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Shari'ah Law as National Security Threat?

Cyra Akila Choudhury

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Recommended Citation

Choudhury, Cyra Akila (2013) "Shari'ah Law as National Security Threat?," *Akron Law Review*: Vol. 46 : Iss. 1 , Article 2.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol46/iss1/2>

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SHARI'AH LAW AS NATIONAL SECURITY THREAT?

*Cyra Akila Choudhury**

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I. INTRODUCTION

Most people familiar with film and literature in the past two decades will recognize two dystopias that recur in our popular imagination. Dystopia 1 describes a society fallen in on itself, chaotic

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and violent. It is a state of nature, of constant battle between factions with a government unable to secure the peace. It is a picture of never-ending civil war.¹ Dystopia 2 is markedly opposite, a society of order and rules in which the state regulates all areas of life carefully, weeds out the bad guys and segregates them for the common good. Those who belong live a peaceful life as long as they obey the state.² Those who do not are removed to life in a camp where they cannot infect society with their presence or are simply disappeared. Of course, there are many other dystopias and utopias ranging from the alien to the mundane; however, it is these two in particular with which we obsess in the United States in the post 9/11 era. These two have become for us the Scylla and Charybdis of inclusion and exclusion, vulnerability and security. The fear that multicultural tolerance will lead to a “beirutization” of our society has led for calls for greater regulation of the undesirable elements of society, for tighter demarcations of the rights and obligations of “belonging” and the detention and expulsion of those who clearly fall out of that demarcation.³

It is in the context of this broader debate on multiculturalism versus assimilation and the war on terror that a number of states have considered enacting measures to prevent the use of shari’ah⁴ or Islamic law in state courts. These measures have been justified as necessary to ensure our national security and to prevent shari’ah from creeping into our legal system.⁵ In the words of an Oklahoma lawmaker, it is a “preemptive strike.”⁶ This Article challenges these claims by arguing that there is no threat of shari’ah taking root in our judicial system to the detriment of our constitutional rights. Further, given that most of the

1. For an example of this in popular film, see CHILDREN OF MEN (Universal Studios 2006); THE HANDMAID’S TALE (MGM Studios 1990).

2. See, e.g., ALDOUS HUXLEY, BRAVE NEW WORLD (1932); George Orwell, 1984 (1949); An interesting take on the transition from chaos to conformity is V for Vendetta (Warner Brothers 2005).

3. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. CIV. RTS & CIV. LIBERTIES L.REV. 1, 1-30 (2003).

4. I use the spelling “shari’ah” to denote the complex legal system that is an umbrella term for the legal science and custom that exists in the Muslim world in all its diversity. On the other hand, “sharia law” is used by the lawmakers who typically reduce the body of knowledge down to denote a regressive subset of rules or even a constructed entity that may have little relationship to the laws that have governed Muslims at different periods of history. For an overview of Islamic legal history, see KNUT S. VIKOR, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW (2005).

5. Amy Sullivan, *The Sharia Myth Sweeps America*, USA TODAY (June 12, 2011, 5:28 PM), http://www.usatoday.com/news/opinion/forum/2011-06-12-Sharia-law-in-the-USA_n.htm.

6. Joel Siegel, *Islamic Sharia Law to Be Banned in, ah, Oklahoma*, ABC NEWS (June 14, 2010), <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521>.

examples of shari'ah creep come from family law cases, the link to national security is illusory. Instead, in this Article, I will argue, these measures should be read as a part of the ongoing project to define national identity that partakes of a broader identity discourse about Muslims and Americans (as mutually exclusive) in the War on Terror. As a result, the laws have social effects such as toleration for profiling and calls for expressions of patriotism that negatively impact the lives of ordinary Muslims.⁷ I will further argue that rather than becoming distracted with these projects that are primarily aimed at scoring political points, the needs of U.S. domestic security are better served by including Muslims as full citizens. Indeed, national security is advanced by recognizing the reality that Muslims have a stake in the protection of the homeland. The political diversity within the Muslim community, some part of which has supported the War on Terror while others have critiqued it, does nothing to diminish the importance of this fact.

The Article proceeds in three parts: in Part II, the Article describes three anti-shari'ah measures.⁸ It describes Oklahoma's Save Our State amendment to show how these laws target Islam. It also reviews the recent decision by the Tenth Circuit Court of Appeals affirming the grant of a preliminary injunction against the certification of Oklahoma's constitutional amendment. It then describes Arizona's law that targets shari'ah as well as other legal traditions. It also examines the original version of the Tennessee bill to illustrate the motivations behind the revised, watered down version that was eventually passed by the legislature. Part II concludes with an examination of the chief architects of the model law disseminated to various states and their motivations.⁹ The aim is to show how the drafters of the laws were preoccupied not by protecting Americans from a threat of terrorists in their midst, but by defining "American" identity through the law.¹⁰

In Part III of this Article, I take a deeper look into the claim that the laws are necessary because "shari'ah creep" is occurring through family

7. Samuel R. Gross and Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L.R. 1413, 1413-1414 (2002).

8. Louisiana has also passed an anti-foreign law measures, *see* HB 785 Act. No. 714, 2010 Leg., 36th Sess. (La. 2010) *available at* <http://www.legis.state.la.us/billdata/streamdocument.asp?did=722536> (last visited, Mar. 9, 2012).

9. *See infra* notes 26-74 and accompanying text. This article does not argue that the courts should rely on shari'ah to settle matters or that there should be more use of Islamic law. I take the position that, if religious laws are accommodated by the judiciary, that all religious laws be given equal standing without prejudice against a single religion. Further, my own normative preference is that wherever possible, secular law be used and that *all* religious law in general be excluded from judicial determinations.

10. *See infra* notes 75-187 and accompanying text.

law and will eventually bleed into other doctrinal areas of our secular system.¹¹ Consequently, I focus on a number of family cases here to show how the courts have dealt with religious law in the United States, particularly in enforcing foreign judgments from Muslim majority countries.¹² This analysis makes clear that family law is not the gateway for shari'ah to enter the judicial system (thereby posing a threat to our security) and that such a view discounts the robust constitutional, choice of law rules and public policy preferences that restrain judges from diluting our secular system.¹³

Finally, in Part IV, I raise the question of what these laws are *really* about if they are not about shari'ah creep or our security.¹⁴ I argue that while these laws may be discounted as ineffectual or unconstitutional, they have an effect on society. They continue the socially acceptable expulsion of Muslims from the mainstream and their marginalization. Far from being innocuous, such strategies of (re)constructing Muslims as the enemy have real lived consequences such as heightened surveillance regulation, incarceration, and even death.

I conclude with some observations about decoupling stereotypes of racial and religious identity from counter-terrorism and integration as opposed to assimilation as a way forward.¹⁵ In this final section, I argue that rather than being distracted by creating outsider groups based on identity, our security is better served through inclusion of all those who have a stake in the security of their communities and their families.

II. MUCH ADO ABOUT NOTHING?: STATE ANTI-SHARI'AH LAWS

In the decade following 9/11, there has been a great deal of concern about the ability of Muslims to assimilate into the American mainstream.¹⁶ In addition, there was also a worry that Islam and democracy are in some fundamental ways incompatible and that, indeed, American Muslims could not be faithful to both their religion and their

11. See *infra* notes 89-187 and accompanying text.

12. *Id.* In most Muslim-majority countries, the only place that shari'ah continues to play a significant role is in family law. See, e.g., Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043 (2004). It is no surprise, then, that it is family law cases that make up the bulk of the "shari'ah creep" examples in the United States.

13. See generally Jill Schachner Chanen, *Anti-Shariah Bills Under Review*, ABA JOURNAL (May 1, 2011, 2:20 AM CST), http://www.abajournal.com/magazine/article/the_law_of_the_land/.

14. See *infra* notes 188-301 and accompanying text.

15. See *infra* notes 302-311 and accompanying text.

16. See Robert Steinback, *Jihad Against Islam*, INTELLIGENCE REPORT, no. 142, 2011, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/jihad-against-islam>.

country. This anxiety has manifested itself periodically throughout the decade, from the immediate rounding up and profiling of Muslims right after the attacks to the Presidential election in 2008, when the “allegation” that Barack Obama was a closet Muslim was made into a campaign issue and refuted as a “slur.”¹⁷ The fear of Muslims and Islam failed to derail Obama’s campaign, but it became entrenched in our political discourse.¹⁸ In other words, the use of “Islam” and the Muslim problem as a political rallying tool has become commonplace.¹⁹ Under these circumstances, it comes as no surprise that politicians would turn to the drafting and enactment of laws to deal with this “problem” as a vital step in preventing the multiculturalism-gone-wrong dystopia described above.

At the time of this writing, Oklahoma, Arizona, Tennessee, and Louisiana have passed some form of anti-shari’ah or anti-foreign law measure.²⁰ In addition to these, a significant number of states were considering, had introduced, or were in the process of passing similar bills.²¹ Mississippi and Utah had attempted to pass bills but failed to do so.²² Complicating matters somewhat, some of the bills introduced were challenged immediately and were amended to remove references to shari’ah.²³ Undoubtedly, other bills will also be amended to read neutrally as they are also challenged. Yet, the challenges have not dampened the appetite for the bills. The number of states joining this

17. See Cyra Akila Choudhury, *Collateral Damage: The Ghettoization of Muslims in the Race to the White House*, in RACE 2008: CRITICAL REFLECTIONS ON A HISTORIC CAMPAIGN 62 (Mendible, ed., 2010).

18. *Id.* See also Barry A. Hollander, *The Persistence in the Perception of Barack Obama as a Muslim in the 2008 Presidential Campaign*, 9 J. MEDIA AND RELIG. 55, 55 (2010) (finding that media reports debunking the view that Obama is a Muslim did little to change perception); see generally Stephen Parks, *The Birthers’ Attacks and the Judiciary’s Article III “Defense” of the Obama Presidency*, 38 S.U. L. REV. 179 (2011).

19. Leon Hadar’s observations from 1992 shed some historical light on this trend. Two decades ago, well before al Qaeda’s attack on the United States, the basic groundwork of creating the green peril were already in place. See Leon T. Hadar, *Policy Analysis: The “Green Peril”: Creating the Islamic Fundamentalist Threat*, CATO INST. POLICY ANALYSIS, no. 177 (Aug. 27, 1992), available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa177.pdf>.

20. Chanen, *supra* note 13.

21. Bill Raftery, *Bans on court use of sharia/international law: ABA House of Delegates opposes “blanket prohibitions,” state legislatures out of session*, GAVEL TO GAVEL (Aug. 8, 2011), <http://gaveltogavel.us/site/2011/08/08/bans-on-court-use-of-shariainternational-law-aba-house-of-delegates-opposes-blanket-prohibitions-state-legislatures-out-of-session/>.

22. Tim Murphy, *Map: Has Your State Banned Sharia?*, MOTHER JONES (Feb. 11, 2011, 8:40 AM PST), <http://motherjones.com/mojo/2011/02/has-your-state-banned-sharia-map>.

23. The bill’s progression from an explicit anti-shari’ah ban to a neutral law can be found on the website of the Tennessee legislature. *Amendment 3 to SB1028*, TENNESSEE GENERAL ASSEMBLY, <http://www.capitol.tn.gov/Bills/107/Amend/SA0654.pdf> (last visited Jan. 24, 2013).

trend is growing.²⁴ Below, I examine the legal enactments introduced in Oklahoma and the challenge to it in the Tenth Circuit. I also describe the Arizona, Tennessee (as originally introduced), and Louisiana laws.²⁵ These laws are representative of the trend that other states inclined to pass anti-shari'ah measures may follow. As the description reveals, the laws generalize broadly about shari'ah, failing to show any real understanding of the legal tradition. Rather, they rely on unexamined assumptions that, first, shari'ah is incompatible with our legal system, and, second, it poses a danger that can be prevented by such enactments.

A. *State Anti-Shari'ah Bills*

1. Oklahoma's "Save Our State" Amendment

Oklahoma's Constitutional amendment is brief and to the point. State Question 755, otherwise referred to as the "Save Our State" amendment, asks whether the following should be approved:

The courts provided for in subsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided for in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law. The provisions of this subsection shall apply to all cases before the respective courts including, but not limited to, cases of first impression.²⁶

The ballot title for the amendment read as follows:

This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids

24. John Esposito, *Norway attacks a wakeup call for a world*, WASH. POST BLOG (July 30, 2011, 7:27 AM), http://www.washingtonpost.com/blogs/on-faith/post/norway-attacks-a-wakeup-call-for-a-world/2011/07/29/gIQAZ4N4iI_blog.html.

25. S.B. 1028, 107th Gen. Assemb., Biennial Sess. (Tenn. 2011) (effective July 1, 2011 as 2011 Tenn. Pub. Acts 497); H.B. 2582, 50th Leg., 1st Sess. (Ariz. 2011); Okla. Const. art. VII, § 1(C).

26. H.R.J. Res. 1056, 52d Leg., (Okla. 2010) (State Question Number 755), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

courts from considering or using Sharia Law.

International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.

The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.

Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.²⁷

This broadly stated provision prevents state courts from using shari'ah or even considering it in deciding cases. The initial draft of the ballot title and measure was submitted to the Secretary of State and reviewed by the attorney general as part of the process for submission to the electorate.²⁸ It is of interest here that, as originally drafted, the ballot title did not define shari'ah. For that reason, the attorney general declared that it did not meet the requirements of applicable state law because it failed to "adequately explain the effect of the proposition because it does not explain what either shari'ah law or international law is."²⁹ In order to remedy this defect, the attorney general's office then provided the following statement: "Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed."³⁰ The state defines shari'ah with a tautological non-definition (Islamic law) and acknowledges only two sources of law.³¹ The measure passed in the general election with 70.08% of voters in favor.³²

27. *Id.*

28. Letter from M. Susan Savage, Okla. Sec'y of State, to W.A. Drew Edmondson, Okla. Att'y Gen. (May 25, 2010) (on file with author), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf>.

29. Letter from W.A. Drew Edmondson, Okla. Att'y Gen., to M. Susan Savage, Okla. Sec'y of State (June 2, 2010) (on file with author), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf>. Amendments to the state's constitution consist of two parts; first, a ballot title that explains the proposed amendment and, second, the amendment itself. Once the measure is put to the vote, if it gains a majority, it is certified by the Election Board upon which the measure takes effect.

30. Letter from W.A. Drew Edmondson, Okla. Att'y Gen., to M. Susan Savage, Okla. Sec'y of State (June 4, 2010) (on file with author), *available at* <https://www.sos.ok.gov/documents/questions/755.pdf>.

31. *See generally* MOHAMMED HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* (2003).

32. *General Election Results*, OKLA. STATE ELECTION BD. (Nov. 12, 2010), <http://www.ok.gov/elections/support/10gen.html>.

The election result precipitated a suit by Muneer Awad seeking to enjoin the certification of the amendment.³³ Mr. Awad was granted a preliminary injunction by the district court on November 22, 2010.³⁴ The state then filed an appeal in December 2010, and the Court of Appeals heard the case in September 2011.³⁵ After receiving supplemental briefs on the Establishment Clause issue, the court issued its opinion on January 10, 2012.³⁶ The Court of Appeals for the Tenth Circuit issued a ruling upholding a preliminary injunction that prevented the amendment becoming law.³⁷

While the decision will undoubtedly generate analysis of the substantive and procedural constitutional issues, the case is interesting for this article because the court recognizes both the *lack* of harm the amendment seeks to prevent and the *real* harm that the architects of these laws actually seek to inflict on Muslims. In dismissing the state's argument that Mr. Awad's claim of being injured is a "personal opinion," the court posits "the harm alleged by Mr. Awad stems from a constitutional directive of exclusion and disfavored treatment of a particular religious legal tradition."³⁸ Analyzing the four factors required for a preliminary injunction, the court applied the test found in *Larson v. Valente*,³⁹ which applies when the state discriminates among religions.⁴⁰ Rejecting the argument that the test did not apply, the court opined that "legislatures seldom pass laws that make 'explicit and deliberate distinctions between different religious organizations.'"⁴¹ If a law does so discriminate, it is subject to strict scrutiny. By singling out shari'ah without mention of any other religious tradition, the law certainly triggers *Larson*.⁴² Moreover, the state's argument that nations and cultures should be read to mean other religions was dismissed by the court:

The amendment bans only one form of religious law—Sharia law. Even if we accept Appellants' argument that we should interpret cultures to include "religions," the text does not ban all religious

33. Awad v. Ziriaux, 754 F.Supp. 2d 1298, 1302 (W.D. Okla. 2010).

34. *Id.* at 1301.

35. Awad v. Ziriaux, 670 F.3d 1111, 1119 (10th Cir. 2012).

36. *Id.* at 1111.

37. *See id.* at 1298.

38. *Id.* at 1123.

39. 456 U.S. 228 (1982).

40. *Id.* at 255 (applying strict scrutiny to laws that discriminate among religions).

41. *See Awad*, 754 F. Supp. 2d at 1127.

42. *Id.*

laws.⁴³

As I argue below, the architects of these model laws are not preoccupied with “whatever religions the legislature considered to be part of domestic or Oklahoma culture,” only “other” laws and cultures. The state’s position, therefore, is a distinction without a difference as the court correctly surmises.

Having activated *Larson’s* strict scrutiny review, the state had to defend the amendment by showing that it had a compelling interest in passing the law and that the law was narrowly tailored to achieving that interest. However, the state could not show any compelling interest, let alone that the law was narrowly tailored. The single, vague statement that is provided on this prong of the test is “Oklahoma certainly has a compelling interest in determining what law is applied in Oklahoma courts.”⁴⁴ No particular harm originating in the use of shari’ah is forwarded by the state as evidence of a need for the law. There is no “actual problem the challenged amendment seeks to solve.”⁴⁵ Upon failing to show a compelling interest, the state could not survive strict scrutiny. Even though it was not necessary to the inquiry because of failure on the first prong, the court made the following observation about the “narrowly tailored” prong of the test: “Even if the state could identify and support a reason to single out and restrict Sharia law in its courts, the amendment’s complete ban of Sharia law is hardly an exercise of narrow tailoring.”⁴⁶ In effect, this is recognition of the oversimplification and blanket condemnation of shari’ah in its entirety.

What is the *real* harm that the law inflicts on Muslims? In order to obtain a preliminary injunction, Mr. Awad had to show that the harm to him is irreparable. In appealing the lower court’s decision, the state argued that Mr. Awad (and by extension all Oklahoma Muslims) would suffer no harm if the injunction were denied (thus allowing the amendment to take legal effect).⁴⁷ However, the court agrees that Mr. Awad would, indeed, suffer an irreparable condemnation injury if the injunction were denied.⁴⁸ Moreover, the balance of harms weighed in favor of Mr. Awad, whose injury through the violation of his constitutional rights would be graver than that of voters who “wish to

43. *Id.* at 1129.

44. *Id.* at 1130.

45. *Id.* at 1130.

46. *Id.* at 1131.

47. *Id.* at 1120.

48. *Id.* at 1131.

enact a likely unconstitutional” law.⁴⁹ It is important to note here that the state and the architects of the laws claim that there is *no injury* suffered by Muslim citizens of Oklahoma when their state seeks to enshrine into the state constitution an amendment that in effect stereotypes and singles them and their sacred law out as a threat—recall that the amendment is called “Save Our State.”⁵⁰ Legally mandating the outsider status of Muslims then amounts to nothing more than hurting their feelings! And this condemnation should be borne in spite of the fact that the state was unable to provide any examples of the necessity of the law.⁵¹

Regardless of the failure of the state in defending the law from being temporarily enjoined, the state has vowed to continue to a trial on the merits.⁵² In the meanwhile, House Bill 1552 has been introduced in the legislature following the ballot measure that prohibits use of foreign law if it violates the rights guaranteed.⁵³ That bill, which makes no reference to shari’ah, has passed unchallenged in the state legislature thus far.⁵⁴

2. Arizona House Bill 2582

Arizona has already gained a measure of attention for its broad-ranging immigration reform bill that was enjoined by a federal court almost immediately after passage.⁵⁵ In this bill, Arizona follows other states attempting to limit the laws that courts may apply in making their decisions on the merits. Specifically, the bill states that:

A. A court shall not use, implement, refer to or incorporate a tenet of any body of religious sectarian law into any decision, finding or opinion as controlling or influential authority.

....

C. Any decision or ratification of a private agreement that is determined on the merits, by a judge in this state who relies on any body of religious sectarian law or foreign law is void, is appealable error and is grounds for impeachment and removal from office.

49. *Id.*

50. *Id.* at 1117-18.

51. *Id.* at 1131.

52. *Id.* at 1137 (reaffirming the issuance of the temporary injunction).

53. H.B. 1552, 53rd Leg., 1st Sess. (Okla. 2011).

54. Bill Information for H.B. 1552, OKLA. STATE LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1552> (last visited Jan. 24, 2013).

55. H.B. 2582, 50th Leg., 1st Sess. § 12-181(A), (C), (F)(3) (Ariz. 2011).

. . . .

F. 3. "Religious sectarian law" means any statute, tenet or body of law evolving within and binding a specific religious sect or tribe. Religious sectarian law includes Sharia law, Canon law, Halacha and Karma but does not include any law of the United States or the individual states *based on Anglo-American legal traditions* and principles on which the United States was founded.⁵⁶

The bill forecloses the reliance on religious law to give meaning to private agreements; however, it carves out marriages conducted in religious ceremonies, and it also carves out law that is based on the Anglo-American legal tradition or principles, much of which trace their roots to English ecclesiastical law.⁵⁷ Arizona's bill expands the prohibition to other faith communities, including Jewish, Catholic, Hindu, and Buddhist communities whose laws can no longer be given any effect in the courts.⁵⁸ It departs from the Oklahoma provision by including other religious law but is also consonant with it in including international law or "foreign law."⁵⁹

3. The Original Tennessee Senate Bill 1028

Tennessee has gained attention in recent years as the location of one of the bitterest mosque-building disputes in the nation. Well before the Park 51 controversy, the Muslim community in Murfreesboro, Tennessee was embroiled in a campaign to prevent the building of a mosque in the town.⁶⁰ While that controversy is still being resolved in

56. *Id.* (emphasis added).

57. *Id.* at § 12-181 (E).

58. *Id.* at § 12-181 (F)(3).

59. *Id.* at § 12-181 (C), (E)(3). It is interesting to note that Arizona also passed a bill restricting the teaching of any subject that promotes resentment towards a race or ethnicity or promotes racial solidarity. H.B. 2281, 49th Leg., 2d Sess. (Ariz. 2010). While the bill is written innocuously and seems to state the obvious, the intent behind it has been questioned by minority groups. *See, e.g.,* Nicole Santa Cruz, *Arizona bill targeting ethnic studies signed into law*, LA TIMES (MAY 12, 2010), <http://articles.latimes.com/2010/may/12/nation/la-na-ethnic-studies-20100512>.

H.B. 2281 bans schools from teaching classes that are designed for students of a particular ethnic group, promote resentment or advocate ethnic solidarity over treating pupils as individuals. The bill also bans classes that promote the overthrow of the U.S. government.

The bill was written to target the Chicano, or Mexican American, studies program in the Tucson School System, said state Supt. of Public Instruction Tom Horne. *Id.*

60. *See Arson reported at Tennessee mosque construction site*, USA TODAY (Aug. 29, 2010, 2:55 PM), http://www.usatoday.com/news/religion/2010-08-29-arson28_ST_N.htm. During this ongoing conflict, Muslims in the town have had the site of the mosque vandalized, suffered arson, and experienced threats to their safety. The opponents of the mosque have painted the mosque as a possible venue for the recruitment of terrorists, a terrorist training center or a refuge for radicalism.

the courts as of this writing, a new avenue of challenge has opened up. In February 2011, Senator Bill Ketron from Murfreesboro, Tennessee introduced a bill in the Tennessee Senate ostensibly to prevent support for “shariah organizations.” The bill entitled the *Material Support to Designated Entities Act of 2011* was introduced into the Tennessee Senate in February 2011 with a proposed enactment date of July 1, 2011.⁶¹ Subsequently, Tennessee retreated⁶² from the specific references to shari’ah, but examining the original text in order to understand the genesis of the amended version and the true intent of the bill that is no longer obvious from the current bill sheds light on the motivations behind similar measures.⁶³

In Section I of the original bill, the drafters laid out the general purpose of the bill as a measure to counter a growing threat of terrorism. The claim that was forwarded was that homegrown terrorism:

[I]s primarily the result of a legal-political-military doctrine and system adhered to, or minimally advocated by tens of millions if not hundreds of millions of its followers around the world. This legal-political-military doctrine and system is known as sharia to its adherents, authoritative leaders, and scholars.⁶⁴

Having made the causal connection among millions of shari’ah adherents, shari’ah, and homegrown terrorism, the bill continued on to redefine shari’ah tautologically.⁶⁵ This redefinition essentially created the basis of the rest of the law. The bill stated that “sharia as a political doctrine” *requires* its adherents to overthrow the secular order and establish a state governed by shari’ah.⁶⁶ It claimed that jihad is an intrinsic and central feature of shari’ah and that shari’ah *requires* jihad in order to establish itself through violent and criminal means, including

For a nationwide look at anti-mosque activity, see *Map—Nationwide Anti-Mosque Activity*, ACLU, available at <http://www.aclu.org/maps/map-nationwide-anti-mosque-activity> (last visited, Jan. 24, 2013) [hereinafter “ACLU Map”].

61. S.B. 1028, 107th Gen. Assemb., Biennial Sess. (Tenn. 2011) (effective July 1, 2011 as 2011 Tenn. Pub. Acts 497).

62. The text of the new bill makes no mention of shari’ah at all, see *supra* note 23.

63. The bill, as it was amended, aligned more closely with anti-terrorism bills akin to the PATRIOT Act. For amendments, see *Bill Information for S.B. 1028*, TENN. GEN. ASSEMBLY available at <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1028&ga=107> (last visited, Jan. 24, 2013).

64. S.B. 1028 at § (I)(39-13-902)(2).

65. *Id.* at § (I)(39-13-902)(8). In this, we can read a sense of every Muslim who follows shari’ah, that is, every observant Muslim, is a terrorist because their beliefs necessarily lead to terrorism.

66. *Id.* at § (I)(39-13-902)(4), (5).

terrorism and “immigration-fed population growth.”⁶⁷ The law also stated that the adherence to shari’ah constitutes “a conspiracy to further the legal, political and military doctrine” that results in terrorism.⁶⁸ Under the law, knowing adherence to shari’ah provides “prima facie evidence of an act to overthrow of the United States.”⁶⁹ The bill allowed the attorney general to designate groups as “sharia organizations” if they are “two or more persons acting in concert in support of, sharia or imposition of sharia” and they commit a terrorist act.⁷⁰ Material support for terrorists is included in the list of acts that qualifies as terrorism.⁷¹ A person found knowingly supporting a “sharia organization” would be guilty of a criminal offense punishable by fifteen years in prison.⁷²

The Act in its original and even in its amended form is in essence an anti-syndicalism measure and bears similarities to other national security measures preventing material support for proscribed organizations engaged in terrorism. However, its original aim was to prevent the takeover of the state and U.S. government by *Islamist radicals* engaged in a political struggle to establish an *Islamic state* in the United States.⁷³ The rewritten version of the bill removes all the references to shari’ah and looks like a generic anti-terrorism bill,⁷⁴ but the original version gives us an opportunity to examine the historical evolution of the specifically anti-shari’ah bills and how Muslims and Islam are constructed, defined, and regulated by those proposing and supporting these bills.

B. *The Architects of the New Threat*

Legislative history and intent are important windows into the law.⁷⁵ In the analysis of the current anti-shari’ah and anti-foreign law

67. *Id.* at § (I)(39-13-902)(6), (10).

68. *Id.* at § (I)(39-13-902)(11).

69. *Id.* at § (I)(39-13-902)(13).

70. *Id.* at § (I)(39-13-904)(2), § (I)(39-13-905)(a)(1)(B).

71. TENN. CODE ANN. § 39-13-803(7)(A)-(B) (West 2013).

(7) “Material support or resources”:

(A) Means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, transportation, and personnel; and

(B) Does not include medicine or religious materials

72. S.B. 1028 § (I)(39-13-906)(a)(1)(A), (B).

73. *Id.* at § (I)(39-13-902)(2), (8), (13).

74. H.B. 1353, 107th Gen. Assemb., Biennial Sess. (Tenn. 2011).

75. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

measures, the writings and public declarations of drafters and proponents is a critical source from which we can draw to understand intent and meaning and also the intended effects of the law.⁷⁶ In other words, we get a sense of what work the law is meant to do in our society. In this section, I want to examine the intent of these laws by drawing primarily from the public statements of their drafters and sponsors.

The bills that have been introduced into state legislatures have common points of origin.⁷⁷ They reflect a social movement to counter a perceived threat of the encroachment of shari'ah in the United States.⁷⁸ Citing the use of shari'ah in the United Kingdom and the statements of Archbishop of Canterbury Rowan Williams that some forms of shari'ah could be used in the state judiciary to settle cases there, the U.S. opponents have made it clear that no such developments are welcome here.⁷⁹ The anti-shari'ah movement has been active in supporting the vigorous regulation of Muslims in general and this particular issue is a spoke in a wheel of broader goals which I shall discuss in greater depth in Part III.⁸⁰

In the wake of the Park51, the mosque that was to be built near Ground Zero,⁸¹ the latest legal effort at keeping Muslims in the margins

76. See generally Legislative History and Statutory Interpretation: The Relevance of English Practice, 29 U. SAN FRANCISCO L.R. 1 (1994); see also, Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL OF RTS. J. 1267 (2005). In arguing for the use of legislative history, McGreal states that:

I am not arguing that every scrap of legislative history has equal importance. As with any other aspect of context, each piece must be weighed against the others to consider how well it describes the overall context of enactment. The Supreme Court has done just that in according different weight to different types of legislative history. For example, the Court gives drafting history heavy weight, as it shows the different choices made in crafting statutory language. Similarly, a legislator's or committee's explanation of a "text's pedigree" can offer guidance on interpretation, and a conference committee report may shed significant light on a statute's meaning.

Id. at 1298.

77. Andrea Elliot, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES (July 30, 2011), http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=1&_r=1.

78. Steinback, *Jihad Against Islam*, *supra* note 16.

79. George Neumayr, *The Sharia-Compliant American Left*, THE AM. SPECTATOR (Sept. 23, 2010, 6:08 AM), <http://spectator.org/archives/2010/09/23/the-sharia-compliant-american>.

80. See *infra* notes 188-300 and accompanying text.

81. During this time, several mosque controversies also arose, although Park51 was the most prominent controversy. The fact that mosque projects faced opposition in far-flung places such as Murfreesboro, Tennessee and Sheboygan, Wisconsin indicates a broader disapproval. See ACLU Map, *supra* note 60. Muslim communities attempting to build mosques have been vociferously opposed on the grounds of traffic, parking, and crowding. However, as the controversies become more heated, the fact that the opposition is based on a belief that these mosques will be breeding grounds for terrorists becomes increasingly apparent. It is worth noting that those who have made a stand against the building of mosques have gone beyond the legal arena to fight the threat. For

has been these anti-shari'ah measures. At the forefront of this endeavor are groups like Act! For America, Society of Americans for National Existence ("SANE"); Stop Islamization of America ("SIOA"); and the American Public Policy Alliance ("APPA").⁸² Indeed, one person in particular has been identified as the drafter of the model law that has been the basis of a majority of the state enactments. He is linked with SANE and the APPA, and although the model law says nothing about shari'ah, the intent of the law is clearly stated on their websites: "American Laws for American Courts was crafted to protect American citizens' constitutional rights against the infiltration and incursion of foreign laws and foreign legal doctrines, *especially Islamic Shariah Law*."⁸³ Despite attempts to clarify the position on his website that the law is not aimed at peaceful practice, the author of the bill makes no attempt to distinguish what is meant by "peaceful" practice of Islam and captures all of shari'ah as a threat to U.S. constitutional rights.⁸⁴ There is no attempt to explain what precisely is meant by "infiltration" or "incursion," suggesting by the use of these words that the courts are eschewing U.S. law in favor of applying shari'ah!⁸⁵ Despite the disclaimers in other venues, the website that offers the model law for adoption makes clear that all of shari'ah generally, and consequently all Islam, is a threat and, indeed, it is family law in particular that is problematic. These views have found fertile ground amongst certain politicians who have adopted the cause and moved it forward legally in state legislatures and in the public discourse. For example:

Unfortunately, increasingly, foreign laws and legal doctrines—including and especially Shariah law—are finding their way into US court cases. Invoking Shariah law, *especially in family law cases*, is a

instance, in Murfreesboro, Tennessee, the site of the mosque in question was set on fire, destroying construction equipment. *See supra* note 60. As of this writing, there were mosque controversies either ongoing or in the last decade in Tennessee, Oregon, Wisconsin, New Jersey, Maryland, New York, Florida, California, and Mississippi. *See* ACLU Map, *supra* note 60.

82. Steinback, *Jihad Against Islam*, *supra* note 16; Robert Steinback, *The Anti-Muslim Inner Circle*, INTELLIGENCE REPORT, Summer 2011, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/the-anti-muslim-inner-circle>; Elliot, *supra* note 77.

83. *American Laws for American Courts*, AM. PUB. POLICY ALLIANCE, http://publicpolicyalliance.org/?page_id=38 (last visited Jan. 13, 2013) (emphasis added).

84. Press Release, Am. Pub. Policy Alliance, Spokesman Stephen M. Gelé statement responding to CAIR-MI Attacks on American Laws for American Courts (Aug. 16, 2011), available at http://publicpolicyalliance.org/?page_id=586.

85. SANE Staff, *SANE: Backgrounder for Update Below: A Tale of Lies, Cries, and Demise*, SOC'Y OF AMS. FOR NAT'L EXISTENCE (Mar. 1, 2011, 2:33 PM), <http://www.saneworks.us/indexnew.php>.

means of imposing an agenda on the American people while circumventing the US and state constitutions by using foreign laws which do not recognize our constitutional rights and liberties in US courts.

The potential impact of using foreign and international laws and legal doctrines in US courts on the liberty of ordinary American citizens are as profound as they are despairing. The embrace of foreign legal systems such as Shariah law, *which is inherently hostile to our constitutional liberties*, is a violation of the principles on which our nation was founded.⁸⁶

A cursory review of the public comments made by other politicians favoring anti-shari'ah measures and expressing suspicion of Muslims reveals similar racist views. Recent Republican presidential candidate, Herman Cain stated that he would not hire Muslims in his administration in contravention of civil rights laws that prohibit employment discrimination for religion.⁸⁷ Similarly, State Representative Rick Wormick of Tennessee's Rutherford County has said that Muslims should not be allowed to serve in the military. In an email sent to a local television station, he opines: "The question that is being asked is how do we tell who is a devout Muslim who follows Sharia Law, versus a Muslim who feels he can worship within the context of our first amendment. The answer is, we cannot."⁸⁸ The point I want to

86. Letter from Rosie Marie Swanger, Pa. Rep., to All H. Members, Pa. (June 14, 2011), available at <http://www.legis.state.pa.us/WU01/LI/CSM/2011/0/8559.pdf> (emphasis added).

87. See Willoughby Mariano, *PolitiFact: Herman Cain said more than once he wouldn't hire Muslims*, TAMPA BAY TIMES, June 10, 2011, available at <http://www.tampabay.com/news/politics/national/article1174539.ece>.

[A] blogger for liberal ThinkProgress.org questioned him:

"Would you be comfortable appointing a Muslim either in your Cabinet or as a federal judge?" the blogger asked.

"No, I will not," Cain replied. "And here's why. There is this creeping attempt, there's this attempt to gradually ease sharia law and the Muslim faith into our government. It does not belong in our government."

Id.

88. Alan Frio, *See Tennessee lawmaker defends anti-Sharia Law comments*, WSMV (Nov. 13, 2011, 11:40 PM EST), <http://www.wsmv.com/story/16030338/tennessee-lawmaker-defends-anti-sharia-law-comments>. The politician whose comments at an anti-shari'ah conference were reported in the news defended his views with the following:

In the e-mail sent to Channel 4 Nov. 13, Wormick states, "[t]he question that is being asked is how do we tell who is a devout Muslim who follows Sharia Law, versus a Muslim who feels he can worship within the context of our first amendment. The answer is, we cannot."

While Wormick doesn't paint every Muslim in the military as wanting to kill their fellow service members, Wormick makes it clear of his concern for Sharia Law.

"Sharia Law prohibits all Muslims from killing a fellow believer/Muslim, even if they are the enemy," said Wormick. The penalty for doing so, says Wormick, is hell. *Id.*

underscore here is that the fear of Islam and “shari’ah creep” is not simply confined to the social but is now an acceptable part of the political ideology of a growing number of people who hold the keys to public power. That political ideology drives these reforms, making law its vehicle.

The broad stereotypes and assumptions about shari’ah in U.S. courts are not supported by any facts. What is the agenda of the individual litigants in a family law case or the courts adjudicating a case involving shari’ah? The suggestion in the materials is imposition of shari’ah on the entire citizenry. And how is this imposition to be achieved?

III. FAMILY LAW AS FIFTH COLUMN: SHARI’AH CREEP IN U.S. COURTS?

The proponents of anti-shari’ah measures have also argued publicly that these laws are necessary to preserve our national security. They draw a connection between the cases in which shari’ah-based foreign law is given comity in our courts and the erosion of the constitutional protections and liberties. In short, the argument seems to run that if a judge gives effect to a marriage or a divorce conducted under shari’ah in a foreign country, he might in reality be opening the door to jihadist ideology. That claim requires a leap of logic that cannot be sustained unless one assumes that any and all shari’ah is *jihadism* and that giving it any quarter is sliding down the slippery slope to a theocratic Islamist state. Setting aside the concerns about terrorism, the effects of these laws on precisely the doctrinal area of family law are likely to be quite serious for individual Muslim litigants and other religious communities should the laws be interpreted and applied as they are meant even if they have no broader legal effect.

In this section, I evaluate the ways in which the courts have dealt with shari’ah law in determining the cases before them in four areas: marriage, divorce, child custody, and marital agreements. The cases discussed below appear on a list that SANE cites as evidence of shari’ah-creep in our judiciary.⁸⁹ But as I demonstrate, these cases do not suggest the trend that anti-shari’ah groups claim and, therefore, do not support the position taken by proponents of the anti-shari’ah laws. Rather they show that the courts decide whether to give comity to foreign judgments through the application of secular methods that work without any need for additional laws prohibiting foreign laws.

89. See SANE Staff, *SANE Email Update*, vol. 6; no. 2, SOC’Y OF AMS. FOR NAT’L EXISTENCE (Apr. 22, 2010), available at <http://www.saneworks.us/indexnew.php>.

Also as a prefatory matter, it is important to recall that the Supremacy Clause states that the Constitution is the supreme law of the land.⁹⁰ Moreover, courts routinely refuse to enforce or give comity to laws from other jurisdictions and religious laws that conflict with the public policy of the state.⁹¹ Taken together, there are finite thresholds that foreign and religious laws may not cross if they contravene either the U.S. Constitution or the forum's public policy.⁹²

A. *Marriage*

Family law is one doctrinal area in the U.S. courts in which shari'ah is periodically implicated.⁹³ In marriages and divorces conducted in different jurisdictions and private marital agreements that parties seek to enforce in the United States, shari'ah rules are implicated through these legal systems. However, this by itself has caused no problems until the recent furor. As a general matter, when a marriage is conducted in a country that operates under shari'ah, it is considered valid in the United States unless it contravenes public policy.⁹⁴ For instance, in Islamic

90. U.S. CONST. art. VI, § 2.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Id.

See McCulloch v. Maryland, 17 U.S. 316, 405 (1819)

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; it's powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures and the officers of the executive and judicial departments of the States shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding."

91. *See Aleem v. Aleem*, 947 A.2d 489, 500 (Md. 2008), *Telnikoff v. Matusevitch*, 702 A.2d 230, 238 (Md. 1997).

92. *See Aleem*, 947 A.2d 489; *Telnikoff*, 702 A.2d 230.

93. The court never simply enforces shari'ah except by way of choice of law provisions that are guaranteed as part of our freedom of contract. The other ways in which it is considered is through the examination and application of foreign law, which might incorporate shari'ah.

94. The law of the place of celebration determines a marriage's validity. *See, e.g.*, Symeon

countries that allow for plural marriages, all the marriages would be legally valid. However, in the United States, polygamy is prohibited for public policy reasons, resulting in the non-recognition of all but the first marriage.⁹⁵

On occasion, a U.S. court has had to decide whether or not a marriage is validly entered into. If the marriage has been conducted in a jurisdiction that requires religious marriages, the court must inquire whether the steps for formalizing the marriage have been completed. In *Nabil Taiseer Hassan and Sawsan Hassan v. Eric H. Holder, Jr.*,⁹⁶ the court had to engage in this very inquiry. In that case, Nabil and Sawsan Hassan, both Israeli citizens who had immigrated to the United States, challenged their removal from the country by the Department of Homeland Security.⁹⁷ Nabil Hassan had entered the country as an unmarried child of U.S. citizen parents.⁹⁸ He then married Sawsan to whom he was engaged.⁹⁹ Sawsan Hassan had entered the United States on a tourist visa before her marriage.¹⁰⁰ The Immigration and Customs Enforcement agent assigned to their naturalization case suspected that they had been married prior to their entry into the U.S. and instituted an investigation.¹⁰¹ A marriage entered prior to entry would have vitiated the grounds for his entry into the United States as a child of a permanent resident and would make him removable.¹⁰² Similarly, Sawsan's status,

C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 310-313 (2009).

95. *Potter v. Murray City*, 760 F.2d 1065, 1068 (10th Cir. 1985).

96. *Hassan v. Holder*, 604 F.3d 915 (6th Cir. 2010).

97. *Id.* at 917.

98. *Id.* at 918.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* The government's allegations were the following:

On May 23, 2002, the government served Nabil Hassan with a Notice to Appear ("NTA"), alleging that: (1) he had married Sawsan before entering the United States; (2) the marriage automatically revoked his visa under 8 C.F.R. § 205.1(a)(3)(i)(I); and (3) he was removable under 8 U.S.C. § 1227(a)(1)(A) because he was actually an inadmissible alien at the time of his entry into the country. Because Sawsan's immigration status was based on Nabil's status, the government also issued an NTA to Sawsan alleging that she too was removable for lacking a valid immigration visa. The government later added two other charges of deportability to Nabil's NTA, including that he was removable under 8 U.S.C. § 1227(a)(3)(D) as an alien who falsely represented himself as a U.S. citizen for any purpose or benefit under the Immigration and Nationality Act ("INA") or any other federal or state law. This additional charge was based on an allegation that on March 27, 2001 and May 16, 2001, Nabil falsely represented himself as a U.S. citizen on a Small Business Administration loan application form. Petitioners denied the pertinent allegations, including the claim that they had married prior to their entry in the United States.

dependent on her husband's, would also be jeopardized.

The investigation required the government to ascertain whether the Hassans had been married in Israel or in the United States.

The validity of a marriage is determined by the law of the place of celebration. *Matter of Luna*, 18 I. & N. Dec. 385, 386 (BIA 1983). Pursuant to Israeli law, the Sharia courts (and Sharia law) control personal status matters of Muslims residing in Jerusalem. *Matter of Darwish*, 14 I. & N. Dec. 307, 308 (BIA 1973).¹⁰³

Given that Israeli law states that religious laws of each religious community govern family law matters, it would be impossible to determine whether the marriage is valid without referring to shari'ah.¹⁰⁴ In this case, the immigration judge heard evidence from an Islamic cleric to determine whether the marriage had been conducted in Israel.¹⁰⁵ Similarly, a court hearing a matter concerning an Israeli Jewish couple under the same circumstances would rely on the testimony of a rabbi and Jewish law to make the same determination because family law is, in fact, religious law.¹⁰⁶ Yet, the proponents of the anti-shari'ah measure emphasize the fact that the court relied on similar testimony about shari'ah, implying the very mention of its use is an example of the pernicious influence of shari'ah law in state courts.¹⁰⁷

It is unclear what proponents of the anti-shari'ah measures would suggest as the alternative to using foreign law in such a case. Would the court be required to substitute alternative law, presumably U.S. state law, as a neutral secular yardstick? And how would we apply such a yardstick in legal and cultural context entirely foreign? The possibility that longstanding marriages would be given no recognition is an absurdity. In addition to those whose marriages have been solemnized abroad, couples married in religious ceremonies within the United States would also face a similar problem unless they can show that their religious marriage conformed to civil standards. In most states, a marriage requires two procedural elements: a license and a ceremony.¹⁰⁸ The state provides the license to marry, however, the ceremony can

Id.

103. *Id.* at 925.

104. *Id.* at 925 n.7.

105. *Id.* at 918.

106. *S.A. v. K.F.*, No. XX/09, 2009 WL 212566, at *11 (N.Y. App. Div. Jan. 28, 2009).

107. Press Release, Am. Pub. Policy Alliance Spokesman Stephen M. Gelé, Gelé statement responding to CAIR-MI Attacks on Am. Laws for Am. Courts, Am. Pub. Policy (Aug. 16, 2011), available at http://publicpolicyalliance.org/?page_id=586.

108. Mitchell Waldman, *Ceremonial marriage*, AM. J. JURIS. § 13 (2011).

either be secular or religious.¹⁰⁹ The result of enforcing laws that seek to ban shari'ah in state courts may be a state-imposed secular ceremony. While this may be acceptable to many, it is difficult to argue that shari'ah could be singled out as a "foreign law" as the drafters of the legislation seek to do: Hindu, Jewish, Catholic, and even some Protestant ceremonies would also be suspect as they are "foreign" imports.¹¹⁰

B. Divorce

While entry into marriage may be relatively simple both substantively and procedurally, divorce with its effects on property and children, is far more complicated. Some forms of Islamic divorce have been subjects of ongoing contention. The recognition of instantaneous, extra-judicial and unilateral divorce as a male prerogative has been the focus of much feminist activism within the majority-Muslim countries.¹¹¹ This form of divorce allows a Muslim male to unilaterally pronounce a divorce upon his wife and, thereby, dissolve the marriage.¹¹² While some interpretations of this form of divorce have attempted to restrict it, as it functions in many states, it is an unfettered right, leaving Muslim wives vulnerable to arbitrary divorce.¹¹³ Muslim feminist activists have argued that this form of divorce is so abused that it should not be recognized by the state.¹¹⁴ In the United States, courts have refused to recognize such divorces because of these substantive and procedural inequities that are well theorized and described *by Muslims themselves*.

The procedural problems are well illustrated in *Aleem v. Aleem*.¹¹⁵ In that case, Irfan Aleem and Farah Aleem had been married in Pakistan in 1980 after which they moved to the United States.¹¹⁶ The husband was employed by the World Bank. They had two U.S. citizen children,

109. *Id.*

110. H.B. 2582, 50th Leg., 1st Sess. § 12-181(F)(3) (Ariz. 2011).

111. Ida Lichter, *Misogyny in the Muslim World: Bound by Culture or Religion?*, HUFFINGTON POST (Jan. 7, 2011), http://www.huffingtonpost.com/ida-lichter-md/misogyny-bound-by-culture_b_803942.html.

112. *Aleem v. Aleem*, 947 A.2d 489, 500, 501 (Md. 2008).

113. *See, e.g., M.A. QURESHI, MUSLIM LAW OF MARRIAGE, DIVORCE AND MAINTENANCE* 205-208 (1995).

114. *See* Manjari Mishra, *Move to Counter Triple Talak, Halala*, TIMES OF INDIA (Mar. 8, 2011, 4:44 AM IST) http://articles.timesofindia.indiatimes.com/2011-03-08/india/28667986_1_triple-talaq-muslim-women-shaista-ambar.

115. 947 A.2d 489.

116. *Id.* at 494.

and Mrs. Aleem was a permanent resident of the U.S. and a domiciliary of Maryland.¹¹⁷ When the relationship broke down, the husband went to the Pakistani Embassy and executed a unilateral divorce of his wife, Farah Aleem.¹¹⁸ Subsequently, the substantial property which had been accumulated during the marriage became a subject of controversy.¹¹⁹ Their marriage contract was silent with regard to property settlement and there was no premarital agreement.¹²⁰ Mr. Aleem argued that the property should be settled pursuant to Pakistani law.¹²¹ Citing the lack of due process afforded to the wife, the inequality of rights in divorce between men and women in direct contravention to the Maryland Equal Rights Amendment and Maryland's public policy of preserving property rights in absence of an agreement, the Maryland court refused to recognize the divorce and apply Pakistani law to the property distribution.¹²² The court spent a great deal of its opinion on the issue of comity. It explained that while foreign laws are to be given comity, there are exceptions and limits to this general preference. If a law from a foreign jurisdiction contravenes the public policy of the forum, a court

117. *Id.*

118. *Id.* at 490.

119. *Id.*

120. *Id.* at 491.

121. *Id.* at 490.

122. *Id.* at 500-501.

On November 7, 1972, the people of Maryland ratified the Equal Rights Amendment, now found as Article 46 of the Maryland Declaration of Rights. It provides "Equality of rights under the law shall not be abridged or denied because of sex." Md. Const. Declaration of Rights, art. 46. Accordingly, in the first instance, the enforceability of a foreign *talaq* divorce provision, such as that presented here, in the courts of Maryland, where only the male, i.e., husband, has an independent right to utilize *talaq* and the wife may utilize it only with the husband's permission, is contrary to Maryland's constitutional provision 13 and thus is contrary to the "public policy" of Maryland.

The *talaq* divorce of countries applying Islamic law, unless substantially modified, is contrary to the public policy of this state and we decline to give *talaq*, as it is presented in this case, any comity. The Pakistani statutes providing that property owned by the parties to a marriage, follows title upon the dissolution of the marriage unless there are agreements otherwise, conflicts with the laws of this State where, in the absence of valid agreements otherwise or in the absence of waiver, marital property is subject to fair and equitable division. Thus the Pakistani statutes are wholly in conflict with the public policy of this State as expressed in our statutes and we shall afford no comity to those Pakistani statutes.

Additionally, a procedure that permits a man (and him only unless he agrees otherwise) to evade a divorce action begun in this State by rushing to the embassy of a country recognizing *talaq* and, without prior notice to the wife, perform "I divorce thee . . ." three times and thus summarily terminate the marriage and deprive his wife of marital property, confers insufficient due process to his wife. Accordingly, for this additional reason the courts of Maryland shall not recognize the *talaq* divorce performed here.

Id. at 500-501, 502.

may refuse comity.¹²³ Moreover, the Full Faith and Credit clause of Article IV §1 of the U.S. Constitution does not apply to foreign judgments; therefore, there is no automatic expectation of comity.¹²⁴

In *Aleem*, the court declined to give the law of Pakistan, which is based on shari'ah, comity.¹²⁵ It did so because the application of that law would deprive Mrs. Aleem of almost all the procedural protections provided her by Maryland law, including the right to be heard on the matter of the divorce.¹²⁶ As the court noted, prior decisions have made clear that laws that contravene the public policy of the forum cannot be afforded comity. What ought to be obvious is the necessary step involved in order to ascertain whether Pakistani law ought to be given comity. That is, the courts had to *examine* the laws of the foreign jurisdiction and decide whether they conflict. Given that a large number of majority-Muslim countries and even some non-Muslim countries, like Israel and India, retain religious law in domestic relations, evaluating these laws is not an uncommon occurrence.¹²⁷ However, application or enforcement of that law is always restrained by public policy and the

123. *Id.* at 498.

124. *Id.* at 499.

125. *Id.* at 502.

126. It should be noted that ex parte divorces, where one spouse obtains a divorce decree in a foreign jurisdiction without the appearance of the other spouse, are an ongoing practice in the United States. However, most jurisdictions require that the non-appearing spouse be given notice of the action, and in many cases, if the party is not resident of the jurisdiction or both parties did not appear, comity is not afforded to the decree. *See* RANDY FRANCES KANDEL, FAMILY LAW, ESSENTIAL TERMS AND CONCEPTS 91-92 (2000). *See also* *Divorce Abroad*, TRAVEL.STATE.GOV, available at http://travel.state.gov/law/family_issues/divorce/divorce_592.html (last visited Jan. 18, 2013).

A divorce decree issued in a foreign country generally is recognized in a state in the United States on the basis of comity provided both parties to the divorce received adequate notice, i.e., service of process and, generally, provided one of the parties was a domiciliary in the foreign nation at the time of the divorce. *See* *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Under the principle of comity, a divorce obtained in another country under the circumstances described above receives "full faith and credit" in all other states and countries that recognize divorce. Although full faith and credit may be given to an ex parte divorce decree, states usually consider the jurisdictional basis upon which the foreign decree is founded and may withhold full faith and credit if not satisfied regarding domicile in the foreign country. Many state courts which have addressed the question of a foreign divorce where both parties participate in the divorce proceedings but neither obtains domicile there have followed the view that such a divorce is invalid. *See* *Weber v. Weber*, 265 N.W. 2d 436 (Neb. 1978); *Everett v. Everett*, 345 So.2d 586 (La. Ct. App. 1977); *Kugler v. Haitian Tours, Inc.*, 293 A.2d 706 (N.J. Super. Ct. 1972); *Estate of Steffke v. Wisconsin Department of Revenue*, 222 N.W.2d 628 (Wis. 1974); *Commonwealth v. Doughty*, 144 A.2d 521 (Pa. Super. Ct. 1958); *Bobala v. Bobala*, 33 N.E.2d 845 (Ohio Ct. App. 1940); *Golden v. Golden*, 68 P.2d 928 (N.M. 1937).

127. *See* *Hassan v. Holder*, 604 F.3d 915 (6th Cir. 2010); *Maddireddy v. Maddireddy*, 886 N.Y.S.2d 495, 496 (N.Y. App. Div. 2009).

laws of the United States.¹²⁸ *Aleem v. Aleem* is an example of the system functioning as it should. The Maryland court required no statutory guidance by way of an anti-shari'ah law to conclude that this particular form of divorce seriously violates the rights of one party. It is difficult to see how this case is an example of the infiltration of shari'ah as an ideology into the U.S. judiciary. More importantly, while in this case the anti-shari'ah or anti-foreign law provisions would provide a short cut to the result, it would have entirely different results in ex-parte divorces undertaken in foreign jurisdictions.

For instance, if Mr. Aleem had gone to Haiti and received a quick divorce there and returned to the United States, his divorce would be recognized as long as Mrs. Aleem had been given notice of the proceeding.¹²⁹ Moreover, the U.S. courts would take jurisdiction over property and child support matters and would have ongoing jurisdiction over child custody matters. Given that Haiti's law would be applied to the divorce, in order to give it comity, the U.S. court would have to *consider*¹³⁰ it and *implement*¹³¹ it. Such reliance would appear to be barred by the anti-foreign law measures.

C. Child Custody

Child custody matters in the United States require the ongoing supervision of courts in order to ensure that children's interests are protected.¹³² Under Islamic law, child custody follows what might be construed as a combination of the "tender years" doctrine and the Roman conception of *patria potestas*.¹³³ That is to say, that upon divorce, children of a young age are left with the mother until they reach a certain age at which time the father gains custody.¹³⁴ This rule differs a great deal from the "best interest of the child" standard applicable in U.S. courts.¹³⁵ Current standards no longer rely on a bright line rule that

128. See Sheldon Shapiro, *Valid judgment of court of foreign country as entitled to extraterritorial effect in federal district court*, 13 A.L.R. FED. 208 § 5(a) (2011).

129. *Guyot*, 159 U.S. at 163-64.

130. See *supra* note 127 and accompanying text.

131. See *supra* note 128 and accompanying text.

132. See Kandel *supra* note 126, at 145, 157.

133. See *Islamic Perspective on Child Custody after Divorce*, ISLAMIC SHARIA COUNCIL, <http://www.islamic-sharia.org/children/islamic-perspective-on-child-custody-after-divorce.html> (last visited, Jan. 18, 2013).

134. See KUTAIBA S. CHALEBY, *FORENSIC PSYCHIATRY IN ISLAMIC JURISPRUDENCE 72-73* (Anas Al-Shaikh-Ali ed., 2001).

135. See *Amin v. Bakaty*, 812 So.2d 12, 28 (La. Ct. App. 2001).

makes decisions on custody based on gender stereotypes.¹³⁶ Rather, the best interest of the child is the paramount consideration. As a result, child custody judgments from countries applying shari'ah laws or other religious laws are subject to the public policy exception when it comes to comity. Moreover, no custody judgment in the United States is final; the determinations remain open to judicial review because of the state's interest in the welfare of children.¹³⁷ Child custody judgments arrived at in other countries are similarly open to revision by U.S. courts, including those that rely on shari'ah.

A Louisiana court followed this well-established reasoning when deciding *Amin v. Bakhaty*.¹³⁸ In that case, Mr. Bakhaty, a U.S. citizen married Ms. Amin in 1991 in Egypt.¹³⁹ She gave birth to a son in 1992.¹⁴⁰ For six years, Ms. Amin lived in Egypt with the expectation that at some time she and her son would relocate to the United States.¹⁴¹ Mr. Bakhaty, who had a medical practice in New York, traveled back and forth to Egypt to visit the family.¹⁴² After six years, Ms. Amin relocated herself and her son to the United States and attempted to contact her husband.¹⁴³ Failing in this, she moved to Louisiana where she had family.¹⁴⁴ When he discovered that his wife and son were in the U.S., Mr. Bakhaty notified them that he would come to Baton Rouge to meet them.¹⁴⁵ Instead, he traveled to Egypt to begin inquiries about how his wife had managed to leave Egypt.¹⁴⁶ He then brought criminal charges against her for removing the child from Egypt without his permission.¹⁴⁷ She was convicted in absentia of these charges in Egypt.¹⁴⁸

When Ms. Amin was informed of these actions, she filed suit seeking a divorce, child custody, and support in the United States.¹⁴⁹ Almost concurrently, Mr. Bakhaty obtained a Certificate of Divorce

136. See *Charara v. Yatim*, 937 N.E.2d 490, 495 (Mass. App. Ct. 2010).

137. See *Overman v. Overman*, 629 P.2d 127, 130 (Idaho 1980).

138. 812 So.2d 12, 28 (La. Ct. App. 2001).

139. *Id.* at 17.

140. *Id.*

141. *Id.* at 20.

142. *Id.* at 17, 23.

143. *Id.* at 25.

144. *Id.* at 17.

145. *Id.* at 20.

146. *Id.*

147. *Id.* at 13.

148. *Id.* at 21-22.

149. *Id.* at 20.

from Egypt.¹⁵⁰ He then filed for a declaratory judgment of permanent custody of the minor child.¹⁵¹ Egyptian family law follows the millet system in which one's religious affiliation determines the applicable law.¹⁵² For Muslim Egyptians, shari'ah is applied, giving children of the marriage to the father after they have achieved a certain age. However, at the time that Mr. Bakhaty petitioned the Louisiana courts seeking custody of the child, there were no outstanding orders issued by any court.¹⁵³

In order to determine which court had jurisdiction over the child custody and support matters, the Louisiana courts applied the Louisiana Uniform Child Custody Jurisdiction Act ("UCCJA") and the Uniform Interstate Family Support Act. At the trial level, the court declined to recognize Egypt as a "state" under UCCJA and relied on the fourth grounds of residual jurisdiction to take custody of the matter.¹⁵⁴ Further, it found that it had personal jurisdiction over Mr. Bakhaty because he had availed himself of Louisiana courts and could, therefore, expect to be haled into its courts.¹⁵⁵

Two questions arise from this case and its use in the SANE document as an example of the inappropriate role of shari'ah. First, why did the Louisiana court refuse to recognize Egypt as a state? Second, does this case represent "shari'ah creep"? To answer the first, a brief discussion of the international application of the UCCJA (or the amended UCCJEA) is required.¹⁵⁶ The UCCJA was enacted to assist courts in determining which state had jurisdiction over custody matters when more than one state is involved. In cases where one of the possible "states" is a foreign country, the act gives discretion to the courts to treat that country as a "state." In making that determination, the courts examined the following factors:

- (1) whether the child custody laws of the foreign jurisdiction and those of the United States were similar, particularly in light of considering the best interests of the child;
- (2) whether foreign custody decrees existed prior to initiating any proceedings in the reviewing court;
- (3) whether any of the parties were U.S. citizens; and
- (4) whether the parties received adequate notice and a chance to be heard in the foreign

150. *Id.* at 18.

151. *Id.* at 13.

152. *See generally* Abu-Odeh *supra* note 12.

153. *See Amin*, 812 So.2d at 25.

154. *Id.* at 19; *see also* Uniform Child Custody and Jurisdiction Act of 1997, § 105, 201-203 [hereinafter "UCCJEA"].

155. *See Amin*, 812 So.2d at 22.

156. UCCJEA.

forum.¹⁵⁷

Applying these factors, it is clear that both substantive (best interest of the child) and procedural (notice and hearing) problems were present in this case. Further, a U.S. citizen father went to a foreign jurisdiction for the divorce and custody determination in a move that could be regarded as forum shopping. The mother in this case did not flee the foreign jurisdiction but rather came to the U.S. in an attempt to reunite with her husband. Both parties were in the United States before the divorce was initiated. At the time that Ms. Amin filed for custody, no judgment existed determining who should take jurisdiction. Clearly, her move to the United States was not made with the intention of evading the reach of Egyptian courts. The assumption of jurisdiction by the Louisiana courts was appropriate in this case. Moreover, the Supreme Court of Louisiana was careful to note that not all cases involving countries with codified Islamic law had the same result. Citing a number of cases, they show that in some cases, foreign decrees are recognized while in others they are not.¹⁵⁸ This tends to indicate that “shari’ah creep” is simply not occurring.

In *Hosain v. Malik*,¹⁵⁹ for example, the Court of Special Appeals of Maryland did give comity to a Pakistani custody decree.¹⁶⁰ Pakistani law is based on shari’ah. However, it includes consideration of the welfare of the minor, a standard similar to the best interest of the child.¹⁶¹ Both standards give the courts broad discretion to make decisions that benefit the child as opposed to upholding the rights of the parents. In both jurisdictions, there is no dispositive factor that assures one parent the custody of the child. Rather, a set of factors are considered and weighed, including the child’s religion and agreements to raise the child in a particular religion, his or her attachment to extended family and the relationship with both parents.¹⁶² The court stated:

157. *Id.*

158. CTR. FOR DEC. POLICY, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES 231 (Mar. 20, 2011) (citing *Horlander v. Horlander*, 579 N.E.2d 91 (Ind. Ct. App. 1991); *Middleton v. Middleton*, 314 S.E.2d 362, 368 (Va. 1984); *Hosain v. Malik*, 671 A.2d 988, 1000 (Md. Ct. Spec. App. 1996); *Rashid v. Drumm*, 824 S.W.2d 497, 499 (Mo. Ct. App. 1992); *Malak v. Malak*, 227 Cal. Rptr. 841, 846 (Cal. Ct. App. 1986); *Ivaldi v. Ivaldi*, 685 A.2d 1319, 1327 (N.J. 1996)).

159. 671 A.2d 988.

160. *Id.* at 1003.

161. *Id.* at 991.

162. See *Kandel supra* note 126, at 146; see also *Hosain*, 671 A.2d at 997 (discussing Guardians and Wards Act of 1992).

The evidence was overwhelming that, as a general principle, Pakistan follows the best

Significantly, this case is not about this Court undertaking the task of acting as a fact finder in place of the circuit court or substituting its judgment for that of the Pakistani court. And, this case is not about whether Pakistani religion, culture, or legal system is personally offensive to us or whether we share all of the same values, mores and customs, but rather whether the Pakistani courts applied a rule of law, evidence or procedure so contrary to Maryland public policy as to undermine the confidence in the trial.¹⁶³

The Maryland court found that the Pakistani court had, indeed, applied the welfare of the minor standard and that Ms. Hosain had been given notice and an opportunity to be heard of which she failed to avail herself.¹⁶⁴ Substantively, the preference given to fathers in Islamic law (where it is a preference as opposed to a mandate) is similar to the maternal preference that was common in U.S. courts well into the 1970s. Moreover, statistics show that that preference is still at work.¹⁶⁵ Furthermore, the court recognizes that the law does not operate in a cultural vacuum. In order to determine what the best interest of a child is, the trial court must do so within the cultural context in which it operates. So, if a parent's morality is a factor to be weighed, that factor can only be given meaning through the mores of the society in which the factor is applied.¹⁶⁶ To argue otherwise would be to assert that there is an objective morality or a neutral moral code that travels easily from one

interest of the child test in making child custody decisions. Both experts testified that the Guardians & Wards Act of 1890 applies to child custody disputes. Section 7 of the Act authorizes a court to appoint a guardian for a child where "the Court is satisfied that it is for the welfare of a minor" GUARDIANS AND WARDS ACT § 7 (1992). Section 17 of the Act, in pertinent part, states:

In appointing or declaring the guardian of the minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

If the minor is old enough to form an intelligent preference, the Court may consider that preference.

GUARDIANS AND WARDS ACT § 17 (1992).

Id.

163. See *Hosain*, 671 A.2d at 997.

164. *Id.* at 1000.

165. See *Custodial Mothers and Fathers and Their Child Support: 2001*, U.S. CENSUS, available at <http://www2.census.gov/prod2/popscan/p60-225.pdf> (last visited, Jan. 24, 2013) (five out of six custodial parents or approximately eighty-four percent were mothers).

166. See *Hosain*, 671 A.2d at 1000.

location to the next and is knowable without any cultural baggage. Acknowledging that the Pakistani court made its determination “utilizing the customs, culture, religion, and mores of the community and country of which the child and—in this case—her parents were a part”¹⁶⁷ is stating the obvious.

Clearly, there is no special deference given to foreign laws based on codifications of shari'ah, nor is there any particular discrimination against those laws. *Malik*'s result is attributable to the Maryland court's recognition of substantive and procedural similarities in Pakistani law that caused no conflict with Maryland law. *Bakhaty*, on the other hand, was a much different case in which a U.S. citizen sought to apply foreign laws that were at odds with Louisiana law. In matters of custody, Egyptian family law relies on gender stereotypes about child rearing and parentage in a way that U.S. law has attempted to move beyond.¹⁶⁸ In the United States, a child does not “belong” to his or her father's family, nor does a mother automatically become the primary custodian based on her gender. The primary consideration is the child's welfare. And it is permissible for a court to consider all the facts and circumstances of the case before it makes its determination. Consideration of religion, culture, the manner in which a child has been raised, and the effects of change in a transnational dispute is essential.¹⁶⁹ Rather than being instances of the application of shari'ah, these cases are prime examples of how the U.S. legal system works efficiently to accommodate decrees from foreign jurisdictions while adhering to the principle of supremacy of the laws and policy preferences of the United States. It is an example of a system that works. If the anti-shari'ah measures were implemented, such in-depth inquiry would certainly be replaced in favor of the blanket assumption that all applications of shari'ah fail to reach a just outcome.

D. *Private Marital Agreements*

Marital agreements, governed by contract law, are given more deference in state courts regardless of their religious origin if it can be shown that they conform to neutral contract law standards. As such, mahr agreements (agreements for the payment of dower) that are part of a Muslim marriage are put on the same footing as prenuptial agreements

167. *Id.*

168. *Amin v. Bakaty*, 812 So.2d 12, 25 (La. Ct. App. 2001).

169. *See, e.g., Shauna Van Praugh, Religion, Custody, and a Child's Identities*, 35 OSGOODE HALL L.J. 309 (1997).

or simple contracts and are typically given force.¹⁷⁰ Dower agreements memorialize the obligation to pay the wife consideration for entering the marriage.¹⁷¹ One common interpretation of this requirement is that it provides financial security for the wife in the event that the marriage fails.¹⁷² The dower is separate property belonging to the wife alone, and it is often the only property she received upon divorce.¹⁷³

One of the most prominent cases dealing with mahr agreements is *Odatalla v. Odatalla*.¹⁷⁴ Zuhair Odatalla, the husband, challenged the validity of the mahr agreement entered into at the time of marriage “on two grounds: (1) the First Amendment to the Constitution precluding this court’s authority to review the Mahr Agreement under the separation of Church and State Doctrine and (2) the agreement is not a valid contract under New Jersey law.”¹⁷⁵ The key issue was whether contracts entered for religious reasons and pursuant to religious laws might be enforced by civil courts. The problem that these religiously based contracts present is that they may give rise to excessive entanglement if the court is required to evaluate the religious principles underlying the contract. However, as the court states in *Odatalla*, where there are neutral principles of law that can be applied to evaluate the contract, the civil courts may consider such contracts without violating the Constitution.¹⁷⁶ Indeed, the enforcement of these contracts is a part of the *free exercise* guarantee: “the Mahr Agreement is not void simply because it was entered into during an Islamic ceremony of marriage. Rather, enforcement of the secular parts of a written agreement is consistent with the constitutional mandate for a ‘free exercise’ of religious beliefs, no matter how diverse they may be.”¹⁷⁷

In order to settle the matter at bar, the New Jersey court examined

170. See *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996), *Aziz v. Aziz*, 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985).

171. Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 199 (2002) (citing JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* 28 (1990)).

172. Chelsea A. Sizemore, *Enforcing Islamic Mahr Agreements: The American Judge’s Interpretational Dilemma*, 18 GEO. MASON L. REV. 1085, 1088 (citing Blenkhorn, *supra*, note 171, at 210-11).

173. See Blenkhorn, *supra* note 171, at 201-202.

174. *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. Ct. Ch. 2002).

175. *Id.* at 95.

176. *Id.* at 97. See also *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. 1990) (recognizing marriage contract in Jewish marriage); *In re Marriage of Berezna & Heminger*, 2 Cal. Rptr. 3d 351 (Cal. Ct. App. 2003) (enforcing binding arbitration in marriage contract).

177. *Odatalla*, 810 A.2d at 97.

the contract that called for the immediate payment of one gold coin (prompt mahr) and \$10,000 in payment at a later time (deferred mahr) and the evidence showing the parties entered into the agreement freely.¹⁷⁸ In a videotape of the marriage ceremony, Zuhair gave the bride, Houida, a gold coin “confirming his intention to be bound by the Mahr Agreement.”¹⁷⁹ Zuhair’s arguments that the contract was unenforceable because it was too vague, that it constituted a gift, or was void for public policy reasons were unavailing.¹⁸⁰ Justice Selser construed the agreement as “nothing more and nothing less than a simple contract between two consenting adults.”¹⁸¹ All the elements of a traditional contract were present.

Mahr agreements have not always been upheld. However, similarly the reasons for their unenforceability have had nothing to do with religion but rather with their characterization. In *Habibi-Fahnrich v. Fahnrich*,¹⁸² the couple had been married for less than a year when the marriage broke down. The Muslim wife sought to enforce the mahr agreement which the parties agreed to: 1) a ring advanced and 2) half of the husband’s property postponed. The court held that this agreement was insufficiently precise because it failed the test “that anyone reading the contract should be able to understand the dictates of the agreement.” Moreover, there was insufficient evidence that both parties agreed to the terms of the contract.¹⁸³ In *Shaban v. Shaban*,¹⁸⁴ a California court found a mahr agreement unenforceable for similar reasons. In that case, the mahr agreement was for a dollar at the time of marriage and about thirty dollars in deferred mahr. At divorce, the wife claimed her share of the community property of more than \$3 million. The husband claimed that the agreement meant that the wife had consented to the separate property regime that is the default in Islamic divorce. However, the court found that the agreement did not satisfy the Statute of Frauds.

178. *Id.* at 95. There are two types of mahr that can be agreed to at the time of marriage. Prompt mahr is payable at the time of marriage whereas deferred mahr is payable at a later time or on the occurrence of a particular event such as divorce.

179. *Id.* at 97.

180. *Id.* at 98.

181. *Id.* In an earlier Florida case, *Akileh v. Elchahal*, the trial court found that the mahr agreement was not enforceable for lack of consideration. The holding was later overturned on appeal. The appellate court found that marriage was sufficient consideration for the contract to be valid. As a result, the wife was due the \$50,000 agreed to in the agreement. *See Akileh v. Elchahal*, 666 So. 2d 246, 248-249 (Fla. Dist. Ct. App. 1996).

182. *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. July 10, 1995).

183. *Id.* at *3.

184. *In re Marriage of Sheban*, 105 Cal. Rptr. 2d 863 (Cal. Ct. App. 2001).

As Pascale Fournier has shown, U.S. courts apply a liberal-formal equality approach to adjudicating mahr agreements:

[T]he secular conception of this religious institution: deprived of its Islamic flavor . . . becomes a (Western) contract enforceable (or not) irrespective of race, gender or religion. In capturing *mahr* under the umbrella of Western contract law, as opposed to Islamic family law, the judge pictures the liberal system as devoid of a representative role for the Muslim-ness of the parties. Contract law, the judge assumes, is not a matter of identity politics.¹⁸⁵

As such, at least in the adjudication of *mahr* as contract/prenuptial agreement, religion is conspicuously avoided as a factor to be considered in interpretation. The inquiry centers on whether the agreements meet the criteria for a contract under common law principles rather than shari'ah principles. Moreover, similar contracts are upheld when there are no religious traditions or different religious traditions involved.¹⁸⁶ In sum, these cases are also unpersuasive examples of shari'ah creep. Rather, they are the opposite, they demonstrate the application of secular law over religious law even where religious contracts are at the heart of the controversy.

SANE and the proponents of anti-shari'ah laws assert that, through family law and the accommodation of practicing Muslims in our judicial system, shari'ah has gained a foothold and now threatens our constitutional rights. These fairly straightforward family law cases are cited in the SANE literature as examples of shari'ah creep that will ultimately lead to an overthrow of our secular legal system.¹⁸⁷ For most legal academics, such claims are clearly overblown political posturing that can be easily ignored at least until they become law. Moreover, the cases themselves do nothing to support such a claim. Rather they are evidence of the sensible approach to comity developed over time by our legal system. However, what ought not to be lost in the move to dismiss these arguments are the social effects of these laws and the ongoing construction of Islam as a threat to “our” way of life—even as mere legal proposals or laws that ultimately fail—on Muslims.

185. PASCALE FOURNIER, MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION 90-91 (2010).

186. See, e.g., *Mallen v. Mallen*, 622 S.E.2d 812 (Ga. 2005) (upholding the enforcement of a prenuptial agreement); see also *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983) (enforcing a Jewish ketubah requiring husband to submit to the Beth Din, a nonjudicial forum that would have no impact on the civil divorce).

187. See SANE *supra* note 89.

IV. THREATS TO NATIONAL IDENTITY OR NATIONAL SECURITY?

If anti-shari'ah measures are a solution in search of a problem, then what is their true purpose?¹⁸⁸ How have these laws achieved the level of support they enjoy? Does their ineffectiveness in preventing national security threats make them nonetheless anodyne? What effects might these laws have on the lives of ordinary Muslims? These are the difficult questions that this section takes up. I contend that in large part these legislative maneuvers are a reflection of a political and social agenda that links the global terrorist “enemy” and all Muslims in the United States and seeks to maintain the distribution of legal and social power that prefers imagined “real” Americans.¹⁸⁹ In other words, there is an anxiety about identity, change, and “American-ness” threatened by an increasingly diverse nation with more visible and powerful minority individuals that has given rise to a retrenchment of dominant power.¹⁹⁰ Moreover, it is not simply an American phenomenon as the recent events in Norway and the ongoing debates in Switzerland, France, and Holland have shown.¹⁹¹

In the case of the United States, two strands of analysis must be undertaken to fully appreciate the legal and social import of these laws.¹⁹² The first strand is one that answers the *methodology* question: how is the “enemy” constructed? I argue below that the creation of the

188. I take this phrase from Jamil Dakwar & Daniel Mach, *Anti-Sharia Law: A Solution in Search Of A Problem*, HUFFINGTON POST (May 20, 2011, 2:55 PM ET), http://www.huffingtonpost.com/2011/05/20/anti-sharia-law-a-solutio_n_864389.html.

189. This move is paralleled in the construction of Latino communities as outsiders and the reemergence of racisms against African Americans particularly in the aftermath of the election of Barack Obama and converges to form a concerted social, political and legal effort to circumscribe the identity boundaries. See generally EDIBERTO ROMAN, *CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE* (2010); see also RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY* (2011).

190. See Robert Steinback, *Jihad Against Islam*, *supra* note 16.

191. See John Esposito, *Norway attacks a wakeup call for a world*, WASHINGTON POST: ON FAITH (July 30, 2011, 7:27 AM), http://www.washingtonpost.com/blogs/on-faith/post/norway-attacks-a-wakeup-call-for-a-world/2011/07/29/gIQAZ4N4iI_blog.html. See also JOAN WALLACH SCOTT, *POLITICS OF THE VEIL* (2007) (discussing the veil ban in France); Lorenz Langer, *Panacea or Pathetic Fallacy?: The Swiss Ban on Minarets*, 43 VAND. J. OF TRANS. L. 863 (2010).

192. In *Globalizing the Margins*, I examined the ways in which the linkage works in one direction, with the U.S. defining Muslims and Islam within its domestic borders, regulating Muslims within these spatial boundaries. I recognized in that piece that the production and traffic of identity and regulation is a two way street. I chose to focus on one direction—the local to the global. I must thank Lama Abu-Odeh and Jorge Esquirol for reminding me of this linkage. See Cyra Akila Choudhury, *Globalizing the Margins: Legal Exiles in the War on Terror and Liberal Feminism's War for Muslim Women*, 9 INT'L REV. OF CONSTITUTIONALISM 241 (2010) [hereinafter “Globalizing the Margins”].

enemy is an ongoing domestic attempt to confine and expel deceitful, “dangerous” people and to define “real” Americans. It is an attempt to draw the boundaries of identity tightly enough to clearly reject certain undesirables from the community of people that national security law seeks to protect. The domestic threat borrows heavily from a global (re)definition of terrorists (that is then conflated with any Muslim as potential or proto-terrorist) as “subhuman.” That definition revives old colonial justifications for the application of special laws to the “backward” races and their removal from the protection of “ordinary law.”¹⁹³

The *effects* of the creation of the enemy are the second thread of the analysis. This thread examines the real effects of these laws geared to disciplining and expelling the enemy. The two strands brought together provide a more robust account of the dissemination of Islamophobia and the justifications for the need to regulate Muslims through law and legalized violence. Moreover, they underscore the traffic between the local and global in the War on Terror and both their intended and unintended effects.¹⁹⁴ It is also important to recognize the dialectical relationship between some causes and some effects, whereby the effects themselves reify the causes.

The purpose of examining these two strands is to call into question the very definition and identity of the “enemy” and to highlight the costs borne by those who are conscripted into this role. But it is not only the travails of ordinary Muslims captured in the dragnet that concerns me, it is also the distractions that these laws targeting minorities cause and the damage they could do to more effective national security approaches. In the following sections, I attempt to lay out some of the methods and strategies by which the threat is constructed and their effects in both local and global spaces.¹⁹⁵

193. See generally Y.G.-M. LULAT, UNITED STATES RELATIONS WITH SOUTH AFRICA: A CRITICAL OVERVIEW FROM THE COLONIAL PERIOD TO THE PRESENT 539 (2008); EDWARD SAID, ORIENTALISM (1979); EDWARD SAID, CULTURE AND IMPERIALISM (1994); Michael Brett, *Legislating for Inequality in Algeria: The Senatus-Consulte of 14 July 1865*, 51 BULL. SCH. OF ORIENTAL & AFR. STUD. 440-461 (1988); see also Cheryl B. Welch, *Colonial Violence and the Rhetoric of Evasion: Tocqueville on Algeria*, 31 POL. THEORY 235 (2003).

194. Some have argued that the core/periphery distinction that is upheld by borders has collapsed. There is some evidence for this as the 9/11 Commission Report shows. See THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 517 (2004).

195. In the next section, I attempt to discover the strategies that are used to create the Muslim as enemy followed by a discussion of the effects of those strategies in regulating the enemy. It is not always possible to identify what is a cause and what is an effect; to some extent, the construction of these as separate is artificial and can be contested.

A. *Methodology: Strategies in Creating the Enemy*

There are numerous discursive strategies that can be used to construct a national enemy.¹⁹⁶ Extensive research has been conducted on propaganda and public dissemination of particular kinds of stereotyping in order to bolster claims about a group that purportedly threatens national identity and security.¹⁹⁷ From the turn of the last century into the new millennium, such methods have been used to define the Bolshevik threat, the Jewish threat, the anti-colonial or nationalist threat, the integrationist/racial threat.¹⁹⁸ The “Muslim-as-terrorist-fifth-column” threat shares in this dismal history.¹⁹⁹ All of these have commonalities in the way that they became national security threats. In this section, I want to focus on three specific methods in the Muslim context: assuming the power to redefine the values or beliefs of the subject; stereotyping the subject; and finally, applying a set of “special” laws that has the dialectical consequence of both creating and maintaining the enemy.

1. Capturing the Discourse: Islam Resignified

Being able to represent oneself in one's own words is critical to any project of self-definition and emancipation. If the ordinary language that a people use to give voice to their lives, values, and aspirations is twisted and redefined, it makes expression of these difficult. The assumption of the power to define is a classic tool in the arsenal of dominating powers from the first colonizers until the War on Terror.²⁰⁰ Increasingly, it has become difficult for Muslims to use familiar terms with well-accepted meanings to express ideas because of the way that these terms have been

196. See EVA HERSCHINGER, CONSTRUCTING GLOBAL ENEMIES: HEGEMONY AND IDENTITY IN INTERNATIONAL DISCOURSES ON TERRORISM AND DRUG PROHIBITION 33-59 (2011).

197. See SUSAN BACHRACH AND STEVEN LUCKERT, STATE OF DECEPTION: THE POWER OF NAZI PROPAGANDA (2009); Richard Jackson, *Constructing Enemies: “Islamic Terrorism” in Political and Academic Discourse*, 42 GOV'T & OPPOSITION: AN INT'L J. OF COMP. POL. 394-426 (2007); NOAM CHOMSKY, MEDIA CONTROL: THE SPECTACULAR ACHIEVEMENTS OF PROPAGANDA (2002).

198. See *supra* notes 192-93.

199. See Yonat Shimron, *Islamic Terrorism Threat May Be Overblown, Expert Says*, HUFFINGTON POST (Aug. 9, 2011, 7:23 PM ET), http://www.huffingtonpost.com/2011/08/09/islamic-terrorism-overblown_n_922757.html; John Esposito, *Violent ‘Muslims’ distort the tradition*, WASH. POST BLOG (July 14, 2010, 9:27 AM ET), http://newsweek.washingtonpost.com/onfaith/panelists/john_esposito/2010/07/violent_muslims_distort_the_tradition.html.

200. See generally EDWARD SAID, ORIENTALISM, *supra* note 193, discussing the creation of distorted knowledge about the “orient” by colonial experts who sought to understand the natives that they were to govern).

captured and resignified for political purposes.

A number of redefinitions are now in currency; for example, *jihad*, which has had positive connotations as an internal struggle of spirituality or a sanctioned external struggle against occupation,²⁰¹ has now become synonymous with terror or anti-Western violence.²⁰² Indeed, it has spurred the creation of a set of neologisms such as *jihadist* and *jihadism* to complete the resignification of the term into a synonym for terror.²⁰³ Similarly, *Madrassa* has gone from simply meaning “school” to indoctrination center where children are taught to hate the West and wage jihad.²⁰⁴ The educational programs in any school in the United States or anywhere else can be radically delegitimized by simply calling them *madrassas*, carrying with it the implication that these are jihadi training centers.²⁰⁵ These are perhaps the most obvious and common examples of words resignified. But increasingly, ideologues are resorting to the Internet and relying on the newly redefined terms coined by those with little or no knowledge of Islam or its jurisprudence. These self-appointed gatekeepers have begun to capture more concepts, decontextualizing them and redirecting their meanings.²⁰⁶ Below are some examples of this trend.

Dhimmi meant “protected peoples” in Islamic societies; the concept, long dead after the rise of the state and the experience of colonization and secularization, has been revived to provide support for the idea that non-Muslims are discriminated against in Islam.²⁰⁷ Hence,

201. DAVID COOK, UNDERSTANDING JIHAD 32-48 (2005).

202. It has even spurred the creation of neologisms like “jihadi” or “jihadism.” See, e.g., “Jihadist,” MIRIAM-WEBSTER DICTIONARY, available at <http://www.merriam-webster.com/dictionary/jihadist> (last visited, Jan 19, 2013).

203. Roxanne L. Euben, *Jihad and Political Violence*, CURRENT HIST., Nov. 2002, at 365-366.

204. See generally Peter Bergen & Swati Pandey, *The Madrassa Scapegoat*, 29 WASH. Q. 2, 115-125 (2006).

205. The Khalil Gibran School is a prime example of this “smear” campaign where the madrasa label was used to delegitimize the enterprise. Of course, to a person for whom the term has no particular meanings, the label would be utterly senseless—there is nothing offensive about calling a school a school after all. See *supra* note 59 and accompanying text.

206. For a sample of these websites, see, e.g., DANIEL PIPES: MIDDLE EAST FORUM, <http://www.danielpipes.org> (last visited Jan. 19, 2013); ISLAM-WATCH.ORG, <http://www.islam-watch.org> (last visited Jan. 19, 2013); JIHADWATCH.ORG, <http://www.jihadwatch.org> (last visited Jan. 19, 2013).

207. The appropriation of this term suggests that “dhimmitude” was an ongoing burden on non-Muslims erasing a complicated history of minority status within existing empires. While it cannot be denied that non-Muslim minorities were treated differently by the state, it is equally true that different ethnicities were treated differently by dominant ruling powers like the Ottomans. Moreover, after the introduction of capitulations, some minorities were given even greater protection than that of the “native;” they could essentially place themselves under the protection of external states like the French and the British. Further, it is important to point out the double

the newly minted neologism *dhimmitude* now negatively denotes the status of *dhimmi* not as a protected class but as a subordinated class within a modern state.²⁰⁸ An Islamic state, according to this thinking, is incapable of treating all groups equally because it requires non-Muslims to assume a second-class status.²⁰⁹

The term *taqqiyya*, which had been uncommon, is increasing in popularity. *Taqqiyya* is a practice that allowed Shi'a Muslims to dissemble about their religious affiliation when under attack for being Shi'a and persecuted by Sunnis. It has been reinvented with the meaning that Muslims may lie at will to deceive non-Muslims. Thus, the redefined practice is now cited to support the belief that nothing a Muslim says can be taken at face value or as truth. The religion requires pathological mendacity. The result is that no defense or assertion of a Muslim's good faith is believable because by definition, Islam requires Muslims to lie to non-Muslims.²¹⁰ This redefinition is perhaps the most pernicious and racist because it captures Muslim in a loop—no amount of explaining, disavowing of the “wrong” beliefs or professing of the “right” ones is satisfactory because the Muslim is a liar and, therefore, anything she says is immediately dismissed as an attempt to hoodwink the unsuspecting.

The Tennessee law as it was originally proposed provides perhaps the most overt and startling example of the power to resignify Islam in a way that suits the dominant anti-Muslim discourse. In this document, shari'ah is redefined to mean a militaristic ideology and religion that supports violence to achieve an Islamic state.²¹¹ This particular redefinition is most alarming because it makes two seemingly

standard often employed by those using the term “*dhimmitude*.” While they charge Muslim empires, which were monarchic and made no claims to Liberal ideas of rights, with treating their minorities as second class citizens, they seem to overlook European empires that were willing to kill their subjects—let alone citizens, second class or otherwise—en masse as readily as the Ottomans. As for the modern period, it is arguable that most states with homogenous populations treat their minorities as second-class citizens, the United States' history in this regard is nothing of which to be proud. See AARON KLEIN, SCHMOOZING WITH TERRORISTS: FROM HOLLYWOOD TO THE HOLY LAND, JIHADISTS REVEAL THEIR GLOBAL PLANS—TO A JEW! 9-10 (2007).

208. See generally BAT YE'OR, *THE DHIMMI: JEWS AND CHRISTIANS UNDER ISLAM* (1985); Abdullahi A. An-Na'im, *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, 9 HUM. RTS. Q. 1, 1-18 (1987). But cf. Nasim, *The concept of Al-Dhimma and the rights and duties of Dhimmis in an Islamic state*, 9 J. INSTITUTE OF MUSLIM MINORITY AFFAIRS 2, 217-222 (1988).

209. See KLEIN *supra* note 207, at 19.

210. See Boura, *Islamic Tactics of Taqqiya teaches Muslims to practice Deception, Fraud & Double Standards to Spread Islam*, DANIELPIPES: MIDDLE EAST FORUM (Nov. 9, 2006, 22:11), <http://www.danielpipes.org/comments/65699>.

211. See *supra* note 61 (describing the original Tennessee law).

conflicting moves: first it reduces Islam to a political ideology akin to communism. The adherents of the religion become analogous to political ideologues who must be convinced of the error of their pernicious beliefs. Islam's relevance as a religion is diminished. Second, it totalizes that construction to create a group of adherents whose every action can be explained via their Muslim identity. Islam as a politics drives all. To put it another way, Islam as a religion that does not dictate all political commitments but rather, like all religions, competes with other important markers of identity such as gender, sexual orientation, ethnicity, linguistic affiliations, and geography in a dynamic and complex way is radically oversimplified and totalized. As such, the law cannot be seen as merely an anti-syndicalism measure and dismissed as having no real effect on "good" Muslims. There is far more going on here than the equation of Islam to communism and as I argue below, it is questionable whether there is any possibility in reality of a "good Muslim."

2. Creating an Identity: Muslim Propensities

Having captured the vocabulary of Islam and resignified it, these anti-shari'ah laws also reflect a particular opinion of Muslims. What are the traits of a Muslim who chooses to, as Pennsylvania Representative Swanger puts it, "embrace Shariah law, which is inherently hostile to our constitutional liberties?"²¹² This view makes these choices mutually exclusive.²¹³ If shari'ah has been defined as inherently hostile to the liberties guaranteed in the Constitution, anyone who continues to follow the former must then be a threat to our political and legal order. This construction of identity in which religious Muslims inevitably choose religion as their politics may result in a particular kind of subject, but that subject is further fleshed out by adding premodern attributes. The result is that Muslims are demarcated as essentially different from "real" Americans.

Muslims have long been the objects of stereotyping like other groups. A large literature already exists of colonial constructions of race.²¹⁴ Here, I want to simply add that in the War on Terror, which

212. See *supra* note 86.

213. Note that because of the resignification of *taqqiyya*, no amount of repudiation of violence or support for jihadism, or rejection of political Islam serves to quiet the anxiety of the Islamophobe. All such attempts are reinterpreted as lies told to non-Muslims because of *taqqiyya*! The circular reasoning results in the view of all Muslims as pathological liars who then by definition cannot signify themselves.

214. See, e.g., SAID, *ORIENTALISM AND SAID, CULTURE AND IMPERIALISM*, *supra* note 193;

includes our domestic national security measures, “Muslim” as an identity prescribed by the dominant discourse has taken on the attributes of a number of other groups that came before. But it is also unique in that it already had a negative history to which more could be added. For instance, Muslims are not the first group to be considered a threat to national security, and they are certainly not the only group against whom the law has been used as a weapon.²¹⁵ As numerous scholars have pointed out, Japanese Americans and German Americans have also been stigmatized when the United States has been at war. Certainly, the renewed calls for loyalty oaths and even internment simply rely on previous actions taken to secure the homeland.²¹⁶ But the character of Muslims as violent, terroristic, and hateful of “our way of life,” oppressive to women, lascivious and venal, mendacious, and incapable of entering modernity (read leaving a medieval religious sensibility behind) makes them quite unique.²¹⁷ Few modern stereotypes have antecedents in the Crusades.²¹⁸ The more current attributes of Muslimness are cobbled together from readily available stereotypes of

Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCHOLOGIST 16 (Jan. 2005).

215. See Aya Gruber, *Raising the Red Flag: The Continued Relevance of Japanese Internment in the Post-Handi World*, 54 U. KAN. L. REV. 307 (2006); Natsu Saito Taylor, *Internments, Then & Now: Constitutional Accountability in Post-9/11 America*, 2 DUKE F.L. & SOC. CHANGE 71 (2010).

216. *Id.*

217. JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE 12-14 (2001); Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 304 (2002); see Jeremy Clutchy, *Imus anchor on Palestinians: “Stinking animals. They ought to drop the bomb right there, kill ‘em all right now”* MEDIA MATTERS FOR AM. (Nov. 19, 2004, 6:22 PM EST), <http://mediamatters.org/items/200411190009>.

MSNBC’s Imus in the Morning offered derisive, racist commentary about Palestinians during the November 12 funeral of deceased Palestinian Authority leader Yasser Arafat. Regular Imus guest and sports anchor Sid Rosenberg referred to Palestinians as “stinking animals” and suggested: “[t]hey ought to drop the bomb right there, kill ‘em all right now.”

On November 19, the program broadcast a radio segment featuring a guest—parodying General George S. Patton, Jr.—who said that the recent report of a U.S. Marine shooting an unarmed, injured Iraqi insurgent provided the enemy “with another cozy ‘al Jazeera moment’ for the Muslim masses to respond to with their routine pack-of rabid-sheep mentality.” The guest also referred to a deceased Iraqi insurgent as “a booby-trapped raghead cadaver.”

218. See, e.g., SAID, CULTURE AND IMPERIALISM, *supra* note 193. For a history of the Crusades from the Arab and Middle Eastern perspective, see generally AMIN MALOUF, CRUSADES THROUGH ARAB EYES (1989).

Muslim males in particular from various locations: the Saudi patriarch, the Palestinian terrorists, the Pakistani double-dealer, the Afghan zealot, and the Egyptian or Iraqi Muslim-supremacist intent on sectarian violence.²¹⁹ When put together, the proverbial nightmare monster of “normal” people’s dreams is realized—a thing inhumane and sub-human. Muslim women are reduced to the trope of the sexually oppressed, burka-wearing silent ghosts constantly threatened with honor killing and too oppressed to even speak.²²⁰ The Muslim is a person steeped in culture and religion. As such, all actions they undertake are driven by this premodern sensibility.²²¹

A clear example of this sort of stereotyping can be seen in a recent op-ed by Richard Cohen of the Washington Post.²²² The column was

219. See *supra* note 216 and accompanying text.

220. See generally Scott *supra* note 191; see also WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE 60-66 (2008).

221. *Id.* In the media, when a Muslim commits an act of violence, the deterministic script deployed tells us that he or she was driven by Islam. Moving to Islam and the conflation of religion and politics (obscuring politics) results in the obscuring of the primarily political bases for Muslim violence and also obscures U.S. violence against Muslims abroad. Take for instance, the treatment of Virginia Tech shooter, Cho Seung-hui, as compared to Army psychologist, Nidal Hasan. In the case of the former, his mental health was the determining factor for his actions. His Koreanness or ethnicity was not a motivating factor. On the other hand, Major Hasan’s actions were construed as being driven by his Palestinian origins and his Muslim identity while his mental health is treated far less seriously as a motivator for his actions. Muslims are not even capable of “madness” or mental disease unless it has something to do with religion. I use this example to underscore that a variety of factors are at play in any violent incident. In the case of Muslim perpetrators, it is Islam that is given the most weight while other perhaps more salient variables are downplayed. See also Daniel Engber, *Is There a Lot of Crime on Military Bases? Not as much as you’d think*, SLATE (Nov. 5, 2009, 8:28 PM ET), http://www.slate.com/articles/news_and_politics/explainer/2009/11/is_there_a_lot_of_crime_on_military_bases.html; Arment Keteyian, *U.S. Army Base Has Bloody History*, CBS EVENING NEWS WITH SCOTT PELLEY (Nov. 5, 2009, 5:15 PM), <http://www.cbsnews.com/stories/2009/11/05/eveningnews/main5541051.shtml?tag=contentMain;contentBody>; see also Lauren Cox, *Fort Hood Motive Terrorism or Mental Illness?*, ABC NEWS (Nov. 9, 2009) <http://abcnews.go.com/Health/MindMoodNews/fort-hood-shooters-intentions-mass-murder-terrorism/story?id=9019410#.Tu9thWwVT8>.

222. See Richard Cohen, *Post Opinions: Enough of Rick Santorum’s sermons*, WASH. POST (Feb. 27, 2012), http://www.washingtonpost.com/opinions/enough-of-rick-santorums-sermons/2012/02/27/gIQAvUKieR_story.html.

The tendency to focus on the religious or cultural explanation is also evident in the reporting of an attack thwarted by law enforcement in July 2011. In those attacks, Yonathan Melaku was apprehended outside the Pentagon with bomb-making materials in his backpack and evidence that he wanted to engage in violent jihad. The Washington Post reports that “[l]aw enforcement sources said that it was unclear what religion Melaku follows and that they were investigating that aspect of his life; leaders at the mosques near his home said they did not know Melaku or his family.” Looking for a motive in religion and interviewing mosque leaders reinscribes the well-worn script that religion motivates these attacks. Searching for religious identity then becomes important. Moreover, self-profession without any knowledge of Islam is enough to create the causal link. In other words, Melaku can shout “Allahu Akbar” and profess to be a Muslim *without knowing*

not about Muslims at all but about Rick Santorum, a contender for the Republican nomination.²²³ Commenting on the controversy raised by Santorum's claim that the separation of church and state makes him sick and his belief that there should not be an impermeable barrier between the two, Cohen starts with the following:

Mullah Rick has spoken.

He wants religion returned to "the public square," is opposed to contraception, premarital sex and abortion under any circumstances, wants children educated in what amounts to little red schoolhouses and called President Obama a "snob" for extolling college or some other kind of post-high school education. This is not a political platform. It's a fatwa.²²⁴

He goes on to discuss Santorum's various problems with secularism and higher education, women's rights and the prevalence of religion in the public square. He ends with this:

But when I mull Santorum's views on contraception, the role of women, the proper place for religion and what he thinks about education, I think he's either running for president of the wrong country or marooned in the wrong century. The man is lost.²²⁵

Whatever one's opinion of Rick Santorum, the link between his views and Islam is deftly made in the first line. The stereotype at work here is that Muslim clergy are regressive and hold political positions that support the oppression of women and that are anti-modern. Moreover, misusing (and resignifying) the term "fatwa," Cohen asserts that Rick Santorum has issued one by calling Obama a snob. And, in case the reader had forgotten that Santorum's views are more in line with a backward Muslim clergy, he ends with the allusion that Santorum

anything about Islam and having no ties to Muslims and yet Islam is purportedly the motivator for his actions. See Josh White & Allison Klein, *Pentagon shooting suspect not known to officials*, WASH. POST, June 23, 2011, available at http://www.washingtonpost.com/local/pentagon-shooting-suspect-not-known-to-law-enforcement/2011/06/23/AGniB8hH_story.html (emphasis added).

A Google search of the string "Yonathan Melaku Muslim" results in a plethora of websites many of which demand to know why the news agencies failed to report that Melaku was a Muslim. Others point out that there is no evidence that he is a Muslim, while others simply assume that he is. See GOOGLE,

<http://www.google.com/search?client=safari&rls=en&q=yonathan+melaku+Muslim&ie=UTF-8&oe=UTF-8> (last visited, Jan. 19, 2013). It should be noted that anyone can convert to Islam with relative ease. This makes it difficult to disavow them as a Muslim despite the fact that they may not be part of a larger community of Muslims.

223. See Cohen, *supra* note 222.

224. *Id.*

225. *Id.*

rightfully belongs in another country (read Iran). Suffice it to say that the position of Muslim clergy on any subject is multifarious; after all, there is no central religious authority akin to the Pope who speaks for them all. Yet, the less obvious stereotype at work here is the clearly erroneous vision that white, educated, heterosexual men cannot have these kinds of views without it being some sort of (Islamic-tainted) aberration. It's normal for Muslims, but abnormal for Santorum and his ilk. There are no descriptors aside from Islamic one's like "mullah" and "fatwa" to describe him. In other words, even when homegrown religious fundamentalists hold premodern positions that liberals disagree with, the terms used to describe them are ones that reify the stereotypes about Muslims. We talk about them as though they were part of an alien population rather than entirely American examples of religious fundamentalism.

A more startling example of the stereotype substituting for real analysis comes from the shootings and bombing in Norway in 2011. Anders Breivik, a self-defined nationalist, perpetrated the worst terrorist attack on Norway to date driven by the kind of ideology that members of SANE and PPA disseminate.²²⁶ His manifesto quotes liberally from groups directly related to the anti-shari'ah measures.²²⁷ Yet in the early hours of the incident, the blame was squarely placed on Muslims, reinforcing the view that only Muslims do this kind of violence.²²⁸ The incident was reminiscent of the U.S.'s experience with the Oklahoma bombing. Such rushes to judgment have serious consequences for both Muslims and our national security. As others have argued before, this blinkered view of the "enemy" prevents us from seeing the threat posed by a variety of quarters.²²⁹

This move to conflate Islam and politics allows for a flexible strategy where Islam as politics is something that can be shed by Muslims; they can *choose* to become "capitalists" or proponents of democracy. At the same time, it is also inescapable because it is a

226. Chris Rodda, *Writers Cited in Breivik Manifesto Have Spoken at U.S. Military Colleges as Anti-Terrorism Experts*, HUFFINGTON POST (July 28, 2011, 12:00 PM ET), http://www.huffingtonpost.com/chris-rodde/writers-cited-in-breivik-_b_910407.html; see also Robert Mendick, *Norway Massacre: the real Anders Behring Breivik*, THE TELEGRAPH, July 31, 2011 available at <http://www.nytimes.com/2011/03/11/us/politics/11king.html>; Anders Breivik, 2083: *A European Declaration of Independence* (2011), available at <http://unitednations.ispnw.org/archives/breivik-manifesto-2011.pdf>.

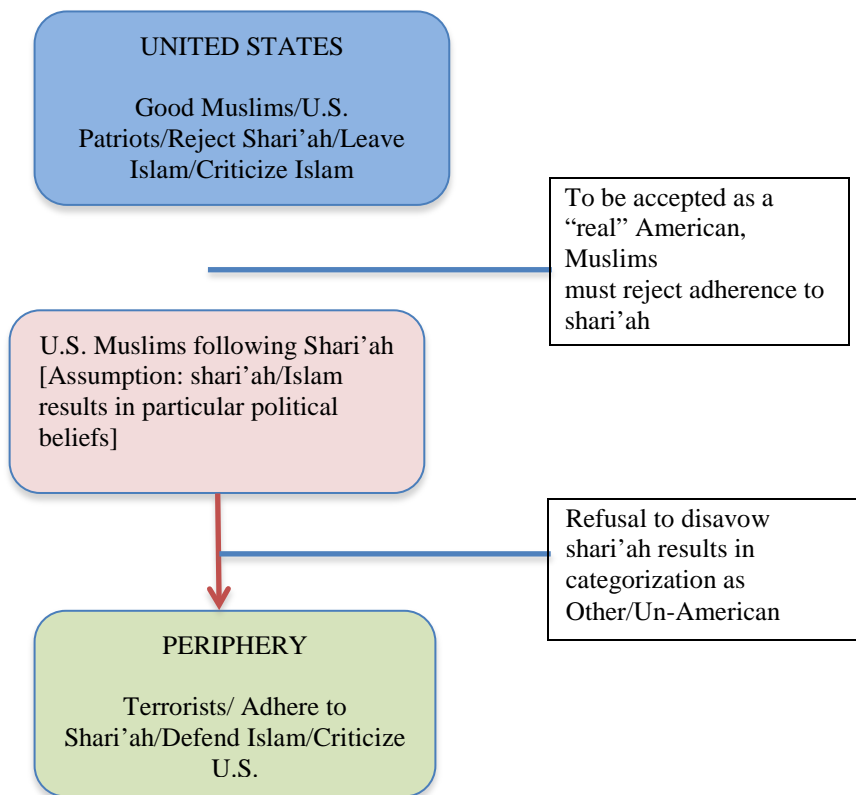
227. Breivik, *supra* note 226.

228. Raja Abdulrahim, *Muslims feel initial sting of blame*, L.A. TIMES, July 23, 2011, available at <http://articles.latimes.com/2011/jul/23/world/la-fg-norway-blame-20110724>.

229. Deborah A. Ramirez, Jennifer Hoopes, & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003).

religion and therefore integral to identity; it is part of the essence of Muslims. The conflation allows the anti-shari'ah proponents to both charge Muslims with *choosing* to follow Islam and to construct them as *inevitably driven* by religion that cannot be shed. The Muslim is a subject that is both political, *choosing* to follow the ideology of Islam and religious, *unable to choose* but infused with religious or cultural sensibility. The subject can only escape the ideology through conversion (see Chart 1 below). This opens up a number of avenues for regulation based on politics and religion both locally and globally.²³⁰

Chart 1: Categorizing Muslims in the United States



230. It should be made clear that, while I critique those in the United States who reduce Muslims to their religious identity, I do recognize some Muslims' invocation of Islam even when acting for non-religious, political reasons has complicated matters. The history of the use of Islam as a political vernacular is beyond the scope of this paper. However, it is worth noting that a more nuanced analysis of motivations is needed to go beyond the shallow view that Islam, as a religion, is the driving force for all violence. In other words, the view that "they did it because of their religion" is facile, reductionist and explains very little.

3. Applying the Rule of (Which) Law?: National Security v. Civil and Human Rights

I have argued above that redefining Islam and Islamic terms so that they can no longer be used in their ordinary sense and the construction of a capacious Muslim stereotype (carried forward from history and added to in the present) are two strategies that work to create a comprehensible, identifiable enemy. In this section, I want to briefly touch upon the way in which law itself can play into this creation. The application of a particular set of laws primarily to Muslims is both a cause and an effect of the construction of the enemy. Insofar as the global War on Terror and national security are primarily constructed around the problem of Islamist terrorism after 9/11, Muslims are their object. The laws are both an effect of a real set of circumstances (terror attacks) and a cause in that they constantly create the subject of a Muslim identity repetitively linked to terror. Furthermore, the national security discourse subsumes human rights and civil rights under the superior claim of security. That is precisely why calls for the respect of Muslim citizens' civil rights are largely unpersuasive in the social arena—the discourse creates a constant threat which must be answered by regulating Muslims.²³¹ It is easy to sacrifice the civil rights of a small, disfavored minority and to subject them to differential legal treatment for the purported security of the greater population.²³²

For instance, the proponents of anti-shari'ah laws seek to exclude Muslim citizens from "normal" law because these Muslims who follow shari'ah have no commitment to that law. That is to say, they eschew the Constitution and American civic values.²³³ Indeed, by clinging to a hostile religio-political law, an ideology rather than a faith, they remove themselves from the protections of civil rights.²³⁴ Thus, the promise of

231. SHADI MOKHTARI, AFTER ABU GHRAIB: EXPLORING HUMAN RIGHTS IN AMERICA AND THE MIDDLE EAST 105 (Chris Arup, et al. eds., Cambridge Univ. Press 2009).

232. See Gruber *supra* note 215 (discussing Japanese internment).

233. See *Globalizing the Margins*, *supra* note 192.

234. See MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR AND THE ROOTS OF TERROR 18-23 (2004). Mamdani explores the lack of politics as an explanation of their actions or beliefs:

In the post-9/11 America, Culture Talk focuses on Islam and Muslim who presumably made culture only at the beginning of creation, as some extraordinary, prophetic act. After that, it seems Muslims just conformed to culture. According to some, our culture seems to have no history, no politics, and no debates, so that *all* Muslims are just plain bad. According to others, there is a history a politics, even debates, and there are good Muslims and bad Muslims. In both versions, history seems to have petrified into a lifeless custom of an antique people who inhabit antique lands. Or could it be that culture here stands for habit, for some kind of instinctive activity with rules that are

equality before the law (where laws that apply are *fairly administered*) does not translate into the equality of laws that *apply* to Muslims. The threat that they pose using the liberal laws of the land to infiltrate and subvert secular order require particular responses. Anti-shari'ah laws then can be read as a means of foreclosing the access to legal techniques like those of comity and conflicts of law in our system that are means by which inherently destructive laws like shari'ah infiltrate.

While these laws do little to protect the homeland because they are aimed at an imaginary threat (shari'ah creep), they do have a commonality with national security laws insofar as they single out Muslims for special treatment. They continually remind us that we can never let down our guard or vigilance. It is beyond the scope of this paper to examine all the specialized laws that apply in depth, but a brief recounting of some of these regulations is warranted here to make the case that there is a concerted effort at discriminating against Muslims underway.

Before the War on Terror, racial profiling had become a disfavored approach to policing.²³⁵ The use of race as a proxy for criminality was rejected for both its racism and its inefficacy.²³⁶ However, after 9/11, erstwhile critics of the practice changed their positions to call for the profiling of Muslim/Arab-looking people to prevent another attack.²³⁷ The result has been a net failure. Few prosecutions were undertaken after the 9/11 sweeps in which most people who were captured were violators of immigration laws, not terrorists. Further, people who are not Muslim have been captured because they are visibly different from "real" Americans. In the meanwhile, the races of people that have been captured and prosecuted for terrorism include White, Latino, Black, South Asian, and Arab, giving the lie to any belief that terrorists can be visibly identified. By that logic, a terrorist seems to *look* like anyone caught doing terrorist acts!

Along with profiling has come heightened surveillance, including surveillance without warrants and probable cause.²³⁸ Periodic

inscribed in early founding texts, usually religious, and mummified in early artifacts?
Id. at 18.

235. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 34-41 (1999); See Ramirez, *supra* note 229.

236. Cole, *supra* note 235; Ramirez, *supra* note 229.

237. See Richard R. Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2003).

238. The latest of the surveillance "scandals" is the revelation of a widespread surveillance of Muslim students extending out of state conducted by the NYPD. See Ryan Devereaux, *Muslim student monitored by the NYPD: 'It just brings everything home'*, THE GUARDIAN (Feb. 22, 2012,

revelations of eavesdropping, wiretapping, infiltration of groups, and spying demonstrate the ongoing scrutiny of a minority population regardless of their actual acts or affiliations.²³⁹ Indeed, recent investigations show that police agencies made note of how many times surveilled Muslims prayed and their level of observance of the faith, conflating practice of the religion with suspicious activity.²⁴⁰ This sort of begging the question is unsurprising given that there have been several exposes of law enforcement using Islamophobic materials for training purposes.²⁴¹ Another form of surveillance are the hearings on Muslim radicalism held by Representative Peter King on March 10, 2011.²⁴² Ostensibly, the hearings were to determine the level of radicalism taking place within the United States as a means of assessing the threat from homegrown terrorism. What is interesting about these hearings, coming ten years after 9/11, is the choice of representatives of the Muslim community. In what has become an easily identified, shop-worn tactic, the hearings used “native informants” who corroborated the prejudices of King and his supporters. Those informants hardly represent the diverse and multiethnic and multiracial Muslim community in the United States and provided no data backing the claim that

13.02 EST), <http://www.guardian.co.uk/world/2012/feb/22/nypd-surveillance-muslim-student-groups>.

Rasul was named in a police report compiled on April 21, 2008. He was one of 18 Muslim students who traveled to upstate New York that day for a whitewater-rafting trip. Among the group was an undercover officer who monitored the outing, noting topics of conversation and *counting the amount of times they prayed*.

“In addition to the regularly scheduled events (rafting), the group prayed at least four times a day, and much of the conversation was spent discussing Islam and was religious in nature,” the report noted. Since it was issued there has been no indication the NYPD brought terrorism-related charges against any of the students. (emphasis added).

For other instances of surveillance, see *Local Muslims outraged by alleged FBI surveillance, lawyers claim*, LA NOW, LA TIMES (Feb 23, 2011, 1:13 PM), <http://latimesblogs.latimes.com/lanow/2011/02/local-muslims-outrage-by-alleged-fbi-surveillance-lawyers-claim.html>; Peter Yost *FBI defends surveillance guidelines allegedly targeting Muslims*, ARAB NEWS (July 28, 2010), <http://www.arabnews.com/node/351363>; Amanda Remling, *NJ Muslim Officials Meet in Newark: Investigation of 2007 NYPD Surveillance*, INT’L BUS. TIMES (Mar. 3 2012, 5:59 PM), <http://www.ibtimes.com/articles/308563/20120303/muslim-leaders-new-jersey-nypd-surveillance-meeting.htm>.

239. Devereaux, *supra* note 238.

240. *Id.*

241. *Id.* See Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. TIMES, Jan. 24, 2012, at A1, available at <http://www.nytimes.com/2012/01/24/nyregion/in-police-training-a-dark-film-on-us-muslims.html?pagewanted=all>.

242. See *The Extent of Radicalization in the American Muslim Community and that Community’s Response: Hearing before the Comm. On Homeland Sec.*, 112th Cong. 1-73 (2011), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72541/pdf/CHRG-112hhrg72541.pdf>.

Muslims in the United States were being radicalized at high rates.²⁴³ Rather members of law enforcement suggested that this was not the case. In sum, the hearings presented a stark lack of evidence of the conclusion that we have a problem with Muslim radicalism.²⁴⁴ Nevertheless, the hearings once again reinforced the Muslim-terror connection in the popular imagination.²⁴⁵

Terrorism laws, such as the PATRIOT Act, subject Muslims to regulation and capture for vague crimes such as material support for terrorist groups.²⁴⁶ “Material support” provisions of national security laws are ambiguous and open to a range of interpretations.²⁴⁷ The

243. The hearings had no recognizable representatives of major Muslim communities like those in New York; Dearborn, Michigan; or Los Angeles. Rather, the committee chose to hear testimony from those who have virtually no standing as leaders of any community but who have since the hearings capitalized on their moment in the spotlight. For an academic approach to radicalization in Muslim communities, see David Schanzer, Charles Kurzman & Ebrahim Moosa, *Anti-Terror Lessons of Muslim-Americans* (Jan. 6, 2010), available at http://www.sanford.duke.edu/news/Schanzer_Kurzman_Moosa_Anti-Terror_Lessons.pdf (finding that radicalism has gone down in the Muslim community). Compare this with Southern Poverty Law Center's recent report on the increase in Patriot groups and militia's, Mark Potok, *The Patriot movement explodes*, INTELLIGENCE REP., Spring 2012, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/the-year-in-hate-and-extremism>. It is interesting to note that the study has been challenged on grounds that it does not adequately reflect the actual radicalization of Muslims, however, it is important to query whether any report absolving Muslims of terroristic tendencies would satisfy those who have already made prejudgments about the communities precisely because such a report does not support their view?

244. See *The Extent of Radicalization in the American Muslim Community and that Community's Response: Hearing before the Comm. On Homeland Sec.*, 112th Cong. 71-120 (2011) (Statement of Sheriff Leroy Baca, Los Angeles County Sheriff Department), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72541/pdf/CHRG-112hhrg72541.pdf>.

245. For instance, the very title of some media reports leave one in no doubt of the Manichean tendencies of “good and evil” that are deployed against Muslims, see, e.g., Gail Russell Chaddock, *Peter King hearings: Are American Muslims the problem or the solution?*, CHRISTIAN SCI. MONITOR, Mar. 10, 2011, available at <http://www.csmonitor.com/USA/Politics/2011/0310/Peter-King-hearings-Are-American-Muslims-the-problem-or-the-solution>. Note that the story is followed by a list of the top ten American jihadis.

246. For academic treatments of the liberty for security trade off, see generally Natsu Taylor Saito, *Beyond the Citizen/Alien Dichotomy: Liberty, Security, and the Exercise of Plenary Power*, 14 TEMP. POL. & CIV. RTS. L. REV. 389 (2005); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. CIV. RTS & CIV. LIBERTIES L. REV. 1, 1-30 (2003); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of Covertpro and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051 (2002).

247. 18 U.S.C §2339B (a)(1) (West 2013):

Unlawful conduct—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or

definition is given in the United States code as:

the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.²⁴⁸

As is readily discernible, the definition is open to interpretation and captures any number of activities. Would knowingly selling food or gasoline to members of the Sinn Fein—once regarded as terrorists by the United Kingdom and freedom fighters by the Irish—result in a violation of the law? To answer this question requires the ordinary person to know whether that organization is on a list of terrorist organizations and whether this activity constitutes material support. The list of terrorist organizations is maintained by the Department of State and it is not comprehensive; therefore, it is possible that a charitable donation overseas may lead to prosecution for material support here²⁴⁹ for terrorist organizations includes non-fungible support like expert advice even for non-violent or humanitarian reasons.²⁵⁰ As a result, the possibility of lengthy detention or even internment is an ever-present concern.

The increased preoccupation with “homegrown” terrorists ten years after the attacks has renewed the need for hyper-vigilance on the part of “real” Americans. After 9/11, the round up and detention of Muslim men and their ongoing detention amounted to de facto internment.²⁵¹

that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

248. 18 U.S.C. §2339A(b)(1) (West 2013).

249. Kavitha Rajagopalan, *Charitable donation or material support for terrorism?*, PBS (Aug. 18, 2010, 6:03 PM), <http://www.pbs.org/wnet/need-to-know/opinion/charitable-donation-or-material-support-for-terrorism/2905/>.

250. 18 U.S.C. § 2339A(b)(1) (2009); Larry Abramson & Maria Godoy, *The Patriot Act: Key Controversies*, NPR (Feb. 14, 2006), <http://www.npr.org/news/specials/patriotact/patriotactprovisions.html>; Ariane de Vogue, *Speech or Support for Terrorists? Supreme Court Weighs Patriot Act Provision*, ABC NEWS (Feb. 22, 2010), <http://abcnews.go.com/Politics/supreme-court-weigh-free-speech-material-support-law-first-amendment-rights/story?id=9891625>.

251. See Cyra Akila Choudhury, *Terrorists & Muslims: The Construction, Performance, and Regulation of Muslim Identities in the Post-9/11 United States*, 7 RUTGERS J. L. & RELIGION 8

Moreover, Muslims continue to be the objects of suspicion and the subjects of regulation and surveillance. The extraordinary treatment via specialized national security laws, use of military commissions, and attempts at denying habeas corpus erode protections afforded other groups and make Muslims second-class citizens vulnerable to expulsion.²⁵²

The inferiority of their status is revealed by the effects of the specialized laws the general populace is willing to tolerate and, in fact, demands. The ease with which they are placed in indefinite detention, tortured, and killed unlike other “real” citizens indicates how far the marginalization of the constructed enemy has gone. The inability of civil rights or human rights to trump or even restrain the security apparatus’s abuse of Muslims goes to show that Muslims have a difficult time convincing others of their very humanity. As we might be reminded, the Constitution is not a suicide pact; the liberties it provides should not become vulnerabilities. Consequently, the law justifies the regulation of the enemy it has a hand in constructing, and it is not surprising to find that the anti-shari’ah measures have been defended in national security terms and as national security measures. In fact, this linkage also performs the role of linking domestic Muslims as potential traitors to their global (terroristic) counterparts and legitimates their regulation through global anti-terror measures.²⁵³

In the global sphere, certain Muslims are expelled from the protection of civilian laws, human rights, and international laws through the legitimization of anti-terrorism laws exported by the United States and the initial suspension of the Geneva Convention.²⁵⁴ Both human rights and the laws of war protect humans from mistreatment in a time of war. The withdrawal of such protection, then, can be seen as legally creating a space in which politics prevails over law and where Muslims can be treated with impunity. Unfortunately, in the Bush-era, that space could conceivably be anywhere Muslims are to be found. Indeed, as the 9/11 Commission stated in its report, the boundaries between states have collapsed: “In this sense, 9/11 has taught us that terrorism against American interests ‘over there’ should be regarded just as we regard terrorism against America ‘over here.’ In this same sense, *the American*

(2006) [hereinafter “*Terrorists & Muslims*”].

252. *Id.*

253. B.E. Whitaker, *Exporting the Patriot Act? democracy and the “war on terror” in the Third World*, 28 THIRD WORLD Q. 1017-1032 (2007).

254. *Id.*

*homeland is the planet.*²⁵⁵ Such a sentiment reflects the Bush administration's will to do whatever it takes, including refusing recourse to international law to Muslims in order to prosecute its war on terror globally.

More recently, in his support of the National Defense Authorization Act of 2012, Senator Lindsey Graham argued that the military should be able to detain American citizens in the U.S. indefinitely because America is "part of the battlefield" and that these alleged traitors should not be afforded any due process.²⁵⁶ Reflecting a dialectical relationship between the local and the global—if not the collapse of the boundary between the two—it is evident that what happens in the periphery has an impact on what happens in the core and vice versa. National security laws gone global regulate Muslims both "over here" and "over there." Civil or human rights are marginal, if not obstructions, to the goals of counterterrorism and must be suspended of necessity. Those who are the proper subjects of national security then come under the jurisdiction of specialized laws like those described above and the anti-shari'ah laws that seek to become a part of that body of law; the civil and human rights guarantees that have often been touted as universal and applicable to all show their limits.

B. Effects: Expulsion, Detention and Death

Anti-shari'ah laws currently being proposed or passed in the state legislatures are examples of an overall strategy to define and circumscribe the boundaries of belonging in the United States.²⁵⁷ The

255. See 9/11 COMMISSION REPORT *supra* note 194, at 517 (emphasis added).

256. Video: *Floor Speech: Graham Supports the National Defense Authorization Act*, LINDSEYGRAHAM.COM (Dec. 15, 2011), <http://www.lindseygraham.com/2011/12/video-floor-speech-graham-supports-the-national-defense-authorization-act/>. The floor debate about the Udall Amendment to the NDAA which would have excised the ability to detain American citizens was rejected by many senators, including Graham. See also CONG. REC. S8012-8054 (daily ed. Nov. 30, 2011), available at <http://www.gpo.gov/fdsys/pkg/CREC-2011-11-30/html/CREC-2011-11-30-pt1-PgS8012-2.htm>; *Ceding Liberty to Terror: Senate Votes Against Due Process Rights*, THE ATLANTIC (Dec. 2, 2011, 11:17 AM ET), <http://www.theatlantic.com/politics/archive/2011/12/ceding-liberty-to-terror-senate-votes-against-due-process-rights/249388/>

"It has been the law of the United States for decades that an American citizen on our soil who collaborates with the enemy has committed an act of war and will be held under the law of war, not domestic criminal law," he said. "In World War II it was perfectly proper to hold an American citizen as an enemy combatant who helped the Nazis. But we believe, somehow, in 2011, that is no longer fair. That would be wrong. My God, what are we doing in 2011? Do you not think al Qaeda is trying to recruit people here at home? Is the homeland the battlefield? You better believe it is the battlefield."

257. In order to understand the current move to target shari'ah, a brief history of the post 9/11 reactions to Muslims in the public is necessary. Because this article focuses on the anti-shari'ah

measures, the account here cannot be exhaustive. It aims merely to provide a sense of the larger attempts at regulating and expelling Muslims. I should also note here that there is another account, which is that of the societal rejection of these attempts and support for Muslim Americans. For example the recent outrage at the decision of Lowe's to no longer advertise during the TLC show American Muslims caused a number of online campaigns against the retailer. See Greg Sargent, *Turning Up the Heat on Lowe's and Anti-Muslim Bigotry, The Plum Line*, WASHPOST OPINIONS (Dec. 14, 2011, 12:46 PM ET), http://www.washingtonpost.com/blogs/plum-line/post/turning-up-the-heat-on-lowes-and-anti-muslim-bigotry/2011/12/14/gIQARVrAuO_blog.html. However, I do not present that account here because I seek to describe the context in which the anti-shari'ah bills arose within the movements against Muslims.

After the 9/11 attacks, the immediate reaction on part of many non-Muslim Americans was outrage expressed through physical attacks on Muslims and Muslim symbols (mosques and other property). Indeed, reports of violence and discrimination against Muslims rose markedly in the aftermath of the attacks. See, e.g., *Terrorists & Muslims*, *supra* note 251. These knee-jerk reactions were to be expected particularly when perpetrated against a "visible" minority. The federal authorities mimicked this societal convulsion by immediately rounding up Muslim men in immigration sweeps. *Id.* at 36. However, after the initial physical violence abated and the government's efforts yielded nothing more than full internment centers, a concerted attempt at demonizing Islam in the social sphere began in earnest. Questions about the ability of Muslims to be faithful to their religion and patriotic Americans arose exacerbating the already Manichean discourse. Seemingly overnight, people who had been on the fringe for focusing on Islam and Muslims in the 1980s and 1990s became experts and media celebrities. Muslims who were willing to turn on their own communities and religion were elevated as the "voice of reason" and representatives of "good Muslims." Those Muslims who either resisted the regulation of state and society or criticized American policies particularly the domestic measures against Muslim communities and the two wars on Afghanistan and Iraq were linked to terrorist organizations and labeled traitors. See generally DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 47 (2003) (citing "We Are Not the Enemy": Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11, 14 HUMAN RIGHTS WATCH 6, 14 (Nov. 2002), available at <http://www.hrw.org/sites/default/files/reports/usa1102.pdf>; *Bias Incidents Against Muslims Are Soaring, Islamic Council Says*, N.Y. TIMES, May 1, 2002, at A3, available at <http://www.nytimes.com/2002/05/01/us/bias-incidents-against-muslims-are-soaring-islamic-council-says.html>; Susan Sachs, *For Many American Muslims, Complaints of Quiet but Persistent Bias*, N.Y. TIMES, April 25, 2002, at A16).

From these anxieties and debates, several other projects arose. In academia, a concerted push has been made to generate knowledge about Muslims even while foreclosing the space for Muslim scholars and those deemed "pro-Islam" to speak. Organizations like *CampusWatch* and *JihadWatch* routinely target academics who have either defended Muslims or written about Muslims or Islam in anything but a negative light. See STEPHEN SHEEHI, ISLAMOPHOBIA: THE IDEOLOGICAL CAMPAIGN AGAINST MUSLIMS (2011). In 2007, the concern about how Muslims and Islamic history is portrayed spilled into the public arena when the Khalil Gibran public school in New York that sought to teach Arabic language and culture became a point of focus. The Muslim head of school was removed from her position as a result of a campaign against the school that labeled it a *madrassa*. The purported reason for the controversy was that she supported a group of girls wearing t-shirts printed with "Intifada NYC." Opponents of the school expressed concern that students would be taught radical Islamist ideology and one opined that it was nearly impossible to teach the language without teaching the ideology. Similarly, Muslim parochial schools have also come under scrutiny as sites of indoctrination and radicalization. See Jennifer Medina, *Head of Arabic Language School Resigns*, N.Y. TIMES, Mar. 16, 2010, A23, available at <http://www.nytimes.com/2010/03/17/nyregion/17school.html> (detailing the finding of discrimination against Khalil Gibran's founding principal, Debbie Montaser).

laws deploy strategies like redefinition and stereotyping to marginalize and expel Muslims from the identity of “real” Americans. The architects of these laws legitimize their agenda through a discourse of national security and through the construction of a very specific enemy that must be dealt with through specific laws. That is to say, the redefinition of Islam to a terrorist religious ideology, the construction of Muslims as latent terrorists because they are primarily driven by this culture/religion, and then the application of laws that secure the homeland and those who rightfully “belong” in it, achieves the broader political goal of denying Muslims any quarter.

In this section, I want to briefly examine three effects of the broader project on Muslims both locally and globally: expulsion, detention, and death. These effects can be placed on a continuum with expulsion or marginalization being the most likely effect for U.S. Muslims, detention is an effect that has been felt globally from criminal and INS detentions “over here” to Guantanamo, Bagram, and Abu Ghraib “over there.” Finally, death is seldom an effect here in the United States. However, death is an everyday effect in places like Afghanistan and Iraq where human rights are made subservient to our security.

1. Expulsion

The act of expelling Muslims (and other undesirables) from the mainstream has taken on a number of forms. In this Article, I have argued that the anti-shari’ah laws that have been proposed or enacted are not simply attempts to protect society from a security threat but also to stigmatize and ostracize a group of people. The argument that is advanced in support of these laws is that any tolerance for Muslim life starts us on the slippery slope to a full-fledged shari’ah-ruled society.²⁵⁸ As a result, shari’ah and consequently any accommodation for Muslims in public should be denied. The laws are themselves an attempt to expel the undesirable Other by preventing its recognition or accommodation in the public.

As I have noted above, courts in the United States are constrained from entering into the thickets of interpreting religion by the Constitution and a clear jurisprudential posture evident in First Amendment religion cases.²⁵⁹ They rely on neutral principles to make

258. See *supra* notes 76-89 and accompanying text.

259. In *Lemon v. Kurtz*, 403 U.S. 602 (1971), the Supreme Court laid out a three-part test in order to determine whether a law runs afoul of the first amendment. *Id.* at 612-613. The test is comprised of three prongs: first, the state action in question must serve a “secular legislative

decisions about cases involving religion to avoid precisely the problem of explicating religious principles or law. Yet the anti-shari'ah/anti-foreign law measures in the states want to recreate the wheel to make absolutely clear that courts *may not* rely on shari'ah in any way to make their determinations. If the purpose of this seeming redundancy is to prevent courts from becoming entangled in religion, there is nothing novel about this as courts have been constrained from venturing into such dangerous territory already.²⁶⁰ However, if these laws want to eradicate the very mention of or reference to shari'ah in the courts, there may be serious implications for our judicial process of determining when to give comity to foreign judgments in the United States. Without the ability to reference foreign law (that is on occasion based on shari'ah), this long-established practice would be replaced with an a priori generalization about the incompatibility of any law "tainted" by shari'ah with U.S. law. In essence, the very comparison that is required to make a judgment about whether the foreign decree comports with our values and our public policy would be rendered impossible.²⁶¹ This creates inefficiencies and burdens by forcing new suits. If the laws do not seek to force re-litigation but merely use our laws as the yardstick by which foreign judgments are measured, then as I have argued above, the choice of law rules, comity, and the supremacy clause already do this work. In sum, these laws have limited utility for courts in preventing the

purpose"; second, it must have a secular effect; and third, it must not result in excessive entanglement between church and state. *Agostini v. Felton*, 521 U.S. 203 (1997) (referencing *Lemon*, 403 U.S. at 613-614).

260. *Id.*

261. What is unstated is that, if the court was required to determine the existence of a marriage without reference to Israeli law that mandates shari'ah in personal law matters for Muslims, the court would have to substitute some alternative law presumably state law. The result is that courts would be forced to evaluate each marriage under that alternate law and determine de novo whether it exists regardless of the length and validity of the relationship entered into in another country under their laws. Although most marriages would likely pass muster under this form of review, the prospect that some *religiously and legally* valid foreign marriages would be rendered invalid simply because they vary either procedurally or substantively from state law should be cause for concern. Further, the burden on courts would be increased substantially.

In addition to those whose marriages have been solemnized abroad, couples married in religious ceremonies within the United States would also face a similar problem unless they can show that their religious marriage conformed to civil standards. In most states, a marriage requires two procedural elements: a license and a ceremony. See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 35-38 (1988). The state provides the license to marry, however, the ceremony can either be secular or religious. *Id.* The result of enforcing laws that seek to ban shari'ah in state courts may be a state-imposed secular ceremony. While this may be acceptable to many, it is difficult to argue that shari'ah could be singled out as a "foreign law" as the drafters of the legislation seek to do; Jewish, Catholic and even some Protestant ceremonies would also be suspect as they are arguably "foreign" imports.

encroachment of foreign laws that run against our public policy.²⁶² What they do instead is pass a value judgment about shari'ah as a barbaric legal code, reducing it to only its most grievous flaws while valorizing our own legal system as superior, civilized and, therefore, irreconcilable with shari'ah. That judgment passed not only on a complex and ancient legal system also marks Muslims as barbaric. Consequently, the anti-shari'ah proponents might argue that forcing Muslims to assimilate totally to a more advanced, modern, secular system by refusing to recognize shari'ah is merely progress and a net benefit to all.

Should these laws be upheld, they will undoubtedly have their intended consequence in forcing Muslims as a religious community into the closet.²⁶³ The legal prohibition on relying on shari'ah would have an impact on contracts, prenuptial agreements, wills, and the ability to request accommodation for religious practice in the public sphere. Without reference to the religious law that gives meaning and definition to Muslim life, how is a court to assess any claim that involves Islam? For concrete examples of what is at stake for Muslim life in the United States, we can examine two hypotheticals: first is that of a *shari'ah* compliant will in probate and the second a private contract based on *shari'ah* law.

Consider a will that provides for the distribution of the estate based on the *shari'ah* principles. In his suit against Oklahoma, Muneer Awad

262. Focusing on religion, these anti-shari'ah laws are not noxious because they attack religion in the public square. Indeed, Liberalism's long history has been replete with attempts at placing religion squarely in its proper place: in the private. See generally JOHN LOCKE, A LETTER CONCERNING TOLERATION (2011). At least theoretically, Liberalism demands this closeting and Marxism goes further and requires that for true human emancipation to occur, religion must be eradicated entirely. See generally Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER (Richard Tucker, ed., 1978) (Rather, these laws target one religion in particular insisting that it is not a religion but rather an ideology itself and revealing the anti-*shari'ah* movements own deeply ideological connections. While we might analyze the current instances Islamophobic legislation as racism, it goes well beyond that. These events partake of a broader imperial ideology in which law is instrumentalized to both create subjects and govern them. See Mamdani *supra* note 234. As such, the attempt to pass anti-shari'ah laws is one instance of the global regulation of Muslims in the war on terror, regardless of what they have or have not done but based on who they are. Moreover, legally and socially, the power to define rests in the hands of those who seek to govern, who wield both social and political power. The result of the definition of Muslims in consonance with categories generated in the war against global terrorism is that Muslims continue to receive the attention of the "good guys" who are bravely rolling back the influence of the "bad guys."

263. The Attorney General of Oklahoma has vowed to move forward with defending the Save Our State amendment now that the preliminary injunction has been upheld. The next step is a trial on the merits in which the court will decide on the Constitutionality of the amendment on substantive grounds and issue a permanent injunction.

made precisely this claim.²⁶⁴ In his will, he incorporates by reference the *Sahih Bukhari* compilation of Hadiths (the examples and sayings of the Prophet Muhammad) that is one of the sources of *shari'ah*.²⁶⁵ Such a will could not be probated in Oklahoma because it references a *shari'ah* source. The only work around is to put all the provisions in the will itself in neutral language.

Similarly, if two parties form a contract that will be governed by *shari'ah* law and one party fails to perform, these laws may make it impossible to enforce the contract. Take, for instance, a contract for the supply of halal meat where the seller breaches by failing to adhere to the halal standards of butchering.²⁶⁶ How is one to determine whether the contract has been breached? The court would have to apply neutral principles to assess whether the procedures were fair without getting into the substance of *shari'ah* laws but the breach is in the process of butchering, which necessitates an inquiry into *shari'ah* requirements.²⁶⁷ However, this would be proscribed under the law as it is written. The court would have to assess the contract under entirely neutral principles, in fact, rewriting the agreement. The result is that none of these agreements would likely be enforceable through a civil court.

Of course, it is possible to argue that requiring Muslims to couch their agreement in neutral language in the first place (although in the halal meat scenario, it is virtually impossible) is not an onerous burden. However, this argument fails to address the question why Muslims should bear the stigma of having their religious law denied recognition by the state?²⁶⁸ One may infer that this erasure of Muslims from the public is precisely what is desired by the architects of the law, despite their denials of such motives.

In addition to these laws that prevent Muslims from seeking judicial intervention, entities that seek to deny Muslims accommodation for

264. *Awad v. Ziriax*, 754 F.Supp. 2d 1298, 1302 (W.D. Okla. 2010).

265. Leah Nelson, *Oklahoma's Shariah Law Ban Creates Controversy*, INTELLIGENCE REP., Spring 2011, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/spring/oklahoma-shariah-law-ban-creates-controversy>.

266. Much like the requirements of Halacha that food be kosher, in order for meat to be halal it must be ritually slaughtered by a Muslim. Observant Muslims will not eat meat that is not halal.

267. For instance, in order to determine whether the contract had been performed, the court would have to inquire into whether the ritual killing had been done according to *shari'ah* standards. That would mean taking testimony about the form of the killing and the words spoken, which are of course embedded in the religion.

268. It should be noted here that Muslims would not be the only ones adversely impacted. Similar measures inevitably bear consequences for other religious groups like Jews, Hindus and Buddhists. In the case of the Arizona law, the lumping of "outsider" religions is explicit. See *supra* notes 55-59 and accompanying text (discussing the Arizona law).

prayer, ritual slaughter, or the wearing of headscarves are numerous.²⁶⁹ Recent discussions about loyalty oaths are another form of marking Muslims as Other.²⁷⁰ These oaths seek to elicit certain kinds of political conformity voluntarily or force a national identity on Muslims that other U.S. citizens do not have to adhere to. Moreover, the requirement reifies the essentialism of Muslim identity in which following Islam as a religion forecloses the possibility of a political affiliation with the nation. It also reifies the identity of the “real” American, defining it as an identity that cannot be tainted by Muslimness.

Another form of expulsion that has occurred from the outset of the War on Terror is rendition. The practice of removing Muslims and sending them to countries in which they can be tortured is a stark effect of the construction and extraordinary treatment of the enemy. Those rendered are given no due process, they are not even informed of what they have been accused and where they are going. The treatment of prisoners assumed to be guilty includes stripping and photographing them nude, shaving their face and heads, depriving them of sleep, slapping them, dousing them with water, forcing them to stand for lengthy periods of time, forcing them to assume stress positions, placing them in cells where they cannot stand, and “walling” to name a few practices. All the cases reported in the public were Muslim men. The U.S. government’s willingness to simply disappear these people regardless of their innocence or guilt chillingly reminds us of what

269. See *Elmenayer v. ABF Freight Sys., Inc.*, 318 F.3d 130 (2d Cir. 2003); *Spell v. Muhammad*, 756 So.2d 748 (Miss. 2000); *E.E.O.C. v. Am. Airlines, Inc.*, 835 F. Supp. 911 (N.D. Tex. 1993).

270. See Huma Khan & Amy Bingham, *GOP Debate: Newt Gingrich’s Comparison of Muslims and Nazis Sparks Outrage*, ABC NEWS (June 14, 2011), <http://abcnews.go.com/Politics/gop-debate-newt-gingrichs-comparison-muslims-nazis-sparks/story?id=13838355#.Txr2qJihDzI>:

At the New Hampshire debate Monday night, Gingrich responded to questions about loyalty tests for administration officials, saying, “[t]he Pakistani who emigrated to the U.S., became a citizen, built a car bomb which luckily failed to go off in Times Square, was asked by the federal judge, how could he have done that when he signed and when he swore an oath to the United States. And he looked at the judge and said, ‘you’re my enemy. I lied.’”

“Now, I just want to go out on a limb here. I’m in favor of saying to people, if you’re not prepared to be loyal to the United States, you will not serve in my administration, period,” Gingrich added, to applause.

But Gingrich didn’t stop there, despite an attempt by moderators to interject. He compared hiring Muslims to how Americans dealt with Nazis in the 1940s: “We did this in dealing with the Nazis. We did this in dealing with the Communists. And it was controversial both times and both times we discovered after a while, you know, there are some genuinely bad people who would like to infiltrate our country. And we have got to have the guts to stand up and say, ‘No.’”

occurs when we treat some groups as requiring extraordinary laws or as deserving no legal protection at all.

Discriminatory legal treatment has social consequences, it evinces a certain permission to follow suit. Crimes against Muslims in the United States after 9/11 have risen dramatically.²⁷¹ Public officials speak about Muslims in terms that would not be tolerated against any other group (except Latinos) in the United States.²⁷² Increasingly, Muslims are suffering employment harms from refusals of accommodation for religious practice to discrimination in hiring and promotion to wrongful termination.²⁷³ In sum, the discourse in the public sphere and official support for unequal treatment has material effects on the lives of Muslims who bear the group responsibility for acts done by individuals and, therefore, must be subject to collective punishment.

2. Internment and Detention

Another effect of the discourse on Muslims and national identity is the fear of the failure of vigilance and the inevitability of another attack. There is more sympathy with the anti-shari'ah laws that seek to draw a closer connection between the practice of Islam and terrorism as that fear is ratcheted up in the public. As the original Tennessee bill evidences, the prevalent view is that shari'ah is part and parcel of terrorism, which makes it difficult to separate "peaceful" practice of religion (and the adherence to shari'ah) with a commitment to violently overthrow the state.²⁷⁴ Anti-shari'ah measures are then justified as a first step to preventing radical Islam from getting a foothold.

Of course, merely preventing shari'ah from being enforced civilly among private citizens may be necessary but it certainly is not sufficient. It does not deal with Muslims themselves and the threat that they pose; it merely seeks to stem their ideology. This has revived the possibility of

271. Aziz Huq, *Defend Muslims, Defend America*, NY TIMES, June 19, 2011, A27, available at <http://www.nytimes.com/2011/06/20/opinion/20huq.html?ref=shariaislamiclaw>.

272. See *supra* note 270. Despite the fact that Gingrich's comments sparked outrage, similar sentiments were expressed by Herman Cain and other Republican candidates. See, e.g., *Ron Paul Takes Swipes at GOP Rivals, Says Michele Bachmann "Hates Muslims"* ABC NEWS (Dec. 17, 2011 8:31 AM), <http://abcnews.go.com/blogs/politics/2011/12/ron-paul-takes-swipes-at-gop-rivals-says-michele-bachmann-hates-muslims>. See also Cyra Akila Choudhury, *Collateral Damage: The Ghettoization of Muslims in the Race for the White House*, in RACE 2008: CRITICAL REFLECTIONS ON A HISTORICAL CAMPAIGN (Mendible, ed., 2010).

273. Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES, Sept. 23, 2010, B1, available at http://www.nytimes.com/2010/09/24/business/24muslim.html?pagewanted=1&_r=1&ref=business.

274. See *supra* note 19 and accompanying text.

internment as both punishment and prevention.²⁷⁵ Albeit these calls come from a small minority of those on the far right; they are present and have found some sympathy among the public.²⁷⁶ While camps are a visceral threat, detention in immigration centers and jails is a reality.²⁷⁷ Immigration law has provided a ready basis for the regulation of Muslims from the period after the Oklahoma bombing to the present. Indeed, it was primarily immigration law that was the basis for the detention of approximately five thousand Muslim and Arab men in the aftermath of 9/11.²⁷⁸

Surveillance and profiling has led to the capture of Muslims but not all of these people have committed crimes or violated immigration laws. Muslims were held without charge or bail as material witnesses immediately after the attacks even when they had nothing to offer by way of evidence.²⁷⁹ Post 9/11, the government shrouded this practice in a veil of secrecy, refusing to articulate on what basis these witnesses were held.²⁸⁰ In some cases, there were no substantial grounds for believing that the witnesses had any real information yet the witnesses were held for extended periods of time. Material witnesses and immigration detainees were not simply held and released once they were found to be innocent; sometimes their incarceration lasted several years and resulted in expulsion through deportation.²⁸¹

275. Nina Bernstein, *Relatives of Interned Japanese-Americans Side With Muslims*, N.Y. TIMES, Apr. 3, 2007, available at <http://www.nytimes.com/2007/04/03/nyregion/03detain.html?pagewanted=all>.

276. MICHELE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR II AND THE WAR ON TERROR (2004). See, e.g., Chris K. Iijima, *Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109, 132 n.132 (2004); Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 ASIAN L.J. 37, 40, 45 (2003); Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (2003).

277. *One man still locked up from 9/11 sweeps*, ASSOCIATED PRESS (Oct. 14, 2006, 6:31:54 PM ET), http://www.msnbc.msn.com/id/15264274/ns/us_news-security/t/one-man-still-locked-sweeps/.

278. David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'*, in COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 248 (Andrea Bianchi & Alexis Keller eds. 2008), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1262792.

279. Ricardo J. Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677, 679-681 (2005).

280. *Id.*

281. *Id.* at 689-690:

The story of Mohammed Bellahouel's detention shows as starkly as that of Brandon Mayfield how judges have authorized "material witness" detentions on unsubstantiated allegations and deferred to prosecutors' claims regarding the need for secrecy. In October 2001, federal agents arrested Mr. Bellahouel, an Algerian immigrant working as

Although no internment camps of the kinds found in the World War II-era have been established or are likely to be established, different kinds of camps are emerging as proxies. Recently, the existence of secret jails has come to light.²⁸² These Communication Management Units house a disproportionate number of Muslims along with tax resisters, eco-activists, and other convicts. According to a lawyer from the Center for Constitutional Rights (“CCR”):

“There is a tenfold over-representation of Muslim prisoners at the CMUs,” he says. “So 6 percent of the national prison population is Muslim, and somewhere in the neighborhood of between 66 and 72 percent of prisoners at the CMUs are Muslim.”²⁸³

The CCR also claims that these prison units are used to segregate and isolate those Muslims who are considered leaders or jailhouse lawyers from the general population. Prisoners are separated from their families

a waiter at a restaurant in a South Florida strip mall. The affidavit filed in support of the government’s application for a “material witness” arrest warrant alleged that Mr. Bellahouel had seen a movie in that mall with one of the 9/11 terrorists. The source of this information was purportedly an unidentified employee of the movie theatre. The affidavit speculated: “It is likely that Bellahouel would have waited on both [Mohammed] Atta and [Marwan] al Shehhi since Bellahouel had worked at the restaurant for 10 months, and both Atta and al Shehhi were frequent patrons during shifts that Bellahouel worked.” The affidavit went on to reveal candidly (if inadvertently) that the FBI had no real reason to suspect Mr. Bellahouel of any wrongdoing. It stated: “In the meantime, the FBI has been unable to rule out the possibility that the respondent is somehow linked to, or possesses knowledge of, the terrorist attacks.”

Despite an affidavit setting forth nothing but conjecture, relying on an undisclosed source, and conceding that the government had no idea whether Mr. Bellahouel had any useful information, a judge in Virginia issued a warrant for his arrest as a “material witness” to the 9/11 attacks. The unsupported inferential leap that Mr. Bellahouel must have waited on two of the 9/11 terrorists is as senseless as the FBI’s contention in Mr. Mayfield’s case that, because there was no record of Mr. Mayfield traveling to Spain, he must have done so under a false identity. Just as the FBI’s reason for incarcerating Mr. Bellahouel was that it had “been unable to rule out” any possible terrorist ties, the government argued three years later that it could not “exclude the possibility that Mayfield was criminally” involved in the Spain bombings.

As unsettling as the fact that Mr. Bellahouel was incarcerated on such thin allegations were the lengths to which the executive and judicial branches of the government went to keep the entire incident from the public. Mr. Bellahouel was secretly held in custody for five months. He was released around March 2002 after testifying before the grand jury in Virginia and being cleared of terrorist links.

282. Margot Williams & Alyson Hurt, *DATA & GRAPHICS: Population Of The Communications Management Units*, NPR (Aug. 24, 2011), <http://www.npr.org/2011/03/08/134227726/data-graphics-population-of-the-communications-management-units>.

283. Carrie Johnson & Margot Williams, ‘*Guantanamo North*’: *Inside Secretive U.S. Prisons*, NPR (Mar. 3, 2011, 1:09 PM), <http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons>.

and are allowed limited human contact with their families. The CCR claims that the Bureau of Prisons use the CMU's to retaliate against those who attempt to stand up for themselves in prison under the guise of preventing radicalism.²⁸⁴

It is interesting to note that the Communications Management Units are nicknamed "Guantanamo North." Indeed, these facilities have taken a lesson from overseas detention centers and prisons like Guantanamo, Bagram, and Camp Delta. The United States continues to hold civilians in detention without bringing charges against them. Recently, the government has conceded that a majority of people detained for being Taliban were actually not members of that group.²⁸⁵ Many were released after relatively short incarcerations, but not all civilians have been so lucky. Others in these camps have been interrogated, tortured, and killed in custody.²⁸⁶ In other words, the "enemy" is not constructed necessarily through their acts but rather through their beliefs and their identity. As such, any Muslim is vulnerable to marking as a terrorist whose rights are secondary to security.

Capturing suspected terrorists and holding them without charge or representation is not infrequent; Philippe Sands notes that it is an ongoing practice that was started at the outset of the War on Terror.²⁸⁷ The recent National Defense Authorization Act of 2012 reinforces the power of the executive to capture and hold those suspected of terrorism without trial "until the end of hostilities." What is remarkable about this new bill is that it extends the power to detain to American citizens captured abroad. In the U.S., Muslims may be detained through extensive national security and immigration laws, while in places like Afghanistan, they are subject to the requirements of a "war" which has resulted in random capture and internment without charge, possibly for life.²⁸⁸

284. *Aref, et al. v. Holder, et al.*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/aref-et-al-v-holder-et-al> (last visited Jan. 19, 2013); see also Muneer I. Ahmed, *Guantanamo is Here: The Military Commissions Act and Noncitizen Vulnerability*, 2007 U. CHI. L. F. 1 (2007).

285. Gareth Porter, 'Most captured Taliban were civilians,' AL JAZEERA (June 27, 2011, 15:04), <http://english.aljazeera.net/indepth/features/2011/06/2011627141529522163.html>.

286. Mark Mazzetti & Scott Shane, *Interrogation Memos Detail Harsh Tactics by the C.I.A.*, N.Y. TIMES, Apr. 16, 2009, A1, available at <http://www.nytimes.com/2009/04/17/us/politics/17detain.html?ref=ciainterrogations>.

287. See PHILIPPE SANDS, *LAWLESS WORLD: A WHISTLE-BLOWING ACCOUNT OF HOW BUSH AND BLAIR ARE TAKING THE LAW INTO THEIR OWN HANDS* 160 (2006); ANDY WORTHINGTON, *THE GUANTANAMO FILES: THE STORIES OF THE 774 DETAINEES IN AMERICA'S ILLEGAL PRISON* 188 (2007).

288. WORTHINGTON, *supra* note 287, at 188.

C. Collateral Damage/Death

Those incarcerated within the prison system of the United States have protections of laws and a civil society that inquires into such unfortunate incidents as custodial death. As a result, prisoners held inside the country's borders are less likely to die in custody or be subject to the degree of torture suffered by Muslims in remote places like Iraq or Afghanistan and in places to which they may be rendered secretly through the security apparatus.²⁸⁹ In addition to the targeted killing of militants and the deaths in custody, the vast majority of the loss of life at the hands of U.S. forces has occurred from drone attacks and bombing.

In conducting the war on terror, the United States has been the catalyst in the loss of over a hundred thousand Iraqi civilian lives.²⁹⁰ In Afghanistan, conservative estimates claim that a third of the people killed in drone attacks are civilians.²⁹¹ On the other hand, the Brookings Institute claims that more than six hundred civilians have been killed, approximately ten for every militant.²⁹² Aside from bombings, there have also been several stories of U.S. troops killing civilians for sport and of U.S. contractors killing unarmed civilians in Iraq and Afghanistan.²⁹³ From these stories, it is obvious that one effect of the creation of a Muslim enemy, making it the object of national security, is the ease with which that enemy can be killed and the lesser value of Muslim lives.²⁹⁴ And that killing is legally justified through the clinical term collateral damage or exceptionalized as in the extrajudicial murders of civilians, nevertheless fails to address the underlying rationale for why such a high cost to civilians is possible at all.

Judith Butler notes that some lives are not grievable;²⁹⁵ that is, they

289. *Id.*

290. *Iraq death toll 'soared post-war,'* BBC NEWS (Oct. 29, 2004, 16:09 GMT), <http://news.bbc.co.uk/2/hi/3962969.stm>.

291. Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2010*, NEW AM. FOUND., 3 (Feb. 24, 2010), <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/bergentiedemann2.pdf>.

292. Daniel L. Byman, *Do Targeted Killings Work?*, BROOKINGS (July 14, 2009), <http://www.brookings.edu/research/opinions/2009/07/14-targeted-killings-byman>.

293. Craig Whitlock, *Members of Stryker Combat Brigade in Afghanistan accused of killing civilians for sport*, WASH. POST (Sept. 18, 2010, 9:39 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/18/AR2010091803935.html>.

294. David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, A1, available at <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html>.

295. I borrow this term from Judith Butler who has written eloquently about the unmourability of the lives of some people. See JUDITH BUTLER, *PRECARIOUS LIFE: THE POWER OF MOURNING AND VIOLENCE* (2006).

evoke no empathy for their deaths.²⁹⁶ Certainly the construction of the dead as belonging to an uncivilized, premodern, and violent culture and religion coupled with the antiseptic language used to describe what they experience (collateral damage, collateral mortality, precision bombing) makes distance and avoidance of the stark realities much more possible.²⁹⁷ I would go so far as to suggest that it is not merely that there is no empathy for the deaths of Muslim civilians and even combatants but that among some supporters of the war, there is a sense that these deaths are necessary.²⁹⁸ They are the just desserts of a people who should collectively pay for the crimes of a few nominal co-religionists. This idea of collective punishment, the idea that entire populations can be subjected to violence in order to suppress resistance or to punish the few is one that dates back to colonial times if not before and acceptable for those waging the war on terror.²⁹⁹

The ongoing vilification of Muslims starts with seemingly inconsequential assaults like their degradation through these anti-shari'ah laws and unequal treatment or protection by the state and in society. Yet it progresses easily to justifications for collective punishment: from mass surveillance to the indefinite detention of Muslim men without charge or even proof of terrorist activity, to their custodial deaths, and then ending in the indiscriminate killings of

296. JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* 31 (2009):

The shared condition of precariousness implies that the body is constitutively social and interdependent—a view clearly confirmed in different ways by both Hobbes and Hegel. Yet, precisely because each body finds itself potentially threatened by others who are, by definition, precarious as well, forms of domination follow. This standard Hegelian point takes on specific meanings under contemporary conditions of war: the shared condition of precariousness leads not to reciprocal recognition, but to a specific exploitation of targeted populations, of lives that are not quite lives, cast as “destructible” and “ungreivable.” Such populations are “lose-able,” or can be forfeited, precisely because they are framed as being already lost or forfeited; they are cast as threats to human life as we know it rather than as living populations in need of protection from illegitimate state violence, famine, or pandemics. Consequently, when such lives are lost they are not greivable, since, in the twisted logic that rationalizes their death, the loss of such populations is deemed necessary to protect the lives of “the living.”

297. *Id.*

298. Members of my own extended family were killed in the 9/11 attacks on New York. *See also* Rick Hampson, *For families of Muslim 9/11 Victims, a new pain*, USA TODAY (Sept. 9, 2010, 1:56 PM), http://www.usatoday.com/news/nation/2010-09-03-1Amuslims911_CV_N.htm. According to the Iraq Body Count, the number of people killed in Iraq alone is over 100,000. *See* IRAQBODYCOUNTO.ORG, www.Iraqbodycount.org (last visited Jan. 19, 2013).

299. For a discussion of collective punishment meted out in the United States, *see* ANNY BAKALIAN & MEHDI BOZOGMEHR, *BACKLASH 9/11: MIDDLE EASTERN AND MUSLIM AMERICANS RESPOND* 1-22 (2009); for a discussion of international collective punishment, *see* Larry Cata Backer, *The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN ST. INT'L L. REV. 509 (2002).

Muslims in drone attacks. All attempts at armed resistance are neatly folded back into the narrative of their barbarism and aggression, reinforcing our own sense of justification for the wars. Nonviolent resistance is all that remains morally available to those who are subject to overwhelming (but therapeutic) violence. Civil rights in the United States and human rights are, then, an important means by which to resist the juggernaut of a globalized national security regime that threatens us with Dystopia 2.³⁰⁰ But these means must overcome the superior claims of national security and a state that has the power to disregard law or make it up to suit when expedient.³⁰¹

V. CONCLUSION: TOWARDS AN INCLUSIVE SECURITY

In this Article I have made the argument that these anti-shari'ah laws are not about protecting the United States' secular legal system nor are they about national security. It has challenged the use of family law as evidence that the laws are a necessity. The cases fail to support the claim that Muslims are using shari'ah in family law as a Trojan horse for the infiltration of the state. Rather, these laws reflect a continuing hostility towards Muslims and the will to discriminate on the basis of religion. Through the Article I have traced some of the methods used in stereotyping and vilifying Muslims in the United States and globally, and it has examined some of the effects of such identity constructions. In sum, I have argued that even if they are ineffective as national security laws and even if they are struck down as unconstitutional, these anti-shari'ah laws have a social effect on Muslims. The condemnation harm is felt before the challenge reaches the courthouse doorsteps. As such, they must be taken seriously.

Further, I argue that what is done to Muslims within the United States can be linked to what is done to Muslims globally in the War on Terror. There is a dialectical relationship of fear and loathing of Muslims both here and there—the identities co-construct each other. The anti-shari'ah measures denying Muslims the same rights as those given to other religious communities parallel the denial of human rights or international law that are available to all people to Muslims globally. The tendency then is to essentialize Muslims in a way that makes them

300. See *supra* notes 1 and 2 and accompanying text describing Dystopia 1 & 2.

301. The Homeland Security Act of 2002 contains a "sense of Congress" provision that recognizes the broad powers afforded the President in the event of a serious threat to national security. For instance, the Insurrection Act (10 U.S.C. §331-335) and the Stafford Act (42 U.S.C.A. §5121-5207) allow the President to use the military to restore public order. 6 U.S.C. §466(a)(5) (2006).

forever alien regardless of where they are and the result is a shrugging willingness to treat them with impunity and to sacrifice “their” security for ours.

In the rush to create a visible enemy, to delineate the threat, what is often forgotten is the vulnerability of Muslims who are caught between the hammer of a nationalist, exclusionary identity construction espoused in national security law and the anvil of an Islamist political ideology that uses religion and constructs Muslim identity to similarly exclude the vast majority of Muslims.³⁰² What are the consequences of acting and legislating based on the belief that Muslims cannot be real Americans or that they should be denied the protection of human rights globally? What is the cost of marginalizing a community as “alien” or outcast? I want to suggest two very real consequences.³⁰³

A. *Other Forms of Terror*

First, the concentration on Muslims and Islamist terrorism fails to bring to public attention the threat of terrorism committed by people like Anders Breivik and Timothy McVeigh. In spite of the media attention, the 2011 King hearings on so-called homegrown “Muslim radicalism” failed to bring to light the kind of evidence that would demonstrate that such radicalism is occurring in the Muslim communities. Rather recent data shows that radicalism is in fact declining. Yet the threat from far-right extremists that recruit young people for their militias has been an ongoing threat to the lives and security of many minorities in the United States.³⁰⁴ Moreover, such a focus on Muslims after 9/11 fails to examine the growing societal issues that is giving rise to violence against

302. Muslims have been on the frontline of terrorism for several decades. Recent attacks have targeted Pakistan, Morocco, Bangladesh, and Indonesia to name a few countries. See, e.g., *Timeline: Terrorist attacks in Pakistan in May 2011*, INT’L HERALD TRIBUNE, May 25, 2011, available at <http://tribune.com.pk/story/175661/timeline-terrorist-attacks-in-pakistan-in-may-2011/>; *Moroccan tourist café terrorist attack leaves at least 15 dead*, THE GUARDIAN (Apr. 28, 2011, 15:16 EDT), <http://www.guardian.co.uk/world/2011/apr/28/marrakech-tourist-cafe-terrorist-attack>; Eben Kaplan, *Bangladesh: Nationwide Attacks Raise Fears of Growing Islamist Presence*, COUNCIL ON FOREIGN RELATIONS (Aug. 29, 2005), <http://www.cfr.org/bangladesh/bangladesh-nationwide-attacks-raise-fears-growing-islamist-presence/p8767>; Farouk Arnaz, *Indonesian Police Targeted in “Terror Attack,”* THE JAKARTA GLOBE (May 25, 2011), <http://www.thejakartaglobe.com/home/breaking-news-indonesian-police-targeted-in-terror-attack/443121>.

303. See generally Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of Cointelpro and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051 (2002).

304. See Sheryl Gay Stolberg & Laurie Goodstein, *Domestic Terrorism Hearing Opens with Contrasting Views on Dangers*, N.Y. TIMES, Mar. 10, 2011, A15, available at <http://www.nytimes.com/2011/03/11/us/politics/11king.html>.

minorities and fails to label exactly the same acts as terror. In other words, the current national security focus on Muslims as the main threat blinds us to the possibility of other threats that come from secular or other religious groups who are actively seeking to undermine our secular society and way of life.³⁰⁵ That makes prevention much harder.

I have argued elsewhere³⁰⁶ that racial profiling as a tactic to prevent terrorism is bound to fail; over the course of the last ten years, I have been largely vindicated in that view. Further, I have argued that focusing on one community leaves a rather large blind spot which other groups are likely to exploit. As mentioned above, this blind spot was precisely what led to the immediate attribution of the Norway massacre to Muslims and immigrants.³⁰⁷ What is even more perplexing is that despite the fact that a “homegrown,” “real” Norwegian perpetrated the violence, the following debate was about whether further *immigration* curbs should be put into place.³⁰⁸ In addition, the connection between Anders Breivik and the propaganda of U.S. proponents of Islamophobia, did little to quell the appetite for such extremism on the part of both U.S. politicians and anti-Muslim groups.³⁰⁹ There was little conversation about the kind of prejudice that fueled the steps needed to prevent racism. Rather, it is perplexing to note that even when Muslims have not committed acts of terrorism, they have been made to pay.

B. Alienating Stakeholders and Creating Insecurity

This brings me to the next problem of an exclusionary national security law. A legal regime based on stereotypes that uses identities like race and religion rather than politics and actions runs the risk of alienating those best able to help secure communities from terrorist violence. Profiling and surveillance and gathering data on religious observance is wrong headed because it implies that all Muslims are suspect. More dramatically, the indiscriminate killings of Muslims globally in the War on Terror particularly through drone attacks and bombing is precisely the kind of security action that implies that we do

305. See *supra* note 226 and accompanying text (discussing Anders Breivik). A similar reaction followed Timothy McVeigh's Oklahoma City bombing. See also *Terror from the Right*, SOUTHERN POVERTY LAW CTR., <http://www.splcenter.org/get-informed/publications/terror-from-the-right> (last visited Jan. 19, 2013) (detailing the number of terrorist actions from the right since the Oklahoma bombing).

306. See *Terrorists & Muslims*, *supra* note 251.

307. See *supra* note 226 and accompanying text (discussing Breivik).

308. *Id.*

309. *Id.*

not care who “they” are because “they” are all one indistinguishable enemy population.

Alienating, stigmatizing, and expelling Muslims from the normal protection of laws, demanding assimilation and a show of patriotism through the conversion away from Islam or forcibly closing the public space to any show of “Muslim-ness,” driving the community into the shadows, will not work to secure us. Rather, these strategies become recruiting tools for organizations that prey upon the disaffection and resentments that they create. It is not difficult to imagine that the Taliban will use the accidental burning of Qur’ans at the infamous Bagram Airbase as proof that the United States is engaged in a crusade. The powerful combination of ongoing civilian deaths through bombings, the threat of Qur’an burnings by a radical Christian preacher in Florida, vocal racialized discourse by political leaders, followed by actual Qur’an burnings at a notorious site of torture makes for an easy inference that Islam is the target. And terror organizations like al Qaeda offer an opportunity to turn those resentments against imperialism and occupation into deadly action.

C. Security with Inclusion

If identity-based strategies do not work, we must find another way. I want to suggest that what *will* provide security is the continued integration that most Muslims in the United States have achieved *despite* attempts to marginalize them after 9/11. A national security framework that encourages trust in law enforcement and that deals in good faith with all communities would work better to secure our communities. As Los Angeles County Sheriff Lee Baca noted in his testimony to the King Commission:

According to the Muslim Public Affairs Council (MPAC), utilizing information provided by respected organizations such as the Congressional Research Service, the Heritage Foundation, and Southern Poverty Law Center, there have been 77 total terror plots by domestic, non-Muslim perpetrators since 9/11. In comparison, there have been 41 total plots by both domestic *and international* Muslim perpetrators during the same period. Reports indicate that American Muslims helped foil seven of the last ten plots propagated by Al-Qaeda within the United States. According to MPAC, evidence clearly indicates a general rise in violent extremism *across ideologies*. Clearly, we should be examining radicalization as an issue that affects all groups regardless of religion It is critical to build mutually respectful relationships with American Muslim communities and

endeavor to work together to protect all Americans whether locally or internationally The Muslim Community in Los Angeles is an active participant in the securing of our Homeland When I made critical outreach to the community after 9/11, I was overwhelmed by the number of Muslims who, while under threat from misinformed sources, were ready and willing to connect with law enforcement to help keep the peace.³¹⁰

As Sheriff Baca notes, without vital intelligence and trust, ensuring security becomes more difficult. He aptly points out that it is impossible to “arrest or enforce your way out of the radicalization issue.” Despite the belief in some quarters that muscular police action and even extrajudicial killings are justified, the war on terror has not given the Executive Branch a blank check. The Supreme Court has acted to protect the liberties of American citizens by pushing back on the national security establishment.³¹¹

Similarly, since the beginning of the War on Terror and the wars in Afghanistan and Iraq, there has been a vigorous push back in the realm of the international on the Bush doctrine of preemptive attacks and his Manichean worldview. There has been some resurgence of critical thought drawn from earlier periods of colonialism and imperialism that has shed light on the global ambitions behind the War on Terror that threatened nations with extinction. More needs to be done to interrogate the identity construction of the enemy that operates both globally and locally and that seems to allow for a legally justified discrimination. Greater critical energies need to be focused on the failure of human rights to protect vulnerable populations from the demands of security. After all, we must include Muslims and their insecurity in the calculus if we are to ever win the War on Terror rather than fighting it endlessly.

Recognizing the humanity of Muslims globally and valuing their lives is the promise of human rights and international law. Allowing all Americans to believe in whatever religion with pride and safety, this is the promise of the United States and the vision of our founding fathers and mothers. The current anti-shari'ah measures and the rest of the spectrum of legal and police/military interventions, the discursive methods and social effects of the creation of a vulnerable minority

310. See Statement of Sheriff Leroy Baca, *supra* note 244.

311. U.S. v. Ghailani, 743 F.Supp.2d 261 (2010) (holding that evidence obtained through illegal means may be excluded); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the Geneva Convention was applicable and that military commissions were illegal under the Uniform Code of Military Justice and international law); Rasul v. Bush, 542 U.S. 466 (2004)(holding that Guantanamo detainees can invoke habeas corpus).

singled out for punishment based on identity betray both these promises.