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## SHARIA LAW, ISLAMOPHOBIA AND THE U.S. CONSTITUTION: NEW TECTONIC PLATES OF THE CULTURE WARS

SAEED A. KHAN\*

Since the twin controversies of the Park 51 Center, the so-called “Ground Zero Mosque,” and the threats of Florida pastor Terry Jones in the summer of 2010 to burn copies of the Qur’an for the anniversary of the September 11 attacks, the public debates on anti-Muslim rhetoric and action, commonly described as Islamophobia, have intensified both in abundance and in rancor. With efforts to block construction of mosques in places like Murfreesboro, Tennessee,<sup>1</sup> Stockton, California<sup>2</sup> and Sheybogan County, Wisconsin,<sup>3</sup> several communities with small Muslim populations that have been living as neighbors for several years have now become the new battlegrounds for whether they can build houses of worship. Prompted and encouraged by community leaders and politicians purporting to represent all members of their constituency, well organized campaigns seek to limit the visibility of Muslim life in the public arena; or, at the very least, create conditions of sufficient hostility so as to dissuade Muslims from moving into the community and give Muslims currently residing in those communities pause as to whether to continue living there.<sup>4</sup>

Given the sordid racial history of the United States,<sup>5</sup> and the demonization of various religious and ethnic suspect groups,<sup>6</sup> one may rightly ask why the country, or at least some segments of it, has failed to learn from its past and assume a more conciliatory, even welcoming, posture toward those that do not seem to fit a certain paradigm. A common rejoinder is to mention the terrorist attacks of

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1. Robbie Brown, *Incidents at Mosque in Tennessee Spread Fear*. NEW YORK TIMES, Aug., 30, 2010, A10, [http://www.nytimes.com/2010/08/31/us/31mosque.html?\\_r=1](http://www.nytimes.com/2010/08/31/us/31mosque.html?_r=1).

2. Bobby Ghosh, *Islamaphobia: Does America Have a Muslim Problem?* TIME, Aug. 19, 2010, <http://www.time.com/time/magazine/article/0,9171,2011936,00.html>.

3. *Id.*

4. *Id.*

5. RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 11 (1993).

6. *Id.*

September 11, 2001, and the fact that Muslims were the perpetrators.<sup>7</sup> Furthermore, one could argue that the toll of two wars in Muslim countries—Iraq and Afghanistan—as well as the Ft. Hood shootings by Major Nidal Malik Hassan and the attempted bombing of Times Square in New York by Faisal Shehzad could affect attitudes toward Muslims.<sup>8</sup>

While a plausible cause for the intensified backlash against Muslim Americans, these events do not explain statistics regarding public opinion about Islam and Muslims. Immediately after the 9/11 attacks, American attitudes toward Muslims were less negative than they are today.<sup>9</sup> These statistics appear to be counterintuitive; the passage of time since 9/11 would, arguably, reduce the emotional trauma associated with that event and allow people to resist the temptation to impute collective guilt upon a people, yet this has not happened.<sup>10</sup> The level of acrimony toward Muslims and Islam has attained a new intensity, and even the ambivalent have decided to take a side in the debate, often toward antipathy.<sup>11</sup>

A decade after the worst attack on American soil, why are perceptions of Muslims eroding even further? Perhaps the answers lie beyond the notion of Islamophobia as a disease unto itself. Instead, perhaps it may be beneficial to locate attitudes toward Muslims as symptomatic of a broader, deeper social disease affecting the American psyche that is part of this nation's ongoing culture wars.

The phenomenon of anti—Muslim sentiment that appears to pervade so much of the public discourse of late does not occur within a vacuum. Notwithstanding Oklahoma's<sup>12</sup> and over a dozen other states' attempts to ban Sharia from their courts,<sup>13</sup> as well as efforts to block the construction of mosques and Islamic community centers across the

7. ROBERT P. JONES, WILLIAM A. GALSTON, AND E.J. DIONNE, JR., WHAT IT MEANS TO BE AMERICAN: ATTITUDES IN AN INCREASINGLY DIVERSE AMERICA TEN YEARS AFTER 9/11, 27 (2011), available at <http://publicreligion.org/site/wp-content/uploads/2011/09/PRRI—Brookings—What—it—Means—to—be—American—Report.pdf>.

8. COUNCIL ON AMERICAN—ISLAMIC RELATIONS, AMERICAN PUBLIC OPINION ABOUT ISLAM AND MUSLIMS 10 (2006), available at <http://www.cair.com/PDF/cairsurveyanalysis.pdf>.

9. THE PEW RESEARCH CENTER, PUBLIC EXPRESSES MIXED VIEWS OF ISLAM, MORMANISM 4 (2007), available at [http://pewforum.org/uploadedfiles/Topics/Religious\\_Affiliation/religionviews07.pdf](http://pewforum.org/uploadedfiles/Topics/Religious_Affiliation/religionviews07.pdf).

10. *Id.*

11. *Id.*

12. H.J.Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010).

13. Andrea Elliott, *The Man Behind the Anti—Shariah Movement*, N.Y. TIMES, July 30, 2011, at A1, available at <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>.

country,<sup>14</sup> various endeavors appear to target an array of ethnic and social groups. Arizona and Alabama have also passed measures aimed at limiting illegal immigration.<sup>15</sup> While this is understandable for the former as a border state, it is puzzling for the latter, which lacks a foreign land neighbor. These measures are seen as being less—than—veiled measures to racially profile people of color,<sup>16</sup> and the scope of the laws will undoubtedly impact people who are legal residents and/or citizens, though deficient in “American appearance.”<sup>17</sup> Some politicians and advocates for these measures have been claiming that in addition to protecting the country’s borders from the infiltration of job—stealing foreigners, the legislation also helps prevent easy access through porous boundaries of terrorists.<sup>18</sup>

Another key area of contestation among cultural warriors is over the definition of marriage. To date, same—sex marriage has been recognized in eight states: Hawai’i, New York, Connecticut, Vermont, New Hampshire, Massachusetts, Iowa and Maryland, as well as the District of Columbia, with California giving conditional recognition pending judicial outcome and others granting privileges and rights similar to heterosexual marriage.<sup>19</sup> The issue of homosexual rights, especially same—sex marriage, has been a contentious and highly politicized aspect of public debate.<sup>20</sup> Currently, the recognition of such unions across state lines pursuant to constitutional notions of the full faith and credit clause remain a hotly contested and open question.<sup>21</sup>

While immigration and efforts to define traditional family conventions is nothing new, there has been a coalescence of various demographic shifts in the United States,<sup>22</sup> culminating with the

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14. Ghosh, *supra* note 2.

15. Julia Preston, *Immigrants Are Focus of Harsh Bill in Alabama*, N.Y. TIMES, June 4, 2011 at A10, available at <http://www.nytimes.com/2011/06/04/us/04immig.html>.

16. *Id.*

17. *Id.*

18. Michael Scherer, *Huckabee’s Growing Pains*, TIME, Dec. 31, 2007, <http://www.time.com/time/politics/article/0,8599,1699101,00.html>.

19. *Same—Sex Marriage, Civil Unions and Domestic Partnerships*, NAT’L CONF. STATE LEGIS. (July 14, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>.

20. David Masci, *An Overview of the Same—Sex Marriage Debate*, PEW RESEARCH CENTER (Apr. 1, 2008), <http://pewforum.org/Gay—Marriage—and—Homosexuality/An—Overview—of—the—Same—Sex—Marriage—Debate.aspx>.

21. *See, e.g.*, Gary J. Simson, *Beyond Interstate Recognition in the Same—Sex Marriage Debate*, U.C. DAVIS L. REV. 313, 315 (2006) (recognizing that the same—sex marriage debate has been dominated by the interstate recognition issue).

22. William Booth, *One Nation, Indivisible: Is It History?* WASH. POST, February 22, 1998, at A01 available at <http://www.washingtonpost.com/wp—srv/national/longterm/meltingpot/melt0222.htm>.

emergence of a new moral panic,<sup>23</sup> where deeply rooted fears of a significant, irreversible change in the social order is imminent. Spasms of this anxiety have been present for some time—some may argue for at least the last several decades since the turbulence of the 1960's<sup>24</sup>—but the intensification of these concerns appears to be related to the impending paradigm change in American demographics estimated for the year 2050.<sup>25</sup> Midway through the twenty—first century, the United States is predicted to become a majority—minority nation.<sup>26</sup> For some, this is a source of considerable consternation as it simultaneously brings the end of an era perceived to be a permanent part of the American experience, as well as a sense of uncertainty and possible foreboding of an American which may not readily be recognizable to them.<sup>27</sup>

In his final book before his death, Harvard scholar Samuel Huntington assessed the changing America.<sup>28</sup> He seemed to imply that the country was moving toward a more entropic, dystopic future as it abandons its purportedly essential core identity—White, Anglo—Saxon, Protestant—for an increasingly Brown, Latin—American, Roman Catholic countenance.<sup>29</sup>

If, as Huntington suggests, the United States is on its way toward a significant transformation of its ethnic zeitgeist, the reaction may be influenced by moral panic and a desire to reverse the process. One possible tactic may be to employ legislative devices to restrict further Hispanic entry to America.<sup>30</sup> The Arizona and Alabama immigration measures may represent a frustration over the influx of Hispanics into each respective state and the eventual cultural shifts that

23. *Id.*

24. *Id.*

25. *Id.*

26. Press Release, U.S. Census Bureau, An Older and More Diverse Nation by Midcentury (August 14, 2008), available at <http://www.census.gov/newsroom/releases/archives/population/cb08—123.html>.

27. SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 243 (2004).

28. *See id.* Huntington reorients his attention from the foreign policy arena which he had established in *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998) to a domestic focus. A common denominator in his work is the framing of cultures along highly impermeable lines of demarcation. For Huntington, hybridity, the so—called “third space” proposed by fellow Harvard scholar Homi Bhabha, apparently is non—existent.

29. *Id.*

30. Tanya Hedges Duroy, *Immigration Policy in* *ENCYCLOPEDIA OF THE CULTURE WARS*, VOL. 1, 274 (Roger Chapman ed., 2009).

would occur.<sup>31</sup> And yet, in neither case have the public debates explicitly framed the issue as a Hispanic “problem,” instead labeling it as a matter of illegal “aliens.”<sup>32</sup>

Similarly, the recent legalization of same—sex marriage in a few states has led its opponents to respond with an affirmative espousal of what marriage is rather than what it is not.<sup>33</sup> In both cases, those affected by moral panic are politically pragmatic enough to engage the issue that vexes them head—on. The Hispanic community is the fastest growing demographic in America<sup>34</sup> and is well established in many states that happen to be rich in electoral votes including California, Arizona, Texas, Florida and New York.<sup>35</sup> Any aspersions against Hispanics collectively would be met with tremendous backlash beyond just the political arena.<sup>36</sup> Similarly, the Lesbian—Gay—Bisexual—Transgender community has gained a reputation of being politically well informed and organized, whereby polemical attacks in the context of the marriage debates would face retribution.<sup>37</sup>

If the cultural sands of America are shifting more than what is acceptable for some people by virtue of the transformations of ethnic and social mores, the election of the first African—American president in 2008 was seen as a significant change for the nation.<sup>38</sup> While some were inspired by Barack Obama’s ascendancy to the country’s highest elected office and believed it was evidence that America had moved beyond its difficult racial history,<sup>39</sup> such was not a categorically—held

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31. Randall C. Archibold, *Growing Split in Arizona Over Immigration*, N.Y. TIMES, April 26, 2010, at A13, available at <http://www.nytimes.com/2010/04/26/us/26immig.html>.

32. *Id.*

33. SHARON R. ENNIS, MERARYS RIOS—VARGAS, AND NORA G. ALBERT, U.S. DEPARTMENT OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, U.S. CENSUS BUREAU: THIS HISPANIC POPULATION: 2010 (2010), available at <http://www.census.gov/prod/cen2010/briefs/c2010br—04.pdf>.

34. Howard Witt, *Latinos Still the Largest, Fastest—Growing Minority*, L.A. TIMES, May 1, 2008, at 18, available at <http://articles.latimes.com/2008/may/01/nation/na—census1>.

35. *Id.*

36. *Id.*

37. Sean Murphy, *Rinehart Loses Okla. County Commissioner Race*, TULSA WORLD, July 30, 2008, [http://www.tulsaworld.com/news/article.aspx?articleID=20080730\\_12\\_OKLA267718](http://www.tulsaworld.com/news/article.aspx?articleID=20080730_12_OKLA267718).

38. Dinesh D’Souza, *Obama and the End of Racism*, TOWNHALL.COM (Sept. 1, 2008), [http://townhall.com/columnists/dineshsouza/2008/09/01/obama\\_and\\_the\\_end\\_of\\_racism/page/full/](http://townhall.com/columnists/dineshsouza/2008/09/01/obama_and_the_end_of_racism/page/full/).

39. *Id.*

sentiment.<sup>40</sup> Racism that may have been latent in many quarters manifested itself in subtle or tangential ways. The President was questioned about his faith, whether he was a Muslim, and whether he was in fact a natural born citizen or a Kenyan citizen.<sup>41</sup> In both instances, there was a seemingly concerted campaign to portray the President as being alien, a foreigner, and someone ineligible to serve as Commander—in—Chief. Of course, his biography is a matter of public record and scrutiny, incontrovertibly stating that he was born in Honolulu, Hawai'i (the year after it was admitted into the Union) and that he is a Christian (despite having an atheist father of Muslim heritage and belonging to a congregation in Chicago whose pastor gained controversy and notoriety).<sup>42</sup>

The contestation of the President's biographical bona fides may have been resolved, though not for some who stubbornly deny evidence supporting his assertions.<sup>43</sup> Notwithstanding the public debates surrounding the issue, the use of religious and national—origin tropes reveals much about the moral panic that possesses Obama's detractors. The issue of racial bigotry, though still evident, has become a sufficient enough *bête noire* that open aspersions and attacks based on race are not tolerated.<sup>44</sup> In today's culture—speak, one would never deign to call the President the “N” word. Instead, anger at the first African American president could be discharged by accusing him of being the “M” word; “Muslim.” The xenophobia driving this phenomenon seemingly has two functions: to impugn the President under the cover of a transferred cultural trope (i.e. Muslim) and to disparage Muslims with impunity.

As the morphology of America changes with ethnic shifts toward a larger Hispanic presence and culture, the redefinition of marriage, and the dismantling of racial homogeneity in the country's leadership, Americans have also been saddled with uncertainties

40. Noah S. Rayman, *Obama Election Transformed Racism?* THE HARVARD CRIMSON, Dec. 10, 2008, <http://www.thecrimson.com/article/2008/12/10/obama—election—transformed—racism—barack—obamas/>.

41. Alex Leary, *For Obama, Religion Remains an Issue*, TAMPA BAY TIMES, Dec. 15, 2011, at 1A, available at <http://www.tampabay.com/news/politics/national/for—obama—religion—remains—an—issue/1206260>.

42. Jodi Kantor, *A Candidate, His Minister, and the Search for Faith*, N.Y. TIMES, Apr. 30, 2007, at A1, available at <http://www.nytimes.com/2007/04/30/us/politics/30obama.html?pagewanted=all>.

43. See, e.g., *Donald Trump: Obama Birth Certificate Could Say He's 'Muslim,'* THE HUFFINGTON POST (Mar. 31, 2011), [http://www.huffingtonpost.com/2011/03/31/donald—trump—obama—birth—\\_n\\_843056.html](http://www.huffingtonpost.com/2011/03/31/donald—trump—obama—birth—_n_843056.html).

44. Bill Carter, *Radio Host Is Suspended Over Racial Remarks*, N.Y. TIMES, Apr. 10, 2007, at C1, available at <http://www.nytimes.com/2007/04/10/business/media/10imus.html>.

regarding the economy and the nation's previously presumed dominance on the international stage.<sup>45</sup> With emerging economic powers such as China, India, Russia and Brazil, the prospect of the United States rapidly declining from being the world's sole superpower to one nation among many is a frightening, demoralizing prospect.<sup>46</sup> Clearly, anger cannot be levied against other countries, especially those that are asserting new conventions of strength. Similarly, on the domestic front, many of the suspect groups driving the most dramatic economic shifts are beyond direct and open reproach given their perceived strength politically, financially, and historically.<sup>47</sup> One of the only remaining communities in America that is the object of derision and lacks social and political capital is the Muslim American population.<sup>48</sup> As a result, the anger and hostility leveled against it may appear to be disproportionate to its size unless one assesses such attitudes as being vicariously channeled toward it in lieu of their actual intended targets.

To explain why anti—Muslim rhetoric appears to be stronger now than even after 9/11, perhaps a more significant date is not 2001, but 2007. In that year, the Pew Center for the Study of Religious Life published an extensive report on Muslims in America.<sup>49</sup> Among the hundreds of pages of data, one statistic gained considerable attention.<sup>50</sup> The report placed the Muslim population in this country at roughly 2.35 million,<sup>51</sup> dramatically lower than the previously and oft—cited estimate of 6 to 8 million people.<sup>52</sup> Instead of Islam being the second largest religion in America, at about three percent of the population, the new figures placed the community at less than one percent of society.<sup>53</sup>

While this steep reduction in numbers could be interpreted to allay fears about the “Muslim threat” in the nation, a second approach was taken. Almost immediately, an amplified negative discourse began

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45. Adam Gopnik, *Decline, Fall, Rinse, Repeat: Is America Going Down?* THE NEW YORKER, Sept. 12, 2011, at 41.

46. *Id.*

47. Carter, *supra* note 44.

48. Rachel Zoll, *US Muslim Voters are Election Year Outcasts*, USA TODAY, Oct. 23, 2008, [http://www.usatoday.com/news/politics/2008-10-24-4293296423\\_x.htm](http://www.usatoday.com/news/politics/2008-10-24-4293296423_x.htm).

49. ANDREW KOHUT, PEW RESEARCH CENTER, *MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM* (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>.

50. *Id.* at 3.

51. *Id.*

52. *Id.* at 13.

53. *Id.* at 12.



in the public sphere, among media and political elites, now emboldened to speak about Muslims in a manner that they would not dare to use about other groups in this country.<sup>54</sup> With the 2008 elections approaching, the Muslim community undulated between being a pariah and a threat, to be avoided at all costs by those seeking election to office.<sup>55</sup> No major candidate for President wished to be seen at a Muslim—sponsored event, and several were wary of accepting Muslim donations lest they receive unwanted scrutiny in the media.<sup>56</sup> Though some may have anticipated such anti—Muslim fervor to be ephemeral,<sup>57</sup> limited only to the election cycle of 2008, the hostility continued beyond inauguration day in 2009 as many of the same issues in the culture wars remained and even increased.<sup>58</sup>

The hysteria swirling around the Park 51 Center controversy<sup>59</sup> in the summer of 2010 occurred in the perfect storm formed by a slow media cycle during the month of August, the impending midterm elections, and the already acceptable demonization of Muslim Americans by some media outlets and opportunistic politicians.<sup>60</sup> Despite several other issues of social and economic concern looming over the country, the Park 51 controversy became a litmus test for many candidates to serve as governors, senators or congresspersons.<sup>61</sup> Although the election is over, the controversy over a proposed Muslim community center in lower Manhattan, New York, open to all irrespective of religious affiliation, has become the new battleground. This controversy concerns not just a physical edifice, but the accommodation of religious laws for Muslims: Sharia.

In November 2010, Oklahoma voters approved the enactment of an amendment to the state's constitution that would in effect forbid state courts from using foreign or international laws as guides for

54. Joel Connelly, 'Hate Free' or 'Hate Filled': Muslim—bashing in America, SEATTLEPI.COM, Aug. 23, 2010, <http://www.seattlepi.com/local/connelly/article/Hate—Free—or—Hate—Filled—Muslim—bashing—in—883256.php>.

55. Zoll, *supra* note 48.

56. *Id.*

57. Kelsey Clark, *Center for Race and Gender Co—Sponsors Report on Islamophobia*, THE DAILY CALIFORNIAN, June 24, 2011, <http://www.dailycal.org/2011/06/24/center—for—race—and—gender—co—sponsors—report—on—islamophobia/>.

58. *Id.*

59. Ghosh, *supra* note 2.

60. *Id.*

61. Mohsin Zaheer, *Park 51 Controversy Leads to Political Engagement by Muslim New Yorkers*, FEET IN 2 WORLDS (Oct. 29, 2010), <http://news.feetintwoworlds.org/2010/10/29/park—51—controversy—leads—to—political—engagement—by—muslim—new—yorkers/>.

judicial decision.<sup>62</sup> State Question 755 specifically identified Sharia (Islamic) law as one such legal system to be banned.<sup>63</sup> The referendum was an effort to codify legislative efforts, and according to Republican state senator Rex Duncan, the bill's sponsor, to launch a "preemptive strike against local judges" who "might be legislating from the bench or using international law or Sharia law."<sup>64</sup> Apparently, Oklahomans' anxiety was driven by a recent New Jersey state judge's decision to consider Islamic law in a divorce proceeding, and by an apparent belief that it was only a matter of time before such protocols would spread to their state as well.<sup>65</sup> That Oklahoma's Muslim population is less than one percent of the state's total population<sup>66</sup> did not allay any of the fears of a full frontal assault by Muslims and their purportedly draconian laws on the heartland of America; the referendum passed with a seventy percent majority.<sup>67</sup> But before the constitutional amendment had the opportunity to go into effect, a Muslim Oklahoman filed a lawsuit seeking to block its implementation.<sup>68</sup> A U.S. District Court judge initially granted a temporary injunction,<sup>69</sup> which was in a later proceeding made a permanent bar on the state's ability to validate the law.<sup>70</sup>

Of course, the concerns about Sharia law, which reached the level of hysteria in Oklahoma, are based on a lack of understanding and several assumptions. First, many do not know exactly what Sharia law is. Second, many believe that Sharia law is inherently antithetical to the state's or nation's legal system. Third, many believe that Sharia is in fact foreign and/or international law such that it would come under the aegis of the proposed constitutional amendment. Each of these important misunderstandings deserves some examination.

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62. MARTHA DAVIS & JOHANNA KALB, AM. CONST. SOC'Y FOR LAW AND POL., OKLAHOMA STATE QUESTION 755 AND AN ANALYSIS OF ANTI—INTERNATIONAL LAW INITIATIVES 1 (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).

63. H.J. Res. 1056, *supra* note 12.

64. Ben Armbruster, *Sharia Hysteria Comes to Oklahoma: Voters Approve Sharia Law Ban*, THINK PROGRESS (Nov. 3, 2010, 5:00 PM), <http://thinkprogress.org/politics/2010/11/03/128074/oklahoma—sharia—law/>.

65. Laurie Ure, *Oklahoma Voters Face Question on Islamic Law*, CNN.COM (Nov. 1, 2010, 12:13 PM), <http://www.cnn.com/2010/POLITICS/10/28/oklahoma.sharia.question/index.html>.

66. Armbruster, *supra* note 64.

67. *Id.*

68. *Court Sides with Muslim Group on SQ 755; Injunction Filed*, KOCO.COM (Nov. 30, 2010, 8:38 AM), <http://www.koco.com/t/25946395/detail.html>.

69. *Id.*

70. *Id.*

First, as for what Sharia is, literally translated, Sharia means “the way.”<sup>71</sup> In practical terms for the Muslim, Sharia represents the sum total of laws, ethics, rules, and regulations that govern one’s life, and one’s relationship to society and the divine.<sup>72</sup> While many non—Muslims, especially those with anti—Muslim sentiments, associate Sharia primarily, if not exclusively, with certain criminal punishments,<sup>73</sup> Sharia has a dauntingly comprehensive scope. Criminal law is certainly a component of Sharia, but it is a rather minimal part.<sup>74</sup> Sharia covers conventional subjects of law such as commercial transactions, family law, civil law, politics, and even military engagement.<sup>75</sup> But Sharia also addresses issues that, though uncommon to secular notions of jurisprudence, will be familiar to those who abide by religious canons.<sup>76</sup> Hygiene, dietary practice and liturgy are all within the ambit of Sharia.<sup>77</sup>

The principal sources of authority for Sharia are the Qur’an and the Prophetic tradition (Sunna).<sup>78</sup> Yet, both of these sources require the essential measure of human interrogation and interpretation for their applicability. As with other legal traditions, Sharia is a vast, complex field that requires for its proper management trained and qualified experts in the discipline. In addition, there is the recognition that Sharia is a corpus of laws, rulings, and opinions that spans over fourteen hundred years and scores of differing cultural and historical contexts.<sup>79</sup> Sharia has thus developed into a highly diverse legal tradition that addresses and answers social realities over utopian models.

A common accusation against Sharia is that it is inherently antithetical to the American legal tradition.<sup>80</sup> Yet, closer study of Islamic law yields considerable similarity in several areas of law and jurisprudence. Contract law in Sharia, for example, recognizes many familiar concepts such as the underlying rationale for the Statute of

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71. JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 92 (4<sup>th</sup> Ed. 2011).

72. *Id.*

73. Scott Shane, *In Islamic Law, Gingrich Sees a Mortal Threat to U.S.*, N. Y. TIMES, Dec. 21, 2011, <http://www.nytimes.com/2011/12/22/us/politics/in-shariah-gingrich-sees-mortal-threat-to-us.html?pagewanted=all>.

74. Farid Sufian Shuaib, *Administration of Shariah Criminal Justice under the Malaysian Constitutional Framework: Issues and Suggestions*, 6 MALAYAN LAW JOURNAL i—xvi (2011).

75. MOHAMMAD HASHIM KAMALI, *SHARI’AH LAW: AN INTRODUCTION* 41—42 (2008).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Kamali, *supra* note 75 at 254.

Frauds, doctrines of unconscionability and fair dealings, and the notion of legal consideration and mutually bargained—for promises.<sup>81</sup>

Much of the misunderstanding about Sharia may stem from the fact that most of the text concerning Sharia—laws, judicial rulings, legal opinions, etc.—is difficult to access, as it may be written in a language other than English. In addition, there is an erroneous assumption that all legal activity in a so-called Muslim country must by definition be in conformance to the Sharia.<sup>82</sup> Often complicated by misguided, inaccurate or disingenuous statements by Muslim countries themselves, many of these states implement Sharia selectively at best, or badge their respective legal codes as Sharia—compliant to give them greater legitimacy among the body politic.<sup>83</sup> Some of these constructions are intended to preserve the political and social status quo in countries led by autocratic, oppressive regimes, and by a small economic elite.<sup>84</sup> As such, certain applications of Sharia, nefarious though they may be, are a function of national or cultural/political specificity, rather than an Islamically—mandated model.<sup>85</sup> Instead, it is critical to locate the broader universal principles common to Sharia and many other legal systems—America included—of jurisprudence that makes Sharia, in principle, compatible with other traditions.

Perhaps the underlying fear of Sharia's usage as a guideline in Oklahoma courts, notwithstanding the possibility of xenophobia being the main thrust for its opposition, may be the concern that Sharia may not be foreign law, per se, but would be governed by a foreign government's religious authority, such as Saudi Arabia or Iran.<sup>86</sup> This concern is ill conceived in two ways. First, American history has demonstrated that such a fear was unreal, as evidenced by the so-called "Catholic threat."<sup>87</sup> With uncanny rhetorical parallels to current debates, nativists in the nineteenth and twentieth centuries were able to foment considerable hysteria about Catholics being disloyal Americans because their primary allegiance was to the Pope in the Vatican.<sup>88</sup> Though a political issue as recently as the 1960 presidential election involving John F. Kennedy, these aspersions have for the most

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81. *Id.* at 158–60.

82. *Id.* at 17.

83. WAEL HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 140—70 (2009).

84. *Id.*

85. *Id.*

86. PHILIP JENKINS, THE NEW ANTI—CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 41–42 (2003).

87. *Id.* at 38.

88. *Id.* at 41–42.

part dissipated,<sup>89</sup> and meatless Fridays in public schools proved not to be a harbinger for the codification of the Latin Mass in the daily schedule. Second, Sharia does not currently recognize a central religious authority that has enforcement powers over Muslims worldwide.<sup>90</sup> In general, and in the case of Muslim—majority countries and other nations that possess large Muslim communities, the ultimate authority over Sharia issues resides in that country itself.<sup>91</sup> Muslims in the United States, and in Oklahoma specifically, would not be required to take their proverbial marching orders from the Middle East or any other foreign authority. As such, the Sharia followed by Muslims in this country would be guided by religious authorities in this country, making it by definition, a domestic, not foreign, legal system.

Is there a legitimate concern that American Muslim authorities could potentially instruct Muslims to select Sharia over American law should a conflict between the two systems occur? The answer to this inquiry lies within Sharia itself, which states that the laws of the state where Muslims reside should be respected and defended unless they clearly prevent the exercise of basic religious obligations, most of which are liturgical in nature.<sup>92</sup> Interestingly, when cases occur of American Muslims refusing to abide by the law, such as matters of defying military deployment by claiming conscientious objector status, this is the invocation of U.S. legal tradition,<sup>93</sup> albeit with a philosophically religious predicate with it. While it may be convenient to raise the specter of potentially disloyal American Muslims collectively repudiating state and federal law as a reason to categorically ban Sharia, statistics simply do not support the notion that Muslims in this country find an irreconcilable chasm between Sharia and American law.<sup>94</sup> This is due to the fact that Muslims see these two systems as being compatible.<sup>95</sup> Equally important is the recognition that Muslims, like members of other faith traditions, span a

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89. *Id.*

90. Qasim Rashid, *Shariah Law: The Five Things Every Non—Muslim (and Muslim) Should Know*, THE HUFFINGTON POST (Nov. 4, 2011, 11:15 AM), [http://www.huffingtonpost.com/qasim—rashid/shariah—law—the—five—things—every—non—muslim\\_b\\_1068569.html](http://www.huffingtonpost.com/qasim—rashid/shariah—law—the—five—things—every—non—muslim_b_1068569.html).

91. *Id.*

92. *Id.*

93. *Clay v. United States*, 403 U.S. 698, 702—05 (1971).

94. DR. JULIE MACFARLANE, INSTITUTE FOR SOCIAL POLICY AND UNDERSTANDING, SHARI'A LAW: COMING TO A COURTHOUSE NEAR YOU? WHAT SHARI'A REALLY MEANS TO AMERICAN MUSLIMS 11 (2012), available at [http://ispu.org/pdfs/ISPU%20Report\\_Marriage%20I\\_Macfarlane\\_WEB.pdf](http://ispu.org/pdfs/ISPU%20Report_Marriage%20I_Macfarlane_WEB.pdf).

95. *Id.* at 20—21.

fairly substantial spectrum of piety; some Muslims adhere to a particularly strict construction of their religious tenets and others may be considerably attenuated from such prescriptions.<sup>96</sup>

The Oklahoma referendum was fraught with problems from its very construction. The obvious constitutional dilemma raised would be the First Amendment issue of violating the free exercise of religion.<sup>97</sup> In addition, the referendum suffers from issues of vagueness and overbreadth. After all, Muslims could be engaged in behavior that was both pursuant to what Oklahoma law allows as well as being Sharia—compliant. The mere notion that Oklahoma would prohibit Muslims from following, for example, their own funeral practices or dietary prescriptions—both of which bearing considerable similarity to Judaic law—illustrates either the woeful ignorance about Sharia or the intentional targeting of a small, marginal community.<sup>98</sup> After all, the same blunt object of legislation intended to target Muslims and prevent them from access to Islamically slaughtered meat would also affect butchers supplying meat killed pursuant to kashrut law.<sup>99</sup>

Even a cursory introduction to the history, development, and dynamics of Sharia would have spared the Oklahoma legislators seeking its ban a great deal of anxiety about Sharia's potential and purported harms. That members of the state's legislative body would not have foreseen the constitutional challenge and the eventual court action striking it down is difficult to imagine. It, therefore, appears that the true legislative intent behind State Question 755 is to demonize the Muslim community of Oklahoma.<sup>100</sup> An easy target given its size and relative lack of political and social capital, and capitalizing on a national fervor described as Islamophobia, the banning of Sharia law has been an effective issue that is a convenient way to garner support

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96. Pew Research Center, *Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, THE PEOPLE & THE PRESS (Aug. 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/>.

97. KOCO.COM, *supra* note 68.

98. Similar efforts to isolate a religious community's practices were attempted and subsequently deemed to be in violation of the US Constitution on grounds of vagueness and overbreadth. In *Church of Lukumi Babalu Aye v. City of Hialeah*, the U.S. Supreme Court struck down a city ordinance in Florida that banned the ritual slaughter of animals within city limits. 508 U.S. 520, 533 (1993). The Court held that the ordinance targeted a specific religious community, but also proscribed otherwise permitted conduct. *Id.* at 547.

99. 508 U.S. at 536–39.

100. L. Ali Khan & Jasmine Abou-Kassem, *Oklahoma Ban on Shariah Law is Unconstitutional*, MWC (MEDIA WITH CONSCIENCE) NEWS (Nov. 9, 2010, 3:30 PM), <http://mwcnews.net/focus/analysis/6496-oklahoma-ban-on-shariah-is-unconstitutional.html>.

for political campaigns and elections.<sup>101</sup> The battle lines drawn on the issue of Sharia law serve as a veritable turf war, marking territory as to what will constitute acceptable Muslim engagement within the public sphere of Oklahoma, notwithstanding that most applications of Sharia for Muslims occur within the private realm.<sup>102</sup>

While the likelihood of implementation of State Question 755 may not be very high,<sup>103</sup> the prospect of its supporters, advocates and sponsors, as well those of similar efforts across the nation, accepting defeat is equally quite low.<sup>104</sup> If, in fact, the true impetus for anti-Sharia legislation emanates from a nativistic, xenophobic, even racist influence,<sup>105</sup> new attempts to refine such laws to pass constitutional may already be underway.<sup>106</sup> After all, in their estimation, the true flaw in their effort was not in its probity, but instead, in the manner of its execution, i.e. supporting a clearly poorly constructed law.<sup>107</sup> Unlikely to accept defeat and change focus, one can expect a renewed, more focused agenda, seeking to avoid the mistakes encountered already. Perhaps one such approach to be employed will involve existing constitutional law as guidance. As explicit emphasis to prohibit Sharia law has been met with obstacles and repudiation, it is plausible that any subsequent proposed legislation will be more nuanced to achieve its objectives. A possibly influential case will be *Dept. of Human Res.*

101. To date, there are fourteen states with laws or proposed legislation banning, explicitly or implicitly, some form of Sharia law, including Alabama, S.B. 62, 2011 Reg. Sess. (Ala. 2011); Alaska, H.B. 88, 27th Leg., 1st Sess. (Alaska 2011); Arkansas, S.B. 97, 88th Gen. Assemb., 2011 Reg. Sess. (Ark. 2011); Georgia, S.B. 51, 151st Gen. Assemb., 2011—12 Reg. Sess. (Ga. 2011); Indiana, H.B. 1078, 170th Gen. Assemb., 1st Reg. Sess. (Ind. 2011); Louisiana, H.B. 785, 36th Reg. Sess. (La. 2010); Michigan, H.B. 4769, 96th Leg. 2011 Reg. Sess. (Mich. 2011); Mississippi, H.B. 301, 126th Leg., 2011 Reg. Sess. (Miss. 2011); Nebraska, Legis.B. 647, 102d Leg., 1st Reg. Sess. (Neb. 2011); South Carolina, H.B. 3490, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); South Dakota, H.J.R. 1004, 86th Legis. Assemb. (S.D. 2011); Texas, H.J.R. 57, 82d Leg. (Tex. 2011); Utah, H.B. 296, 59th Leg., 2010 Gen. Sess. (Utah 2010); and Wyoming, H.J.R. 8, 61st Leg., 2011 Gen. Sess. (Wyo. 2011).

102. MacFarlane, *supra* note 94 at 6—7.

103. DAVIS & KALB, *supra* note 62 at 11.

104. Armbruster, *supra* note 64.

105. Tim Murphy, *Meet the White Supremacist Leading the GOP's Anti-Sharia Crusade*, MOTHER JONES (Mar. 1, 2011, 7:00 AM), <http://motherjones.com/politics/2011/02/david-yerushalmi-sharia-ban-tennessee>.

106. AARON FELLMETH, AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LAW AND FOREIGN LAWS IN THE U.S. STATE LEGISLATURES 2 (2011), *available at* <http://www.asil.org/pdfs/insights/insight110526.pdf>.

107. NCRCR Interview Series: *The Ban on Islamic Law in Oklahoma*, NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS, <http://www.rollbackcampaign.org/library/attachment.189111>.

*v. Smith*.<sup>108</sup> There, the U.S. Supreme Court held that a generally applicable law that is religiously neutral on its face may impede the free exercise of religion, and is therefore not in violation of the free exercise clause of the First Amendment.<sup>109</sup>

Although Oklahoma and other states<sup>110</sup> have attempted to ban Sharia law, such efforts may ultimately be unsuccessful after challenges to their constitutionality, primarily on the grounds that they are overbroad, and their explicit targeting of a single religious community.<sup>111</sup> The holding in *Smith*, however, obviates any such need; instead of attacking Muslims by driving the proverbial stake through the heart of Sharia, it may be more effective and successful to cause death by a thousand paper cuts. There already exist a myriad of laws and statutes that regulate employment conditions, family law and a host of other pertinent legal arenas that govern communities, including those with Muslim Americans.<sup>112</sup> Even without the broad anti-Sharia laws, Muslims have been affected by laws and regulations that define, for example, appropriate dress codes at work, as with the impact on Muslim women wearing the headscarf.<sup>113</sup> While cases of employment discrimination have been commonplace across the American judicial landscape on issues pertaining to workplace apparel, including the headscarf,<sup>114</sup> many of these cases have resulted in outcomes favorable to the employee—claimant through the use of the EEOC and other

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108. Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

109. *Id.* at 888—89 (1990). As a consequence of the Court's holding in *Smith*, Congress passed the Religious Freedom Restoration Act in 1993, signed into law by President George H.W. Bush. Religious Freedom Restoration Act of 1993, 42 U.S.C.S. § 2000bb (1993). Although its sponsors were not against the Court's holding as it applied to the facts of *Smith*, i.e. denying a Native American's claims for the use of peyote as a recognized religious sacrament, they were nonetheless worried that a dangerous precedent could occur that would restrict other expressions of the free exercise of religion. The law therefore was designed to prevent such restrictions on free exercise of religion, with the underlying conceit that some religions their beliefs and practices deserved more recognition and freedom from interference than others. 42 U.S.C.S. § 2000bb—1 (1993). However, their intended objective for the Act was stifled when the U.S. Supreme Court held that such an Act was an unconstitutional overreach of congressional authority onto the states and violation of the fourteenth amendment. *City of Boerne v. Flores*, 521 US 507, 536 (1997). As such, *Smith* remains valid law for states to enact religiously neutral legislation that may have the incidental impact on the free exercise of religion.

110. Elliott, *supra* note 13.

111. FELLMETH, *supra* note 106 at 3.

112. Press Release, The U.S. Equal Employment Opportunity Commission, Alamo Car Rental Guilty of Religious Bias Federal Court Rules in EEOC Lawsuit (May 30, 2006), available at <http://www.eeoc.gov/eeoc/newsroom/release/5—30—06.cfm>.

113. *Id.*

114. *Id.*



civil rights arguments.<sup>115</sup> It is highly likely that this approach will continue, either when existing legislation is employed or with new proposed laws.

The current debates regarding the place of Sharia law in America is not a unique historical phenomenon. After all, Jews and Catholics in this country have faced similar challenges and hurdles for acceptance.<sup>116</sup> While an examination of the nation's past and its treatment of other groups provides little comfort to those enduring such attitudes today, it helps contextualize the issue and lend clarity to the debate itself. Odious as it may be that Sharia is being exploited to foment division and to manipulate people's fears about their future, efforts to ban laws seen as foreign have been underway for almost a decade.<sup>117</sup> In 2005, for example, Congress attempted to enact the Constitution Restoration Act, designed to affirm the primacy of U.S. law in the face of international law.<sup>118</sup> The Act also sought to acknowledge God as the source of authority for America's legal system, including the Constitution.<sup>119</sup> While the proposed bill never progressed past committee in both houses of Congress,<sup>120</sup> the efforts and the objectives sought provide useful insight as to powerful attitudes in this nation and anxiety that its most fundamental institutions may be under threat.

Anti—Muslim rhetoric and legislative measures occupy a significant part of the current public debates.<sup>121</sup> Whether defined as Islamophobia, Muslimophobia or the more generic term of bigotry, it is important to understand that such attitudes do not exist in isolation. Rather, they represent a crystallized manifestation of a greater malaise that affects American society of late. It is quite likely that had there never been a 9/11 or an accepted aspersion of the Muslim community, the volatility and hostility of the public discourse would still persist.<sup>122</sup> The determination to avail the judicial system to serve as a bulwark against a phantom menace of Sharia law or Muslims as a whole is indicative less of a particular aversion against a specific suspect group than of a desperate attempt to reverse the irreversible process of

115. *Id.*

116. TAKAKI, *supra* note 5 at 28, 261.

117. H.R. 1070, 109th Cong. (1st Sess. 2005), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS—109hr1070ih/pdf/BILLS—109hr1070ih.pdf>.

118. *Id.*

119. *Id.*

120. Frederick Clarkson, *The Rise of Dominionism*, THE PUBLIC EYE MAGAZINE (2005), [http://www.publiceye.org/magazine/v19n3/clarkson\\_dominionism.html](http://www.publiceye.org/magazine/v19n3/clarkson_dominionism.html).

121. Ghosh, *supra* note 2.

122. *Id.*

change toward an America whose new and emerging complexion is a source of irrational fear for a palpable segment of its society.<sup>123</sup>

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123. *Id.*