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Jeffrey A. Schoenblum

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Jeffrey A. Schoenblum[*]

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I. INTRODUCTION

An intriguing question related to this symposium's focus on the international trust is whether other legal systems have

[*] Professor of Law, Vanderbilt University School of Law.

developed similar legal constructs to facilitate the intergenerational management of family wealth. In this regard, there are a number of methods for accomplishing these goals in the European civil law system.[1] However, they are not nearly as efficient as the trust. Not surprisingly, then, the trust is making enormous inroads, as the civil law is reworked domestically and by international convention to allow for trust or quasi-trust arrangements.[2]

The trust has had no such success with respect to another system of law—Islam. Legal historians have long recognized that the origins of the trust may actually be traceable to an Islamic legal construct, the *waqf*.[3] However, whereas the trust has expanded its domain in the modern economy, the *waqf* has experienced a precipitous decline throughout the Islamic world. To some degree, this has been attributable to factors that point less to inefficiencies with respect to *waqf* legal doctrine itself than to consolidation of power by political movements intent on gaining control of private capital.[4] To a large degree, however, it is ascribable to the legal doctrine associated with the *waqf*.

The starting point of this article is that the same impulses present in societies with Western legal systems to manage family wealth over time have been present in Islamic societies as well.[5] But unlike other legal regimes regulating such impulses, *waqf* law has been largely unresponsive, especially in light of changing typologies of wealth and socio-economic conditions. A number of factors explain the failure of legal doctrine to respond. The first of these is the religious or divine grounding of *waqf* law,[6] making

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1. *See* JEFFREY SCHOENBLUM, 1 MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 18.03 (2d ed. 1999).

2. *See, e.g.*, Maurizio Lupoi, *The Civil Law Trust*, 32 VAND. J. TRANSNAT'L L. 967 (1999).

3. For a consideration of the use and its possible Islamic origins, see, for example, Henry Cattan, *The Law of Waqf, in* 1 LAW IN THE MIDDLE EAST 203, 213 (photo. reprint 1970) (Majid Khadduri & Herbert J. Liebesny eds., 1955) (considering its use and possible Islamic origins) [hereinafter LAW IN THE MIDDLE EAST]. *See also* Monica M. Gaudiosi, *Comment: The Influence of the Islamic Law of* Waqf *on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231 (1988) (positing that the Crusaders brought the *waqf* back to England). Others have suggested that the *waqf* itself is a derivative of Roman law, and was adopted by conquering armies after being exposed to the charitable foundations of Byzantium. *See generally* A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 276 (4th ed. 1974). The *waqf* itself is also referred to as the *wakf* and in the plural as *awqaf*.

4. *See infra* notes 69-72 and accompanying text.

5. For a discussion of the origins of the *waqf* as a means of avoiding restrictive regulations on testamentary freedom, see David Powers, *The Islamic Family Endowment* (Waqf), 32 VAND. J. TRANSNAT'L L. 1167 (1999).

6. *See infra* Part III.A.1.

it difficult for the law to evolve in a responsive and uncontroversial manner, one that does not represent a threat to the fundamental structure of Islamic law itself. Second, the related social norms observed by constituents of Islamic societies have deterred individuals from aggressively planning in ways that contradict "divine" precepts of the law.[7] Furthermore, these norms have fostered an ethos of not taking seriously alternatives to the rules of inheritance. A third consideration has been the statutory response to the problem.[8] Legislative reforms in countries with sizeable Muslim populations have differed strikingly from the legislative reforms with respect to trusts. Trust legislation has progressively eliminated many of the significant impediments to its more efficient, worldwide use. Legislation addressing the *waqf* has tended more to its overregulation or outright prohibition, sometimes accompanied by expropriation of property currently held in existing *waqfs*.

The origins of *waqf* legal doctrine may, in fact, be divine, or no more than the outgrowth of certain practical accommodations made and then concretized more than a thousand years ago. In either event, detailed operational rules exist just as in the case of trust law.[9] These more detailed operational rules of *waqf* law have had a particularly destructive impact on the *waqf*'s utility as a family wealth management tool in Islamic societies.

The foregoing is not intended to suggest that ad hoc accommodations have not been made to allow long-standing *waqfs* to cope with altered social, political, and economic conditions. In numerous instances and at various times in history this has occurred. However, occasional or even recurrent accommodations do not augur well for widespread resort to an outdated legal construct. By way of contrast, trust law has effectively and formally responded to meet changed circumstances.

There have been various explications of the detailed rule regime of the *waqf*. However, there has not been a concerted attempt to demonstrate how the legal doctrine, along with the process of enforcement, have played instrumental roles in the downfall of the *waqf*. The premise of this article is that doctrine matters, and this is true in all legal systems. While ad hoc adjustments can sustain the system for some time, it must ultimately falter when it can no longer efficiently serve the interests of the consumers. This is not the case, however, where

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7. *See infra* Part III.A.2.
8. *See infra* Part III.A.3.
9. *See infra* Part III.B.

the legal process itself permits adaptation in response to inevitably changing conditions and needs.

II. A BRIEF INTRODUCTION TO ISLAMIC LAW AND THE *WAQF*

The *waqf* has its source in the *sharī'a,* or religious law of Islam.[10] Islam is generally divided between the Sunni and Shiite traditions. With regard to the Sunnis, there are four prominent schools of jurisprudence.[11] The prevalence of one school or another in a particular geographic area contributes to somewhat different approaches depending on whether the relevant jurisdiction is Sudan or Africa west of Egypt,[12] Saudi Arabia,[13] part of Central Asia,[14] or within a band stretching from Egypt and East Africa through parts of the Persian Gulf area and on to

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10. For a discussion of the sources of the *sharī'a,* see William F. Fratcher, *Trust, in* 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 11, § 132 (1973). This work also contains an extensive bibliography of writings on the *wakf* and, more generally, on Islamic law. *See also* AQUIL AHMAD, TEXT BOOK OF MOHAMMEDAN LAW 9-10 (15th ed. 1992). In India, where governing law in family matters is primarily determined by religious affiliation rather than by notions of domicile or nationality, the *sharī'a* was codified and is applicable to Muslims. It overrides existing customary law practices. *See* Muslim Personal Law (*Shariat*) Application Act, 7 Oct. 1937, *reprinted in* FYZEE, *supra* note 3, at app. A at 468. For a discussion of the Shariat Act, see FYZEE, *supra* note 3, at 58-60. Of course, it is not always clear who is a Muslim and, thus, governed by the Act. *See id.* at 60-68 (considering who, for the purposes of the administration of justice, is Muslim).

11. Efforts have been made to accommodate the differences among the various schools. Thus, legal forms have been written to satisfy the requirements of all of them. In addition, Muslims can apparently designate as governing law in agreements, including *waqf-nāma* (the creating instrument), the rules of one school or another. More recently, Arab states have freely accepted principles from schools predominant in other countries and incorporated them in statutes. *See* HERBERT J. LIEBESNY, THE LAW OF THE NEAR AND MIDDLE EAST 22 (1975). *See also* Choucri Cardahi, *Conflict of Laws, in* 1 LAW IN THE MIDDLE EAST, *supra note* 3, at 334, 341-42. *But see* FYZEE, *supra* note 3, at 87 (noting that, in India, a "court is not entitled on the score of social justice to adopt a rule taken from another school of Islamic law.").

12. The predominant school here is the Malikite, which is also followed by certain adherents in Kuwait, Bahrain, Oman, and in the eastern Saudi Arabian provinces. It is apparently characterized by a pragmatic orientation. *See* FYZEE, *supra* note 3, at 34. *See also* Joseph Schacht, *The Schools of Law and Later Developments of Jurisprudence, in* 1 LAW IN THE MIDDLE EAST, *supra* note 3, at 58, 69.

13. The Hanbalite School prevails in Saudi Arabia as well as in Qatar. It is generally regarded as the most fundamentalist school. *See* FYZEE, *supra* note 3, at 35. *See also* LIEBESNY, *supra* note 11, at 21.

14. The dominant school is the Hanafite. It has been described as the most liberal school. *See* FYZEE, *supra* note 3, at 33-34.

southern Asia.[15] In addition, various schools in Iran and Iraq of the Shiite tradition have developed their own coherent systems of law.[16]

Although the Qur'an does not directly mention the institution of *waqf*,[17] the significance it attained is exemplified by the fact that at the time of the dissolution of the Ottoman Empire three-quarters of the land and buildings in Turkey were *waqf* properties.[18] The genesis of this powerful institution can be traced back to the Prophet Mohammed, who apparently directed a caliph, Farouk Omar ibn al-Khattāb, to make his property inalienable so that the income could forever be distributed for charity.[19]

This philanthropic foundation of the *waqf* is an important one and helps explain the institution's role through the centuries as a means of disposing of property for what would be perceived in the common law as "charitable purposes." But a family *waqf* concept also developed. Providing for family members was deemed a worthy purpose.[20] The family *waqf*, commonly known as *waqf ahli*, or *waqf dhurri*, is the principal focus of this article.[21]

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15. The Shafiite School predominates and seems distinguishable by its eclectic tradition. *See id.* at 34-35. It is especially predominant in Indonesia, Malaysia, and the Philippines. *See* Schacht, *supra* note 12.

16. *See* Fratcher, *supra* note 10, § 133.

17. *But see infra* note 19 and accompanying text for its origins.

18. *See* Fratcher, *supra* note 10, § 133. The *waqf* was also widespread in North Africa where it is known as the *hubs*, or *habous* in French.

19. *See id.*; FYZEE, *supra* note 3, at 275. *See also* W. Heffening, *Waqf*, *in* 4 ENCYCLOPAEDIA OF ISLAM 1096-1103 (1934) for an especially informative description of the nature and history of the *waqf*. The actual account of this first *waqf* mentioned by legal authorities is set forth by Bukhārī as follows:

> Ibn Omar reported, "Omar ibn al-Khattāb got land in Khaybar; so he came to the Prophet, peace and blessings of Allah be on him, to consult him about it. He said, "O Messenger of Allah! I have got land in Khaybar than which I have never obtained more valuable property; what dost thou advise about it?" He said: "If thou likest, make the property itself to remain inalienable, and give (the profit from) it in charity."
>
> So Omar made it a charity on the condition that it shall not be sold, or given away as a gift, or inherited, and made it a charity among the needy and the relatives and to set free slaves, and in the way of Allah and for the travellers and to entertain guests; there being no blame on him who managed it if he ate out of it and made (others) eat, not accumulating wealth thereby.

FYZEE, *supra* note 3, at 275 (footnote omitted). Note also the emphasis on the consumption, rather than accumulation and reinvestment of the profit.

20. *See supra* note 19 ("[T]here being no blame on him who managed it if he ate out of it and made [others] eat, not accumulating wealth thereby.").

21. *See* SHORTER ENCYCLOPAEDIA OF ISLAM 624 (H.A.R. Gibb & J. H. Kramers eds. 1965). The family *waqf* is also referred to as *waqf 'alā'l-awlād*. *See* FYZEE,

The actual creation of the *waqf*, superficially, does indeed resemble that of the trust. The settlor, or *wākif*, typically transfers property to the analogue of the trustee, the *mutawallī*.[22] Not uncommonly, the *waqf* instrument will name the *mutawallī* and provide for successors, just as in the case of a trust.[23] If no such provision is made, either the *wākif* or the supervisory judge, the *qādī*,[24] may appoint a successor. If no *mutawallī* is originally appointed, the *waqf* may fail altogether. This would certainly seem to be the case in much of the Islamic world, though not everywhere.[25] Interestingly, Shiite jurists have upheld the validity of the *waqf* under these circumstances, but have considered the beneficiaries to have become the *mutawallīs*.[26] The *mutawallī* generally has power to administer the property held in *waqf*, although only upon the express approval of the court or the creating instrument may he actually sell the property. If sold, the proceeds may have to be reinvested in like-kind property.[27]

From a family wealth management and distribution standpoint, the *waqf's* role is comparable to that of certain trusts—restrictions otherwise imposed by the law of inheritance are bypassed and a structure for intergenerational administration is established. Thus, apart from the *waqf*, the testator is required under Islamic inheritance law to leave various heirs, including

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supra note 3, at 301. The term means "generation after generation." *See* ISTAFA HUSAIN, LAW OF *WAQFS* 75 (1990).

22. Generally, any Muslim adult can be a *wākif* and create a *waqf*. As to whether a non-Muslim can create a *waqf*, see *infra* note 181 and accompanying text. It should be cautioned, however, in this respect as well as others, that the Islamic law as applied in India may be unreliable in matters arising elsewhere, except perhaps other former British colonies. The reason is that while Islamic law was applied during the days of the British Empire, British judges sat, assisted by Muslim law officers. The inevitable infiltration of common law doctrines such as equity, as well as the inability of the British judges to give the Muslim law anything but a static construction, makes Indian Islamic law rather unique. *See* LIEBESNY, *supra* note 11, at 118. Furthermore, by statute, only Muslims are now entitled to establish *waqfs*. *See* Wakf Act, 1954, *as amended by* Act 69 of 1984 § 3(l).

23. *See* Fratcher, *supra* note 10, § 136.

24. In India, a public *waqf* board might well perform this function.

25. *See* FYZEE, *supra* note 3, at 313-15.

26. *See* Fratcher, *supra* note 10, § 136.

27. See FYZEE, *supra* note 3, at 317. For a further consideration of the inalienability of *waqf* property and its implications for the utility of the *waqf*, see *infra* note 111 and accompanying text. One study has revealed that few founders actually provided for sale. Indeed, "founders went out of their way to state that the property must not be exchanged." YITZHAK REITER, ISLAMIC ENDOWMENTS IN JERUSALEM UNDER BRITISH MANDATE 172 (1996). In India, the statute law prevents sale without court authorization, even if permitted in the *waqf-nama*. *See* HUSAIN, *supra* note 21, at 192.

distant relatives, specified percentages of his wealth. The decedent usually is left with one-third of the estate to devise, but he cannot increase the share of one heir without the consent of the other heirs. This rule of the *sharī'a* may prevent a man from adequately providing for the needs of his immediate family.[28]

When attempts were made to bypass the restrictive succession laws through the use of a family *waqf*, Islamic jurisprudence approved of it, so long as the ultimate beneficiary was a religious, pious, or charitable purpose.[29] The *waqf*, therefore, affords a means of avoiding the undesirable division of property resulting from application of the succession laws, which tends to produce inefficient fractionation of family wealth in the Islamic world.[30]

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28. *See* Fratcher, *supra* note 10, § 138. *See also* LIEBESNY, *supra* note 11, at 226; FYZEE, *supra* note 3, at 387-467 (for an elaborate presentation of the highly intricate succession laws of the Sunni and Shiite sects). The succession laws, however, have been undergoing modernizing changes in some predominantly Muslim countries. *See, e.g.*, NORMAN ANDERSON, LAW REFORM IN THE MUSLIM WORLD 146-62 (1976).

29. The purpose of the *waqf* is "to acquire merit in the eyes of the Lord: all other purposes are subsidiary. Therefore every purpose considered by the Muhammadan law as 'religious, pious or charitable' would be considered valid." FYZEE, *supra* note 3, at 294.

30. The *waqf* has also been used for other wealth preservation purposes that are comparable to those for which the trust has been utilized, including the not always successful protection of "property in times of insecurity from unscrupulous rulers" and the defeat of creditors. With respect to the latter objective, a *fatwā*, or reply of a jurisconsult, forbids this, but it still has been pursued. *See* SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 627, referring to the fatwā of Abu 'l-Su`ud (d. 928/1474). The *waqf* has also been regarded as a device for retaining property in the nuclear family, *see* REITER, *supra* note 27, at 74; perpetuation of the founder's name, *id.* at 109 (Reiter's own theory); GREGORY C. KOZLOWSKI, MUSLIM ENDOWMENTS AND SOCIETY IN BRITISH INDIA 47 (1985); the avoidance or reduction of taxes, *id.* at 86-87 (noting that "[u]nlike the governments of the Muslim states, the British offered no concessions to land held in *awqaf*;" and preservation of culture from foreign or occupier influences). *See, e.g.*, REITER, *supra* note 27, at ix; Aharon Layish, *The Muslim* Waqf *in Jerusalem After 1967: Beneficiaries and Management, in* LE WAQF DANS LE MONDE MUSULMAN CONTEMPORAIN (XIXe-XXe SIECLES): FONCTIONS SOCIALES, ECONOMIQUES ET POLITIQUES 145, 163 (Faruk Bilici ed. 1994) [hereinafter LE WAQF DANS LE MONDE MUSULMAN CONTEMPORAIN].

III. THE *WAQF* VERSUS THE TRUST

A. *Fundamental Differences in the Sources and Evolution of the Law, Norms as to Utilization, and State Regulation*

There are certain fundamental differences between the *waqf* and the trust in terms of the sources and evolution of the law, norms as to utilization, and state regulation. These differences help explain the trust's success and the *waqf's* failure as a legal construct to keep apace of changing social and economic conditions.

1. The Religious Versus Secular Foundations of the Two Legal Constructs

While there have indeed been differences of interpretation and practice by various schools of Islam, fundamentally, the parameters within which the *waqf* may evolve are narrow. This is true despite radical social, financial, and technological change in the Islamic world as elsewhere.[31] The *waqf* derives from religious authority and furthers what are perceived to be religious, pious, and charitable goals.[32] As previously explained, the *waqf* is considered to have been authorized directly by the Prophet Mohammed.[33] This authorization extends to the family *waqf*.[34] While there are variations depending on the particular school of Islam, there has been little evolution in the law of *waqf* for more than a thousand years.[35] The fact is that the law of *waqf* is arguably "the most important branch of Muhammadan law, for it

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31. *See* Layish, *supra* note 30, at 146-47.

32. See *infra* notes 91-94 and accompanying text for a discussion of the fundamental misunderstanding of the Islamic concept of charity by English jurists.

33. The actual law of *waqf* is considered to have developed in the two or three centuries after the death of Mohammed, having assumed "rigid legal forms in the second century." SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 626.

34. *See supra* notes 19-20. The Prophet is reported to have said: "[W]hen a Muslim bestows on his family and kindred, hoping for reward in the next world, it becomes alms, although he has not given to the poor, but to his family and children." PARAS DIWAN & PEEYUSHI DIWAN, MUSLIM LAW IN MODERN INDIA 246 (7th ed. 1997).

35. *See* Cattan, *supra* note 3, at 217-18.

is 'interwoven with the entire religious life and social economy' of Muslims."[36]

As a result of the foregoing, the *waqf* had to remain a largely static construct for disposing and managing of wealth. As one leading commentator has noted: "In the case of *waqf*, there was, generally speaking, no evolution until the present time. It retained the rigidity of its original concept as devised more than a thousand years ago."[37] A less doctrinaire *waqf* law might call into question the very fundamentals of the *sharī'a* itself.[38]

Importantly, many accommodations were made in practice to overcome unjust or uneconomical circumstances. For example, exaggerated or even completely fabricated claims of "duress" or other justifications were offered to permit the sale or exchange of *waqf* property.[39] Special leasing arrangements were also pursued.[40] More broadly, the traditional view of Islamic law as frozen in time for a millennium, especially regarding family law and succession matters,[41] has been challenged. The (in)famous "closing of the gates" (*insidad bab al-ijtihad*) and the dominance of *taqlid* (imitation) may be too simplistic a description of the true condition of the law during much of the present millennium. This suggests the possibility of a more varied and flexible jurisprudence, generally, and a *waqf* law, in particular, that was more responsive to actual conditions than has been traditionally accepted.[42]

Even giving credit to this revisionist account, there was certainly not a clearly defined, predictable set of formal legal rules, body of judicial precedents, or juristic commentary upon

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36. FYZEE, *supra* note 3, at 274, quoting from a revered modern scholar and jurist, Syed Ameer Ali *See also* HUSAIN, *supra* note 21, at xi ("The law in relation to *waqf* constitutes the most important branch of the Mohammadan law.") (italics added).

37. *See* Cattan, *supra* note 3, at 217 (italics added).

38. *See* KOZLOWSKI, *supra* note 30, at 6-9. Of course, there may be differences of some consequence on particular points. In the case of the *waqf*, this is particularly true of the Hanafi school. See, for example, *infra* note 176 and accompanying text pertaining to the opportunity of the *wākif* to retain an interest in the *waqf*. Furthermore, in practice, the experience with particular *waqfs* may be unique and may not confirm the application of orthodox doctrine. Indeed, the underlying premise of the *waqf* as a cornerstone of larger, coherent Islamic system of law may be dubious.

39. "Duress" is a basis for ignoring otherwise applicable doctrine. *See* REITER, *supra* note 27, at 171-84. *See generally infra* Part III.B.2.

40. *See infra* note 134.

41. *See, e.g.*, Georges F. Hourani, *The Basis of Authority of Consensus in Sunnite Islam, reprinted in* ISLAMIC LAW AND LEGAL THEORY 155, 166 (Ian Edge ed. 1996); NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 42-44 (1969).

42. *See, e.g.*, Wael B. Hallaq, *Was the Gate of Ijtihad Closed?, reprinted in* ISLAMIC LAW AND LEGAL THEORY, *supra* note 41, at 287, 288.

which to rely, other than the traditional doctrine. There could be no *ex ante* assumption that a deviation from the legal norms would yield the intended outcome. To achieve that end required creative lawyering *ex post*, judicial inertia and complicity, or even extralegal interventions.[43]

Waqf law has also not been differentiated geographically. Although conditions of Muslims differ dramatically from one country to another, the doctrine is largely uniform and unvaried from one region to another. Consideration need only be given to two countries with especially large Islamic populations—Indonesia and India, both non-Arabic Islamic communities. The social, economic, and political[44] conditions in these countries, as well as customary family wealth disposition norms in each, differ dramatically from the other.[45] Nevertheless, fundamentally the same inheritance and *waqf* law apply.[46] This has been dictated by the religious law, which has not permitted an ongoing process of decentralized legal experimentation and lawmaking.

In contrast to the *waqf*, the trust, from the time of its origins as a use,[47] has been the epitome of a vaguely defined legal construct able to address practical wealth management and disposition requirements of property owners. Its evolution and juridical recognition were directly linked to the inadequacy of formal legal structures that could be employed to accomplish the

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43. *See, e.g.*, REITER, *supra* note 27, at 183-84 (describing in particular the complicity of some *qādīs*).

44. A unique use of the *waqf* for political purposes is evident in Israel and the West Bank. The *waqf* has been conceived as a tool for avoiding the sale of Arab land piecemeal by certain resistance groups. *See* Layish, *supra* note 30, at 167 ("Hamas, the Islamic Resistance Movement . . . states that the land of Palestine has been a *waqf* since the emergence of Islam and will be so until the resurrection of the dead.").

45. This is especially due to the influence of *adat*, or customary practices in Indonesia. *See, e.g.*, FYZEE, *supra* note 3, at 22. Nevertheless, the secular courts have tended to apply orthodox principles, even when local Muslim jurisconsults have been prepared to be more flexible. *See, e.g.*, Commissioner for Religious Affairs v. Tengku Mariam, [1970] 1 Malay. L.J. 222. *See generally* M. B. HOOKER, ISLAMIC LAW IN SOUTH-EAST ASIA 157-58 (1984).

46. Because of local pressures, *waqf* law, in contemporary terms, has had to be modified by particular national and provincial statutes. *See generally* HUSAIN, *supra* note 21 (relating to India and Uttar Pradesh); S. A. KADER, THE LAW OF *WAQFS*: AN ANALYTICAL AND CRITICAL STUDY (1999) (relating to India and the recently enacted Wakf Act 1995, as well as the Delhi *Waqf* Rules 1997, the Karnatka *Waqf* Rules 1997, the Kerala *Waqf* Rules 1996, the Madhya Pradesh *Waqf* Board (Election of Members) Rules 1997, the Tamil Nadu *Waqf* Board (Conduct of Election for Members) Rules 1997, the Uttar Pradesh Shia Central *Waqf* Board and Sunni Central *Waqf* Board Conduct of Election Rules 1997, and the West Bengal Board of *Waqfs* (Election of Members) Rules 1996 and (Election of Chairperson) Rules 1996).

47. *See* Cattan, *supra* note 3.

goals of certain individuals,[48] initially Franciscan monks who had taken vows barring them from outright ownership of property. Since its origination, the trust has altered with changing circumstances in a manner that has addressed the individual's and the society's wealth management exigencies. For example, the current work associated with the Restatement (Third) of Trusts in endorsing modern portfolio theory is only one example of a long history of adaptation.[49] Another example, pertinent to this symposium, is the radical alteration of trust law offshore, designed to attract capital by accommodating the economic needs of onshore consumers whose own jurisdictions are unresponsive on account of local political pressures and broader social welfare concerns.[50] Thus, trust law's secular nature and history of pragmatic evolution are sharply distinguishable from the more inflexible and divine *waqf* legal doctrine.

Of course, the common law process of lawmaking and evolution of doctrine was largely, if not completely, foreclosed in the case of Islam. Moreover, propensities toward "equity" are largely absent from Islamic jurisprudence, where impulses along similar lines were cabined, at least until modern times.[51] Even analogic reasoning in cases in which textual language does not address the matter, a cornerstone of the common law process, has proved controversial in Islam, albeit unavoidable.[52]

2. Differences in Norms as to Utilization of the *Waqf* and the Trust

A second essential difference between the *waqf* and the trust is the strikingly different norms as to utilization. As has been noted by Professor Powers,[53] the *waqf* largely represented a

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48. *See id.*

49. RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).

50. *See* Antony Duckworth, *The Trust Offshore*, 32 VAND. J. TRANSNAT'L L. 879 (1999); David Brownbill, THE ROLE OF JURISDICTIONS IN THE DEVELOPMENT OF THE INTERNATIONAL TRUST, 32 VAND. J. TRANSNAT'L L. 953 (1999).

51. *See, e.g.*, John Makdisi, *Legal Logic and Equity in Islamic Law, reprinted in* ISLAMIC LAW AND LEGAL THEORY, *supra* note 41, at 229, 232-35 (challenging the pejorative Western view of "*qādī* justice"). On the other hand, modern reformers have urged utilization of Islamic law concepts of *maslaha* and *istislah*. The former is a justification of change based on public interest. *See* WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 214 (1997). The latter is a justification based on the need to avoid harm and give due consideration to what is beneficent or expedient. *See* MOHD. HAMEEDULLAH KHAN, THE SCHOOLS OF ISLAMIC JURISPRUDENCE: A COMPARATIVE STUDY 84-86 (1991).

52. This process is known as *qiyas*. *See* DIWAN & DIWAN, *supra* note 34, at 31-32. *See also* KHAN, *supra* note 51, at 101-03.

53. *See* Powers, *supra* note 5.

response to and escape from rigid Islamic inheritance rules,[54] which tended to dissipate family wealth,[55] favor agnatic heirs over uterine heirs,[56] and favor males over females.[57]

While there have undoubtedly been many attempts over the centuries to utilize the *waqf* as an escape device, the reality is that the vast majority of Muslims do not seek to deviate from the Qur'anic scheme of inheritance.[58] Indeed, the rules relating to inheritance are set forth as first principles, religious precepts uttered by the Prophet himself.[59] While the ascription of these precepts to the Prophet do not mean they were actually uttered by him—and there may be social, economic, and political explanations for the adoption of the rule[60]—the association with the Prophet elevates the importance of continued adherence to the inheritance rules.[61]

The importance of the rules of inheritance are emphasized by the considerable study given to their intricacies. Moreover, in countries with substantial Muslim populations, Muslims are not governed by secular law in wealth matters.[62] In these and other family matters, Muslims are specifically governed by the religious law of Islam, of which inheritance is a major part. Thus, the law carries particular authority. As has been noted, based on one study analyzing Jerusalem *waqfs* since the beginning of the 16th Century:

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54. *See supra* note 28 and accompanying text. For other explanations for the utilization of the *waqf*, see *supra* note 30.

55. The dissipation is principally a result of the division of the estate in accordance with "extremely rigid rules, so rigid as to practically exclude all power of testamentary disposition. . . ." FYZEE, *supra* note 3, at 388, *quoting from* Mahmood J. *in* Gobind Dayal v. Inayatullah, (1885) 7 All. 782-83 (India).

56. *See* FYZEE, *supra* note 3, at 428-29.

57. The female is generally entitled to one-half the share of male siblings. *See id.* at 393 (describing this result as supporting the conclusion that males and females "have equal rights over property"). In some cases, however, *waqfs* may have been employed to disinherit females completely. The fear was that property would pass under the control of their husbands. *See* REITER, *supra* note 27, at 224.

58. *E.g.*, FYZEE, *supra* note 3, at 354: "Hence, it is true to say that Muhammadan sentiment is in most cases opposed to the disposition of property by will." For a similar response of the French public to forced heirship rules, see FREDERICK H. LAWSON, ET AL., AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 334 (3d ed. 1967); 1 SCHOENBLUM, *supra* note 1, at § 12.02[A] at 12-4 n.6. *See also infra* note 64 and accompanying text.

59. He is reported to have said: "Learn the laws of inheritance, and teach them to the people, for they are one half of useful knowledge . . ." al-Sirājiyaya 11 (A. Rumsey trans. 2d ed. 1890).

60. *See generally* DAVID S. POWERS, STUDIES IN QUR'AN AND HADITH: THE FORMATION OF THE ISLAMIC LAW OF INHERITANCE (1986).

61. However, there have been efforts at reform. *See, e.g.*, FYZEE, *supra* note 3, at 389; *supra* note 46.

62. *See supra* note 45 and accompanying text.

> To challenge the rules and norms of the inheritance law by establishing a *waqf*, a founder must have strong and specific motives. This may explain the fact that regardless of the importance of the *waqf* as such and regardless of the large properties involved, few people founded *waqfs* . . . . [T]he number of family *waqf* founders . . . has been small compared to the great majority who stayed within the bounds of the inheritance law.[63]

In contrast to the wealth transmission norms of Islamic society, the Anglo-American norm is one of distributional self-determination, both *inter vivos* and at death. This norm, of course, is entirely consistent with general cultural preferences and economic theory that accentuate individuality and relatively unregulated private property ownership. Even when compared with the European civil law, the extent to which these values hold sway is evident. The civil law neither recognizes the trust nor any construct truly comparable to it.[64] Moreover, the civil law not only affords the spouse postmortem protection, as in the Anglo-American system, but children are also accorded a sizable *legitime* or forced heirship right.[65] Again, these obligatory shares tend to create a cultural norm in support of limited exercise of testamentary freedom and in favor of standardized, state-specified patterns of inheritance. It deprives the owner of substantial incentive to plan the disposition of her estate, since there are few opportunities with respect to the bulk of the assets in many cases.[66]

A system that encourages freedom of transmission of wealth, without even a provision for the support of surviving minor children, is a hospitable environment for constructs such as the trust. Specifically, the trust tends to counter state intervention in the wealth transmission process that proves inefficient. Thus, the revocable trust developed as a vital tool to address the inefficiency of probate. When the sovereign regulates and threatens to take property through taxation, the trust serves as an ameliorating influence. Indeed, numerous variations of the trust perform this function by deferring or eliminating taxes.[67] In

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63. REITER, *supra* note 27, at 75.

64. *See generally* Adair Dyer, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989 (1999).

65. *See generally* 1 SCHOENBLUM, *supra* note 1, § 12.02.

66. *See id.* § 18.02.

67. These include the Q-TIP marital deduction trust, which accomplishes the deferral of tax until the surviving spouse dies, but without requiring the testator to surrender control over the choice of the ultimate takers; the Crummey trust, which allows for the benefit of the present interest gift tax annual exclusion even though the property is transferred to a trust for control purposes, rather than directly to the donees for their present enjoyment; and the Alaska self-settled trust, which *may* allow for discretionary distributions to the settlor without

the case of indirect community takings, such as through the allowance of confiscatory private lawsuits against wealth owners with deep pockets, the trust, especially as developed offshore, serves as an asset protection device.[63]

3. The Different Experiences with State Regulation

A third important overarching element that distinguishes the *waqf* from the trust is the recent experience with sovereign regulation of each. The family *waqf*, at least, has largely been regulated out of existence in a number of predominately Muslim countries. For example, in Egypt,[69] Turkey,[70] and Syria,[71] the *waqf dhurri* is no longer permitted. Furthermore, in Syria, there was no grandfathering for pre-existing *waqfs*. In these and other countries, the prohibition of or reining in of the *waqf* has been an important step in the consolidation of power by new governing elites, such as the military, and the elimination of potentially alternative power centers of accumulated wealth and prestige that could challenge their hegemony.

Legislation, therefore, has not served as a liberalizing influence with respect to *waqf* law but as a prohibitory or constraining, "reformist" one. This is true even in India, where the greatest efforts have been made to assure proper and uncorrupt administration of *waqfs*, but not their abolition. The utilization of legislation to address *waqfs* in modern society is a direct response to resistance of many Islamic authorities to significant change in the traditional law. It is an outgrowth of the failure of that law to adapt naturally in prior periods to radically different social and economic realities.[72]

The regulatory experience of trusts has been, on the whole, quite different. This century, in particular, has witnessed a revolution in trust law. First various statutory enactments, then

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inclusion in his gross estate, the defeat of out-of-state creditors, and the elimination of the rule against perpetuities in a manner that enhances the benefit to be derived from the federal GST exemption.

68. *See, e.g.*, Duckworth, *supra* note 50.

69. Law No. 180 of Sept. 1952. Prior to the new military regime that took power in the early 1950s, a serious effort had been made to reform the *waqf* and to introduce elements akin to the trust. *See* Law No. 48 of June 12, 1946. See generally ANDERSON, *supra* note 28, at 162-71 for a discussion of the 1946 reforms.

70. *See* Fratcher, *supra* note 10, § 140.

71. Legislative Decree No. 762, May 16, 1949.

72. For a discussion of modern challenges to legal orthodoxy, see, e.g., HALLAQ, *supra* note 42, at 202-54; Ann Mayer, *The Shari'a: A Methodology or a Body of Substantive Rules*, *in* ISLAMIC LAW AND JURISPRUDENCE 177 (Nicholas Heer ed. 1990); Joseph Schacht, *Problems of Modern Islamic Legislation*, *reprinted in* ISLAMIC LAW AND LEGAL THEORY, *supra* note 41, at 515.

the Restatement (Second) of Trusts, and now the Restatement (Third) of Trusts have all fostered a major liberalization in many important respects.[73] As has been noted: "We are in a moment in time when our ideas about what a trust is, what it is for, and how to operate it are under consideration and, indeed, are changing meaningfully."[74] This willingness in much of the common law world to adapt the trust to changing conditions and needs may largely account for its success. As has been observed, "the trust has endured because it has changed function."[75] In particular, changes have occurred recently in such diverse areas as principal and income, the rule against perpetuities, self-settled spendthrift trusts, reformation of the trust to achieve the settlor's tax goals, and revocation of an *inter vivos* trust by will.[76] These follow upon earlier radical changes in terms of increasingly broad trustee investment flexibility and a statutory default rule extending the trustee's authority over the administration of the trust, without the requirement of prior judicial authorization of the exercise of powers.

These changes have been effected through the common law, the decentralized introduction of market-enhancing trust legislation in several offshore jurisdictions as well as Alaska and Delaware,[77] and the strong support of esteemed scholars. None of these elements is palpably present in connection with the *waqf*.

B. *Significant Technical Distinctions Between the Waqf and the Trust*

The foundational differences previously discussed explain a great deal about why the *waqf* has suffered a different fate than has the trust. However, a great deal of the present diminished status of the *waqf*[78] may well be attributable to the strikingly

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73. *See* RESTATEMENT (THIRD) OF TRUSTS (1992); RESTATEMENT (SECOND) OF TRUSTS (1959).

74. Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543, 543-44 (1998).

75. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 637 (1995).

76. *See* Dobris, *supra* note 74, at 575.

77. *See, e.g.*, 1 SCHOENBLUM, *supra* note 1, § 18.23[G]; Duckworth, *supra* note 50.

78. *See* DIWAN & DIWAN, *supra* note 34, at 241-42; Layish, *supra* note 30, at 146-48, 163 (asking "[w]hat, then, are the reasons that the institution of the *waqf* has survived, and even flourished, in East Jerusalem, when it has been on the decline in Israel and in some Arab countries in the region in the modern era?"); REITER, *supra* note 27, at ix (the author notes that "making widespread use of the

inefficient character of doctrinal *waqf* law. Although there is insufficient and even disputable empirical data respecting the *waqf*,[79] the argument here is that while it may have served efficient purposes in its earlier development, such as the consolidation of land for agricultural use, it has been unable to accommodate the demands of an exchange-based, modern economy. Again, there were many ad hoc adjustments made to address these conditions that could not compensate for the absence of a systematic legal doctrine in harmony with evolving socio-economic conditions.

1. The Mandatory Rule in Favor of Perpetuities

A central operational principle of *waqf* law is that a *waqf* for a limited period of time is invalid. Thus, even if a person declares that his house is a *waqf* exclusively for the poor for twenty years, the *waqf* is void *ab initio*.[80] The *waqf* must endure in perpetuity. The requirement that the property be held in perpetuity (*mu'abbad*) is a logical outgrowth of the application of the fundamental principle that property in *waqf* is dedicated to Allah. Having been granted to Allah, it can hardly be reclaimed.

As was stated by two disciples of Abū Hanīfa, Qādī Abū Yūsuf and Imām Mohammad, *waqf* is

> the tying up of the substance of a thing under the rule of the property of Almighty God so that the proprietary right of the *wakf* becomes extinguished and is transferred to Almighty God for any purpose by which its profits may be applied to the *benefits* of His creatures.[81]

The consequences of this mandatory rule *in favor* of perpetuities were catastrophic from an economic standpoint. As previously noted, the effect of the Dead Hand in the Ottoman Empire was to tie up three-quarters of arable land in *waqf*.[82] By the middle of the 19th Century, half of Algiers was held in *waqf*; the figure for Tunis was one-third. As late as 1935, one-seventh of the cultivated soil in Egypt was held in *waqf*, while in Iran it

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waqf [in Jerusalem] ran counter to its decline in other Islamic countries in the twentieth century").

79. See REITER, *supra* note 27, at 146.

80. See FYZEE, *supra* note 3, at 287.

81. 1 SYED AMEER ALI, MAHOMMEDAN LAW 336 (4th ed. 1912). *See also* FYZEE, *supra* note 3, at 279. The Shiite position is less clear. The *sharā i al-Islām*, observed by Shiite Muslims, defines the *waqf* as "[a] contract the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free." Thus, the owner of the corpus is unclear and may even be the beneficiary. *See, e.g.*, FAIZ BADRUDDIN TYABJI, MUSLIM LAW 494 n.15 (4th ed. 1969); SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 627.

82. *See supra* note 18 and accompanying text.

was fifteen percent as late as 1930.[83] As one commentator has explained:

> [T]he immense accumulation of landed property in the possession of the Dead Hand was economically injurious. . . . One consequence of this accumulation very frequently was that the soil was not used to the best advantage; these great *latifundia* are even often an impediment to the implementation of modern agricultural methods. They often deteriorated so much that the yields were not even sufficient for the necessary upkeep and improvements.[84]

In addition, over time the number of beneficiaries naturally multiplied with each new generation of descendants entitled to share in the usufruct, with each beneficiary generally becoming entitled to ever-decreasing shares of that usufruct.[85] With relatively little at stake, not only were the beneficiaries disinterested, they had in some cases no motivation to hold the *mutawallī* accountable, thereby setting the stage for corruption and skimming.

Ironically, then, one of the prime motives for utilization of the *waqf*, avoidance of the initial fractionation compelled by the Islamic rules, was not accomplished in the long term. While the property technically remained undivided, the benefits were themselves so divided as to remove any incentive for economic development.[86]

A seeming contradiction exists with respect to the family *waqf*. How can the underlying commitment of the property to Allah—and, thereby, religious, pious, or charitable use for the Muslim community—be squared with private benefit? As noted, there is no limitation on the retention of the usufruct for the immediate and successive beneficiaries throughout time, short of the end of the world.

From the Islamic law perspective, there is no puzzle at all. Indeed, the Prophet Mohammed said, "[O]ne's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious

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83. *See* SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 627. In a recent work, one Indian commentator noted that "[i]f the income from these properties are properly applied, there will be a sea-change in the social, educational and economic condition of Muslims in this country." KADER, *supra* note 46, at 6.

84. SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 627.

85. *See* Cattan, *supra* note 3, at 217.

86. Because of restrictions on alienation, see *infra* note 113 and accompanying text, *waqf* tracts could not be pooled, as might be done via the corporate or partnership form in the West. Moreover, these forms of ownership were generally not permitted or developed under Islamic law. *See, e.g.*, Lino J. Lauro & Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 98 (1996).

and obtains greater 'reward' than to bestow on the indigent stranger."[87]

The mandatory rule in favor of perpetuities, whether actually based on prophecy or on a construction developed to serve a more earthly agenda, has had the effect of the withdrawal of property from the marketplace. It has also prevented property from being available to serve general community purposes. As noted, it encouraged the creation of an indolent class of beneficiaries. These beneficiaries lacked any incentive to become risk-takers, but also any incentive to maximize the productivity of the property. Each successor only had a usufructuary interest. Moreover, the interest of each beneficiary was typically quite small.[88] Indeed, the striking inefficiency associated with the Islamic rule in favor of perpetuities is evident from an example given by a leading scholar on the *waqf*: a *waqf-nāma* is executed, which provides that if property is being mismanaged, the *waqf* shall terminate and the assets distributed outright to the heirs of the settlor.[89] The presence of this provision invalidates the *waqf ab initio*. On the other hand, the *waqf* would be valid if it did not provide for termination in the event of mismanagement.[90]

A dramatic legal encounter demonstrates in bold relief the contrast between the *waqf* and the trust on the question of perpetuities and the meaning of charity. In *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdrey*,[91] the Privy Council upheld the High Court of India in its determination that the *waqf* involved in that case was invalid. The *waqf* had specified that benefits were to be provided for the children of two brothers creating the *waqf* and then to their descendants from generation to generation until the total extinction of the family. The Privy Council reasoned that "provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family" is "illusory and was not sufficient for the creation of a valid *waqf*."[92] In other words, a perpetuity for individual benefit

87. Bikani Mia's Case, (1892) I.L.R. 20 (Cal.) 116 (India), *quoted in* FYZEE, *supra* note 3, at 304 (comments of Syed Ameer Ali).

88. *See supra* note 85 and accompanying text.

89. *See* FYZEE, *supra* note 3, at 287. *See also* Ashraf v. Wajihuddin, A.I.R. 1993 Oudh 222. *See generally* MOHAMMED AHMAD QUERESHI, *WAQFS* IN INDIA: A STUDY OF ADMINISTRATIVE AND LEGISLATIVE CONTROL 39 (1990).

90. *See* M. HIDAYATULLAH & ARSHAD HIDAYATULLAH, MULLA'S PRINCIPLES OF MAHOMEDAN LAW § 174 (19th ed. 1990).

91. (1894) 22 I.A. 76 (India).

92. *Id.* at 89. *See also* Riziki Binti Abdulla v. Sharifa Binti Mohamed Bin Hemed, [1964] App. Cas. 12 (P.C.) (Kenya).

had been created.[93] No doubt this is an economically sound determination of the discounted value likely to flow to charity, if charity is defined as the general poor. The decision, however, is mistaken to the extent premised on Islamic concepts of charity. As previously discussed, under the Islamic law of *waqf*, the benefits accorded family members would themselves fulfill a charitable end.[94]

As the leading Islamic law scholar and jurist in India at the time, Syed Ameer Ali emphasized that the poor are not made ultimate beneficiaries so as to make the *waqf* charitable, but simply to impart a permanency to the endowment. The use of the *waqf* proceeds for the wants of the children and descendants in the first place "is part and parcel of the charitable purpose for which the dedication is made. . . ."[95]

The Privy Council's decision generated an extraordinary outcry, which resulted in enactment of the Indian Wakf Validating Act 1913.[96] This act specifically authorized the creation of a *waqf* by a Muslim

> for the maintenance and support wholly or partially of his family, children or descendants . . . . Provided that the ultimate benefit is

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93. Under the common law, a trust for exclusively "charitable" purposes can survive in perpetuity. *See* WILLIAM M. MCGOVERN, JR., ET AL., WILLS, TRUSTS AND ESTATES § 8.6 (1988).

94. *See, e.g., supra* note 5 and accompanying text. The court was clearly introducing the English perspective, if inadvertently, into its determination of Islamic law. Note that in response to the perpetuity permitted in the case of a charitable trust, a *cy pres* doctrine was necessary. See *supra* note 89 and accompanying text. A variation on *cy pres* is recognized in *waqf* law as well. If, for example, the descendants of the *wākif* are named as successive beneficiaries of the usufruct and there are no more descendants, the property will then be utilized for the "charitable" purpose designated. If none has been designated or it no longer exists, then a substitute is likely to be named. However, unlike common law *cy pres*, there is no judicial or other process for ascertaining the *wākif's* intent nor for identifying a charity that approximates that intent. Since a religious, pious, or charitable purpose is implied in any event in every *waqf*, the general approach in the foregoing situation is automatically to utilize the funds for the benefit of the poor. *See generally* Cattan, *supra* note 3, at 207-08. Nevertheless, if there is no direction as to a portion of the income, *cy pres* may not be applied so as to convert a *waqf dhurri* into a public *waqf*. *See* M. H. BEG & S. J. VERMA, ISLAMIC LAW – PERSONAL 729-30 (6th ed. 1991).

95. Bikani Mia's Case, (1892) I.L.R. 20 (Cal.) 116, 145-6 (opinion of Syed Ameer Ali), *quoted in* FYZEE, supra note 3, at 304. Note that other former British colonies differed in their response to the *Abul Fata Mahomed Ishak* case. For a discussion of the applicability of the decision in Kenya and Zanzibar (Tanzania), see Fatuma Binti Mohamed v. Mohamed bin Salim, App. Cas. 1 (P.C. 1952) (appeal taken from Eastern Africa). *See also* Riziki Binti Abdulla v. Sharifa Binti Mohamed Bin Hemed, [1964] App. Cas. 12 (P.C. 1962) (appeal taken from Eastern Africa) (applying Bikani Mia's Case to a *waqf* dispute in Kenya).

96. Mussalman Act No. VI of 1913, 6 Unrepealed Central Acts 238-9 (1950).

> in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.[97]

The distaste of the Privy Council for the *waqf* rule in favor of perpetuities is fully understandable. In sharp contrast to the *waqf*, the history of the trust has been until recently one of deep concern about perpetuities.[98] The product has been the rule against perpetuities, which has been deemed to further both efficiency and equity interests. First, with respect to efficiency, the rule helps prevent the transmission of wealth under circumstances that unduly inhibit the alienability of property.[99] If a decedent can specify successive generations of holders of property in perpetuity, the maximization of wealth will be impeded.[100] For example, a descendant with a term interest will likely be unable to obtain a substantial mortgage to improve the property since the security in the property will have to be limited to the value of the remainder of the term interest. He will also find it difficult to make a sale since all that he can sell is what he has, a term interest. A potential purchaser will be deterred from buying and developing the underlying property. Capital improvements are not likely to be made if they must be surrendered at the end of the term. A perpetuity also discourages leasing, at least on a long-term basis. With respect particularly to agricultural lands, a tenant would not wish to invest the back-breaking human capital to cultivate the property only to see it pass on to another indolent descendant of the donor.[101]

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97. Wakf Act of 1913, § 3, *reprinted in* FYZEE, *supra* note 3, at 305.

98. *See* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 32-38 (Thomas M. Cooley Series No. 6, 1955). Some commentators, however, have actually viewed the evolution of the rule as a victory of sorts for Dead Hand control in light of the relatively lengthy period in which the terms of the enjoyment of wealth transmitted to the next generations can be controlled. *See* MCGOVERN, *supra* note 93, § 13.2. Even a principal reformer, Professor Lawrence Waggoner, has concluded that the rule is "overpermissive" in allowing "donors in some cases to extend control through or into generations completely unknown and unseen by them." Nevertheless, there is little enthusiasm, in his view, for tightening up the rule. *See* Lawrence Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP., PROB. & TRUST L.J. 569, 586-89 (1987).

99. *See, e.g.*, Scatterwood v. Edge, 91 Eng. Rep. 203 (1699). *See generally* MCGOVERN, *supra* note 93, § 13.2.

100. Thus, as Lewis Simes emphasized, the rule is not really about "free enterprise versus governmental regulation," but rather "free marketability versus restrictions imposed by an erratic testator." SIMES, *supra* note 98, at 38.

101. *See id.* at 36-37. The rule against perpetuities actually is not directed at all future interests, just contingent ones. In other words, any attempt to alienate land can be accomplished with the agreement of identifiable future owners or their guardians. However, if those future owners cannot be presently identified, then there cannot be consent. The same is true if the future owners

In addition to efficiency, the rule against perpetuities purports to accomplish "intergenerational equity."[102] Individuals, especially owners of great concentrations of wealth, ought not be allowed to control the distribution of that wealth for all future generations. The argument is that the resources of the society in the future ought to be allocated to a considerable degree based on productivity and merit. Dead Hand control is not only fundamentally antithetical to wealth maximization, it also undermines values of personal autonomy and self-determination. It discourages economic and social mobility and creates unstable political situations.[103] Nevertheless, this function of the rule is of minimal significance, since the same goal can be accomplished through taxation.[104]

As for the efficiency argument, it is *no longer* compelling. Efficiency concerns may have had relevance at the time of the *Duke of Norfolk's Case*[105] and for some time thereafter, when legal life estates and highly restrictive rules governed trust investments and the exercise of trustee powers. However, these conditions no longer exist.[106] To the extent that modern trust law allows for broad powers of sale, reinvestment, mortgaging, leasing, and the like, property held in trust is hardly inalienable. Indeed, the trustee has a duty to make the trust corpus productive.[107] Particularly with the application of the modern portfolio theory of investing, the focus is not on the growth of any particular asset, *but the sustaining of an appropriate overall return.*[108]

Precisely because of these alterations in trust investment policy and governance through the intervention of the equity courts and the legislature, the preoccupation with perpetuities

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are not presently in existence. .*See* JOEL C. DOBRIS & STEWART E. STERK, RITCHIE, ALFORD & EFFLAND'S ESTATES AND TRUSTS: CASES AND MATERIALS 750 (1998).

102. *See generally* MCGOVERN, *supra* note 93, § 13.2.

103. The rule against perpetuities has been credited with sparing the English a social revolution as in France. *See* J.H.C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES 11-12 (1962). *See also* TEX. CONST. art. 1, §26 ("[p]erpetuities and monopolies are contrary to the genius of a free government and shall never be allowed.").

104. *See* MORRIS & LEACH, *supra* note 103, at 15.

105. 22 Eng. Rep. 931, 940 (1685) *cited in* MORRIS & LEACH, *supra* note 103, at 11-12.

106. See SIMES, *supra* note 98, at 40-41.

107. Simes does question whether the trust overcomes all concerns, since a trustee "cannot invest the funds as freely as a person who owns it beneficially." *Id.* at 60. Increasingly, however, a trustee is able to do so.

108. *See generally* John Langbein & Richard Posner, *Market Funds and Trust Investment Law*, 1976 AMER. BAR. FOUND. R.J. 1, 14-16 (1976) (arguing that a trustee should note pick and choose within the class of publicly-traded securities).

has dissipated. Indeed, many offshore jurisdictions, as well as an increasing number of states in the United States, have eliminated the rule altogether.[109] Other states, adopting provisions such as the Uniform Statutory Rule Against Perpetuities, have sought to eliminate the remaining unjustifiable and unfathomable complexities of the rule. In so doing, they have liberalized the perpetuities period and provided such effective escape devices that the reformed rule is viewed as equatable to no rule.[110] Ironically, then, developments in trust law regarding perpetuities seem to be leading it to an apparent convergence with the position of Islam on the matter. This apparent convergence, however, is an especially superficial and misleading one. A trust instrument that may direct the distribution of income and corpus in perpetuity still does not lock in the underlying assets. As shall be discussed in the next section of this article, the same is simply not true of the *waqf.*

2. The Inalienability of *Waqf* Property

As has been seen, the expanding powers of sale of the trustee over time have ameliorated concerns regarding perpetuities.[111] In the case of Islam, the mandatory rule in favor of perpetuities has had the negative effect of actually deflating value.[112] The reason for this is that the law imposes, as a logical conclusion of the perpetuities mandate, a strong, albeit not absolute, proscription against sale or other alienation of property held in *waqf.* Indeed, this prohibition is attributed directly to the Prophet, who is reported to have declared that "You must bestow the Actual LAND ITSELF, in order that it may not remain to be

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109. *See* Dobris, *supra* note 74, at 557, 571; 1 SCHOENBLUM, *supra* note 1, § 13.03[C]&[D].

110. *See, e.g.*, Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 U.C.L.A. REV. 1023, 1027 (1987):

> If the future does shape up this way, the effect of adopting the Uniform Statute is to keep the Rule against Perpetuities formally on the books, but in abeyance, for 90 years, after which we can expect the Rule to be discarded as an obsolete, overcomplicated relic of the Industrial Age, to be wholly replaced by a 90-year limitation on the dead hand.

111. *See supra* note 107 and accompanying text.

112. *See* SIMES, *supra* note 98, at 35 (reporting on a similar concern expressed in England). Simes quotes from William David Lewis, an early English writer on the law of perpetuities, who states that perpetuities, if permitted, would lead to "stagnant possession, and, [be] for all purposes of the commonwealth, useless. A miserly disposition, in this case, withdraws from free circulation and, therefore, renders worse than valueless, property which without the protection of the state and its municipal laws, could not have been obtained, or if obtained, preserved." *Id.*

either SOLD or BESTOWED, and that INHERITANCE may not hold in it."[113]

There are certain exceptions to the foregoing. For example, if *waqf* property has fallen "into ruins or ceases to produce any benefit, so that the objects of the *wakf* cannot be fulfilled," the *mutawallī* can apply to the *qādī* (or *waqf* board in India) for permission to sell.[114] However, the *mutawallī* can only sell the property and reinvest the proceeds in other property or exchange properties. Indeed, a sale or exchange of properties is permitted, even if property is not in a ruinous or unproductive state, if the *wākif* had authorized the sale or exchange originally at the creation of the *waqf*.[115] Few founders appear to have authorized a power of sale for a variety of reasons.[116] When there is no express authorization, "the power to sell or exchange is very strictly exercised and *waqf* property may not, generally speaking, be sold in exchange for another property merely because the resulting increase of the corpus would be beneficial to the *waqf*."[117] While some jurists have recognized the right of sale purely for gain, most have not, and orthodox theory clearly disapproves of this practice.[118] As for the new property acquired in an exchange or through investment of the proceeds of the sale of the original property, "all the incidents of *wakf* would attach to the new property which will be subject to the same conditions as the original property."[119]

Undoubtedly, claims have been made that property was in ruinous condition when it was not.[120] Moreover, *qādīs* may have been willing to make such findings or simply approve sales without a showing of duress.[121] Still, a universally observed, predictable rule of law, recognizing the power to sell or exchange *waqf* property and reinvest the proceeds freely, did not exist.

The *waqf* developed in an economy in which land was scarce and represented the most valuable asset that could be owned. Since the particular *waqf* tract of land had been dedicated in perpetuity to Allah, it could not be taken back and disposed of by

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113. 2 THE HEDAYA: COMMENTARY ON THE ISLAMIC LAWS 335 (Charles Hamilton trans. 1989) [hereinafter HEDAYA].

114. FYZEE, *supra* note 3, at 289; Cattan, *supra* note 3, at 208.

115. *See* Cattan, *supra* note 3, at 208-09.

116. See REITER, *supra* note 27, at 172-73.

117. Cattan, *supra* note 3, at 209 (italics added).

118. *See* HEDAYA, *supra* note 113, at 335.

119. SYED AMEER ALI, THE LAW RELATING TO GIFTS, TRUSTS, AND TESTAMENTARY DISPOSITIONS AMONG THE MAHOMMEDANS 281 (1885).

120. *See* REITER, *supra* note 27, at 172-73. The claim for deviation from standard doctrine due to duress, coupled with economic utility, is referred to as *istibdāl*.

121. *See id.*

mere mortals. Another consequence of the economic conditions in which the *waqf* took hold was that *waqf* law could not readily be extended to new forms of movable wealth, such as shares in a joint stock company,[122] an unfortunate development in that movables became the predominant form of wealth ownership.[123]

Admittedly, an exception has always existed for certain tangibles that can be analogized to the corpus/usufruct model. Thus, horses, camels, cattle, and trees bearing fruit are allowed to be held in *waqf*.[124] In contrast, wasting assets were not permitted to be held in *waqf*. This fostered serious debates over cash, the line sometimes being drawn between cash being expended and cash being invested,[125] the latter permitted as *waqf* property. While there were blatant and widespread deviations from the traditional restraints on cash-funding of *waqf*s,[126] uncertainty persisted as to the rule.[127] Variations from one geographic region to another on this important point also

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122. *See, e.g.*, Kulsom Bibee v. Golam Hossein, (1905) 10 C.W.N. 449 (India), *cited in* FYZEE, *supra* note 3, at 291 (holding that shares of stock could not be held in *waqf*). The Wakf Act of 1913, § 2(1) altered this result by providing that "any property" could be held in *waqf*. Of course, this statutory enactment applies only to India, where the more liberal Hanafite school holds sway. The Wakf Act 1954 follows the 1913 Act, by using the term "any immovable or movable property." Wakf Act of 1913, § 2(1), *reprinted in* FYZEE, *supra* note 3, at 305. However, there is a serious debate that persists as to whether these words apply to property that is consumable but capable of conversion to permanent investments yielding regular income. *Compare* DIWAN & DIWAN, *supra* note 34, at 260 (questioning this) *with* FYZEE, *supra* note 3, at 282 (approving a very liberal interpretation of the terminology). Both authorities would exclude from *waqf* pure consumables, thus indicating that the Indian legislation will likely be construed in the context of traditional *waqf* law.

123. Indeed, the HEDAYA, provides that "The appropriation of *land* is lawful; because several of the prophet's companions appropriated their land: but the appropriation of *moveable* property is altogether unlawful . . . . " HEDAYA, *supra* note 113, at 342.

124. Books, as well, are allowed to be held for their use. Under one view, only items that can be subject to a legal agreement in the *sharī'a* may be the property of a *waqf*. *See* SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 624. *See also* HEDAYA, *supra* note 113, at 343, for a disagreement even with regard to these items.

125. *See, e.g.*, Abdul Hamid v. Fateh Mohammed, P.L.D. 1958 Lah. 824 (Pakistan), discussed in QUERESHI, *supra* note 89, at 77 & 107 n.228.

126. *See generally* Murat Cizakça, *Changing Values and the Contribution of the Cash Endowments (AWQAF AL-NUQUD) to the Social Life in Ottoman Bursa, 1582-1823, in* LE *WAQF* DANS LE MONDE MUSULMAN CONTEMPORAIN, *supra* note 30, at 61 (describing the cash *waqf* and its widespread use in Anatolia and Ottoman Europe). At least one commentator, however, has suggested that the rigidities of *waqf* doctrine were later reintroduced, at least in Kayseri, as the attitude toward Islamic law became more conservative. *See* KOZLOWSKI, *supra* note 30, at 18.

127. For example, Syed Ameer Ali, in his famous Tagore Law Lectures of 1884, declared that "the question is involved in considerable difficulty." ALI, *supra* note 119, at 365.

impaired the overall utility of the utilization of cash and intangibles *waqfs* on a transregional basis. In some areas, the strong doctrinal barrier to holding intangibles in *waqf*[128] had to be confronted.[129] The inability to transform the vast assets already held in real property and agricultural *waqfs* further limited the benefit of the flexible asset rule. Too much value was already locked-in. Thus, for a variety of theoretical and practical reasons, the *waqf* has been a less commodious vehicle than the trust for the administration of an array of assets central to the modern economy, assets that now exceed land in economic and social significance. Serious disincentives to use of the *waqf* as a management vehicle of first choice have persisted. In contrast, the trust may hold any legally protected interest in property, no matter how ephemeral.[130]

The same sort of restrictions of *waqf* law with respect to sale and exchange—a logical outgrowth of the mandatory rule in favor of perpetuities—is also present with respect to the mortgaging of *waqf* property. Generally, property held in *waqf* cannot be encumbered.[131] Again, the logic inherent in a commitment of the property to Allah in perpetuity is that no secured creditor ought to be able to remove it from this endowment for the Almighty. More pragmatically, mortgaged property can otherwise be taken by unsatisfied creditors, thereby undermining the Dead Hand control and continuity intended by use of the *waqf*. Indeed, commitment of the property to Allah, subject to prior enjoyment of the fruits by family members and successive generations of descendants, would discourage mortgages, even if otherwise permissible. A secured creditor could only count on the usufruct, and only so long as the debtor's interest lasted.[132] Thus, the

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128. *See* Cattan, *supra* note 3, at 205. *See also supra* note 121 and accompanying text.

129. For example, the dispute in India persists. *See supra* note 120.

130. For example, even the right to future proceeds of a life insurance contract or to future pension benefits may be held in trust. However, a mere expectancy or future profits may not. *See, e.g.*, Brainard v. Commissioner, 91 F.2d 880 (7th Cir. 1937). *See generally* MCGOVERN, *supra* note 93, § 4.7.

131. *See* DIWAN & DIWAN, *supra* note 34, at 271. While a mortgage has on occasion been retroactively approved on the theory that it was necessary to carry out the object of the *waqf*, *see id.* at 271, as a general matter not only is the mortgaging of property disapproved, but the mortgagee has no action to recover the funds loaned from the *waqf* property or otherwise. *See id.* Indeed, the mortgagee may be liable for damages and may owe rent if he takes over possession. *See* HUSAIN, *supra* note 21, at 194-95. Thus, another strong disincentive is introduced in the way of the availability of capital for property improvement.

132. While security in rents might suffice for a mortgage loan, this would be unusual even in modern Western real estate finance, in which security is generally sought in both the underlying property and the rents.

inability to mortgage represents another striking distinction between the *waqf* and the trust, one that makes the *waqf* a far less appealing estate planning tool. Over the course of generations, borrowing in order to make productive capital improvements, in order to diversify the portfolio of assets of the *waqf*, or even in order to address the emergency needs of family beneficiaries, will be unavailable. The usufruct of the particular beneficiary may well prove an insufficient source of security to the lender.[133]

Just as *waqf* property may not be mortgaged, it may not, as a doctrinal matter,[134] be leased for an unrestricted term. Again, in sharp distinction to the trust, any lease must be limited to one year. In certain cases involving land, the term is extended to three years. The same concern about impairing the ultimate endowment reflected in the barrier to alienating and mortgaging the property is present here.[135]

With respect to *waqfs*, rents often proved unreliable over time. In part this has been ascribed to declining neighborhoods that accompanied industrial development, as in India.[136] It is

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133. As to the use of the *waqf* to avoid creditors, see *supra* note 30.

134. This is also true as a statutory matter in India today. The traditional rules as to one- and three-year leases of immovables remain, subject to *waqf*-board approval of longer leases after careful review. *See* HUSAIN, *supra* note 21, at 203, discussing the Wakf Act 1954, § 36-F.

135. Note that certain techniques were developed to overcome the harsh leasing rule and to offset somewhat the general prohibition against alienability. For example, in the Ottoman Empire, a devise known as an *ijāratayn* overcame the lease term limitation. Subject to the approval of the *qādī*, a lessee could lease the property in perpetuity by paying (a) advance rent for repairs and improvements and (b) an annual rent equal to three percent of the increased value of the property. *See* Cattan, *supra* note 3, at 209. The right of the lessee was made assignable or inheritable by legislation. "For all practical purposes, the holder of *ijāratayn* on *waqf* property became its owner, subject to the payment of what was, in fact, a rent charge to the *mutawallī*." *Id.* A second device overcoming the prohibition on long-term leases was the transfer of a permanent right to erect buildings or to plant trees on *waqf* property. The holder became the effective owner of the building or trees. In exchange, the lessee paid annual rent. As with the earlier arrangement, approval was required preliminarily for this "ground lease." A third device was the signing of successive short-term leases up front. *See* REITER, *supra* note 27, at 148. These devices had the effect of ameliorating, in some cases, the rigid inalienability of *waqf* property. *See id.* at 209-10. However, they were not available in many regions on a formally approved basis. Moreover, they tended to benefit the lessee far more than the *waqf* itself, neither the *mutawallī* nor the beneficiaries having further incentive to invest in the *waqf* property. Due to the deteriorated condition of the property and its location, rents were low in many instances. *See, e.g.*, REITER, *supra* note 27, at 176.

136. *See, e.g.*, KOZLOWSKI, *supra* note 30, at 81. The *waqf* was often caught between a government seeking revenues and tenants unable or unwilling to pay rent. This was particularly true when the tenants had no relation to the *waqf* beneficiaries. *See id.* at 87.

also partially explainable by the decisions of certain *mutawallīs* to favor current beneficiaries by substantial income distributions at the expense of the long-term maintenance of the property. These decisions may be ascribable to the interest in accommodating persons with whom the *mutawallī* has an actual relationship. It may also result, from the need to obtain consents. A legal prescription provides:

> When the *waqf* is in favour of individuals, the building cannot be enlarged without their consent. In other words, the beneficiaries of a trust have a right to be consulted in any alteration in the character of the subject of the *waqf* as may be likely to entail serious expenditure.[137]

However, whereas trust remaindermen had a substantial economic stake in challenging a trustee's allocative decisions, the same was not always true of future *waqf* beneficiaries. Over time, their usufructuary interest was not substantial enough. Moreover, the procedures for mounting a challenge and the prospects of success were also far less certain because of the absence of a systemized court system, the questionable basis for *qādī* decisionmaking, and the unavailability of appellate procedure.[138]

Historically, trust law has also been concerned with leases. Generally, however, the term of the lease entered into by the trustee could be at least for the term of the trust.[139] Of course, in the trust's case this was possible, since the trust usually had a termination date. The *waqf* does not. This is not to say that the trust leasing rule was desirable. If the trust ends on the termination of the life of the income beneficiary, there is no certainty when this will occur. This will discourage long-term leases. However, there is an obvious way under trust law to overcome the problem—simply provide for the power of the trustee to lease beyond the term of the trust. In the case of a *waqf*, that option is not available. Although the *wākif* has substantial power to determine the distributional scheme of the *usufruct* and the line of succession of *mutawallīs*, the power to specify the lease term was not generally available.

3. Ownership of Assets

At the core of the restrictions on alienation, mortgaging, and leasing lies the question of "ownership." Not enough has been

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137. ALI, *supra* note 119, at 227-28, quoting from the Fatāwa-i-Alamgiri, II, at 468.

138. *See generally infra* notes 163-65 and accompanying text.

139. *See* RESTATEMENT (SECOND) OF TRUSTS § 189 cmts. c, d (1959).

made of a crucial distinction between the trust and the *waqf*, one that places the *waqf* in this respect in closer proximity to civil law institutions such as the *fideicommisum*.[140] The trustee holds legal title to the trust assets. As noted, this is central to the resolution of the perpetuities problem. As legal titleholder, the trustee is able at all times to deal with the property as the owner.

In the case of the *waqf*, title is in the Almighty and not in the *mutawallī*.[141] The latter, as indicated earlier, is more of an administrator or custodian. Since the *mutawallī* does not own the property in any sense, he cannot deal with it except in the very particular ways permitted by the religious law.

Since ownership is out of the hands of the *wākif* as well, there is also no right on his part under most schools of Islamic thought to revoke the *waqf*.[142] This is in sharp contrast to trust law, which permits the reservation of a power to revoke by the settlor.[143] A great appeal of the revocable trust is that at any point while the power is extant, the property can be recouped through a revocatory act specified in the trust instrument.[144] In some states, if otherwise unspecified in the instrument, the trust is actually presumed to be revocable.[145] The power to revoke is

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140. For a discussion of the *fideicommisum* and other civil law constructs, see SCHOENBLUM, *supra* note 1, § 18.03.

141. However, this is not the case in the Malikite school, which deems ownership to have been retained by the *wākif*. Nevertheless, he is prohibited from exercising any economic attributes associated under the common law with ownership. *See* SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 628.

142. Abū Hanīfa, for whom the Hanafite school is named, believed that the *wākif* had a power to revoke. This view was not shared by his disciple, Abū Yūsuf, who took a different view, and the latter's view has prevailed. To avoid revocability, a Hanafī *wākif* brings an action to recover property from the *mutawallī*. The *qādī* must choose between Abū Hanīfa and Abū Yūsuf. The *qādī* will choose the latter. The *waqf* is then confirmed by the *qādī*, rejecting the position of the *wākif*. *See id.* at 625.

143. Farkas v. Williams, 125 N.E.2d 600 (1955), for example, rejected the argument that a trust was "illusory," despite the power of the settlor to revoke at any time. Contrast this refusal by this and other common law courts to find an "illusory" arrangement involving a revocable trust with the *Abul Fata* case, *supra* note 91 and accompanying text (relating to Privy Council holding that Islamic family trust was invalid, because the ultimate gift to charity was so distant as to have little economic value and, thus, was illusory).

144. However, failure to comply with the procedures for revocation set forth in the trust instrument may well result in the failure of the attempt at revocation. *See, e.g.*, Northwestern Univ. v. McLoraine, 438 N.E.2d 1369 (Ill. App. Ct. 1982).

145. See David English, *Drafting the Uniform Trust Act*, *in* REPRESENTING ESTATE AND TRUST BENEFICIARIES AND FIDUCIARIES 117, 132 (ALI-ABA ed., 1999), which discusses the adoption of a presumption of revocability in the pending Uniform Trusts Act, which is slated for final approval by the Uniform Law Commissioners in July 2000. The proposed Act should not be confused with the less comprehensive and largely repudiated Uniform Trusts Act (1937). The

useful, for example, if the settlor requires the property because of his own changed needs or altered family circumstances. In this sense, the revocable trust is an efficient tool for wealth management. It is also efficient in avoiding probate, thereby serving as an easy-to-use substitute for the more cumbersome route of testation via a will.

In contrast to an *inter vivos* revocable trust, a testamentary trust must comply with will formalities. However, the testator has the freedom to dispose of the property, just as if he were to make outright dispositions. In the case of a testamentary *waqf*, on the other hand, the formalities of *waqf* law must still be observed.[146] In addition, a testamentary *waqf* is bound by the strict regime of shares that is central to Islamic inheritance law. Thus, a principal purpose for use of a *waqf*, to bypass the inheritance system, is sacrificed by use of a testamentary *waqf*. Yet, the *inter vivos waqf* is unsatisfactory in comparison to a trust since, unlike a revocable trust, it requires a premature freezing of the estate plan during the settlor's life.

Although a power to revoke is not permitted,[147] it would be erroneous to suggest that no power can be reserved to change the *waqf* during the *wākif*'s life. Indeed, a *wākif* may retain a power to alter or amend. At first glance, the power to alter or amend may appear as a satisfactory alternative to a power to revoke, that little more than semantics is involved. It may suggest that, indeed, the *waqf* law does afford the *wākif* the same power to recover the property that a settlor of a trust has and, more generally, can develop flexibly to address changing economic conditions over time. Upon closer scrutiny, however, this view is not supportable. To begin with, while the power to alter or amend may pertain to distributional provisions and provisions for the appointment of *mutawallīs*, this is still only true as to the usufruct and not the underlying corpus. Certainly, within this realm, the ability to change beneficiaries or alter their shares does ameliorate the rigidity of the *waqf*. However, any authorization must provide for the repeated exercise of the discretion. Otherwise, Islamic law only permits *one* such alteration or amendment.[148] This limitation on the power should

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presumption as to revocability in the proposed Act is modeled after the laws in California, Montana, and Texas.

146. On the other hand, a testamentary *waqf* is the only sort of *waqf* that need not come into effect immediately on its creation. *See id.*; Cattan, *supra* note 3, at 206.

147. Indeed, the very presence of a clause to this effect can invalidate the *waqf ab initio*. See FYZEE, *supra* note 3, at 288.

148. The theory for this rule of judicial construction is that "once the discretion is exercised, it is exhausted." Cattan, *supra* note 3, at 211.

be contrasted with the right of the settlor of a trust to exercise such powers throughout his life and with regard to both income and corpus.[149]

Even if effectively utilized, the power to alter or amend does not address many of the problems raised throughout this article that limit the *waqf's* appeal.[150] Additionally, the invocation of the power is a dicey matter. Since a power to revoke invalidates the *waqf*, care must be taken not to draft a power to alter or amend that is so broad as to be regarded as a power to revoke. There is no clear demarcation between the two types of powers.[151] Certainly, the mere use of the descriptive term in the *waqf-nāmā* will not resolve the matter.[152]

In addition to the uncertain power to alter or amend, there is a power to invade a *waqf* of marginal value. The parameters of this right to invade are extremely narrow and in large part dependent on the controlling school of Islam. Regardless of the value, the corpus cannot be invaded, irrespective of the minimal amount left to administer or an individual beneficiary's immediate need.

Furthermore, in the case of a trust, the settlor can create an *inter vivos* or testamentary power of appointment in another person, as well as imbue the trustee with various discretionary powers. A protector or investment advisor may be designated to serve as a check on the trustee, to appoint successor trustees, or to perform other functions for which the trustee would not be suitable or have the financial expertise. In the case of a *waqf*, there is the considerably more limited capability of endowing the *mutawallī* with a power to alter or amend.[153] Third persons do

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149. Of course, the retention of such power can create tax problems and lead to the inclusion of the subject property in the settlor's gross estate pursuant to I.R.C. § 2038. Historically, *waqfs* have been utilized in an attempt to bypass taxation. *See id.* at 206 (referring to practices in Egypt at the time of the Mamluk rulers, 1254-1517). In particular, endowment property was taxed at a lower rate. One incentive for colonial rulers and modern states to limit or eliminate *waqfs* has been its historically detrimental effect on the tax base in many regions. See KOZLOWSKI, *supra* note 30, at 19. The author describes the failed efforts of Muhammed Ali in 1846 Egypt to preserve the tax base by forbidding the creation of any new *waqf*. "His regulation proved impossible to enforce and [he] violated it himself by creating a number of endowments in favour of his family." *Id.*

150. For a similar conclusion as to the effect of the power to alter or amend on the overall appeal of the *waqf*, see Cattan, *supra* note 3, at 211.

151. See QUERESHI, *supra* note 89, at 43-44, for a discussion of some extremely fine distinctions. *See generally* DIWAN & DIWAN, *supra* note 34, at 245.

152. *See, e.g.*, Abdul Satar v. Advocate General, (1932) 35 Bom. L.R. 18. *See also* Abdeally Hyderbhai v. Advocate General, (1946) 48 Bom. L.R. 631. *See generally* FYZEE, *supra* note 3, at 288.

153. *See* Cattan, *supra* note 3, at 209.

not appear to be among those capable of exercising discretionary powers with respect to the *waqf*.

The *mutawallī*, unlike the trustee, is a mere superintendent.[154] The appeal of the office is principally the salary.[155] Furthermore, as family interest wanes with the fractionation of interests, *mutawallīs* have been known to engage in "sweetheart" deals with their own family members or otherwise improperly take advantage of *waqf* assets.[156] Indeed, in a number of countries in which *waqfs* are still allowed, *waqfs* must be registered and boards supervise them and the *mutawallīs* on a regular basis.[157] However, the temptation is so considerable, especially after several generations have transpired, that serious allegations of corruption and collusion involving the *mutawallīs*, as well as the boards, are commonplace.[158]

The *wākif* can specify the line of succession of *mutawallīs*.[159] He can even authorize a *mutawallī* to appoint his successor. Indeed, in all but the Malakite school of Islam, the *wākif* himself can serve as *mutawallī*.[160] Nonetheless, once a *mutawallī* assumes office pursuant to a designation, he cannot be removed by the *wākif*, who cannot reserve a power to do so—yet another striking distinction from trust law.[161]

In the event that the *wākif* has not retained the power to designate a successor or is no longer able or alive, the board of *waqfs* or the *qādī* has the power to replace a *mutawallī* as well as oversee the *mutawallī*'s actions.[162] The precise scope of the *mutawallī*'s duty is not clearly defined. The great ferment in trust law over the precise parameters of a trustee's "fiduciary" duty

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154. *See* FYZEE, *supra* note 3, at 311.

155. The salary may be fixed in the instrument. If not, a limit of one-tenth of the income is imposed. *See* Tyabji, *supra* note 81, §523.

156. *See infra* notes 164-65 and accompanying text.

157. *See, e.g.*, FYZEE, *supra* note 3, at 318.

158. *See generally id.* at 277-78; DIWAN & DIWAN, *supra* note 34, at iii ("All the world over mismanagement, maladministration of, and corruption in *waqf* have become legendary. . . . Yet, satisfactory solution of [sic] problem eluded us. Another and probably more effective effort has now been made by Parliament by replacing the 1954 Act with the Wakf Act 1995. It may be hopefully thought that India would succeed providing better management of *waqfs* and eradicate corruption.").

159. *See* FYZEE, *supra* note 3, at 313.

160. *See* SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 625.

161. *See* FYZEE, *supra* note 3, at 314. There is, nevertheless, some support for the view that the *wākif* can retain the power to *replace* a *mutawallī*, but only if the *wākif* is the first *mutawallī*.

162. *Id.* at 314-15. If no *mutawallī* has been originally appointed, the *waqf* may fail, another deviation from trust law. For the differences within the Hanafite school on this point, see *id.* at 313. The Shiite school will not let the *waqf* fail, much like under trust law. *See* TYABJI, *supra* note 81, § 511(2).

does not seem to have a parallel in Islamic law. On the other hand, the *mutawallī's* duty has been compared to that of the trustee.[163] He must "do everything that is necessary and reasonable to protect and administer the *waqf* property."[164] His duty is viewed as a moral and religious duty. The *mutawallī* can be removed for misfeasance, insolvency, breach of trust, or adverse claims to the *waqf*.[165] However, there is no substantial discussion by scholars of the personal liability of the *mutawallī* for these acts, other than return of property.[166] What little debate there is suggests a strong reluctance on the part of *qādīs* to impose it at all or certainly in a routinized manner so as to create institutional disincentives to self-interest on the part of tempted *mutawallīs*, especially those of long-standing *waqfs* regarding which the temptation would likely be the greatest.[167] Moreover, the mechanisms for obtaining relief are of dubious merit. As one commentator has explained with respect to the 20th Century experience of enforcement in Jerusalem:

> One of the weaknesses of the *waqf* system is the absence of an efficient supervisory mechanism for the administration of its properties . . . . [P]rocedures of governance . . . do not vest the *qādī* with the means to discharge this duty. Neither have the authorities devised auditing rules to ensure control of sound management of *awqāf* by the *qādī* . . . . This weakness is exploited by the *mutawallī* . . . to derive personal gain from *waqf* resources . . . .[168]

The problems described with respect to 20th Century Jerusalem also persist in India. Thus:

> The institution of family *waqfs* also needs immediate attention of the government as well as of the public particularly Muslims. These *waqfs* are looked upon by *mutawallīs* in management as

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163. *See, e.g.*, HUSAIN, *supra* note 21, at 18.

164. FYZEE, *supra* note 3, at 312.

165. *See id.* at 312. Even when a new *mutawallī* is appointed by a sincere *qādī* there is always the risk of corruption on the part of the successor *mutawallī*. See, for example, the account of the actions of one Walid Ali in KOZLOWSKI, *supra* note 30, at 92-93.

166. Indian legislation now imposes a fine on the *mutawallī* for wrongdoing. *See* HIDAYATULLAH & HIDAYATULLAH, *supra* note 90, at 173.

167. *See* Yitzhak Reiter, *The Administration and Supervision of* Waqf *Properties in 20th Century Jerusalem, in* LE WAQF DANS LE MANDE MUSULMAN CONTEMPORAIN, *supra* note 30, at 169, 181.

168. *Id.* at 169. The author notes the difficulty in arriving at conclusions in view of each of a substantial body of reliable data. His study does evaluate available evidence, largely confirming the problems of the supervisory mechanism, though concluding that some *mutawallīs* were, in fact, dismissed for misconduct and that there was greater corruption with regard to public *waqfs* than with family *waqfs*. *Id.* at 181.

> though they were waqfs for their benefit only. They tend to ignore the rights and interests of other beneficiaries.[169]

The problem of proper supervision appears pervasive and also chronic. In the 16th Century, one well-known jurist, Ibn al-Nujaym, barred sales for financial remuneration on the ground that:

> The *mutawallīs* squander the proceeds of the sale and seldom use them to purchase alternative properties. We have not seen any *qādī* supervising this, despite the abundance of *istibdāl* transactions today. I even alerted several *qādī* to this fact; they began to take an interest in supervision but stopped doing so subsequently.[170]

Similar problems regarding *qādī* lack of oversight were routinely experienced in India in colonial times.[171]

To the extent that there is no personal liability, it is poorly delineated, or it is only occasionally imposed, the incentive to carry out the plans of the settlor present in trust law is lacking in Islamic law. The absence of a reliable enforcement regime is not likely to create comfort in a potential *wākif* concerned about guaranteeing that the intended terms of the gift will be observed in perpetuity.

Moreover, even the requirement that the *mutawallī* do all that is necessary and reasonable to protect and administer the *waqf* property is laced with ambiguity and contradiction. After all, he cannot sell, mortgage, or lease the underlying property freely, except with the approval of the governing board or *qādī*. However, the *mutawallī* can delegate his responsibilities. In this regard, the *waqf* law is more liberal than the trust common law, which generally did not allow the trustee to delegate.

Even with respect to the usufruct or income, there are substantial restrictions. For example, income must be used first for the upkeep of *waqf* property.[172] Only the surplus is available for the beneficiaries. This is the exclusive part over which the *wākif* can exercise discretion in the *waqf-nama*. In the case of a trust, there is also a duty to maintain the principal. However, this is a duty imposed on the trustee and is not a first principle of distribution.[173] In fact, *mutawallīs* have tended not to keep up

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169. QUERESHI, *supra* note 89, at vi (italics added).

170. Ibn al-Nujaym. Al-Bahr al-rā'iq fi sharh kanz al-daqā'iq (al-Matba'a al-'a-Illmiyya), 241, *quoted in* REITER, *supra* note 27, at 174-75.

171. *See* KOZLOWSKI, *supra* note 30, at 21.

172. *See, e.g.*, ALI, *supra* note 119, at 229-30.

173. That is, there is no unwaivable rule that "no income shall be distributed to income beneficiaries until proper expenditure has been made for the maintenance of trust property."

the property.[174] In large part, this may be due to a desire to please the usufructary beneficiaries, especially in the initial generation.[175]

As for the *wākif*'s right to reserve for himself an initial life interest in the trust, the Hanafi school of Islam may permit it, but other schools do not.[176] This prohibition throughout much of the Islamic world is yet one more striking difference between the *waqf* and the trust, one that obviously deprives the *waqf* of serious appeal to an owner of property seeking to establish *inter vivos* a long-term family wealth management vehicle, and thereby avoid the severe restrictions on testamentary freedom inherent in Islamic inheritance law. Thus, to accomplish this goal, the *wākif* is put on the horns of a dilemma, since the creation of the *waqf* means that he must surrender for the remainder of his life the use and income from the property.

Even where the Hanafi school holds sway, there are limits on how the surplus income interest retained by the *wākif* can be applied. Specifically, the *wākif*'s interest should not be confused with the life income interest retained by the settlor of a trust. Considerable uncertainty prevails as to the nature of the right. For example, in *Abdul Karim Adenwalla v. Rahimabai*,[177] the court held that Islamic law only permits the reservation of income by the *wākif* to the extent of his needs for maintenance and support.[178] Moreover, the *wākif* is barred from creating successive life interests if he retains the first.[179]

4. Who Can Create a *Waqf* and How Is It Created?

The trust is a multigenerational wealth management device for a secular society. Any person can establish a trust that will be enforced in common law courts. Until recently, the stratified nature of many Islamic societies and the nature of asset ownership has tended to limit the use of *waqfs* to certain dominant elites in the society at the particular time.[180] In some

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174. *See* SHORTER ENCYCLOPAEDIA OF ISLAM , *supra* note 21, at 626-27; FYZEE, *supra* note 3, at 277-78.

175. *See supra* note 132-33 and accompanying text.

176. *See* Cattan, *supra* note 3, at 203-04.

177. (1946) 48 Bom. L.R. 67, 72. *See also* Ahmed Arif v. Commissioner of Wealth Tax, A.I.R., 1971 S.C. 1691 (Sup. Ct.).

178. These terms appear to have a more restrictive meaning in *waqf* law than they do in trust law. *See* FYZEE, *supra* note 3, at 298. *But see* HIDAYATULLAH & HIDAYATULLAH, *supra* note 90, at 162.

179. *See* Rashidunnissa v. Ata Rasool, (1958) A.I.R. All. 67.

180. See KOZLOWSKI, *supra* note 30, at 16. In many instances, the *waqf* was utilized to insulate the property from the efforts of a new leader or ruling elite to take the property. These efforts did not always succeed. *See id.* at 15.

regions, the non-Muslim population, which might have introduced additional pressure to reinterpret *waqf* law, has been denied the right to use *waqfs*.[181] By way of contrast, the trust, especially in terms of its recent offshore statutory transformation,[182] has been greatly influenced by the needs of persons from civil law systems seeking protection from forced heirship laws.

The concern of Islam with maintaining the exclusive Muslim cast to the *waqf* is understandable, in light of a desire to encourage the ultimate disposition for an acceptable Muslim charitable or religious purpose. For example, there have been several Indian cases applying Islamic law in which the *waqf* was held invalid because there was an ultimate disposition to the "poor," which was interpreted as applying to non-Muslims as well. Even when a non-Muslim is permitted to employ a *waqf*,[183] it cannot be designed for unacceptable purposes under Islam, such as the eventual support of a church.[184]

Notwithstanding the foregoing, it is surprising that certain Islamic jurisdictions go so far as to follow the principle that a Muslim founder's adoption of a new religion terminates the *waqf*.[185] The corpus is then distributed to his heirs. Since the property is already committed to Allah, this is difficult to rationalize and will require further exploration.

The actual creation of the *waqf* by the Muslim *wākif* is as informal as the trust, if not more so. Traditionally,[186] a *waqf* could be created orally. Unlike a trust, no formal conveyance is generally required, even when a person other than the *wākif* is serving as the *mutawallī*. This makes the very consideration of the creation of a *waqf* a delicate matter, since too great a remonstration of intent could result in the perpetual dedication of

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181. In India, there was some disagreement on this point. However, the Wakf Act of 1913 clearly limits the *waqf's* availability to Muslims, as does the Wakf Act, 1954. On the other hand, certain court decisions hold otherwise, consistent with traditional Islamic legal doctrine. *See, e.g.*, Moti Shah v. Gaffar, A.I.R. (1956) Nag. 32, 42. *See also* Hundaria v. Shyam Sunder, (1963) Pat. 98. *See generally* DIWAN & DIWAN, *supra* note 34, at 259 (contending that, in view of the statute, the court decisions are incorrect).

182. *See* Duckworth, *supra* note 50.

183. *See also supra* note 22 and accompanying text.

184. *See* HIDAYATULLAH & HIDAYATULLAH, *supra* note 90, at 147; DIWAN & DIWAN, *supra* note 34, at 262. A *waqf* for a church would be void, since the object must be valid both under the creed of the founder *as well as* under Islam. The latter law prohibits dedication for churches.

185. *See, e.g.*, SHORTER ENCYCLOPAEDIA OF ISLAM, *supra* note 21, at 625.

186. *See* FYZEE, *supra* note 3, at 282-83; DIWAN & DIWAN, *supra* note 34, at 265.

the speaker's property.[187] In essence, the *waqf* may be *too* easy to create and *too* difficult to break, a logical set of outcomes if charitable and religious interests benefit therefrom. By way of contrast, in the case of the secular institution of the trust, the requirement of a conveyance, in cases other than a self-settled trust, is not a major imposition, but does help clarify the intent of the settlor. This is consistent with the overall goal, which is to effectuate the settlor's dispositive objectives.

In fact, the dominant goal in Islamic law of directing assets for religious and charitable uses led to the development of a rule of construction recognizing the existence and validity of the *waqf*, even when the *wākif* had not specifically referred to the ultimate charitable use for the endowed property.[188] If the intent to create a *waqf* is established, the fact that no charitable purpose has been designated will not in most cases invalidate the *waqf*;[189] a gift over for charity will be implied.

IV. CONCLUSION

The *waqf* and the trust have an ancient, intertwined history. However, whereas the *waqf* has largely remained a static institution, the trust has proven remarkably flexible and responsive to changing conditions affecting intergenerational management of family wealth and its preservation. While there is a temptation to find clones in legal constructs of different cultures, care must be exercised to avoid simplistic or superficial generalizations. This is true of the *waqf* and the trust. It would be intriguing to find comparable wealth administration and preservation constructs in these two great systems of law. This is simply not the case with the *waqf* and the trust. True, at certain times in history both have been resorted to so as to avoid unacceptable wealth transfer regimes and external threats to family wealth. Yet, the trust has proven more resilient, increasing its domain over worldwide capital by offering an efficient means to manage private capital cross-generationally. The family *waqf*, on the other hand, has continued to lose ground, a victim of its own rigid doctrine's inability to adapt to

187. Hanafis, who allow the *wākif* to be the first beneficiary and the *mutawallī*, still require a conveyance. So do Imamis.

188. The doctrinal explanation offered for the rule is that each person should be allowed to obtain religious merit by creating an endowment. *See* FYZEE, *supra* note 3, at 299-301.

189. *See id.* at 287. But see DIWAN & DIWAN, *supra* note 34, strongly intimating a different view regarding the issue and viewing it as one of uncertainty as to charitable purpose.

modern conditions, the absence of adequate adjudicatory mechanisms, and statist[190] and populist[191] concerns about alternative political power centers and economic inefficiencies.

The stark contrast between these superficially similar institutions emphasizes those attributes of the trust and the system in which it functions that have played and are playing a role in its remarkable development as the vehicle of choice for intergenerational wealth management throughout the world. While the *waqf* may have been conceived as an ameliorative construct for the harsh inheritance rules of Islamic society and may have functioned successfully for long periods under different conditions,[192] its modern decline seems, in retrospect, readily predictable. The legal system, of which it is an integral part, and its related, highly stylized rule regime and undeveloped enforcement procedures, made any different fate impossible to achieve without legislative intervention by secular authorities.[193]

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190. The connection between the modern state and the religious law has been a complex one in Islam. No persuasive justification appears to have been presented yet for departures from traditional law by way of a secular legislative process. *See* Mayer, *supra* note 72, at 187-88.

191. *See, e.g.*, KOZLOWSKI, *supra* note 30, at 21.

192. *Cf.* REITER, *supra* note 27, at x ("the major issue discussed in this study is to what degree the *waqf*, as an institution of the old world order, proved capable of adapting itself to modern socio-economic conditions; the author reaches mixed conclusions."); *id.* at xii.

193. To a certain degree, this has been accomplished in both India, see the Wakf Act of 1913, along with subsequent amendments, and Lebanon, which has built upon the reform efforts originally introduced in Egypt in 1946. See the Law of Mar. 12, 1947. *See also supra* note 149.

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