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The First Amendment: Religious Freedom for All, Including Muslims

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I'm going to start by describing the various categories and types of anti-sharia laws that have been proposed in various states. Then, I'm going to do a brief analysis of those laws under the Establishment Clause and the Free Exercise Clause of the First Amendment, and show the types of issues and problems that raises, and then end with explaining how, ultimately, these laws solve a non-existent problem. In other words, there isn't really a need for them, and when they are enacted, other issues pop up.

The last panel discussed The Center for American Progress Report, "Fear, Inc."[1] This report describes the Islamophobia cottage industry in this country.[2] The report starts by defining what is Islamophobia, which it says is an "exaggerated fear, hatred, and hostility toward Islam and Muslims that is perpetuated by negative stereotypes resulting in bias, discrimination, and the marginalization and exclusion of Muslims from America's political, social, and civic life."[3] It then goes on to discuss the five key individuals and organizations that are pushing this agenda.[4] They are people and organizations whose names you, like most Americans, won't be familiar with, but they are having a concrete influence on the national and international debate and discourse related to Islam and Muslims.[5]

These guys, dubbed "misinformation experts" by the "Fear, Inc." report, are advancing a notion of Islam as an intrinsically violent ideology,

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1. Wajahat Ali et al., *Fear, Inc.: The Roots of the Islamophobia Network in America*, CTR. FOR AM. PROGRESS 9 (Aug. 2011), http://www.americanprogress.org/issues/2011/08/pdf/islam ophobia.pdf.

2. *See id.* (discussing the organization and the key players in the Islamophobia industry).

3. *Id.* at 9.

4. *See id.* at 13 (listing the five leading think tanks pushing Islamophobia).

5. *See id.* (stating that these five organizations, "are primarily responsible for orchestrating the majority of anti-Islam messages polluting our national discourse today").

the goal of which is to achieve dominance over America and over all non-Muslims worldwide.[6] And they seek to define sharia as a totalitarian ideology; a legal, political, military doctrine committed to annihilating Western civilization as we know it today.[7] That's pretty extreme rhetoric, but despite its inherent absurdity, it's definitely having an effect, unfortunately. And one of the effects that we see is the promulgation of these anti-Sharia laws.[8]

There are three categories of anti-Sharia laws. The first category includes those that single out Sharia specifically from all other legal traditions and describe it as anti-American and treasonous. A prime example of this type of legislation is Alabama's proposed, but now dead bill, which stated that a court shall not look to the legal precepts of other nations or cultures, specifically the court shall not consider international law or sharia.[9] The second category mentions sharia specifically, but mentions it as one of several different types of legal traditions that should not be permitted. For instance, the Arizona bill, says that courts are forbidden from considering religious sectarian law, which it goes on to define as including sharia law, canon law, halacha and karma.[10] And finally, the third and most frequently seen type of bill is the type that outlaws any reliance by the courts on foreign law. It does not mention sharia specifically. These types of bills define foreign law as any law, rule, or legal code, or system other than the state and federal constitutions, state and federal statutes, and the ratified treaties of the U.S.

In today's presentation, I want to focus on one of these laws, and that is the Oklahoma International Law Amendment, which was on the November 2010 general election ballot as a legislatively referred

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6. *See, e.g.*, CTR. FOR SEC. POLICY, SHARIAH: THE THREAT TO AMERICA, AN EXERCISE IN COMPETITIVE ANALYSIS (REPORT OF TEAM 'B' II) 53 (2010), *available at* http://www.centerforsecuritypolicy.org/upload/wysiwyg/article%20pdfs/Shariah%20-%20The%20Threat%20to%20America%20(Team%20B%20Report)%2009142010.pdf (stating that Muslims use the "supremacist character of the Shariah" as an "instrument for realizing its global dominance").

7. *See id*. at 10 (stating that Sharia Law should not be thought of as a religious code but a document which regulates economic, political, legal, social, and military actions).

8. *See infra* notes 9–11.

9. H.R. 597, 2011 Leg., 1st Reg. Sess. (Ala. 2011) (Constitutional Amendment), *available at* http://e-lobbyist.com/gaits/text/282975.

10. H.R. 2582, 15th Leg., 1st Reg. Sess. (Ariz. 2011), *available at* http://www.azleg.gov/legtext/50leg/1r/bills/hb2582p.pdf.

constitutional amendment.[11] The ballot initiative was approved by Oklahoma voters and fell into the first category of anti-sharia law. So it specifically mentioned sharia and singled it out, for specific disfavor. That same month Muneer Awad, represented by the Council on American-Islamic Relations, and the ACLU, filed suit challenging the law.

The U.S. district court in Oklahoma blocked the measure, saying any sort of harm that would result from a delay in certifying the election results was minimal because the legislatures could not show even one instance in which sharia had in any way led to any problems.[12] In other words, anti-sharia laws are a solution looking for a problem. In January 2012, the Tenth Circuit Court of Appeals upheld the district court[13] and there was little activity on this in the 2012 Oklahoma legislature, but 2013 finds a new effort: House Bill 1486.[14] HB 1486 does not specifically mention sharia and falls closer to the third type of anti-sharia law that I mentioned earlier.[15]

For purposes of my analysis today, I'm going to be focusing on the earlier version of the bill—the one that did mention sharia. I'll start by briefly setting up the constitutional framework.

First, there's the Establishment Clause, and the purpose of the Establishment Clause is to protect religion from state overreaching.[16] And its protection extends to both minority and majority religions.[17]

There are various legal tests used to assess whether or not a law violates the Establishment Clause. We are all familiar with the three-prongs of the *Lemon*[18] Test; the idea is that the intent behind the law and the

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11. H.R. 1056, 52d Leg., 2d Reg Sess. (Okla. 2010); H.R. 4769, 96th Leg., Reg. Sess. (Mich. 2011), *available at* http://www.legislature.mi.gov/documents/2011-2012/bill introduced /House/pdf/2011-HIB-4769.pdf.

12. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

13. *See* Awad v. Ziriax, 670 F.3d 1111, 1116 (10th Cir. 2012).

14. H.B. 1486, 54th Leg., 2d Sess. (Okla. 2013), *available at* http://www.ok legislature.gov/BillInfo.aspx?Bill=hb1486&Session=1300.

15. *See* Bill Raftery, *Oklahoma's effort to ban court use of international/sharia law having been held unconstitutional, new version introduced avoids using word "sharia,"* GAVEL TO GAVEL (Jan. 23, 2013), *available at* http://gaveltogavel.us/site/2013/01/23/oklahomas-effort-to-ban-court-use-of-internationalsharia-law-having-been-held-unconstitutional-new-version-introduced-avoids-using-word-sharia/.

16. *See* Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) ("[T]he Constitution's authors sought to protect religious worship from the pervasive power of government.").

17. *See id*.

18. *See id*. at 612.

primary effect of the law cannot disfavor or favor a particular religion, and cannot excessively entangle the government in religious questions.[19]

Under the Free Exercise Clause, protection for religious *beliefs* is absolute.[20] When it comes to religiously-motivated *action*, there is broad protection in certain cases, for instance, where the law in question has existing categorical exemptions or allows for a system of individualized exemptions.[21] The idea generally under the Free Exercise Clause is that if there are exemptions for secular conduct or for particular religious conduct, you cannot then disfavor other religious conduct.[22] If the law allows for these other exemptions, in order to prohibit a religious exemption, it must satisfy strict scrutiny—which means that the government must demonstrate a compelling interest and the law must be the least restrictive means of serving that interest.[23] So thematically, the Free Exercise Clause requires that individuals be given wide discretion in ordering their lives according to their religious beliefs.

Based in the Establishment and Free Exercise Clauses is a doctrine called the religious question doctrine.[24] Under the First Amendment, the government and religious individuals kind of exist in two separate "spheres," and the First Amendment protects each from interference from the other.[25] The First Amendment protects government from religious

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19. *See id.* ("[T]he statute must have a secular legislative purpose . . . its primary effect must be one that neither advances or inhibits religious conduct . . . and finally that the statute must not foster 'an excessive government entanglement with religion.").

20. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hiaheah, 508 U.S. 520, 531 (1993) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

21. *See id*. at 537 ("Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct." (quoting Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S., at 884, 110 S. Ct., at 1603)).

22. *See* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 361 (3d Cir. 1999) (explaining that there are areas of conduct protected by the Free Exercise clause and thus beyond the power of the State to control, even under regulations of general applicability).

23. *See id.* (discussing the strict scrutiny test).

24. *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 347 U.S. 203, 222–23 (1963) (explaining that both the Establishment Clause and the Free Exercise Clause place our Government in a "neutral" position).

25. *See* Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.").

incursion and religion from government incursion.[26] One way this works is that civil courts cannot delve substantively into religious questions.[27] Courts can engage in fact-finding, in order to determine whether a particular doctrine or practice is religious and thus deserving of protection under the First Amendment.[28] On the other hand, civil courts cannot get into the substance of religious issues, questioning or determining the truth or validity of beliefs.[29]

The reason our constitution forbids civil courts from getting involved in religious questions is because civil judges are not competent in religious matters.[30] Moreover, if civil courts started asking these sorts of questions, they would inevitably end up privileging one religious interpretation over another.[31]

Given this existing constitutional framework, and the fact that the Supreme Court articulated this principle, very early on, it's a bit suspicious that now that we're seeing laws that are trying to solve the problem of judges considering religious substantive law. That problem has already been taken care of—it's already addressed by the Constitution.

Turning back to the Oklahoma anti-sharia law—how does it fare under this constitutional framework?

Awad's lawsuit had an Establishment Clause claim.[32] He said the Oklahoma Ballot Initiative provided that Oklahoma courts shall not consider international law or sharia law, and that the courts may not look to

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26. *See id*.

27. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969) (explaining that the First Amendment forbids civil courts from interpreting particular church doctrines and the importance of those doctrines to the religion).

28. *See* Jared A. Goldstein, *Is There A "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 538 (2005) ("[C]ourts routinely undertake excessive fact-finding into the content of religious doctrines and practices in determining whether a practice or doctrine is 'religious.'").

29. *See id.* at 539 (explaining that courts can competently assess the content of religious doctrines and practices without assessing their validity).

30. *See* Watson v. Jones, 80 U.S. 679, 729 (1871) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own.").

31. *See Presbyterian Church*, 393 U.S. at 450 (explaining that the First Amendment forbids civil courts from determining the importance of particular church doctrines).

32. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010), *aff'd*, 670 F.3d 1111 (10th Cir. 2012).

the laws of other states if those laws include sharia law.[33] It described sharia law in definite religious terms as Islamic law based on the Quran and the teaching of Muhammad.[34] Thus, sharia law is the only particular body of law specifically proscribed by this amendment. Awad argued that the Oklahoma Ballot Initiative labeled him a political and social outsider because of his Islamic practice and belief, characterized his Islamic religious beliefs as a threat from which Oklahoma must be saved, and conveyed the unmistakable message that his Muslim faith is officially disfavored by the state generally, and the judicial system in particular.[35]

In his Free Exercise claim, he argued that Muslims, out of all the other religious groups in the state, were singled out for special disfavor.[36] Unlike any other religious groups, they were the only ones who had to scrub all religious terms from their legal documents. Specifically, he argued that the proposal might even interfere with the operation of his last will and testament.[37] Because his will refers to and incorporates his Islamic religious beliefs, the Amendment would render those will provisions unenforceable.[38] The presence of the Amendment created a cloud of uncertainty over the will's full enforceability because of its religious references.

In addition to Awad's claims, there are a number of other hypotheticals that I can pose for you that demonstrate some of the problematic results of laws like this.[39]

For instance, consider a situation—an employment contract—where an employer agrees to allow an employee to go on the Hajj pilgrimage or to come in on different timings during Ramadan (Ramadan is the month during which Muslims fast from dawn to dusk). Maybe an employer has agreed in the contract that you can come in at different times, maybe after you break the fast, so on. Again, in order to enforce this contract, a court

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33. *Id*. at 1303.

34. Complaint Seeking a Temporary Restraining Order and Preliminary Injunction at 5, Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla 2010) (No. CIV-10-1186-M).

35. Complaint Seeking a Temporary Restraining Order and Preliminary Injunction, *supra* note 34, at 6.

36. *Awad*, 754 F. Supp. 2d at 1303.

37. *Id*. at 1304.

38. *Id*.

39. These examples were discussed in the speaker's previously-published article, Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363, 404–05 (2012).

doesn't have to get into the nitty gritty of Islamic law, but it does have to understand whether there was a meeting of the minds—what was the issue that they agreed to? That requires some basic reference to the sharia principles at issue.

Another type of contract might involve somebody's promise to pay for your Hajj pilgrimage, or to cover the expense of some other religious obligation. Again, the court does not need to get into the substantive issues, but does have to have a basic idea of what exactly Hajj pilgrimage is, which requires some basic understanding and fact-finding related to sharia issues. Not only does the Oklahoma anti-sharia law prohibit this sort of fact-finding, but it also creates a question of discrimination. Because a similar contract involving either non-religious obligations or religious obligations of people of other faiths could easily be enforced.

Similarly, such a law would limit a judge's ability to craft equitable remedies. When courts formulate remedies or sentences, a judge often has flexibility and the ability to look at both public and private needs. In the case of a Muslim, the judge wouldn't be able to do this because some of those private needs might in fact include their religious obligations. Basic reference to sharia principles is, by the terms of anti-sharia laws, completely forbidden. For instance, if you're trying to determine community service hours or a visitation order in the context of a custody dispute, if a Muslim needs to explain her schedule or time table in terms of her religious obligations, the judge wouldn't be able to consider those sorts of factors.

And finally, such a law would provide unequal protection for persons who make use of Islamic arbitration. Now the law itself does not prevent the use of Islamic arbitration, people can still engage in it, and some Muslims in the U.S. do engage in it for the purposes of resolving family disagreements, inheritance or business disputes, marriage and divorce issues. While nothing in the law prevents the use of arbitration, once a person does engage in it, not only does it impact the enforceability of the arbitration decision, but it also takes away the protection of civil courts. A civil court is the only court that can enforce an arbitration decision.[40] And before a civil court enforces it, it has to review the decision for both substantive and procedural fairness. Civil court review provides certain checks and balances to make sure that the decision isn't, for instance,

40. *See* 9 U.S.C. § 207 (2012) (stating that parties to an arbitral award may apply to a court to "confirm" the award as against any other party to the arbitration).

grossly unfair.[41] Those sorts of protections are denied to Muslims who might want to engage in arbitration, simply because judges can't look to sharia.

So, what I propose is that instead of enacting laws that solve a problem that doesn't exist, we let the American legal system do what it always has done, because it's actually always worked very well. When dealing with contracts written with sharia principles in mind, civil courts have always only referred to sharia as a tangential issue, instead focusing on issues within their competence such as the basic principles of contract law. The crucial feature of any kind of arbitration is that an arbitrator, whether religious or not, has no ability to enforce the arbitral decision. Only state or federal courts have that power. In deciding whether to enforce arbitral awards, civil courts first review whether the parties agreed to take part in the arbitration of their own free will. Courts also review the decision to ensure the arbitrators are neutral, and that the resulting decisions are neither grossly unfair nor undermine public policy.

As I mentioned earlier, these checks and balances and very carefully crafted safeguards protect against all of the scary things that proponents of anti-sharia laws claim sharia imposes. Here are a couple of examples of cases where sharia has come up. In one case, a federal district court honored the contractual choice of law provision at issue, which designated Saudi law.[42] The court accepted that it is apparent that Islam permeates every aspect of life in the kingdom of Saudi Arabia, including its legal structure. Saudi law limits damages for breach of contract to losses that are actual and direct, such as physical harm to property or out-of-pocket losses. This is based on an Islamic law principle that damages can be obtained for only those losses that are certain. Despite its foundations on Islamic principle, the Saudi law is enforceable without reference to religious doctrine. As such, the court applied Saudi law because doing so did not entangle the court in religious questions.

Similarly, there are a number of cases that involved an agreement for the *mahr*.[43] The *mahr* is a dowry that is paid by the husband to the wife, and

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41. *See* 9 U.S.C. § 10 (2012) (allowing federal district courts to vacate arbitral awards upon finding "any misbehavior by which the rights of any party have been prejudiced").

42. *See* Nat'l Grp. for Commc'ns and Computers, Ltd. v. Lucent Tech.s Int'l, Inc., 331 F. Supp. 2d 290, 293 (2004) (upholding contract provision stipulating that "interpretation and execution" of the contract and "claims arising therefrom" were subject to the regulations in force in Saudi Arabia).

43. *See* ACLU, NOTHING TO FEAR: DEBUNKING THE MYTHICAL "SHARIA THREAT" TO

it becomes due and payable in the instance of divorce if it hasn't been paid at some point earlier. In dealing with this question, courts have approached it from the framework of the legal safeguards that are in place. The results have been different, however. For instance, in *Odatalla v. Odatalla*,[44] a case in the Superior Court of New Jersey, a *mahr* agreement was upheld.[45] The court determined that enforcing the sharia-based agreement raised no First Amendment concerns because this action was based on neutral legal principles of contract law.[46] In contrast, the court did not uphold a *mahr* agreement in another case, *Zawahiri v. Alwattar*[47] because it concluded that the husband had entered into the agreement as a result of overreaching or coercion.[48] The court held that because the contract was signed under duress, it was not valid.[49]

In conclusion, what I hope I demonstrated in my talk today is that, while anti-sharia laws purport to solve a problem that does not actually exist, they in turn raise new issues. Instead of creating these unnecessary hurdles, proponents of anti-sharia laws should instead have more faith in the American legal system and our constitutional framework.

Thank you.

OUR JUDICIAL SYSTEM 3 (2011), *available at* https://www.aclu.org/religion-belief/nothing-fear-debunking-mythical-sharia-threat-our-judicial-system (describing cases in which courts applied contract law to disputes involving mahr agreements).

44. *See* Odatalla v. Odatalla, 810 A.2d 93, 95–96 (N.J. Super. Ct. Ch. Div. 2002) (holding that the First Amendment did not prevent the court from enforcing a *mahr* agreement).

45. *See id*. at 98 (finding that a *mahr* agreement was "nothing more and nothing less" than a contract between two consenting adults).

46. *See id*. at 95–96 (applying principles of contract law to the *mahr* agreement and asserting that no "doctrinal issues" of religious belief or policy were involved).

47. *See* Zawahiri v. Alwattar, No. 07AP-925, 2008 WL 2698679, at 6 (Ohio Ct. App. July 10, 2008) (holding that husband's agreement to pay $25,000 if parties divorced was coerced and thus unenforceable).

48. *Id*.

49. *Id*.