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## “Islamic Law” in US Courts: Judicial Jihad or Constitutional Imperative?

Faisal Kutty

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# “Islamic Law” in US Courts: Judicial *Jihad* or Constitutional Imperative?

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Faisal Kutty\*

One month after the State of Kansas passed Senate Bill 79<sup>1</sup> banning the use of foreign law; a Johnson City district court was faced with the consequences when Elahm Soleimani sought the enforcement of her Islamic marriage contract.<sup>2</sup> Her contract with Farahmarz Soleimani stipulated a *mahr*<sup>3</sup> payment of 1,354 gold coins, a value of \$677,000 at the time, in the

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\* Faisal Kutty is an assistant professor of law at Valparaiso University School of Law and an adjunct professor of Law at Osgoode Hall Law School of York University. Prior to academia, he co-founded the Toronto-based firm KSM Law and served as counsel to a coalition of national Muslim organizations during the faith-based arbitration controversy in Ontario from 2003 to 2005 when the Ontario government ostensibly “banned” Islamic arbitrations. See Faisal Kutty, *The Myth and Reality of “Shari’a Courts” in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 U. St. Thomas L.J. 559, 559 (2010). The author would like to acknowledge research assistance from Zahran Khan (J.D. candidate, Temple University Beasley School of Law) and Ali Chaudhry (J.D. candidate, Leicester University Law School). He would also like to thank Sana Mirza and Shaikh Ahmad Kutty for their comments, suggestions, and encouragement. The author remains indebted to them for their help, suggestions, and insights without which this project would have been left incomplete.

1. S.B. 79, 84th Leg. (Kan. 2012) (enacted).

2. Rafia Zakaria, *Sharia Law Ban and Muslim Wives*, AL JAZEERA, <http://www.aljazeera.com/indepth/opinion/2013/02/201321174724878286.html> (last modified Feb. 16, 2013, 15:18).

3. *Mahr* is a provision of a nuptial contract negotiation by most Muslims who marry according to Islamic custom, both abroad and domestically. Richard Freeland, *The Islamic Institution of Mahr and American Law*, 4 GONZ. J. INT’L L. 2, 2 (2001). Generally, it is considered the husband’s payment of money to the wife, which can be a small token sum of one dollar or millions of dollars.

event of divorce.<sup>4</sup> From the facts, it appears that Farahmarz was more than happy to agree to the *mahr* amount at the time of the marriage given that it was his second marriage and she was twenty-four years his junior.<sup>5</sup>

While introducing the bill for a vote on July 1, 2012, State Senator Susan Wagle told the Kansas Legislature that it was "a vote to protect women,"<sup>6</sup> confirming the suspicions of many that it was specifically designed to target "*Sharī'ah*" law.<sup>7</sup> Elham would beg to disagree with the

*Id.* The property received is the legal property of the wife, so it is not a "bride price." *Id.* Many times, there is a portion that is deferred and a portion that comes due immediately. *Id.*

4. Zakaria, *supra* note 2. See *In re Marriage of Soleimani v. Soleimani*, No. 11CV4668 Ch. 23, Div. 7 (Dist. Ct. of Johnson Cnty., Kan. Civ. Ct. Dep't Aug. 28, 2012), available at <http://www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf>.

5. Zakaria, *supra* note 2. In traditional Muslim societies the *mahr* served as a form of security for women from being divorced or constructively divorced. See *id.*

6. Zakaria, *supra* note 2. "This [bill] doesn't say 'Sharia law,'" Republican State Senator Chris Steineger said in a speech that condemned the legislation for discriminating against Muslims, "but that's how it was marketed back in January and all session long—and I have all the e-mails to prove it." Abed Awad, *The True Story of Sharia in American Courts*, THE NATION (July 13, 2012), <http://thenation.com/article/168378/true-story-sharia-american-courts#>.

7. I use *Sharī'ah* because anti-Islamic law activists have been using it. Faiza Patel, Matthew Duss & Amos Toh, *Foreign Law Bans: Legal Uncertainties and Practical Problems*, CTR. FOR AM. PROGRESS 1 (May 2013), available at <http://americanprogress.org/wp-content/uploads/2013/05/ForeignLawBans.pdf>. They are referred throughout as anti-*Sharī'ah* activists. Some writers also inaccurately use *Sharī'ah* and Islamic law interchangeably. See *id.* at 5. There is also confusion and conflation of the terms *Sharī'ah* and *Fiqh*. *Id.* The most accurate characterization of what some people object to are certain *Fiqh* positions, views or rulings (loosely subsumed under Islamic law). See *id.* (explaining that if people are objecting to the "processes of Islamic legal reasoning or the rulings produced through it," they are referring to the term *fiqh*. *Sharī'ah* encompasses the broad and overarching principles and methodologies, while *fiqh* is used to refer to the body of derivative rules formulated by jurists. *Id.* *Fiqh* and Islamic law may be closer in terms of meaning but the two may also be different depending on context and use. See *id.* (highlighting the slight difference in meaning between *fiqh* and *Sharī'ah*). Muhammad Asad, the prominent Islamic thinker, narrows down the *Sharī'ah* to the *nusus*, the definitive ordinances of the *Qur'ān* which are expounded in positive legal terms. See M. H. Kamali, *Source, Nature and Objectives of Shari'ah*, 33 ISLAMIC Q. 211, 233 (1989). "Islamic law is far broader and includes those rules and laws that have been derived using sources and methodologies for deriving laws sanctioned by Islamic jurisprudence, as well as all the quasi-Islamic laws in existence in Muslim countries as a result of colonization and secularization." *Id.* Islamic law encompasses *fiqh* (from pre-modern times to contemporary times) as well as the state sanctioned derivatives and laws. See *id.* In other words, Islamic law can refer to the following: (1) classical/medieval/pre-modern iterations of *fiqh*; (2) the laws in some Muslim nations which are more accurately an amalgam of common law and/or civil law and manifestations and derivatives of classical *fiqh* and modern *fiqh*; (3) it can refer to the modified classical (traditionalist) *fiqh* that we find Muslims practicing to varying degrees in contemporary times without any governmental or state oversight or direct interference; (4) it can also refer to diverse salafi/modernist/islamist/progressive, etc. iterations of *fiqh* (and combinations and permutations thereof), which operate similarly to

Senator, her self-proclaimed and self-appointed savior. The court refused to enforce Elham's request citing various reasons, the most significant for our purposes being "the religious nature of the [contract]."<sup>8</sup> In its August 28, 2012 ruling, the court concluded that "enforcing the agreement . . . would abdicate the judiciary's role to protect such fundamental rights [ostensibly women's' rights], a concern that was articulated in Senate Bill No. 79."<sup>9</sup> Essentially the court took the position that enforcing the Islamic contract would violate the foreign law ban and the "separation of Church and State [doctrine] under the Establishment Clause of the First Amendment" of the U.S. Constitution.<sup>10</sup>

This contrasts with a decision the same month in New York in *SB v. WA*, where a Muslim-American woman who was married to an Egyptian man successfully enforced her *mahr* of \$250,000.<sup>11</sup> The court upheld the contract even though it was religious in nature and notwithstanding the fact that the actual divorce took place in the United Arab Emirates.<sup>12</sup>

Now rewind back to 1998. That year in another *mahr* case brought in the State of Massachusetts, Rima Nahavandi sought a court order compelling her husband Ahmad to grant her *mahr* as part of the divorce proceedings.<sup>13</sup> Judge Alexander Waugh wrote: "[T]he agreement should be enforced in an appropriate Islamic tribunal."<sup>14</sup> He identified the threshold questions as: whether the contract was "a purely secular one governed by [the precedent of] 'neutral principles,'" or was it "so inextricably intertwined with the tenets of the Islamic faith that it cannot be enforced in this Court?"<sup>15</sup> Judge Waugh concluded the latter and refused to order Ahmad Nahavandi to pay

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number three. *See id.* (explaining that Islamic law has a broad definition). For a good visual representation of the main concepts see Faisal Kutty & Ahmad Kutty, *The Kutty Islamic Law Flowchart*, available at <http://faisalkutty.com/islamic-law/flowchart/>.

8. *Id.*

9. Zakaria, *supra* note 2.

10. *Id.*

11. *Id.*; *S.B. v. W.A.*, No. 51875(U) (N.Y. Sup. Ct. Sept. 26, 2012) (Justicia), available at <https://law.justia.com/cases/new-york/other-courts/2012/2012-ny-slip-op-51875-u.html>.

12. *Id.*

13. Sylvia Whitman, *Whose Place to Decide? Islamic Family Law Issues in American Courtrooms*, Presented at the Ass'n of Muslim Social Scientists' 34th Annual Conference: Muslims and Islam in the Chaotic Modern World: Relations Among Themselves and with Others (Sept. 30–Oct. 2, 2005) (on file with author) (citing *Nahavandi v. Nahavandi*, No. FM-12-2237-97, (N.J. Ch.)).

14. *Id.*

15. *Id.*

the \$20,000 *mahr* stipulated in the Islamic marriage contract.<sup>16</sup> The judge did state though that if the wife, Rima, was to get a favorable decision from an Islamic tribunal or Imam, then she could have it enforced through the courts.<sup>17</sup>

Before and since the many foreign law/*Sharī'ah* law ban proposals, various courts in diverse North American jurisdictions have taken different positions on such religious questions and proposed different solutions.<sup>18</sup> This ground reality of case-by-case decision-making—as disjointed as it is—challenges the view advocated by proponents of the *Sharī'ah* law/foreign law ban that "Islamic law" is overtaking American law.<sup>19</sup> Their calls to ban foreign law/ *Sharī'ah* law demonstrate a lack of understanding of the nuances and sophistication of both American law and of course Islamic law.<sup>20</sup>

16. *Id.*

17. *Id.*

18. See Jay M. Zitter, *Application, Recognition, or Consideration of Islamic Law by Courts in United States*, 82 A.L.R. 6th 1 (2013); see also Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *WOMEN'S RIGHTS & ISLAMIC FAMILY LAW* 177, 177–229 (Lynn Welchman ed., 2004); see also JULIE MACFARLANE, *ISLAMIC DIVORCE IN NORTH AMERICA: A SHARĪ'A PATH IN A SECULAR SOCIETY* (Oxford Univ. Press 2012).

19. The foreign law ban movement, which morphed into the "American law for American courts" movement, started out as a "ban *Sharī'ah* law" movement. "Although packaged as an effort to protect American values and democracy, the bans spring from a movement whose goal is the demonization of the Islamic faith . . . . The most vociferous proponents of foreign law bans are a small network of activists who cast Muslim norms and culture, which they collectively and inaccurately labeled as Sharia law, as one of the greatest threats to American freedom since the Cold War." Patel, *supra* note 7; see also Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 30, 2011, available at [http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&_r=0) (describing the Anti- *Sharī'ah* law movement as an "orchestrated drive" begun by David Yerushalmi, "a 56-year-old Hasidic Jew with a history of controversial statements about race, immigration, and Islam"); Wajahat Ali, Matthew Duss, Lee Fang, Scott Keyes & Faiz Shakir, *Fear Inc: The Roots of the Islamophobia Network in America*, CTR. FOR AM. PROGRESS, (Aug. 2011) 2, <http://www.americanprogress.org/issues/2011/08/pdf/islamophobia.pdf>. The recasting as a foreign law/international law ban came after the Oklahoma save the state referendum banning the use of Islamic law in state courts was deemed unconstitutional. See *Awad v. Ziriax*, 670, F.3d 1111, 1129–1131 (10th Cir. 2012). See also Omar Sacirbey, *Anti-Shariah movement changes tactics and gains success*, RELIGION NEWS SERV. (May 16 2013), <http://www.religionnews.com/2013/05/16/anti-shariah-movement-changes-tactics-and-gains-success/>.

20. In popular usage, this term raised the specter of stoning women, capital punishment, and other such fears. See Sherman A. Jackson, *What is Shariah and Why Does it Matter?*, HUFFINGTON POST (Sept. 11, 2010, 8:16 PM), [http://www.huffingtonpost.com/sherman-a.jackson/what-is-sharia-andwhy-d\\_b\\_710976.html](http://www.huffingtonpost.com/sherman-a.jackson/what-is-sharia-andwhy-d_b_710976.html). A significant contributing factor to this fear is the *Sharī'ah*-based laws

Such cases highlight the tension inherent when courts engage with religion per se, but in particular Islam and Muslims in the present Islamophobic climate.<sup>21</sup> There has always been an uneasy relationship

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and practices in certain Muslim countries. Arguments in defense of Islam or Islamic jurisprudence became unwinnable no matter how nuanced or qualified once the term *Shari'ah* was associated with the issue. As Tariq Modood accurately noted in the British context: "Part of the problem is language. The mere fact of saying something positive about '*sharia*' leads to knee-jerk hostility amongst many people, just as the term 'secularism' regrettably is understood [by some] Muslims as a policy of atheism, colonialism or postcolonial despotism. The use of either of these terms can lead to the closing of minds, however reasonable and qualified what is being said." Tariq Modood, *Multicultural Citizenship and the Anti-Sharia Storm*, OPENDEMOCRACY (Feb. 14, 2008), [http://www.opendemocracy.net/article/faith\\_ideas/europe\\_islam/anti\\_sharia\\_storm](http://www.opendemocracy.net/article/faith_ideas/europe_islam/anti_sharia_storm). For a detailed discussion of Islamic law sources, methodology, diversity and potential for evolution see Faisal Kutty, *The Myth and Reality of 'Shari'a Courts' in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 U. ST. THOMAS L.J. 559, 577–595 (2010). Despite the nuance—complexity, diversity and changeability in Islamic jurisprudence—opponents have seized on a fundamentally flawed understanding of "Sharia law." As explained in a recent report issued by the Center for American Progress, the "'Sharia threat' argument is based on an extreme type of scripturalism where one pulls out verses from a sacred text and argues that believers will behave according to that text." Wajahat Ali & Matthew Duss, *Understanding Sharia Law: Conservatives' Skewed Interpretation Needs Debunking*, CTR. FOR AM. PROGRESS 3 (March 2011), [http://www.americanprogress.org/issues/2011/03/pdf/sharia\\_law.pdf](http://www.americanprogress.org/issues/2011/03/pdf/sharia_law.pdf). But "[t]here is no one thing called Sharia." *Id.* Rather, "[a] variety of Muslim communities exist, and each understands Sharia in its own way." *Id.* Thus, attributing particular beliefs and activities to all Muslims based on the Quran or other religious writings would be akin to declaring, based on the Bible, that all "Jews stone disobedient sons to death (Deut. 21:18-21) or that Christians slay all non-Christians (Luke 19:27)." *Id.* Moreover, because Sharia "is overwhelmingly concerned with personal religious observance such as prayer and fasting, and not with national laws," characterizing it as a threat to our courts or country "is the same thing as [saying that] all observant Muslims are a threat," as "[i]t is [impossible to] find a Muslim who practices any ritual and does not believe himself or herself to be complying with Sharia." *Id.* These fine details fall on deaf ears when hysteria, fear, and emotions take over.

21. *Id.*; see also NATHAN LEAN, THE ISLAMOPHOBIA INDUSTRY: HOW THE RIGHT MANUFACTURES FEAR OF MUSLIMS (2012); Haroon Siddiqui, *Islamophobia: The new anti-Semitism*, TORONTO STAR (Sept. 16, 2012), [http://www.thestar.com/news/insight/2011/09/16/islamophobia\\_the\\_new\\_antisemitism.html](http://www.thestar.com/news/insight/2011/09/16/islamophobia_the_new_antisemitism.html); Daniel Luban, *The New Anti-Semitism*, TABLET (Aug. 19, 2010), <http://www.tabletmag.com/jewish-news-and-politics/43069/the-new-anti-semitism-2>; Commission on British Muslims, RUNNYMEDE, [www.runnymedetrust.org/projects-and-publications/projects/past-projects/commissionOnBritishMuslims.html](http://www.runnymedetrust.org/projects-and-publications/projects/past-projects/commissionOnBritishMuslims.html) (last visited Mar. 1, 2014); Highlights of EUMC Report Muslims in the European Union: Discrimination and Islamophobia, E.U. AGENCY FOR FUNDAMENTAL RIGHTS (Dec. 2006), <http://fra.europa.eu/en/publication/2006/highlights-eumc-report-muslims-european-union-discrimination-and-islamophobia>; Declaration of the Stockholm International Forum Combating Intolerance (Jan. 30, 2001), available at <http://www.fasena.de/download/rechts/SIFCI.pdf>; Mark Potok, *FBI: Anti-Muslim Hate Crimes Still Up*, SALON (Dec. 10, 2012), [http://www.salon.com/2012/12/10/fbi\\_anti\\_muslim\\_hate\\_crimes\\_still\\_up/](http://www.salon.com/2012/12/10/fbi_anti_muslim_hate_crimes_still_up/); Mark Potok, *The 'Patriot' Movement Explodes*, S. POVERTY L. CTR., <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/the-year-in-hate-and-extremism> (last

between religion and law. Since the Enlightenment, secular and religious elites have been constantly negotiating and renegotiating their respective spheres of influence and power. In much of the western world, the dominant discourse and practice became one of strict separation of church and state.<sup>22</sup> From this marginalization and premature pronouncement of its demise, religion has come back from the dead to reclaim an even greater role in the new world.<sup>23</sup> As globalization ramps up and nation-states become more multi-religious, modern liberal democracies are witnessing even more complex tensions between law and religion. This has obviously resulted in more legislation, disputes and of course increased litigation. The US is of course no exception. As recently as the 1960's and 1970's religion had relatively little place in the current system, but now "the current system...embraces religion as an important source and dimension of law, politics and society."<sup>24</sup>

This paper argues that in a nation with a constitutional guarantee of freedom of religion, and which respects the notions of freedom of contract and legal pluralism, religion must not be excluded outright from the calculus of court decisions if we are to ensure equal treatment and access to justice in a multi-religious society. Contrary to those who argue that America is experiencing creeping *Shari'ah* and that courts have caved in to judicial *jihad*, this paper posits that courts have simply carried out their constitutional imperative of equal treatment and religious freedom for all within the parameters of the Constitution, principles of comity, freedom of contract, and federal and state public policy goals. Part I introduces the issue with a macro overview of first amendment jurisprudence. Part II reviews how U.S. courts have treated cases involving contracts, arbitrations,

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visited Mar. 1, 2014).

22. DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* (2003). In contrast, in much of the Islamic world there was no theoretical separation of the two but in practice the state and the *ulama* (jurists and scholars) had their mutually understood spheres of influence and control at least in the *Sunni* context. See, e.g., LEON CARL BROWN, *RELIGION AND STATE: THE MUSLIM APPROACH TO POLITICS* 1–5 (2000).

23. See, e.g., Wendy Kaminer, *The Tea Party's Religious Inspiration*, ATLANTIC (Feb. 25, 2011), <http://www.theatlantic.com/politics/archive/2011/02/the-tea-partys-religious-inspiration/71679/>; Jonathan Merritt, *The Rise of the Christian Left in America*, ATLANTIC (July 25, 2013), <http://www.theatlantic.com/politics/archive/2013/07/the-rise-of-the-christian-left-in-america/278086/>.

24. John Witte, *The Study of Law and Religion in the United States: An Interim Report*, 14 ECCLESIASTICAL L.J. 327, 329–330.

defenses, and other personal law matters brought by Muslims or that address the Islamic faith. Part II also situates this debate through the prism of the right to contract, the principle of comity and public policy. Part III presents the argument that, given the essentially multicultural and legal pluralistic nature of American society, constitutional rights to religious freedom and freedom of contract will only have any real value when religious communities, including Muslims, are guaranteed some level of autonomy and access to justice both within and outside US courthouses. Part V concludes that far from succumbing to the *Sharī'ah* bogeyman and an imaginary judicial *jihad*, defending religious freedoms and equal treatment is the only way to remain true to the founding constitutional principles of this great country.

#### I. THE FIRST AMENDMENT AND RELIGION IN U.S. COURTS

Religious tribunals, religious schools and vouchers, religious symbols, the pledge of allegiance, religion and discrimination laws, religious liberty, personal law and status issues, contracts, and inheritance, among others, are some of the catalysts that engage law and religion. To appreciate the tension inherent in these issues, we must first explore the evolving understanding of the First Amendment in American history. Indeed, the First Amendment's protection of religious freedom is one of the most celebrated aspects of the American liberal tradition.<sup>25</sup> Many have argued that this is achieved through a wall of separation.<sup>26</sup> The most acclaimed champion of the notion of a wall of separation between church and state is America's founder Thomas Jefferson.<sup>27</sup> In a series of tracts, he argued that true religious liberty can only

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25. See, e.g., John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869, 1869-1905 (2003).

26. See, e.g., *id.*

27. See Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation Between Church & State,"* 7 J. ASS'N LEGAL WRITING DIRECTORS 123, 132 (2010). Though some argue that the separation of church and state has no historical foundation in the First Amendment, Philip Hamburger argues that the detailed evidence shows that eighteenth-century Americans almost never invoked this principle. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 19 (2002). Although Thomas Jefferson and others retrospectively claimed that the First Amendment separated church and state, Hamburger argues that separation became part of American constitutional law only much later. *Id.* Others suggest that: "The First Amendment did not conceive religious freedom; rather, it adopted and incorporated the widely-recognized natural and inalienable right of each person to worship God according to his or her own conviction and conscience." See E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 488



be attained by privatizing religion and secularizing politics.<sup>28</sup> He further argued that religious privatization is the bargain that must be struck to contain religious bigotry and ensure religious freedom for all.<sup>29</sup> Jefferson, it is argued, read this understanding of religious liberty into the First Amendment of the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>30</sup>

Without wading into the detailed legislative and judicial histories, this view of the Establishment Clause, though initially dismissed as too radical, was affirmed by the Supreme Court in the 1947 case of *Everson v. Board of Education of Ewing Twp.*<sup>31</sup> Justice Hugo writing for the majority noted: "In the words of Jefferson, the clause against the establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"<sup>32</sup> Then in 1971, the Supreme Court established a three-part test for First Amendment Establishment Clause challenges in *Lemon v. Kurtzman*.<sup>33</sup> First, the law must have a secular purpose.<sup>34</sup> Second, the primary effect of the law must not be to advance nor hinder religion.<sup>35</sup> Third, the law must not foster excessive government entanglement with religion.<sup>36</sup> All three prongs must be satisfied to pass constitutional muster.<sup>37</sup> As John Witte notes: "This constitutional reification of Jeffersonian logic rendered the establishment clause a formidable obstacle to many traditional forms of state patronage of

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(2009).

28. See Hamburger, *supra* note 27; see also DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002). There are also those who argue that Jefferson has been misread. See THOMAS S. KIDD, GOD OF LIBERTY: A RELIGIOUS HISTORY OF THE AMERICAN REVOLUTION (2010); see also Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 494–95 (2004).

29. See Hamburger, *supra* note 27, at 19.

30. U.S. CONST. AMEND. I. Notwithstanding this view, there is now much scholarship arguing that Jefferson demanded a firm separation of church and state but never sought a wholly secular public square. See, e.g., JOHN RAGOSTA, RELIGIOUS FREEDOM: JEFFERSON'S LEGACY, AMERICA'S CREED (2003).

31. 330 U.S. 1, 15–16 (1947).

32. *Everson v. Board of Education*, 330 US 1, 15-16 (1947).

33. *Lemon v. Kurtzman*, 403 US 602 (1971)

34. *Id.*

35. *Id.*

36. *Id.* at 613.

37. *Id.* at 612.

and co-operation with religion."<sup>38</sup>

With respect to the accompanying Free Exercise provision, fast forwarding to the contemporary era, the Supreme Court under Earl Warren adopted an expansive view.<sup>39</sup> The Court required that states have a "compelling interest" in refusing to accommodate religiously motivated conduct in *Sherbert v. Verner*.<sup>40</sup> The case involved Adele Sherbert, who was denied unemployment benefits by South Carolina because she refused to work on Saturdays, something forbidden by her Seventh-day Adventist faith.<sup>41</sup> In *Wisconsin v. Yoder*, the Court ruled that a law that "unduly burdens the free exercise of religion" without a compelling interest, even though it might be "neutral on its face," would be unconstitutional.<sup>42</sup> The "compelling interest" doctrine became much narrower in 1990, when the Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* that as long as a law does not target a particular religious practice, it does not violate the Free Exercise Clause.<sup>43</sup> In 1993, the Supreme Court revisited the Free Exercise Clause in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>44</sup> Hialeah had passed an ordinance banning ritual slaughter, a practice central to the Santería religion, while providing exceptions for some practices such as the kosher slaughter of Judaism. Since the ordinance was not "generally applicable," the Court ruled that it was subject to the compelling interest test, which it failed to meet, and was therefore declared unconstitutional.<sup>45</sup>

Defenders of the Free Exercise Clause argue that it is as a cornerstone of

38. John Witte, *The Study of Law and Religion in the United States: An Interim Report*, 14 ECCLESIASTICAL L.J. 327, 338 (2012).

39. See Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN. ST. L. REV. 77 (2007); Joseph A. Ignagni, *U.S. Supreme Court Decision-Making and the Free Exercise Clause*, 55 REV. POL. 511, 511-29 (1993).

40. 374 U.S. 398, 403 (1963).

41. *Id.* at 399.

42. 406 U.S. 205, 220 (1972).

43. 494 U.S. 872, 894 (1990).

44. 508 U.S. 520 (1993).

45. *Id.* at 531. Also in 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which sought to restore the "compelling interest" standard. In *City of Boerne v. Flores* (1997) the Court struck down the provisions of the Act that forced state and local governments to provide protections exceeding those required by the First Amendment, which the courts enjoy sole power to interpret. According to the Court's ruling in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, RFRA remains applicable to federal statutes, which must therefore still meet the "compelling interest" standard in free exercise cases. 546 U.S. 418, 439 (2006).

American history and liberty, while critics argue that it grants a privileged and undeserved legal status to increasingly irrelevant religious communities.<sup>46</sup> Courts in Canada and much of Europe have frequently turned to proportionality analysis to determine what provisions ought to be allowed for individuals' religious liberty.<sup>47</sup> In contrast, in the United States, courts have historically attempted to leave such decisions to legislators. This clearly goes against the argument of those advocating for a ban on *Sharī'ah* law that the courts have been giving in to *Sharī'ah*.

Recent examples of these tensions in the United States include a wide range of conflicts, including a proposed circumcision ban in San Francisco,<sup>48</sup> the foreign law/*Sharī'ah* law bans,<sup>49</sup> and state laws prohibiting religiously-motivated business owners from denying services for same-sex weddings.<sup>50</sup>

Indeed, even the apex court of the nation has itself been called upon to address recent skirmishes between law and religion, issuing decisions in both *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*<sup>51</sup> and *CLS v. Martinez*<sup>52</sup> that consider conflicts between anti-discrimination norms and religious liberty. In November 2013, the Court also heard arguments in *Town of Greece v. Galloway*,<sup>53</sup> where the Court was asked to determine whether a New York town's practice of having prayer before town board meetings violates the establishment clause.<sup>54</sup>

At the end of 2013, the Court agreed to weigh in on the *Patient Protection and Affordable Care Act*<sup>55</sup> (ACA) requirement that employers

46. See Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1083–1120 (2008); see also Edward McGlynn Gaffney, Jr., *Curious Chiasma: Rising and Falling Protection of Religious Freedom and Gender Equality*, 4 U. PA. J. CONST. L. 394 (2002).

47. T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. LAW 465, 466 (2005).

48. Madison Park, *San Francisco judge removes circumcision ban from ballot*, CNN (July 28, 2011), <http://www.cnn.com/2011/HEALTH/07/28/circumcision.ban.voting/>.

49. *State Legislation Restricting Use of Foreign or Religious Law*, PEWRESEARCH: RELIGION AND PUBLIC LIFE PROJECT (April 8, 2013), <http://features.pewforum.org/sharia-law-map/>.

50. See, e.g., *Initial Decision Granting Complainant's Motion for Summary Judgment*, Craig v. Masterpiece Cakeshop, Inc., No. CR 2013-0008 (Colo. Admin. Ct. Dec. 6, 2013), available at [https://www.aclu.org/sites/default/files/assets/initial\\_decision\\_case\\_no\\_cr\\_2013-0008.pdf](https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf).

51. 132 S. Ct. 694. (2012).

52. 130 S. Ct. 2971 (2010).

53. 681 F. 3d 20 (2d Cir. 2012).

54. *Id.* at 22.

55. OFFICE OF THE LEGIS. COUNSEL, 111<sup>TH</sup> CONG. COMPILATION OF PATIENT PROTECTION AND

provide contraceptive coverage to their employees irrespective of the employers' religious objections. The Court has agreed to hear an appeal from the 10th U.S. Circuit Court of Appeals, which sided with Hobby Lobby, an Oklahoma-based chain of craft stores owned by a Christian family who claimed that providing such coverage would violate the company's religious freedom.<sup>56</sup> At the same time it will hear a related appeal from the 3rd U.S. Circuit Court of Appeals, which denied that Conestoga Wood Specialties Corp. had the same religious conscience rights as an individual.<sup>57</sup> Earlier this year, the court also granted a temporary injunction temporarily barring the Obama administration from enforcing the Health and Human Services contraceptive mandate under the ACA against Little Sisters of the Poor.<sup>58</sup>

A review of case law reveals that people of all faiths have used their right to seek relief through the courts when they believe their religious freedom is restricted.<sup>59</sup> Indeed, courts throughout America have been called upon to adjudicate assertions of religious freedom in a variety of contexts and faiths where religious beliefs and practices conflict with state law.<sup>60</sup> This should not cause any concerns provided that courts do not become improperly entangled with religion. Anti-*Shari'ah* advocates point to *Allah v. Adella Jordan-Luster*,<sup>61</sup> as an example of wading improperly into religion.<sup>62</sup> Shaheed's claim that the prison violated his free exercise rights by not ensuring that all the meat served to him was prepared in accordance with his Islamic beliefs was rejected by the court.<sup>63</sup> Contrary to what anti-*Shari'ah* advocates claim, rather than caving in to this instance of "Judicial

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AFFORDABLE CARE ACT (2010), available at <http://housedocs.house.gov/energycommerce/ppacacon.pdf> (Sandra L. Strokoff & Edward G. Grossman).

56. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (2013).

57. Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377, 388 (3d Cir. 2013).

58. Little Sisters of the Poor Home for the Aged v. Sebelius, 134 S. Ct. 893, 893 (2013).. As of February 13, 2014, the Becket Fund for Religious Liberty documents ninety-three challenges to the ACA HHS contraceptive mandate. *Legal Challenges to the HHS Mandate*, THE BECKETT FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last viewed Feb. 13, 2014).

59. See Patel, *supra* note 7, at 1.

60. *Id.*

61. No. 04-1083, 2007 WL 2582199 (C.D. Ill. Aug. 3, 2007).

62. Spearit, *Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 WHITTIER L. REV. 29, 42 (2012).

63. *Allah*, 2007 WL 2582199, at \*10.

*Jihad*," the court ruled against the Muslim inmate and held that the prison's practice of serving pork-free meals was sufficient accommodation.<sup>64</sup>

Anti-*Sharī'ah* advocates appear to have a problem with someone even raising Islam in court, while apparently not having any issues with other groups raising similar arguments.<sup>65</sup> Many of them appear to blame Muslims for what they see as increasing porousness of the wall of separation.<sup>66</sup> The wall of separation is clearly not as solid or as impermeable as once thought, but for reasons other than those advanced by anti-*Sharī'ah* advocates— Islam and Muslims.<sup>67</sup> This shift has been taken place not because of foreign law and certainly not due to any takeover by *Sharī'ah* advocates.<sup>68</sup> It has simply been a response to the demands from American society.<sup>69</sup> Religious scholar John Witte, for instance, writes:

Over the past 30 years, the Supreme Court has been quietly defying its earlier separationist logic and has reversed some of its harshest

64. *Id.*

65. Courts have recognized that, "[u]nder both the Free Exercise Clause and RLUIPA in its most elemental form, a prisoner has a 'clearly established . . . right to a diet consistent with his . . . religious scruples[.]' . . . A prison official violates this clearly established right if he intentionally and without sufficient justification denies an inmate his religiously mandated diet." *Lovlace v. Lee*, 472 F.3d 174, 198–99 (4th Cir. 2006) (granting Muslim inmate's request for Ramadan meal). In fact, inmates of diverse faiths routinely request religious diets. Courts grant or deny such requests taking into consideration a number of factors, including the nature of the inmate's claimed religious beliefs, the sincerity of such beliefs, and the institutional justification, if any, for refusing the request. *See, e.g., Nelson v. Miller*, 570 F.3d 868, 869 (7th Cir.2009) (finding that denying a non-meat diet during Lent and on Fridays substantially burdened the religious practice of a Roman Catholic prisoner); *See, e.g., Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (holding that federal prison was required to provide Orthodox Jewish inmate with kosher meals consistent with his religious beliefs); *See, e.g., Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (ordering religious diet requested by inmate follower of Thelema – a magic-based faith).

66. *See* John Witte, Jr., *From Establishment to Freedom of Public Religion*, 32 CAP. U. L. REV. 499 (2004) for a discussion of the break down of the wall of separation of church and state.

67. JAMES HITCHCOCK, *THE SUPREME COURT AND RELIGION IN AMERICAN LIFE, VOL. 1: THE ODYSSEY OF THE RELIGION CLAUSES* (2004); John Witte, Jr., *From Establishment to Freedom of Religion*, 32 CAP. U. L. REV. 499, 513 (2004) (suggesting that recent cases indicate a shift toward freedom of public religion); Steven D. Smith, *How Secularists Helped Knock Down the Wall of Separation between Church and State*, SOCIAL SCIENCE RESEARCH NETWORK (Nov. 8, 2007), <http://ssrn.com/abstract=1028602> (explaining the dissolution of the wall separating church and state).

68. *Id.*

69. *See, e.g., Separation of Church and State*, BOISI CTR. PAPERS ON RELIGION IN THE U.S., [http://www.bc.edu/content/dam/files/centers/boisi/pdf/bc\\_papers/BCP-ChurchState.pdf](http://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP-ChurchState.pdf) (last visited Feb. 13, 2014).

separationist precedents...The Court has defended these more recent holdings on wide-ranging constitutional grounds; among other arguments, as a proper accommodation of religion under the establishment clause; as a necessary protection of religion under the free speech or free exercise clauses; and a simple application of the equal protection clause. Collectively, these cases have shifted the centre of gravity of the First Amendment religion clauses from separationism and secularization to equal treatment of public and private religious expression.<sup>70</sup>

The evidence clearly reveals that this is not the fault of Muslims or Islamic law.<sup>71</sup> Indeed, as a report by the Brennan Center concluded: "When adjudicated within the guidelines of the First Amendment, cases involving Muslims' right to free exercise no more threaten the imposition of Sharia law than, for example, cases involving the rights of Christians pose a 'Biblical threat' to our courts."<sup>72</sup>

## II. CASES INVOKING CONTRACT PRINCIPLES, COMITY AND PUBLIC POLICY

Disputes involving religion in different manifestations and at various levels set these competing interests into stark contrast and pose complex questions to secular judges. In addition to religious liberty cases, in a growing number of cases, the courts as ultimate arbiters of law are called upon to resolve tensions and determine rights and responsibilities pursuant to certain religious arrangements and settlements.<sup>73</sup> These have included cases involving arbitrations, contracts, business disputes, family and other personal law matters and even cases where defenses rely on manifestations of Muslim culture and different interpretations of Islam are raised.<sup>74</sup>

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70. Witte, *supra* note 24, at 339–40.

71. See Patel, *supra* note 7, at 1.

72. ACLU PROGRAM ON FREEDOM OF RELIGION AND BELIEF, NOTHING TO FEAR: DEBUNKING THE MYTHICAL "SHARIA THREAT" TO OUR JUDICIAL SYSTEM 1 (May 2011), available at [https://www.aclu.org/files/assets/Nothing\\_To\\_Fear\\_Report\\_FINAL\\_MAY\\_2011.pdf](https://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf).

73. See, e.g., *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004).

74. There is of course no monolithic Muslim culture or one single understanding of Islam. In fact, Islamic law and culture is deeply contested, interpreted and practiced in a multitude of ways. See, e.g., Asifa Quraishi-Landes, *Sharia and Diversity: Why Some Americans are Missing the Point* INST. FOR SOC. POL'Y & UNDERSTANDING (JAN. 2013), [http://www.ispu.org/pdfs/ISPU\\_Report\\_ShariaDiversity\\_Final\\_web.pdf](http://www.ispu.org/pdfs/ISPU_Report_ShariaDiversity_Final_web.pdf); see also Kutty, *supra* note

Addressing these issues demands a consideration not only of how to weigh the competing interests addressed in Part I, but also of the extent to which secular authorities should assess religious obligations.<sup>75</sup> As the Brennan Center report notes:

“The anti-Sharia movement also distorts how U.S. Courts treat Sharia and other religious codes such as Catholic canon law and Jewish law. Many persons of faith—including Muslims, Jews, and Catholics—arrange their everyday lives according to religious laws and customs.”<sup>76</sup>

American courts have traditionally recognized their ability to consider such cases provided that they are able to adjudicate them using neutral principles of law.<sup>77</sup> These types of cases also engage the notion of freedom of contract, the principle of comity and public policy.<sup>78</sup> Though not necessarily distinct or mutually exclusive at all times, each of these have a long track record in the American legal tradition and I would argue have served the nation well.

There is a well-known common law tradition of freedom of contract which has entrenched itself in the American psyche.<sup>79</sup> The idea of freedom of contract has always elicited heated debate among scholars and the U.S. Supreme Court has tackled and addressed the issue under the contract clause in Article 1, Section 10 of the Constitution and the Fourteenth Amendment due process clause.<sup>80</sup> Without getting into the technical details, the liberty of contract doctrine survives but with significant powers enjoyed by the state to

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20, at 558–97.

75. See Patel, *supra* note 7, at 5.

76. *Id.*

77. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 603 (1979). Courts can enforce agreements that are drafted with religious principles provided that they meet the requirements of secular law. *Id.*

78. These are not necessarily mutually exclusive and are not always distinctly engaged.

79. See, e.g., F. H. BUCKLEY, *THE FALL AND RISE OF FREEDOM OF CONTRACT* (Duke Univ. Press, 1999); P. S. ATIYA, *THE RISE AND FALL OF FREEDOM OF CONTRACT*, (Oxford Univ. Press, 1979); Hanoch Dagan & Michael A. Heller, *Freedom of Contracts* (Columbia Law & Econ., Working Paper No. 458, 2013), available at <http://ssrn.com/abstract=2325254> or <http://dx.doi.org/10.2139/ssrn.2325254>.

80. See generally DAVID. E. BERNSTEIN, *FREEDOM OF CONTRACT* (2008) available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/0851%20Freedom%20of%20Contract.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/0851%20Freedom%20of%20Contract.pdf).

restrict this right.<sup>81</sup>

This raises the question: can we support the idea that the state has the right to interfere in how citizens might decide, by mutual consent, to peacefully settle their private disputes and disagreements? This of course goes against the liberal democratic notion of individual freedom and the latitude to make decisions about one's own life. The issue of arbitrations and Islamic contracts—family or business—is really one of freedom of contract.<sup>82</sup>

Obviously it would be discriminatory to prohibit courts from entertaining such matters merely because Islam was involved without evaluating the merits and substance against long established American judicial practice and legal precedent. This is precisely what many anti-*Shari'ah* advocates are proposing.<sup>83</sup> A June 2011 report published by a right-wing center founded by anti-Muslim activist Frank Gaffney stated that "Shariah law has entered into state court decisions, in conflict with the Constitution and state public policy."<sup>84</sup> The group's general counsel happens to be none other than the man behind the *Shari'ah* ban campaign, David Yerushalmi.<sup>85</sup> The report also claims that there were 150 cases invoking what it inaccurately calls *Shari'ah* law in state courts in 23 states.<sup>86</sup> The report also compiled a list of the "Top 20" cases where judges purportedly deferred to *Shari'ah* law.<sup>87</sup>

81. *Id.* Two caveats are in order with respect to this. *See id.* First, these cases involved business and commercial enterprise. Second, the case law does not negate the idea of freedom of contract but simply provides that the right may be restricted by the state in its attempts to prevent injury or advance its public policy goals.

82. *See* Patel, *supra* note 7, at 23–24. Arguably with more scrutiny and checks and balances in the family context necessary given the greater potential for inter alia abuse, exploitation, coercion, unequal bargaining power and social pressure. *See id.* at 25–27.

83. *See id.* at 5–8.

84. CTR. FOR SEC. POL'Y, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES 8 (May 20, 2011), <http://www.centerforsecuritypolicy.org/2012/08/30/shariah-law-and-american-state-courts/>. *See also Intelligence Files Profiles: Frank Gaffney, Jr.*, S. POVERTY L. CTR., <http://www.splcenter.org/get-informed/intelligence-files/profiles/frank-gaffney-jr.> (last visited Feb. 13, 2014); *see also Issues: Shariah Law*, AM. PUB. POL'Y ALLIANCE, <http://publicpolicyalliance.org/issues-2/shariah-law/> (last visited Feb. 13, 2014).

85. Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), [http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all&_r=0).

86. CTR. FOR SEC. POL'Y, *supra* note 84, at 10–11.

87. *Id.* at 29–42.



One of the cases put forth as evidence of the *Shari'ah* onslaught is a business partnership dispute arbitration, *Abd Alla v. Mourssi*.<sup>88</sup> Far from being part of a stealth *Shari'ah* invasion, the court merely upheld an arbitration award because there was no evidence that the award "was [the] result of fraud, corruption, or other undue means."<sup>89</sup> The court also held that the defendant had run out of time to challenge the tribunal decision.<sup>90</sup>

Alternative dispute resolution is an option that any American can resort to.<sup>91</sup> Arbitration is one of these alternatives.<sup>92</sup> It is one of myriad ways through which people can resolve their disputes.<sup>93</sup> The process is based on contract law within the parameters of Constitution, public policy, and arbitration laws.<sup>94</sup> Within these parameters parties have significant amount of freedom in its design and in crafting their terms of reference.<sup>95</sup> For instance, parties have full rights to choose what rules will govern the resolution of the dispute—be it religious, secular, the law of other jurisdictions (subject to choice of law and conflict of law rules), or any other mutually agreed upon rules.<sup>96</sup> While a party cannot unilaterally withdraw from the process after agreeing to arbitration, the process can be altered or terminated if both parties consent.<sup>97</sup> As with any contractual arrangement, courts can stay a pending action while the matter is being arbitrated.<sup>98</sup> Courts can also be called upon to enforce arbitral decisions and will do so provided that they are not contrary to public policy, discriminatory, totally irrational, or unconscionable.<sup>99</sup>

88. 680 N.W.2d 569, 574 (Minn. Ct. App. 2004).

89. *Id.*

90. *Id.*

91. Katherine V.W. Stone, *Alternative Dispute Resolution*, in *Encyclopedia of Legal History* (Stan Katz, ed., Oxford Univ. Press), available at <http://ssrn.com/abstract=631346>.

92. Joseph L. Daly, *Arbitration: The Basics*, 5 J. Am. Arb. 1 (2006).

93. Jerome T. Barrett & Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (2004)

94. Daly, *supra* note 92, at 1.

95. *Id.* at 14–16.

96. *See id.* at 16; *see also* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. Rev. 1231, 1243–44 (2011) (discussing that United States courts will enforce religious arbitration awards).

97. *See, e.g.*, *Wein v. Morris*, 909 A.2d 1186, 1192 (N.J. Super. Ct. App. Div. 2006) (quoting *McKeeby v. Arthur*, 81 A.2d 1, 4 (N.J. 1951)) ("exercise of jurisdiction as arises out of the agreement to arbitrate may be lifted by the consent or waiver of the parties.").

98. Daly, *supra* note 92, at 16, n.63.

99. *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial*

As with almost all dispute resolution methods, arbitration must be jointly and voluntarily chosen by the parties to the dispute and cannot be imposed against their will.<sup>100</sup> The only mandatory dispute resolution option is the court system; a party filing a claim or bringing an action or application through the courts can compel the other party to respond.<sup>101</sup> Even in cases that proceed through the courts, the initiating party must take the first step by filing a claim or otherwise bringing the matter to a court.<sup>102</sup> Generally, an affected party is under no obligation to enforce his rights, whether it be through the courts or otherwise.<sup>103</sup>

The fear mongering with respect to Islamic arbitration is all the more hypocritical and discriminatory when one considers that various other communities have been arbitrating without outrage or objection.<sup>104</sup> Such a blanket opposition is clearly against long established American ideals of freedom of contract, other contract law principles, and encouraging people to resolve disputes outside the courts, while providing access to the courts to uphold agreements and promises that are within established and accepted parameters.<sup>105</sup>

In the case of a marriage contract or family dispute, arbitration may entail agreeing for a local committee of religious leaders to rule on the division of property following a divorce; or, in the case of a business transaction, it might be deciding that a private arbitration organization or industry association rules on any disagreements.<sup>106</sup> The point is that the arbitration body—regardless of whether it is a Rabbinical court, an Islamic

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*Arbitration Awards*, 30 Ga. L. Rev. 730, 764 (1996) (discussing the various non-statutory grounds under which vacatur is granted); see also Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 Okla. L. Rev. 431, 435–36 (2014).

100. One argument is that women will be forced to submit to arbitration, but this risk is there whether it be religious or non-religious arbitration or even judicial proceedings. See Daly, *supra* note 92, at 15; Volokh, *supra* note 99, at 453.

101. Not responding may mean that a judgment or decision may be made without your participation.

102. See Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

103. Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 Vt. L. Rev. 157, 162 (2012).

104. See, e.g., Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 437–40 (2006); see also Helfand, *supra* note 96 at 1232–40.

105. See Baker, *supra* note 103, at 162.

106. It should be noted that many parties may not even be able to agree on the arbitrator, rendering this whole issue moot.

tribunal, or a secular body—derives its authority from the consent of the parties requesting arbitration within the confines of established laws, procedures, and public policy.<sup>107</sup> The fact that the parties are choosing to settle their disagreements by reference to their understanding of Islamic law is therefore of no more consequence to society than if they decided to settle the same dispute by tossing a coin, asking a neighbor to decide, or any of the other ways in which human beings settle disagreements peacefully.<sup>108</sup>

In the matrimonial context, anti-*Shari'ah* advocates have pointed to a number of cases to evince the threat posed by Muslims. One such case is *Odatalla v. Odatalla*, where the wife appealed to the courts to enforce the *mahr* provision of her Islamic prenuptial agreement or marriage contract.<sup>109</sup> The court held that "all of the essential elements of a contract [were] present" and ordered the husband to pay \$10,000 to his wife.<sup>110</sup> The court noted that enforcement was "based upon 'neutral principles of law' and not on religious policy or theories."<sup>111</sup> Illustrative for our purposes, the judge wrote: "Why should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? . . . . Clearly, this court can enforce a contract which is not in contravention of established law or public policy."<sup>112</sup>

The evidence, even in the cases put forth by anti-*Shari'ah* advocates, proves that courts make such determinations on a case-by-case basis. In fact, in *Zawahir v. Alwattar*,<sup>113</sup> the court applied the same contract principles and refused to enforce a *mahr* agreement because the husband only entered

107. See Baker, *supra* note 103, at 165.

108. Of course, this is provided that there is no question of duress, unconscionability, bias, or violation of public policy. There is also a great deal of debate and discussion about privatization of justice and the possible dangers to the vulnerable. See, e.g., Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES IN L. 573–607 (2008). Although there are some legitimate issues here, it must be noted that these problems are not limited to the religious context alone and would not justify banning religious alternative dispute resolution but not others.

109. 810 A.2d 93, 94 (N.J. Super. Ct. Ch. Div. 2002); see also Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *Women's Rights and Islamic Family Law: Perspectives on Reform* (Lyn Welchman, ed., 2004) (discussing whether it should be treated as a pre-nuptial agreement or a simple contract and citing Muslim lawyer, Abed Awad, who has extensive litigation in this area).

110. *Odatalla*, 810 A.2d at 98.

111. *Id.* at 95–96.

112. *Id.* at 95.

113. No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008).

into it "as a result of overreaching or coercion."<sup>114</sup>

In addition to cases revolving around *mahr* agreements, courts have also been called upon to determine the validity of marriages conducted in accordance with religious law. In fact, in many instances Muslim couples perform religious ceremonies without following through with the legal registration.<sup>115</sup> Courts are often asked to adjudicate the validity of such marriages as a precursor to determining the other rights flowing from such relationships. In *Mussa v. Palmer-Mussa*, the North Carolina Court of Appeals recognized a couple's Islamic marriage, but not their religious divorce.<sup>116</sup> In *Aleem v. Aleem*, a Maryland court held that a *talaq* (Islamic divorce), granted in Pakistan, was unenforceable because, by being accessible only to men, *talaq* was against public policy under the Equal Rights Amendment of the Maryland Constitution, and it denied due process rights to women.<sup>117</sup>

In the context of custody, American courts have for some time applied the best interest of the child test.<sup>118</sup> This test would, presumably, apply regardless of whether the court was interpreting a religious or non-religious contract, reviewing an arbitration agreement, or enforcing a foreign judgment or settlement related to child custody. The courts also have inherent common law *parens patriae*<sup>120</sup> jurisdiction, often supplemented by statute, to intervene when and if necessary to ensure that the best interests of vulnerable children are protected in all contexts.<sup>121</sup>

114. *Id.* at \*6.

115. See Ruqaiyyah Waris Magsood, *Weddings*, BBC (Sept. 8, 2009), [http://www.bbc.co.uk/religion/religions/islam/ritesrituals/weddings\\_1.shtml](http://www.bbc.co.uk/religion/religions/islam/ritesrituals/weddings_1.shtml).

116. 719 S.E.2d 192, 194 (N.C. Ct. App. 2011), *rev'd*, 731 S.E.2d (N.C. 2012).

117. 947 A.2d 489, 500–02 (Md. 2008).

118. See Christian Reichel Van Deusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417, 419–20 (1991); see also Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 450 (2005).

120. See Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 287–88 (1992); see also Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L. J. 195, 195–96 (1978).

121. Judith Areen, *Intervention between the Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. J. 887, 894–910 (1975) (providing a historical account of the *parens patriae* doctrine); Tanya Washington, *Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 30 (2009) (noting that a "child's best interests provide the sole justification for state's

Other cases brought up by anti-*Shari'ah* activists as evidence of creeping *Shari'ah* involve Muslim business people attempting to use Islamic principles in business dealings; innocuous attempts to work around interest prohibitions; zoning and property disputes, attempts to have judgments from Islamic jurisdictions enforced; and even attempts to raise defenses relying on interpretations of Islamic law or a certain Muslim cultural practices or views<sup>122</sup> Anti-*Shari'ah* advocates have pounced on situations where parties attempt to have American courts enforce decisions made in foreign courts.<sup>123</sup> In such contexts, it may be necessary for an American court to consider the foreign law applied to determine whether to defer to the foreign court's decision. This principle of comity, whereby courts of one nation voluntarily recognize the executive, legislative, and judicial acts of another, has a long history in America.<sup>124</sup> Scholars disagree about whether it is a rule of customary international law, but the fact remains that comity plays a significant role in American domestic jurisprudence.<sup>125</sup> In evaluating foreign law cases, American courts consider whether the foreign jurisdiction's decision, judgment, order, and the legal systems practices and procedures

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exercise of its *parens patriae* authority").

122. See generally, Patel, *supra* note 7; CTR. FOR SEC. POL'Y, *supra* note 84.

123. One of the main proponents of the anti-*Shari'ah* law movement, the American Public Policy Alliance (APPA) notes: "These foreign laws, frequently at odds with U.S. constitutional principles of equal protection and due process, typically enter the American court system through: [c]omity (mutual respect of each country's legal system); [c]hoice of law issues; and [c]hoice of forum or venue." *American Laws for American Courts*, AM. PUB. POL'Y ALLIANCE, (last visited Feb. 15, 2014) [hereinafter *American Laws*] (emphasis omitted), <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts>.

124. Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 19, 38 (2008). William S. Dodge, *International Comity in American Courts*, 1 (unpublished manuscript) available at <https://www.yumpu.com/en/document/view/11719956/william-s-dodge-american-society-of-international-law>.

125. Dodge, *supra* note 124, at 39. The Restatement (Third) of Foreign Relations Law of the United States suggests that comity is a rule of customary international law, but some scholars argue that this is not in line with state practice. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 403 cmt. a (1987). As the Supreme Court noted in *Hilton v. Guyot*, 159 U.S. 113, 163–64, 167 (1895): "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. . . . A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law."

violate federal or state public policy.<sup>126</sup>

Anti-*Sharī’ah* advocates have cited a number of cases to back their tenuous claim that *Sharī’ah* is stealthily sneaking in through the doctrine of comity, but a close examination of the cases they have highlighted contradicts their claim. In *Amin v. Bakhaty*, the Louisiana Supreme Court refused to enforce a custody order as being against public policy because Egyptian law did not consider the child’s best interest as “paramount.”<sup>127</sup> In *Aleem v. Aleem*, a Maryland court refused to enforce Pakistani law pertaining to divorce and division of assets because Pakistani law did not afford the wife due process, in violation of state public policy.<sup>128</sup> In *Tarikonda v. Pinjari*, a Michigan court denied the recognition of a divorce conducted according to Indian laws governing Muslim marriage because the wife was not afforded due process or equal protection rights, and the divorce thus violated state public policy.<sup>129</sup> In contrast, in two other cases cited by anti-*Sharī’ah* advocates—*Hosain v. Malik*<sup>130</sup> and *Saleh v. United States Department of Justice*<sup>131</sup>—both courts concluded that public policy and American due process standards were not violated.<sup>132</sup> Even in a non-family

126. Where foreign law conflicts with state public policy, courts refuse to recognize or apply it. See, e.g., *Innes v. Carrascosa*, 918 A.2d 686, 710 (N.J. Super. Ct. App. Div. 2007) (holding that, because child custody order issued by court of Spain “contravene[s] the public policy of this state that both parents should share in the custodial rights of the child absent a finding that it would not be in the best interest of the child, comity cannot be afforded”); *Telnikoff v. Matusevitch*, 702 A.2d 230, 249 (Md. 1997) (declining to enforce British court’s libel judgment because “[t]he principles governing defamation actions under English law . . . are so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law, that [the] judgment should be denied recognition under principles of comity”); *Al-Fassi v. Al-Fassi*, 433 So.2d 664, 668 (Fla. Dist. Ct. App. 1983) (noting, with respect to child custody order issued by Bahamian court, that “the principles of comity do not require recognition since the decree is offensive to a public policy of our state, i.e., that a custody decision be based upon the best interests and welfare of the minor children”).

127. 798 So.2d 75, 86 (La. 2001).

128. 947 A.2d 489, 500 (Md. 2008).

129. No. 287403, 2009 WL 930007 (Mich. App. Apr. 7, 2009).

130. 671 A.2d 988 (Md. Ct. Spec. App. 1996) (examining “whether the Pakistani courts applied a rule of law, evidence, or procedure so contradictory to Maryland public policy as to undermine the confidence in the trial”).

131. 962 F.2d 234 (2d Cir. 1992).

132. In *Hosain v. Malik*, the court granted comity to a Pakistani court’s child custody order. 671 A.2d 988, 1003 (Md. Ct. Spec. App. 1996). The court held that Pakistan applied the best interest of the child test and that “[t]he evidence was overwhelming that, as a general principle, Pakistan follows the best interest of the child test in making child custody decisions.” *Id.* at 998. In *Saleh v. United States Department of Justice*, 962 F.2d 234 (2d Cir. 1992), a federal court refused to reverse

case, *Rhodes v. ITT Sheraton Corp.*,<sup>133</sup> an American court determined that a Saudi Arabian court would not be an adequate alternative forum for a female plaintiff to pursue her claims for a diving injury because of "biases against women and non-Muslims [and] . . . systemic prejudices."<sup>134</sup>

Far from supporting the position advanced by anti-*Shari'ah* activists, these cases reveal that courts have granted comity only when doing so would not violate public policy or cherished American due process rights. Indeed, even one of the main proponents of the anti-*Shari'ah* law movement, the American Public Policy Alliance ("APPA"), acknowledges that:

Granting comity to a foreign judgment is a matter of state law, and most state and federal courts will grant comity unless the recognition of the foreign judgment would violate some important public policy of the state. This doctrine, the "Void as against Public Policy Rule," has a long and pedigreed history.<sup>135</sup>

The last types of cases that anti-*Shari'ah* advocates have attacked involve those where criminal defendants use their religious beliefs as a defense to vitiate their culpability.<sup>136</sup> Again, this is not new or restricted to Muslims.<sup>137</sup> There is a growing body of scholarship exploring this issue as part of individuals' due process rights to assert their lack of intent.<sup>138</sup> Again,

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a deportation order for a Yemeni man released from state prison after serving a sentence for murdering a fellow Yemeni. *Id.* at 240. The man claimed that he would be persecuted upon his return to Yemen because a Yemeni Islamic court had sentenced him to death for the murder. *Id.* at 237-38. After examining Yemeni law, the appeals court rejected the defense, holding that "the nondiscriminatory application of Yemeni criminal law to his intentional killing of a fellow Yemeni Moslem" and "imposing a punishment that would be inflicted in many secular jurisdictions" did not amount to persecution. *Id.* at 237, 239.

133. No. CIV.A. 97-4530-B, 1999 WL 26874, at \*1, \*3 (Mass. Super. 1999).

134. *Id.* at \*3.

135. *American Laws*, *supra* note 123 (emphasis omitted).

136. See, e.g., Ave Mince-Didier, *Cultural and Religious Defenses to Criminal Charges*, CRIMINAL DEFENSE LAWYER.COM (2014), <http://www.criminaldefenselawyer.com/resources/cultural-and-religious-defenses-criminal-charges.htm>.

137. *Id.*

138. See generally, Kent Greenawalt, *The Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act*, 6 OHIO ST. J. CRIM. L. 299 (2009); Alison Dundes Renteln, *The Cultural Defense: Challenging the Monocultural Paradigm*, CULTURAL DEFENSE (Aug. 7, 2009), available at [http://www.unipa.it/dottoratodirittumani/seminari\\_dottorato\\_archivio\\_2010/maggio\\_10/Renteln\\_Bruylant.pdf](http://www.unipa.it/dottoratodirittumani/seminari_dottorato_archivio_2010/maggio_10/Renteln_Bruylant.pdf).

courts have not rejected these arguments outright, but they have measured them against American public policy.<sup>139</sup> Anti-*Sharī'ah* activists went as far back as 1976 to find the case of *People v. Benu*, where a Muslim man was charged with child endangerment for arranging the marriage of his underage daughter.<sup>140</sup> The court rejected his "Islamic" argument and found him guilty, just as courts have done in religious defenses raised by Christians.<sup>141</sup> Despite the fact that it is not an exclusively Muslim issue and that it is far more nuanced and complex than they have made it out to be, anti-*Sharī'ah* activists were able to latch onto one trial judge's ruling in New Jersey (which was correctly overturned by a New Jersey court of appeals) to prove that *Sharī'ah* was taking over America.<sup>142</sup> As Abed Awad writes:

The Sharia scaremongers often rely on a single New Jersey case, *S.D. v. M.J.R.*, as proof that Islamic law is seeping into our court system. In it, a wife sought a restraining order against her husband, alleging that he repeatedly beat and sexually assaulted her. The judge denied her request, holding that the defendant did not form the criminal intent necessary to commit the crime, because his genuine religious beliefs dictated that he was entitled to sexual relations upon demand. The ruling was wrong—both under state law and Sharia—and, not surprisingly, the New Jersey Appellate Court reversed it in 2010.<sup>143</sup>

### III. MULTICULTURALISM AND LEGAL PLURALISM

Effective governance in contemporary liberal societies requires balancing individuals' religious commitments and convictions with the state's need to maintain general rules and standards applicable to all. While these debates implicate a wide range of very broad philosophical, social and

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139. See *infra* notes 108–09 and accompanying text.

140. 87 Misc. 2d 139, 140 (N.Y. Crim. Ct. 1976).

141. In the case of Scott Roeder, convicted for murdering abortion provider Dr. George Tiller, the court rejected his argument that his religious beliefs about abortion being murder should mitigate his culpability. See Robin Abcarian, *Scott Roeder Convicted of Murdering Abortion Doctor George Tiller*, L.A. TIMES, Jan. 29, 2010, <http://articles.latimes.com/2010/jan/29/nation/la-na-tiller-trial30-2010jan29>. Criminal defendants in polygamy cases who put forth religious arguments to vitiate their intent where are also found guilty. See *Cleveland v. United States*, 329 U.S. 14, 20 (1946).

142. *S.D. v. M.J.R.*, 2 A.3d 412, 413 (N.J. Super. App. Div. 2010).

143. Awad, *supra* note 6.



constitutional considerations, another recurring theme is the unique challenge of reconciling conflicts not just between religion and law, but between "religious legal communities" and the law of the nation-state.<sup>144</sup> American Muslim and Jewish communities serve as prime examples of such religious legal communities—that is, communities that experience some of their religious norms through the prism of "legal" rules—and thus the challenges faced by these communities often parallel each other in important ways.<sup>145</sup> What is worthy of note here is that the focus has been on trying to deny Muslims an equal seat in the dockets.<sup>146</sup>

A popular war cry of anti-*Shari'ah* advocates in a number of western jurisdictions has been "one law for all"<sup>147</sup> and in the American context, this has morphed into "American Law for American Courts."<sup>148</sup> These rallying cries are, at worst, disingenuous and, at best, inaccurate because these jurisdictions permit parties a variety of routes, options, and choices in resolving their legal issues within a legal framework and, in many cases, even allow parties to opt out of statutory regimes.<sup>149</sup> In addition to the foregoing, in the United States there is diversity between states and between

144. See *supra* note 141 and accompanying text.

145. Muhammed Elsayed, *Contracting Into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses*, 20 GEO. MASON L. REV. 937, 937–38 (2013).

146. See *infra* notes 145–49 and accompanying text.

147. See, e.g., *One Law For All—Against Sharia Law in Britain*, ONE LAW FOR ALL: NO SHARIA CAMPAIGN (Aug. 2008), <http://onelawforallpetition.com/onelaw/onela300.php?nr=40155035>; <http://www.onelawforall.org.uk/>; see also Harvey Simmons, *One Law for All Ontarians*, STAR (Sept. 14, 2010), [http://www.thestar.com/opinion/editorialopinion/2010/09/14/one\\_law\\_for\\_all\\_ontarians.html](http://www.thestar.com/opinion/editorialopinion/2010/09/14/one_law_for_all_ontarians.html).

148. *American Laws*, *supra* note 123. This of course shifted after their defeat in Oklahoma when Islamic law was specifically targeted. See, e.g., *American Law*, *supra* note 123.

149. As Natasha Bakht, who wrote a report that various women's groups used in opposing faith-based arbitration in Ontario, points out in a reconsidered article published after the controversy:

In fact, it is disingenuous to speak of "one law for all" when Ontario's family law permits parties to opt out of the default statutory regime such as the equal division of matrimonial property. Parties can, through negotiation, mediation or arbitration, based on the right to contract freely, agree to almost any resolution of their marital affairs . . . . [C]ouples' decisions to settle their family law affairs are generally left un-reviewed by the courts.

See Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, OTTAWA L. REV. 67, 67–82 (2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1121790](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121790). Indeed, if the right existed for people to opt out of the existing family law regime, why should religious people be prevented from structuring settlements consistent with their values and beliefs, again subject to the usual contractual and common law protections and mechanisms for review?

states and the federal realm.<sup>150</sup> Moreover, these simplistic slogans deny the reality on the ground in terms of the prevailing multiculturalism, legal pluralism, choices and options to opt out.

The foreign law and *Shari'ah* law ban controversy is a compelling case study in multiculturalism<sup>151</sup> and legal pluralism.<sup>152</sup> A multicultural society inherently accepts the idea that the various subgroups within society will celebrate their differences in all areas including the legal arena. Indeed, this is the essence of multicultural citizenship and stands in stark contrast to the cultural assimilation traditionally demanded of migrants and minorities.<sup>153</sup> Many nations around the world have officially adopted multiculturalism though the United States has not officially done so.<sup>154</sup> Nevertheless, a strong argument can be made that multiculturalism is the most accurate characterization of the ethnic interrelationships and diversity in the United States.<sup>155</sup>

The nature and limits of multicultural and multi-religious accommodation within liberal democracies has been the subject of considerable scholarship over the last few decades.<sup>156</sup> The primary focus of pioneering theorists such as Charles Taylor and Will Kymlicka has been the legal accommodation claims of minorities.<sup>157</sup> Much of this discussion has centered on issues of internal self-governance and legal pluralism.<sup>158</sup> Indeed, as Jeff Spinner-Halev and Jacob Levy argue, if liberty is to be meaningful,

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150. See *supra* Part II and accompanying text.

151. Multiculturalism is essentially the idea that a diversity of cultures can coexist within a single national state. See generally CHARLES TAYLOR ET AL., *MULTICULTURALISM* (1994); TARIQ MODOOD, *MULTICULTURALISM* (2d ed. 2007); Faisal Bhabha, *Between Exclusion and Assimilation: Experimentalizing Multiculturalism*, 54 *MCGILL L.J.* 45, 51 (2009).

152. Legal pluralism is the notion that individuals and groups are bound by and respect a plurality of legal orders within that state. John Griffiths, *What is Legal Pluralism?*, 24 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1, 38 (1986); Sally Engle Merry, *Legal Pluralism*, 22 *L. & SOC'Y REV.* 869, 870 (1988).

153. JOSEPH F. HEALEY, *RACE, ETHNICITY, GENDER, AND CLASS: THE SOCIOLOGY OF GROUP CONFLICT AND CHANGE* 45 (6th ed. 2012).

154. Bhabha, *supra* note 149, at 51.

155. John A. Garcia, *A Multicultural America: Living in a Sea of Diversity*, in *MULTICULTURALISM FROM THE MARGINS* 29, 29–38 (Dean A. Harris ed. Bergin & Garvey 1995).

156. WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* (1989); RICHARD A. SHWEDER ET AL., *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* (Richard A. Shweder et al. eds., 2002).

157. KYMLICKA, *supra* note 154; TAYLOR, *supra* note 149.

158. See Griffiths, *supra* note 150; Merry, *supra* note 150.

the liberal state must protect the freedom of religious communities to govern their lives according to their deeply-held views.<sup>159</sup>

Over time, scholars have begun to realize that while a state may impose its own law, various other legal systems continue to exist and compete with the state law system.<sup>160</sup> In essence, contrary to conventional wisdom, legal pluralism, not legal centrism is the norm.<sup>161</sup> As with any controversial term, definitions of legal pluralism are abound. John Griffiths, one of the key developers of the theory, defines a situation of legal pluralism as:

[O]ne in which law and legal institutions are not all subsumable within one "system" but have their sources in the self-regulatory activities . . . which may support, complement, ignore or frustrate one another, so that the "law" which is actually effective on the "ground floor" of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.<sup>162</sup>

This contrasts sharply with legal centralism, which assumes that the state is the only source of law.<sup>163</sup> Many involved in the *Shari'ah* law debate uncritically accept (or pretend to accept) the assumption of exclusive state control over law inherent to the notion of legal centralism.<sup>164</sup> In reality, legal pluralism is predominant in virtually all societies.<sup>165</sup>

The most widely used conception of plural legal systems is Sally Falk Moore's notion of the semi-autonomous social field.<sup>166</sup> These semi-autonomous social fields each have rule-making powers and people abide by these rules in contexts ranging from classrooms to sports fields to places of worship.<sup>167</sup>

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159. MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 11 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

160. See Griffiths, *supra* note 150, at 38–39; Merry, *supra* note 150, at 870–71; Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375 (2008).

161. See Merry, *supra* note 150, at 869.

162. Griffiths, *supra* note 150, at 39.

163. *Id.* at 3.

164. See Patel, *supra* note 16, at 1–2, 2 n.9.

165. Merry, *supra* note 150, at 869.

166. See generally Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973).

167. *Id.* at 721. For instance boxers can get in the ring and as long as they comply with boxing

The evolutionary nature of Islamic law<sup>168</sup> and the multicultural and pluralistic nature of American society provide an opportunity to acknowledge and accept this reality, and to devise a practical model of legal pluralism that can facilitate a harmonious relationship between Islamic law and various state and federal laws and systems.<sup>169</sup> Indeed, as Moore points out, the different legal orders exist in relation to each other and, hence, affect the way that each is able to operate.<sup>170</sup> There is a range of possible relationships that can be devised between Islamic law and state law.<sup>171</sup>

Miranda Forsyth, for instance, details a typology of seven potential models of "how to 'do' legal pluralism."<sup>172</sup> They range from informal to formal, and include: (1) "[r]epression of non-state justice system by the state justice system;" (2) "[f]ormal independence between the systems but tacit acceptance by the state of the non-state justice system;" (3) "[n]o formal recognition but active encouragement of non-state justice system by the state;" (4) "[l]imited formal recognition by the state of the exercise of jurisdiction by a non-state justice system"; (5) "formal recognition of exclusive jurisdiction in a defined area;" (6) "state recogni[tion of] the right of non-state justice system to exercise jurisdiction and lend its coercive powers"; and (7) "complete incorporation of the non-state justice system by the state."<sup>173</sup> The level of formality and self-governance will determine what will be acceptable to each of the perspectives—society as a whole, the state, and the respective communities whose norms and scope of self-governance is under negotiation or discussion.<sup>174</sup>

American policy makers and legislators have much to play with if they are truly concerned about crafting a workable and constitutionally sound arrangement to allow religious law and state law to co-exist in their own social fields.<sup>175</sup> In fact, various states and stakeholders have been

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regulations (their internal community "law") the state does not charge a boxer with assault unless the boxing rules or regulations were broken. How come religious communities are not, for the most part, granted such autonomy and, if they are, then why do activists have issues with this?

168. Quraishi-Landes, *supra*, note 74, at 5.

169. *See supra* note 153 and accompanying text.

170. Moore, *supra* 164, at 723.

171. *See infra* notes 171–72 and accompanying text.

172. Miranda Forsyth, *How to "Do" Legal Pluralism*, in *LEGAL PLURALISM: CONCEPTS AND CRITIQUES 1* (Naresh Kumar ed., 2009).

173. *Id.* at 5–8.

174. *Id.* at 8–9.

175. *See id.* at 5–8.

implementing such arrangements for some time.<sup>176</sup> In essence, they have been "doing" legal pluralism.<sup>177</sup> Fearing the *Shari'ah* bogeyman, some states have tried to implement the first model from Forsyth's typology, the result of which, as we saw in Oklahoma, was found unconstitutional.<sup>178</sup> This model, of course, will not address any of the legitimate concerns raised by some anti-*Shari'ah* advocates, nor will it respect the rights of those who wish to live their vision of the good life in accordance with their core beliefs, as promised to them by the project of liberal democracy.<sup>179</sup>

I would concur with Chandran Kukathas and Jeff Spinner-Halev that the state, in a multicultural citizenship model, should grant greater self-governance powers, particularly over issues central to cultural identity and preservation.<sup>180</sup> This would be consistent with the reality of legal pluralism that is evident on the ground.<sup>181</sup> The state should only intervene when a community harms its members (or a segment thereof) or the outside community or when procedural and constitutional norms are violated.<sup>182</sup> Such an intervention would only be possible and effective if there was formal institutionalization of the practice and interaction between the state and non-state systems.<sup>183</sup>

A more robust multicultural model-taking cognizance of the reality of legal pluralism would have also facilitated the indigenization process of Islamic law.<sup>184</sup> Such an indigenization would be in line with the essence of multiculturalism and legal pluralism.<sup>185</sup> Moreover, this would have been one of the best ways to ensure that the minority community evolves itself using its own internal mechanisms and through respectful engagement and

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176. See, e.g., *Awad v. Ziriax*, 670 F.3d 1111, 1117–18 (10th Cir. 2012) (exemplifying Oklahoma's attempt to implement Forsyth's first model of typology).

177. See *id.*

178. *Awad*, 670 F.3d at 1129–33.

179. Forsyth, *supra* note 170 at 5.

180. MINORITIES WITHIN MINORITIES, *supra* note 157, at 10–11.

181. See Bhabha, *supra* note 149, at 48–49.

182. Cf. Minorities Within Minorities, *supra* note 157, at 10–11 (arguing for even less state intervention in communities).

183. Cf. Forsyth, *supra* note 170, at 11–12 (describing possible ways the state and communities' systems can better interact and coexist).

184. Cf. Kutty, *supra* note 20, at 594 (discussing the indigenization process of Islamic law in Canada).

185. See *id.* at 595.

interaction with the mainstream community.<sup>186</sup> This would be consistent with Miranda Forsyth's notion of "planned legal pluralism," which would "ensure that the various legal systems in a particular jurisdiction operate in ways that support and enrich each other, rather than undermine and compete with each other."<sup>187</sup> This is not a farfetched theoretical dream because the evolutionary and context-specific nature of Islamic law makes it conducive to the dialectical model within the broader state legal system.<sup>188</sup>

As scholars have documented, it is impossible to suppress these semi-autonomous social fields entirely within a society.<sup>189</sup> This *Shari'ah* ban controversy provides a timely opportunity to develop and experiment with models of legal pluralism that can balance the competing rights in a manner that attempts to respect all parties and protect the vulnerable.<sup>190</sup> It is also a great occasion to explore how Islamic law and liberal democracy can coexist and complement each other.

#### IV. CONCLUSION

The number of religion and state issues brought before the Supreme Court in recent years underscores an incontrovertible truth in the American legal system: the relationship between the state and religion in this country is still fluid and changing.<sup>191</sup> To put a twist on a well-known saying from Mohandas K. Gandhi, those who thought that religion could be separate and distinct from law understand neither religion nor law. As outrageous as it may appear to anti-*Shari'ah* advocates, if constitutional rights to religious freedom, equal treatment, and freedom of contract are to have any real value, religious communities, including Muslims, must be guaranteed access to justice both in United States courts and outside of the court system. It would be odd and un-American to insist that Muslims must always couch their claims in non-religious terms to obtain justice while others need not do so.

The idea that people entering freely into a contract have the right to agree as to how they settle any disagreements within the confines of state

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186. See Forsyth, *supra* note 170, at 8–9 (giving examples of ways that the state and non-state systems can interact and engage with one another more productively).

187. Forsyth, *supra* note 170, at 1.

188. See generally, WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* (2005).

189. Moore, *supra* note 164, at 720.

190. See Forsyth, *supra* note 170, at 5–8.

191. See *supra* Part I.

law is relatively uncontroversial (provided the normal contractual and legal protections are in place) outside this anti-*Sharī’ah* group.<sup>192</sup> Consenting and informed adults must be able to make religious choices even if others do not believe these are “correct” choices. As Ronald Dworkin says about faith (albeit not in the context of this controversy):

We can’t ask people to set aside their most profound convictions about the truth of deep moral and ethical issues when we are also asking them to make decisions . . . that are for most people the most basic and fundamental moral and ethical decisions they will in their lifetime be called upon to make.<sup>193</sup>

Scholars have advanced various arguments as to why the Establishment Clause instructs courts not to interfere in cases implicating religious doctrines or practice. These reasons have ranged from adjudicative disability (state has limited competence)<sup>194</sup> to ensuring that the government does not favor any one religion or any particular minority or majority view within a religion.<sup>195</sup> These are all legitimate considerations but these difficulties and complexities do not justify court’s total or complete prohibition from entertaining religious issues. Moreover, from a religious freedom and equal treatment perspective, it would be unfair to prevent Muslims from resorting to courts to have their religious disputes resolved when this right is available to others. Additionally, from the perspective of access to justice, as made evident from the plight of the two women from our introduction, Elahm Soleimani and Rima Nahavandi, in some cases justice is being denied to deserving Americans simply for the sake of preserving theoretical purity. Michael Helfand makes a strong case for

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192. See *supra* Part II.

193. Elizabeth Katz, *Dworkin Explores Secular, Religious Models for Society*, UNIV. VA. SCH. L. (Apr. 19, 2006), [http://www.law.virginia.edu/html/news/2006\\_spr/dworkin.htm](http://www.law.virginia.edu/html/news/2006_spr/dworkin.htm).

194. Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL’Y 119, 138 (2009).

195. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14–11, at 1231 (2d ed. 1988). Tribe also observes that this endorsement concern represents the more fundamental rationale behind the religious question doctrine over and above the “desire to preserve the autonomy and self-government of religious organizations.” See also Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 812 (2009); Kent Greenwalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 804 (1998) (describing the endorsement concern implicated by various state kosher laws).

allowing the litigation of certain religious cases (that have traditionally not been entertained) through the courts when no other forum is available.<sup>196</sup> He points out:

Indeed, the prohibition against litigating religion in judicial forums has come at a serious cost. As a number of courts have noted, dismissing a case as non-justiciable under the Establishment Clause “imposes a harsh consequence on a plaintiff” and “is a drastic measure, because when a case is nonjusticiable it means the wrong committed, if there is one, cannot be remedied anywhere.”<sup>197</sup>

As discussed above and as noted by anti-*Shari’ah* advocates, there are cases where Muslims have sought, directly or indirectly, to use Islamic principles in resolving aspects of their disputes—as is their right.<sup>198</sup> This is nothing unique to Muslims; people of other faiths have regularly exercised the same right.<sup>199</sup> These cases provide evidence of nothing more than the fact that, just like non-Muslims, some Muslims may wish to settle their disputes in accordance with the principles of their faith, and courts will oblige this desire within the confines of American constitutional law and judicial practice and precedent. The courts have also rejected such claims—sometimes for valid reasons, and other times for reasons that we may need to question in a multi-religious legal pluralistic liberal democracy.

The evidence is clear that courts treat claims by Muslims using religious law the same way they deal with claims brought by those of other faiths and those of no faith—sometimes they are accepted and sometimes they are rejected.<sup>200</sup> The nuanced, case-by-case approach that has evolved in the courts, acting through the prism of established Establishment Clause and

196. Michael A. Helfand, *Litigating Religion*, 93 B.U. L. Rev. 493 (2013) (quoting *Abdelhak v. Jewish Press Inc.*, 985 A.2d 197, 211 (N.J. Super. Ct. App. Div. 2009) and *Congregation Yetev Lev D’Satmar, Inc. v. Kahana*, 879 N.E.2d 1282, 1286 (N.Y. 2007) (Smith, J., dissenting)).

197. *Id.* at 496.

198. See also Jay M. Zitter, Annotation, *Application, Recognition, or Consideration of Islamic Law by Courts in United States*, 82 A.L.R. 6, 1 (2013); *supra* note 123.

199. See, e.g., *Persad v. Balam*, 187 Misc. 2d 711, 714–15 (N.Y. Sup. Ct. 2001) (holding that Hindu wedding ceremony resulted in valid marriage despite lack of marriage license because the evidence “more than adequately established that. . . [the officiant] possessed the requisite authority under [state statute] to solemnize marriages in the Hindu religion” and “the substance of the ceremony” was sufficient under the law); see *supra* Part I.

200. See *supra* Part I.



Free Exercise Clause jurisprudence, principles of comity, contract law, and public policy, provides sufficient checks to ensure that courts do not become impermissibly entangled with religion and do not allow for Islamic law, or any religious or foreign law for that matter, to become the law of the land. Indeed, as Matthew Franck, a noted legal analyst at the Conservative *National Review*, concluded after reviewing the cases identified as transforming American legal culture:

Thirty-five years’ worth of American law, and we have a whopping seven cases in which some “foreign law” was honored (not even Sharia in every case), and not enough information even to tell if something truly unjust happened in any of the seven. In the other thirteen cases, Sharia-law principles were rejected either at trial or on appeal.<sup>201</sup>

While his use of the term “Sharia” can be quibbled with, for our purposes, suffice it to reinforce this paper’s position that far from evidencing creeping *Shari’ah* or a surrender to judicial *Jihad*, the cases he addresses and those touched upon in this paper only confirm that the American Constitution and legal principles stand firm and pre-eminent; Muslims merely have had access to the dockets, nothing more and nothing less.

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201. Matthew Franck, *A Solution in Search of a Problem*, NAT’L REV. ONLINE (June 15, 2012, 5:10 PM), <http://www.nationalreview.com/bench-memos/303028/solution-search-problem-matthew-j-franck>. The ACLU comes to the same conclusion. PROGRAM ON FREEDOM OF RELIGION AND BELIEF: ACLU, NOTHING TO FEAR: DEBUNKING THE MYTHICAL “SHARIA THREAT” TO OUR JUDICIAL SYSTEM 5 (2011) available at [https://www.aclu.org/files/assets/Nothing\\_To\\_Fear\\_Report\\_FINAL\\_MAY\\_2011.pdf](https://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf) (“Far from confirming some fabricated conspiracy, these cases illustrate that our judicial system is alive and well, and in no danger of being co-opted or taken over by Islam.”).