

**DRAFT**

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**Who Governs the Family?  
Marriage as a New Test Case of Overlapping Jurisdictions**

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“Overlapping jurisdictions” – the theme of this symposium – is at the heart of some of the most volatile issues that arise under the First Amendment and attendant federal and state statutes guaranteeing religious freedom. The notion of “overlapping jurisdictions” includes two broad clusters of issues. One cluster concerns claims of conscientious objection to general laws. These are headline issues today. May the government require a minister to marry a same-sex or interreligious couple, a medical doctor or hospital to perform an elective abortion or assisted-reproductive procedure, a pharmacist to fill a prescription for a contraceptive or a morning-after pill, or a private employer to carry medical insurance for the same prescription – when all of those required actions run counter to those parties’ core claims of conscience or central commandments of their faith? May a religious organization dismiss or discipline its officials or members because of their sexual orientation or sexual practices, or because they had a divorce or abortion? May a private religious citizen refuse to photograph or cater a wedding, to rent an apartment or car, or offer a general service to someone whose lifestyle or relationships they find religiously or morally wanting – especially when the state’s laws of civil rights and non-discrimination command otherwise?<sup>2</sup> These new

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<sup>2</sup> See, e.g., Erin N. East, Note, *I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships*, 59 EMORY L.J. 259 (2009) (discussing the conflict that can arise between the statutory right of a same sex couple to be free from discrimination and the religious liberty of those who object to performing certain services for same sex couples). See also recent short opinion articles by Richard W. Garnett at <http://usatoday30.usatoday.com/news/opinion/forum/story/2011-11-27/hhs-contraception-mandate/51424562/1>; <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-02-15/obama-contraceptive-mandate-compromise-bishops/53103138/1>;

<http://magazine.nd.edu/news/31400-understanding-the-hhs-lawsuits/>

contests join older cases of conscientious objection to participate in the military, to swear an oath, to work on one's Sabbath or holy days, to receive medical treatment, or to hire religious outsiders.<sup>3</sup> At the heart of all these contests are competing claims between the laws of the individual conscience and the laws of the organized communities of which that individual is a part. Whose law governs in instances of irresolvable dispute: the law of the state, of the religious community, or of the individual's conscience?

A second cluster of issues of overlapping jurisdiction and religion concerns the governance of institutions that, by their nature, have both spiritual and secular, religious and political dimensions. The classic institutions are education and schooling, charity and social welfare, marriage and family life. These are what the Western legal tradition has long called the *res mixta publica* – the hybrid institutions of private and public, spiritual and secular life, where religious and political authorities have always shared (and always contested) jurisdiction: the power to make and enforce their own laws.<sup>4</sup> These mixed institutions remain forums for sharp jurisdictional contests between religious and political officials in the United States.

The most perennial and prominent such contests are between private religious schools and public state-run schools. Five dozen Supreme Court cases and thousands of lower court cases over the past century have sought to sort out the place of religion in public schools, the place of government in private schools, and the wavering lines between private and public school faculties, facilities, students, programs, and services.<sup>5</sup> This is an easy place to find hard cases of overlapping jurisdiction, with a headline case appearing every year or two.

Charity and social welfare are becoming hotter areas of conflict, too. Beginning in the mid-1990s,<sup>6</sup> federal and state social welfare policies shifted from the state-centric

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and the blog by Dan Philpott: <http://mirrorofjustice.blogspot.com/mirrorofjustice/2012/12/great-piece-by-dan-philpott-on-the-hhs-mandate.html>

<sup>3</sup> See ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010).

<sup>4</sup> See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983); HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003); JOHN WITTE, JR., *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* (2002).

<sup>5</sup> JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 191-222 (3D ED. 2010).

<sup>6</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, 110 Stat. 2105 (1996).

programs inaugurated in the New Deal half a century earlier to new programs that allow religious communities to play a more prominent role in providing relief for the poor and the needy and for victims of abuse and disaster both at home and abroad. One of the new programs called "faith-based initiatives" – government programs that fund religious and other private charities to deliver social welfare and emergency relief services on the government's behalf – is the subject of growing cultural and constitutional battles today.<sup>7</sup> Some object to government financing of religious charities, or government use of religious facilities and programs to dispense aid and services. Others object to government interference in the internal organization and operations of the religious charities that deliver tax-funded services. Those battles will likely increase as the modern social welfare net continues to fray, and as non-state institutions, including religious ones, either step in or are pushed in to help with the growing social fallout and humanitarian needs of our day.

It is the third of these classic "mixed" institutions beyond schools and charities – that of marriage and the family – that is the focus of this Essay. The headline battles today are over what *forms* of marriage should be recognized by the state – sometimes over the objection of religious groups, and sometimes at their insistence: straight versus gay marriage, contract versus covenant marriage, monogamous versus polygamous marriage, and more.

But an emerging battle concerns not the forms of marriage, but the *forums* in which marriage and family cases are adjudicated. Specifically, the new battle is looming over the place of faith-based family laws and religious tribunals in our democratic system of government – especially ancient and sophisticated religious legal systems based on Jewish *halacha*, Christian canon law, and Muslim *Shari'a*, among others that quietly govern a good number of the family law questions of religious believers.<sup>8</sup> The question of the legitimacy and authority of these faith-based family law systems is lurking just over the horizon of American family law; Muslim laws in particular have already become a newly controversial issue at state constitutional law. Controversies over the jurisdiction of these religious legal systems will become sharper in the years ahead as various religious individuals and groups – often dismayed by the marital fragility, family breakdown, and sexual lassitude of modern society – press for greater

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<sup>7</sup> See STEVEN V. MONSMA, PLURALISM AND FREEDOM: FAITH-BASED ORGANIZATIONS IN A DEMOCRATIC SOCIETY (2012) ; Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J. L. & PUB. POL'Y 165 (2009). Compare *Grote Industries, LLC v. Sebelius*, No. 4:12-cv-001340-SEB-DML WL 6725905 (S.D. Ind. Dec. 31, 2012) with *Korte v. Sebelius*, No. 12-3841 WL 6757353 (7th Cir. Dec. 28, 2012) (showing a divide among courts in ruling on whether entities are granted exceptions to the Affordable Care Act's mandate to provide contraceptives).

<sup>8</sup> See MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel A. Nichols, ed., 2012); SHARI'A IN THE WEST (Rex Ahdar & Nicholas Aroney, eds., 2010).

freedom to make judgments about sex, marriage, and family life based on their own religious beliefs.

### I. Religion, Marriage, and the State

For many religious people today – and for many non-religious people, too – marriage is “more than a mere contract.”<sup>9</sup> It is not merely a private contract between two individuals but also an important familial, communal, if not spiritual event. It is not merely an avenue by which the state confers status benefits and burdens on a couple, but also a unique marker of fundamental change in a person’s identity and responsibility within their communities. For many people, the proper formation of a marriage thus requires more than compliance with state procedural forms of adequate notice and consent. It also requires a religious ceremony before a qualified officiant who solemnizes and consecrates the union, with witnesses and a celebrating community looking on and promising to help the new couple in their life together and in their hoped-for roles as parents. For many people, these communal and ceremonial dimensions of marriage are more important as a religious matter than a civil matter. Similarly for them, a marital dissolution is not valid unless and until granted by competent religious authorities on adequate grounds that are proven through appropriate procedures that are recognized and validated within their community. For such people, a statement by the state – of either marriage or divorce – is simply not morally weighty or conclusive enough to have binding effect.<sup>10</sup>

This is partly because, as Ayelet Shachar and others have argued, individuals exercise complex “citizenships” as members of multiple communities.<sup>11</sup> They frequently possess strong citizenship affiliations to a religious group at the same time that they possess a citizenship affiliation to the civil state. If those two communities lack alignment on a critical matter such as marriage or divorce, individuals may feel competing normative pulls. It is not a given that the normative stance of state law will

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<sup>9</sup> See John Witte, Jr. & Joel A. Nichols, *More than a Mere Contract? Marriage as Contract and Covenant in Law and Theology*, 5 U. ST. THOMAS L.J. 595 (2008);.

<sup>10</sup> See examples in SEX, MARRIAGE, & FAMILY IN WORLD RELIGIONS (Don S. Browning & M. Christian Green, eds.) (2009).

<sup>11</sup> AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS (2001); see also Ayelet Shachar, *Faith in Law? Diffusing Tensions Between Diversity and Equality*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note 8, at 341.

control.<sup>12</sup> Sometimes the “unofficial law” of the religious or cultural community has a stronger hold on individuals than the sanctioned official civil law of the secular polity.<sup>13</sup>

### A. Protestant Dilemmas.

For many conservative Christians today, among other cultural conservatives, the norms of sex, marriage, and family in liberal society stand increasingly juxtaposed to traditional Christian norms. Until recently, American family law generally reflected Christian norms, especially Protestant norms of sex, marriage, and family life.<sup>14</sup> Marriage was limited to one man and one woman with the freedom, fitness, and capacity to marry each other. The parties had to be of marriageable age and without prohibited degrees of consanguinity or affinity. A priest or pastor was vested with the authority to preside over the wedding on behalf of both the church and the state. Divorce was available only for proven hard fault, with ongoing obligations of care and support for the innocent spouse and dependent children.

This congruence between state law and marital theology corresponded to basic Protestant beliefs that the state’s law itself had a constructive teaching function for society (concerning the ideals and goods of marriage) as well as a restrictive boundary function for its members (concerning who may or may not marry or divorce).<sup>15</sup> American Protestants historically did *not* maintain church courts to govern their marriage disputes – unlike minority Jewish and Catholic communities who maintained their *beth din* and consistory courts with the gradual acquiescence of the states in some ways.<sup>16</sup> Instead,

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<sup>12</sup> In the United States, for example, 70% of Muslims “with a high level of religious commitment . . . consider themselves to be Muslims first . . . . But among those with a low religious commitment, just 28% see themselves this way while a 47% plurality identifies first as American and 12% say they consider themselves equally Muslim and American.” PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 31 (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>. This is not a uniquely Islamic notion, as a significant portion of American Christians also identify with their religion first before identifying with their country. Richard Wike & Greg Smith, *Little Support for Terrorism Among Muslim Americans*, PEW RESEARCH CTR. (Aug. 25, 2011), <http://pewresearch.org/pubs/1445/little-support-for-terrorism-among-muslim-americans>.

<sup>13</sup> Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449 (2009); cf. Sarah Beresford, *Seeking Secularism: Resisting Religiosity in Marriage and Divorce - A Comparative Study of England and America*, 3 WEB JCLI (2011), available at <http://ssrn.com/abstract=1873287> (advocating for a secular marriage law and assuming that non-recognition by the state would lead to compliance and adherence to civil law norms).

<sup>14</sup> See e.g., JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2d ed. 2012).

<sup>15</sup> See JOHN WITTE, JR., GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION 263-94 (2006) (on uses of the law).

<sup>16</sup> Joel A. Nichols, *Louisiana’s Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929 (1998); Joel A. Nichols, *Multi-Tiered Marriage: Reconsidering the*

majority Protestant groups were content to put jurisdiction over marriage and divorce in the hands of elected government officials, who were presumed to be Christians or, at least, would maintain Christian standards of morality.

This system of church-state cooperation in the governance of marriage worked well enough for most American Protestants until the 1950s. But with the sexual revolution of the culture and the constitution, and the corresponding decline of Protestant political and judicial clout, state marriage and divorce laws were rapidly liberalized in the 1960s and thereafter. Protestants and other conservative Christians saw a growing dissonance between their traditional marital teachings and the new state family law. The differences were not just about same-sex marriage – the hot topic today – but about a host of family issues, including contraception, abortion, and privacy rights in general. The onset of no-fault divorce (and the lack of any “grandfathering” provisions for those married under other regimes), the adverse effects of divorce on weaker parties (especially women and children), the sheer number of divorced individuals over the ensuing years, the increased judicial solicitude toward cohabitation and non-marital procreation, and the attendant creation of alternative legal norms for the same have combined to contribute to a cultural conflict for conservative Christians.

The looming question for conservative American Protestants and Evangelicals today is whether it is time to acknowledge that they are rapidly becoming religious and political minorities in the United States who lack the clout to bend state policy to their moral visions for sex, marriage, and family life. This is so despite the continued efforts of groups like Focus on the Family and their local equivalents today, despite the ample new interreligious Marriage Movement with conservative Christians at the lead, and despite the earlier successes of the Moral Majority to change state and national policies. Those days are numbered, if not over.

Protestants faced a comparable crisis in the education field a century ago when they slowly lost their control of the public schools, especially after the Supreme Court got involved after 1948.<sup>17</sup> While some have continued to fight to keep religion in the public schools, the response of many conservative Protestants has been to set up more of their own private Protestant schools to educate their children in the faith. Perhaps conservative Protestants are reaching a comparable crossroad in the marriage and family field. Perhaps it is time for them to develop sophisticated new forms of religious mediation and arbitration,<sup>18</sup> perhaps even an independent church court system to

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*Boundaries of Civil Law and Religion* in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note 8, at 11, 15-32.

<sup>17</sup> WITTE AND NICHOLS, *supra* note 5, ch. 8.

<sup>18</sup> Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011); Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VERMONT L. REV. 157 (2012).

handle some of the marriage and family law issues of their voluntary faithful. This would take massive new political thinking among Protestants about the relationships of church, state, and family. But there are historical prototypes in place in the historical Protestant world,<sup>19</sup> and there are contemporary analogies at hand among American Jews, Catholics, Muslims, and other religious minorities who have not had the inclination or clout to shape state laws on marriage and family life and have thus quietly operated their own religious legal systems.

## **B. Islamic Plights and Anti-Shari'a Laws.**

Ironically, Protestants are now beginning to contemplate this brave new world of church, state, and family just at the time when religious tribunals are becoming ever more visible and controversial in the United States. The power of Jewish *beth din* over marriage and divorce within Orthodox Judaism has always raised a few constitutional eyebrows, but there has been no sustained campaign to eradicate them.<sup>20</sup> The power of Fundamentalist Mormon communities to maintain polygamous families in open defiance of state criminal laws has triggered stronger political reaction, and a growing number of court cases of late are challenging the legitimacy of their religious leadership and legal structures.<sup>21</sup> The recent scandals in American Catholic circles concerning pedophilia and clerical cover-ups have raised even stronger cultural and legal reactions and a relentless stream of litigation that has cost the Catholic Church hundreds of millions of dollars in damage awards and out-of-court settlements.<sup>22</sup>

But the concerns about the operation of such “overlapping jurisdictions” pale by comparison to the growing antipathy against American Muslims, and their sophisticated legal system called Shari'a.<sup>23</sup> Muslims now “represent the second largest religion in Europe and the third in North America.”<sup>24</sup> But Muslims are also on the receiving end of a

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<sup>19</sup> See JOHN WITTE, JR. & ROBERT M. KINGDON, *SEX, MARRIAGE, AND FAMILY LIFE IN JOHN CALVIN'S GENEVA I: COURTSHIP, ENGAGEMENT, AND MARRIAGE*, (2005) (volume II, forthcoming 2013).

<sup>20</sup> See Michael J. Broyde, *New York's Regulation of Jewish Marriage, Covenant, Contract, or Statute?* in *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT*, *supra* note 8, at 138.

<sup>21</sup> See JOHN WITTE, JR., *WHY TWO IN ONE FLESH? THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY* (forthcoming).

<sup>22</sup> See e.g., *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W. 3d 436 (Tenn. 2012); *Moe v. Trustees of Stigmatine Fathers, Inc.*, No. 050059 WL 2345859 (Mass. Super. 2008); *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009).

<sup>23</sup> ABDULLAHI AHMED AN-NA'IM, *ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI'A* (2008). See also Robert A. Kahn, *Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective*, 21 *DUKE J. COMP. & INT'L L.* 567 (2011).

<sup>24</sup> John L. Esposito, *Foreword*, in *MUSLIMS' PLACE IN THE AMERICAN PUBLIC SQUARE* xi (Zahid H. Bukhari et al., eds., 2004). Islam is the fastest growing religion in America, and some scholars assert that it will be the second

great deal of cultural antipathy, allegedly because of their religion. This backlash has had a substantial uptick the past decade – after the tragic events of 9/11, followed by London’s 7/7, Fort Hood, and the bloody and unpopular wars in Afghanistan and Iraq.<sup>25</sup>

The public rebuke of Islam in the United States in the past decade has come from various quarters. For example, FOX Television commentators Bill O’Reilly and Sean Hannity compared the Qur’an, Islam’s holy book, to Adolf Hitler’s *Mein Kampf*.<sup>26</sup> Talk radio host Michael Savage told his listeners that lawmakers should institute an “outright ban on Muslim immigration” in order “to save the United States”; he also recommended making “the construction of mosques illegal in America.”<sup>27</sup> An enormous public outcry in 2010 delayed construction of a mosque near the site of the World Trade Center attacks in New York City.<sup>28</sup> Republican presidential hopeful and one-time frontrunner Herman Cain insisted that he would not hire Muslims as part of his administration; he also firmly opposed the construction of mosques, wrongly justifying his stance on First Amendment grounds.<sup>29</sup> And in March 2011, nearly a decade after 9/11/01, U.S. Representative Peter King held congressional hearings on terrorism and Islam.<sup>30</sup> Indeed, as Professors Sisk and Heise have said, “We are all living in the shadow of 9/11 – but that shadow appears to be longer and darker for Muslim

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largest religion in America by the mid 21<sup>st</sup> century. See KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY* (2000); JANE I. SMITH, *ISLAM IN AMERICA* (1999).

<sup>25</sup> See, e.g., LORI PEEK, *BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11* 16 (2011) (“In the aftermath of the terrorist attacks, Muslims experienced a dramatic increase in the frequency and intensity of these hostile encounters.”).

<sup>26</sup> Deborah Amos, *Students Discuss Koran Book after Battle*, ABC NIGHTLINE (Aug. 25, 2002), <http://abcnews.go.com/Nightline/story?id=128548&page=1>.

<sup>27</sup> Ryan Chiachiere, *Savage: To "save the United States," lawmakers should institute "outright ban on Muslim immigration" and on "the construction of mosques,"* MEDIA MATTERS FOR AMERICA (Nov. 29, 2006), <http://mediamatters.org/mmtv/200611290005>.

<sup>28</sup> See e.g., Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1. For part of the vision of Islamic law from the imam primarily behind the mosque, see Imam Feisal Abdul Rauf, *Justification and Theory of Sharia Law*, 7 U. ST. THOMAS L.J. 452 (2011); For a discussion on whether states can regulate religious land use, see Heather Greenfield *International Law, Religious Limitations, and Cultural Sensitivity: The Park51 Mosque at Ground Zero*, 25 EMORY INT’L L. REV. 1317 (2011).

<sup>29</sup> See e.g., Neil Cavuto, *The New Voice - CEO Interview*, WORLD WITH NEIL CAVUTO (interview with Herman Cain) (Mar. 28, 2011).

<sup>30</sup> David A. Fahrenthold & Michelle Boorstein, *Hearing Brings Debate on Islam to the Fore*, WASH. POST, Mar. 9, 2011, at A1 (contending that the hearings implicitly asked the “most important question: How should America talk about Muslim Americans?”); see also PEEK, *supra* note 27, at 17–35 (including examples of controversial Quran burning by a Florida pastor, violent physical acts against Muslims, harassment, etc.).

Americans.”<sup>31</sup> To be sure, there have also been calls for accommodation, toleration, and better incorporation of Muslims’ beliefs into liberal democracies via dialogue and greater respect for multiculturalism. But even these conversations and actions have tragically given rise to extreme violence at times, as witnessed, for example, in Norway when Andres Breivik slaughtered dozens of people, ostensibly because they supported the Muslim population in Norway.<sup>32</sup>

To date, most political controversies in the United States regarding Islam have not centered directly upon family law matters. They focus instead on the building of mosques or on generic charges of the imposition of Shari’a. A number of states over the past three years have debated new laws that ban the application of Shari’a in their state legislatures and courts. Oklahoma was the first state to pass such a law in November 2010, with its popularly-ratified “Save Our State” Amendment to the Oklahoma Constitution. That amendment was promptly enjoined by a federal court and eventually struck down as unconstitutional.<sup>33</sup> But more than a dozen other states have stepped into the fray. Kansas and South Dakota recently passed variations of these “anti-Shari’a” statutes, and several more states are deliberating them seriously.<sup>34</sup>

The recent movement in Missouri to enact anti-Shari’a legislation exemplifies how much these proposed laws have been driven by xenophobia and imagined legal worries. In Missouri, State Representative Paul Curtman proposed a new anti-Shari’a law, both in 2011 and in 2012.<sup>35</sup> Representative Curtman offered a few prosaic reasons for the proposed law when he spoke at a St. Louis symposium in March 2012.<sup>36</sup> He

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<sup>31</sup> Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of Post 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 289 (2012). (showing that Muslims face a “distinct and substantial disadvantage” when asserting US constitutional free exercise or religious accommodation claims – in addition to the cultural challenges mentioned above).

<sup>32</sup> Miguel Marquez, *Norway Shooting Suspect Anders Breivik: Attacks Were 'Price of Their Treason'*, ABC WORLD NEWS (July 25, 2011), <http://abcnews.go.com/Blotter/anders-breivik-hearing-closed-pulpit-alleged-shooter/story?id=14152129>.

<sup>33</sup> See *Awad v. Zirriax*, 670 F.3d 1111 (10th Cir. 2012).

<sup>34</sup> For regular updates and compilations, see Bill Raftery, *Bans on court use of sharia/international law: signed into law in Kansas, sent to study committee in New Hampshire, still technically alive in MI, NC, PA & SC*, GAVEL TO GAVEL, (May 29, 2012), <http://gaveltogavel.us/site/2012/05/29/bans-on-court-use-of-shariainternational-law-signed-into-law-in-kansas-sent-to-study-committee-in-new-hampshire-still-technically-alive-in-mi-nc-pa-sc/>. See also Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM J. COMP. L. 303, 320-21 (2011).

<sup>35</sup> H.R. 1512, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

<sup>36</sup> Remarks by Rep. Paul Curtman, St. Louis University Law Review symposium on “Invisible Constitutions: Culture, Religion, and Memory” (March 1-2, 2012) [hereinafter “SLU Symposium”]. See also CAIR, *CAIR Hosts Meeting With Sponsor of Anti-Sharia Legislation*, (Mar. 26, 2012), <http://cair-stlouis.com/events-and-programs/53->

spoke of the need to “promote liberty” and to make sure Missouri headed off a problem before it started.<sup>37</sup> When pressed to cite examples of the imposition or use of Shari'a that would merit his proposed anti-Shari'a law, however, Representative Curtman failed to cite a single Missouri case – and there was, in fact, no Missouri case to cite. Instead, he referenced a “binder” he had with him collecting “dozens” of cases nationwide that used Shari'a; those cases, he said, provided him with further reason to sponsor the law. The binder, however, contained only a copy of a 635-page document designated *Shariah Law and American State Courts: An Assessment of State Appellate Court Cases* [SLASC].<sup>38</sup> Because this binder of cases and its analysis is the proffered reason for the Missouri law, and because it has been cited in numerous other places as the reason behind the need for anti-Shari'a legislation more broadly, it is worth taking a closer look at these materials.<sup>39</sup>

The SLASC document seems to have originated with a single person: David Yerushalmi. Mr. Yerushalmi has a history of arguing quite combatively about the threat of Shari'a and is insistent about the need to protect U.S. courts from foreign influence.<sup>40</sup> In 2010, Yerushalmi drafted the American Laws for American Courts Act,<sup>41</sup> which was designed to insulate and prohibit state courts from embracing foreign law.<sup>42</sup> After the

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cair-holds-successful-event-with-rep-paul-curtman-a-the-muslim-community (videos originally posted on YouTube, first video available at [http://www.youtube.com/watch?feature=player\\_embedded&v=q4BTNNhM6Kc](http://www.youtube.com/watch?feature=player_embedded&v=q4BTNNhM6Kc)).

<sup>37</sup> SLU Symposium, *supra* note 39.

<sup>38</sup> CENTER FOR SECURITY POLICY, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES (June 21, 2011) available at <http://shariahinamericancourts.com/> [hereinafter SLASC].

<sup>39</sup> Despite the legislative clamor for anti-Sharia laws and the use of the SLASC document and its compilation of cases as rationale for such laws, we have been unable to find any sustained scholarly commentary about the SLASC document. There are a few online articles criticizing the report. See, e.g., Matthew J. Franck, *A Solution in Search of a Problem*, NAT'L REV. ONLINE, June 15, 2012, <http://www.nationalreview.com/bench-memos/303028/solution-search-problem-matthew-j-franck>; see also Matthew Schmitz, *Anti-Sharia Laws are Magic*, NAT'L REV. ONLINE, June 18, 2012, <http://www.nationalreview.com/corner/303135/anti-sharia-laws-are-magic-matthew-schmitz#> (calling the SLASC a “flimsy document”).

<sup>40</sup> Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, Jul. 31, 2011, at A1, available at [http://www.nytimes.com/2011/07/31/us/31shariah.html?\\_r=3&pagewanted=all](http://www.nytimes.com/2011/07/31/us/31shariah.html?_r=3&pagewanted=all) (questioning Yerushalmi's lack of formal training in Islamic law even though he has a substantial amount of influence in America, promoting public discourse about Sharia and promoting anti-Sharia legislation).

<sup>41</sup> American Public Policy Alliance, *American Laws for American Courts*, (last visited Jan. 6, 2013), [http://publicpolicyalliance.org/?page\\_id=38](http://publicpolicyalliance.org/?page_id=38). The Act is reproduced as Appendix B to SLASC and SLASC states that “[v]ersions of the” law have “passed into law in Tennessee, Louisiana and Arizona.” SLASC, *supra* note 41, at 614-615.

<sup>42</sup> LAW OFFICES OF DAVID YERUSHALMI, P.C., <http://www.davidyerushalmi.com/aboutus.php> (last visited Jan. 6, 2013).

Oklahoma “Save Our State” Amendment was declared unconstitutional by a federal judge, Yerushalmi co-founded the American Freedom Law Center (AFLC) to “aggressively fight those who seek to undermine and destroy our Nation’s founding principles.”<sup>43</sup> SLASC states that it is “based on research and analysis in 2010 and 2011 by the Center for Security Policy and the offices of the Center’s general counsel, attorney David Yerushalmi.”<sup>44</sup>

SLASC purports to gather fifty relevant cases to show how United States courts are being overrun with Shari’a and are applying Shari’a principles. But in fact, SLASC is simply the product of a perfunctory search of legal databases for the word “Shari’a,” and then a reproduction of any American case where the phrase is used.<sup>45</sup> In the vast majority of cases, the civil court does *not* “rely” on Shari’a in any meaningful way, but instead resorts to traditional tools of judicial interpretation and neutrally applies the law through principles of contract, comity, and conflict of laws.<sup>46</sup>

The stated goal of the SLASC is “to encourage an informed, serious and civil public debate and engagement with the issue of Shariah law in the United States of America.”<sup>47</sup> We join the “debate,” and find the SLASC glaringly wanting. It lists 29 cases as “Highly Relevant” and 21 cases as “Relevant.”<sup>48</sup> In another breakdown, it lists the “Top 20” cases of purportedly corrosive Shari’a influence.<sup>49</sup> Whatever the method of selection or priority, a review of the cases themselves says far more about the use of ordinary principles of comity regarding the law of foreign nations, respect for the

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<sup>43</sup> AMERICAN FREEDOM LAW CENTER, <http://www.americanfreedomlawcenter.org/> (last visited Jan. 6, 2013).

<sup>44</sup> SLASC, *supra* note 41, at 9.

<sup>45</sup> SLASC gathered information about state cases via “Google Scholar using search terms including ‘Islam,’ ‘Islamic,’ ‘Muslim,’ ‘Sharia,’ and ‘Shariah.’ Additional search terms were country-specific: ‘Iran,’ ‘Pakistan,’ ‘Egypt’ and ‘Saudi Arabia,’ all countries with Shariah-centric legal systems.” SLASC, *supra* note 41 at 10. The problems with this search methodology, terms, and database are too numerous to catalog in full.

<sup>46</sup> See Abed Awad, *The True Story of Sharia in American Courts*, THE NATION, (June 13, 2012) (stating that SLASC and supporters of the anti-sharia movement ignore that “whether a US judge considers Sharia as a foreign law as in the Exxon case, or as a way to better understand a dispute between parties, as in *Odatella*, the extent of its applicability is always dictated by American law”).

<sup>47</sup> SLASC, *supra* note 41, at 28.

<sup>48</sup> SLASC defines “Highly Relevant” as “upon legal review [the cases] were found to involve Shariah in a conflict of law with the Constitutional principles or state public policy at the trial court or appellate court level.” It defines “Relevant” as “a significant element of Shariah Law was involved at the trial court or appellate court level.” SLASC, *supra* note 41, at 10.

<sup>49</sup> SLASC *supra* note 41, at 29. It is unclear to us how the “Top 20” was decided.

voluntary choices of individuals, and a sense of growing multiculturalism in general than it does about any sort of fanciful imposition of Shari'a law on unwitting parties.

Only a few of the family law cases in the SLASC merit mention. The most (in)famous case, on the top of the list of anti-Shari'a advocates, is *S.D. v. M.J.R.*<sup>50</sup> In a June 2011 Republican primary debate, Herman Cain cited this case as proof that “there have been instances in New Jersey ... where Muslims did try to influence court decisions with Sharia law,”<sup>51</sup> and the lead sponsor of the Oklahoma anti-Shari'a statute cited this case as evidence of the need for Oklahoma's “Save Our State” amendment.<sup>52</sup> What *S.D. v. M.J.R.* shows, however, is nothing more than that a trial judge can make a reversible error. In this case, a wife sought a restraining order against an abusive husband. The trial judge denied the result, holding that the husband failed to form the criminal intent necessary for abuse because his genuine Islamic religious beliefs supported his actions. The appellate court reviewed this *de novo* and reversed and remanded, ordering that a restraining order should issue and that the husband's religious beliefs did not immunize him from criminal indictment. The trial court was simply wrong, and the appellate court performed its requisite reviewing function. A claim of religious belief does not give one license to physically harm another person.

Several of the family law cases cited as problematic by the SLASC involve applications of comity and conflict of laws principles. For example, in *Hosain v. Malik* the court upheld a decision by a Pakistani court on a matter of child custody because of principles of comity.<sup>53</sup> Indeed, in that case the appellate court affirmed only after confirming that the lower court had properly determined the best interests of the child and that the Pakistani decision did not conflict significantly with Maryland public policy. Similarly, in *Chaudry v. Chaudry*, the court held that a divorce that was valid in Pakistan should be granted recognition in the U.S. under principles of comity, even though this meant that the wife would not receive alimony in accordance with the couples' premarital agreement.<sup>54</sup> *In re Marriage of Malak* held that a child custody decision rendered abroad in Lebanon should be respected in the U.S. court because of principles of comity.<sup>55</sup> And *Nationwide Res. Corp. v. Massabni* held that foreign law (of Morocco) applied in determining property rights at divorce for a couple who was validly

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<sup>50</sup> *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010); SLASC *supra* note 41, at 29, 468.

<sup>51</sup> Awad, *supra* note 50.

<sup>52</sup> See A. G. Sulzberger, *Voters Face Decisions on Mix of Issues*, N.Y. TIMES (Oct. 5, 2010), at <http://www.nytimes.com/2010/10/06/us/politics/06ballot.html>

<sup>53</sup> *Hosain v. Malik*, 671 A.2d 988 (Md. Ct. Spec. App. 1996); SLASC, *supra* note 41, at 29, 273.

<sup>54</sup> *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978); SLASC, *supra* note 41, at 31, 427

<sup>55</sup> *In re Marriage of Malak*, 182 Cal. App. 3d 1018 (Cal. Ct. App. 1986); SLASC, *supra* note 41, at 36, 90.

married in Morocco, because Moroccan law did not establish community property and therefore the wife never gained an ownership interest in the marital estate.<sup>56</sup> While the outcomes of a few of these cases may be less than optimal, the cases feature standard applications of neutral legal principles regarding comity and conflict of laws. The fact that the foreign law being applied was that of a Muslim-majority nation (which used parts of Shari'a in its state law) does not affect the outcome of the case.<sup>57</sup>

Other family law cases involve the treatment of the Islamic *sadaq* as a premarital contract. *Akileh v. Elchahal* falls into this category. There the appellate court found that “marriage is sufficient consideration to uphold an antenuptial agreement,” and it reversed a trial court by finding that “a religious antenuptial agreement may be enforceable in a court of law, if it complies with contract law.”<sup>58</sup> Other commentators have suggested that principles of contract law can work well for resolving disputes about religious antenuptial agreements.<sup>59</sup> As an example, in *In re Marriage of Obaidi*, a court used neutral principles of contract law to hold that the parties failed to enter a valid premarital agreement when they signed an Islamic *mahr* because the *mahr* was written in Farsi and the husband did not read or speak Farsi and also had insufficient time to review the document.<sup>60</sup> While one concern in some of the cases involving the *sadaq* or *mahr* is the voluntariness of the parties’ agreement, voluntariness is a standard concern for any premarital agreement. If parties voluntarily choose a forum that involves an imam or an “Islamic Arbitration Committee” as decision-maker, then such decision could be treated as an arbitration award and upheld just as any other award on a neutral basis.<sup>61</sup> There remains a standard boundary of public policy, whereby courts will not enforce arbitral awards from any forum if they contravene public policy.

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<sup>56</sup> *Nationwide Res. Corp. v. Massabni*, 694 P.2d 290 (Ariz. Ct. App. 1984); SLASC, *supra* note 41, at 32, 55.

<sup>57</sup> A non-family-law example cited in SLASC (at 38, 122) is *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem Co., Inc.*, 866 A.2d 1 (Del. 2005). That case also involved foreign law, but in fact benefitted two American companies for they were immune from suit because of a U.S. (Delaware) statute of limitations that was held to apply rather than the longer available time for a lawsuit in Saudi Arabia, which purported to apply Shari'a law.

<sup>58</sup> *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996); SLASC, *supra* note 41, at 39, 170.

<sup>59</sup> Nathan B. Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579 (2010). See also PASCALE FOURNIER, MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION (2010).

<sup>60</sup> *In re Marriage of Obaidi and Qayoum*, 226 P.3d 787 (Wash. Ct. App. 2010); SLASC *supra* note 41, at 30, 570; See also *In re Marriage of Shaban*, 105 Cal. Repr. 2d 863 (Cal. Ct. App. 2001) (refusing to enforce a *mahr* as a premarital agreement based on contract law principles of statutes of frauds and parol evidence rule); SLASC *supra* note 41, at 37, 77.

<sup>61</sup> See e.g., *Tarikonda v. Pinjari*, No. 287403 WL 930007 (Mich. Ct. App. Apr. 7, 2009) (disallowing Islamic divorce from India based on procedural due process concerns); SLASC *supra* note 41, at 31, 374. For a non-family law example, see *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004) (upholding an arbitration award between

Reviewing the family law cases in the SLASC actually gives one the impression that U.S. courts are less solicitous of Shari'a than is often suggested precisely because of this boundary. For example, in *Aleem v. Aleem*,<sup>62</sup> the court was faced with a straightforward issue of whether a divorce that would have been valid in Pakistan should be recognized in Maryland. The couple had been married in Pakistan in 1980 under Pakistani law, but had lived in Maryland for 20 years while retaining their Pakistani citizenship. The wife filed for divorce in Maryland state court, but before a decree was issued, the husband rushed to the Pakistan Embassy and performed the triple *talaq* (his right of unilateral divorce under Shari'a, which would have been recognized as valid under Pakistani law). The Maryland court did *not* hold that Shari'a applied – nor even that the law of Pakistan applied (which would have aligned a Shari'a principle in allowing a unilateral divorce right only to the husband). Instead, the court held that Pakistani law violated Maryland's public policy – which meant that the Maryland court need not grant the comity that it usually would to foreign law because “to enforce the foreign law ... would be hurtful or detrimental to the interest and welfare of its own citizens.”<sup>63</sup> Although the state court generally would follow this law as a matter of comity, it was not bound to do so and, in fact, declined to do so because of a standard public policy exception.

A similar public policy concern was at play in *In Re Custody of R.*<sup>64</sup> In that case, the state appellate court held that it was error to enforce, via comity, a Shari'a council decision from Malaysia that awarded custody of a child to the father. That Malaysia decision had previously been held (by a Philippines court) to be lacking in jurisdiction. The appellate court held that the mother should have been allowed sufficient time to produce documentation that the Malaysia council lacked jurisdiction and that she had a valid custody decree, and should have been allowed an opportunity to show that the proceedings in Malaysia were contrary to the state law and public policy regarding the best interests of the child.<sup>65</sup>

We could go in our analysis of the cases in the SLASC, but simply put, the anti-Shari'a campaign it has inspired seems to be “a solution in search of a problem.”<sup>66</sup> This purportedly authoritative resource for supporters of anti-Shari'a laws fails to show any

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former business partners where decision was issued by Islamic Arbitration Committee, which had authority to decide the dispute per contract of the parties); SLASC *supra* note 41, at 35, 379.

<sup>62</sup> *Aleem v. Aleem*, 947 A.2d 489 (Md. 2008); SLASC *supra* note 41, at 39, 317.

<sup>63</sup> *Id.* at 498.

<sup>64</sup> *In re Custody of R.*, 947 P.2d 745 (Wash. Ct. App. 1997); SLASC *supra* note 41, 33, 557.

<sup>65</sup> *Id.* at 753.

<sup>66</sup> Franck, *supra* note 42.

real problem that must be addressed. The SLASC trolls through 40 years of cases, spanning the appellate courts in all 50 states, in search of Shari'a cases that "conflict with the Constitution and state public policy."<sup>67</sup> Finding only 29 "highly relevant" cases in this vast sea of cases already says a lot; that none of these cases actually reflect a legitimate problem says even more: namely, that the anti-Shari'a campaign in the American states is transparently discriminatory in its effort to single out Muslims and their laws for special restrictions. Courts have long had a boundary of "public policy" when faced with enforcing a contract or other matter that runs afoul of accepted civil norms, and many of the examples adduced in SLASC involve the navigation of that boundary. Even more, the Supremacy Clause of the United States Constitution, which renders the Constitution as the supreme law of the land and supersedes any other law in conflict, operates as a clear backstop for the wrongful imposition of foreign or religious law. The anti-Shari'a legislation in place in the states today is unnecessary, harmful, and most often unconstitutional.

### **C. Comparative Examples.**

While Islamic family law issues have not yet been the flashpoint of public anti-Islam fervor in the United States (outside their application in these anti-Shari'a matters more generally), they are in our common law cousins, Canada and the United Kingdom. In both places, the focus has been whether to permit Muslims to adjudicate family law disputes according to religious principles through religious arbitration. In both places, opposition has centered, in part, on political opposition to the principles of Shari'a and the fear of its possible "imposition" upon citizens of those countries. And in both places, Islamic religious arbitration of family law disputes has continued, despite opposition.

In Canada, Christians, Jews, and Muslims had been submitting their personal disputes to religious arbitration for years (using marital contracts that designate a specific dispute resolution forum). But when news broke in the province of Ontario in 2003 that an outspoken imam was publicly advocating a more formal procedure to promote the application of Shari'a to Canadian Muslims in family law matters, citizens and citizens' groups complained loudly to the government. The government commissioned the former Attorney General, Marion Boyd, to consider the matter. She undertook a thorough investigation that culminated in a lengthy report about the use of alternative dispute resolution in family law, including the use of religious norms (e.g., Shari'a) as a choice of law in family law arbitration.<sup>68</sup> Attorney General Boyd recommended that Ontario should continue to *allow* religious arbitrations – on the condition that certain safeguards be implemented and followed to ensure proper consent and fairness. Contrary to this

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<sup>67</sup> SLASC, *supra* note 41, at 8.

<sup>68</sup> See MARION BOYD, OFFICE OF CANADIAN ATTORNEY GENERAL, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION (2004), *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

recommendation, in 2005 political leaders removed the legal option of applying any religious principles and insisted that there would be “one law for all Ontarians.”<sup>69</sup>

In the United Kingdom, Archbishop Rowan Williams gave an important speech on the intersection of civil and religious law in February 2008. In that speech, he suggested that some sort of “accommodation” of Shari’a by British common law was “unavoidable.” For both pragmatic and substantive reasons, he advocated a sort of “plural jurisdiction,” according to which Muslims could resolve family law disputes (and some other civil matters) either in British courts or in religious arbitration tribunals. His remarks gave rise to a flurry of articles, the vast majority denouncing the idea – in part because it would “license polygamy.”<sup>70</sup> Despite the cries of many critics, however, the Archbishop was not advocating a wholesale abdication of the state’s marriage and divorce law, but rather calling for a constructive conversation about the complex citizenships exercised by Muslim believers. Rather than engage in productive dialogue about this difficult issue, many in the popular press instead merely aired unrealistic concerns about the wholesale takeover of British law (or at least for some British citizens) by Shari’a.

The facts on the ground in Canada and the United Kingdom underscore the impossibility of the civil law claiming full allegiance and commitment from religiously-devout citizens, including Muslims. In Canada, while Ontario provincial law is uniform, and courts will not enforce family arbitrations that purport to apply religious law, this does not mean that religious arbitrations have ceased. Rather, Attorney General Boyd has reported that Muslim arbitrations have “merely becom[e] invisible to official law without ceasing operations.”<sup>71</sup> And in the United Kingdom, one of the main reasons behind Archbishop Williams’s speech was the reality that a very high percentage of Muslims already lack alignment between their civil and religious marriages. For example, one study indicated that 27% of all Muslim marriages in the United Kingdom are not officially married under English law.<sup>72</sup> (This mirrors the experience of many

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<sup>69</sup> See Prithi Yelaga & Robert Benzie, *McGuinty: No Sharia Law*, THE TORONTO STAR, (Sept. 12, 2005), at A1.

<sup>70</sup> Rowan Williams, ARCHBISHOP’S LECTURE – CIVIL AND RELIGIOUS LAW IN ENGLAND: A RELIGIOUS PERSPECTIVE, Feb. 7, 2008, reprinted in SHARI’A IN THE WEST 293 (Rex Ahdar and Nicholas Aroney, eds., 2010). See also Catherine Bennett, *It’s One Sharia Law for Men and Quite Another for Women*, THE OBSERVER (THE GUARDIAN (U.K.)), Feb. 10, 2008 (“licensed polygamy”).

<sup>71</sup> Prakash Shah, *A Reflection on the Shari’a Debate in Britain*, 13 STUDIA Z PRAWA WYZNANIOWEGO (STUDIES OF ECCLESIASTICAL LAW) 71 (2010) (citing Marion Boyd, “The Past, Present and Future of Arbitration in Religious Contexts: Reflections on Ontario Law in a Comparative Context.” Lecture given at the Institute of Advanced Studies, London (July 10, 2009)).

<sup>72</sup> S.N. SHAH-KAZEMI, UNTYING THE KNOT: MUSLIM WOMEN, DIVORCE AND THE SHARIAH (2001). See also GILLIAN DOUGLAS ET AL., SOCIAL COHESION AND CIVIL LAW: MARRIAGE, DIVORCE AND RELIGIOUS COURTS (Cardiff 2011); Farrah Ahmed, *Religious Tribunals, Religious Freedom, and Concern for Vulnerable Women*, in CHILD AND FAMILY LAW QUARTERLY (2012) (describing the “current legal position in the United Kingdom”).

Orthodox Jews in New York who also marry and divorce only under religious law, and not according to the civil law.<sup>73)</sup>

#### D. In Search of a Middle Way

In earlier writings, separately and together, we have tried to respond constructively to the growing controversy over the use of Shari'a family law and Muslim marriage tribunals in the United States, Canada, the United Kingdom, and other Western democracies.<sup>74</sup> Our main effort in these writings has been to counsel against the constitutional brinkmanship we saw emerging on both sides – the effort by anti-Shari'a critics in Oklahoma and elsewhere to pass state constitutional amendments against Shari'a, and the constitutional rights arguments pressed by some advocates to allow for voluntary use of Shari'a on grounds of religious freedom, non-discrimination, and self-determination. We agree that adults have a fundamental right to be married and divorced and that religious parties have a fundamental right to religious freedom and equal treatment. But this does not mean that religious tribunals have the fundamental right to govern the marriage and family questions of their voluntary faithful nor that religious parties have the free exercise right to choose which law governs them: the state's or that of their own religious community. The state, we argued, cannot simply cede jurisdiction over so fundamental an institution as marriage that is so deeply woven into sundry other public, private, penal, and procedural laws. But the state can and should share marital jurisdiction with religious officials by allowing religious officials to preside at weddings, testify in divorce cases, assist in the adoption of a child, facilitate the rescue of a distressed family member, preside in mediation and arbitration proceedings, and perhaps more.

Our further effort in these earlier writings was to invite American parties to take a longer historical and developmental view of this new jurisdictional contest over marriage and family life. Marriage has long been both a spiritual and temporal institution in the history of the West, and changes in religious and political jurisdiction over marriage have always taken time, patience, negotiation, and experimentation. In American history, this has occurred by what Professor Steven Smith has aptly called “soft constitutional” developments that depend heavily upon gradual and skillful cultural negotiation outside of the formal instruments of state law and beneath the purview of

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<sup>73</sup> See Broyde, *supra* note 22, at 161.

<sup>74</sup> E.g., John Witte, Jr. & Joel A. Nichols, *Faith-Based Family Laws in Western Democracies?*, FIDES ET LIBERTAS 119-132 (2010); John Witte, Jr. & Joel A. Nichols, *The Frontiers of Marital Pluralism: An Afterword*, in MARRIAGE AND DIVORCE IN MULTICULTURAL CONTEXT, *supra* note 8, at 357; John Witte, Jr., *Shari'ah's Uphill Climb*, CHRISTIANITY TODAY (Nov. 20, 2012 9:08 AM), <http://www.christianitytoday.com/ct/2012/november/shariahs-uphill-climb.html>; see also John Witte Jr., *The Future of Muslim Family Law in Western Democracies*, in SHARI'A IN THE WEST, *supra* note 8, at 279; Joel A. Nichols, *Multi-tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135 (2007).

constitutional law.<sup>75</sup> American Catholics and Jews have, for two centuries and more, used this technique to balance the marital jurisdictional claims of both their own religious communities and their state sovereigns. And they now have sophisticated tribunals that govern some of the hard family law questions of their voluntary members. American Protestants, Evangelicals, and Muslims are now slowly learning to do the same. Each religious group can learn from the other in developing these necessary skills of cultural and legal navigation.<sup>76</sup> They can also learn from the examples of earlier American jurisdictional struggle over education that slowly gave rise to the shared public and private school system we have in place today.

Some critics like Eric Kniffin have charged that our writings about Muslims suggest that we believe “the free exercise of religion is something less than a fundamental – even inalienable – right.”<sup>77</sup> This criticism misses the mark. We fundamentally believe that free exercise rights and other religious freedoms are at the heart of the human rights regime; indeed, we have contended for this forcefully and at length elsewhere.<sup>78</sup> But that begs the question of what practices are protected by free exercise rights, especially in the field of marriage and family life. Not all family actions by religious individuals and groups can be viewed as exercises of religious rights. It also begs the question of what limits the state can justifiably impose on the exercise of those rights that are deemed within the realm of free exercise for religious individuals and/or religious groups. Surely, the state may and must step in to help vulnerable individuals -- especially women, children, the elderly or disabled -- from physical harm done to them by their family members in the name of religion. Surely a religious community cannot get carte blanche religious freedom to devise and implement rules of spousal support, child custody, or inheritance that systematically harm some members of the family, or that protect incest, polygamy, or the rape of children. The hard questions are to articulate just where the lines are between state regulation and religious freedom, especially when a given family practice harms other citizens. The

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<sup>75</sup> See Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN'S L. REV. 407 (2011).

<sup>76</sup> Jean-Francois Gaudreault-DesBiens, *Religious Courts, Personal Federalism, and Legal Transplants*, in SHARI'A IN THE WEST, *supra* note 8, at 160

<sup>77</sup> Eric N. Kniffin, *Are American Muslims Entitled to the Same Free Exercise Rights as Other Americans?*, HUFFINGTON POST (May 26, 2011), [http://www.huffingtonpost.com/eric-n-kniffin/are-american-muslims-enti\\_b\\_867777.html](http://www.huffingtonpost.com/eric-n-kniffin/are-american-muslims-enti_b_867777.html).

<sup>78</sup> WITTE AND NICHOLS *supra* note 5. See Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. REV. 1693; SHAJOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007); *RELIGION AND HUMAN RIGHTS: AN INTRODUCTION* (John Witte, Jr. & M. Christian Green, eds., 2012); *CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* (John Witte, Jr. & Frank S. Alexander, eds., 2010); *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE*, 2 VOLS. (John Witte, Jr. & Johan D. van der Vyver, eds., 1996); .

right of religious freedom for individuals and groups, within the family sphere, is the beginning, not the end of the matter.

Other critics like Matthew Schmitz allege that our effort to describe the problems of and to counsel prudence in accepting Muslim and other religious family laws and tribunals effectively serves as a “defense of anti-shari’a laws.”<sup>79</sup> Far from it. We oppose such anti-Shari’a laws for their targeted discrimination, their duplication of other laws and decisional norms, their potential conflict with the Federal Arbitration Act, and more. Professors Paul Horwitz and Robert McFarland, who are part of this Symposium, are surely right in saying that the first generation anti-Shari’a laws (like Oklahoma’s) were patently unconstitutional for wrongly singling out “Shari’a” for special restrictions.<sup>80</sup> That violates elementary First Amendment prohibitions on religious discrimination under both the Free Exercise and Establishment clauses.<sup>81</sup> The second generation anti-Shari’a laws are more nuanced; they do not mention “Shari’a” at all, but rather seek to preempt use of any “foreign” or other law. Such laws are redundant, however, of the Supremacy Clause of the U.S. Constitution. They are also discriminatory in their efforts to single out Muslim Shari’a even while allowing Jews, Christians, and other religious communities to retain their “foreign” laws.<sup>82</sup> So even if the second generation statutes are constitutional, they are still problematic from a civil society perspective because they alienate, if not target, Muslims for no real gain.<sup>83</sup>

But hard questions persist that cannot be easily swept away with the assertion that religious groups should enjoy autonomy over the marriage and family affairs of their voluntary faithful. Those are the questions that we have been probing and encouraging others to probe. What *are* the appropriate lines between the civil state and religions with respect to marriage? Can there be a place for “new legal pluralism in the domain of

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<sup>79</sup> Matthew Schmitz, *Christianity Today's Dead-Wrong Defense of Anti-Sharia Laws*, FIRST THOUGHTS, (Nov. 20, 2012 2:56 PM), <http://www.firstthings.com/blogs/firstthoughts/2012/11/20/christianity-todays-dead-wrong-defense-of-anti-sharia-laws/#more-51182>.

<sup>80</sup> See articles by Paul Horwitz and Robert L. McFarland in this Issue of the FAULKNER LAW REVIEW.

<sup>81</sup> That is clear discriminatory intent in violation of *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). See also Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Statutes*, 10 FIRST AMEND. L. REV. 363 (2012). Other problems are too numerous to mention, including that the statute seemingly even outlaws the mention of Blackstone, if one follows its explicit statutory text.

<sup>82</sup> See Awad, *supra* note 51 (describing Kansas’s new second general anti-Shari’a law and its discriminatory intent, and quoting a state senator who said, “This [bill] doesn’t say ‘Sharia law’ . . . but that’s how it was marketed back in January and all session long – and I have all the emails to prove it.”).

<sup>83</sup> Robert K. Vischer, *The Dangers of Anti-Sharia Laws*, FIRST THINGS, Mar. 2012, <http://www.firstthings.com/article/2012/02/the-dangers-of-anti-sharia-laws>.

intimacy”?<sup>84</sup> Civil marriage and divorce are perhaps a least common denominator for all citizens, but can there be variations once base level protections for women, children, and other vulnerable members of the household are in place?<sup>85</sup> What exactly would such base level protections be? How can the state best protect vulnerable members and also advance its liberal ends? Which “citizenship” will affected individuals follow when jurisdictions overlap – religious or civil? The debate about the propriety of Shari'a should not distract us for the actual complications of growing marital and legal pluralism in the United States.

## II. Possible Paths Ahead

Professor Brian Tamanaha recently wrote: “The longstanding image of a uniform and monopolistic law that governs a society is plainly obsolete.”<sup>86</sup> If this is a true description of our modern legal condition, what does it mean for American family law? Will we find ways to recognize and accommodate believers with differing understandings of marriage and divorce? Given the dissonance internal to family law for many religious believers, including (increasingly) for Muslims in the United States, what are the possible avenues for interaction between civil law and religion in the United States?<sup>87</sup> Four possibilities suggest themselves.<sup>88</sup>

First, and perhaps the most extreme, is to “take the state out of the business of deciding what is a marriage and leave that question to the churches” and other religious

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<sup>84</sup> Jean L. Cohen, *The politics and risks of the new legal pluralism in the domain of intimacy*, 10 INT'L J. CONST. 380, 382 (2012) (arguing against “introducing any version of religious status-based legal pluralism” based on gender equality concerns).

<sup>85</sup> Linda C. McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note 8, at 309-340; Robin F. Wilson, *The Perils of Privatized Marriage*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note 8, at 253-283.

<sup>86</sup> Brian Z. Tamanaha, *A Framework for Pluralistic Socio-Legal Systems*, in CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD (Marie-Claire Foblets et al., eds., 2009), 381, 400.

<sup>87</sup> Critics might broadly contend that the First Amendment of the US Constitution completely prohibits direct involvement of religion in matters of family law. Such an assertion is both an overreading of Supreme Court precedent and a misunderstanding of the principle of separation of church and state in the United States. For further discussion, see Witte & Nichols, *The Frontiers of Marital Pluralism*, *supra* note 79.

<sup>88</sup> Of course, there may be more than four, or a different grouping of possibilities. *Cf. e.g.*, Brian H. Bix, *Pluralism and Decentralization in Marriage Regulation*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note 8, at 60 (providing an alternate listing of ways the regulation of marriage could become more decentralized); see also Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998).

groups.<sup>89</sup> This approach would attempt to divide conclusively the notions of “civil marriage” and “religious marriage,” which lie at the heart of many of the debates about marriage. It would disentangle the state and put as the state’s higher priority the value of equality by, presumably, enacting civil unions. Proposals of this sort have been floated by those on both the left and the right of the political spectrum.<sup>90</sup> Whatever its merits, this proposal seems like a non-starter. A similar proposal was recently bandied about in Canada (which is often more liberal on family law matters than most American states), but gained very little political traction even there.<sup>91</sup>

Second, a quite different approach is that the state remain involved in regulating marriage – but do so according to a majority’s particular religious, moral, or political views. This used to be the avenue of choice for Christians, but it increasingly has led to conflict as society has become more liberal on both entrance to and exit from marriage, and conservative Christian groups have felt alienated. This has been substantially exacerbated by the same-sex marriage debates over the past decade and more, and it has reignited the culture wars. There have been DOMAs, state level mini-DOMAs, state court decisions in favor of same-sex marriage, sometimes (as in California) democratic reversal of such decisions, and, occasionally (as in New York), democratic instatement of the possibility of same-sex marriage. Perhaps these winner-take-all political battles will continue to be the norm. But, at present, they show little promise of settling on one position.<sup>92</sup>

Third, a variation on the instantiation of one set of religious values into civil law as the exclusive governing law for marriage and divorce would be to offer different models and regimes of marriage that that are animated by different religious beliefs, and let the parties choose one. Louisiana’s “covenant marriage laws” are an example of this: couples choose either a regular contract marriage with easy entrance and no-fault divorce or a covenant marriage, which requires premarital counseling and other

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<sup>89</sup> Stephen B. Presser, *Marriage and the Law: Time for a Divorce?*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note 8, at 78, 81.

<sup>90</sup> See, e.g., Martha Albertson Fineman, *The Meaning of Marriage* in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29-69 (Anita Bernstein, ed., 2006); Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667 (2010); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006); Presser, *supra* note 93.

<sup>91</sup> Law Commission of Canada, *Beyond Conjugalilty: Recognizing and Supporting Close Personal Adult Relationships* (2001), available at [http://www.samesexmarriage.ca/docs/beyond\\_conjugalilty.pdf](http://www.samesexmarriage.ca/docs/beyond_conjugalilty.pdf) (last visited Jan 6, 2013).

<sup>92</sup> As another proposed way forward, especially regarding same sex marriage, some have proposed choice of law proposals across state lines whereby couples in one state could “choose” the marriage law of another state to govern them. See, e.g., Adam Candeb & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J. L. REFORM 735 (2011). See also symposium papers in the Michigan State Law Review (2011), summarized in Mae Kuykendall & Adam Candeb, *Symposium Overview: Perspectives on Innovative Marriage Procedure*, MICH. ST. L. REV. 1 (2011).

entrance requirements with correspondingly higher exit requirements. Or a state might hold a blend of civil and religious marriage/divorce norms and procedures for its citizens. New York's "get" statutes are an example of this model, which prevent Orthodox Jewish couples from divorcing at state law unless and until they are divorced at Jewish law -- an "invisible dance," Professor Michael Broyde calls it.<sup>93</sup> But neither covenant marriage statutes nor legislatively enacted "get" statutes seem promising practically. Only three states have enacted covenant marriage statutes (and none since 2001), only a few couples in those states have availed themselves of the covenant marriage option. Moreover, no state besides New York has passed a *get* statute despite other attempts in the past twenty years.<sup>94</sup>

A final option is for the state to show more solicitude for the private choices of dispute resolution set out by marital couples in their pre- and post-marital agreements.<sup>95</sup> Currently, marital parties may agree in advance to arbitrate any marital disputes, rather than litigate them. That choice of forum provision in a prenuptial agreement is typically enforceable. But, as can be seen in Ontario and the U.K., the growing presence of arbitration done by religious authorities is making these agreements more controversial. Even more controversial would be the parties' agreement to choose the law that governs within that chosen forum -- state law or religious laws. Having this choice of law within the arbitration tribunal would make it easier for parties to align their commitments as both religious and political citizens. But such religious arbitration, especially on choice of law matters, would itself likely be contested by the state, especially if the religious laws used defer the state's norms and aspirations for gender equality, the best interest of the child, or more.<sup>96</sup> Religious arbitration is getting more scholarly attention of late,<sup>97</sup> and will likely yield more articles and court opinions as American society becomes ever more mobile and multicultural. Whether American courts will treat

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<sup>93</sup> See Broyde, *supra* note 22, at 159.

<sup>94</sup> See STEVEN L. NOCK, LAURA ANN SANCHEZ, & JAMES D. WRIGHT, COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA 3 (2008) (describing how only 2% of couples entered covenant marriages during the first five years of law's enactment (1998-2001)). This has been attributed to a lack of interest by couples, a lack of knowledge of the law (partly due to the failure of clerks to inform engaged couples), and the failure of institutionalized religion to encourage or mandate covenant marriages. There is also a *get* statute in the United Kingdom. Matrimonial Causes Act 1973, 1973, c. 18, § 10A (inserted by Divorce (Religious Marriages Act), 2002, c. 27).

<sup>95</sup> See Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 372 (Robin Fretwell Wilson, ed., 2006).

<sup>96</sup> See, e.g., *Aleem*, 947 A.2d 489 (disapproving an Islamic religious marital dissolution on public policy grounds).

<sup>97</sup> See, e.g., Helfand, *supra* note 20; Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501 (2012).

religious arbitrations of family law matters the same as they treat arbitrations of other matters is still an open question.<sup>98</sup>

One avenue that is *not* viable, however, is to presume that that Professor Tamanaha is incorrect and that, in family law matters, there can be one “uniform and monopolistic law”<sup>99</sup> that has robust effect and implementation. We would be better served to recognize, as Professor Werner Menski has said, that “perhaps we must all be conscious pluralists, whether we like it or not.”<sup>100</sup> This means that we must realize that “unofficial law” will operate regardless of what the civil law says. That is, some individuals are going to feel themselves bound by their communal (religious) norms regardless of what the civil law says. And some individuals are going to seek religious adjudication of their disputes (as Muslims in Ontario and the United Kingdom do), even if the civil law refuses to enforce those arbitral judgments. Failing to understand these matters means that a liberal state may protect vulnerable parties the *least* when the state claims and seeks to exercise hegemonic control over marriage and divorce and when it passes anti-Shari’a statutes. Instead, it may be that *only* through recognizing and respecting alternate norm systems may the state have more of an avenue to affect change and protect vulnerable parties.<sup>101</sup>

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<sup>98</sup> See Robert L. McFarland, *Faith Based Family Arbitration Panels: A Response to Professor Witte*, (Faulkner Law Review, forthcoming) (contending that courts should recognize faith-based arbitral decisions pertaining to the family).

<sup>99</sup> Tamanaha, *supra* note 90, at 400.

<sup>100</sup> Werner Menski, *Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note 8, at 219, 222.

<sup>101</sup> Any conversation about joint governance (to use Ayelet Shachar’s term) with the state raises very serious concerns *from a religious perspective*, however, because it suggests less than full respect for religious liberty and separation of church and state. It runs a very serious risk of the state co-opting religion and shaping/molding that religion. Indeed, that would be one aim of the state, presumably – and would be exactly the kind of thing a religious person would want to avoid. See, e.g., F.C. DeCoste, *Caesar’s Faith: Limited Government and Freedom of Religion in Bruker v. Marcovitz*, 32 DALHOUSIE L.J. 153, 175 (2009) (“[O]nly if faith and family are secure from state management and predation is a state a constitutional state.”); Abdullahi Ahmed An-Naim, *Religious Norms and Family Law: Is it Legal or Normative Pluralism?*, 25 EMORY INT’L. L. REV. 785, 786 (2011) (stating that religious believers should eschew coercive state enforcement of religious norms).