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## Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms

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ASIFA QURAISHI-LANDES

## Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms

57 N.Y.L. SCH. L. REV. 245 (2012–2013)

ABOUT THE AUTHOR: Asifa Quraishi-Landes is an Associate Professor, University of Wisconsin Law School. I extend my sincere thanks to Sadiq Reza for inviting me to the stimulating New York Law School Law Review Symposium, *Sharia in America: Principles and Prospects*, available at <http://www.nylslawreview.com/Sharia-in-america>, for which these remarks were prepared, as well as the contributions of all in attendance. Additional thanks go out to seasoned Islamic family law practitioner Abed Awad for his helpful comments on the current state of the case law.

## RUMORS OF THE SHARIA THREAT ARE GREATLY EXAGGERATED

### I. INTRODUCTION

The campaign to ban Muslim religious law, known as Sharia, in American courtrooms argues that judicial accommodation of any religious law is inappropriate in an American secular courtroom. At first blush, the argument seems to have merit—the idea of religious law in a secular liberal democracy seems to fly in the face of our rule of law. It seems to contrast with the principle of equality, which states that we all (regardless of race, status, or religion) are held to the same rules. In the United Kingdom, the sentiment is summed up in a campaign titled “One Law for All.”<sup>1</sup> Here in the United States, the argument appears as the title of the latest iteration of Sharia-ban legislation: “American Law for American Courts.”<sup>2</sup> The idea is simple: all Americans should be bound by the same American laws. This seems to be an unassailable principle—until one looks more closely at American law itself.

First, “American law” is not one law; it differs from state to state, and federalism protects this diversity. Much of an American citizen’s life is controlled not by uniform federal law, but by different state laws, which change every time she crosses a state border, and legal principles like comity facilitate mutual state respect for these different laws. Comity also extends to judicial accommodation of foreign law when relevant, such as in the adjudication of a contract with a foreign choice of law clause. And even beyond this, litigating parties in America are regularly encouraged to use alternative dispute resolution to resolve their disputes out of court, often producing results that are significantly different than those which would have resulted under straight judicial application of “American law.”

Separate from state law, the American rule of law has always considered issues of accommodations of religious minorities seeking to follow rules that differ from American secular legal norms. In other words, Sharia is by no means the first religious law to be presented in American courts. Two centuries of case law involving religious-based requests from American Catholics, Jews, Mormons, Native Americans, and others has resulted in several established policies and practices that American judges use to adjudicate requests for consideration of religious law. In short, requests for consideration of religious law are balanced with constitutional and legislative principles, using judicial tools such as comity, public policy, and unconscionability.<sup>3</sup> Because many Americans are unaware of this established practice, the anti-Sharia campaign has been able to create a concern that judicial consideration of Sharia-based claims from Muslim American litigants is compromising American law and values. The case law, however, shows a different picture. Judicial treatment of Sharia requests is not threatening the American rule of law, it is an *illustration* of

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1. See ONE L. FOR ALL, [www.onelawforall.org.uk/](http://www.onelawforall.org.uk/) (last visited Sept. 18, 2012).

2. See the legislation promoted by the American Public Policy Alliance. AM. PUB. POL’Y ALLIANCE, [http://publicpolicyalliance.org/?page\\_id=122](http://publicpolicyalliance.org/?page_id=122) (last visited Sept. 18, 2012).

3. For a summary of the current practice, with a commentary on how this judicial approach could be improved (by expanding the application of unconscionability and limiting the application of public policy), see Michael Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231 (2011).

it. As with requests from other American religious groups, sometimes Sharia requests win, and sometimes they don't. Reasonable minds differ over whether the courts get it right each time. But in every case, the job of the judge is a careful balancing of rights against each other, not an automatic trumping of religious practice by secular law or vice versa.

The campaign to ban Sharia in the United States appears to be directed at two different alleged threats: (1) that Sharia will take over American law, and (2) that judicial accommodation of Muslim religious practices is eroding our secular rule of law. The first is a non-issue: there is no real chance that Sharia will replace American law or our Constitution. But the second is worth talking about. It asks a question crucial to the nature of our secular constitutional democracy: Can we legally accommodate a diversity of religious legal practices among our citizens and, if so, with what limits?<sup>4</sup> I will address one aspect of this question by summarizing in Part II how Islamic family law<sup>5</sup> is currently accommodated in American courtrooms today and discussing in Part III why this does not threaten women's rights or our American rule of law. In Part IV, I consider the global and domestic implications of Muslim American tribunals serving the dispute resolution needs of American Muslims. Part V concludes.

## II. THE ACCOMMODATION OF ISLAMIC FAMILY LAW IN AMERICAN COURTROOMS

### *A. Legal Validity of Religious Marriages and Divorces*

Looking over the field of cases involving Islamic family law issues, there are several recurring topics.<sup>6</sup> One is the validity of Islamic marriages and divorces themselves.<sup>7</sup> Because civil and religious marriages have different rules, some Muslim couples perform a religious ceremony, but do not obtain a marriage license from the

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4. This is not a simple question. It brings up compelling and complex issues of legal and political theory, none of which I have the space to engage here. For a recent publication collecting commentary on the question with direct reference to the question of Sharia in the West, see generally *SHARI'A IN THE WEST* (Rex Adhar & Nicholas Aroney eds., 2010).

5. My focus here is Islamic family law *as it is addressed in American courts*, not the substantive doctrines of Islamic family law itself. The latter is a much larger topic than there is room for here, but for a good summary, see Kecia Ali, *Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 11 (Asifa Quraishi & Frank Vogel eds., 2008).

6. A useful website documenting major American cases addressing Sharia, with brief case summaries and some commentary, is the "Sharia Index," maintained by Abed Awad and Noura Jebara. See *SHARI'A IN AMERICA: THE ROLE OF SHARI'A LAW IN U.S. COURTS*, <http://shariainamerica.com> (last visited Sept. 18, 2012).

7. There are several cases involving the legitimacy of marriages and divorces conducted in foreign Muslim-majority countries. I do not detail those here because they usually center on questions of comity to the law of foreign jurisdictions more than the question of American consideration of Sharia, which I believe is the more relevant question for most American Muslims and the issue presented by the anti-Sharia campaign.

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state. If this happens for a polygamous marriage<sup>8</sup> or the marriage of a minor child,<sup>9</sup> the state will not recognize these marriages as valid as a general matter of public policy. Outside of these situations, the legal validity of a religious marriage will depend upon the jurisdiction. In some states, a marriage without a license is void; in others, it is voidable, leaving the possibility that with evidence of a “putative marriage” (defined on secular terms) it may nevertheless be found valid.<sup>10</sup>

Purely religious divorces, on the other hand, are not recognized by state law because states claim exclusive subject matter jurisdiction over marriage dissolution. This means that a divorce that is valid under Islamic law, but does not comport with state law, will not usually be considered a legal divorce and, most importantly, will not affect the state’s legal dissolution of the parties’ financial matters.<sup>11</sup> This is especially relevant to Muslim religious divorces because, of the three types of divorces recognized in Islamic law (*talaq*, *khul’*, and *faskh*<sup>12</sup>), two can occur extra-judicially with no one other than the couple involved at all. One of these two extra-judicial divorces, *talaq*, does not even involve the wife. Under classical Islamic law, a *talaq* divorce can be performed unilaterally by a husband with just a declaration of words and without the consent or participation of the wife. *Talaq* divorces have been rejected as against public policy by some American judges because of their lack of due process and their unequal treatment of the wife.<sup>13</sup> Public policy also guides consideration of gendered (and patriarchal) child custody and guardianship rules found in Islamic family law: they are honored only if they are found to be consistent with the “best interests of the child” standard demanded by public policy.<sup>14</sup>

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8. The marriage of the first wife may be recognized, but not those of women married after the first. For commentary on this phenomenon, and the disadvantages in which it places “later wives,” see Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *WOMEN’S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM* 179, 192–94 (Lynn Welchman ed., 2004).
  9. *See, e.g.*, *People v. Benu*, 385 N.Y.S.2d 222 (Crim. Ct. Kings Cnty. 1976) (charging the defendant with endangering the welfare of a child by arranging the minor child’s marriage).
  10. *See, e.g.*, *Vryonis v. Vryonis*, 202 Cal. App. 3d 712, 722 (Ct. App. 1988) (finding invalid a religious marriage without evidence of public representations of married life).
  11. A recent example is *Mussa v. Palmer-Mussa*, 719 S.E.2d 192 (N.C. Ct. App. 2011), in which the North Carolina Court of Appeals recognized a couple’s Muslim marriage, but not their Muslim religious divorce. 719 S.E.2d at 194–95; *see also* Abed Awad & Noura Michelle, *Appeals Court Had the Chance to Do Right by a Wife and Children—But Declined It*, N.C. LAW. WKLY. (Dec. 26, 2011), available at <http://nclawyersweekly.com/2011/12/23/appeals-court-had-the-chance-to-do-right-by-a-wife-and-children--but-declined-it/> (arguing that the result was consistent with state law, but that the dissenting opinion would have better served justice without unsettling the law of the land that religious divorces do not legally dissolve marriages under state law).
  12. *See* Ali, *supra* note 5, at 23.
  13. *See, e.g.*, *Aleem v. Aleem*, 947 A.2d 489, 502 (Md. 2008) (holding that a *talaq* that was allowed in Pakistan was unenforceable in Maryland because, by being accessible only to men and not to women, *talaq* was against public policy under the Equal Rights Amendment of the Maryland Constitution, and also deprived women of the due process they would be entitled to when they initiate a divorce in Maryland).
  14. *See, e.g.*, *Malik v. Malik*, 638 A.2d 1184 (Md. Ct. Spec. App. 1994). The court remanded the case, noting that both Pakistan and Maryland had jurisdiction, and that it would be rare for the second home

*B. Enforcement of Mahr*

The most commonly litigated Islamic family law issue in American courts is probably *mahr*. A *mahr* is an agreement for a specified gift from a groom to the bride, and is a necessary clause of any valid Muslim marriage contract. The substance of the *mahr* itself can be anything of value agreed upon by the couple, and can range significantly in nature—from a small token of little monetary value, to jewelry or other personal property, to thousands of dollars or a piece of real estate. The *mahr* that a couple agrees upon will depend largely on their individual desires and social context. A *mahr* is often divided into two portions—one given at the time of the wedding and a later portion deferred to a later event, usually the death of the husband or divorce of the parties.

There are different theories about the concept and purpose of the *mahr*.<sup>15</sup> One of its legal consequences is to designate and preserve some independent property for married women, which might be quite important for women who want to maintain their financial independence but choose not to pursue a career outside the home. A large deferred *mahr* can also deter husbands from divorcing wives who do not wish to be divorced because a man who divorces his wife by unilateral *talaq* must pay the full, deferred *mahr* at that time.

Because the *mahr* is often a financial sum—and sometimes a quite significant sum—it can become a crucial and often contentious element during negotiations of the dissolution of assets during a divorce. Requests for judicial enforcement of *mahr* bring up an interesting aspect of American judicial treatment of Sharia claims because, as a clause of a contract, *mahr* claims invoke an important principle of American law: freedom of contract. Because of the importance of the meeting of the minds in American contract law, most state judges treat a *mahr* clause as they do any other contract clause; it is enforced unless: (1) it violates some basic rule of contract law (e.g., the contract terms are unclear or there is coercion), or (2) its application would violate public policy. The fact that the clause itself was inspired by religious law is usually irrelevant to this larger respect for contractual intent. In the words of one New Jersey judge,

why should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? . . . Clearly, this Court can enforce a contract which is not in contravention of established law or public policy . . . . If this Court can apply “neutral principles of

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state to assume jurisdiction where a party disobeyed a custody order imposed by the first home state, with an exception if the Pakistani court did not apply the best interest of the child standard. *Id.* at 1191–92. The court further noted that Pakistan’s preference toward paternal custody was not necessarily against Maryland public policy—being similar to the now-outdated Maryland maternal preference, but, to be granted comity, the husband would have to prove that the Pakistani court exercised a best interest of the child standard in reaching its decision. *Id.* at 1191.

15. For some commentary, see Quraishi & Syeed-Miller, *supra* note 8, at 206.

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law” to the enforcement of a Mahr Agreement, though religious in appearance, then the Mahr Agreement survives any constitutional implications.<sup>16</sup>

Thus, American judges often give respect to a *mahr* clause as a matter of simple contract law. Sometimes American Muslim couples write their *mahr* clauses with very ambiguous, unclear terms, often resulting in their *mahr* clause not being enforced. For example, a *mahr* for “a ring advanced and half of husband’s possessions postponed” was not enforced because the court concluded that this language left too much of the financial calculations unclear.<sup>17</sup> Another aspect of basic contract law that can prove fatal to a *mahr* clause is coercion: American judges have declined to enforce *mahr* clauses if they conclude there was coercion or a lack of understanding by one of the parties.<sup>18</sup>

In one case, the California Court of Appeals declined to enforce a *mahr* agreement (despite its clear terms) because the court considered it to be a mechanism for the wife’s “profiteering by divorce” and, therefore, it was against public policy (similar to the state’s public policy against enforcing prenuptial agreements that “facilitate divorce or separation by providing for a settlement only in the event of such an occurrence”).<sup>19</sup> It might be noted that, in the written opinion, this court displayed an incomplete understanding of classical Islamic law regarding deferred *mahr* because it is not always the case that a wife will receive her *mahr* when she initiates a divorce. To the contrary, unlike *talaq* divorces initiated by the husband, in *khul’* and *faskh* divorces that are usually initiated by the wife, it is often the case that the wife ends up forfeiting her *mahr* as a part of the dissolution.<sup>20</sup> Thus, the court’s comments

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16. Odatalla v. Odatalla, 810 A.2d 93, 95, 97 (N.J. Super. Ct. Ch. Div. 2002); see also Aziz v. Aziz, 488 N.Y.S.2d 123, 124 (Sup. Ct. Queens Cnty. 1985) (awarding \$5,000 deferred *mahr* “enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony”); Akileh v. Elchahal, 666 So.2d 246, 248 (Fla. Dist. Ct. App. 1996) (finding the essential terms of the marriage contract, considered as a prenuptial agreement, to be met, and awarding the wife \$50,000 in deferred *mahr*).
  17. Habibi-Fahnrich v. Fahnrich, No. 46186/93, 1995 WL 507388, at \*1, \*3 (N.Y. Sup. Ct. Kings Cnty. July 10, 1995) (finding it unproblematic as a matter of state law to enforce a *mahr* agreement, but nevertheless declining to enforce it in this particular case because of vague language).
  18. *In re Marriage of Obaidi & Qayoum*, 226 P.3d 787, 790–91 (Wash. Ct. App. 2010) (declining to enforce a *mahr* agreement on neutral principles of contract law, namely, lack of mutual assent); *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at \*5–6 (Ohio Ct. App. July 10, 2008) (judging a Muslim marriage contract as a prenuptial agreement and denying enforcement of the *mahr* provision because facts demonstrated overreaching and coercion).
  19. *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872–73 (Ct. App. 1988) (citations omitted) (noting the Jewish *kethuba* also facilitated divorce).
  20. See Ali, *supra* note 5, at 23–24. From my reading of the court opinion, this misunderstanding was partly created by exaggerated claims about Islamic family law made by the attorneys on both sides. First, the husband’s lawyer insisted that a *mahr* is awarded only when a husband initiates a divorce. This is a partial truth; in classical Islamic family law, a wife is generally awarded her *mahr* even if she initiates a *faskh* divorce, as long as sufficient grounds of harm (from husband to wife) are shown. Instead of clarifying this point, the wife’s lawyer in this case made the equally exaggerated claim that a wife is entitled to her *mahr* regardless of who initiates the divorce. That is, again, a partial truth; it is true of *faskh* divorces where harm is shown, but it is not generally true in wife-initiated *khul’* divorces, for



about *mahr* being a “profiteering” mechanism reveal that its policy decision not to accommodate Sharia was based on a basic misunderstanding of *mahr*. Nevertheless, this case serves as a useful illustration of a basic principle underlying all judicial treatment of Muslim marriage contracts in the United States: when a Sharia-based claim is found to violate public policy, it is not enforced. This is an important assurance for anyone concerned that judicial accommodation of Sharia-based claims is causing our legal system to enforce religious practices that offend American law and values. The case law illustrates how the public policy control is set up to assure this does not happen.

### III. A BROADER SHARIA PICTURE: SHARIA DISCOURSE IN AMERICA AND THE ISSUE OF WOMEN’S RIGHTS

Viewed together, these cases show that, when considering Sharia-based requests in their courtrooms, American judges neither react with an automatic rejection of Sharia, nor do they give it wholesale deference without considering public policy and general constitutional principles. Yet the campaign to ban Sharia in American courts insists that the status quo does not go far enough. Bills to ban Sharia take the approach that, rather than rejecting individual Sharia-based requests when they violate public policy, judges should always view Sharia with suspicion. This comes from a presumption that Sharia is itself contrary to American law and values and, some even argue that it is a political-military movement set out to take over the world.<sup>21</sup> Most Americans dismiss the “Sharia-as-world-takeover” warning as rhetorical exaggeration, but, nevertheless, the idea that Sharia-as-Islamic-law is generally a bad idea—especially for women—does resonate with many Americans. This is important because few Americans have any appreciation for either how Sharia might be seen as a positive force in Muslim lives, or what a Sharia ban could mean for American Muslims. I believe there are several important, largely overlooked, features of Sharia, and especially its role in women’s rights, that merit brief attention.

First, it should be clarified that Sharia itself is not a uniform monolithic code of legal rules, but instead is manifested in several different schools of law. From the perspective of Islamic jurisprudence, Sharia is the perfect Law of God, but the specific rules that are extrapolated from scripture are a human creation. These humanly

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reasons quite similar to the public policy concerns expressed by the California appellate court—namely, that if a woman pursues a divorce even where the husband is not at fault, then she should not get a windfall of the deferred *mahr*. What the California court did not appreciate (apparently based on the exaggerated argument from the wife’s attorney) was that in the case of a *faskh* Islamic divorce, a wife might be seeking divorce because of harm from her husband, in which case the *mahr* is not a mechanism for “profiteering” by divorce, but rather a mechanism for having the financial independence sufficient to support herself once she is able to get out of an unfortunate marriage (especially important if she was financially dependent upon him during the marriage).

21. For example, the original Tennessee Sharia ban legislative proposal (before it was amended) defined Sharia as a “legal-political-military doctrine . . . requir[ing] the abrogation, destruction, or violation of the United States and Tennessee Constitutions and the imposition of Sharia through violence and criminal activity.” S.B. 1028, 107th Gen. Assemb., 1st Sess. (Tenn. 2011), available at <http://www.capitol.tn.gov/Bills/107/Bill/SB1028.pdf>.



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created legal rules, called “*fiqh*” (literally, “understanding”), multiplied with the diversity of Muslim jurists over time. Yet, because of the ever-present possibility of human error none could claim with certainty to have *the* correct understanding of God’s Law as against all others. Therefore, all scholarly efforts to articulate the rules of Sharia must be accepted, creating a multiplicity of *fiqh* schools (and their corresponding legal doctrines) from which individual Muslims can choose as they seek to live by Sharia.<sup>22</sup>

Second, the Sharia-ban campaign often quotes some “offensive” *fiqh* rules to argue that Sharia oppresses women and is therefore antithetical to American values.<sup>23</sup> For those unfamiliar with Islamic jurisprudence, this argument sounds damning, especially when classical *fiqh* texts are quoted. But a basic appreciation of the difference between Sharia and *fiqh* reveals the conceptual error in such assertions. Quoting one (or even more than one) *fiqh* rule does not define Sharia any more than quoting *Plessy v. Ferguson* defines the U.S. Constitution.<sup>24</sup> After all, it was not the *Constitution* that endorsed the oppression of black schoolchildren in the United States; it was one *interpretation* of the Constitution that did so. Therefore, while there are quite a few gender-discriminatory rules in the collections of *fiqh*, Muslims are not Islamically obligated to follow them simply because they exist in the *fiqh* doctrine. This principle is part of the epistemology of *fiqh* itself: because no *fiqh* rule can conclusively claim to be “the” correct understanding of Sharia, no *fiqh* rule is—in and of itself—binding on any Muslim. Moreover, because the diversity of *fiqh* interpretations of Sharia continues to evolve and grow even today, many Muslim scholars (men and women) are actively engaging in creating new *fiqh* alternatives to many of the gender-specific rules (such as unilateral *talaq* and patriarchal child custody rules).<sup>25</sup>

Moreover, Islamic legal reform is not the only answer for those concerned about women’s rights under Sharia. It is important to recognize that not all existing *fiqh* is “bad” for women. This goes largely unnoticed by feminists in the West, but there are several aspects of classical *fiqh* that many Muslim women find quite empowering

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22. For more detail on Islamic jurisprudential theory and how it created several different schools of law, see generally Asifa Quraishi, *Interpreting the Qur’an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006).

23. For example, the website Breitbart.com contains an article asserting the following:

Shariah institutionalizes discrimination against women, deprives people of freedom of expression and association, criminalizes sexual freedom, and incites hatred and violence against people of certain social groups. As manifested in countries officially ruled by Islamic law, shariah condones or commands abhorrent behavior, including underage and forced marriage, “honor killing” (usually of women and girls) to preserve family “honor,” female genital mutilation, polygamy and domestic abuse, and even marital rape.

Team B, *What is ‘Shariah’?*, BREITBART (Sept. 17, 2010), <http://www.breitbart.com/Big-Peace/2010/09/17/What-Is-Shariah>; see also TEAM B II, THE CTR. FOR SEC. POLICY, SHARIAH: THE THREAT TO AMERICA: AN EXERCISE IN COMPETITIVE ANALYSIS (Oct. ed. 2010), available at <http://shariahthethreat.org/>.

24. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding separate but equal was constitutional).

25. There are far too many examples to list here, but some examples are noted in Asifa Quraishi, *What If Sharia Weren’t the Enemy?: Rethinking International Women’s Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 215–25 (2011).

and important to maintaining their independence and organizing their lives. For example, all classical *fiqh* schools agree that a woman's property is exclusively her own—no one can ever assert any legal claim over it, including all male relatives and husbands. Those familiar with women's rights under common law should recognize that this fourteen-hundred-year-old *fiqh* rule is quite different than the property rules that used to apply to American women. Under the common law, women were not only limited in their ability to acquire property of their own (for example, through restrictions on the ability to contract in their own names), but they also lost separate ownership of their property upon marriage when it then became the property of their husbands. The adoption of community property principles (borrowed from civil law) by some states presented a radical departure from this scheme because these principles designated and protected the property that women brought with them into a marriage as their own separate property, and gave women ownership interests in the property acquired by both the husband and wife during the marriage.<sup>26</sup>

When compared to classical Islamic law, however, community property is not necessarily a woman-empowering move forward. If you begin from the position that a woman's property is her exclusive property, then community property (by transforming all assets and income earned during the marriage into marital property shared equally with one's husband) actually takes away the property rights granted to a woman under Islamic law. As an illustration, consider this hypothetical: imagine that Leila is a young professional with a high salary and a successful career. Assuming that her income would be exclusively her own, upon marriage she opted for a very low *mahr*, figuring that she would not need to rely on it if she were to end up single again. If Leila ends up divorcing in a community property state, a marital dissolution would award her ex-husband half of all the assets Leila acquired during the marriage. This could put her in a financial position far inferior to the one that she was expecting under Islamic law (specifically, the principle of exclusive female ownership of women's property), especially if the marital property brought into the marriage by her now-ex-husband was very small. From Leila's perspective, community property would not give her *more* property rights; it would cut them in half.<sup>27</sup>

Another provision from classical *fiqh* that promotes women's financial independence upon divorce is the rule that considers a wife's household work to be financially compensable. Under classical *fiqh*, housework is not a wife's legal obligation, so those who do so can in some cases be financially compensated for this

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26. See Caroline B. Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 2–13 (2011).

27. Had she known of the community property consequences, Leila might have argued for a much larger deferred *mahr* to offset the potential future loss—although, as the cases above illustrate, it is no guarantee that an American court will honor a *mahr* agreement. Alternatively, Leila could have opted out of community property with a valid prenuptial agreement, but this solution is not ideal because few newlywed couples are fully aware of the legal consequences of community property, much less the state in which they will be living if and when they divorce.

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work.<sup>28</sup> This rule can have important financial consequences in the dissolution of a marriage in which the husband earned a large salary while the wife maintained the home. Yet this aspect of *fiqh* is rarely raised in Muslim family law cases in America. Instead, Muslim husbands in these cases often argue that the contractual *mahr* is the sum total of the wife's rights under Islamic law, and that the wife should receive nothing in alimony or through any equitable distribution of property.<sup>29</sup> In such cases, given the significant financial disadvantage in which this resolution would put the wife, many American judges have rejected these purported Sharia arguments as against public policy. What is not acknowledged in these cases, however, is that the *mahr* clause of a Muslim marriage contract (unlike a prenuptial agreement) is not meant to constitute a full division of property upon divorce under classical *fiqh*. Rather, the *mahr* is just one part of a complex interconnected network of Islamic property laws that could include not only compensation for housework, but also women's exclusive ownership of their property, men's exclusive financial household support obligations, and gendered inheritance laws, to name just a few. Thus, in the case of a long-term marriage between a career husband and a stay-at-home wife, a Muslim judge might award the wife her *mahr*, *plus* compensation for the financial value of all of her housework over the course of the marriage (which could amount to as much as or perhaps even more than the distribution under state law).

In other words, even classical *fiqh* rules can accomplish women-empowering goals similar to secular American laws, but they operate within a different framework and start from different premises. As a result, it is overreaching to assume that all Sharia-based rules offend American legal values of gender fairness. Indeed, rather than rescuing them from the gender inequalities of Islamic law, some Muslim women might object to the wholesale judicial disregard of Sharia as an intrusion upon their rights. Simply put, it is not true that a woman is always financially better off under American law than under Islamic law.

### IV. LOOKING FORWARD: THE IMPLICATIONS AND LIKELIHOOD OF AMERICAN MUSLIM TRIBUNALS

There is a hollow mechanical aspect to the way that *fiqh* rules are depicted in American courts. *Fiqh* is often treated as a static collection of legal rules to be quoted and applied regardless of social context and circumstances. But for someone schooled in Islamic jurisprudence, it would be awkward and insufficient to simply slice off the classical rules from the books and apply them in the considerably different realities of

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28. Alternatively, the husband must hire someone to do it, or do it himself. In the classical *fiqh* doctrine, whether or not a woman was entitled to this compensation might depend on her social class. This condition, however, may or may not be considered relevant to limit application of this rule today. Recent divorce cases in Iran that awarded women this compensation do not seem to so limit it.

29. Not surprisingly, this is a common legal argument made by the husband if the *mahr* is quite small in comparison to a very large marital estate. See, e.g., *In re Marriage of Altayar*, No. 57475-2-I, 2007 Wash. App. LEXIS 2102, at \*1 (Ct. App. July 23, 2007) (finding that a marriage contract containing a *mahr* of nineteen gold coins was not a sufficient substitute for a prenuptial agreement because exchange of *mahr* for equitable property distribution under Washington law was not fair).

life in twenty-first century America. *Fiqh* lawmaking and adjudication requires not just knowledge of the scripture and the doctrinal rules extrapolated from that scripture, but also knowledge of the social context in which the rules are to be applied. Thus, where social context changes, the *fiqh* often changes as well. Further, Muslim judges also consider the practical consequences of applying a *fiqh* rule in a given case.<sup>30</sup> This brings up a question often asked within the American Muslim community: Can Muslims in America access civil institutions that provide religious advice, counseling, and dispute resolution from the perspective of Islam *in America*, rather than *fiqh* rules imported from overseas? As the American Muslim community grows and creates its own homegrown Islamic scholars, these civil institutions may grow along with it.

In the arena of dispute resolution, some American Muslims have looked to the American Jewish community for inspiration. That community has created a successful alternative to presenting Jewish legal arguments in secular courts: the Beth Din. As Professor Michael Broyde elucidates in his article, the Beth Din arbitration tribunals offer Jewish Americans the option of resolving their disputes before arbiters who are experts in both Jewish and American law and are aware of the particular social realities of Jewish life in America today.<sup>31</sup> Would a Muslim arbiter schooled in both Islamic law and American law similarly serve the American Muslim community with a more nuanced and contextualized approach to Islamic law that applies—perhaps even creates—different *fiqh* rules than the majority opinions of classical *fiqh*? Possibly. It is by no means a certainty, but it is conceivable that if Muslim equivalents of Beth Din tribunals were staffed by creative and professionally trained Muslim arbiters,<sup>32</sup> a new body of uniquely American *fiqh* could evolve out of these tribunals. Such *fiqh* could incorporate the realities of modern Muslim life in the United States, such as racial equality, religious pluralism, the absence of gendered public and private spaces, advanced medical technology, and so on.<sup>33</sup> These rules would provide powerful alternatives to the stagnant “*fiqh* on the books” currently quoted to American judges by expert witnesses in their courtrooms.

The possibility of Muslim American tribunals also provides food for thought for Americans interested in supporting human rights and democracy in the Muslim world. Those wanting to help “moderate Muslims” prevail over the intolerance and

30. For more on the role of a Muslim judge, see Asifa Quraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law*, 2009 MICH. ST. L. REV. 339 (2009).

31. See Michael J. Broyde, *Jewish Law Courts in America: Lessons Offered to Sharia Courts by the Beth Din of American Precedent*, 57 N.Y.L. SCH. L. REV. 287 (2012–2013).

32. This caveat is crucial. The arbiters would have to be qualified to do independent *ijtihad* (Islamic legal reasoning) in order for their *fiqh* to actively incorporate the relevant American context. Imams who only apply existing, outdated *fiqh* of the classical books would arguably do more harm than good.

33. I am not the first to make this suggestion. Similar thoughts have been expressed by, for example, Anver Emon and Faisal Kutty, both writing in the context of the aborted Muslim tribunal project in Canada. See Anver M. Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence and Multicultural Accommodation*, 87 CAN. B. REV. 391 (2008); Faisal Kutty, *The Myth and Reality of “Shari’a Courts” in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7:3 U. ST. THOMAS L.J. 559 (2010).

## RUMORS OF THE SHARIA THREAT ARE GREATLY EXAGGERATED

extremism of radical Muslims around the world might consider this: What if it's not about over *there*? What if it's about over *here*? That is, what if the answer to extremist understandings of Sharia is to drown them out with new and different *fiqh* rules—rules that are just as authentically Islamic, but born in the open space of a free civil society like the United States where the process of legal interpretation can evolve naturally and creatively, not stifled by social and political forces? That is, if authentic, sophisticated American Muslim tribunals existed in the West, then perhaps some<sup>34</sup> of the new *fiqh* rules that would emerge from them would reflect American social values like gender equality, human rights, and religious freedom. When that *fiqh* goes out into the world, and American Muslim scholar-arbiters interact with Muslim judges and scholars from other places, this could have powerful potential for contributing to the global evolution of *fiqh* generally. It also might help facilitate a new, authentically Muslim consensus on stalemate issues in international civil, human, religious, and women's rights discourses in ways that most western policymakers and social activists have yet to appreciate.

None of this is likely to happen any time soon, however. I recognize that there is simply too much resistance to Sharia (let alone Sharia tribunals) in the current American political climate to make this a reality—despite our legal system's openness to religious alternative dispute resolution systems like the Beth Din. For empirical evidence, we need look no further than Canada, where the recent planned addition of Islamic arbitration tribunals to existing Jewish and Christian tribunals was revoked after the announcement sparked public controversy.<sup>35</sup> At the moment, negative associations with Sharia seem to be too strong in Western minds to leave any room for understanding Sharia-based adjudication as a dynamic interpretive process that allows for evolution and new *fiqh* rules. Given this reality, as well as the current limited numbers of Islamic legal scholars who also hold an American law degree, we are not likely to see the Muslim equivalents of Beth Din tribunals in the near future, despite their potential even beyond the litigation needs of American Muslims. For now, the status quo continues: American judges evaluate Sharia-based claims presented by Muslim parties through expert testimony, and enforce what they understand as long as it does not violate public policy.

## V. CONCLUSION

Although the principle of “One Law for All”<sup>36</sup> has powerful emotional appeal, it is simply not the reality of law in the United States. Uniform federal law and the Constitution are supreme, but within those boundaries, a great deal of legal diversity exists, and American accommodation of religious law, within the limits of public

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34. I say “some” here because I believe that, if these tribunals were to work, the principles of *fiqh* pluralism would have to apply. That is, I do not imagine one central body of arbiters producing one collection of new *fiqh* rules, but rather a diversity of *fiqh* interpretations reflecting the different ideologies of the arbiters (ranging from conservative to liberal and otherwise) and those of the American Muslim public.

35. See Kutty, *supra* note 33.

36. See ONE L. FOR ALL, *supra* note 1.

policy, has always been part of that diversity. Many have pointed to this American tradition with pride, arguing that the United States has a better approach than those countries where secularism is coming to mean “assimilationism” and where religious diversity is suffocated by aggressive laws restricting religious practices. The anti-Sharia movement in the United States seeks to similarly narrow the range of religious practice legally protected by American courts.

The question presented by the anti-Sharia movement is therefore not really about Sharia. It is about America. It is about what sorts of religious diversity our liberal democracy chooses to honor. Will we continue to find ways to legally accommodate the many different religious practices of our citizens, even when we don’t quite understand or agree with them? Or will we move toward legal uniformity and homogeneity and “One Law for All”? Given that America has never been a homogeneous society, I hope that we choose the former, honoring individual freedom whenever possible, despite the tough cases that will inevitably arise. I believe that America is at its best when we find strength in our diversity, and especially when we protect the diverse practices of our minorities. I believe our differences exist for us to learn from, not to iron out. Muslim families following Sharia are part of that diversity. American judicial accommodation of their requests should be something of which Americans are proud, not afraid.