

Fall 2018

## Charity Disparity: The Challenge of Applying Religious Law on Zakāt in the United States

Ahmed E. Taha

*Pepperdine University School of Law*

Sohaib I. Khan

*Ph.D. Candidate, Columbia University*

---

### Recommended Citation

Ahmed E. Taha and Sohaib I. Khan, *Charity Disparity: The Challenge of Applying Religious Law on Zakāt in the United States*, 14 Nw. J. L. & Soc. POL'Y. 1 (2018).

<https://scholarlycommons.law.northwestern.edu/njlsj/vol14/iss1/1>

This Article is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

# Charity Disparity: The Challenge of Applying Religious Law on *Zakāt* in the United States

Ahmed E. Taha\*  
Sohaib I. Khan†

Legal pluralism is “generally defined as a situation in which two or more legal systems coexist in the same social field.”<sup>1</sup> One type of legal pluralism occurs when a group of people is subject to both the law of its country and to a religious law. Practicing Muslims in the United States are in this situation—they must fulfill numerous personal obligations imposed by Islamic law within the context of the American legal system. Doing so is usually not difficult; however, it causes significant problems in at least one area: calculating their annual almsgiving (*zakāt*) required by Islamic law. Muslim jurists disagree about how much *zakāt* should be paid on certain modern financial assets created by American corporate, securities, and tax law, such as publicly traded stocks and 401(k) retirement accounts. As a result, American Muslims can choose from a wide range of *zakāt* calculation opinions, which are usually presented on the internet without a framework of legal reasoning. This causes inequity, confusion, and creates a moral hazard for American Muslims that threatens to undermine the societal and spiritual purposes of *zakāt*.

*Zakāt* is a mandatory almsgiving in Islam. As one of the five central “pillars” of Islam, paying *zakāt* is one of the most important religious obligations of Muslims.<sup>2</sup> Each year, Muslims whose wealth exceeds their basic needs must donate a specified portion of their financial assets and certain tradable assets, such as business inventories, livestock, and agricultural produce. Detailed rules exist for calculating *zakāt*, and these rules differ somewhat by asset type. Thus, Muslims seeking guidance regarding how much *zakāt* to pay have turned to Islam’s scriptural sources and jurisprudential tradition, Muslim scholars and jurisconsults, and, in present times, even Islamic websites for information about these rules.

---

\* Ahmed Taha is a Professor of Law, Pepperdine University School of Law; J.D., Ph.D., Stanford University; B.A., B.S., University of Pennsylvania.

† Sohaib Khan is a Ph.D. candidate in Middle Eastern, South Asian, and African Studies at Columbia University; M.A., Duke University; B.S., Lahore University of Management Sciences. The authors are grateful for helpful comments and suggestions from Abdullah Ali, Sami Catovic, Michael Helfand, Youssef Ismail, Asifa Quraishi, and Asma Sayeed.

<sup>1</sup> Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 870 (1988).

<sup>2</sup> The other four pillars are the profession of faith (sincerely declaring belief that there is no god except God—“Allah” in Arabic—and that Muhammad is a messenger of God), the five daily prayers, fasting from dawn to sunset during the month of Ramadan, and making the pilgrimage to Mecca at least once in one’s lifetime. THE STUDY QURAN: A NEW TRANSLATION AND COMMENTARY 740 n.30 (Seyyed Hossein Nasr et al. eds., 2015).

The Qur’ān, regarded by Muslims as divine revelation and the most authoritative primary source of Islamic law, repeatedly orders Muslims to pay *zakāt*.<sup>3</sup> It also lists some of the assets on which *zakāt* must be paid<sup>4</sup> and designates the categories of eligible recipients.<sup>5</sup> However, the Qur’ān does not specify how *zakāt* should be calculated. When *zakāt* was first instituted, the calculation rules came from traditions of Prophet Muhammad. These traditions, comprised of the words and actions of the Prophet, are called Ahādīth (sing. Ḥadīth) and are a primary source of Islamic law. Of course, the Ḥadīth literature only discusses rules pertaining to asset types that existed in the agrarian and mercantile economy of seventh century CE Arabia. After Prophet Muhammad’s death and the end of revelation in 632 CE, generations of Muslim jurists (*fuqahā’*) gradually developed a comprehensive legal discourse to determine rules for calculating and distributing *zakāt*.<sup>6</sup> As changing economies in Muslim societies caused other asset types to emerge, jurists incorporated these assets into *zakāt*’s legal framework, applying existing calculation rules to these new assets and sometimes even formulating new rules. In doing so, jurists often differed on how to calculate *zakāt* on these new assets. The resulting legal corpus on *zakāt* was therefore marked by internal diversity and interpretive complexity.<sup>7</sup>

Contemporary jurists attempt to extend principles of *zakāt* calculation from the classical legal canon to modern financial assets, such as publicly traded stock and 401(k) accounts.<sup>8</sup> Like their predecessors, contemporary scholars differ regarding how *zakāt* should be calculated in these instances. However, these present-day scholarly disagreements are often qualitatively different from the diversity of opinion found in classical Islamic law. Today, competing positions commonly appear arbitrary; they are rarely presented as anchored in a coherent theoretical or methodological framework of legal reasoning. Additionally, the internet makes this array of opinions readily available to lay Muslims.

This situation creates several important problems for the American Muslim community. First, it leads to great inequity. The choice of which *zakāt* calculation rules to follow can dramatically affect the amount of *zakāt* someone will pay. Thus, two people with identical financial assets can pay vastly different amounts. In the United States, the

---

<sup>3</sup> See e.g., Qur’ān 2:110 (“And perform the prayer and give the alms. Whatever good you send forth for your souls, you will find it with God. Truly God sees whatsoever you do.”); *id.* at 22:78 (“So perform the prayer and give the alms, and hold fast to God.”). All quotations from the Qur’ān are from the translation THE STUDY QURAN, *supra* note 2.

<sup>4</sup> See e.g., Qur’ān 6:141 (“[God] it is Who brings into being gardens, trellised and untrellised, and the date palm and crops with diverse produce, olives and pomegranates . . . [P]ay the due thereof on the day of its harvest.”).

<sup>5</sup> See *id.* at 9:60 (“The charitable offerings are only for the poor and the indigent, and those working for them, and those whose hearts are [to be] reconciled, and for [ransoming] slaves and for debtors, and in the way of God, and for the traveler: a duty from God. And God is Knowing, Wise.”).

<sup>6</sup> See e.g., Aron Zysow, *Zakāt*, 11 THE ENCYCLOPAEDIA OF ISLAM 411–18 (P.J. Bearman et al. eds., 2002) (discussing the historical disagreement among jurists of different schools regarding the calculation and distribution of *zakāt*).

<sup>7</sup> This is true for all jurisprudential traditions in Islam. However, in this Article, we focus on Sunni Islam.

<sup>8</sup> 401(k) accounts are savings in a type of employer-sponsored retirement plan. See *infra* Part III.B.

high value and widespread ownership of modern financial assets make this a common problem.

A second problem is the confusion Muslims face in trying to calculate their individual *zakāt* payments. The internet has made religious knowledge and answers to religious questions easily accessible. An American Muslim conducting even a cursory internet search will find a wide range of advice on how to calculate *zakāt* on modern financial assets. This advice, however, is generally presented as technical instructions and lacks any contextual justification. Whether or not Muslims accessing this advice wish to adhere to a particular school of Islamic law, they are unlikely to find a jurisprudential basis for picking one *zakāt* calculation formula over another. Thus, Muslims seeking information about how to calculate *zakāt* face a wide range of conflicting advice without having a basis for choosing among the advice. Even though the calculation method can greatly affect one's *zakāt* payment, the choice appears arbitrary. Compounding this problem, much of this advice is unclear or incomplete, so even after choosing a method, calculating *zakāt* can be difficult.

This leads to a third problem, which is a moral hazard issue. Faced with competing positions on how to calculate *zakāt* without any jurisprudential criteria, choosing the calculation method that minimizes one's *zakāt* payment can be a tempting option. However, such a utilitarian approach to calculating *zakāt* undermines *zakāt*'s social and ethical purposes. Specifically, it reduces the funds given to needy *zakāt* recipients and reduces the spiritual benefits received by *zakāt* payers. To avoid such a result-oriented approach, classical jurists recommended that lay Muslims conform to the legal opinions of a particular school of Islamic law. However, adopting this advice today is difficult because contemporary opinions regarding *zakāt* calculation rarely are presented as belonging to particular schools.

These problems and their causes generally are not acknowledged—let alone addressed—by traditionally trained jurists and modernist Muslims who propose *zakāt* calculation formulas.<sup>9</sup> Although these problems can affect Muslims worldwide, this Article focuses on the *zakāt* discourse in America today. In particular, the Article focuses on *zakāt* calculation rules proffered by individual Muslim scholars, Fiqh Councils (i.e., organizations of scholars), and other grassroots and umbrella organizations for two types of commonly held modern financial assets in the United States: publicly traded stock and 401(k) accounts.

This Article is organized into five parts. Part I provides a brief introduction to *zakāt* jurisprudence and calculation rules in classical Islamic law. Part II presents a historical overview of Islamic law's codification, from the historical formation of school-based legal identities to modern Islamic legal discourse on the internet. These two parts provide

---

<sup>9</sup> An exception is Egyptian jurist Yusuf al Qardawi, who in the introduction of his treatise on *zakāt* jurisprudence laments that “Muslim jurists differ on many details of zakah. Each has his own opinion and arguments, and there are sometimes contradictions among their interpretations, which leaves the majority of people in chaos and confusion about what opinion to choose.” 1 YUSUF AL-QARDAWI, *FIQH AZ ZAKAT: A COMPARATIVE STUDY: THE RULES, REGULATIONS AND PHILOSOPHY OF ZAKAT IN THE LIGHT OF THE QUR’AN AND SUNNAH XX* (Monzer Kahf trans., 1999) (1985). The translation of this treatise uses the transliteration “zakah” rather than “*zakāt*.” Both are common transliterations of the same Arabic word.

the necessary background to understand how lay Muslims can easily shop among scholarly opinions on *zakāt* calculation. Part III surveys many of the contemporary scholarly opinions regarding *zakāt* calculation for publicly traded stock and 401(k) accounts. It also includes a discussion of jurisprudential rationales for these different positions. In addition, it presents an experiment—a brief survey of the internet—to show that this diversity of opinion is reflected on the internet in the form of positive legal advice that lacks contextual justification. This internet survey also demonstrates the conflicting and often unclear advice readily available to any American Muslim seeking guidance in calculating *zakāt*. Having described the range of contemporary positions concerning *zakāt* calculation rules, in Part IV these rules are applied to two hypothetical case studies of *zakāt* calculation, one involving publicly traded stock and the other involving a 401(k) account. These case studies demonstrate that Muslims with the same assets can pay dramatically different amounts of *zakāt* depending on which calculation opinions they follow. Finally, Part V summarizes the implications of these analyses and recommends the creation of a *zakāt* database that would provide American Muslims with the different calculation methods associated with particular schools or scholars.

## I. OVERVIEW OF *ZAKĀT*

Differences among contemporary *zakāt*-calculation formulas can cause great disparities in *zakāt* payments. Because these formulas are primarily derived from calculation methods prescribed in classical Islamic law, we first provide a brief overview of pre-modern *zakāt* jurisprudence. In particular, we outline the theology and social ethics of *zakāt*, the recipients and administration of *zakāt*, in addition to the exemption threshold, holding period requirement, and *zakāt* rates.

### A. *Theology and Social Ethics of Zakāt*

*Zakāt* is an annual charitable donation required of Muslim men and women.<sup>10</sup> As the third of the five central “pillars” of Islam, *zakāt* follows only the profession of faith and the daily prayers in importance. The importance of *zakāt* is emphasized in the Qur’ān, where it is repeatedly mentioned alongside the mandatory daily prayers.<sup>11</sup> Linguistically, the word *zakāt* comes from the trilateral root *z-k-y* which means “to be pure.”<sup>12</sup> Thus, *zakāt* entails “purifying” one’s wealth by donating part of it to scripturally designated recipients. In Islamic theology, God has sovereignty and ultimate ownership over all things. A person’s wealth, therefore, is seen as a provision from God. The gift of

---

<sup>10</sup> The Islamic calendar is based on a lunar year, which is approximately eleven days shorter than a solar year. 10 THE ENCYCLOPAEDIA OF ISLAM 258 (P.J. Bearman et al. eds., 1998) Because *zakāt* rates in discussions of Islamic jurisprudence are expressed in terms of lunar years (e.g., 2.5% of one’s cash holdings every lunar year), we do the same in this Article. If the rates were expressed in terms of solar years, they would be slightly higher.

<sup>11</sup> See *supra* note 3.

<sup>12</sup> HANS WEHR, THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC 441 (J. Milton Cowan ed., 1993).

wealth generates a debt of gratitude to God for the person who possesses it. One expresses this gratitude by donating part of one's wealth to the needy, as prescribed in the Sharī'a.<sup>13</sup> The donor's correct intention (*niyya*) is necessary to guarantee the spiritual merit of the donation, without which the *zakāt* is considered invalid.<sup>14</sup> This willful act of generosity toward the needy and submissiveness to God is also meant to curtail the greed, avarice, and social apathy that could result from excessive wealth.<sup>15</sup> *Zakāt* is therefore simultaneously a form of worship (*'ibāda*), a means of ethical self-cultivation, and an instrument of social justice by which society's needy obtain material support.<sup>16</sup> Classical jurists considered these purposes when devising *zakāt* calculation formulas for different types of assets. For example, in the Ḥanafite school, a guiding principle of adjudicating among different *zakāt* calculation methods was to choose the method that was "most beneficial to the poor" (*anfa' li 'l-fuqarā'*), i.e., that led to the most *zakāt* being paid.<sup>17</sup>

### B. Recipients of Zakāt

The Qur'ān specifies eight categories of eligible *zakāt* recipients.<sup>18</sup> Unlike other, optional forms of charity, *zakāt* can only be given to people in those eight categories:

- The poor (*fuqarā'*): people who lack sufficient wealth to meet their everyday needs
- The indigent (*masākīn*): people who are destitute<sup>19</sup>
- *Zakāt* collectors (*'āmilūn al-zakāt*): wages for people responsible for the collection and distribution of *zakāt*
- Those whose hearts are to be reconciled (*mu'allafat al-qulūb*): non-muslims who can be appeased or recent converts to Islam who are at the risk of reverting to their previous religion due to economic hardship<sup>20</sup>
- Slaves (*riqāb*): slaves struggling to buy their freedom
- Debtors (*ghārimūn*): people who do not have enough wealth to repay their debts
- People working in the way of God (*fī sabīl Allāh*): people whose actions or efforts are for the sake of God or Islam<sup>21</sup>

---

<sup>13</sup> Literally, the word *Sharī'a* means "path." In the tradition of Islamic jurisprudence, the *Sharī'a* refers to the entire set of norms and conduct that represents comprehensive guidance from God. The word *Sharī'a* is often used interchangeably with "Islamic law." However, unlike law qua law, the authority of the *Sharī'a* is not restricted to a set of commandments, rules and prescriptions. For an insightful analysis on the limitations of defining *Sharī'a* as law, see WAEL B. HALLAQ, *SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS* 1–24 (2009).

<sup>14</sup> WAEL B. HALLAQ, *THE IMPOSSIBLE STATE: ISLAM, POLITICS, AND MODERNITY'S MORAL PREDICAMENT* 124 (2013).

<sup>15</sup> *Id.* at 150.

<sup>16</sup> *Id.* at 123.

<sup>17</sup> ISLAMIC FIQH ACAD., INDIA, *ZAKAT KE NAE MASA'IL* 570 (Mujahid al-Islam Qasmi ed., 2008).

<sup>18</sup> *See supra* note 5.

<sup>19</sup> Some Qur'ānic commentators believe instead that *fuqarā'* refers to people who have nothing and *masākīn* refers to those who are not destitute but still have need. *THE STUDY QURAN*, *supra* note 2, at 522 n.60.

<sup>20</sup> *Id.*; *see also* MANAZIR AHSAN GILANI, *ISLĀMI MA'ĀSHIYĀT* 447 (2007).

- Travelers in need (*ibn al-sabīl*): travelers and other people who are cut off from their wealth because they are far from their homes.

### C. Zakāt Administration

Jurists disagree as to whether the collection and distribution of *zakāt* is the responsibility of each Muslim individually or of a governing authority. Historical sources document that during the time of Prophet Muhammad and the two successive Caliphs, *zakāt* was collected and distributed by “state” officials.<sup>22</sup> According to some reports, however, the third Caliph, ‘Uthmān b. ‘Affān (d. 656), delegated this responsibility to *zakāt*-paying Muslims as an individual matter between them and God.<sup>23</sup> Today, *zakāt* is collected and distributed in some capacity by the state only in a minority of Muslim countries, including Malaysia, Pakistan, Saudi Arabia, the Sudan, and Yemen.<sup>24</sup> In the United States—the country this Article focuses on—Muslims pay *zakāt* voluntarily through private charities, non-governmental organizations, and informal channels.

### D. The Exemption Threshold (*Niṣāb*), Holding Period (*Ḥawl*), and Rates of Zakāt

To calculate the *zakāt* owed on an asset, a person must know the *niṣāb* and the *zakāt* rate. The *niṣāb* is the minimum amount of an asset that a person must own for that asset to be subject to *zakāt*. The *niṣāb*’s purpose is to exempt the needy from paying *zakāt*.<sup>25</sup> If a person owns more than the *niṣāb* of an asset, *zakāt* has to be paid on that asset at a specific rate. For example, if the *niṣāb* for gold is 85 grams<sup>26</sup> and the *zakāt* rate for gold is 2.5%,<sup>27</sup> then someone owning at least 85 grams of gold must pay 2.5% of that gold as *zakāt*. In addition, most scholars believe that an asset must be owned for at least one lunar year (*ḥawl*) before it is subject to *zakāt*. Other scholars, however, believe that

---

<sup>21</sup> Classic commentators on the Qur’ān largely understand “working in the way of God” as referring to those engaged in armed struggle (*jihād*). 3 AS-SAYYID SABIQ, FIQH US-SUNNAH 69 (Abdul-Majid Khokhar et al. trans., 1991) (1981). Thus, *zakāt* could be used to provide arms and meet the living expenses of Muslim armies. Modern Qur’ānic commentators, however, prefer the more expansive meaning of noble and charitable activities performed for the sake of God. For a modern interpretation of “in the way of God,” see THE STUDY QURAN, *supra* note 2, at 523 n.60. For a discussion of changes in interpretation of this verse and an excellent overview of *zakāt* in the Sharī‘a, see Aron Zysow, *Zakāt*, 11 ENCYCLOPEDIA OF ISLAM 406–23 (P.J. Bearman et al. eds., 2002).

<sup>22</sup> There is an unavoidable anachronism in using the term “state” to refer to forms of Islamic governance prior to the formation of nation-states. For a detailed analysis of the structural differences between the modern nation-state’s legal authority and the juristic authority of the classic Sharī‘a, see HALLAQ, *supra* note 12, at 361–70.

<sup>23</sup> 2 ABU BAKR AL-JASSAS, AHKAM AL-QURAN 155 (1986).

<sup>24</sup> ABU AL-HASAN SADEQ, ISLAMIC RES. & TRAINING INST., A SURVEY OF THE INSTITUTION OF ZAKAH: ISSUES, THEORIES AND ADMINISTRATION 43 (2d ed. 2002).

<sup>25</sup> AL-QARDAWI, *supra* note 9, at 65.

<sup>26</sup> See *id.* at 126–30 (arguing that the *niṣāb* for gold is 85 grams).

<sup>27</sup> See *id.* at 125 (noting that jurists agree that there is a 2.5% *zakāt* rate for gold).

this holding period requirement does not apply if the person already owned at least the *niṣāb* for that asset type.<sup>28</sup>

Together, the Qur’ān and the Ḥadīth specify some asset types on which *zakāt* must be paid and stipulate their *niṣāb* values and *zakāt* rates. For example, based on the practices of Prophet Muhammad, jurists generally agree on the amount of *zakāt* due on up to 120 camels<sup>29</sup> and the *zakāt* rate on gold and silver.<sup>30</sup> However, jurists often differ much more on how to calculate the *zakāt* on asset types that came into existence after Prophet Muhammad’s lifetime.

Part III of this Article examines the differences of opinions that contemporary scholars have expressed regarding *zakāt* rates on certain modern financial assets. First, however, it is important to contextualize contemporary disagreements on *zakāt* calculation within the specific form of codification taken by Islamic law over the past two centuries. Historical shifts have not only brought changes in the codification format of Islamic law, but also a crisis in its interpretive authority, leading to differences in the interpretation and practice of *zakāt*. Therefore, the following Part provides a brief overview of the evolution of Islamic law from its inception to the contemporary era and highlights key features of modern Islamic legal discourse on the internet.

## II. DIVERSITY OF OPINION AND ISLAMIC LEGAL DISCOURSE ON *ZAKĀT*

In Sunni Islam, the classical legal corpus on *zakāt* is marked by diversity of opinion—differences in methodological reasoning among the legal schools (*madhhab* sing., *madhāhib* pl.). The tolerance for disagreement in Islamic jurisprudence is noted by an oft-quoted statement attributed to Prophet Muhammad: “Difference of opinion in my community is a mercy for people” (*ikhtilāfu ummatī raḥmatun*).<sup>31</sup> Muslim jurists have therefore seen their disagreement as a sign of the Sharī’a’s flexibility, its responsiveness to local customs, and its ability to accommodate the needs of individuals in diverse circumstances.<sup>32</sup> Diversity in the Sharī’a, however, is not an arbitrary phenomenon; Muslim jurists developed a methodological framework to manage disagreement within the Sharī’a by codifying school positions and rules of interpretation. These methods ensured that diversity of opinion remained within acceptable bounds. Codification affected not only how interpreters accessed legal texts and injunctions, but also how rules were enjoined upon and practiced by observant Muslims. In this Part, we trace a genealogy of Islamic law’s codification to clarify how contemporary Islamic legal discourse limits and opens new possibilities for the calculation of *zakāt*.

---

<sup>28</sup> For a discussion of the differences of opinion on this one-year requirement, see *id.* at 71–73.

<sup>29</sup> *Id.* at 84–85.

<sup>30</sup> *Id.* at 125.

<sup>31</sup> 11 MUHYI AL-DIN YAHYA IBN SHARAF AL-NAWAWI, AL-MINHĀJ BI SHARH SAHIH MUSLIM IBN AL-ḤAJJĀJ 91 (1987).

<sup>32</sup> Colonial administrators and Orientalist scholars, however, frowned upon these characteristics of the Sharī’a as a sign of analytical weakness and chaotic organization. See HALLAQ, *supra* note 12, at 373; BRINKLEY MESSICK, THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY 59–60 (1996).

### A. *Tarjīh or Weighing Scholarly Opinions for Evidentiary Strength*

Historians of Islamic law generally agree that the Sharī‘a is closer to a common law system than a civil law system, which partly explains its flexibility and responsiveness to local customs.<sup>33</sup> The link between substantive legal rulings and their underlying school-based methodological reasoning is critical to the internal diversity and social responsiveness of the Sharī‘a.<sup>34</sup> The ability to connect legal judgments with underlying rationales and the methodological procedures of a particular school is key to maintaining organizational order and stability in the Sharī‘a.

From the eleventh to the thirteenth centuries CE, the boundaries of the four major legal schools within Sunni Islam were established.<sup>35</sup> Each school developed its own interpretive principles and a body of positive legal judgments through intra-school codification. During this time, Muslim jurists ordered legal opinions from their own schools through a process called preponderance (*tarjīh*).<sup>36</sup> *Tarjīh* involved ranking competing opinions from a school by evaluating their evidentiary merit and methodological strength.

By the end of the thirteenth century, the school identities solidified. The jurisprudence of the four Sunni schools crystallized into relatively autonomous legal systems, each with its own interpretive principles and major corpuses of positive legal judgments.<sup>37</sup> These developments were marked by the emergence of two new genres of legal literature: the *mukhtaṣar* (abridged manual) and *khilāf* (legal disagreement).<sup>38</sup> The *mukhtaṣar* succinctly summarized the doctrines and interpretive principles of each school and the *khilāf* literature reported the differences of opinion across schools on a wide range of issues. These two new genres provided a nearly comprehensive presentation of the differences and commonalities between the four schools. However, they also threatened the integrity of the school-based system of jurisprudence because they facilitated choosing among competing legal opinions for utilitarian expediency.<sup>39</sup>

### B. *Talfīq or Selecting Scholarly Opinions for Utilitarian Expedience*

As noted above, disagreements among jurists are considered a blessing of providential lenience. However, jurists also understand that this blessing can be manipulated. Specifically, they worry about a moral hazard in which lay Muslims—motivated by a desire for their own convenience rather than by a desire to obey God—would pick the most lenient legal positions across the schools. Similarly, laypeople could inappropriately combine legal positions from different schools to reach positions that are unacceptable under the legal criterion of each school separately. For example, a person

---

<sup>33</sup> HALLAQ, *supra* note 14, at 372–73.

<sup>34</sup> *Id.* at 368.

<sup>35</sup> AHMED FEKRY IBRAHIM, PRAGMATISM IN ISLAMIC LAW: A SOCIAL AND INTELLECTUAL HISTORY 23 (2015).

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.* at 37.

<sup>38</sup> *Id.* at 59.

<sup>39</sup> *Id.* at 17–18.

could insincerely justify adultery (*zinā*) under the cover of marriage law by combining the Ḥanafite position that a woman's guardian's (*walī*'s) permission for marriage is unnecessary with the Mālikite position that relaxes the requirement of having witnesses to the marital contract.<sup>40</sup> Jurists gave the pejorative name *talfīq* ("legal concoction") to this mixing and matching of opinions to justify an unprecedented legal position.<sup>41</sup> *Talfīq* could become a dangerous tool in the hands of the impious who seek a life of relaxation from all legal norms (*tatabbu' al-rukhas*).<sup>42</sup>

To maintain the integrity of legal schools and to ensure coherence and consistency in legal practice, scholars advised laypeople to conform to a single school. This conformity was called *taqlīd*, the opposite of *talfīq*.<sup>43</sup> Specifically, scholars advised a layperson who lacked the knowledge and skill to conduct *tarjīḥ* to either follow the non-binding religious edicts (*fatwā* sing., *fatāwā* pl.) of a pious jurist (*muftī*) or to rely on the layperson's own conscience to choose amongst competing opinions from within the layperson's school.<sup>44</sup>

### C. *Talfīq and Codification of Islamic Law under the State*

Although classical jurists considered *talfīq* a moral problem for the individual, it became an institutional norm in the twentieth century with the formation of nation-states and their co-option of the Sharī'a. Prior to the formation of nation-states, schools of jurisprudence were mostly indigenous to specific geographic regions and developed within their economic and cultural milieus.<sup>45</sup> Thus, lay Muslims could easily fulfill their religious, conjugal, and commercial needs within the boundaries of their own schools. With the advent of European colonization and formation of nation-states, religious and charitable institutions (the *madrassa* and the *waqf*), which provided sustenance to regional schools of jurisprudence and integrated their legal hermeneutics with social reality were either displaced or subsumed under the centralized authority of the state.<sup>46</sup> Unlike the classical Sharī'a, in which lawmaking was independent of state authority, nation-states made the Sharī'a subservient to the state's centralized legal and administrative logic. The Sharī'a's organic linkages with society were thus severed once its authoritative foundation was shifted from socially embedded interpretive communities and placed

---

<sup>40</sup> Birgit Krawietz, *Cut and Paste in Legal Rules: Designing Islamic Norms with Talfiq*, 42 DIE WELT DES ISLAMIS 18 (2002).

<sup>41</sup> IBRAHIM, *supra* note 35, at 105–06. In practice, the kind of *talfīq* that was vehemently criticized by jurists as sinful and amounting to a mockery (*ta'ālub*) of the Sharī'a was the exception rather than the norm. Permissible modes of *talfīq* in cases of necessity (*ḍarūra*) were developed to facilitate commercial transactions involving debt and were usually restricted to elite classes with transregional commercial interests. *Id.* at 42–43.

<sup>42</sup> *Id.* at 63–64.

<sup>43</sup> *Id.* at 12–14.

<sup>44</sup> A minority of scholars, mostly from the Ḥanbalite school, objected to the practice of strict school conformism as a form of blind imitation. They advised laypeople instead to follow the opinion that was most closely grounded in the Sharī'a's scriptural sources. *Id.* at 69–71.

<sup>45</sup> HALLAQ, *supra* note 14, at 203.

<sup>46</sup> *Id.* at 472.

within state institutions.<sup>47</sup> *Talfiq* thus became a major instrument of legislation under colonial governance and post-colonial nation-states.<sup>48</sup>

#### D. Cyber Islamic Environments and Privatized Talfiq

In the age of globalization, the internet has further altered the authority and transmission of Islamic knowledge. Although state-based legislation shifted the locus of *talfiq* from the individual to a centralized authority, the internet facilitated privatized *talfiq* in which individuals can shop around for their desired legal opinions. Contrary to popular perception, there is little evidence the internet displaced forms of traditional religious authority in the Muslim world.<sup>49</sup> However, religious information and knowledge can be disseminated and accessed much more rapidly via the internet. The scholar Gary Bunt uses the term “Cyber Islamic Environment” to describe the more collaborative knowledge space that encourages “peer-to-peer networking” and prompt user feedback.<sup>50</sup> These developments expose Muslims to a greater diversity of views outside traditional spheres of religious authority.<sup>51</sup>

Traditionally, a lay Muslim would seek guidance on religious issues from a jurisconsult (*mufti*). The *mufti*'s advice would be based in the legal methodology of the *mufti*'s school—generally the same school as the questioner's—and would be contextualized according to the questioner's specific circumstances.<sup>52</sup> Today, with a Google search, the *mufti*'s advice is available to a much wider audience, especially because the advice is often reproduced by websites unaffiliated with the *mufti*.<sup>53</sup> On these websites, the advice is generally not presented as associated with a particular *mufti* or legal school and usually omits the underlying legal rationales and methodological principles. The advice is also usually decontextualized from the particular situation to which the *mufti* was originally responding.

Thus, Islamic legal discourse on the internet facilitates a *talfiq*-based practice of the Shari'a. By making legal opinions across the schools much more accessible, the internet makes it easier for a lay Muslim to shop around for opinions even outside the boundaries of his or her school. Furthermore, because legal opinions on the internet are generally presented without underlying legal methodology, even a layperson interested in connecting an opinion with a specific school will have difficulty doing so.<sup>54</sup>

The remainder of this Article uses two case studies to demonstrate how these characteristics of the internet can affect Muslims' religious practice. We will examine the

---

<sup>47</sup> *Id.* at 412.

<sup>48</sup> *Id.* at 449.

<sup>49</sup> GARY R. BUNT, *IMUSLIMS: REWIRING THE HOUSE OF ISLAM* 286 (2009).

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.* at 38.

<sup>52</sup> ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 3, 21–26 (Muhammad Khalid Masud et al. eds., 1996).

<sup>53</sup> *Id.* at 113.

<sup>54</sup> There are school-specific websites, but even these fail to address many important questions that laypeople have and still generally maintain the disconnect between positive law and legal hermeneutics.

current legal discourse on the internet regarding *zakāt* calculation for two modern financial assets: publicly traded stock and 401(k) accounts.

### III. RANGE OF OPINIONS REGARDING *ZAKĀT* ON MODERN FINANCIAL ASSETS

There are substantial differences of opinion in contemporary scholarly discourse on how to calculate *zakāt*. However, little disagreement exists regarding calculation rules for assets that were prevalent at the time of Prophet Muhammad. For example, livestock, gold, and silver were major forms of wealth in seventh century Arabia and most scholars agree on how to calculate *zakāt* on them.<sup>55</sup> In contrast, significant disagreement exists regarding asset types that did not exist at the time of the Prophet and were not covered under the classical juridical corpus on *zakāt*. Indeed, this Part of the Article presents several of the opinions regarding *zakāt* calculation for two modern assets held by many Americans: publicly-traded stock and 401(k) accounts.

#### A. *Zakāt on Publicly Traded Stock*

In the modern economy, a vast amount of wealth is held in stock of publicly traded companies. For example, in 2017, the market value of American corporations whose stock was traded on U.S. exchanges was over \$32 trillion.<sup>56</sup> In the most recently available data, 48.8% of American families reported owning stock directly or indirectly—indirect ownership includes stock held in retirement accounts or through mutual funds.<sup>57</sup> The 13.8% of American families who hold individual stocks outside of retirement accounts have an average of \$294,300 in such stocks.<sup>58</sup> This subpart only addresses *zakāt* on individual stocks held outside of retirement accounts. Indirectly-held stock poses different *zakāt* calculation issues. We also assume the stock is held by the investors as a long-term investment; many scholars believe *zakāt* should be calculated differently on stock not held for the long-term.<sup>59</sup>

Because stock did not exist in Arabia at the time of Prophet Muhammad, he did not specify how to calculate *zakāt* on stock. Contemporary Islamic scholars use his instructions for other types of assets to arrive at many differing opinions regarding how to

---

<sup>55</sup> See, e.g., AL-QARDAWI, *supra* note 9, at 125 (“There is unanimous agreement among Muslims that the rate of *zakah* on money is two and a half percent. The author of *al Mughni* says, ‘I am aware of no dispute among scholars that *zakah* on gold and silver is one-fourth of a tenth.’”); *id.* at 84–85 (stating that there is a scholarly consensus on the amount of *zakāt* due on up to 120 camels).

<sup>56</sup> *Market Capitalization of Listed Domestic Companies (Current US\$)*, WORLD BANK, <http://data.worldbank.org/indicator/CM.MKT.LCAP.CD?locations=US> (last visited July 16, 2018).

<sup>57</sup> Jesse Bricker et al., *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, FED RES. BULL., Sept. 2014, at 1, 18, <https://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf>.

<sup>58</sup> *Id.* at 16, tbl. 3.

<sup>59</sup> See, e.g., MONZER KAHF, *Zakah on Stocks and Mutual Funds*, in FATAWA ON ZAKAH 1–2, [http://monzer.kahf.com/fatawa/2000-2002/FATAWA\\_ZAKAH.pdf](http://monzer.kahf.com/fatawa/2000-2002/FATAWA_ZAKAH.pdf). One definition scholars use for a long-term investment is stock bought by the investor for its dividends or to participate in the company’s management, rather than for capital gains from the stock’s possible future price appreciation. See, e.g., *id.*

calculate *zakāt* on publicly traded stock.<sup>60</sup> A common scholarly opinion is that the *zakāt* is 2.5% of the stock's current market value.<sup>61</sup> This is based on the 2.5% *zakāt* rate applied to the inventory of a merchant or trader of goods. Scholars analogize stock to such business inventory because, like inventory, stock is bought with the hope of reselling it at a higher price in the future.<sup>62</sup> Additionally, some of these scholars explicitly state that, in addition to 2.5% *zakāt* on the stock's market value, 2.5% *zakāt* must be paid on the dividends the investor received and saved.<sup>63</sup> For the other scholars, the 2.5% *zakāt* on saved dividends is implicit. A saved dividend increases a shareholder's cash holdings by the amount of the dividend, and there is scholarly consensus that a 2.5% *zakāt* rate applies to cash holdings.<sup>64</sup>

A second opinion regarding *zakāt* on stock is that, because stockholders own the company, each stockholder should instead each pay his or her share of the *zakāt* on the company's underlying business. Under this approach, the *zakāt* on a business would be 2.5% of the value of the company's net assets subject to *zakāt* (i.e., assets that are subject to *zakāt*, less certain liabilities).<sup>65</sup> For example, many scholars believe a business's inventory, cash, and other short-term (i.e., current) assets are subject to *zakāt* but the business's long-term (i.e., fixed or non-current) assets such as buildings, equipment, and land are not.<sup>66</sup> Scholars who believe fixed assets are exempt from *zakāt* often analogize these fixed assets to animals used to produce agriculture (such as animals that plow fields), which are exempt from *zakāt*. *Zakāt* on agricultural businesses is imposed on the crops produced rather than on the assets used to grow and harvest them.<sup>67</sup> Thus, one approach to calculate a business's net assets subject to *zakāt* is to subtract the value of certain short-term liabilities from the value of the short-term assets.<sup>68</sup> One can obtain a set of values of these assets and liabilities from the company's balance sheet, a publicly available financial statement.

---

<sup>60</sup> The purpose of this Part of the Article is to demonstrate that a wide range of *zakaat* calculation opinions exists regarding modern financial assets, not to provide a comprehensive list of these opinions.

<sup>61</sup> See, e.g., MONZER KAHF, *THE CALCULATION OF ZAKAH FOR MUSLIMS IN NORTH AMERICA* 8 (revised 4th ed. 2007), [http://monzer.kahf.com/books/english/Calculation\\_of\\_Zakah\\_-\\_revised\\_July\\_2007.pdf](http://monzer.kahf.com/books/english/Calculation_of_Zakah_-_revised_July_2007.pdf) (listing some scholars who, to calculate *zakaat*, consider stock a tradable object).

<sup>62</sup> AL-QARDAWI, *supra* note 9, at 271; see also Abdul Azim Islahi & Mohammed Obaidullah, *Zakah on Stocks: Some Unsettled Issues*, 17 ISLAMIC ECON., no. 2, 2004, at 3, 6.

<sup>63</sup> AL-QARDAWI, *supra* note 9, at 271.

<sup>64</sup> *Id.* at 125.

<sup>65</sup> See Islahi & Obaidullah, *supra* note 62, at 7 (citing Muhammad Taqi Usmani as saying that a long-term investor should pay *zakāt* only on a company's assets that are subject to *zakāt* if the investor can distinguish between such assets and the company's other assets).

<sup>66</sup> See AL-QARDAWI, *supra* note 9, at 270 (noting the "well known view that factories, machinery, and buildings are not *zakatable*").

<sup>67</sup> Islahi & Obaidullah, *supra* note 62, at 5–6.

<sup>68</sup> See KAHF, *supra* note 59, at 2 (noting that the position of the OIC Fiqh Academy is that *zakāt* on stock is 2.5% of a company's cash, receivables, and inventory minus its "short term debts"). We assume that "short term debts" includes accounts payable (i.e., money owed to the company's suppliers of goods and services).

A third opinion is that *zakāt* is 2.5% of the portion of the market value of the stock that can be attributed to the company's assets that are subject to *zakāt*.<sup>69</sup> For example, imagine a person owns stock in a retailer and 70% of the retailer's assets consist of inventory and cash, and the other 30% consist of fixed assets. The stockholder's *zakāt* would be 2.5% of 70% (i.e., 1.75%) of the market value of the stock because only 70% of the company's assets are subject to *zakāt*.

A fourth opinion is that the *zakāt* on stock is 10% of the profits—the dividends and capital gains—earned by the stockholder.<sup>70</sup> Scholars adopting this approach analogize stock profits to crops: the output of farmland is crops, and the output of stock is capital gains and dividends.<sup>71</sup> Thus, because a 10% *zakāt* rate applies to crops produced from naturally watered land, a 10% *zakāt* rate should apply to stock profits. Under this approach, although *zakāt* on capital gains need not be paid until the gains are realized, scholars allow *zakāt* to be paid on unrealized capital gains instead so that it is distributed more quickly to the needy.<sup>72</sup>

In summary, scholars recommend many different approaches for calculating *zakāt* on publicly traded stock. If these differences were apparent only within scholarly circles, their impact would be limited because *zakāt*-paying Muslims generally would be unaware of them. However, the internet makes these differences easily accessible to lay Muslims. Indeed, American Muslims conducting even a cursory internet search to determine the *zakāt* to pay on their stockholdings will likely be confused by the conflicting advice they receive from Islamic education websites and Muslim charitable organizations' websites in the United States and elsewhere. The format of this advice is also very different from that found in traditional manuals of Islamic law; it typically only offers technical instructions on how to calculate one's *zakāt* payment. The advice usually lacks depth, presents little or no background explanation, sometimes is unclear, and rarely associates the advice with particular legal schools.

For example, imagine a Muslim in the United States Googles “How much zakat should I pay on my stock?” Following the links on the first page of the search results<sup>73</sup> would lead to the following webpages:

1. *Zakat Foundation of America*.<sup>74</sup> This webpage “endorses” the opinion that stock is analogous to goods purchased for resale and thus the *zakāt* rate is 2.5% of

---

<sup>69</sup> Islahi & Obaidullah, *supra* note 62, at 5–6.

<sup>70</sup> See *Investing and Zakah*, SATURNA CAPITAL, <https://www.saturna.com/amana/investing-and-zakah> (last visited Feb. 8, 2018) (stating that Muslim scholars have adopted this approach); see also M. Yaqub Mirza & Saturna Capital Corp., *Calculating Zakah On Your Equity Investments*, SATURNA CAPITAL, <https://www.saturna.com/sites/default/files/zakah.pdf> (last visited Feb. 8, 2018) (stating that this *zakāt* calculation methodology has been approved by the Fiqh Council of North America).

<sup>71</sup> *Investing and Zakah*, *supra* note 70.

<sup>72</sup> Mirza & Saturna Capital Corp., *supra* note 70.

<sup>73</sup> We focus on the first page of the search results because people generally are much less likely to follow links appearing after the first page of search results. See Eric Sharp, *The First Page of Google, by the Numbers*, PROTOFUSE (Apr. 30, 2014), <https://www.protofuse.com/blog/details/first-page-of-google-by-the-numbers/> (reporting that 91.5% of traffic from Google comes from the first page of Google's search results).

the stock's market value.<sup>75</sup> It also notes that, according to a second "major opinion," stock purchased as a long-term investment is analogous to "produce of plowed land" (i.e. crops), and thus there would be 10% *zakāt* rate on the "return" on stock. The webpage then says, under this second opinion, *zakāt* is 10% of the dividends received. Confusingly, it does not say whether, under this second opinion, *zakāt* also must be paid on capital gains, the other component of stock returns.<sup>76</sup>

2. *Islamic Relief Worldwide*.<sup>77</sup> This webpage links to a "Zakat Calculator" that calculates users' *zakāt* payments if they enter their assets and liabilities in a table.<sup>78</sup> One of the asset categories is "Business investments, shares, saving certificates, pensions funded by money in one's possession," and the *zakāt* calculator applies a 2.5% rate on this asset category.<sup>79</sup> This indicates a *zakāt* rate of 2.5% of a stock's market value.

3. *SeekersHub*.<sup>80</sup> In response to a question by a user of the website, this webpage answers that if stock is "purchased for resale," it is considered trade merchandise and thus *zakāt* should be paid on the market value of the stock every year. If instead the stock is bought for its dividends, the shareholder is deemed a co-owner of the company and *zakāt* is paid on the company's inventory and monetary assets. The webpage does not specify the *zakāt* rate in either case.<sup>81</sup>

---

<sup>74</sup> The Zakat Foundation of America is an international charity with the mission of "foster[ing] charitable giving to alleviate the immediate needs and ensure the self-reliance of the poorest people around the world with the *zakāt* and *sadaqa* dollars of privileged Muslims and the support of other generous donors." *Our Mission*, ZAKAT FOUND. OF AM., <https://www.zakat.org/en/about-us/> (last visited Oct. 6, 2018).

<sup>75</sup> *Zakat and Business*, ZAKAT FOUND. OF AM., <https://www.zakat.org/en/zakat-resource-center/zakat-and-business/> (follow "What Zakat Rate Does the Second Opinion on Stocks and Shares Prescribe?" hyperlink) (last visited Feb. 8, 2018).

<sup>76</sup> *Id.* The webpage might omit mention of capital gains because a long-term investment would not result in capital gains quickly. But even long-term investors usually eventually sell at least some of their shares, often realizing capital gains.

<sup>77</sup> Islamic Relief Worldwide is one of the "top" 100 charities in the United Kingdom. *Why Support Us?*, ISLAMIC RELIEF WORLDWIDE, <http://www.islamic-relief.org/about-us/why-support-us/> (last visited Oct. 6, 2018).

<sup>78</sup> *Zakat on Businesses*, ISLAMIC RELIEF WORLDWIDE, <http://www.islamic-relief.org/zakat/zakat-on-businesses/> (last visited Feb. 8, 2018).

<sup>79</sup> *Zakat Calculator*, ISLAMIC RELIEF WORLDWIDE, <http://www.islamic-relief.org/zakat/zakat-calculator/> (last visited Feb. 8, 2018).

<sup>80</sup> SeekersHub is a website with the apparent purpose of educating Muslims about Islam. *Will You Join the Fight of the Century? #FightwithLight*, SEEKERSHUB, <http://seekershuh.org/blog/tag/fight-with-light/> (last visited Feb. 8, 2018).

<sup>81</sup> Faraz A. Khan, *How Is Zakat Determined for Stocks?*, SEEKERSHUB (Aug 23., 2011), <http://seekershuh.org/ans-blog/2011/08/23/how-is-zakat-determined-for-stocks/>.

4. *Syaria*.<sup>82</sup> In response to a question by a user of the website, this webpage states that if someone purchases the stock intending to later resell it for a profit, *zakāt* is 2.5% of the stock's market value. If one instead purchases the stock "to get dividend (profits) from the company, and do[es] not intend to trade [the] shares," the *zakāt* depends upon the company's business. In particular, if the company is "operating in industrial services," which appears to mean it is producing a product, then the *zakāt* is 2.5% of the stockholder's share of the total market value of the stock minus the "value of the company's assets which are not traded." If the company is "operating merely in [the] trading sector, such as [an] export and import company," the *zakāt* is 2.5% of the stock's market value. Finally, if it is a service business, *zakāt* is paid on "merely the result, or dividend, or profit of that company." The webpage does not state the *zakāt* rate in that case. It also does not clarify whether *zakāt* should be paid on the dividend one receives from the company or on one's share of the company's profit, even if that profit is not distributed as a dividend.<sup>83</sup>

5. *Muslim Money Guide*.<sup>84</sup> As part of its answer to the question "How do I know when I have to pay Zakat?", this webpage states that the *zakāt* rate on marketable securities is 2.5%.<sup>85</sup> In addition, a different page on the website poses the question "Do I have to pay Zakat on my stocks and shares?"<sup>86</sup> and answers that the *zakāt* depends on whether the stock is held as a long-term investment (i.e., whether the owner intends to hold it for at least a year) or as a short-term investment. For long-term investments, *zakāt* must be paid on the company's "book value/net asset value," which the webpage indicates is based at least in part on the company's "assets (cash, receivables, inventory)." However, for short-term investments, *zakāt* is based on the market value of the shares. Also, any dividends the investor receives are subject to *zakāt* regardless of whether the stock is a short-term or long-term investment. However, the website does not indicate whether *zakāt* must be paid on the dividend if the investor spends the dividend rather than saves it.

---

<sup>82</sup> *Syaria* is a website based in Indonesia with the purpose of teaching "Islamic laws" to English-speaking audiences. *About*, SYARIA, <http://syaria.com/about> (last visited Feb. 8, 2018).

<sup>83</sup> Muhammad Arifin Baderi, *Zakat Obligation in Shares*, SYARIA (Oct. 25, 2012), <https://syaria.com/312-zakat-obligation-in-shares.html>.

<sup>84</sup> *Muslim Money Guide* is a website with the apparent purpose of educating Muslims about finance and financial planning. *About Us*, MUSLIM MONEY GUIDE, <http://www.muslimmoneyguide.com/about-us/> (last visited Feb. 8, 2018).

<sup>85</sup> Joe Bradford, *20 Questions on Zakat: A Quick and Easy Guide to Understanding Zakat*, MUSLIM MONEY GUIDE (June 2, 2015), <http://www.muslimmoneyguide.com/20-questions-on-zakat-a-quick-and-easy-guide-to-understanding-zakat/>.

<sup>86</sup> Joe Bradford, *Do I Have to Pay Zakat on My Stocks and Shares?*, MUSLIM MONEY GUIDE (Dec. 29, 2015), <http://www.muslimmoneyguide.com/do-i-have-to-pay-zakat-on-my-stocks-and-shares/>.

6. *Islamic Relief UK*.<sup>87</sup> Under the heading “Shares & Property Trading,” this webpage states that if stock is held for “trading” (i.e., “with an intention to resell it”) then *zakāt* is 2.5% of its market value.<sup>88</sup> Otherwise, “only the dividends . . . need to be counted in your assets.” This suggests *zakāt* is only due on dividends to the extent they increase one’s cash holdings (i.e., the dividends are saved). The webpage also states that there is a 2.5% *zakāt* rate on wealth, implying a 2.5% *zakāt* rate on the saved dividends, like any other cash holdings.

7. *Islamweb.net*.<sup>89</sup> This webpage has a section of *fatāwā* regarding “Zakah on investments, shares, and bonds.”<sup>90</sup> The relevant *fatāwā* are not clear but appear to say that if the stock is bought to earn capital gains, *zakāt* is 2.5% of the market value of the shares and any dividends received. If, however, the stock is bought for its dividends, *zakāt* is 2.5% of the dividends received unless the company’s underlying business is “related to trade commodities.” It also appears that the dividends are only subject to *zakāt* if they are saved. But if the company’s underlying business is related to trade commodities, then the *zakāt* is due on the stockholder’s share of the underlying business as well as on any saved dividends. However, none of the *fatāwā* explains how to calculate *zakāt* on the underlying business.

8. *Hidaya Foundation*.<sup>91</sup> This webpage provides a “Zakat Calculator” that determines *zakāt* payments for users who enter their assets and liabilities in a table.<sup>92</sup> One of the asset categories is “Stocks and Mutual Funds.” The calculator applies a 2.5% *zakāt* rate on this category, implying a 2.5% *zakāt* rate on a stock’s market value.

9. *Hidaya Foundation*. A different page on Hidaya Foundation’s website discusses *zakāt* on stock in more detail.<sup>93</sup> It states that *zakāt* is 2.5% of the market value of stocks that are “tradable objects waiting for a good opportunity to realize

---

<sup>87</sup> Islamic Relief U.K. appears to be the United Kingdom branch of Islamic Relief Worldwide. *About Us*, ISLAMIC RELIEF U.K., <http://www.islamic-relief.org.uk/about-us/> (last visited Feb. 8, 2018).

<sup>88</sup> *Zakat FAQs*, ISLAMIC RELIEF U.K., <http://www.islamic-relief.org.uk/about-us/what-we-do/zakat/zakat-faqs/> (last visited Oct. 6, 2018) (follow “Shares & Property Trading” hyperlink).

<sup>89</sup> Islamweb is a website intended to educate people about Islam. *About Us*, ISLAMWEB. (June 3, 2002), <http://www.islamweb.net/en/index.php?page=aboutus>.

<sup>90</sup> *Zakat on Investments, Shares, and Bonds*, ISLAMWEB, <http://www.islamweb.net/emainpage/index.php?page=fatwa&tab=1&vPart=671> <http://www.islamweb.net/e-mainpage/index.php?page=fatwa&tab=1&vPart=671> (last updated Aug. 8, 2015).

<sup>91</sup> Hidaya Foundation is a U.S.-based charity with the mission to “implement educational, environmental, social welfare, and health care programs in economically depressed areas of South Asia, West Africa and North America, with focus on projects which promote self-employment.” *Mission*, HIDAYA FOUND., <http://www.hidaya.org/about-us/mission/> (last visited Feb. 8, 2018).

<sup>92</sup> *Zakat Calculator*, HIDAYA FOUND., <http://www.hidaya.org/zakat-calculator> (last visited Feb. 8, 2018).

<sup>93</sup> *Stocks*, HIDAYA FOUND., <http://www.hidaya.org/publications/zakat-information/stocks> (last visited Feb. 8, 2018).

a capital gain and sell.” However, a different rule might apply to stocks bought instead as long-term investments (i.e., “for either holding them and expecting their dividends or for participating in the management of the company”). It explains that the majority scholarly opinion on long-term investments is that *zakāt* is paid on the investor’s share of the underlying company (i.e., the *zakāt* is 2.5% of the company’s cash, receivables, and inventory, minus its short-term debts). It also notes the minority view is that if it is “difficult to calculate Zakat from the balance sheet, one may pay 10% of the net income of the stock, in analogy with agriculture.” The website does not explain why calculating *zakāt* from the balance sheet might be difficult, but it might refer to non-publicly traded companies that do not frequently provide balance sheets to shareholders. Also, the webpage does not clarify whether the phrase “10% of the net income of the stock” refers to 10% of the dividends and capital gains earned by the shareholder or to 10% of the company’s net income. Regardless, it says there “is not enough logical support in the Shariah for this [minority] opinion.” Finally, it notes another minority opinion that even long-term investors who lack “any interest in the management and [have] little concern about dividends” must pay 2.5% *zakāt* on the stock’s market value because this type of investor is similar to a stock trader.

In summary, Muslims who consult the internet to determine how much *zakāt* to pay on their long-term stock investments will quickly receive a wide range of conflicting and often unclear guidance. This advice ranges from paying 2.5% of the stock’s market value to paying only 2.5% of the saved dividends, with many approaches in between. Importantly, none of this advice is presented as being associated with particular legal schools and reasons for choosing one *zakāt* calculation approach over another are rarely offered. This situation is not unique to stock. Indeed, the next subpart demonstrates that a very similar situation exists for 401(k) accounts. These accounts, which are savings in a type of employer-sponsored retirement plan, are financial assets that have become increasingly important in the United States over the last few decades.

### *B. Zakāt on 401(k) Accounts*

Determining *zakāt* on retirement savings is very important because these savings are a substantial portion of Americans’ wealth. As of June 30, 2018, retirement assets were 32% of the total financial assets of U.S. households.<sup>94</sup> Moreover, because retirement savings can be accumulated and withdrawn over many decades, the choice of *zakāt* calculation rules can affect a person’s *zakāt* payments for 50 or more years.

Retirement savings in the United States often occur through employer-sponsored retirement plans. Such plans are either defined-benefit or defined-contribution plans.<sup>95</sup> Defined-benefit plans, such as traditional pension plans, are those in which retired

---

<sup>94</sup> INV. CO. INST., *Retirement Assets Total \$28.3 Trillion in Second Quarter 2018* (Sept. 27, 2018), [http://www.ici.org/research/stats/retirement/ret\\_18\\_q2](http://www.ici.org/research/stats/retirement/ret_18_q2).

<sup>95</sup> As of June 30, 2018, there were \$28.3 trillion in retirement assets, of which \$9.1 trillion were in defined-benefit plans and \$7.8 trillion were in defined-contribution plans. *Id.*

employees typically receive a monthly payment specified by a predetermined formula. The formula bases the payment amount on factors such as the employee's length of service and salary with the employer.<sup>96</sup> In contrast, defined-contribution plans are those in which the employees and employers may make periodic contributions to an account set up for the employee. The employee is responsible for allocating these contributions among the plan's investment options, such as stock, bond, or money market mutual funds. The value of a defined-contribution plan account at retirement is not predetermined. Instead, the value depends on the returns on the employee-chosen investments.<sup>97</sup>

In recent decades, U.S. employers have largely shifted from providing defined-benefit plans to providing defined-contribution plans. For example, from 1989 to 2013, the percentage of workers participating in defined-benefit plans declined from 32% to 13% while the percentage of workers participating in defined-contribution plans increased from 25% to 38%.<sup>98</sup> As of June 30, 2018, \$7.8 trillion was held in defined-contribution plans, of which \$5.3 trillion was in 401(k) accounts, a type of defined-contribution plan for private sector employees.<sup>99</sup>

Contemporary Islamic scholars differ on how to calculate *zakāt* on savings in 401(k) accounts. A major reason for these differences is that these savings are generally not completely accessible until the employee nears retirement age.<sup>100</sup> Before delving into these differences, we briefly outline the limited access that people have to their 401(k) accounts. For simplicity, we only discuss traditional 401(k) accounts.<sup>101</sup>

### 1. Accessing 401(k) Funds

Before age 59.5, employees generally cannot withdraw funds from their 401(k) accounts at their current employers except for certain "hardship" reasons, such as medical or educational expenses or the purchase of a primary residence.<sup>102</sup> If a person switches

---

<sup>96</sup> *Types of Retirement Plans*, U.S. DEP'T OF LABOR.

<https://www.dol.gov/general/topic/retirement/typesofplans> (last visited Feb. 8, 2018).

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

<sup>98</sup> ALICIA H. MUNNELL, CTR. FOR RET. RESEARCH, 401(K)/IRA HOLDINGS IN 2013: AN UPDATE FROM THE SCF 13, tbl.1 (2014), [http://crr.bc.edu/wp-content/uploads/2014/09/IB\\_14-151.pdf](http://crr.bc.edu/wp-content/uploads/2014/09/IB_14-151.pdf).

<sup>99</sup> INV. CO. INST., *supra* note 94. The remaining \$2.5 trillion was in other private sector defined-contribution plans, 403(b) plans, 457 plans, and the Federal Employees' Retirement System's Thrift Savings Plan. *Id.*

<sup>100</sup> *Infra* Part III.B.2.

<sup>101</sup> Different rules apply to Roth 401(k) accounts, but these accounts are much less common than traditional 401(k) accounts. For example, it has been estimated that, as of the end of 2017, only 68% of defined-contribution plans administered by the Vanguard Group permitted employees to make Roth contributions, and only 12% of employees who could make Roth contributions actually did so. VANGUARD GRP., HOW AMERICA SAVES 2018: VANGUARD 2017 DEFINED CONTRIBUTION PLAN DATA, 44–45, fig.43 (2018), [https://pressroom.vanguard.com/nonindexed/HAS18\\_062018.pdf](https://pressroom.vanguard.com/nonindexed/HAS18_062018.pdf).

<sup>102</sup> I.R.C. § 401(k)(2)(B)(i)(IV) (2018). The IRS permits, but does not require, employers to allow hardship distributions from 401(k) plans. A hardship distribution is defined as one necessary to satisfy an "immediate and heavy financial need" of the employee or the employee's spouse or dependents. 26 C.F.R. § 1.401(k)-1(d)(3)(i) (2018). Whether a particular expense qualifies for a hardship withdrawal depends on the particular facts and circumstances, but IRS regulations deem certain expenses—such as some medical,

employers, savings in a 401(k) account can be rolled over (i.e., transferred) to an Individual Retirement Account (IRA), a type of retirement account that is not employer-sponsored.<sup>103</sup> Funds can be withdrawn from an IRA without penalty before age 59.5 for certain higher education expenses or for a home purchase by a first-time homebuyer.<sup>104</sup> IRA funds also can be withdrawn before age 59.5 for any other reason, but a 10% tax penalty is typically imposed.<sup>105</sup> After age 59.5, IRA funds can be withdrawn for any reason without penalty.<sup>106</sup>

Similarly, at age 59.5, employees can withdraw funds without penalty from their former employers' 401(k) plans.<sup>107</sup> At that age, they can also withdraw funds from their current employers' 401(k) plans without penalty if the employers permit such "in-service" withdrawals, which the majority of employers do allow.<sup>108</sup> Whether or not a penalty is imposed, employees generally must pay income taxes on funds withdrawn from a traditional 401(k), regardless of whether the withdrawals are from employee or employer contributions or from the investment returns on those contributions.<sup>109</sup> If, however, the withdrawals are rolled over into another tax-advantaged retirement account, such as an IRA or another employer's 401(k), the taxes are deferred until the funds are later withdrawn from that account.<sup>110</sup>

## 2. Calculating *Zakāt* on 401(k) Accounts

Modern Islamic scholars are divided regarding how to calculate *zakāt* on funds in 401(k) accounts. This subpart discusses several of these contemporary opinions. At one extreme is the view 401(k) funds are not subject to *zakāt* until withdrawn because these funds are under the control of a third party—a trustee for the 401(k) plan—rather than the employee who legally owns those funds.<sup>111</sup> This position is supported by a well-known principle in classical Ḥanafite jurisprudence: *zakāt* is only assessable on wealth that carries defined property rights (*milkiya*) and is also under the possession (*qabḍ*) of its owner. Wealth that meets both conditions is characterized as being under "complete ownership" (*milkiya tāmma*), whereas wealth legally owned but not physically possessed

---

educational, and primary residence expenses—as being "immediate and heavy." 26 C.F.R. § 1.401(k)-1(d)(3)(iii)(A)-(B) (2018).

<sup>103</sup> *401(k) Rollovers*, FIN. INDUS. REGULATORY AUTH., <http://www.finra.org/investors/401k-rollovers> (last visited Feb. 8, 2018).

<sup>104</sup> I.R.C. § 72(t)(2)(E)-(F) (2015).

<sup>105</sup> § 72(t)(1).

<sup>106</sup> § 72(t)(2)(A)(i).

<sup>107</sup> *Id.*

<sup>108</sup> Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124 YALE L.J. 1476, 1520-21 (2015).

<sup>109</sup> *Rollovers of Retirement Plan and IRA Distributions*, INTERNAL REVENUE SERV., <https://www.irs.gov/retirement-plans/plan-participant-employee/rollovers-of-retirement-plan-and-ira-distributions> (last updated May 30, 2018).

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

<sup>111</sup> *Zakat and Business*, *supra* note 75 (follow "Should 401(k) and Similar Funds Be Considered Personally Controlled or Beyond Personal Control?" hyperlink).

by its owner (*ghayr maqbūd*) is considered as being under “diminished ownership” (*milkiya nāqiṣa*).<sup>112</sup> The condition of having physical access to one’s wealth is referred to as “wealth in hand” (*milk ma‘a ‘l-yad*).<sup>113</sup> Savings that accumulate in a retirement account such as a 401(k), depending on the nature of the plan, might not meet the condition of *milk ma‘a ‘l-yad*. Under the view that the employee has only “diminished ownership” of such an account, no *zakāt* would apply to funds in the account until they are withdrawn and possessed by the employee.

A second opinion is that *zakāt* should be assessed only on the 401(k) funds the employee *could* access currently. In other words, *zakāt* is due on the amount the employee would have—after income taxes and any applicable 10% penalty—if the employee were to withdraw all the funds he or she is presently permitted to withdraw.<sup>114</sup> The rationale for this opinion likely is that the employee could access that amount if he or she wished to, so it is effectively a form of complete ownership (*milkiya tāmma*).

A third opinion is that, prior to accessing the funds, *zakāt* is assessable on the employee’s voluntary contributions, but not on an employer’s contributions until they are vested<sup>115</sup> and can be withdrawn.<sup>116</sup> The reasoning behind this view appears to be that employees voluntarily gave up control over their own contributions, but do not have control of employers’ contributions until the employers’ contributions can be withdrawn.<sup>117</sup> Therefore, the amount voluntarily contributed to the account by the employee is not “diminished wealth” (*milkiya nāqiṣa*) that is beyond the employee’s reach. Instead, it is effectively “wealth in hand” (*milk ma‘a ‘l-yad*).<sup>118</sup> Furthermore, the reasoning behind this opinion might imply *zakāt* should also be assessed on the investment returns earned on the employees’ voluntary contributions. Employees could

<sup>112</sup> ISLAMIC FIQH ACAD., INDIA, *supra* note 17, at 563.

<sup>113</sup> *Id.* at 565.

<sup>114</sup> *Zakat and Business*, *supra* note 75 (follow “Should 401(k) and Similar Funds Be Considered Personally Controlled or Beyond Personal Control” hyperlink) (citing this view as being held by Dr. Salah Al-Sawy, the Secretary General of the Assembly of Muslim Jurists of America).

<sup>115</sup> An employer’s contributions to a 401(k) account vest when the employee is given an unconditional right to those contributions. Many employers require that an employee work for a specified number of years for the employer before all of the employer’s contributions vest. In contrast, an employee’s own contributions to a 401(k) account vest immediately. *Retirement Topics—Vesting*, INTERNAL REVENUE SERV., <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-vesting> (last updated Apr. 2, 2018).

<sup>116</sup> Sohail ibn Arif, *How Do I Pay Zakat on My 401(k) Plan?*, ASK IMAM (July 5, 2014), [http://askimam.org/public/question\\_detail/29670](http://askimam.org/public/question_detail/29670); see also *Do I Have to Issue Zakat al-Mal for My 401 K Retirement Plan?*, ISLAMICITY (Jan. 3, 2008), <http://www.islamicity.com/qa/action.lasso.asp?-db=services&-lay=Ask&-op=eq&number=25755&-format=detailpop.shtml&-find> (quoting a *fatwā* of Muzammil H. Siddiqi, former President of the Islamic Society of North America).

<sup>117</sup> See *Do I Have to Issue Zakat al-Mal for My 401 K Retirement Plan?*, *supra* note 116 (supporting the conclusion that an employee’s voluntary contributions are subject to *zakāt* under the principle that *zakāt* “is due on the wealth that one owns and has the freedom to use”); Ibn Arif, *supra* note 116 (indicating that contemporary scholars have held that retirement plans such as 401(k) plans are subject to *zakāt* because the “employee can opt out of making contributions to the 401(k) plan or even withdraw his money before retirement age subject to taxes and penalties”).

<sup>118</sup> ISLAMIC FIQH ACAD., INDIA, *supra* note 17, at 565.

have access to those returns if they instead invested their 401(k) contributions outside of a retirement account.

The last two opinions are also consistent with viewing at least part of 401(k) funds as subject to *zakāt* because those funds are similar to a “good” or “strong” debt that is owed to the employee. In other words, even though the employee does not currently possess the funds, the 401(k) trustee acknowledges that the employee is owed the funds and the 401(k) plan is able to pay that “debt.” The jurisprudential logic for this position is based on certain rulings pertaining to *zakāt* on debts (sing. *dayn*, pl. *duyūn*). These rulings exempt a debtor (*madyūn*) from paying *zakāt* on borrowed wealth but require a creditor (*dā’in* or *rabb al-dayn*) to pay *zakāt* on wealth loaned to others. This is because the creditor is legally entitled to repayment, so the loans are assets of the creditor.<sup>119</sup> Many scholars distinguish between three categories of debt: strong debt (*dayn qawiyy*), intermediate debt (*dayn mutawassit*), and weak debt (*dayn da’if*). A strong debt is likely to be repaid; a weak debt is one that a creditor has little hope of recovering. A creditor is expected to pay *zakāt* on strong debts.<sup>120</sup> Thus, scholars who consider 401(k) funds to be a form of strong debt believe that *zakāt* is owed each year on those funds.<sup>121</sup>

In summary, scholars recommend several different approaches for calculating *zakāt* on 401(k) accounts. These differences are reflected in the advice given to American Muslims via the internet. However, as with the advice regarding *zakāt* on stock, the format of this advice is very different from that found in traditional manuals of Islamic law. The advice on the internet usually is limited to technical instructions regarding how to calculate *zakāt* on 401(k) accounts. It generally lacks depth, presents little or no background explanation, is often unclear, and rarely associates the advice with particular Islamic legal schools. For example, imagine a Muslim in the United States Googles “How much zakat should I pay on my 401(k)?” Following the links on the first page of the search results would lead to the following webpages:

1. *Zakat Foundation of America*. This webpage notes that “opinions differ” regarding the *zakāt* on 401(k) funds and presents two of those opinions: (1) they are not subject to *zakāt* because they are “under the control of an independent agency,” and (2) they are subject to *zakāt* because they are “under the employee’s control (minus penalties).”<sup>122</sup> It also notes that 401(k) funds “may be deemed a ‘good’ loan, which is to say a debt likely payable in

---

<sup>119</sup> AL-QARDAWI, *supra* note 9, at 58 (stating that most scholars believe that a creditor must pay *zakāt* on a debt that the debtor acknowledges and is able to repay).

<sup>120</sup> *Dayn qawiyy* pertains to debts incurred on tradable goods; *dayn mutawassit* applies to debts incurred on goods not intended for trade; and *dayn da’if* applies to debts that are incurred due to something other than to a sale or exchange of goods, such as dowries or inheritances. ISLAMIC FIQH ACAD., INDIA, *supra* note 17, at 361.

<sup>121</sup> In contrast, the general consensus among Hanafi scholars seems to be that 401(k) funds are a form of weak debt (*dayn da’if*) and the employee acts as a creditor who loans part of their income to be used in various investment projects. The ruling for weak debts is that, upon repayment, *zakāt* will only be paid for the current year and not retroactively for all the years during which the debt was owed. *Id.* at 362.

<sup>122</sup> *Zakat and Business*, *supra* note 75 (follow “Should 401(k) and Similar Funds Be Considered Personally Controlled or Beyond Personal Control?” hyperlink).

the future.” It then adopts a position consistent with the second view: 401(k) accounts are subject to *zakāt* “because the employee has eventual access to and ultimate control over the funds.” However, because people are often unable to access all of their 401(k) funds, *zakāt* applies only to the amounts presently eligible for withdrawal, less any required taxes and penalties.

2. *Joe Bradford’s Blog*.<sup>123</sup> This blog notes that modern scholars differ regarding *zakāt* on retirement accounts such as 401(k) accounts, because people do not “actively have control over and cannot access without penalty the funds therein until a threshold or time period is met.”<sup>124</sup> It then adopts the position that 401(k) funds are not subject to *zakāt* until they can be withdrawn without penalty, which is usually at age 59.5.
3. *IslamiCity*.<sup>125</sup> This webpage answers a user-submitted question regarding whether someone must pay *zakāt* on a 401(k) account.<sup>126</sup> The provided answer states that an employee’s voluntary contributions to a 401(k) account are subject to *zakāt*, but an employee’s mandatory contributions and an employer’s contributions are not subject to *zakāt* until “they can be withdrawn.” The webpage does not clarify whether “withdrawn” means withdrawn without penalty. It also does not state whether investment returns on an employee’s voluntary contributions are also subject to *zakāt*.
4. *Ask Imam*.<sup>127</sup> This webpage answers a user-submitted question regarding how much *zakāt* to pay on 401(k) accounts.<sup>128</sup> It explains that employees’ contributions and employers’ “vested” contributions are subject to *zakāt* each year. It does not state whether the investment returns on those contributions are also subject to *zakāt*. Also, confusingly, the response defines “vested” as “the amount of the company’s contribution that the employee has acquired an ownership of and can withdraw along with his own money.”<sup>129</sup> However, employees usually acquire ownership over an employer’s contributions (i.e.,

---

<sup>123</sup> Joe Bradford is a scholar with degrees in Islamic law and experience in Islamic banking, personal finance, and other areas. *About This Site*, JOEBRADFORD.NET <http://www.joebradford.net/author/> (last visited Oct. 6, 2018).

<sup>124</sup> Joe Bradford, *Do I Pay Zakat on 401k and IRA?*, JOEBRADFORD.NET, <http://www.joebradford.net/pay-zakat-on-401k/> (last visited Feb. 8, 2018).

<sup>125</sup> IslamiCity’s parent organization is Human Assistance and Development International (HADI), a U.S.-based non-profit organization. IslamiCity’s website’s primary purpose appears to be to educate people about Islam. *About IslamiCity*, ISLAMICITY, <https://www.islamicity.org/about-islamicity/> (last visited Feb. 8, 2018).

<sup>126</sup> *Do I Have to Issue Zakat al-Mal for My 401 K Retirement Plan?*, *supra* note 116.

<sup>127</sup> *Ask Imam* is a collection of *fatāwā* issued by, or with the approval of, Mufti Ebrahim Desai, an Islamic scholar based in South Africa. *About*, ASK IMAM, <http://www.askimam.org/about> (last visited Feb. 8, 2018).

<sup>128</sup> Ibn Arif, *supra* note 116.

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

become vested in these contributions) many years before the employees can withdraw them.<sup>130</sup>

5. *Hidaya Foundation*. This webpage says 401(k) accounts are subject to *zakāt* every year, but a person may wait to pay the *zakāt* until withdrawing the funds at retirement, at which time all previous years' *zakāt* on the 401(k) account must be paid retroactively.<sup>131</sup> Regardless of when the *zakāt* is paid, the webpage does not say how to calculate this *zakāt*.
6. *Know Your Deen*.<sup>132</sup> This webpage answers a user-submitted question about whether *zakāt* must be paid on 401(k) accounts.<sup>133</sup> It answers that *zakāt* applies to 401(k) funds each year, but to calculate *zakāt*, the person should reduce the amount of the 401(k) by any "deduction penalty" that would be incurred if funds are withdrawn at that time. It does not clarify whether the "deduction penalty" refers only to the 10% tax penalty for early withdrawal or also to the normal income taxes that must be paid on any withdrawal. The webpage also says a person may wait to actually pay the *zakāt* until the funds are withdrawn at retirement, at which time all previous years' *zakāt* on the 401(k) account must be paid retroactively. However, if one chooses to wait to pay the *zakāt*, the prior years' *zakāt* payments should not be reduced to account for an early withdrawal penalty (presumably because there is no such penalty if the funds are withdrawn after age 59.5).
7. *Islamic Center of North East Florida*.<sup>134</sup> This webpage poses and answers twenty questions on *zakāt*, including "Do I have to pay Zakat on my 401k plan or my IRA?"<sup>135</sup> The website responds "You do not pay zakat on your 401k, your IRA, or any account to which you do not have access until you cash out without penalty. At that time you pay Zakat for one year." The website does not indicate whether this means that *zakāt* is not assessed on

---

<sup>130</sup> By law, employer contributions to retirement plans must vest within six years. *Retirement Plans and ERISA FAQs*, EMP. BENEFITS SEC. ADMIN., <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-consumer> (last visited Feb. 8, 2018). However, as discussed above, 401(k) contributions usually cannot be withdrawn until age 59.5. I.R.C. § 72(t)(2)(A)(i) (2015).

<sup>131</sup> *Retirement Plans (401K, IRA, etc.)*, HIDAYA FOUND., <http://www.hidaya.org/publications/zakat-information/retirement-plans-401k-ira-etc> (last visited Feb. 8, 2018).

<sup>132</sup> *Know Your Deen* is a website with the apparent purpose of educating people in North America about Islam. *About*, KNOW YOUR DEEN, [http://knowyourdeen.com/qa/?page\\_id=7](http://knowyourdeen.com/qa/?page_id=7) (last visited Feb. 8, 2018). The relevant section is a collection of questions about Islam from the website's users answered by Moulana Muhammed Shoayb.

<sup>133</sup> Moulana Muhammed Shoayb, *401K and Zakat Agencies*, KNOW YOUR DEEN (Aug. 4, 2012), <http://knowyourdeen.com/qa/?p=13225>.

<sup>134</sup> The Islamic Center of North East Florida appears to be an Islamic community center located in Jacksonville, Florida. *Our Mission*, ISLAMIC CTR. NE. FLA., <https://icnef.org/our-mission-3/> (last visited Feb. 8, 2018).

<sup>135</sup> Joe Bradford, *20 Questions on Zakat*, ISLAMIC CTR. NE. FLA. (July 29, 2011), <https://icnef.org/?s=401k>.

401(k) funds until the funds are actually withdrawn or just until they can be accessed without penalty (i.e. usually at age 59.5), even if they are not withdrawn at that time.

8. *Exploring Islam*.<sup>136</sup> This webpage states that under the “traditional understanding” of *zakāt*, a 2.5% rate must be paid on any part of a 401(k) to which a person has “access” and which is “lying idle.”<sup>137</sup> The term “lying idle” is not defined, nor is the term “access,” but the webpage does state a person must be able to access the funds “as his own, not as a loan.” The author then gives his personal opinion: no *zakāt* is due on 401(k) funds because the owner already must pay taxes on these funds and “Zakah is the very tax that you pay to the state and no more zakah is due other than the tax that the state demands.”
9. *IslamQA*.<sup>138</sup> In an answer to a user-submitted question, this webpage states that employee contributions, employer contributions that vested, and all investment returns in a 401(k) are subject to *zakāt*.<sup>139</sup>

In summary, American Muslims conducting a basic internet search to determine how much *zakāt* to pay on their 401(k) accounts will find a wide range of often unclear advice. Significantly, only one of the surveyed websites (*IslamQA*) connects its advice to a particular legal school.<sup>140</sup> In addition, none of the surveyed websites presents any other reason for choosing one calculation method over another.

Thus, American Muslims face a wide range of opinions regarding how to calculate *zakāt* on their stock and 401(k) accounts without guidance on how to choose among those opinions. In addition to causing confusion, the choice can dramatically affect the amount of *zakāt* a person pays. In the next Part of this Article, we demonstrate this by using different recommended approaches to calculate *zakāt* in two case studies.

#### IV. EFFECTS OF DIFFERENT *ZAKĀT* CALCULATION APPROACHES

The previous Part of this Article presented many of the approaches that different scholars recommend for calculating *zakāt* on stock and on 401(k) accounts. In this Part, the *zakāt* is calculated under each of these approaches for a hypothetical person holding

---

<sup>136</sup> *Exploring Islam* is an educational website containing information on Islam written by Farhad Shafti, an Islamic educator. Farhad Shafti, *About the Author*, EXPLORING ISLAM, <http://www.exploring-islam.com/about-the-author.html> (last updated June 2018).

<sup>137</sup> Farhad Shafti, *Zakah of the Retirement Account*, EXPLORING ISLAM (July 2016), <http://www.exploring-islam.com/zakah-of-the-retirement-account.html>.

<sup>138</sup> *IslamQA* is a website that allows users to browse a variety of answers to questions about Islam. ISLAMQA, <http://islamqa.org/> (last visited Feb. 8, 2018).

<sup>139</sup> Abdurrahman ibn Yusuf Mangera, *Permissibility of and Zakat on 401k Plan & Other Securities*, ISLAMQA (Oct. 25, 2004), <http://islamqa.org/hanafi/qibla-hanafi/34801>.

<sup>140</sup> The IslamQA webpage in which Shaykh Abdurrahman ibn Yusuf Mangera’s answer is given is labeled as presenting Ḥanafī fiqh. *Id.*

these assets. This exercise demonstrates that the choice of which approach to follow can dramatically affect the amount of *zakāt* a person pays.

#### A. *Zakāt on Publicly Traded Stock*

Imagine that at the end of the last day of the Islamic year, October 1, 2016, a person invested \$10,000 in the stock of Walmart Inc., the world's largest retailer.<sup>141</sup> At the time, Walmart stock traded for \$72.12 per share, so the investor would have bought 138.658 shares of stock.<sup>142</sup> This case study assumes the following about the investor:

- The investor saves all the dividends he or she receives.
- The investor is 60 years old and holds the stock in a Roth IRA account that was opened more than five years ago.<sup>143</sup>
- The investor follows the scholarly opinion that *zakāt* must be paid on accessible funds in a retirement account, such as a Roth IRA.
- At all times, the investor's wealth has exceeded the relevant *niṣāb*, so the investor must pay *zakāt*.<sup>144</sup>
- The investor calculates *zakāt* based on his or her wealth at the end of the next Islamic year, September 20, 2017.

By the end of the next Islamic year (September 20, 2017), Walmart's stock price rose to \$80.50 per share, so the \$10,000 investment would have been worth \$11,161.97. In addition, the investor would have received a total of \$281.48 in dividends from the stock during that period (i.e., \$2.03 per share).<sup>145</sup>

---

<sup>141</sup> We chose this scenario because the return on Walmart stock over the next Islamic year was fairly typical of the annual return for American stocks in recent decades, so the differences in the *zakāt* under each of the calculation methods are also fairly typical.

<sup>142</sup> To streamline the calculations, we assume that the investor does not pay a commission to buy or sell shares and that the investor could buy fractional shares of Walmart stock. In general, however, people cannot buy fractions of shares of individual stocks except through dividend reinvestment plans (DRIPs). See David Sarokin, *What Happens to Partial Shares from Reinvested Dividends When You Sell?*, POCKET SENSE, <https://pocketsense.com/happens-partial-shares-reinvested-dividends-sell-5036.html> (last visited Oct. 9, 2018) (stating that investors can receive fractional shares of individual stocks through dividend reinvestment plans).

<sup>143</sup> This assumption avoids additional, complicating issues related to taxes and the issues discussed in the previous part regarding the accessibility of funds invested in non-taxable accounts. A Roth IRA is a type of IRA on which no taxes are paid if funds are withdrawn from the account after age 59.5 and the account was established at least five years before the withdrawal. *Roth IRA Taxes and Tax Issues*, ROTHIRA.COM, <http://www.rothira.com/roth-ira-taxes-and-tax-issues> (last visited Feb. 8, 2018).

<sup>144</sup> Recall that the *niṣāb* is the minimum amount of an asset that a person must have before being obligated to pay *zakāt* on that asset.

<sup>145</sup> Walmart paid a \$0.50 dividend on January 3, 2017, and \$0.51 dividends on April 3, June 5, and September 5, 2017. The record dates for these dividends were December 9, 2016; March 10, 2017; May 12, 2017; and August 11, 2017, respectively; so the investor in this case study would have been entitled to these dividends. *Walmart Inc. Dividend Date & History*, NASDAQ, <http://www.nasdaq.com/symbol/wmt/dividend-history> (updated daily).

*Calculation Method 1: 2.5% of Stock's Market Value*

Under this approach, the *zakāt* on stock is 2.5% of the stock's market value when *zakāt* is calculated (i.e., at the end of the Islamic year in our case study). Because the stock's market value at that time was \$11,161.97, the *zakāt* on the stock is \$279.05.<sup>146</sup> In addition, because the investor saved the \$281.48 of received dividends, effectively \$7.04 (i.e., 2.5%) of *zakāt* is due on the dividends because the investor's cash holdings increased by the amount of the dividends and there is a 2.5% *zakāt* rate on cash. Thus, the total *zakāt* under this method is \$286.09.<sup>147</sup>

*Calculation Method 2: 2.5% of Company's Net Assets Subject to Zakāt*

Under this approach, the investor pays his or her share of the *zakāt* that would be paid on Walmart's underlying business. As noted above, one way to calculate *zakāt* owed by a merchant, such as Walmart, is 2.5% of the value of the merchant's inventory, cash, and other current (i.e., short-term) assets, minus the merchant's short-term debt and accounts payable.<sup>148</sup> One can calculate this from Walmart's balance sheet for the fiscal quarter ending July 31, 2017, the last publicly available balance sheet during that Islamic year. As of that date, Walmart had \$43.442 billion in inventory, \$6.469 billion in cash and cash equivalents, and \$6.852 billion in other current assets.<sup>149</sup> Walmart also had \$3.262 billion in short-term debt and \$42.389 billion in accounts payable.<sup>150</sup> Thus, subtracting those liabilities from Walmart's current assets gives net assets of \$11.112 billion subject to *zakāt*. A 2.5% *zakāt* rate on that amount gives a total *zakāt* on Walmart's business of \$278 million. As of July 31, 2017, the book value of Walmart's shareholder equity was \$76.389 billion out of a total of \$79.046 billion in equity (i.e., approximately 96.6%) because a \$2.657 billion non-controlling interest existed.<sup>151</sup> Thus one can estimate that the total *zakāt* on Walmart's business that could be attributed to shareholders is approximately \$269 million, 96.6% of the total \$278 million *zakāt* on Walmart's business. In the quarter that ended July 31, 2017, Walmart averaged 3.021 billion shares of stock outstanding,<sup>152</sup> so the *zakāt* would be approximately 8.9 cents per share.<sup>153</sup> Because our hypothetical investor owned 138.658 shares of stock, the investor would pay \$12.34 of *zakāt* on the stock. In addition, because the investor saved the dividends the investor received, \$7.04 *zakāt* would be due on the \$281.48 of dividends. Thus, the total *zakāt* would be \$19.38.<sup>154</sup>

<sup>146</sup> \$279.05 is 2.5% of the \$11,161.97 market value.

<sup>147</sup> The \$286.09 total is the sum of the \$279.05 *zakāt* on the stock and the \$7.04 *zakāt* on the saved dividends.

<sup>148</sup> Islahi & Obaidullah, *supra* note 62, at 6.

<sup>149</sup> U.S. SEC. & EXCH. COMM'N, WAL-MART STORES, INC. FORM 10-Q FOR THE QUARTERLY PERIOD ENDED JULY 31, 2017, at 5 (2017), <http://secfilings.nasdaq.com/filingFrameset.asp?FilingID=12262569&RcvdDate=8/31/2017&CoName=WALMART%20INC.&FormType=10-Q&View=html>.

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

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 3.

<sup>153</sup> \$269 million divided by 3.021 billion shares is approximately 8.9 cents per share.

<sup>154</sup> The \$19.38 total is the sum of the \$12.34 *zakāt* on the stock and the \$7.04 *zakāt* on the dividends.

*Calculation Method 3: 2.5% of Stock's Market Value Attributable to Assets Subject to Zakāt*

Under this approach, *zakāt* is 2.5% of only the portion of the stock's market value attributable to company assets subject to *zakāt*. For purposes of this calculation, we assume all of Walmart's current assets are subject to *zakāt*. As of July 31, 2017, Walmart had \$56.763 billion in current assets, and \$144.803 billion in non-current assets (primarily property and equipment).<sup>155</sup> Thus, 28.2% of Walmart's assets were subject to *zakāt* under this approach.<sup>156</sup> Therefore, a 2.5% *zakāt* rate should be paid on 28.2% of the market value of Walmart's stock. Because the market value of the investor's shares is \$11,161.97 when the *zakāt* is calculated, the *zakāt* on the shares would be \$78.69.<sup>157</sup> In addition, because the investor saved the dividends received, \$7.04 *zakāt* would be due on the \$281.48 of dividends. Thus, the total *zakāt* would be \$85.73.<sup>158</sup>

*Calculation Method 4: 10% of Capital Gains and Dividends*

Under this approach, *zakāt* is 10% of the capital gains and dividends earned on the stock. The investor received \$281.48 of dividends and, because the stock increased in value from \$10,000 to \$11,161.97, he or she had a \$1,161.97 capital gain. If *zakāt* is due only on realized capital gains, then the only *zakāt* that must be paid this year is 10% of the dividends, i.e., \$28.15. As of now, a future year's *zakāt* will be increased by 10% of the unrealized capital gain, i.e., \$116.20. That *zakāt* will be paid in the year when the investor sells the stock, if the investor actually sells it for that amount. Thus, under this approach, the *zakāt* on the Walmart stock would be a total of \$144.35, composed of \$28.15 this year and \$116.20 in the year when the investor eventually sells the stock. On the other hand, if the investor sells the stock at the end of the current Islamic year (i.e., September 20, 2017), or if the investor chooses to pay *zakāt* now on unrealized capital gains, the *zakāt* would be the full \$144.35 this year.

Table 1 summarizes the *zakāt* on the Walmart stock investment under each of the approaches just discussed. As displayed, the *zakāt* varies widely based on the calculation method used. Under the first approach, the *zakāt* is more than fourteen times greater than under the second approach (\$286.09 versus \$19.38, with a total difference of \$266.71).

---

<sup>155</sup> U.S. SEC. & EXCH. COMM'N, *supra* note 149, at 5.

<sup>156</sup> Walmart had a total of \$201.566 billion in assets (\$56.763 billion in current assets plus \$144.803 billion in non-current assets). *Id.* Thus, 28.2% (i.e., \$56.763 billion divided by \$201.566 billion) of Walmart's assets were subject to *zakāt*.

<sup>157</sup> \$78.69 is 2.5% of 28.2% of \$11,161.97.

<sup>158</sup> The \$85.73 total is the sum of the \$78.69 *zakāt* on the stock and the \$7.04 *zakāt* on the dividends.

**TABLE 1: *Zakāt* on \$10,000 Investment in Walmart Stock for One Islamic Year  
October 1, 2016—September 20, 2017**

<b>ZAKĀT CALCULATION METHOD</b>	<b>ZAKĀT</b>
<b>1. 2.5% of Stock's Market Value</b>	\$ 286.09
<b>2. 2.5% of Company's Net Assets Subject to <i>Zakāt</i></b>	\$ 19.38
<b>3. 2.5% of Market Value Attributable to Assets Subject to <i>Zakāt</i></b>	\$ 85.73
<b>4. 10% of Capital Gains and Dividends</b>	\$ 144.35

Although a \$267 *zakāt* difference is not very large in absolute terms, the difference can be much greater in the real world. Recall that this example was based on only a \$10,000 initial investment. For larger investments, the dollar difference will be proportionately larger. Also, if the case study used the stock of a company that only provides services, rather than a retailer like Walmart, then the difference between the calculation methods would likely be greater because service companies have little inventory. Calculation methods based on the company's assets that are subject to *zakāt*—such as the second and third methods discussed above—generally result in less *zakāt* for service companies than for retailers.<sup>159</sup>

In addition, the calculated differences were only for a single year of investing. Over an investor's lifetime, the differences become much larger. The great effects of different *zakāt* calculation methods over long periods of time are made especially clear in the following subpart, which presents a case study calculating *zakāt* on a 401(k) account using different calculation formulas.

#### *B. Zakāt on 401(k) Accounts*

For American Muslims using 401(k) accounts to substantially fund their retirement, the choice of which calculation approach to use dramatically impacts their *zakāt*. This can be seen by calculating the *zakāt* payments under different approaches for a hypothetical employee. In particular, assume the following:

- The employee begins working on his or her 25<sup>th</sup> birthday on January 1, 2018.

<sup>159</sup> Islahi & Obaidullah, *supra* note 61, at 6 (“A group of *ulama* [Islamic scholars] have tried to differentiate between companies that have capital goods to provide services only and those engaged in production and sale of goods. In their opinion there is no *zakah* on shares of companies that provide services only (since all assets of such service providers are in the form of fixed assets that are fully exempted).”).

- The employee's initial annual salary is \$30,000 and increases by 3% each year.
- During the employee's first year working, the employee voluntarily contributes 6% of his or her salary to the employer's traditional 401(k) plan. The employee contributes 7% in the second year, 8% in the third year, 9% in the fourth year, and 10% thereafter.<sup>160</sup> These contributions are made monthly—specifically, one-twelfth of the annual contribution is made at the end of each month.
- The employer contributes an additional 3% of the employee's salary each year to the 401(k) plan and these contributions vest immediately.<sup>161</sup> One-twelfth of these contributions are made at the end of each month.
- The employee invests his or her entire 401(k) account in stock mutual funds that earn a 7% return each calendar year.<sup>162</sup> This 7% annual return is spread evenly over the year, so that each monthly return is the same (i.e., 0.57% per month).
- If the investments (stock mutual funds) were not held in a 401(k) account, the employee would choose to follow the scholarly opinion that the annual *zakāt* would be 2.5% of the market value of investments.<sup>163</sup>
- The employee retires at age 67 on January 1, 2060, at which time both the employee and employer stop contributing to the 401(k) account.
- Beginning at retirement, the employee makes monthly withdrawals from the 401(k) account until all the funds are withdrawn in 20 years (January 1, 2080). Each monthly withdrawal has the same real value (i.e., the same value after adjusting for an assumed 2% annual inflation rate).<sup>164</sup>

---

<sup>160</sup> Many 401(k) plans allow individual employees to automatically increase their contribution rates by 1% each year until that individual's rate reaches a particular level. *What Is Auto-Escalation and SMarT? In a Nutshell, a Painless Way to Increase Your Savings*, NAT'L ASS'N OF RET. PLAN PARTICIPANTS, <http://www.narpp.org/fiacademy/auto-escalation> (last visited Feb. 8, 2018).

<sup>161</sup> Employers typically contribute to employees' 401(k) accounts, often by at least partially matching employee contributions. According to the most recently available data, 89% of 401(k) plan participants were in 401(k) plans to which employers contributed. INV. CO. INST., TEN IMPORTANT FACTS ABOUT 401(K) PLANS 6 (2018), [https://www.ici.org/pdf/ten\\_facts\\_401k.pdf](https://www.ici.org/pdf/ten_facts_401k.pdf).

<sup>162</sup> Most Islamic scholars believe that Muslims are forbidden from receiving interest and thus cannot invest in fixed-income securities such as bonds and money-market securities. 1 MUHAMMAD TAQI USMANI, BUḤŪTH FĪ QADĀYĀ FIQHĪYYAH MU'ĀŞARAH 218–32 (2013). Thus, we assume that the employee in this case study invests his or her 401(k) funds only in stock mutual funds. A 7% annual return is consistent with the Vanguard Capital Markets Model's median forecast for U.S. equities over the next decade. See JOSEPH DAVIS ET AL., VANGUARD GRP., 2017 ECONOMIC AND MARKET OUTLOOK: STABILIZATION, NOT STAGNATION 25 fig. II-6 (2016), [https://pressroom.vanguard.com/news/ISGVEMO\\_012017\\_clean.pdf](https://pressroom.vanguard.com/news/ISGVEMO_012017_clean.pdf) (figure showing median forecasted annual return of approximately 7% for U.S. equities over the next decade).

<sup>163</sup> Recall that Islamic scholars differ on the proper *zakāt* calculation method for stock. These differences extend to stock mutual funds. For the purpose of this hypothetical, we assume that the employee follows the opinion that *zakāt* is 2.5% of the mutual fund's current market value (i.e., net asset value). See, e.g., *Mutual Funds*, HIDAYA FOUND., <http://www.hidaya.org/publications/zakat-information/mutual-funds> (last visited Feb. 8, 2018) (expressing the opinion that a 2.5% *zakāt* rate exists on a mutual fund's current value).

<sup>164</sup> The Federal Open Market Committee has set a 2% long-term inflation rate target. *What Are the Federal Reserve's Objectives in Conducting Monetary Policy?*, FED. RESERVE SYS., [https://www.federalreserve.gov/faqs/money\\_12848.htm](https://www.federalreserve.gov/faqs/money_12848.htm) (last updated Sept. 26, 2018).

- The employee spends each month's withdrawal before the beginning of the next month.<sup>165</sup>
- The employee's marginal income tax rate is 33%.
- For purposes of calculating *zakāt* each year, the employee uses the value of the 401(k) account as of the end of the last Gregorian calendar quarter before the first day of the Islamic year. For example, if the Islamic year begins on May 5, the employee uses the 401(k) account's value as of March 31. This assumption is based on the U.S. Department of Labor's requirement that employees be provided an account statement showing the value of their 401(k) accounts at least quarterly.<sup>166</sup>
- Similarly, the employee pays *zakāt* annually at the end of the last Gregorian calendar quarter before the first day of the Islamic year.<sup>167</sup>
- At all times, the employee's wealth exceeds the relevant *niṣāb* and the one-year holding requirement is satisfied,<sup>168</sup> so the employee must pay *zakāt*.

#### *Calculation Method 1: Zakāt Assessed on Withdrawn Funds Only*

Under this approach, 401(k) funds are subject to *zakāt* only after withdrawal from the account. In our case study, we assumed the person spends the funds during the month they are withdrawn. Thus, each year, *zakāt* will be paid only on the most recent month's withdrawal; the previous withdrawals will have been spent already.<sup>169</sup> Under this approach, he or she would pay a total of only \$5,516 in *zakāt* on the 401(k) account over its lifetime, i.e., until the last withdrawal is made from the account at age 87.<sup>170</sup> Because the *zakāt* is paid decades in the future, inflation would cause the real value (i.e., inflation-adjusted value) of the *zakāt* to be much lower. Assuming a 2% annual inflation rate, the real value of the *zakāt* would be only \$1,957.

#### *Calculation Method 2: Zakāt Assessed on Accessible Funds*

Under this approach, *zakāt* each year is assessed on the amount that a person would have if he or she were to withdraw the 401(k) funds to the extent possible. Thus, *zakāt* must be paid on the total amount eligible for withdrawal from the 401(k) account minus any applicable taxes, including the 10% tax penalty for non-hardship withdrawals before age 59.5.

---

<sup>165</sup> This assumption simplifies the calculations by avoiding the necessity of calculating *zakāt* on funds withdrawn from the 401(k) account that are then saved elsewhere, such as in a checking account.

<sup>166</sup> EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, REPORTING AND DISCLOSURE GUIDE FOR EMPLOYEE BENEFIT PLANS 9 (2017), <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf>.

<sup>167</sup> This assumption simplifies the calculation of the real values (i.e., values after accounting for inflation) of the *zakāt* payments. It does not substantially change those values.

<sup>168</sup> Recall that most scholars believe that a specific asset, or at least the *niṣāb* for that asset type, must be owned for at least one lunar year before it is subject to *zakāt*. *Supra* note 28 and accompanying text.

<sup>169</sup> We assume that the employee pays *zakāt* on the full amount of the most recent month's withdrawal, although income taxes must later be paid on all withdrawals from a traditional 401(k).

<sup>170</sup> A spreadsheet showing the calculations under each approach is available from the authors.

The amount eligible for withdrawal before retirement depends upon which employer(s) the employee worked for. Employees who spend their entire career with a single employer might not have access to any 401(k) funds for several decades. Recall that 401(k) funds cannot be withdrawn until some triggering event occurs, such as the employee retiring after age 59.5, incurring certain hardship expenses, or leaving the employer.<sup>171</sup> Former employees can withdraw funds from a 401(k) account, but unless they roll over the funds into another tax-advantaged account (such as an IRA), they must pay income taxes on these withdrawals and, if younger than age 59.5, also must pay a 10% tax penalty.<sup>172</sup> In addition, many employers also allow current employees to withdraw 401(k) funds at age 59.5 even if they continue to work for the employer. Such “in-service” withdrawals are subject to income taxes but not the 10% penalty.<sup>173</sup>

For a first scenario, assume the employee works for the same employer for the employee’s entire career and the employer allows in-service withdrawals at age 59.5. In this scenario, for *zakāt* calculation purposes, the employee could not access any of the 401(k) funds until age 59.5, but then could access all of the funds less income taxes. Thus, the employee would not pay *zakāt* on the 401(k) account before age 59.5. After that, the annual *zakāt* would be 2.5% of the current after-tax value of the account. Under this approach, the total *zakāt* over the lifetime of the 401(k) is \$434,379,<sup>174</sup> which has a real value of \$174,029 (assuming a 2% annual inflation rate).

As noted above, even before age 59.5, employees who leave their employer can withdraw their 401(k) funds when employment is terminated. Thus, for a second scenario, assume the employee switches employers at least every Islamic year, so he or she could access all his or her 401(k) funds every year. However, if the employee were to withdraw the funds and not roll them over into another tax-advantaged account, income taxes would have to be paid on the withdrawal and—if the withdrawal were before age 59.5—would incur an additional 10% penalty. In this scenario, the annual *zakāt* before age 59.5 would be 2.5% of the current after-tax and after-penalty value of the 401(k) accounts.<sup>175</sup> After age 59.5, it would be 2.5% of the current after-tax value of the 401(k) accounts. Under this approach, the total *zakāt* over the lifetime of his or her 401(k) accounts would be \$549,273, which would have a real value of \$242,731 (assuming a 2% annual inflation rate).

### *Calculation Method 3: Zakāt Assessed on Employee Contributions*

Under this approach, until the 401(k) funds are accessible, *zakāt* is due each year on the total amount of contributions the employee voluntarily made to the 401(k) account

---

<sup>171</sup> See *supra* notes 102–103 and accompanying text.

<sup>172</sup> See *supra* notes 103–106 and accompanying text.

<sup>173</sup> See *supra* note 108 and accompanying text.

<sup>174</sup> Like in all the calculation methods, this includes the \$5,516 *zakāt* on the funds that are withdrawn from the 401(k) in the most recent month. Recall that, in the first calculation method, these withdrawn funds are the only 401(k) funds on which *zakāt* is paid.

<sup>175</sup> Because the employee has a different 401(k) account at each employer, the employee will have multiple accounts. Our calculations using this approach aggregate these accounts to report the total *zakāt* that the employee will pay on the 401(k) funds.

less the taxes that will have to be paid on those contributions when they are eventually withdrawn.<sup>176</sup> Thus, before age 59.5, the *zakāt* is 2.5% of the employee's total contributions less taxes. After the 401(k) funds are accessible at age 59.5, *zakāt* is due each year on all the 401(k) funds less the taxes that would have to be paid when they are withdrawn. Assuming that the employer allows in-service withdrawals, the 401(k) funds are accessible at age 59.5. Under this approach, the total *zakāt* over the lifetime of the 401(k) account would be \$478,147, which would have a real value of \$201,222 (assuming a 2% annual inflation rate).

As noted above, the reasoning behind this approach implies that, before the 401(k) funds are accessible, *zakāt* should also be paid on the after-tax investment returns on the employee's (but not the employer's) contributions because the employee also would have had access to those investment returns if the employee had chosen to invest his or her own 401(k) contributions outside of a 401(k) account instead. This calculation adjustment makes the *zakāt* higher. Specifically, the total *zakāt* over the lifetime of the 401(k) account would be \$536,694, which has a real value of \$235,159 (assuming a 2% annual inflation rate).

In summary, the amount of *zakāt* paid on 401(k) accounts can differ dramatically based on which *zakāt* calculation method is used. Table 2 summarizes the total nominal and real (inflation-adjusted) value of the *zakāt* paid under each of these approaches. As displayed in the case study, there could be about a \$545,000 difference in the *zakāt* paid based on which scholarly opinion the payer follows. Even after adjusting for inflation, the dollar difference is still extremely large; one calculation method leads to about 124 times more *zakāt* than does another method.

---

<sup>176</sup> Under this approach, we believe it is appropriate to only pay *zakāt* on the after-tax value of the employee's contributions. Recall that the rationale for this approach appears to be that the employee could have had access to his or her own 401(k) contributions if the employee had chosen not to contribute to the 401(k). However, if the employee had not contributed to the 401(k), he or she would have had to pay income taxes on that extra income. Thus, the employee only could have had access to the after-tax value of his or her 401(k) contributions.

**TABLE 2: Zakāt on 401(k) Retirement Account Over Lifetime of the Account**

<b>ZAKĀT CALCULATION BASIS</b>	<b>TOTAL ZAKĀT PAID (Nominal Dollars)</b>	<b>TOTAL ZAKĀT PAID (Real Dollars)</b>
<b>1. Withdrawn Funds</b>	\$ 5,516	\$ 1,957
<b>2. Accessible Funds</b>		
<i>a. Single Lifetime Employer</i>	\$ 434,379	\$ 174,029
<i>b. Different Employer Annually</i>	\$ 549,273	\$ 242,731
<b>3. Employee Contributions</b>		
<i>a. Contributions Only</i>	\$ 478,147	\$ 201,222
<i>b. Contributions Plus Returns     on Contributions</i>	\$ 536,694	\$ 235,159

If the assumptions underlying these calculations change, the numbers in this table could change drastically. For example, we assumed the employee's starting annual salary was \$30,000. If his or her starting salary was \$50,000 instead, then the total *zakāt* paid under the "Employee Contributions Plus Returns on Contributions" approach would be \$894,489, and under the "Withdrawn Funds" approach would be only \$9,194.<sup>177</sup> In contrast, if the annual investment returns were less than the assumed 7%, the differences between the approaches would also be less. Regardless of which reasonable assumptions are used, the conclusion is the same: the chosen *zakāt* calculation method has a dramatic effect on the amount of *zakāt* paid.

## V. CONCLUSION

*Zakāt* is one of the most important religious obligations for Muslims. However, there is no consensus on how to calculate it for many modern financial assets. Developing these calculation rules requires applying principles from the classical legal canon to asset types that did not exist at that time. It is unsurprising that scholars disagree on how to do this. Indeed, differences of opinion are common among Islamic scholars, even in matters involving other major religious obligations such as the daily prayers.<sup>178</sup> In classical manuals or compendiums of Islamic law, it is not unusual to find ranges of opinions on many issues.<sup>179</sup> Usually, such differences are not concerning. On the

<sup>177</sup> The real value of the *zakāt* paid under these two approaches would be \$391,931 and \$3,262, respectively.

<sup>178</sup> For a survey of such disagreement, see BEHNAM SADEGHI, *THE LOGIC OF LAW MAKING IN ISLAM: WOMEN AND PRAYER IN THE LEGAL TRADITION* 53–60 (2013).

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

contrary, scholarly disagreement is traditionally considered a blessing.<sup>180</sup> Historians favorably contrast the pluralism and interpretive latitude of classical Islamic law with the rigidity of its codification under colonial rule and the modern nation-state.<sup>181</sup>

But unlike differences of scholarly opinion in other religious matters, the magnitude of the *zakāt*-calculation differences and how these opinions are presented today cause serious problems for Muslim communities. For example, scholars also differ regarding the proper placement of one's hands in the daily prayers.<sup>182</sup> However, that choice has no effect beyond where Muslims place their own hands—the choice does not affect the spiritual benefits from prayer and certainly does not affect anyone else. In contrast, Muslims' choices regarding *zakāt*-calculation causes inequity, confusion, and a moral hazard for American Muslims that threatens to undermine the societal and spiritual purposes of *zakāt*.

This Article uses two case studies to demonstrate the first problem—the great inequity that can occur. In particular, the case studies show that two people with identical, substantial assets in 401(k) accounts or stock can pay dramatically different amounts of *zakāt* over their lifetimes depending on the calculation formulas they use. This is especially important because of the large value and widespread ownership of these assets in the United States.

In addition, these differences in the *zakāt*-calculation formulas create other problems because of how Islamic knowledge is transmitted today. Traditionally, a layperson seeking guidance on a religious issue—such as how much *zakāt* to pay—would consult a local *mufti* from the legal school the layperson followed. Thus, although jurists had substantial differences of opinions on many issues, lay Muslims could be shielded from these scholarly disagreements. Today, however, anyone with an internet connection can instantaneously obtain advice from a wide range of sources. This has the advantage of great convenience; the internet provides Muslims with answers to their religious questions quickly and easily. However, with regard to *zakāt* calculation, this convenience also comes with serious drawbacks.

One such drawback is the second problem: the great confusion felt by Muslims trying to calculate their *zakāt*. The internet forces lay Muslims to confront the scholarly disagreements. As we demonstrate in this article, a Muslim consulting the internet must navigate through—and choose from among—a wide range of conflicting advice. Furthermore, the advice provided via the internet is qualitatively different from the opinions provided in classical Islamic law. In a legal tradition marked by internal disagreement, the ability to connect legal judgments with their underlying rationales and methodological procedures is necessary to maintain organizational order and stability. Today, internet advice encompasses a range of opinions within and across legal schools. This *zakāt*-calculation advice generally is not presented as being anchored in a coherent theoretical or methodological framework of legal reasoning. It is rarely identified as coming from a particular legal school. For example, of all the internet advice regarding

---

<sup>180</sup> See *supra* text accompanying note 31.

<sup>181</sup> See *supra* note 32 and accompanying text.

<sup>182</sup> See Yasin Dutton, *Amal v Hadīth in Islamic Law: The Case of Sadl al-Yadayn (Holding One's Hands by One's Sides) When Doing the Prayer*, 3 ISLAMIC L. & SOC'Y, no. 1, 1996, at 13, 13–40.

*zakāt* calculation on stocks and 401(k) accounts surveyed in this article, only one identified itself as following a particular school. Instead, the advice is generally given only as a set of technical formulas. Muslims accessing this advice receive no guidance for choosing one calculation method over another.

The final problem resulting from the uncertainty over which calculation formulas to use is the creation of a moral hazard for lay Muslims: the great potential for *taḥfīq*. The choice of calculation methods can dramatically affect the amount of *zakāt* one pays, especially over one's lifetime. When confronted with a wide range of advice regarding how to calculate *zakāt*—and no guidance regarding how to choose among that advice—many Muslims might choose the formulas that minimize their *zakāt* payments. This approach reduces the spiritual benefits received by *zakāt* payers. It also undermines a primary social purpose of *zakāt*: providing material support to society's needy.

These problems lack an obvious solution. One potentially helpful approach, however, is to create a searchable database that collects and organizes scholars' opinions regarding calculating *zakāt* on asset types over which there is scholarly disagreement. For example, for each Muslim scholar who has expressed an opinion on the calculation of *zakāt* on 401(k) accounts, the database could contain that opinion along with the school if the scholar is affiliated with one. This would allow a lay Muslim who wants to follow a particular scholar's opinion to easily find that opinion. Also, a lay Muslim who follows a particular school (rather than a particular scholar) could use the database to find which opinion is most prevalent among scholars affiliated with that school. Lay Muslims who do not follow a particular scholar or school could at least compare the relative merits and bases of reasoning behind the competing opinions. In addition, to encourage the database's use, the database could be hosted on a website of an organization familiar to American Muslims, such as the Islamic Society of North America or the Islamic Circle of North America.

Such a database could help alleviate some of the problems discussed in this Article. The ability to easily find the opinion of a particular scholar or the predominant opinion of scholars in a particular school would reduce the confusion created by navigating the wide range of opinions available on the internet. It would also provide a sounder basis for choosing one particular calculation method by making the choice less arbitrary and reducing the moral hazard issue because a lay Muslim would have a better understanding of the different calculation methods and the reasoning behind the approaches. For example, a lay Muslim who identifies with a particular school might find it difficult in good conscious to follow the opinion that requires paying the least amount of *zakāt* if he or she is informed that most scholars in that school recommend a different calculation method. However, there could still be great inequity because, as we demonstrated earlier, Muslims who follow different calculation methods could still end up paying vastly different amounts of *zakāt*.

We are fully aware that a database cannot undo the historical-structural changes brought forth by the institutionalization of Islamic law under the modern nation-state and its subsequent dissemination on the internet. Moreover, our purpose in suggesting a database is not to advocate a consensus position against the diversity of opinion inherent in Islamic law. Ideally, such a database would compile different positions on *zakāt*

calculation but only by referencing them to their distinct school-based identities and underlying methodological reasoning.

In conclusion, calculating *zakāt* payments is increasingly complicated for American Muslims today. The internet provides them with easy access to a wide range of advice regarding how to calculate *zakāt* on modern financial assets. However, it also leaves them to navigate this advice without having an informed basis for doing so. As a result, deciding how to fulfill a primary religious obligation appears arbitrary, causing confusion and potentially undermining *zakāt*'s spiritual and social purposes. Providing more structured information about the sources of this advice might at least partially alleviate this problem.