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## ISLAMIC LAW IN AMERICAN COURTS: GOOD, BAD, AND UNSUSTAINABLE USES

EUN-JUNG KATHERINE KIM\*

*A number of states have proposed initiatives or implemented laws that prohibit state courts from applying, considering, or interpreting foreign law, and in particular, Islamic law. The constitutionality of anti-Sharia legislation is in question. Its proponents claim that the Sharia ban protects state and federal constitutional rights, whereas its opponents claim that the ban infringes on the religious freedom of Muslims. The all-or-nothing approach to anti-Sharia legislation misses the distinction between cases where Islamic law should be given consideration from the cases where it should have no influence on judicial decision. This Essay provides a principled distinction between the different uses of Islamic law and shows how the courts can preserve a balance among religious liberty and other constitutional rights. By applying three principles—neutrality, reciprocity, and protection—derived from the core commitments of a liberal democratic society, this Essay explains the distinction between good, bad, and unsustainable uses of Islamic law in American courts: (1) good use where the judge’s application, consideration or interpretation of Islamic law should be sustained; (2) bad use where the grounds that render the use unsustainable may be overridden by other considerations; and (3) unsustainable use that lacks overriding considerations. This Essay offers a way to avoid the undesirable consequences of a strict ban or an unrestricted permission on Sharia use by applying the three principles to a number of cases involving Islamic law reviewed by American courts.*

### INTRODUCTION

A newlywed Muslim couple from Morocco appeared at a New Jersey court in 2008. The wife sought a restraining order against her husband, who had repeatedly raped her. The judge refused to order protection for the wife on grounds that a wrongful intent, which is necessary for sexual assault, could not be identified. According to the

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judge, the husband was operating under the religious precepts of Islam, which permitted him to have coerced sex with his wife.<sup>1</sup>

Judicial decisions that rely on Islamic law—and as a result, violate the rights of litigants—have led to support for legislation that prohibits U.S. state courts from applying, considering, or interpreting Islamic law. A number of states have proposed initiatives or implemented laws that bar judges from using foreign judgment as precedent or enforcing foreign law that violates state or federal constitutional rights.<sup>2</sup> “Anti-Sharia” legislation received national attention when the voters of Oklahoma passed a constitutional amendment stating that “the courts shall not consider international or Sharia Law.”<sup>3</sup> A federal court blocked the amendment on grounds that banning Sharia law from legal proceedings would undermine religious liberty protected by the First Amendment.<sup>4</sup> Despite the court’s decision, a number of state legislatures have approved the Sharia ban in light of notorious cases where the courts applied Sharia law or enforced a foreign judicial decision that resulted in violation of rights.

There is a clear divide in the legal community regarding the constitutionality of anti-Sharia legislation. Its proponents claim that legislating against Sharia use in American courts would preserve fundamental American values of liberty and freedom, and would protect the constitutional rights of Muslims residing in the United States.<sup>5</sup> The absence of the ban can deprive Muslims (and non-Muslims) of their constitutional protections, an absurd consequence reflected in the New Jersey rape case. On the other hand, the opponents of the Sharia ban argue that it infringes on the civil liberties and religious freedom of Muslims.<sup>6</sup> Oklahoma’s constitutional amendment violates not only the First

1. *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010). The decision was reversed on appeal. *Id.* at 428.

2. Since 2010, two dozen states have proposed legislation that prohibits judges from considering foreign or international law in American courts. Varying forms of anti-Sharia legislation include H.R. 2379, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.R. 79, 2012 Leg., Reg. Sess. (Kan. 2012); H.R. 785, 2010 Leg., 10RS-899 Reg. Sess. (La. 2010); H.R. 1253, 2012 Legis. Assemb., 87th Sess. (S.D. 2012); H.R. 3768, 106th Gen. Assemb., 2009-2010 Sess. (Tenn. 2010). Idaho’s state legislature passed a non-binding resolution: H.R. 44, 60th Leg., 2d Reg. Sess. (Idaho 2010).

3. H.R.J. 1056, 52d Leg., 2d Sess. (Okla. 2010).

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

5. See *American Laws for American Courts*, AM. PUB. POL’Y ALLIANCE, <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/> (last visited Mar. 21, 2014); CTR. FOR SEC. POL’Y, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASE 8 (2012); Robert Spencer, *The Necessity of Anti-Sharia Laws*, AMERICAN THINKER (Mar. 13, 2012), [http://www.americanthinker.com/2012/03/the\\_necessity\\_of\\_anti-sharia\\_laws.html](http://www.americanthinker.com/2012/03/the_necessity_of_anti-sharia_laws.html).

6. See Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT’L L., 107, 107–12 (2012). See generally Robert K. Vischer, *The Dangers of Anti-Sharia Laws*, FIRST THINGS (Mar. 1, 2012), <http://www.firstthings.com/article/2012/02/the-dangers-of-anti-sharia-laws>; Martha F. Davis & Johanna Kalb, *Oklahoma State Question 755 and An Analysis of Anti-International Law Initiatives*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (Jan. 2011), available at [http://www.acslaw.org/sites/default/files/davis\\_and\\_kalb\\_anti-international\\_law.pdf](http://www.acslaw.org/sites/default/files/davis_and_kalb_anti-international_law.pdf).

Amendment, but also three other clauses of the federal Constitution.<sup>7</sup> Further, the legal consequences of implementing the Sharia ban are unacceptable. Prohibiting judges from considering foreign law conflicts with established legal principles and practices, including deference to foreign judgments “when resolving family law, estate, or contract disputes involving the activities of Americans while abroad or of foreign nationals living in the United States.”<sup>8</sup> By taking an all-or-nothing approach to anti-Sharia legislation, the two opposing camps often miss the distinction between cases where Islamic law should be given consideration and cases where it should have no influence on judicial decision.

This Essay provides a principled distinction between the different uses of Islamic law to show how the courts can preserve a balance among religious liberty and other constitutional rights. A strict ban that prohibits judges from using Sharia in their rulings would undermine a litigant’s right to religious freedom, whereas a blanket permission that gives total discretion to judges can lead to the absurd consequence that a litigant’s basic right to physical security is not enforced. By applying three principles—neutrality, reciprocity, and protection—derived from the core commitments of a liberal democratic society, this Essay explains the distinction between good, bad, and unsustainable uses of Islamic law in American courts. Part I discusses the good use of Islamic law, where the judge’s application, consideration, or interpretation of Islamic law should be sustained; Part II discusses the bad use where the grounds that render the use unsustainable may be overridden by other considerations; and Part III discusses the unsustainable use that lacks overriding considerations. This Essay offers a way to avoid the undesirable consequences of a strict ban or an unrestricted permission on Sharia use by applying the three principles to a number of cases involving Islamic law adjudicated in American courts.

The three principles are offered as a guide for judges in applying, considering, and interpreting Islamic law rather than acting as necessary and sufficient conditions that determine the three categories of use. The purpose of articulating the three principles is to guide both the legal community and the public in evaluating the uses of Islamic law in American courts. The application of the principles of neutrality, reciprocity, and protection to particular cases shows that using Islamic law in the courts can protect important rights in some cases but violate rights in others. A nuanced understanding of the different uses will

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7. In addition to the Establishment and Free Exercise Clauses of the First Amendment, it has been claimed that Oklahoma’s constitutional amendment violates the Contracts Clause of Article I, the Supremacy Clause of Article VI, and the Due Process Clause of the Fourteenth Amendment of the federal Constitution.

See N.Y. CITY BAR COMM. ON FOREIGN & COMP. L., THE UNCONSTITUTIONALITY OF OKLA. REFERENDUM 755 – THE “SAVE OUR STATE AMENDMENT” 2 (2010), available at <http://www.nycbar.org/pdf/report/uploads/20072027-UnconstitutionalityofOklahomaReferendum755.pdf>.

8. Davis & Kalb, *supra* note 6, at 8.

correct the misunderstanding that all uses of Islamic law in American courts threaten rights, which motivates the public effort to reduce judicial discretion and approve anti-Sharia legislation.

### I. GOOD USE: NEUTRALITY PRINCIPLE

In 2001, the Islamic Center of Little Rock (ICLR) hired Monir El-Farra, an imam or Islamic minister, under an employment contract. It provided that ICLR could terminate the contract “on valid grounds according to Islamic Jurisdiction (Shari’a)” upon sixty days’ notice.<sup>9</sup> In 2002, some members of ICLR expressed grievances against El-Farra regarding his sermons, conduct that “contradicts the Islamic law,” and interference in ICLR’s administration.<sup>10</sup> After an in-house arbitration and two warning letters stating concerns and requirements for improvement, ICLR voted to terminate El-Farra with a payment for sixty days.<sup>11</sup> El-Farra filed a complaint against ICLR for defamation and breach of contract. The Circuit Court of Arkansas dismissed El-Farra’s complaint for lack of subject-matter jurisdiction.<sup>12</sup> The Supreme Court of Arkansas affirmed that the First Amendment prohibited the court’s exercise of jurisdiction in the matter because it would require an inquiry into a religious doctrine to determine whether El-Farra’s conduct violated the principles that govern an Islamic organization.<sup>13</sup>

In *El-Farra v. Sayyed*, the court recognized broad protections for the internal activities of religious organizations against governmental interference.<sup>14</sup> The decision falls under the “ministerial exception,” a doctrine rooted in the First Amendment that prevents employees who perform a religious function from suing their employers (i.e., religious organizations) over most employment disputes.<sup>15</sup> The Free Exercise Clause of the First Amendment provides that religious organizations have the right to choose and discipline their employees who perform religious functions, and the Establishment Clause prevents the courts from reviewing cases dealing with ecclesiastical disputes.<sup>16</sup> In *El-Farra*, the Arkansas Supreme Court stated that the “federal courts have repeatedly concluded that any attempt by civil courts to limit a religious institution’s choice of its religious representatives would constitute an impermissible burden upon that institution’s First Amendment

9. *El-Farra v. Sayyed*, 226 S.W.3d 792, 793 (Ark. 2006).

10. *Id.*

11. *Id.*

12. *El-Farra v. Sayyed*, 2005 WL 4718371, at \*1 (Ark. Ct. App. 2005).

13. *El-Farra v. Sayyed*, 226 S.W.3d 792 (Ark. 2006).

14. *Id.* at 794.

15. See Serbian Eastern Orthodox Diocese for the United States and Canada v. Milojevich, 426 U.S. 696, 713 (1976); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997).

16. *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp’t Opportunity Comm’n* 132 S.Ct. 694, 702-07 (2012). For a discussion of the ministerial exception in contract cases following *Hosanna-Tabor*, see Kevin J. Murphy, Note, *Administering the Ministerial Exception Post-Hosanna-Tabor: Why Contract Claims Should Not be Barred*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383 (2014).

rights.”<sup>17</sup> The hiring and firing of an imam are activities included in the protected sphere of religious organizations and the courts cannot override ecclesiastical decisions that compose the protected sphere. A judgment on whether an imam fulfilled the mission of the religious organization would involve using Islamic law as the basis of the assessment. A court’s application of non-neutral principles derived from a religious doctrine would be an illegitimate interference into the internal matters of a religious organization. A legal practice that gives weight to a secular court’s assessment of the fit between a religious doctrine and the decision of a religious organization would merge—rather than separate—church and State.<sup>18</sup>

The court’s decision in *El-Farra* represents a good use of Islamic law because it is compatible with—and further supports—a constitutional right, in particular, the right to religious liberty.<sup>19</sup> The court recognized that Islamic doctrine is the proper source of governing principles for an organization that congregates people who pursue a corporate life guided by religious precepts. It should be noted that the compatibility between a court’s use of Islamic law and United States law does not amount to their convergence on a legal rule or principle. Rather, Islamic law is relevant to the *El-Farra* decision in the following two ways: (1) the court’s recognition of the authority of Islamic law in governing a specific activity (e.g., an employment decision) within a religious organization; and (2) the inclusion of the activity within the protected sphere of religious organizations according to state, federal, or constitutional law. A court’s inquiry into Islamic law to determine whether an employment contract has been breached would invade the protected sphere of a religious organization. While the enforcement of a contract that requires intrusion into the internal matters of ICLR would undermine religious liberty, there are obvious limits to the range of activities permitted for the sake of religious liberty. For example, religious organizations are prohibited from disciplining their members with the means of physical punishment. Granting authority to Islamic law over activities excluded from the protected sphere of a religious organization would fail to constitute a good use of Islamic law.

A court promotes religious liberty through both non-enforcement and enforcement of Islamic law. In *El-Farra*, the court’s recognition of the authority of Islamic law in the protected sphere of ICLR required non-enforcement. However, there are cases in which non-enforcement would undermine religious liberty. A court might protect an individual’s religious liberty by enforcing a valid contract or probating a will that incorporates the requirements of Islamic law. In *Awad v. Ziriax*,

17. See *El-Farra*, 226 S.W.3d at 794.

18. To distinguish the sovereign political entity (recognized in international law and organized under a government) from sub-entities, “State” refers to the former and “state” refers to the fifty states of the United States.

19. I am borrowing Will Kymlicka’s distinction between good, bad, and intolerable group rights. My usage, however, differs from his original definitions in the sense that the evaluative terms are applied not to rights but to the uses of Islamic law. See Will Kymlicka, *The Good, the Bad, and the Intolerable: Minority Group Rights*, 33 *DISSENT* 22–30 (1996).

Awad alleged that the proposed "Save Our State Amendment," which would bar Oklahoma state courts from considering Islamic law in making judicial decisions, violated his free exercise rights.<sup>20</sup> One of the concerns raised against the proposal was that it would disable a court from probating Awad's will and testament, which incorporated by reference aspects of what SQ755 ("Save Our State Amendment") defined as Sharia Law.<sup>21</sup> Awad claimed that the proposed amendment was "not facially neutral" because it specifically prohibited the consideration of Islamic law. While the amendment would encroach upon the religious liberty and property rights of Muslim citizens, the amendment would safeguard for other citizens the same liberty and right against governmental interference. He claimed that the violation of neutrality, as required by the Establishment Clause, would send an unmistakable message that Muslims are religious and political outsiders in their own State.<sup>22</sup>

The decisions in *El-Farra* and *Awad* reflect different aspects of the neutrality requirement of the Establishment Clause: (1) the prohibition of governmental interference in the protected sphere of religious organizations (the non-interference requirement exemplified in *El-Farra*) and (2) the prohibition of showing preference for one religion over another (the non-preference requirement in *Awad*). The non-preference requirement of neutrality prohibits institutions from granting a privileged status to (or discriminating against) a particular religious doctrine. The State must refrain from exhibiting partiality by endorsing the values of a particular religious group while rejecting the values of another group. For example, a judge who considers a particular religious doctrine but refuses to consider another religious doctrine in his or her rulings would violate the non-preference requirement of neutrality. A complaint in *Awad* was that Oklahoma's constitutional amendment "conveys an official government message of disapproval and hostility toward his religious beliefs, that sends a clear message he is an outsider, not a full member of the political community, thereby chilling his access to the government . . . ."<sup>23</sup> By prohibiting the courts from enforcing contracts based on Islamic requirements, a Muslim citizen's values suffer institutional exclusion and thereby undermine his status as a member of the political community. A liberal democratic society maintains institutional mechanisms that eliminate discrimination based on religious difference, and provides legal protections for minority religious groups so that they are not disadvantaged in society for carrying out religious activities within the protected sphere.<sup>24</sup>

State neutrality toward different religious doctrines has both moral and epistemic significance in a liberal democratic society. The moral significance of neutrality is that it expresses respect for the moral equal-

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

21. *Id.* at 1304.

22. *Id.* at 1303.

23. *Id.*

24. BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 32-40 (2001).

ity of persons. A liberal democratic society recognizes the equal moral status of persons by respecting their rational autonomy, i.e., the self-governing capacity to make decisions based on reasons. This liberal commitment is expressed through the democratic process that gives citizens an equal opportunity to shape the institutions that exercise coercive power over them. The institutional recognition of moral equality through a democratic process allows citizens to designate a limit to coercive power and carve out a protected sphere within which they can freely pursue their life projects. The commitment to moral equality is also reflected in the equal protection of religious liberty that allows citizens to exercise their rational capacity to acquire (or reject) beliefs and values from a range of options, including religious doctrines. Under liberal institutions, citizens enjoy the freedom to evaluate various beliefs and engage in activities (e.g., worship) informed by those beliefs within the protected sphere of non-interference.<sup>25</sup>

Institutions that guarantee freedoms necessary for the exercise of rational autonomy should not discriminate against (or show preferences for) beliefs and related activities, as long as the activities do not harm or encroach upon the protected sphere of others. If a liberal democratic society maintains institutions that protect the rational autonomy of citizens, and at the same time discriminates against beliefs or interferes in the activities that result from exercising rational autonomy, then the institutions fail to embody equal concern and respect for citizens. Further, the equal treatment of religious groups requires that the values of a minority religious group that diverge from the majority not be excluded from the political community. Majority and minority religious groups have equal standing in the political community; the legal institution would not be justified in privileging the majority by making demands according to their deep-seated beliefs, but ruling over the minority with demands that conflict with their core beliefs. Given that the activities informed by both sets of beliefs belong in the protected sphere, the legal institution should correct rather than embody unequal treatment of persons based on their beliefs. Partiality toward (or discrimination against) a particular religious group violates the principle of moral equality that governs liberal institutions.<sup>26</sup>

State neutrality also has epistemic significance. Under liberal institutions that protect religious liberty, citizens arrive at different conclusions on the good and the true. The principles of rationality do not require that thoughtful persons agree on the answers to fundamental questions. The exercise of rational autonomy leads to a reasonable disagreement on questions of religion—e.g., whether religious beliefs can be justified and what is the correct interpretation of a religious doctrine. Citizens of a liberal democratic society make different judgments on these questions and the disagreement cannot be easily explained in terms of ignorance or defective rational capacity.<sup>27</sup> Reasonable disa-

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25. JOHN RAWLS, *POLITICAL LIBERALISM* 47-58 (1st ed. 1993).

26. BARRY, *supra* note 24, at 24-32 (2001).

27. JOHN RAWLS, *POLITICAL LIBERALISM* 54-55 (1st ed. 1993).



greement is the expected result of liberal institutions and, hence, it would be unjustifiable for the State to establish orthodoxy or to show preference for a particular religious doctrine (the non-preference requirement of neutrality). Further, the State does not have rational grounds to resolve the disagreement or assess the degrees of reasonableness of the different religious doctrines and their interpretations. Even if the State had privileged access to eternal truths, ranking the doctrines would involve assigning differential rational capacities to citizens who endorse them. Given that the effort to eliminate or resolve a reasonable disagreement on religious beliefs would result in the unjustifiable use of power, the only option for a liberal democratic State is to remain neutral between different religious doctrines by exercising epistemic restraint, i.e. non-interference, in religious matters.<sup>28</sup>

## II. BAD USE: RECIPROCITY PRINCIPLE

In 2001, two Muslim citizens of India married in Andhra Pradesh, moved to the United States, and had one child. They lived in Michigan for two years before their separation in 2008. The husband returned to India in April 2008, and performed the triple *talaq*, a method of divorce under Muslim personal law by which a husband divorces his wife by pronouncing “I divorce thee” three times. In May 2008, the wife also filed for divorce in Michigan. The husband then filed a motion to dismiss the complaint by proving an existing divorce with a divorce certificate from Andhra Pradesh. The trial court granted his motion but the appellate court reversed by refusing to recognize the Indian divorce. The appellate court held that the triple *talaq* is “violative of due process and contrary to public policy” because the wife had no right to prior notice of the triple *talaq* or to be present at the pronouncement.<sup>29</sup> The appellate court refused to grant comity to the Indian system by stating that it makes “arbitrary and invidious” distinctions and thereby denies equal protection of the law (women cannot initiate divorce with the *talaq*).<sup>30</sup>

The disagreement between the trial and appellate courts in the case above, *Tarikonda v. Pinjari*, shows that comity or deference to foreign law is a principle rather than a rule that “states a reason that argues in one direction, but does not necessitate a particular decision.”<sup>31</sup> There is a reason—e.g., reciprocity that governs international relations—to recognize the validity and legal effects of foreign judicial acts, but deference is not required. Deference to foreign jurisdictions must be weighed against the commitment to equal protection of the law for individuals residing within the political territory. *Tarikonda* shows that a court’s obligation to enforce the rights of persons under its protection overrides the obligation to enforce foreign judgments.<sup>32</sup>

28. *Id.* at 54.

29. *Tarikonda v. Pinjari*, No. 287403, slip op. at 2 (Mich. Ct. App. Apr. 7, 2009).

30. *Id.* at 4.

31. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 26 (1978).

32. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895):

The facts of *Tarikonda* give rise to an apparent conflict between comity and equal protection of the law. The case, however, demonstrates a deeper moral conflict between religious liberty and moral equality, the fundamental values of a liberal democratic society. Equal protection of the law is an institutional expression of moral equality and comity is deference to foreign law, including religious law under which the faithful voluntarily subject themselves. On the one hand, a U.S. court's enforcement of a foreign judgment made under Islamic law can undermine the fundamental value of moral equality. Granted that Islam—like many religions—is “tilted against women,” a U.S. court might enforce a judgment that fails to give women equal concern and respect.<sup>33</sup> Gender inequality under Islamic law is a relevant consideration in many decisions involving comity; the majority of cases involving Islamic law reviewed by U.S. courts deal with family law (marriage, divorce, child custody, and domestic violence).<sup>34</sup> On the other hand, the non-enforcement of foreign judgments rendered by Islamic courts (or barring U.S. courts from considering Islamic law) might impose undue restriction on religious liberty, and thereby, violate the First Amendment.<sup>35</sup>

In the previous Part, it was argued that the values of equality and neutrality are wedded in liberal theory.<sup>36</sup> In application, however, the two values may come apart or conflict in a civil court. Suppose that a state court reviews cases involving noncitizen litigants who are also subject to a foreign jurisdiction that fails to provide equal protection of the law, or litigants who subscribe to a religious doctrine that rejects gender equality. In such cases, a court that aims to treat all persons as moral

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‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

33. In addition to *Tarikonda*, there are other cases in which upholding a foreign judgment resulted in violation of gender equality. In *Parveen Chaudry v. M. Hanif Chaudry*, M.D. 159 N.J. Super. 566 (1978), the Appellate Court overturned the Trial Court and denied child support, equitable distribution of property and alimony. Further, the Appellate Court found the marriage contract—signed by the parents of the couple under Pakistani law and which provided for only \$1,500 towards the wife—was valid.

34. The Center for Security Policy compiled fifty cases from twenty-three states in which Sharia was relevant to the judicial decision. Most of the disputes are covered under family law. *Shariah Cases By State*, SHARIAH IN AMERICAN COURTS (Jan. 16, 2014), [http://shariahinamericancourts.com/?page\\_id=305](http://shariahinamericancourts.com/?page_id=305).

35. *Awad v. Ziriax* illustrates how the Sharia ban might violate First Amendment protections. In addition, the ban would conflict with other federal laws and policies. For example, the Uniform Foreign Money-Judgments Recognition Act establishes “recognition of the foreign country judgment” in order to meet “the increased needs for enforcement of foreign country money-judgments.” See *Foreign-Country Money Judgments Recognition Act Summary*, UNIFORM L. COMM’N, <http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Apr. 5, 2014). For conflict-of-laws consequences of the Sharia ban, see Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT. L. 107 (2012).

36. See *supra* Part I.

equals by recognizing their right to equal protection of the law cannot satisfy the non-interference and non-preference requirements of neutrality. By recognizing moral equality, the court would fail in neutrality. The commitment to treat all persons with equal concern and respect can result in a court's violation of the non-interference requirement by exercising jurisdiction over cases (or refusing to recognize foreign judgments) that leave women worse off based on religious reasons. Or a court might discriminate against a religious doctrine that explicitly endorses gender inequality by refusing to consider the doctrine while appealing to other religious doctrines that are consistent with gender equality. Alternatively, the commitment to neutrality might require a court to recognize a foreign decision rendered by a religious jurisdiction or permit a religious practice that undermines women's moral status and, thereby, the court would fail to recognize moral equality.

A bad use of Islamic law in American courts would undermine a litigant's rights as the result of applying, considering, or interpreting Islamic law. In *Tarikonda*, the trial court's recognition of the Indian divorce was a bad use of Islamic law because the court's deference to a foreign judicial act undermined the principle of equal protection of the law. Nonetheless, bad uses of Islamic law should not be eliminated as an option for cases involving noncitizen litigants. The courts have an obligation to exercise restraint in applying coercive measures that interfere in the personal sphere of noncitizens, who comprise the majority of cases involving Islamic law. The following argument for legal restraint regarding noncitizens depends on "equality-based reciprocity" ("reciprocity" for short) that governs democratic institutions.

A legitimate democratic State has the right to rule over citizens through institutions that regard them as worthy of equal consideration. And citizens have the obligation to respect the authority of the State by complying with the demands of its institutions. In a liberal democratic society, legitimacy is a function of the reciprocal relationship between the State and each citizen who is subject to its coercive institutions.<sup>37</sup> Democratic institutions recognize the same fundamental status of all citizens by giving them an equal opportunity to shape the institutions that demand compliance and punish non-compliance. The institutional recognition of moral equality is reflected in the equal opportunity to participate in decision-making.<sup>38</sup> The right to political participation recognizes the rational autonomy of citizens by inviting them to design the institutions according to the values by which they would govern their own lives. The obligation to comply with the directives of liberal democratic institutions is grounded in the State's recognition of each member as equal to other members of the political community.

On the other hand, noncitizens are denied full membership in the political community. They are not granted the right to vote; they are

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37. JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 272–73 (2d ed. 2011).

38. ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 256 (2004).

prohibited from effectively participating in the political process in a way that can shape the institutions that govern their lives. Because the State does not recognize the noncitizens' claims about which values should be embedded in the institutions that demand their compliance, the State treats noncitizens differently from citizens. Further, the State and noncitizens fail to enjoy a relationship of reciprocity. While noncitizens are prohibited from imposing their own values on coercive institutions, the State nonetheless demands their compliance with these institutions. If reciprocity is important for legitimate coercion in a democratic society, then the State should limit its exercise of power against noncitizens. The limited reach into the lives of noncitizens implies enlarging their protected sphere relative to that of citizens. That is, the State should exercise greater restraint in applying coercive measures by allowing noncitizens to govern their lives according to their own deep-seated values. For example, a civil court would exercise minimal intervention in matters involving personal law by enforcing a judgment from the jurisdiction of the noncitizen's home State, especially if it is a religious jurisdiction to which she voluntarily subjects herself. Coercive institutions of the receiving State should have minimal control over the private lives of noncitizens because they are denied the opportunity to shape those institutions. Noncitizens should be protected from undue interference that undermines their ability to pursue a conception of life according to their own worldview—even if it conflicts with the values embodied in the institutions of a liberal democratic society.

One might raise the objection that reciprocity between the receiving State and noncitizens is insignificant for legitimate coercion, even for a liberal democratic State. The entrance into a political territory marks the noncitizen's acceptance of the authority of the receiving State, which has the right to impose duties and the conditions of residence. By enjoying the benefits conferred by the receiving State, noncitizens tacitly consent to its authority.<sup>39</sup> (An important benefit of residing in a liberal democratic State is the protection of rights; all persons within the territorial boundaries of the United States are granted most—but not all—constitutional rights.) Consent may be an unlikely basis for State legitimacy vis-à-vis persons who are born into their political community because they do not have the opportunity to express their willingness to become a member. However, outside persons who cross the border to enter into a new political community commit an act that should be understood as their willingness to obey the authority of the receiving State. The receiving State's legitimacy vis-à-vis the noncitizen is derived from their consent rather than reciprocity.<sup>40</sup> And hence, the lack of equality-based reciprocity that treats noncitizens with equal concern and respect does not limit the receiving State's political authority. The objector might point out an additional basis for dismissing the significance of reciprocity for the receiving State's exercise

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39. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 348 (Cambridge U. Press 1960).

40. *Id.*

of legal authority: territorial jurisdiction gives the receiving State power over noncitizens and the activities performed within its territory.

While the receiving State has the right to rule over all persons residing in its territory, it is not an exclusive right; that is, the receiving and home States share their authority over an individual.<sup>41</sup> Consent to be ruled by the receiving State does not amount to recognizing its exclusive authority. A noncitizen is not endowed with the power to bestow upon the receiving State the exclusive right to rule over her. The receiving State's right to rule over a noncitizen is limited by the special political relationship the individual has with the home State in virtue of political membership. The noncitizen's home State has the authority to impose certain duties as long as the individual remains a member of the political community.<sup>42</sup> And by implication, the receiving State shares its authority over the noncitizen. The home State retains its right to rule over a member who has left its territory because the right supervenes on political membership rather than physical residence. Political membership generates the right to rule (for the State) and political obligations (for its members).<sup>43</sup> For example, a member who leaves the territory still shares the burden of mutual defense with other members of the political community. South Korean males, over the age of 18, who are residents of the United States but citizens of the Republic of Korea have an obligation to serve in its military (usually a two-year service).<sup>44</sup> There are consequences for failing to discharge this duty (e.g., being forbidden from entering or leaving the Republic of Korea). The special political relationship permits the home State to take coercive action in certain areas of an individual's life even after he or she has left the territory. One cannot be completely free from the laws of the home State through migration and remain bound to certain duties against one's wishes.

The State has legitimate authority to impose duties on members who no longer reside in its territory, even if the duties are imposed against their will and result in significant reduction of liberty (e.g., military service). The same authority should also have jurisdiction over a limited range of non-criminal cases, especially if an individual invites the home State's courts to exercise jurisdiction over a dispute. The recognition that some residents of the United States are subject to two sovereign authorities sometimes involves enforcing foreign judgments

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41. *Id.*

42. *Id.*

43. *Id.*

44. According to Article 39 [Duty to Military Service] of the Constitution of the Republic of Korea,

“(1) All citizens shall have the duty of national defense under the conditions as prescribed by Act.

(2) No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.” DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 39 (S. Kor.). South Korean men who live abroad are subject to compulsory military service. Military Service Information for Conscription Candidates Overseas, MIL. MANPOWER ADMINISTRATION, [http://www.mma.go.kr/eng/s\\_notice/notice/1211661\\_2577.html](http://www.mma.go.kr/eng/s_notice/notice/1211661_2577.html) (last visited April 10, 2014).

regarding disputes between noncitizens. As *Tarikonda* shows, deference to a foreign court may result in sacrificing U.S. constitutional rights in cases where one party wants to settle a dispute in a foreign court and the other party files a complaint over the same matter in a U.S. state court. The enforcement of a foreign decision based on Islamic law can result in a rights violation, in which case the enforcement would amount to a bad use of Islamic law in American courts. Nonetheless, the enforcement of foreign decisions that undermine the rights of a noncitizen should be left to the discretion of judges who must recognize that the United States shares its authority over noncitizens with another State.

There are additional reasons for permitting bad uses of Islamic law in American courts. If judges were prohibited from enforcing decisions rendered by foreign courts that fail to recognize a similar range of rights as U.S. courts, then comity would be granted only to a limited number of Western democratic States. The lack of legal recognition of foreign jurisdictions has been regarded as a failure to respect the judicial decisions or laws of other States. Political consequences (e.g. tension in U.S. foreign relations) may follow from refusing to respect foreign jurisdictions.<sup>45</sup>

By applying the Reciprocity Principle to *Tarikonda*, I argued that state courts should limit their authority over noncitizens in non-criminal cases. Noncitizens are denied the opportunity to shape the institutions that govern their lives, and thus, the institutions fail to treat noncitizens with equal concern and respect. The absence of reciprocity is not the only reason for placing constraint on legal authority over noncitizens; they are subject to two sovereign authorities as members of one political community and residents of another. Islamic law, however, is not merely foreign law that governs the members of other political communities but also religious law that governs the personal lives of Muslim-American citizens. What would be the result of applying the reciprocity principle to cases involving Muslim-American citizens over whom the United States has exclusive authority rather than shared authority? In a liberal democratic society, the State's claims of authority depend on its equal treatment of citizens. Muslim-American citizens would have a general obligation to comply with coercive institutions under the reciprocity principle because they enjoy an equal opportunity to shape these institutions. Political institutions give expression to equal concern and respect by protecting and enabling the exercise of the equal right to political participation.

The legal institution of a liberal democratic society, as argued in the previous section, satisfies moral equality by observing the non-interference and non-preference requirements of neutrality. The appeal to neutrality requirements, however, cannot always settle the question of whether the courts have treated litigants as moral equals in disputes involving religious matters. The following two cases involve disputes between Muslim-Americans who voluntarily entered into Islamic mar-

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45. See Davis & Kalb, *supra* note 6, at 9.

riage contracts with similar provisions that appear to undermine gender equality. The two U.S. courts adjudicating the disputes rendered conflicting judgments on the enforceability of the contracts. In the rest of this section, I will provide an explanation of the disagreement between the courts based on their divergent understandings of what is required by equal concern and respect. The court opinions indicate that one court believed that moral equality requires gender equality, whereas the other court believed that the protection of autonomy is central to equal concern and respect.

In *Jabri v. Qaddura*, a husband and wife signed an Islamic marriage contract, “Islamic Society of Arlington Islamic Marriage Certificate,” which provided that the “dowry for the bride” was “[o]ne-half of the value of the house located at 2206 Gladstone.<sup>46</sup> This is in addition to \$40,000 Fourty [sic] Thousand U.S. Dollars the payment of which is deferred.”<sup>47</sup> The wife filed for divorce and sought enforcement of the Islamic Marriage Certificate. The trial court found that the “purported Islamic Dowry agreement” was not “a valid or qualified premarital agreement under the Texas Family Code.”<sup>48</sup> There are at least two possible grounds for the trial court’s judgment that rendered the contract unenforceable. One possibility is that enforcing the contract would violate the First Amendment’s non-interference requirement of neutrality.<sup>49</sup> The contract was signed under the religious authority of the Islamic Society of Arlington and contained provisions in accordance with the requirements of Islamic marriage law. The court would have to apply non-neutral principles of a religious doctrine to determine the performance of the contract, and hence, the court is not the proper agent for its enforcement. This possibility, however, can be ruled out. Rather than stating that the case lies beyond the court’s subject-matter jurisdiction, the trial court rendered the contract invalid based on its provisions.<sup>50</sup>

A second possibility is that the contract’s provisions were contrary to public policy. The court may have believed that the contract assigned a purchase value to the bride and undermined her moral status. The court’s misunderstanding of the “deferred payment” to the bride mostly likely led to the judgment that the contract was invalid. There is reason to believe that the court confused dowry with bride price, which serve different functions. A dowry is a package of goods, like cash or property, which the bride brings to the marriage, whereas the bride price is money paid by the groom to the bride’s family.<sup>51</sup> The function of a dowry is to establish the woman’s position in her new

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46. *Jabri v. Qaddura*, 108 S.W.3d 404, 407 (Tex. Ct. App. 2003).

47. *Id.*

48. *Id.*

49. *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (stating the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers”).

50. *Jabri*, 108 S.W.3d at 407.

51. Dowry Prohibition Act, No. 28 of 1961, 21 India A.I.R. Manual 127 (5th ed. 1989). In this Act, gifts or presents made to either party at marriage were not considered dowry unless they were made “as consideration for the marriage of said parties.”

bridal home by contributing to the financial stability of the household and also protects her from indigence in case her husband dies or abandons her.<sup>52</sup> If the court had a proper understanding of the function of a dowry, it is not clear that the dowry agreement would have been rendered unenforceable. Bride price, on the other hand, is barter for the bride, who is attributed with a cash value and purchased at a (negotiated) price. It would be contrary to public policy if the bride were purchased and payment deferred.

There is no indication, however, that the payment functioned as a bride price. The payment appeared to be a security measure for the bride in case the marriage dissolved (and hence, “deferred”). There is further support for the view that the court misunderstood “dowry” as “bride price”: the court opinion writes “dowry *for* the bride,” as in payment in exchange for the bride (emphasis added).<sup>53</sup> The proper description would have been “dowry *from* the bride,” as in goods contributed to the marriage from the bride’s family.<sup>54</sup> It seems plausible that the court believed that enforcing a contract that provides for cash in exchange for the bride would amount to recognizing her as an object to be purchased. An enforcement of the contract would demean her dignity and fail to treat her with equal concern and respect.

It should be noted that the woman not only agreed to the dowry contract but that she was the party seeking its enforcement.<sup>55</sup> The court seems to have believed that her voluntary consent failed to give effect to the contract because its provisions undermined her moral status. The court’s judgment in *Jabri* is not the only approach to moral equality in the context of marriage contracts. In another case, *Odatalla v. Odatalla*, a New Jersey Muslim-American couple married in a religious ceremony.<sup>56</sup> Prior to the ceremony, the families negotiated the terms of the Islamic marriage license, including the dowry agreement, which provided the following: “According to Islamic Law Dower is: Prompt *One golden pound coin*[.] Postponed *Ten Thousand U.S. Dollars*.”<sup>57</sup> A videotape was submitted as evidence: “Each party read the entire license and Mahr [dowry] Agreement and signed the same freely and voluntarily.”<sup>58</sup> When the marriage fell apart and the wife claimed the dowry, the issue was not the court’s refusal to enforce the contract but the husband’s claim that the court could not order the performance of the dowry agreement on two grounds: “(1) the First Amendment to the Constitution precludes this court’s authority to review the Mahr Agreement under the separation of Church and State Doctrine and (2) the

52. A.S. ALTEKAR, *THE POSITION OF WOMEN IN HINDU CIVILIZATION* 71–72 (3d ed. 1978).

53. *Jabri*, 108 S.W.3d at 407.

54. For explanations of the historical change in marriage practices and the distinction between brideprice and dowry, see Diane Owen Hughes, *From Brideprice To Dowry in Mediterranean Europe* 3 J. FAM. HIST. 262 (1978).

55. *Id.*

56. *Odatalla v. Odatalla*, 810 A.2d 93, 95 (N.J. Super. Ct. Ch. Div. 2002).

57. *Id.*

58. *Id.*



agreement is not a valid contract under New Jersey law.”<sup>59</sup> The Superior Court of New Jersey found that enforcing the contract did not infringe upon free exercise rights under the First Amendment because the court could apply “neutral principles of law” to determine enforceability and need not rely on religious doctrine.<sup>60</sup> Further, the court found that “[c]learly, the Mahr [dowry] Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society.”<sup>61</sup>

The disagreement between the two courts on the enforceability of dowry contracts reflects different approaches to moral equality. The *Jabri* court believed that the recognition of the woman’s equal moral status should be given priority over other considerations, and by implication, refused to give effect to a contract that treated the woman as a commodity with a purchase value. Based on a correct understanding of the significance of the dowry, however, the *Jabri* court might not have rendered the dowry contract invalid. On the other hand, the *Odatalla* court recognized the woman’s equal moral status by protecting her voluntary choices. The court’s judgment points out that the moral significance of autonomy lies in the value of the choice itself rather than what is chosen. Respect for autonomy requires the courts to operate on the presumption that rational and mature persons have the capacity to exercise autonomy based on their considered beliefs, values, and interests. The courts have an obligation to give effect to agreements that result from the exercise of autonomy, unless the presumption of rational capacity can be overridden. In a liberal democratic society, the courts should give high priority to the protection of autonomy, given that equal concern and respect for citizens is based on their rational capacity to govern their lives according to their beliefs, values, and interests.

### III. UNSUSTAINABLE USE: PROTECTION PRINCIPLE

We now return to the case introduced at the beginning of this Essay. A Muslim couple married in Morocco and moved to New Jersey in 2008 for the husband’s employment.<sup>62</sup> After three months of marriage, the husband’s physical abuse against his wife led up repeated instances of rape. The case went to trial and the court did not find that sexual assault or criminal sexual conduct had been proven:

This court does not feel that, under the circumstances, that this defendant had a criminal desire to or intent to sexually assault or to sexually contact the plaintiff when he did. The court believes that he was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was some-

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59. *Id.*

60. *Id.* at 95–96.

61. *Id.* at 98.

62. *S.D. v. M.J.R.*, 2 A.3d 412, 418 (N.J. Super. Ct. App. Div. 2010).

thing that was consistent with his practices and it was something that was not prohibited.<sup>63</sup>

The trial court's decision was reversed on appeal, pointing out "the responsibility of the courts to protect victims of such violence . . . ."<sup>64</sup>

The courts are instruments of the State, which is a protective agent for the victims of crime.<sup>65</sup> In the case above, *M.J.R.*, the trial court's appeal to Islamic practices to determine that the husband did not commit a sexual crime amounts to the State's denial of the responsibility to protect individuals from physical harm within its borders. The harm that results from coerced sex—even if it is permitted under Islamic law—reaches beyond the protected sphere of noncitizens. It was argued in the previous section that the protected sphere of noncitizens is larger than that of citizens; that is, more activities should be guarded against governmental interference for noncitizens because they do not enjoy a relation of reciprocity with the State. While the lack of reciprocity limits the State's use of power over the noncitizen's right to control his or her own life, the activities that result in third-party physical harm are excluded from the protected sphere of both citizens and noncitizens.

Reciprocity between the State and perpetrator is not always relevant to the question of whether the State is authorized to interfere in a matter. That is, a special relationship between the coercer and the coerced is not always necessary for the legitimate use of force. As an analogy, a parent who is looking after her own child on a playground also has the responsibility to prevent harm to other children to the extent that she is able, even if she does not have a special relationship with the other children. Likewise, the State has the duty to protect all persons—citizens and noncitizens—within its borders. The State claims jurisdiction over activities within its geographical territory; citizens and noncitizens may be coerced or punished for actions over which the State, *qua* protective agent, has a compelling interest. Unsustainable uses of Islamic law in American courts undermine not merely some rights of Muslim persons but their most basic right to physical security. The courts have an obligation not to use Islamic law if it would result in the failure to discharge the duties of a protective agent.

A State's territorial jurisdiction over persons and activities performed within its borders does not imply that it has exclusive authority over them, as argued in the previous Part.<sup>66</sup> The United States shares with other States both the right to rule over and the responsibility to protect noncitizens. American courts work with foreign courts to discharge their duty to protect, which may involve enforcing foreign judgments. State courts routinely defer to foreign courts, unless their

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63. *Id.* (citing unpublished trial court opinion).

64. *Id.* at 426.

65. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 26–53 (1st ed. 1974).

66. *See supra* Part II.

judgment contradicts American public policy.<sup>67</sup> Call this the “public policy constraint” on comity. Anti-Sharia laws place a further constraint, the “rights constraint” on comity, which prohibits the recognition of foreign judicial acts that violate a litigant’s constitutional and legal rights.<sup>68</sup> While adding the rights constraint might help U.S. courts in meeting their obligation to protect noncitizens, the courts can nonetheless fail to discharge their duty to protect even if the two comity constraints were satisfied. That is, the non-enforcement of foreign judgments that contradict public policy or violate rights does not amount to sufficient constraints on comity. With the following case as an example, I will argue that the duty to protect requires in some cases the refusal to recognize a judgment rendered by a foreign jurisdiction that fails to protect basic rights, even if the judgment itself does not contradict public policy or violate rights. This additional constraint on comity—call it the “jurisdiction constraint”—would require a higher number of foreign judgments to be barred from enforcement in U.S. courts. However, the courts should satisfy the jurisdiction constraint if they take seriously the responsibility to protect the physical security of noncitizens residing within the United States.

*Hosain v. Malik* was a custody dispute between Pakistani parents for the sole custody of their daughter.<sup>69</sup> Both mother and father were Pakistani citizens and their daughter was born in Pakistan. In 1990, after eight years of marriage, the mother fled Pakistan with the child and resided in Maryland with a man with whom she had a son. The father filed for custody of the daughter, but the mother refused to obey the Pakistani court order, which required her to return to Pakistan with the daughter for a custody hearing. When the father was granted custody in a Pakistani court, he attempted to enforce the court order by locating the mother and daughter in Maryland, where the mother also filed for sole custody. The circuit court granted comity to the Pakistani court order that gave sole custody to the father. The Special Appeals Court affirmed the decision, stating that the Pakistani court did not presumptively privilege the father in custody rulings, but rather, the “best interest of the child standard is the law in Pakistan in child custody disputes.”<sup>70</sup> Further, “substantial evidence before the circuit court indicated that the Pakistani courts in fact applied the best interest of the child standard” in this particular case.<sup>71</sup>

It might appear that the Maryland courts satisfied the principle of protection—i.e., the State should protect the physical security of all per-

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67. In one case, the Court of Appeals in Washington state refused to enforce an Iranian custody order on grounds that Iranian law “contradicts the strong public policy of Washington.” *In re Marriage of Donboli*, 128 Wash. App. 1039, 1039 (Wash. Ct. App. 2005).

68. In *Tarikonda*, the Appellate Court stated, “To accord comity to a system that denies equal protection would ignore the rights of citizens and persons under the protection of Michigan’s laws.” *Tarikonda v. Pinjari*, No. 287403, slip op. at 4 (Mich. Ct. App. Apr. 7, 2009).

69. *Hosain v. Malik*, 671 A.2d 988, 999 (Md. Ct. Spec. App. 1996).

70. *Id.*

71. *Id.*

sons within its borders—by granting comity based on the relative conformity between Maryland and Pakistani courts, which are both guided by the interests of the child in custody cases. However, in granting comity to the Pakistani court, the Maryland courts failed to consider the proper scope of application for the principle of protection. The reasoning of the Pakistani court in granting sole custody to the father was in part the mother’s failure to appear at the custody hearing and produce the child as ordered.<sup>72</sup> Her return to Pakistan for the hearing, however, would have involved a high risk of danger for her physical security. The Pakistani State does not consistently protect women’s physical security. Pakistan is considered one of the most dangerous places in the world for women; more than 1,000 women and girls are murdered in “honor killings” every year and ninety percent of women suffer domestic violence.<sup>73</sup> In the case above, the husband and his family might have inflicted physical harm against the wife for conceiving a child with another man. Or the woman’s own family might have inflicted harm on her for having disgraced her family.<sup>74</sup> These acts would be culturally condoned in Pakistan. If the widespread violence against women in Pakistani society were considered, then the Maryland courts might have taken a different approach to the case. By deferring to a foreign jurisdiction that fails to enforce women’s basic right to physical security, granting comity was unsustainable in the case.<sup>75</sup>

The U.S. courts have at least two options in enforcing foreign judgments. The courts might refuse to enforce (1) only judgments that are contrary to U.S. public policy or violate federal or state constitutional rights or (2) all judgments rendered by foreign jurisdictions that do not protect rights similar to U.S. federal or state constitutional rights, regardless of whether the judgment itself is contrary to public policy or violates rights. Under (1), the Maryland court’s decision to grant comity in the custody case would be sustainable. The court satisfied both the public policy and rights constraints on comity. The Pakistani judgment was based on the welfare of the child and ordering the mother’s appearance at the hearing did not result in any actual rights violations against her. By refusing to return to Pakistan, she took precaution and did not suffer physical harm.

On the other hand, the court’s decision would be unsustainable under (2). The decision to grant comity to a foreign jurisdiction that

72. *Id.*

73. Zara Jamal, *To Be a Woman in Pakistan: Six Stories of Abuse, Shame, and Survival*, ATLANTIC (Apr. 9, 2012, 7:28 AM), <http://www.theatlantic.com/international/archive/2012/04/to-be-a-woman-in-pakistan-six-stories-of-abuse-shame-and-survival/255585/>.

74. Jon Boone, *Pakistani wife in disputed marriage gunned down in court by her brother*, GUARDIAN (Aug. 5, 2012, 10:23 AM), <http://www.guardian.co.uk/world/2012/aug/05/pakistani-wife-marriage-brother; Pakistani couple arrested over acid attack on daughter>, BBC NEWS (Nov. 4, 2012, 12:55 PM), <http://www.bbc.co.uk/news/world-asia-20199899>.

75. According to Amar Sindhu, a professor of philosophy at Sindh University and a women’s rights activist, the violence against women is better explained by “the complete absence of the rule of law” rather than social and cultural practices. See Boone, *supra* note 65; *Pakistani women sentenced to death by cleric, alive and well, court told*, AL ARABIYA NEWS (Jun. 7, 2012), <http://english.alarabiya.net/articles/2012/06/07/219186.html>.

does not enforce the basic right to physical security can result in the failure to discharge the duty to protect all persons within U.S. borders. The jurisdiction constraint proposed here is weaker than (2), however. The non-recognition of foreign jurisdictions that fail to enforce the basic right to physical security is less demanding than non-recognition of jurisdictions that fail to enforce the full range of U.S. constitutional rights. Implementing (2) would most likely result in limiting comity to a handful of foreign jurisdictions at most, whereas a weaker version of (2) that recognizes only jurisdictions that protect basic rights would be instrumental to discharging the duty to protect.

### CONCLUSION

This Essay argued that the use of Islamic law in American courts should be guided by principles rather than strictly prohibited or permitted without clear constraints. While the advocates of the Sharia ban claim that the courts should be prohibited from using Islamic law because it violates litigants' rights, the cases examined show that the ban can lead to the same result. To avoid the absurd consequences of a total ban or an unrestricted permission, this paper distinguished three categories of Sharia use in state courts based on three principles. A good use of Islamic law is compatible with—or further supports—a federal or state constitutional right, and in particular, the right to religious liberty. In a liberal democratic society, the commitment to equal concern and respect requires neutral institutions that do not privilege or discriminate against a particular religious doctrine. Institutional neutrality that requires non-interference in ecclesiastical disputes requires the courts to consider a religious doctrine by recognizing it as the proper source of authority for the governance of a religious organization.

A bad use of Islamic law undermines a constitutional right; however, the use is not unsustainable. The courts should be given discretion in cases where there are important considerations that may obligate the courts to use Islamic law. For example, the authority of liberal institutions should be limited in adjudicating a range of disputes between noncitizens because they do not enjoy a relation of reciprocity with the State. That is, a legitimate democratic institution operates within a relation of reciprocity between the State and citizens in which the State respects citizens' equal rights, and citizens respect the authority of the State's coercive institutions. Unlike citizens who enjoy the right to political participation and shape coercive institutions, noncitizens are not granted the same right and lack the opportunity to impose their values on the same institutions. The State should exercise restraint in its use of power over individuals who are not granted the full range of constitutional rights.

Finally, a court's unsustainable use of Islamic law results in the failure to deliver the primary responsibility of the State, i.e., the protection of all individuals within its geographical borders. In cases where the use of Islamic law poses a high risk in the violation of a person's right to

physical security, the relation of reciprocity between the State and the individual becomes irrelevant to the question of whether State intervention is authorized.

