Domestic Applications of Sharia and the Exercise of Ordered Liberty

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Sharia. Religion scholars may dispute the precise meaning of the term, but it invariably provokes immediate and conflicting reactions among the American public. To believers, it is a series of sacred precepts ordained by God to help foster a holy life. To critics, it is an oppressive and theocratic menace that must be stopped at all costs. But whatever the meaning or merits of sharia as a religious matter, the festering controversy over its present consideration by domestic courts is not, at bottom, a religious dispute. Rather, it is a struggle over the extent to which Muslims, like people of other faiths in this country, should be free to tailor their personal or business affairs according to deeply-held beliefs about who they are and where they are going—even, and especially, where those beliefs are controversial or unpopular. It is about religious liberty.

I. INTRODUCTION

The particulars of sharia are somewhat amorphous, and can vary by sect, nationality, or believer. Sharia may nonetheless be described generally as a "moral, religious, ethical, and legal system based on Islam's two primary sources: the Holy Qu'ran, which Muslims believe to be the literal word of God, and the Sunnah, the teachings and practices of Prophet Mohammad."[1] In addition to the Koran and Prophet, Muslims also draw upon the wisdom of Islamic scholars and a form of religious common law based on analogies to Koranic principles.[2] As one would expect, sharia concerns religious worship and ritual.[3] It can extend further, however, to also address more secular matters like domestic relations, wills and estate planning, business transactions, and, perhaps most controversially, crime and punishment.[4]

American courts do not, and could not, apply the criminal-law provisions of sharia.[5] They do, however, consider sharia in civil disputes—at least indirectly. Courts, for example, enforce contract terms requiring certain disputes be resolved through sharia-based arbitration.[6] They also address sharia in domestic-relations cases, including those arising from relationships among Muslims in this country as well as those begun, and perhaps previously adjudged, overseas (i.e., in Muslim countries).[7] And courts defer to Muslim officials when reviewing clerical or other intra-faith disputes.[8] In the

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[1] Muhammad Elsayed, Comment, *Contracting Into Religious Law: Anti-Sharia Enactments and the Establishment and Free-Exercise Clauses*, 20 GEO. MASON L. REV. 937, 939 (2013).

[2] Frank Griffel, *Introduction* to SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 1, 3 (Abbas Amanat & Frank Griffel eds., 2007).

[3] MOHAMMAD HASHIM KAMALI, SHARI'A LAW: AN INTRODUCTION 41 (2008).

[4] *See id.* at 41–42.

[5] *See* Jeremy Grunert, Note, *How Do You Solve a Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America*, 40 PEPP. L. REV. 695, 725–26 (2013) (describing statutory and constitutional limitations on the domestic application of any sharia-based criminal-law provisions).

[6] *See, e.g.*, Abd Alla v. Mourssi, 680 N.W.2d 569, 574 (Minn. Ct. App. 2004) (affirming Islamic arbitration); Jabri v. Qaddura, 108 S.W.3d 404, 413–14 (Tex. App. 2003) (same).

[7] *See, e.g.*, S.B. v. W.A., 959 N.Y.S.2d 802, 819 (N.Y. Sup. Ct. 2012) (upholding sharia-based premarital agreement); Hosain v. Malik, 671 A.2d 988, 1010–11 (Md. Ct. Spec. App. 1996) (enforcing a Pakistani child-custody order).

[8] *See, e.g.*, El-Farra v. Sayyed, 226 S.W.3d 792, 796 (Ark. 2006) (relying on "ministerial exception" in refusing to hear imam's claims against his former mosque

end, the results in these cases might differ from what civil law would otherwise require. For example, courts might impose monetary penalties in a no-fault divorce,[9] block the sale of freely owned property,[10] allow a faith-based result in arbitration,[11] or grant relief from an arms-length business transaction.[12]

Because of its treatment of areas regulated by temporal authority, conflicts between sharia and domestic secular law are inevitable. But should that justify the hostility sharia has received in the dozens of states where laws targeting its domestic use have been proposed or enacted in recent years? After all, judges in a common-law system like ours frequently draw from external sources of authority where the litigants have agreed they should do so, or where such references are required by comity—i.e., reciprocal respect for another jurisdiction's law or decisions. Plus, applications of any such "foreign" law are subject to the crucial exception that no external laws should be applied if the public policy of the applying jurisdiction would suffer—e.g., it would violate a fundamental civil right.[13] And regarding religious law, domestic courts already must strike a balance in accordance with long-standing constitutional norms: religious practices are to be honored and respected, but they should neither be imposed by, nor become unduly entangled with, the state.[14] Determining applicable law can be tricky, and judges do not always get it right. But sharia is not unique in this regard.

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employer).

[9] *See* Odatalla v. Odatalla, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002) (upholding sharia-based contract imposing monetary penalty on husband in divorce proceeding).

[10] *See* Elsayed, *supra* note 1, at 940–41 (describing sharia-based right of first refusal of cotenant).

[11] *See Abd Alla*, 680 N.W.2d at 573 (enforcing Islamic arbitration award under state contract law).

[12] *See* Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc., 866 A.2d 1, 30–35 (Del. 2005) (upholding damage award for "usurpation" in business transaction under Saudi law).

[13] *See* Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431, 435–41 (2014) (describing public-policy limits on the application of foreign law); *see also generally* Asifa Quraishi-Landes, *Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do With Islamic Family Law in Their Courtrooms*, 57 N.Y.L. SCH. L. REV. 245, 249–51 (2012) (same).

[14] *See* MARK E. HANSHAW, MUSLIM AND AMERICAN? STRADDLING ISLAMIC LAW AND U.S. JUSTICE 191–92 (2010) (describing First Amendment prohibitions on the imposition of religious arbitration on the unwilling); Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 383–84 (2012) (describing First Amendment contemplating "individual ordering . . . according to one's own religious beliefs").

Within this framework, application of, or deference to, foreign authority has regularly included faith-based sources. Secular courts, for example, enforce Beth Din contracts between observant Jews requiring resolution of their disputes before rabbinical tribunals;[15] "covenant" (i.e., limited divorce) marriage contracts between Evangelical Christians are increasingly recognized;[16] and the right of Amish parents to raise children according to the laws of their faith has been endorsed by no less authority than the United States Supreme Court.[17] The corporate decisions of each of these faiths are also broadly protected by the "ministerial exception" recently blessed by the Court in the *Hosanna-Tabor* case.[18] But none of these other religions attract the antipathy faced by Muslims hoping to follow sharia. As Professor Feldman has put it, "[n]o legal system has ever had worse press."[19]

The reasons for hostility are perhaps no mystery. Anti-Islamic sentiment has increased in frequency and intensity since September 2001, and continued unrest in the Middle East has deepened religious mistrust.[20] Coincidentally, controversy arising from the Supreme Court's recent references to foreign law in applying the federal constitution—a distinct matter of domestic law often confused with the direct imposition of another country's law—has not cooled associated nationalist impulses.[21]

But whatever the origins or merits of popular opposition to Islam (or foreign law generally), targeting sharia consideration in domestic courts undercuts religious liberty and is inconsistent with our standard approach to foreign law. As with these other sources, religious or

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[15] *See generally* Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of America Precedent*, 57 N.Y.L. SCH. L. REV. 287 (2012) (describing history and broader significance of the recognition of Jewish law courts by domestic courts).

[16] Covenant marriage laws have been passed in Arkansas, Arizona, and Louisiana. ARIZ. REV. STAT. ANN. § 25-901 (2000); ARK. CODE ANN. § 9-11-801 (2002); LA. REV. STAT. ANN. § 9:272 (2000).

[17] Wisconsin v. Yoder, 406 U.S. 205, 230 (1972).

[18] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (protecting the right of religious organizations to determine their religious missions; there, the right to select ministers).

[19] Noah Feldman, *Why Shariah?*, N.Y. TIMES MAG., Mar. 16, 2008, at MM46.

[20] *See* Yaser Ali, Comment, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CAL. L. REV. 1027, 1042–49 (2012) (describing sharia-based Islamophobia in post-9/11 context).

[21] *See generally* Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219 (2014) (describing controversy over the Supreme Court's recent invocations of foreign law in interpreting constitutional provisions, and the resulting confusion in adoption of anti-sharia measures).

otherwise, the domestic court's encounter with sharia does not constitute an application of Islamic or other foreign law in its own right, but the consideration of outside authority based on rules of decision that apply—and within due and neutral limits—under established conflicts-of-law doctrine.[22] Singling out sharia for disfavored treatment, even (and perhaps particularly) where it plays no different role than any other foreign legal source, stigmatizes the Muslim community and clashes with our constitutional tradition.[23]

Practices central to many faiths are at risk if, as some states have declared recently, courts are not only prohibited from considering sharia but cannot apply legal rules or enforce judgments from "any system" with different constitutional norms.[24] Under these regimes, a court could reject an otherwise valid choice-of-law or arbitration term in a contract, a property sale, or a family arrangement because of its religious origins.[25] More broadly, even where "anti-sharia" laws may have little practical effect—e.g., in the states that profess, in supposed contrast to Islam, that courts must act legally[26]—the message is worrisome and contrary to the robust religious pluralism to which our nation has historically aspired.

To this point, the bulk of the literature addressing the domestic application of sharia has taken one of two opposing forms—both of which, purposefully or not, also tend to take a view of sharia on the merits and thus confuse the important distinction between religion and religious liberty. On one side, those who oppose the use of sharia in domestic law invariably do so because, they argue, it violates human

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[22] *See* Volokh, *supra* note 13, at 431 ("But in many of the instances that critics see as improper 'creeping Sharia,' it is longstanding *American* law that calls for recognizing or implementing an individual's religious principles, including Islamic principles." (emphasis added)).

[23] *See* Robert K. Vischer, *The Dangers of Anti-Sharia Laws*, 221 FIRST THINGS 26 (2012) (describing the resulting stigmatization of Islam by domestic anti-sharia measures).

[24] *E.g.*, KAN. STAT. ANN. § 60-5103 (2013) (preventing application of foreign law where "system" from which it comes fails to accord the same fundamental rights as are available under the state or federal constitutions); OKLA. STAT. tit. 12, § 20 (2013) (providing similarly); *cf.* S.D. CODIFIED LAWS § 19-8-7 (2012) (prohibiting the enforcement of "any religious code").

[25] *See* Matthew Schmitz, *Fears of 'Creeping Sharia'*, NAT'L REV. (June 13, 2012), http://www.nationalreview.com/article/302280/fears-creeping-sharia-matthew-schmitz (describing the broad religious liberty implications of Kansas's anti-foreign law statute).

[26] *E.g.*, LA. REV. STAT. ANN. § 9:6001 (2010) (preventing application of "foreign law" if doing so would "result in a violation of a right guaranteed" by the Louisiana or United States Constitution).

dignity and freedom.[27] On the other side, those who support applying sharia (at least as it has been applied domestically) commonly emphasize aspects that would be widely accepted and minimize its more controversial invocations.[28]

This Article proposes a third path, based on religious-liberty principles: regardless whether sharia is good, bad, or indifferent, our courts (and political culture) should approach it no differently than any other foreign source of law. In so arguing, it proceeds in six parts: (I) this introduction; (II) a summary of approaches courts take when faced with external authority; (III) an overview of how Muslims typically try to follow sharia domestically; (IV) a discussion of the relevant "anti-sharia" trend (including its practical and legal aspects); (V) an exploration of some broader religious-liberty implications of the "anti-sharia" movement; and (VI) a brief conclusion. At bottom, this Article seeks to provide a theoretical framework to resolve the controversy in a manner consistent with "the best of our traditions."[29]

One of the most rewarding aspects of our launching at Stanford Law School the nation's only full-time law-school clinic dedicated to religious liberty has been teaching students how to reflect upon and articulate to an often-skeptical audience that our clients' claims are not about faith or politics, but freedom. That freedom is not absolute, but nor should it be restricted simply because its exercise is controversial, unpopular, or maybe even inconsistent with freedom itself. After all, religious-liberty protections would be unnecessary were the practice at issue widely accepted and consistent with the dominant cultural or political ethos. And so it is for Muslim Americans seeking to live in accordance with sharia.

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[27] *E.g.*, CTR. FOR SEC. POLICY, SHARIA LAW AND AMERICAN STATE COURTS (2011), *available at* http://www.centerforsecuritypolicy.org/wp-content/uploads/2014/12/Shariah_in_American_Courts1.pdf (assembling cases applying sharia, which authors describe as threat to liberty and equality); Karen Lugo, *American Family Law and Sharia-Compliant Marriages*, 13 ENGAGE 65, 66–68 (2012) (citing oppressive practices in questioning domestic application of sharia); Bradford J. Kelley, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 609–12 (2013) (rejecting application of sharia law in domestic courts, based in large part on unjust results).

[28] *See, e.g.*, Cyra Akila Choudhury, *Shari'ah as National Security Threat?*, 46 AKRON L. REV. 49, 83–99 (2013) (describing Islamophobia of "anti-sharia" campaign); Abed Awad, *The True Story of Sharia in American Courts*, THE NATION (June 13, 2012) (minimizing controversial sharia-based practices); Quraishi-Landes, *supra* note 13, at 251–54 (describing pro-woman aspects of sharia); WAJAHAT ALI & MATTHEW DUSS, *Understanding Sharia Law*, CTR. FOR AM. PROGRESS 3 (Mar. 2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/03/pdf/sharia_law.pdf (arguing that claims against the domestic application of sharia ignore how sharia is actually practiced).

[29] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

II. CONFLICTS, COMITY, AND RELIGION

Before exploring the domestic application of sharia, it is important first to review the basic parameters of the two legal contexts in which the issue arises: conflict-of-laws and the so-called "religious question" doctrine. Conflict-of-laws, or conflicts, is a set of rules courts use in deciding what substantive law to apply where a case involves facts or circumstances arising outside the place where suit is brought.[30] Among the options are for the court to apply the laws of the place where it sits (despite the case's foreign aspects), those of another jurisdiction, or those chosen by the parties or otherwise seemingly required by the action—which, for our purposes, might include faith-based concepts.[31] Use of religious authority, however, is regulated further by the religious-question doctrine. That doctrine, which is driven by First Amendment concerns, generally requires courts to refrain from resolving doctrinal or other religious questions outside the courts' competence that should be resolved, if at all, by religious authorities.[32]

As one would expect, where a secular dispute arises entirely within the geographic area in which suit is brought and the parties have not sought to agree otherwise, the court applies the secular law of that place.[33] Of course, not all domestic relationships, accidents, or contracts are so parochial. A couple might marry in one state, raise children in another, and separate in yet another still. A tort lawsuit might involve a product made, sold, or used in different states. And modern business contracts often involve interstate or international matters.

Courts must therefore have a process for deciding what "foreign" law should govern—i.e., law other than that which it uses for intra-jurisdictional disputes. That process, whether adopted by statute or judges themselves, is the courts' conflicts rules.[34] And because the resulting use of foreign law depends entirely upon such conflicts rules, the law applied to the case at hand is ultimately not the creature of any other place, but is in fact the enforcement of local law—in its entirety.[35]

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[30] CONFLICT OF LAWS 1 (Peter Hay et al., eds., 2010).

[31] *Id.* at 144 (describing courts' conflicts options).

[32] *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 494 (2013) (describing general parameters of First Amendment limitations on court adjudication of religious disputes).

[33] CIVIL PROCEDURE: CASES AND MATERIALS 371 (John J. Cound et al., eds., 2001).

[34] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (describing conflicts rules).

[35] *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that the application of a state's laws necessarily includes that state's choice of law for a given

In other words, the application of foreign law results not from the authority of that law in its own right but from the local forum's conflicts rule for deciding the case before the court. In this sense, it *is* domestic law.

Conflicts doctrine varies by jurisdiction, and the subject is not free from its own controversies.[36] Typically, however, American courts apply law to cases before them as follows: (1) local law, if the dispute and parties are from there; or (2) the law of another state or country, if (a) the dispute arises (or was already ruled upon) there, (b) one or more parties is from there, or (c) the dispute is otherwise connected in a significant way to that other place.[37] Alternatively, all jurisdictions recognize the right of parties, as a matter of personal autonomy and freedom of contract, to "opt out" of a forum's laws, including its conflicts rules, and agree that other laws—including, perhaps, faith-based ones—will govern.[38]

Pertinently, religious norms often serve as the source of law in a conflicts scenario—whether directly (through privately chosen religious doctrine or faith-based dispute-resolution methods) or indirectly (through privately chosen foreign laws arising from countries with an established religion, or comity for the laws or pre-existing judgments entered in such countries).[39] Common direct examples include disputes arising from marriages formed under religious auspices,[40] wills drafted in accordance with the decedents' faith,[41] or agreements to arbitrate using religious norms or referring

dispute).

[36] *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1968 (1997) (observing that "nothing in conflicts law is ever neat or tidy").

[37] *See* Thomas J. Tallarico & Patrick M. McCarthy, *Conflict of Laws*, 44 WAYNE L. REV. 597, 599–601 (1998) (describing typical conflict of laws approaches).

[38] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). As a leading treatise notes, the Restatement's private "choice of law" rule is "followed by more American courts than any other provision of the Restatement." CONFLICT OF LAWS, *supra* note 30, at 1088 (internal quotation marks omitted); *see also* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 367 (2003) (noting private-law clauses "are enforced in all but certain narrow categories").

[39] *See* Elsayed, *supra* note 1, at 945–48 (describing foreign and religious law in American courts).

[40] *See, e.g.*, In re Marriage of Goldman, 554 N.E.2d 1016 (Ill. 1990) (upholding pre-nuptial agreement binding couple to Orthodox Jewish principles in the event of divorce).

[41] *See, e.g.*, K. Eli Akhavan, *Basic Principles of Estate Planning Within the Context of Jewish Law*, PROBATE & PROP. 60, 60–63 (July/Aug. 2011) (describing Jewish estate planning).

disputes to a panel of fellow believers.[42] Less direct examples include disputes over marital or child-custody arrangements that were already ruled on in some way by a court in a country with an established religion, or contracts to resolve disputes under the laws of such a country.[43]

No matter the conflicts method or source of law chosen, however, every jurisdiction in the United States also retains a "public policy exception."[44] Justice Cardozo famously described this exception as precluding application of foreign law that "would violate some fundamental principle of justice, some prevalent conception of morals, [or] some deep-rooted tradition of the common weal."[45] The exception has been defined alternatively as applying where the foreign law "is not only different from but also offensive to generally accepted values within the [applying] forum."[46] Examples of public-policy limitations include refusals to recognize tort claims among spouses,[47] gambling-based claims,[48] covenants-not-to-compete,[49] and the validity of certain marriages.[50] Courts also will not enforce another jurisdiction's criminal laws, whether rooted in religion or otherwise.[51]

The mere presence of a conflict will not suffice to refuse the application of foreign law on public-policy grounds; naturally, a certain level of difference is presumed whenever a court is confronted with the question of what law it should use. Rather, the public-policy exception

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[42] Helfand, *supra* note 32, at 506–08 (describing growth in faith-based arbitration).

[43] *See, e.g.*, Nat'l Grp. for Commc'ns., Ltd. & Computers v. Lucent Techs. Int'l, 331 F.Supp. 2d 290, 292 (D.N.J. 2004) (applying Saudi sharia-based law in commercial dispute).

[44] Gutierrez v. Collins, 583 S.W.2d 312, 321 (Tex. 1979) (observing that the public-policy exception is common to all jurisdictions).

[45] Loucks v. Standard Oil Co., 224 N.Y. 99, 111 (1918).

[46] John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 649 (1985).

[47] *See, e.g.*, Mertz v. Mertz, 271 N.Y. 466, 473–74 (1936) (refusing on New York public-policy grounds to recognize inter-spousal tort claim arising from out-of-state accident).

[48] *See, e.g.*, Lane & Pyron, Inc. v. Gibbs, 266 Cal. App. 2d 61, 68 (1968) (upholding on California public-policy grounds trial court's rejection of gambling-based claim arising out of state).

[49] *See, e.g.*, Application Grp. v. Hunter Grp., 61 Cal. App. 4th 881, 901 (1998) (refusing on California public-policy grounds to enforce out-of-state covenant not to compete).

[50] *See, e.g.*, Hesington v. Estate of Hesington, 640 S.W. 2d 824, 826–27 (Mo. 1982) (refusing to recognize common-law marriage arising out of state based on Missouri public policy).

[51] *See* CONFLICT OF LAWS, *supra* note 30, at 173–74 (on non-enforcement of foreign criminal law).

applies where fundamental or substantial public interests are implicated.[52] For example, the policy "may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power."[53] Therefore, courts refuse to enforce foreign-law arrangements that violate equal protection on the basis of gender, due process, or other important civil rights.[54] Pertinently, they likewise would not impose religious law on those who never chose it.[55]

Although not classified as public policy, the religious-question doctrine imposes additional parameters on the application of foreign law where religion is involved.[56] These arise chiefly from constitutional concerns. To that end, the First Amendment prohibits courts from deciding the "truth or falsity" of religious beliefs, or resolving "controversies over religious doctrine and practice."[57] As the Supreme Court has observed, "religious controversies are not the proper subject of civil court inquiry."[58] Moreover, and as the Court clarified recently, the First Amendment includes within this deferential approach broad protection from—or, in the words of Chief Justice Roberts, "special solicitude" against—governmental interference with decisions of church governance and the selection of ministers.[59]

Provided they avoid doctrinal questions or matters on which they must defer to religious authorities, however, courts commonly face cases with religious ingredients.[60] Again, courts might determine the

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[52] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) & cmt. g (1971).

[53] *Id.*

[54] *See, e.g.*, Aleem v. Aleem, 947 A.2d 489, 500–01 (Md. 2008) (refusing to recognize husband's disproportionate divorce rights under Islamic law based on gender-inequality statute); Tarikonda v. Pinjari, No. 287403, 2009 WL 930007, at *2 (Mich. Ct. App. Apr. 7, 2009) (refusing to recognize talaq divorce on due-process grounds).

[55] Sarah M. Fallon, Note, *Justice for All: American Muslims, Sharia Law, and Maintaining Comity Within American Jurisprudence*, 36 B.C. INT'L & COMP. L. REV. 153, 180 (2013) ("The First Amendment's Free Exercise Clause and Establishment Clause protect against the application of religious law to a party who has not agreed to such application.").

[56] *See generally* Helfand, *supra* note 32 (discussing and critiquing the so-called "religious question doctrine," which limits secular courts' ability to examine religious questions).

[57] United States v. Ballard, 322 U.S. 78, 87 (1944); *accord* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

[58] Serbian Eastern Orthodox Diocese U.S.A. & Canada v. Milivojevich, 426 U.S. 696, 713 (1976).

[59] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 692, 706 (2012).

[60] *See, e.g.*, Watson v. Jones, 80 U.S. 679, 714 (1871) ("Religious organizations come before us in the same attitude as other voluntary associations for benevolent or

validity of faith-based marriages, enforce contracts arising from such marriages, or interpret estate plans written according to religious norms.[61] And although the litigants' faith may frame such controversies and provide the final answer, any court consideration of religion is shunted in the first instance through civil marriage, contract, and estate law, not religious doctrine.[62] Courts might consider faith-based concepts to determine the nature of a relationship—for example, whether a couple had in fact agreed to a prenuptial contract or what the terms of a testator's will are—and perhaps even be called upon to resolve the question on conflicting evidence.[63] Any consideration of religious matters like this, however, results not from religion but from secular conflicts rules—including their public-policy and constitutional limitations.[64]

Whether in the personal or business context, courts also assess faith-based arbitration using largely the same standards as the arbitration of secular disputes.[65] As long as the parties consented, the arbitration terms are clear, the arbitrator does not abuse her authority or allow the process to be tainted, and public policy is not offended, the agreement to arbitrate and any resulting orders will be enforced.[66]

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charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints."); Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 547–48 (2004) (describing religious neutrality).

[61] *See generally* Quraishi-Landes, *supra* note 13 (describing domestic courts' treatment of Islamic family law matters); Omar T. Mohammedi, *Sharia-Compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. SCH. L. REV. 259 (2012) (describing treatment of sharia-compliant wills).

[62] *See* Quraishi-Landes, *supra* note 13, at 249–51 (observing that domestic recognition of sharia-based marital arrangements is rooted in secular "freedom of contract"); Mohammedi, *supra* note 61, at 260 (emphasizing "freedom of contract" in ensuring viability of sharia-based wills).

[63] *See* Elsayed, *supra* note 1, at 953–54 (describing courts' occasional need to review evidence on religious teachings where faith-based contracts are unclear).

[64] Quraishi-Landes, *supra* note 13, at 251 ("[J]udges neither react with an automatic rejection of Sharia, nor do they give it wholesale deference without considering public policy and general constitutional principles."); *see also* Volokh, *supra* note 13, at 431 (same).

[65] *See* Helfand, *supra* note 32, at 506–08 (describing approach of courts to religious arbitration as substantially similar to non-religious arbitration); *see also generally* Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169 (2007) (criticizing courts' equal treatment of religious arbitration).

[66] Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1243–44 (2001) (observing that "[t]he mechanism to have a claim arbitrated by a religious arbitration court is the same as it is for standard arbitration courts" and that "[a]wards issued by religious arbitration courts, like those of standard arbitration tribunals, are subject to the [limited]

Likewise, courts enforce foreign judgments and private choices of law involving faith-based rules—often under the laws of another country—provided they do not involve controversies over religious doctrine.[67] Finally, most courts try to resolve religious-property disputes under "neutral principles of law" (i.e., through secular sources like deeds or charters).[68] And even where neutral principles are not used, courts try to defer to relevant religious authorities rather than impose their own views.[69]

In sum, American courts have an established system for applying foreign law, including religious law. They might not always reach the correct results, but any analysis of sharia applications must account for these common approaches.

III. SHARIA AND ITS DOMESTIC APPLICATIONS

Against the backdrop of conflicts rules and First Amendment limitations, and as described below, the application of sharia by domestic courts is a fairly standard legal enterprise. This is not to suggest sharia's critics—which, it should be noted in this context, can include Muslims who disagree among themselves on how others of their faith might understand or practice it—have no basis for concern over the use of Islamic law generally. They may, they may not. But when it comes to its application by domestic courts in this country, singling out sharia for facially disfavored treatment is not justified. Rather than ensuring "American law for American courts," the recent pursuit of "anti-sharia" laws undercuts our standard approach to such matters. As Professor Quraishi-Landes observes, "judicial treatment of Sharia requests is not threatening the American rule of law, it is an *illustration* of it."[70]

A brief review of sharia generally and three areas of law where it is most commonly applied reveal the largely unremarkable nature of the supposed problem and the unnecessary harm—both to the budding American Muslim community and to religious liberty generally—caused by recent "anti-sharia" efforts in many states. These three areas are (1) domestic relations; (2) estate practices; and (3)

statutory grounds for vacatur").

[67] *See* Quraishi-Landes, *supra* note 13, at 246–47 (describing court approaches to religious law).

[68] *See* Masterson v. Diocese of Nw. Texas, 422 S.W.3d 594, 607 n.6 (Tex. 2013) (describing "neutral principles" approach in religious land-use cases and citing cases from majority of states where it has been adopted).

[69] *See id.* at 602 (describing minority approach of deference to church hierarchy in property cases).

[70] Quraishi-Landes, *supra* note 13, at 246–47.

alternative dispute resolution. (Again, recall that domestic courts do not apply the sharia-based criminal-law provisions that are the most controversial of all.)[71]

A. Sharia Generally

Sharia, or "the path to the watering place" in Arabic, is for believers a set of "commands, prohibitions, guidance and principles that God has addressed to mankind pertaining to their conduct in this world and salvation in the next."[72] As an integrated system for both secular and religious behavior, sharia "designate[s] the rules and regulations that govern the lives of Muslims."[73] More than a mere legal code, sharia is designed "to facilitate the ability of Muslims to know how to conform their lives with the Will of Allah."[74]

Sharia's particulars are generally based on four sources: (1) the Koran's text; (2) reports ("hadith") about the sayings and life ("sunna") of the Prophet Mohammed; (3) the consensus of Islamic scholars ("ijma"); and (4) analogies to teachings from the Koran or Prophet ("qiyas") where new situations occur.[75] As one would expect, not all Muslims subscribe to a uniform interpretation, analysis, or application of these four sources (collectively referred to as "fiqh"); indeed, sharia interpretations are diverse and dynamic.[76] That said, American Muslims commonly turn to sharia, in whatever form or understanding, as a source of divine guidance in their lives—particularly where marriage and family are concerned.[77]

In secular countries like the United States, sharia applies only to the extent particular believers seek to follow it in their own affairs.[78]

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[71] *See* CONFLICT OF LAWS, *supra* note 30, at 173–74.

[72] KAMALI, *supra* note 3, at 14.

[73] GRIFFEL, *supra* note 2, at 3.

[74] RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) xiii (2011).

[75] *Id.*

[76] *See id.* at 3–4; see also Quraishi-Landes, *supra* note 13, at 251–54 (describing intra-Muslim diversity of views about the nature and content of sharia).

[77] *See* Maha Alkhateeb, *Islamic Marriage Contracts: A Resource Guide for Legal Professionals, Advocates, Imams & Communities* 18, PEACEFUL FAMILIES PROJECT (2012), http://www.bwjp.org/files/bwjp/articles/Islamic_Marriage_Contracts_Resource_Guide_APIIDV_2012.pdf (describing common adherence to sharia in marriages among Muslims); *see also* Ali, *supra* note 20, at 1064 (observing "most" Muslims "would proudly refer to themselves as Shariah adherents," albeit in varying degrees); Mohammedi, *supra* note 61, at 262 (noting "devout Muslims are expected" to follow sharia inheritance rules).

[78] BHALA, *supra* note 74, at xxxi; *see also* Elsayed, *supra* note 1, at 961 ("[T]he reality is that Sharia law is only as relevant to a case as the parties to a contract make it—they must contract into Sharia (or any other religious law) for it to have any import in a case.").

And once again, and as in other long-established and diverse religious traditions, "Shari'a today means different things to different Muslims."[79] In any event, however, where a Muslim believer considers it to apply, sharia is a sacred set of principles central to that individual's public and private affairs in service and obedience to God—no matter the society or country in which they live.[80] It is central to who they are as human beings.

B. Marriage and Family

Like most religions, Muslims look to sharia for detailed rules on marriage and family; indeed, the family is rightly described as "the heart" of sharia.[81] And in regulating the domestic affairs of Muslims, sharia may foster arrangements that are unequal between men and women, or otherwise at odds with typical family relationships in the United States.[82] Nonetheless, when domestic courts address family-related disputes among American Muslims, they do not apply sharia in its own right but only, if at all, through state law in the first instance.[83]

In marriage formation, for example, sharia might prohibit a Muslim from marrying someone who does not believe in God.[84] And while a Muslim man may marry a "woman of the Book" (i.e., Jew or Christian), a Muslim woman may marry only a Muslim man.[85] Sharia can also provide disparate age minimums, the negotiation of marriage by one's relatives, and in some cases allow polygamy.[86] But questions

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[79] GRIFFEL, *supra* note 2, at 12.

[80] JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 4 (1982) (observing that sharia "is, in the last resort, the sum total of the personal privileges and duties of all individuals"); *see also* Mark L. Movsesian, *Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. 861, 864 (2011) (describing importance of religious law to contemporary Muslims).

[81] Lugo, *supra* note 27, at 66.

[82] Quraishi-Landes, *supra* note 13, at 247–51 (describing sharia marriage and divorce rules).

[83] Estin, *supra* note 60, at 551 (observing that in the United States, "persons of all religious, cultural and ethnic backgrounds are subject to the same family law rules and institutions").

[84] *See* Alex B. Leeman, Note, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 IND. L.J. 743, 755 (2009) (describing religious-entry rules under traditional sharia).

[85] *See id.* at 755–58.

[86] *See* Yehiel S. Kaplan, *A Father's Consent to the Marriage of His Minor Daughter: Feminism and Multiculturalism in Jewish Law*, 18 S. CAL. REV. L. & SOC. JUST. 393, 400 (2009) (describing marital-age rules in Muslim context); Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in America Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 197–98 (2002) (describing disparate ages of consent for an Islamic marriage contract based on gender, and observing that such contracts are often negotiated by the groom and a male bridal

about a marriage's legal standing are resolved under secular, not religious, law—whether as a matter of public policy, constitutional protections for marital choice, or concern that to do otherwise might violate the Establishment Clause.[87] A state might defer to religious officials to confirm certain formalities were observed.[88] A state might also honor Islamic marriages performed overseas based on conflicts principles and comity, provided public policy is not offended.[89] But sharia norms are facially irrelevant to a marriage's domestic validity.[90]

The question becomes trickier in divorce, property, and child-custody disputes.[91] Under the "talaq" doctrine, for example, sharia allows men to divorce their wives through a series of verbal declarations.[92] And although sharia might allow other divorce

relative); 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, 177, 192–93 (2009) (describing polygyny in Islamic law).

[87] *See* Quraishi-Landes, *supra* note 13, at 247–51 (observing that marriages of minor children are not recognized in the United States as a matter of public policy); Quraishi & Syeed-Miller, *supra* note 86, at 192–93 (describing universal prohibition of polygamy in domestic law, and describing marriage as a personal right that cannot be forfeited based on the religious identity of one's partner); Estin, *supra* note 60, at 550–51, 551 n.64 ("[P]rovision for an explicitly religious family law regime would violate the bar on established religion under the First Amendment."); *see also* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (observing that Fourteenth Amendment requires a "critical examination" where state law significantly interferes with the right to marry).

[88] *See* Aghili v. Saadatnejadi, 958 S.W.2d 784, 787–88 (Tenn. Ct. App. 1997) (describing state's marriage solemnization process in Muslim context); *see also* Quraishi & Syeed-Miller, *supra* note 86, at 188 (describing solemnization process authorized by state laws).

[89] *See* Fallon, *supra* note 55, at 171–74 (describing both the recognition and limits of comity in the Islamic law context).

[90] *See* Estin, *supra* note 60, at 557 ("[D]espite the move toward greater private ordering of family life, courts and legislatures continue to enforce a set of background norms based on constitutional values."); *see also* Quraishi & Syeed-Miller, *supra* note 86, at 188 (observing that marriages conducted only under religious rules are "a risky practice under U.S. law because, barring a finding of common law or putative marriage, the parties and their children have no state-enforceable legal rights upon each other"). Limited exceptions to the irrelevance of sharia in the domestic recognition of marriages have arisen where courts are asked to recognize otherwise invalid marital arrangements that were valid in a foreign jurisdiction—e.g., a polygamous marriage or marriage between cousins—but any such recognition arises as a matter of comity for foreign authority, not independent validation of these arrangements. *See* Estin, *supra* note 60, at 563–65 (describing balancing approach taken by courts to foreign marriages).

[91] *See* Estin, *supra* note 60, at 559 ("[B]eyond the rules for celebration of marriages . . . substantive marriage regulations pose more difficult cultural and legal conflicts.").

[92] *See* RAFFIA ARSHAD, ISLAMIC FAMILY LAW 111 (2010) (providing a helpful flow chart on the various steps in a talaq divorce, where a husband unilaterally divorces his wife through a series of statements and waiting periods, subject only to financial support in the case of a recent birth).

methods—with some initiated by women—talaq is the normal form, and one that reflects a more traditional (and arguably chauvinistic) view of gender roles.[93] On the other hand, sharia typically also requires marrying couples to first enter a "mahr" agreement, under which the husband pays a monetary penalty in the event of such summary divorce.[94] Mahr contracts can thus be seen as a way to protect women from financial burdens and compensate them for income lost in marriage—though again, this is a practice reflecting a more traditional view of marriage.[95]

Despite the religious aspects of talaq or mahr, however, American courts use secular standards, not religious ones, to determine in the first instance the reality and consequences of divorce for Muslims.[96] As a matter of comity, our courts might recognize a talaq obtained while a couple lived abroad—provided its recognition would not violate an important public policy, like due process or the equitable treatment of assets.[97] But that recognition would be based on domestic respect for the other country's authority, not the substance of the religious norm.[98]

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[93] SCHACHT, *supra* note 80, at 164–65.

[94] *See* Blenkhorn, *supra* note 86, at 201 (describing mahr agreements as "compensation to women for men's unlimited, unilateral right to divorce"); *see also* SCHACHT, *supra* note 80, at 167 (describing mahr as a "powerful limitation" on the right of husbands to unilaterally divorce).

[95] *See* Blenkhorn, *supra* note 86, at 201–02 (observing the economic-support purposes of a mahr agreement and its roots in a particular understanding of marital gender roles).

[96] *See, e.g.*, Shikoh v. Murff, 257 F.2d 306, 309 (2d Cir. 1958) (rejecting a talaq, and observing that divorce "must be secured in accordance with [state] law[ ]"); Aziz v. Aziz, 127 Misc. 2d 1013, 1013–14 (N.Y. Sup. Ct. 1985) (enforcing mahr under state contract law "notwithstanding that it was entered into as part of a religious ceremony," and citing in support Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983), where the court upheld a Jewish couple's agreement to have a rabbinical tribunal resolve their marital disputes); *see also* Quraishi-Landes, *supra* note 13, at 248, 249 ("Purely religious divorces . . . are not recognized by state law because states claim exclusive subject matter jurisdiction over marriage dissolution . . . . [M]ost state judges treat a *mahr* clause as they do any other contract clause; it is enforced unless (1) it violates some basic rule of contract law . . . , or (2) its application would violate public policy").

[97] *See* Aleem v. Aleem, 947 A.2d 489, 501 (Md. 2008) (refusing talaq from Pakistan where property in husband's name was not subject to equitable division); Tarikonda v. Pinjari, No. 387403, 2009 WL 930007, at *2 (Mich. Ct. App. Apr. 7, 2009) (refusing talaq from India without "basic rudiments of due process"); *see also* Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501, 511 (2004) (observing that American courts may recognize foreign talaq divorces as a matter of comity, provided they were obtained with due process); Emily Thompson & F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 382 (2007) (observing similarly). *But see* Chaudry v. Chaudry, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978) (enforcing Pakistani talaq and mahr in lieu of greater relief under state spousal-support laws).

[98] *See* Fallon, *supra* note 55, at 168–74 (framing domestic recognition of sharia-

No such unilateral divorce would be honored for couples residing here.[99]

Mahr contracts are the most distinctive legal feature of Islamic marriage in this country, even for more "progressive" Muslims.[100] Nevertheless, civil courts regularly address them under "neutral principles"—which include both a broad freedom of contract (including on a religious basis) and public-policy limits on that freedom, such as prohibition of contracts that encourage divorce or protections against the inequitable waiver of marital property.[101] At bottom, mahr contracts are treated no differently than similar arrangements that limit the future rights of couples in divorce, whether in the secular or religious context (like the Jewish ketuba).[102]

Enforcing a mahr can be problematic where, as is sometimes the custom, a bride's father or other relative negotiated it.[103] Similarly, because sharia may allow marriage by minors, a mahr's validity may be suspect on that basis, too.[104] These aspects can clash with Western

based judgments in other countries as a matter of comity).

[99] *See* Estin, *supra* note 97, at 511 (observing that a talaq divorce "has no secular legal effect" in the United States).

[100] *See* Quraishi & Syeed-Miller, *supra* note 86, at 188 ("[M]ost Muslims in the U.S. seem to consider only one thing really important that would not otherwise be included in a standard civil marriage license: a provision regarding the wife's bridal gift or dower.").

[101] *See, e.g.*, Odatalla v. Odatalla, 810 A.2d 93, 97 (N.J. Super. Ct. Ch. Div. 2002) (enforcing mahr under neutral principles of law as a contract between consenting adults); Akileh v. Elchahal, 666 So. 2d 246, 248–49 (Fla. Dist. Ct. App. 1996) (same); Habibi-Fahnrich v. Fahnrich, No. 46186/93, 1995 WL 507388, at *3 (N.Y. Sup. Ct. 1995) (refusing to enforce mahr under statute of frauds); In re Marriage of Shaban, 88 Cal. App. 4th 398, 404–07 (2001) (same); In re Marriage of Dajani, 204 Cal. App. 3d 1387, 1390 (1988) (rejecting mahr as violating state policy against contracts encouraging divorce); In re Altayar & Muhyaddin, 139 Wash. App. 1066 (Wash. Ct. App. 2007) (rejecting mahr as inequitable avoidance of state property distribution rules); *see also* Estin, *supra* note 97, at 521–22 (observing that enforcement of mahr contracts "turn[s] on the law of contract").

[102] *See* Comment, *The Uniform Premarital Agreement Act and its Variations Throughout the States*, 23 J. AM. ACAD. MATRIMONIAL LAWYERS 355, 355–59 (2010) (describing uniform act adopted in twenty-seven states that allows for the enforcement of premarital agreements); Estin, *supra* note 60, at 570 (describing California courts' similar treatment of Jewish and Islamic marital agreements); *see also Odatalla*, 810 A.2d at 97 (upholding mahr under "neutral principles" approval of ketuba in Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983).

[103] *See* Kecia Ali, *Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines*, *in* THE ISLAMIC MARRIAGE CONTRACT 14–15 (Quraishi & Vogel eds., 2008) (describing common role of guardian-representative ("wali") in negotiating marriage contract); s*ee also* BHALA, *supra* note 74, at 872–73 (describing broad authority of wali over minor ward). In some traditions, a minor girl's representative can marry her off against her will. *See* SCHACHT, *supra* note 80, at 161–62.

[104] *See* Blenkhorn, *supra* note 86, at 198–99 (emphasizing marriage of minors in

norms of equality and personal autonomy, and can also undercut marital-property protections where the mahr is deemed a prenuptial agreement that waives a greater financial award available under state law.[105] But domestic courts will not enforce mahr contracts that are rooted in coercion or lack of understanding.[106] And although there are outliers, courts commonly refuse to honor agreements that would waive and then undervalue what a spouse might receive under secular rules governing the division of property in divorce.[107]

Finally, regarding child custody, various schools of sharia thought differ. On the whole, mothers are preferred custodians for their small children.[108] Once adolescence is reached, however, there is in some circles a distinct preference for custody to originate with, or even transfer to, fathers, who are often understood as the chief guardian of a child's education (particularly for boys).[109] But no matter what sharia might say, domestic courts almost universally apply the secular "best interests of the child" test in assigning custody.[110] Context is of course important in assessing a child's best interests, and religious background and upbringing are not ignored.[111] Indeed, religious factors can be an integral part of the analysis.[112] Nevertheless, and as

broad attack on the domestic enforcement of mahr agreements).

[105] *See* Blenkhorn, *supra* note 86, at 191 (criticizing mahr agreements as depriving women of property without adequate representation or understanding); Lugo, *supra* note 27, at 79 (arguing that the enforcement of mahr agreements endorses an "institutional discrimination against women").

[106] Quraishi-Landes, *supra* note 13, at 250.

[107] *See* Chelsea A. Sizemore, Comment, *Enforcing Islamic Mahr Agreements: The American Judge's Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085, 1093 (2011) (citing cases and noting "discernable trend" about the enforcement of mahr contracts that "courts are not inclined to enforce these agreements if they are financially inequitable to one of the parties"). Those opposed to domestic recognition of mahr contracts invariably point to the New Jersey case of *Chaudry*, where the court upheld a $1,500 mahr in lieu of a more sizeable alimony and property claim. But the mahr was recognized there not in its own right but only as a matter of international comity—i.e., the parties were Pakistani citizens and the matter had already been fully litigated there. Chaudry v. Chaudry, 388 A.2d 1000, 1005–06 (N.J. Super. Ct. App. Div. 1978).

[108] *See* ARSHAD, *supra* note 92, at 152–54 (describing sharia schools of thought on child custody).

[109] *See id.* at 154–57 (describing transfer or origination of fatherly custody during adolescence); *see also* JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA 192–93 (2012) (describing sharia-based gender preferences in post-adolescent custody).

[110] *See* Quraishi-Landes, *supra* note 13, at 248 (emphasizing the primacy of the "best interests of the child" custody test as a matter of domestic public policy). *See also* Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract, and the Constitution*, 41 PEPP. L. REV. 1029, 1036, 1040 (2014) (same).

[111] *See* Estin, *supra* note 60, at 593 ("American courts are prepared to recognize that religious and cultural factors are a legitimate part of a best interests analysis.").

[112] *See* George L. Blum, Annotation, *Religion As Factor in Child Custody Cases*, 124

Professor Quraishi-Landes has also observed, secular public policy "guides consideration of gendered (and patriarchal) child custody and guardianship rules found in Islamic family law: they are honored *only* if they are found to be consistent with the 'best interests of the child' standard."[113]

C. Estate Planning

An additional area where sharia commonly arises in the lives of American Muslims is estate planning. "Planning for death by ensuring a distribution of one's estate in accordance with Islamic Sharia law is obligatory upon all Muslims wishing to comply with their religious obligations."[114] Indeed, understanding sharia inheritance rules is often seen as central to understanding what it means to be a Muslim.[115] As the Koran insists of certain distributions, "this is a law from God, and He is all knowing, all wise."[116] Islamic Law thus contains arguably the most particular and technical scheme of inheritance rules of all major religions.[117]

Islamic inheritance rules originate from detailed provisions in the Koran, as well as examples from the Prophet and centuries of scholarly teaching.[118] A common understanding of these rules allows a Muslim to leave up to one-third of his or her estate to an outsider but requires the remaining two-thirds to be distributed under a relatively strict and complex formula that, unlike domestic law, creates a "guaranteed right" to certain inheritance shares in designated family members.[119] Protected family status includes spouses, parents, and children, but also extends to grandparents, grandchildren, and even siblings

A.L.R.5th 203, § 2[b] (2004) (summarizing courts' considerations of religion in awarding child custody).

[113] Quraishi-Landes, *supra* note 13, at 248 (emphasis added); *see also* Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Considerations of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1633–41 (1998) (summarizing cases where religious factors were rejected based on a broad spectrum of potential harms to child). Courts will also refuse religious considerations where the litigating parents disagree on such matters. *See* Estin, *supra* note 60, at 548.

[114] Mohammedi, *supra* note 61, at 260; *see also* ARSHAD, *supra* note 92, at 187 (quoting the Prophet as saying,"[i]t is the duty of a Muslim who has anything to bequeath not to let two nights pass without writing a will about it").

[115] *See* Mohammedi, *supra* note 61, at 264 (observing that in the Maliki school of jurisprudence, "knowledge of inheritance law is referred to as half the knowledge of religion").

[116] THE QUR'AN: A NEW TRANSLATION 51 (M.A.S. Abdel Haleem, ed., 2004).

[117] BHALA, *supra* note 74, at 1092.

[118] *See* ARSHAD, *supra* note 92, at 188–89 (describing origins and evolution of inheritance rules).

[119] BHALA, *supra* note 74, at 1093–94.

(including half-brothers and half-sisters).[120]

Like other traditional faith practices, sharia-based inheritance rules tend to "presuppose a patriarchal organization of the family,"[121] reflecting a view of the man as chiefly responsible for family welfare.[122] For example, shares of husbands and sons are often twice that of wives and daughters, respectively.[123] The rules also do not typically provide an elective share, where the surviving spouse can choose a default minimum in the event the sharia amount is inadequate.[124] That said, in response to charges that the system is sexist, its defenders often point to the system's complexity, cultural context, and differences among Muslims as to the rules in question, as well as countervailing rules that may benefit women—e.g., any outstanding mahr must be paid as a debt before any other distribution (which would then also include a share to the wife based on succession).[125]

An additional controversial aspect of Islamic inheritance arises from the understanding in some quarters that non-Muslims, including spouses, are disqualified from any legacy to which they might have had a right.[126] To quote the Prophet, "a Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim."[127] Defenders of a literal reading of this text stress that the rule does not typically forbid a decedent from granting a non-believer all or part of the one-third portion of his or her estate left to discretion.[128] Nevertheless, even among faithful Muslims, the "difference of religion" prohibition for the remainder of the estate is readily acknowledged to be difficult and potentially divisive.[129]

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[120] *See id.* at 1137–43 (describing estate succession rights of male and female heirs).

[121] SCHACHT, *supra* note 80, at 170.

[122] *See* BHALA, *supra* note 74, at 1162 (observing that inheritance rules recognize the man as the "bread-winner, provider, and protector"); KAMALI, *supra* note 3, at 273 (observing that any male favoritism in sharia-based estate rules is based chiefly on a view of the man being in charge of family finances).

[123] BHALA, *supra* note 74, at 1162, 1092, 1141–42, 1148–49 (describing gender-based disparities in sharia-based estate succession rules).

[124] Mohammedi, *supra* note 61, at 276–77 (describing lack of spousal election in Islamic wills).

[125] *See id.* at 278–79 (discounting feminist critique of sharia inheritance rules as ignoring other pro-woman aspects of those rules and other dynamics in Muslim culture); *see also* BHALA, *supra* note 74, at 1162–63; ARSHAD, *supra* note 92, at 192–93 (same).

[126] *See* BHALA, *supra* note 74, at 1104, 1159 (describing prohibition on non-Muslim legatees).

[127] ARSHAD, *supra* note 92, at 188 (quoting hadith by Sahih al Bukhari).

[128] *See id.* (observing that prohibitions against non-Muslim inheritance do not apply to the one-third discretionary share).

[129] *See* BHALA, *supra* note 74, at 1159 (describing negative cultural implications of

Notwithstanding these controversies, however, the enforceability of faith-based will terms is a common probate question in the case of decedents from other religions.[130] And the approach courts take is largely the same as in handling similar marriage and family matters: private choice is enforced as a matter of personal liberty, subject only to narrow public-policy or constitutional limits.[131] Provided the will does not require a court to interpret or become unduly tangled in religious doctrine, distributions based on religious status, like a "difference of religion" disqualifier, will be upheld as free religious exercise or under the general right to dispose of one's property as one sees fit.[132] As the Oregon Supreme Court urged in upholding a similar term in the Catholic context, "[t]he right to espouse any religious faith . . . carries with it the cognate right to engage as its champion in the proselytization of followers or converts."[133] On the other hand, faith-based terms will more likely be ignored where public policy would be violated—e.g., where a *spouse* would lose property relative to what she might be entitled under a state's elective share.[134]

D. Alternative Dispute Resolution

Similar to arrangements found among many orthodox Jews and an increasing number of Christians, another common and sacred aspect of Muslim legal affairs is the use of faith-based arbitration or mediation, rather than the courts, to resolve conflicts.[135] Many Muslims

prohibition on non-Muslim inheritance, both externally and within the Muslim community).

[130] *See* Mohammedi, *supra* note 61, at 271 ("U.S. courts have long grappled with conflicts . . . emerging out of the enforcement of religious clauses in wills . . .").

[131] *See id.* at 270–71 (describing "near-total flexibility and freedom" in all states for distributing property upon death, subject to narrow public-policy and constitutional limitations).

[132] *See id.* at 270–81 (describing current and anticipated legal landscape for domestic enforcement of sharia-compliant wills); *see also* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010) (describing testator's free-exercise interest in making faith-based bequests).

[133] U.S. Nat'l Bank of Portland v. Snodgrass, 275 P.2d 860, 863–64 (Or. 1954).

[134] *See* Mohammedi, *supra* note 61, at 272, 279–81 (observing that under domestic law, spouses may not be entirely disinherited and that, in most states, deprivation of an elective share will be ordered only where a spouse has affirmatively waived the right—though speculating that a court might ignore the elective share in cases where the spouse is otherwise adequately protected under the will and attendant circumstances); *see also* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 242–46 (1989) (describing broad public policy in United States favoring elective share rights for spouses: "the surviving spouse has clearly become the favorite in inheritance").

[135] *See* Grossman, *supra* note 65, at 177–81 (describing rise in faith-based arbitration among Jews, Christians, and Muslims); Helfand, *supra* note 66, at 1243 (same); *see also*

prefer private panels—whose members are typically chosen by religious criteria and charged with applying sharia-based rules—as an alternative method of dispute resolution more consistent with their religious faith.[136] These dispute-resolution mechanisms are particularly attractive to today's American Muslims, who face unique challenges integrating into a distinctively Western, secular, and at times hostile, milieu while retaining their own culture.[137] As such, faith-based alternative dispute resolution can "play a freedom-enhancing role . . . by serving as part of the infrastructure that makes religious freedom possible."[138]

Standard faith-based arbitration involves parties agreeing that a dispute be resolved by co-religionists and according to religiously derived procedural or substantive rules.[139] Examples in three contexts are as follows:

- Jewish. The parties "'hereby agree to recognize the Beth Din of the Rabbinical Assembly . . . or its duly appointed representatives, as having the authority to counsel us in light of Jewish tradition . . . and to impose such terms of compensation as it may see fit for failure to respond to its summons or carry out its decision.'"[140]
- Christian. The parties agree to submit their claims to an arbitration process conducted "'in accordance with the *Rules of Procedure for Christian Conciliation* of the Institute for Christian Conciliation,'" which in turn provide that "'the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.'"[141]
- Muslim. A party's claim must be "be submitted to and settled by arbitration before the Arbitration Court of an Islamic mosque located in [a chosen state] pursuant to the

Uddin & Pantzer, *supra* note 14, at 391–92 (describing Muslim interest in faith-based arbitration).

[136] *See* R. Seth Shippee, Note, *"Blessed Are The Peacemakers": Faith-Based Approaches to Dispute Resolution*, 9 ILSA J. INT'L & COMP. L. 237, 245–48 (2002) (detailing sharia-based alternative dispute resolution).

[137] *See* Michael J. Broyde, *Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society*, 90 CHI. KENT. L. REV. 111, 113, 134 (2015) (emphasizing the community-building benefits of faith-based arbitration).

[138] Helfand, *supra* note 66, at 1247.

[139] *See* Grossman, *supra* note 65, at 182 (describing common aspects of faith-based arbitration).

[140] Avitzur v. Avitzur, 446 N.E.2d 136, 137 (N.Y. 1983).

[141] Encore Prods., Inc. v. Promise Keepers, 53 F. Supp. 2d 1101, 1106, 1111 (D. Colo. 1999).

laws of Islam."[142]

The religious dimension in each instance is unmistakable. But deference to private decision-makers to resolve disputes on a basis that might differ from otherwise-applicable law—which, at bottom, is what the parties are choosing—is, for better or worse, common and unremarkable. Whether as a matter of religious liberty or civil law generally, "[a]rbitration is what the parties say it is."[143]

Indeed, courts look favorably on private agreements to arbitrate.[144] And faith-based arrangements are no exception.[145] As long as the parties agreed to arbitrate, the arbitrator acted impartially and within the scope of the agreement, and the result would not violate public policy, courts will enforce.[146] Some raise concerns in the religious context; for example, that enforcing such arbitration might threaten free exercise or create an establishment of religion; or conversely, that courts' fear of becoming mired in "religious questions" might cause them to defer unduly.[147] But the prevailing "neutral principles" approach—where courts chiefly apply secular rules to recognize (or not) faith-based contracts—addresses most of these concerns.[148] Pertinently, there is nothing distinct about Muslim arbitration on this score. Nor should there be.[149]

Among the reasons for American Muslims to choose a faith-based tribunal is not only a sense of religious obligation to abide by Islamic law, but also that these private tribunals are likely more accessible and sensitive to corresponding matters of language or culture that might differ from the Western mainstream.[150] Cultural sensitivity might be

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[142] Abd Alla v. Mourssi, 680 N.W.2d 569, 570 (Minn. Ct. App. 2004).

[143] Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1053 (1998).

[144] Grossman, *supra* note 65, at 169 ("[C]ontemporary American statutory and decisional law on arbitration are in keeping with the unequivocal . . . acceptance of arbitral adjudication.") (quoting THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 105 (1989)).

[145] Helfand, *supra* note 66, at 1245 ("[T]he policy favoring arbitration applies to religious and secular arbitration alike."); *see also* Broyde, *supra* note 137, at 112 (same).

[146] *See* Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 404–05 (2009) (describing (limited) rules for enforceable faith-based arbitration).

[147] *See id.* at 389 (flagging constitutional concerns of religious arbitration).

[148] *See* Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 625 (2006) ("The neutral-principles doctrine has helped clarify which sorts of disputes courts may adjudicate without excessively entangling church and state.").

[149] *See* Bambach, *supra* note 146, at 389.

[150] *See id.* at 404–05 (describing reasons Muslims might choose faith-based arbitration).

important, for example, where a mahr agreement would require payment in a non-fault divorce situation or a sharia-compliant business contract would prohibit the charging of interest. In these and similar situations, Muslim arbitrators can render decisions in light of shared norms, values, and rules that secular judges might miss.[151]

Sharia-based arbitration can, of course, resolve matters differently than had the parties gone to court. For better or worse, agreements to be bound by religious arbitration do not face the First Amendment dilemmas that might require a court to follow secular legal principles or remain blind to nuances of religious doctrine.[152] A talaq, for example, would more likely be recognized in arbitration, as would remedies available only under sharia, because the enforcement question does not concern the validity of the practice at issue but the authority of the body charged with deciding the dispute. But in these cases of course, the parties wanted—at least *ex ante*—to use this method to resolve their dispute.[153]

As with any arbitration agreement, involuntariness or duress at its signing will void the provision.[154] Public policy can also preclude arbitration. In domestic-relations cases, for example, the "'protective function' of family law" typically leads courts to apply heightened scrutiny.[155] Similarly, arbitration will not be enforced where procedures are unfair or fail to afford due process.[156] Some critics alternatively suggest that enforcing secular courts may be more reluctant to interfere with faith-based tribunals due to constitutional concerns or fail to appreciate cultural pressures that might prevail when faith-based agreements are entered.[157] But there is nothing

[151] Helfand, *supra* note 66, at 1268.

[152] *See* Trumbull, *supra* note 148, at 612–13 (describing constitutional and evidentiary limitations on the courts' ability to interpret and apply contracts that implicate Islamic law).

[153] *See* Michael A. Helfand, *Fighting for the Debtor's Soul: Regulating Religious Commercial Conduct*, 19 GEO. MASON L. REV. 157, 169 (2011) ("Without the consent of the parties, religious arbitration tribunals simply lack any enforcement power.").

[154] *See* Grossman, *supra* note 65, at 197 (describing duress exception to arbitration, though doubting its full effectiveness in the religious context, where coercion may be part of the faith).

[155] Estin, *supra* note 60, at 599–600; *see also* Elsayed, *supra* note 1, at 975 (observing that the private arbitration of family law matters "require[s] closer scrutiny to ensure fairness").

[156] *See* Bambach, *supra* note 146, at 396 (describing courts' rejection of Beth Din agreements where resulting arbitration procedures were "insufficient to protect a party's due process rights").

[157] *See* Grossman, *supra* note 65, at 186–87, 197–98 (describing undue arbitrator deference that can result from "neutral principles" approach in religious context, and duress and lack of due process often inherent in religious understandings of

constitutionally distinct about sharia-based arbitration, nor is family or community pressure short of legal duress unique to the Muslim community.[158]

In sum, the life of a practicing Muslim involves not only formal worship but also a host of legal practices that might differ from the secular approach in various areas, including marriage and family, estate planning, and alternative dispute resolution. These faith-based practices, however, are recognized (or not) under the established approach of American law to religious accommodation, including its corresponding limiting principles, and not as a religious matter.[159]

IV. SHARIA'S DOMESTIC DISCONTENTS

Despite the limited, yet cherished, applications of sharia for Muslims in America, a concerted effort is afoot to limit their ability to so handle their own affairs. As a constitutional enterprise, the effort has had mixed results; the leading sharia-specific ban (adopted in Oklahoma by voter referendum in 2010, with over 70-percent support) has since been struck down as unconstitutional, and "anti-sharia" advocates have needed to become more creative.[160] But the march continues, and, in many ways, its newer, subtler manifestations—which, on their face, tend to target only "foreign" law—are perhaps all the more corrosive to religious liberty.[161] If, as the drafters of the 2014 Florida statute and Alabama constitutional amendment have observed, sharia is a "dreadful disease" that is "invading" America and must be addressed for the sake of the future, the challenge is clear.[162]

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arbitration); *see also* Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 158 (2002) (raising similar criticisms).

[158] *See* Bambach, *supra* note 146, at 389 (arguing there is nothing distinct about constitutional deference to Muslim arbitration when compared with its Jewish counterpart); Volokh, *supra* note 13, at 435 (observing that community and family pressures are common to Muslim, Jewish, and Christian communities, and are an unremarkable part of the calculus in the American freedom-of-contract system); *see also* Fallon, *supra* note 55, at 180 (arguing that the established approach to the Jewish arbitration experience should inform legal approaches to sharia-based arbitration).

[159] *See* Volokh, *supra* note 13, at 431–32 (describing American approach to sharia recognition).

[160] *See* Vischer, *supra* note 23, at 27.

[161] *See* Omar Sacirbey, *Anti-Shariah Movement Changes Tactics and Gains Success*, RELIGIOUS NEWS SERVICE (May 16, 2013), www.religionnews.com/2013/05/16/anti-shariah-movement-changes-tactics-and-gains-success/ (describing change in tactics by the "anti-Sharia movement" and the continued concern among civil-rights groups raised by "anti-foreign" law bills).

[162] Tiffany Gabbay, *Bill That Would Ban Sharia Law in Family Cases Passes Fla. Senate*, THE BLAZE (Apr. 9, 2013), www.theblaze.com/stories/2013/04/09/bill-that-would-ban-sharia-law-in-family-cases-passes-fla-senate/#; Tim Lockette, *Legislation Would Ban*

Whether because of the foreign nature of Islamic culture, confusion over the reality and effect of domestic conflicts rules (which largely preclude the harms feared by "sharia-in-America" opponents), misplaced theological disagreement, or mere prejudice, in the past five years legislation has been proposed in at least thirty-two states, and enacted so far in nine, that targets adherence to sharia as an illegitimate exercise of religious freedom.[163] Not every provision mentions sharia by name; that would likely fail First Amendment scrutiny, as the Tenth Circuit made clear in blocking Oklahoma's "Save Our State" amendment.[164] But even where sharia is not specified, it is the cause and object of these initiatives; the enemy that shall remain nameless.[165]

Islamic Law in Alabama Courts, ANNISTON STAR (Mar. 4, 2011), http://annistonstar.uber.matchbin.net/pages/full_story/push?article-Legislation+would+ban+Islamic+law+in+Alabama+courts-%20&id=12157691 (describing earlier, sharia-specific effort by the sponsor of the foreign-law initiative approved by Alabama voters in November 2014 election).

[163] *See* David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers*, 44 ARIZ. ST. L.J. 1647, 1700 app. (2012) (providing table of "state blocking measures on international and foreign law"). The following nine state statutes target (directly or indirectly) the application of sharia: ALA. CONST. art. I, § 13.50 (2014); ARIZ. REV. STAT. ANN. § 12-3101 (2013); FLA. STAT. § 61.0401 (2014); KAN. STAT. ANN. § 60-5103 (2013); LA. REV. STAT. ANN. § 9:6001 (2013); LA. REV. STAT. ANN. § 51:705(C)(1)(p) (2012); N.C. GEN. STAT. § 1-87.12 (2013); OKLA. STAT. TIT. 12, § 20 (2012); OKLA. CONST. ART. 7, § 1(b) (2010); S.D. CODIFIED LAWS § 19-8-7 (2012); TENN. CODE ANN. § 20-15-101 (2010). Idaho passed a bill asking Congress to outlaw the use of foreign law by domestic courts, but did not do so itself. *See* H.R. Con. Res. 44, 60th Leg., 2d Reg. Sess. (Idaho 2010). Legislation has also been proposed in at least twenty-three other states: Alaska, Arkansas, Georgia, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. *See* PEW RESEARCH CTR., FORUM ON RELIGION & PUB. LIFE, STATE LEGISLATION RESTRICTING USE OF FOREIGN OR RELIGIOUS LAW, 2010–2012, at 2–33 (2013), www.pewforum.org/files/ 2013/04/State-legislation-restricting-foreign-or-religious-law.pdf; *see also* S. 265, 2013-2014 Leg., Reg. Sess. (Vt. 2014).

[164] Awad v. Ziriax, 670 F.3d 1111, 1119 (10th Cir. 2012).

[165] *See* Vischer, *supra* note 23, at 78 (describing "clear" targeting of Islam through "foreign law" provisions); *see also* Faiza Patel & Amos Toh, *The Clear Anti-Muslim Bias Behind Anti-Sharia Laws*, WASH. POST, (Feb. 21, 2014), www.brennancenter.org/analysis/clear-anti-muslim-bias-behind-anti-shariah-laws/ (same); Steve Chapman, *The Bogus Threat From Sharia Law*, TOWNHALL.COM (June 10, 2012), http://townhall.com/columnists/stevechapman/2012/06/10/the_bogus_threat_from_shariah_law/page/full (same).

The "anti-sharia" trend can generally be divided into three categories:

- Express Anti-Sharia Provisions: laws prohibiting the application of sharia by name; i.e., courts "shall not consider sharia law."[166] Oklahoma is the only state that has passed a sharia-specific law (there, a constitutional amendment by ballot initiative), but similar bills have been introduced in at least nine more states.[167]
- Religious-Law Bans: laws prohibiting or limiting the application of religious law generally; i.e., courts may not enforce "any religious code."[168] Both South Dakota and Louisiana recently passed laws expressly targeting religious codes, and legislation has been introduced in at least four more states.[169]
- Foreign-Law Bans: laws prohibiting or limiting the application of foreign law, without specific mention of sharia or other religious law. The typical provision, inspired by the model-law project "American Law for American Courts," forbids the application of "foreign or international" law where it would violate the state or federal constitution to do so. Laws of this type have recently been adopted in Alabama, Arizona, Florida, Kansas, Louisiana, North Carolina, Oklahoma, and Tennessee.[170] Related bills (or constitutional referenda) have been offered in at least twenty-three more states.[171]

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[166] *See* OKLA. CONST. ART. 7, § 1(b) (2012) (providing that, *inter alia*, "[t]he courts shall not look to the legal precepts of other nations or cultures" and "[s]pecifically, the courts shall not consider international law or Sharia Law").

[167] *See* PEW, *supra* note 163 (describing proposed legislation that makes specific mention of sharia, or Islamic law, having been introduced in the following nine states: Alabama, Arizona, Iowa, Mississippi, Missouri, New Mexico, South Carolina, Tennessee, and Wyoming).

[168] *See* S.D. CODIFIED LAWS § 19-8-7 (2012) ("No court, administrative agency, or other governmental agency may enforce any provisions of any religious code.").

[169] *See id.*; LA. REV. STAT. ANN. § 51:705(C)(1)(p) (2012). Un-passed bills (or constitutional referenda) targeting "religious law" have been offered in at least four states: Arizona, Georgia, Iowa, and Texas. *See* PEW, *supra* note 163.

[170] *See* ALA. CONST. art. I, § 13.50 (2014); ARIZ. REV. STAT. ANN. § 12-3101 (2013); FLA. STAT. § 61.0401 (2014); KAN. STAT. ANN. § 60-5103 (2013); LA. REV. STAT. ANN. § 9:6001 (2013); N.C. GEN. STAT. § 1-87.12 (2013); OKLA. STAT. tit. 12, § 20 (2012); TENN. CODE ANN. § 20-15-101 (2010).

[171] Bills limiting foreign law have been introduced (but not passed) in at least twenty-three states: Alaska, Arkansas, Georgia, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Vermont, West

Each type of legislation varies in its practical effects and constitutionality. But without much digging, the universal anti-Islamic message becomes clear.[172] Indeed, all three types have their genesis in the "American Laws for American Courts" project begun in 2009, which frames "Islamic Sharia Law" as its chief target.[173]

A. Sharia-Specific Bans

Practically speaking, laws that expressly prohibit courts from considering sharia (category #1) would render unenforceable—or at least judicially suspect—many arrangements cherished by Muslim Americans that were described in the last section—e.g., mahr agreements, wills with sharia distribution rules, faith-based arbitration.[174] For example, a will that includes a "difference in religion" term or incorporates the teachings of the Prophet would face significant obstacles in probate.[175] Similarly, sharia-specific bans would undercut contracts to arbitrate before private panels in accordance with Islam.[176] And marriage-based contracts that might require extrinsic evidence to clarify their validity or terms—a typical scenario—would be jeopardized, if not made unenforceable.[177]

Virginia, and Wyoming. *See* PEW, *supra* note 163; *see also* S. 265, 2013-2014 Leg., Reg. Sess. (Vt. 2014).

[172] *See* Patel & Toh, *supra* note 165 (observing that "the legislators leading the charge for foreign-law bans have not been shy about their [anti-Muslim] agenda").

[173] *American Laws for American Courts*, AM. PUB. POLICY ALLIANCE, http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/ (last visited Sept. 24, 2014); *see also* Fallon, *supra* note 55, at 161–62 (describing origins of "anti-sharia" trend); FAIZA PATEL ET AL., CTR. FOR AM. PROGRESS & BRENNAN CTR. FOR JUSTICE, FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS 1 (2013), https://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf (observing that the foreign-law ban trend "spring[s] from a movement whose goal is the demonization of the Islamic faith").

[174] *See* Elsayed, *supra* note 1, at 953–54 (describing various practical effects of laws that expressly prohibit the consideration of sharia).

[175] *See, e.g.*, Mohammedi, *supra* note 61, at 275–76 (describing faith-based bequest terms that require at least consideration of sharia); Awad v. Ziriax, 754 F.Supp. 2d 1298, 1303–04 (W.D. Okla. 2010) (finding reasonable a plaintiff's concern that his faith-based will would not be probated under Oklahoma's anti-sharia law). Among other things, Mr. Awad's will provided that moneys be given to charity and that his body be prepared and point toward Mecca, according to express rules "found in Sahih Bukhari" (a sacred text). Udin & Pantzer, *supra* note 14, at 390.

[176] *See* Uddin & Pantzer, *supra* note 14, at 406–17 (describing the implications of anti-sharia laws on the enforceability of Islamic arbitration agreements).

[177] *See* Elsayed, *supra* note 1, at 954 (describing situations short of determining religious doctrine where courts would need to consider sharia in making a determination in the marriage setting).

Fortunately, states that would single out Islam for inferior treatment face distinct First Amendment obstacles, as the Tenth Circuit held in *Awad v. Ziriax*.[178] Indeed, laws that target one religion over another are constitutionally suspect, and can therefore be justified only if they pass strict scrutiny.[179] Because supporters of the Oklahoma law could point to no "actual problem" caused by the application of sharia in that state, the law failed to pass constitutional muster.[180] And based on a "top ten" list of offending cases compiled by the American Laws for American Courts project, there appears no compelling interest elsewhere either.[181] (Of the listed cases only three ultimately applied sharia, and in limited circumstances: two honored overseas custody awards but only where the foreign court had used the best-interest-of-the-child test, while the third refused to disturb an overseas divorce judgment with a (limited) mahr but because there was scant evidence of unfairness and the couple had left the United States long ago.)[182]

In any event, however, the fact that the Oklahoma amendment passed with overwhelming public support and similar bills have been proposed in nine other states is alone cause for continued concern over manifest anti-Muslim sentiment in this context.[183] As one commenter put it: Oklahoma's law "is emblematic of a new kind of legal assault on the citizenship of American Muslims whereby they are publicly ostracized as 'religious and political outsiders.'"[184]

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[178] 670 F.3d 1111 (10th Cir. 2012).

[179] *Id.* at 1126–29 (10th Cir. 2012) (relying on Larson v. Valente, 456 U.S. 228 (1982)).

[180] *Id.* at 1130.

[181] *See* AM. PUB. POLICY ALLIANCE, *supra* note 173 (listing ten cases where sharia law was, according to the authors, wrongfully applied).

[182] *See* Hosain v. Malik, 671 A.2d 988, 1010–11 (Md. 1996) (enforcing overseas custody order based on court's use of best-interest-of-child test); In re Marriage of Malak, 182 Cal.App.3d 1018, 1025–29 (1986) (same); Chaudry v. Chaudry, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978) (refusing to modify oversees divorce decree and limited support award based on inadequate showing of unfairness and lack of significant connection to New Jersey); *see also* Matthew J. Franck, *A Solution in Search of a Problem*, NAT'L REV. ONLINE (June 15, 2012), www.national review.com/ bench-/bench-memos/303028/solution-search-problem-matthew-j-franck (criticizing a similar "top 20" list of "applications" of sharia for providing limited evidence of any problem).

[183] *See* Awad v. Ziriax, 966 F.Supp. 2d 1198, 1206 (W.D. Okla. 2013) (finding "any reasonable voter" on Oklahoma initiative would have perceived the measure "as a referendum on Sharia law" and "voters would not have approved the amendment without the unconstitutional provisions"); *see also* MARTHA C. NUSSBAUM, THE NEW RELIGIOUS INTOLERANCE 11–13 (2012) (describing rise in anti-Muslim animus evidenced by anti-sharia movement in Oklahoma and elsewhere).

[184] Ali, *supra* note 20, at 1031.

B. No Religious Codes

Regarding the second type of "anti-sharia" measure—the "no religious code" variant (category #2)—there is little improvement as a symbolic, practical, or even constitutional matter. The language of such legislation may not single out Islam, but there is little question it remains the target. As one South Dakota leader observed, the state's "no religious code" law "answer[s] the question of the Shariah law" without naming it.[185] Likewise, the sponsor of Texas's proposed "religious or cultural law" prohibition singled out sharia as the chief reason for the bill, claiming that "[w]e want to prevent [sharia's subjugation of women] from ever happening in Texas."[186] For better or worse—and perhaps ironically—supporters of such laws stress concerns over the merits of sharia rather than religious law generally; indeed, they are often religiously partisan themselves.[187] One need only look at the proposal in Georgia—which redundantly sought to prohibit faith-based "lashing, flogging, [and] stoning" or "forced marriage"—to infer these provisions are more about politics than law.[188]

In any event, the proposition that religion should be banished entirely from the courts would have a significant practical impact on people of all faiths, not just Muslims. Assuming a non-redundant interpretation of such a law—i.e., that it is not merely restating the religious-question abstention principle required by the First Amendment—then any will, contract, or foreign judgment containing, or even mirroring, religious law would be in doubt.[189] If, as South Dakota's law provides, a court may not "enforce any provisions of any religious code," wills with Islamic inheritance rules, covenant-marriage contracts among Evangelical Christians, and Jewish Beth Din

[185] Karl Huus, *South Dakota Lawmakers Tackle 'Shariah question'*, NBC NEWS (Mar. 2, 2012), http://usnews.nbcnews.com/_news/2012/03/02/10553424-south-dakota-lawmakers-tackle-shariah-question.

[186] Anna M. Tinsley, *Texas Lawmakers Considering Sharia Law Ban*, FT. WORTH STAR-TELEGRAM, Apr. 11, 2011, http://www.mcclatchydc.com/2011/04/11/111934/texas-lawmakers-considering-sharia.html (quoting Texas state representative Leo Berman).

[187] *See* Lomi Kriel, *Muslim Group Seeks to Educate Houstonians on Islamic Law*, HOUSTON CHRON., Mar. 12, 2012, at B1 (describing support of anti-sharia laws from conservative Christian community, sometimes as a matter of "religious freedom").

[188] S. Res. 926, 2011-2012 Leg., Reg. Sess. (Ga. 2012); *see also* Volokh, *supra* 13, at 457 (describing enforcement of domestic criminal law as an obvious and vigorous protections against violence undertaken in the name of religion).

[189] *See* Eugene Volokh, *South Dakota Ban on Court Enforcement of Religious Law*, VOLOKH CONSPIRACY (Dec. 7, 2012), http://volokh.com/2012/12/07/south-dakota-ban-on-court-enforcement-of-religious-law/ (describing broad implications of a non-redundant interpretation of South Dakota's no-religious-law provision).

arbitration agreements could all be unenforceable.[190]

As for the constitutionality of global religious-law prohibitions, they are arguably less offensive than sharia-specific measures given the facially neutral approach. Nevertheless, the singling out of religion in such provisions—if not the anti-Islamic animus motivating their proposal—renders them constitutionally suspect. As the Supreme Court urged in *Church of the Lukumi Babalu Aye v. City of Hialeah*: "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or prohibits conduct because it is undertaken for religious reasons."[191] Moreover, to the extent anti-religious motivations are at play, "[t]he Free Exercise Clause protects against government hostility which is masked, as well as overt."[192]

Supporters might respond that laws prohibiting the judicial application of religious codes are necessary to prevent their undue recognition by the courts and the purported harms they cause—interests presumably compelling enough to justify legislative action.[193] But the First Amendment itself forbids religious establishments—i.e., imposing religious law as such.[194] And most of the alleged harms at issue—e.g., physical violence, deprivation of civil rights—are already addressed by well-established state criminal laws and public policy.[195] In short, these measures are either redundant or unconstitutional.

C. Foreign-Law Limitations

Finally, the most common and "stealthiest" attack on the use of sharia—particularly after the Tenth Circuit's decision in *Awad*—is the "foreign law" statute (category #3).[196] At least eight states have adopted such laws (Alabama, Arizona, Florida, Kansas, Louisiana, North Carolina, Oklahoma, and Tennessee), and bills have been proposed in

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[190] *See id.* (providing examples of faith-based arrangements jeopardized by religious-code laws).

[191] 508 U.S. 520, 532 (1993).

[192] *Id.* at 534.

[193] *See, e.g.*, Huus, *supra* note 185 (describing establishment and personal-harm concerns driving South Dakota law); Kriel, *supra* note 187, at B1 (describing Texas effort's entanglement focus).

[194] *See* Volokh, *supra* note 189 (describing the redundancy of various establishment concerns behind no-religious-code measures).

[195] *See* Grunert, *supra* note 5, at 725–26 (describing the redundancy of domestic anti-sharia measures: "For all of their gloomy predictions of Islamization in the American heartland, anti-sharia activists have failed to explain how or why United States civil and criminal law, supported by over one hundred years of Supreme Court precedent, would suddenly cease to apply to Muslim-Americans.").

[196] Vischer, *supra* note 23, at 27.

twenty-three other states, from Alaska to Vermont.[197] And although these foreign-law statutes stand up better to constitutional muster, and many arguably add little to the law—e.g., by simply requiring courts to act constitutionally—they may be the most insidious of all to the interests of religious liberty.[198]

States have taken two general approaches to the foreign-law statute. The first, and most typical, version limits or prohibits the enforcement of any foreign *law* that would itself result in a violation of the state or federal constitution, laws, or public policy.[199] Alabama, Arizona, Florida, Louisiana, North Carolina, and Tennessee have enacted this sort of law to varying degrees; bills have been offered in thirteen other states.[200] The second version of the foreign-law statute prohibits courts from considering the laws of any foreign *system* that fails to afford rights akin to those under the state or federal constitution, regardless the specific law or judgment at issue in the case.[201] Statutes of this latter type have been passed in Kansas and Oklahoma (after the failed referendum); bills have been offered in eight states.[202]

Requiring courts to act constitutionally should not really have a direct impact on the use of sharia in domestic courts. Because religious law is implicated only where its use is otherwise in accord with (or perhaps even required by) the constitution, foreign-law statutes that would set the constitution as a limit should be pointless, at least

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[197] *See supra* notes 170, 171 (citing state anti-foreign law provisions).

[198] *See* Vischer, *supra* note 23, at 27–28 ("Even though the First Amendment has now forced anti-Sharia advocates to frame their proposed laws so broadly as to be meaningless, these initiatives should be vigorously contested by the defenders of religious liberty.").

[199] *See* PATEL ET AL., *supra* note 173, at 18 tbl. 1 (listing states with foreign-law measures triggered by direct violation of the state or federal constitution, laws, or policy).

[200] *See id.*; ALA. CONST. art. I, § 13.50 (2014); ARIZ. REV. STAT. ANN. § 12-3101 (2013); FLA. STAT. § 61.0401 (2014); LA. REV. STAT. ANN. § 9:6001 (2010); N.C. GEN. STAT. § 1-87.12 (2013); TENN. CODE ANN. § 20-15-101 (2010).

[201] *See* PATEL ET AL., *supra* note 173, at 18 tbl. 1 (listing states with foreign-law measures). *See also* Estin, *supra* note 110, at 1032 (lamenting "broad comparative constitutional law inquiry" required by system-based foreign law prohibitions).

[202] KAN. STAT. ANN. § 60-5103 (2013); OKLA. STAT. tit. 12, § 20 (2012) (referencing a law enacted by the Oklahoma legislature in 2013 to replace the state's defunct anti-Sharia constitutional amendment). *See also* Eugene Volokh, *California Court: 'The Probable Use of Islamic Law in a Civil Action . . . Offends California Policy*,' WASH. POST (Nov. 4, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/04/california-court-the-probable-use-of-islamic-law-in-a-civil-action-offends-california-policy/ (criticizing California state court order refusing to recognize Iranian law based on systemic problems, or, as the superior court put it, "Iran is run by mullahs and lacks an independent judiciary and due process of law").

from a legal perspective.[203] As Professor Vischer has noted, "American courts are generally not in the business of issuing rulings that violate litigants' constitutional rights."[204] Moreover, because violations of public policy already limit applications of foreign law, foreign-law statutes that include public policy as a further limiting ground should really be no stronger than constitutional limits; again, as a legal matter.[205] Likewise, even in states that would prohibit the application of foreign law where doing so would conflict with state law, any such application would be driven by the state's conflicts rules, and thus, by its nature, should be understood as consistent with state law—in its entirety—anyway.[206]

Courts, however, may differ in their interpretation of constitutional, public-policy, or other state-law limits, causing (at a minimum) significant uncertainty for faith-based legal arrangements—not only for Muslims but all believers. For example, one might interpret Arizona's ban on the "enforcement" of foreign law where "doing so would violate" state or federal law as forbidding any result that differs from domestic law; as opposed to requiring only that the state's conflicts rules operate.[207] Similarly, a court might evaluate whether an underlying foreign judgment was obtained according to domestic procedural standards (beyond the state's conflicts rules) in interpreting the Louisiana or North Carolina statutes, which refuse such judgments if a constitutional violation "results."[208] Finally, a court might reject an arbitration order under these laws where the panel

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[203] *See* Elsayed, *supra* note 1, at 965 (calling "superfluous" foreign-law statutes to the extent that they would "prohibit courts from basing their decisions on foreign legal systems that do not provide the same protections guaranteed under the U.S. Constitution"); Fallon, *supra* note 55, at 176 ("Given that by the very definition of comity, principles of foreign law do not override the U.S. Constitution, efforts to ban Sharia [on that basis] are simply unnecessary.").

[204] Vischer, *supra* note 23, at 27.

[205] *See* Volokh, *supra* note 21, at 236 ("Existing choice of law rules contain many tools that ensure American courts do not apply a foreign law that is sufficiently against American public policy.").

[206] *See* Quraishi-Landes, *supra* note 13, at 246 (describing a pre-existing conflicts-based approach to the application of religious law).

[207] ARIZ. REV. STAT. ANN. § 12-3101 (2013); *see also* Matt Anderson, *The Threat to Interest-Free Home Financing: The Problem of State Governments' Prohibition of Islamic-Compliant Financing Agreements*, 37 HAMLINE L. REV. 311, 334 (2014) (describing uncertainty caused by foreign-law statutes in the enforcement of contracted-for choice-of-law provisions).

[208] LA. REV. STAT. ANN. § 9:6001 (2010); N.C. GEN. STAT. § 1-87.12 (2013); *see also* PATEL ET AL., *supra* note 173, at 32 ("[S]tate courts acting under a foreign law ban may . . . refus[e] enforcement when foreign proceedings deviate from specific procedures considered constitutionally necessary to satisfy the requirement of due process in the United States.").

addressed religious questions in a manner contrary to the Establishment Clause.[209] In these respects, common "foreign" approaches such as faith-based tribunals, contracted-for waivers of rights, or judgments obtained without a jury would all be at risk regardless whether they would otherwise be honored as a matter of comity.[210]

In any event, the fact that this first version of the foreign-law statute (i.e., no violation of constitution, public policy, or other domestic law) is superfluous at the least, and confusing at the most, may be its greatest significance. To the extent these statutes are unnecessary, their (often-dogged) pursuit can rightly be perceived as nothing more than an attempt to divide and stigmatize.[211] And based on their common legislative history, the unspoken enemy is Muslim.[212] One need only read the recently adopted Alabama measure, which restricts the use of laws established "by any *people, group, or culture different* from the Constitution and laws of the United States or the State of Alabama," to get the implication.[213] Finally, even where the impact is unclear, the chilling effect on the personal affairs of those potentially affected is unmistakable.[214] (The fact that several states exempt corporations from their new foreign-law rules only furthers the notion that they are more about degrading religious practice than protecting domestic legal principles).[215]

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[209] *See* Samir Islam, Comment, *The Negative Effects of Ill-Advised Legislation: The Curious Case of the Evolution of Anti-Sharia Law Legislation into Anti-Foreign Law Legislation and the Impact on the CISG*, 57 HOW. L.J. 979, 1016 (2014) (describing possible entanglement problems for enforcing faith-based arbitration under an anti-foreign law regime).

[210] *See* PATEL ET AL., *supra* note 173, at 23 (describing the wide impacts on the lives of Muslims and other faiths of even narrow foreign-law statutes).

[211] *See* Vischer, *supra* note 23, at 28 (observing that unnecessary foreign-law statutes "serve[ ] only to fan the flames of religious intolerance while nurturing public acceptance of the notion that the religious commitments of our citizens have no place in our courts").

[212] *See* PATEL ET AL., *supra* note 173, at 33–35 (describing anti-Muslim legislative history of foreign-law statutes: "as the history of these bans shows, anti-foreign law measures have been pushed, in large part, by those who openly advocate an anti-Islamic agenda").

[213] ALA. CONST. art. I, § 13.50 (2014) (emphasis added).

[214] *See* Islam, *supra* note 209, at 1015–16 (describing "chilling effects" of foreign-law statutes).

[215] ALA. CONST. art. I, § 13.50(h) (2014); LA. REV. STAT. ANN. § 9:6001(g) (2013); TENN. CODE ANN. § 20-15-101 (2010). The fact that exceptions are made might also undercut the constitutionality of foreign-law statutes. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365–66 (3d Cir. 1999) (applying strict scrutiny under the First Amendment to laws that treat substantial categories of secular conduct more favorably than religious conduct; there, beard rules for police

The second version of the foreign-law statute—i.e., no application of laws from an out-of-sync system—is less common, but more significant as a practical matter. In Kansas, for example, courts cannot enforce foreign laws arising from a "code or system that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States and Kansas constitutions."[216] Naturally, examining the domestic legitimacy of an entire legal system rather than determining whether enforcing a particular law or judgment violates public policy breaks from traditional conflicts doctrine and related notions of comity.[217] And the disqualifying circumstances are broad, including most domestic-relations arrangements from countries that otherwise lack full gender equality (a common scenario), almost any faith-based arbitration (which would include established religious rules in conflict with the First Amendment), and any choice-of-law provision involving a jurisdiction without, say, a civil-jury trial.[218]

The foreign-system approach is particularly harmful to Muslims. Mahr contracts, which are common among Muslim married couples, are often entered into in countries that neither separate church and state nor treat men and women equally, and would thus be rejected on that basis no matter their terms.[219] And because foreign "systems" are not limited to sovereign nations, but could also include religious codes, any estate plan based on sharia would be suspect given the many differences between faith-based systems like sharia and Western secular law, even if the estate terms at issue are unremarkable.[220]

officers).

[216] KAN. STAT. ANN. § 60-5103 (2012).

[217] *See generally* Fallon, *supra* note 55 (describing clash between anti-sharia laws and comity).

[218] *See* Volokh, *supra* note 21, at 238–42 (describing implications of the Kansas-style approach to foreign law on domestic relations and choices of foreign law in business contracts); Islam, *supra* note 209, at 1016 (describing impacts on faith-based arbitration).

[219] *See* Ryan H. Boyer, Comment, *"Unveiling" Kansas's Ban on Application of Foreign Law*, 61 KAN. L. REV. 1061, 1079 (2013) (outlining challenges to mahr enforcement under Kansas statute); *see also* Soleimani v. Soleimani, No. 11CV4668, ¶ 27 (D. Ct. Johnson Cnty. Kan. 2012), *available at* www.volokh.com/wp-content/uploads/2012/09/soleimani.pdf (describing impacts of the new Kansas law: "Thus, if a premarital agreement in the context of [the new statute], was the product of a legal system which is obnoxious to equal rights based on gender, a court could not become a proxy to perpetuating such discrimination.").

[220] *See generally* Mohammedi, *supra* note 61 (describing non-Western estate practices that are sacred to Muslims and should be respected as a matter of freedom of contract).

Sharia-based arbitration would similarly be at risk.[221] Finally, and like their foreign-law counterparts, the legislative history behind these foreign-system laws plainly reveals their target is sharia and the affairs of Muslims, with particularized stigma on the basis of religious belief the inevitable result.[222]

In sum, whether prohibiting sharia or religious law outright or limiting the application of foreign law, the wave of recent laws on the subject unnecessarily disrupts the free exercise by Muslim Americans of their religious faith, and more.

V. SHARIA AND RELIGIOUS LIBERTY

Thomas Jefferson famously observed of the removal of Christian-specific language from an earlier draft of the 1786 Virginia Act for Religious Freedom (the First Amendment's chief precursor) that the Act was thus "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mohammedan, the Hindoo and Infidel of every denomination."[223] And although the protection of non-Christians was not without controversy at our nation's founding,[224] the global concept of religious freedom as a universal human right, no matter the particular faith practiced—or not practiced, as the case may be—has since become constitutional dogma.[225] The Supreme Court declared in 1952, accommodating religious choices "follows the best of our traditions."[226]

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[221] *See* Elsayed, *supra* note 1, at 967 (observing that sharia arbitration differs from constitutional procedures). An examination of religious arbitration may also violate the Establishment Clause, by requiring the court to examine the adequacy of particular religious laws; or the Free Exercise Clause, by prohibiting arbitration in situations where secular arbitration would be allowed. *See id.* at 966–68 (describing First Amendment implications of foreign-system scrutiny).

[222] *See* Boyer, *supra* note 219, at 1069 (describing anti-Muslim bias in Kansas legislative history).

[223] THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), *reprinted in* 1 WRITINGS OF THOMAS JEFFERSON 66–67 (A. Lipscomb et al. eds., 1903).

[224] *See* DENISE A. SPELLBERG, THOMAS JEFFERSON'S QUR'AN: ISLAM AND THE FOUNDERS 3–11 (2013) (describing conflicting views at the founding on the rights of Muslims).

[225] *See* County of Allegheny v. ACLU, 492 U.S. 573, 590 (1989) ("Perhaps in the early days of the Republic [the First Amendment was] understood to protect only the diversity within Christianity, but today [it is] recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'") (quoting Wallace v. Jaffree, 472 U.S. 38, 52 (1985)); *see also* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 15–16 (1947) (observing that the First Amendment includes the protections of all faiths).

[226] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

Religious freedom is perhaps nowhere more important than where a given practice or belief is controversial or unpopular. As Justice Robert Jackson poignantly emphasized for the Supreme Court in upholding the right of Jehovah's Witnesses to refuse to salute the flag, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[227] Moreover, the Court has since noted, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[228] And this protection applies both to beliefs and actions; the latter may be subject to greater government regulation, of course, but never in a discriminatory way—barring compelling circumstances.[229]

In light of these norms, sacred practices pursued by Muslim Americans under sharia-based religious or foreign law should be protected (or not) according to existing conflicts and constitutional rules. They should not be singled out for disfavored treatment. To the common observer of law and religion in the United States, it is not unusual for believers to choose a set of principles to govern their affairs; nor is it rare for private arbitration arrangements or foreign judgments to reflect religious practices.[230] To target Muslims, therefore, is not only inconsistent with how we treat similar arrangements in other faiths but clashes with domestic notions of familial subsidiarity, freedom of contract, and religious freedom. It also places Muslims, and faith-based arrangements generally, in an inferior position relative to analogous secular relationships—e.g., contracts that mention religion or other "foreign" concepts, as opposed to those that do not.[231]

The current push to outlaw "sharia in America" poses a significant threat to the Muslim family, whether by refusing to enforce domestic-relation arbitration agreements, nullifying mahr contracts, or dishonoring marriages and divorces first entered into in Muslim

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[227] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[228] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981).

[229] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–34 (1993) (describing non-discriminatory approach to religious beliefs and actions under First Amendment).

[230] *See* Volokh, *supra* note 13, at 431–32 (describing common occurrence in American law for faith-based estate planning, contracting, arbitration, and domestic relations).

[231] *See* Schmitz, *supra* note 25, at 1 (observing that domestic anti-sharia laws "assault[ ] religious liberty by putting contracts with a religious motivation on an unequal footing with contracts that have no religious motivation").

countries.[232] And in striking at "the heart" of sharia (i.e., the family), affected states either discriminate directly against Islam or malign it as an alien way of life inherently subject to suspicion.[233] Domestic "anti-sharia" measures also undermine the (often predominant) religious interests in marriage and family life, and the corresponding balance with state authority in this context achieved with almost every other religion throughout our history.[234]

Muslim Americans, and religious liberty generally, also suffer from the impact of "anti-sharia" measures on estate-planning practices. In this context, the twin freedoms of contract and testamentary disposition are undercut based not on the merits of the bequest but on religious grounds (also a common element in such deeply personal circumstances).[235] Although courts may not resolve disputes over the merits or substance of religious beliefs—in this or any other circumstance—the fundamental ability to dispose of one's own property as one sees fit should not vary based on the motivations behind that disposal.[236] And where, as in the case of Islam, specialized dispositions may be a fundamental duty of the faith, the need for protection is clear—particularly absent an "actual problem" to the contrary.[237]

As for faith-based dispute resolution, "anti-sharia" measures diminish the religious-liberty aspects of communal decision-making, which is important to many religions but particularly minority faiths that may be understandably skittish about a majority-led justice

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[232] *See generally* Abed Awad, *Islamic Family Law in American Courts*, in MUSLIM FAMILY LAW IN WESTERN COURTS 168 (E. Giunchi ed., 2014) (describing current (stable) state of resolving marital disputes in domestic courts and the threat to such arrangements posed by anti-sharia laws).

[233] *See* Fallon, *supra* note 55, at 181 (describing corrosive effect on American culture bred by domestic anti-sharia movement's stigmatization of Muslims).

[234] *See* Joel A. Nichols, *Multi-Tiered Marriage*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT 11, 11–15 (Joel A. Nichols, ed. 2012) (describing domestic interplay between religious and state authority in domestic marriage regulation); *see also* Robert D. Baird, *Traditional Values, Governmental Values, and Religious Conflict in Contemporary India*, 1998 B.Y.U. L. REV. 337, 344 (1998) ("Both Hindus and Muslims have traditionally held that family law was part of their religion and not a secular matter.").

[235] *See* Volokh, *supra* note 13, at 435 (describing faith-based interests in estate planning).

[236] *See id.* at 436–37 (arguing that the "strong presumption in American law" for the "freedom to dispose one's property by will" should not vary based on religious motivations).

[237] *See* Mohammedi, *supra* note 61, at 264 ("[E]very single practicing Muslim must ensure that his or her estate is distributed in a fashion dictated by Sharia law."); Awad v. Ziriax, 670 F.3d 1111, 1130 (10th Cir. 2012) (rejecting Oklahoma's anti-sharia law based on lack of "actual problem").

system.[238] In an "anti-sharia" regime, courts would second-guess both the nature and substance of faith-based arbitration, contrary to the global rule that private arbitration arrangements should be honored as a matter of freedom of contract and disturbed only where there is an abuse of authority or a violation of public policy.[239] And where foreign judgments are concerned, courts would similarly unduly interfere with otherwise-valid rulings from competent jurisdictions, both in violation of our long-standing tradition of comity (on which, not incidentally, we rely for similar respect for our laws and judgments abroad) and to the particular detriment of immigrant populations.[240]

To the extent problems arise in the enforcement of faith-based contracts or foreign law or judgments—e.g., gender discrimination, deprivation of civil rights, unconscionable contracts—those should of course be addressed.[241] But they in fact are being addressed, and in ways that do not malign faith.[242] Religious liberty does not always trump.[243] Rather, public policy, comity, conscionability, and even the First Amendment itself, provide meaningful limits in the application of private and foreign law, religious or otherwise.[244] And where there

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[238] *See* Helfand, *supra* note 153, at 167 ("Thus, the existence of religious arbitration tribunals—and the legal enforceability of their awards—significantly expands the scope of religious liberty enjoyed by religious legal communities as they provide an adjudicative forum that both embodies religious values and promotes religious practices."); *see also* Bambach, *supra* note 146, at 404 (observing that Muslim tribunals are attractive because "they may be more aware of, and sensitive to, cultural or religious practices that run counter to U.S. norms").

[239] *See* Bambach, *supra* note 146, at 401 (describing general rules of enforceability for arbitration agreements, including those rooted in religion).

[240] *See, e.g.*, Fallon, *supra* note 55, at 155–57, 164–66 (describing comity implications of anti-sharia laws on immigrant Muslim population).

[241] *See* Lugo, *supra* note 27, at 79 ("Adoption of Islamic practices or Sharia law to the result of institutional discrimination against women is in conflict with American laws, constitutional protections, and public policy."); Estin, *supra* note 60, at 601 (raising gender-based free-exercise and family-law concerns in the context of faith-based contracting for domestic-relations matters).

[242] *See* Volokh, *supra* note 21, at 236 ("Existing choice of law rules contain many tools that ensure American courts do not apply a foreign law that is sufficiently against American public policy.").

[243] John Witte, Jr., *The Future of Muslim Family Law in Western Democracies*, *in* SHARI'A IN THE WEST 279, 286 (R. Adhar & N. Aroney eds., 2010) (observing that "even though religious freedom is cherished" in the West, it does not always trump).

[244] *See* ASIFA QURAISHI-LANDES, INST. FOR SOC. POLICY & UNDERSTANDING, SHARIA AND DIVERSITY: WHY SOME AMERICANS ARE MISSING THE POINT 16 (2013), http://www.ispu.org/pdfs/ISPU_Report_ShariaDiversity_Final_web.pdf (describing common-law limits on domestic application of sharia); Fallon, *supra* note 55, at 180 (observing that "[t]he First Amendment's Free Exercise and Establishment Clauses protect against the application of religious law to a party who has not agreed to such application").

are intangible social pressures that lie behind faith-based or foreign arrangements but which fall short of disqualifying duress, these are not unique to Muslims and are better suited to neutral and targeted reforms rather than global limits on religious liberty.[245]

For some, the courts' conception of current limits on religious or foreign law is inadequate; "anti-sharia" advocates, for example, have argued public policy is too malleable a concept to be trusted.[246] But insisting in non-specific terms, as many "anti-sharia" laws invariably do, that courts must apply foreign or religious law in a manner consistent with domestic law, hardly removes the risk of court error.[247] And in any event, if, as domestic sharia critics have argued, Islamic law is truly a "dreadful disease" or a "mortal threat" to America,[248] it is difficult to imagine any examples fitting that bill which could overcome existing constitutional, policy, or legal barriers to enforcement. That activists can produce only a handful of cases where sharia has been applied in a controversial way illustrates the point.[249]

Some also have argued that, unlike other faiths, Islam is different because, they submit, it espouses an approach that is ultimately inconsistent with Western democracy, or perhaps even with the principle of religious freedom itself.[250] But no matter the theoretical or political merits of this argument, our domestic civil-rights regime has never been reserved to those who fully agree with it. As Professor

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[245] *See* Bambach, *supra* note 146, at 413–14 (flagging issue of social pressure to enter into faith-based contracts, particularly among women in minority-faith traditions, but arguing such pressure is not an issue unique to Muslims and that overestimating it might undercut the freedom women themselves should have to practice their faith); *see also* Volokh, *supra* note 13, at 435 (describing pressure to conform as a common factor in other faith communities).

[246] *See* Lugo, *supra* note 27, at 67 (decrying as "soft" the public-policy limit on the domestic use of sharia); Kelley, *supra* note 27, at 630 (calling existing limits on sharia "woefully inadequate").

[247] *See* Volokh, *supra* note 21, at 243 (observing that the recent wave of foreign-law statutes do not eliminate the risk of that courts will get domestic law wrong in applying them).

[248] *See* Gabbay, *supra* note 162 (quoting Florida lawmaker describing sharia as a "dreadful disease"); Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N.Y. TIMES, Dec. 21, 2011, at A22 (quoting then-presidential candidate Newt Gingrich describing sharia as a "mortal threat" to the United States).

[249] *See* Franck, *supra* note 182 (observing, sarcastically, that critics of sharia in America could only point to a "whopping" seven cases in thirty-five years of even arguable application).

[250] *See* TONI JOHNSON & LAUREN VRIENS, COUNCIL ON FOREIGN RELATIONS, ISLAM: GOVERNING UNDER SHARIA (2013), http://www.cfr.org/religion/islam-governing-under-sharia/p8034 ("Whether democracy and Islam can coexist is a topic of heated debate."); Kelley, *supra* note 27, at 628–29 (framing anti-sharia measures as protection against norms at odds with domestic views of liberty).

Volokh observes in this context, "[n]either the freedom of speech nor the freedom of religion is limited to people who believe in values that are compatible with American constitutional guarantees," nor are such freedoms limited "to those who support religious freedom."[251]

To conclude otherwise risks alienating our fellow citizens and, some have suggested, could even threaten our stability as a nation.[252] By passing these laws, states send a message that Muslims are outsiders who should be met with suspicion and distrust.[253] The net result is a mutually-reinforcing divisiveness that only increases the obstacles Muslims already face—particularly since September 2001—in seeking to assimilate and be treated as full and equal citizens.[254] As Professor Breger has lamented, "Muslims everywhere worry (rightfully) whether they have a place in the American mosaic."[255] Therefore, to avoid further misunderstanding and intolerance, "American non-Muslims would be well-advised to extend the same rights to their Muslim counterparts that they themselves enjoy."[256]

As new faiths have come to America's shores or sprouted up from its soil, mainstream society has consistently struggled to understand and incorporate them. Their often-unfamiliar practices can fit awkwardly within existing cultural and legal frameworks. And the majority, confronted by these strange and seemingly threatening practices, has often been quick to condemn and slow to accommodate. But over time, religious liberty has ultimately prevailed. Indeed, "America's exceptionalism has always been its ability to transform itself—economically, culturally and religiously."[257] As such, broad respect for religious-accommodation requests "should be something of

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[251] Volokh, *supra* note 13, at 456–57.

[252] *See* Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 173–74 (2012) (framing domestic anti-sharia movement in context of other counter-radicalization efforts that risk alienating Muslim Americans from their country).

[253] *See* Schmitz, *supra* note 25, at 2 ("[T]he anti-sharia movement's implication that all Muslims are radicals amplifies resentments and fuels hate by encouraging Americans to view their neighbors with suspicion and distrust.").

[254] *See* Ali, *supra* note 20, at 1065–67 (arguing that domestic anti-sharia movement is designed to make Muslims second-class citizens, either directly or throughout intimidation and fear-mongering).

[255] Marshall J. Breger, *International Holocaust Remembrance Day: Bringing Imams to Auschwitz*, HUFFINGTON POST (Jan. 26, 2011), www.huffingtonpost.com/marshall-j-breger/imams-at-the-death-camps_b_814447.html; *see also* Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 288 (2012) (finding anti-Muslim tendencies even within the federal judiciary).

[256] Fallon, *supra* note 55, at 181.

[257] Eliyahu Stern, *Don't Fear Islamic Law in America*, N.Y. TIMES, Sept. 2, 2011, at A21.

which Americans are proud, not afraid."[258]

In the colonial era, Baptists and Quakers were banished, imprisoned, and attacked.[259] In the mid to late nineteenth century, Catholics and Mormons faced mob violence, the burning of churches, and various forms of overt discrimination.[260] And in the early to mid-twentieth century, anti-Semitism was widespread and other religious minorities like Jehovah's Witnesses were derided and targeted.[261]

At each of these moments in our history, however, persecution gave way to accommodation and respect—even if imperfect or delayed.[262] As Professor Witte notes, "[t]he current accommodations made to the religious legal systems of Christians, Jews, First Peoples, and others in the West were not born overnight. They came only after decades, even centuries of sometimes hard and cruel experience, with gradual adjustments and accommodations on both sides."[263] Hopefully, it will not be such a long and suffering road for Muslim Americans.[264]

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[258] Quraishi-Landes, *supra* note 13, at 257.

[259] *See* THOMAS D. HAMM, QUAKERS IN AMERICA 23–24 (2003) (describing Quaker persecution in colonial period); Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 932–33 (2004) (describing similar anti-Baptist bigotry during period).

[260] *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 201–19 (2002) (detailing anti-Catholic violence and persecution in the nineteenth century); Lawrence Wright, *Lives of the Saints*, NEW YORKER, Jan. 21. 2002, at 40 (recalling that Mormons "entered the twentieth century as the most persecuted creed in America").

[261] *See* LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA 128–49 (1994) (describing "high tide" of anti-Semitism during World War II); SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 96–152 (2000) (describing the common and relentless persecution of Jehovah's Witnesses during World War II).

[262] *See* PETERS, *supra* note 261, at 14–16 (describing pivotal role played by Jehovah's Witnesses in the development of religious liberty in the twentieth century); Wright, *supra* note 260, at 40 (calling Mormonism "perhaps the country's most robust religion").

[263] Witte, *supra* note 243, at 288; *see also* Lee Tankle, Note, *The Only Thing We Have to Fear is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273, 302 (2012) ("Religious persecution is not a new phenomenon in America, and history suggests that the passage of time generally leads to acceptance.").

[264] The foregoing description of the developing acceptance (or not) of new faiths echoes one our clinic made in an amicus effort at the Supreme Court led by Stanford law students Paul Harold and Jessica Spencer. *See* Brief of Amicus Curiae American Islamic Congress in Support of Petitioners, Big Sky Colony, Inc. v. Montana Dep't of Labor & Indus., 134 S. Ct. 59 (2013) (No. 12-1191).

VI. CONCLUSION

Like most matters we handle in our clinic at Stanford, the application of sharia in domestic law chiefly concerns the ability to practice one's faith, not the merits of the practice chosen. Political conservatives and liberals, believers of all stripes, and those with no religious beliefs at all should appreciate this crucial and unifying distinction—whether the religious practice involves liturgical worship, grooming or clothing, marriage and family, or voluntary adherence to sharia. And although religious liberty is not without its limits, those limits should be imposed based on legitimate countervailing concerns and under the established, non-discriminatory structures already developed to address any such concerns.

In seeking to restrict further the domestic application of sharia by those who strive to obey its precepts as they understand them, many states have, purposefully or not, committed an all-too-common error in the development of religious pluralism in this country. Like those opposed to the practices of other faiths in earlier generations, today's "anti-sharia" activists may be able to point to controversial ways in which sharia has been applied elsewhere or practiced as a purely religious matter. But they ignore how it is in fact applied in American courts—i.e., in accordance with established conflicts rules and the First Amendment. The hype does not match the reality.

Whether framed in sharia, religious-law, or foreign-law terms, legislation restricting the religious liberty of Muslim Americans has been passed or proposed in almost two-thirds of the states. And although it is practices sacred to many Muslims that are most at risk—including those central to their families, communities, and identities—all are threatened by the assault. Something is amiss where, as here, a majority can restrict the religious liberty of a minority with neither factual nor legal support to justify their actions. By pointing out these errors and reminding the majority of the universal nature of that liberty, the tide can, and must, turn.