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RELIGIOUS LAW (ESPECIALLY ISLAMIC LAW) IN AMERICAN COURTS

EUGENE VOLOKH*

I. Introduction

Many people worry about the possible encroachment of Sharia—Islamic law—into the American legal system. Oklahoma voters banned the use of Sharia and other religious law, though the Tenth Circuit struck down the ban precisely because it singled out Sharia by name.¹ Other state legislatures have considered similar bans.²

But in many of the instances that critics see as improper “creeping Sharia,”³ it is longstanding *American* law that calls for recognizing or implementing an individual’s religious principles, including Islamic principles. American law provides for freedom of contract and disposition of property at death. Muslims (like Christians, Jews, and the irreligious) can therefore write contracts and wills to implement their understanding of their religious obligations. American law provides for arbitration with parties’ consent.⁴ Muslims can use this to route their disputes to Muslim tribunals, just like Christians, Jews, and the irreligious often route their disputes to private arbitrators of their choice.

* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Many thanks to the University of Oklahoma College of Law for inviting me to give the Henry Lecture in March 2013; this article is based on that lecture.

1. *Awad v. Ziriax*, 670 F.3d 1111, 1128-29 (10th Cir. 2012).

2. *See, e.g.*, H.B. 2582, 50th Leg., 1st Sess. (Ariz. 2011); H.R.J. Res. 1004, 86th Sess. (S.D. 2011).

3. *See, e.g., About, CREEPING SHARIA*, <http://creepingsharia.wordpress.com/about-2/> (last visited Sept. 22, 2013).

4. *E.g.*, 9 U.S.C. § 2 (2012).

American law provides for religious exemptions from generally applicable laws and from employer regulations. Muslims, as well as Christians, Jews, and others, may claim such exemptions.⁵ American law provides for the use of foreign law in certain cases stemming from foreign occurrences (marriages, divorces, injuries, and the like).⁶ Sometimes this calls for the use of foreign religious law, whether Islamic law, Jewish law, or the decisions of Christian tribunals.

Of course, American law also imposes limiting principles on these doctrines. Some contracts and foreign judgments are unenforceable.⁷ Many religious exemption requests are denied.⁸ But these limiting principles, I argue below, already adequately prevent improper recognition of Islamic law and allow recognition of such law when recognition is proper. There is no need for new law here. The current principles just need to be applied equally to all situations, whether those situations involve Islamic law or other law.

In my experience, much of the criticism of the use of Sharia in American courts has come from the political Right. And I myself am generally a political conservative, and one who shares some of the concerns about the use of Islamic law in certain contexts.

Indeed, I have often criticized the bad conduct of various Muslim countries' governments, especially suppression of perceived blasphemy or apostasy.⁹ I have criticized the occasions on which American officials have restricted speech because it was offensive to Muslims,¹⁰ or failed to protect

5. See Eugene Volokh, *Some Background on Religious Exemption Laws*, THE VOLOKH CONSPIRACY (June 12, 2010, 7:07 PM), <http://www.volokh.com/2010/06/12/some-background-on-religious-exemption-law-2/>.

6. See generally Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219 (2014).

7. See *infra* Part II.

8. See *infra* Part V.

9. See, e.g., Eugene Volokh, *Singaporean Resort Owner in Malaysia Arrested, Loses Permanent Residency, for Letting Buddhists Meditate in Muslim Prayer Room*, THE VOLOKH CONSPIRACY (Aug. 19, 2013, 2:59 PM), <http://www.volokh.com/2013/08/19/singaporean-resort-owner-in-malaysia-arrested-loses-permanent-residency-for-letting-buddhists-meditate-in-muslim-prayer-room/>; Eugene Volokh, *7 Years in Prison + 600 Lashes in Saudi Arabia for "Insulting Islam,"* THE VOLOKH CONSPIRACY (Aug. 1, 2013, 12:53 PM), <http://www.volokh.com/2013/08/01/7-years-in-prison-600-lashes-in-saudi-arabia-for-insulting-islam/>; Eugene Volokh, *Schoolteacher in Egypt Fined \$14,000 for Allegedly Insulting Islam*, THE VOLOKH CONSPIRACY (June 17, 2013, 2:37 PM), <http://www.volokh.com/2013/06/17/schoolteacher-fined-100000-in-egypt-for-allegedly-insulting-islam/>.

10. See, e.g., Eugene Volokh, *Terry Jones Jailed, Apparently for Refusing to Promise Not to Demonstrate in Front of a Mosque*, THE VOLOKH CONSPIRACY (Apr. 22, 2011, 7:19

such speech against private violence.¹¹ I have publicly defended those who published the Mohammed cartoons, and I published the cartoons myself on my blog.¹² I was also apparently the first person to write about (and to condemn) one example often relied on by the anti-Sharia movement¹³—*S.D. v. M.J.R.*, the New Jersey case in which a trial court judge refused to issue a restraining order against a Moroccan Muslim husband who allegedly raped his wife.¹⁴

Nonetheless, I think many other complaints about incidents of alleged “creeping Sharia” in American law are misguided, partly because the complaints miss the way those incidents simply reflect well-settled (and sound) American law. Indeed, the alternative approach that I offer is, I think, a conservative approach. It urges courts to continue following well-established American legal traditions rather than distorting those traditions either in favor of Islam or against. I will explain this below by surveying various areas in which American law arguably implements or recognizes Islamic law, and discussing how my proposed approach—simply evenhandedly applying established American legal principles—would play out in those areas.

PM), <http://www.volokh.com/2011/04/22/dearborn-jury-holds-terry-jones-may-be-barred-from-organizing-rally-outside-mosque/>.

11. See, e.g., Eugene Volokh, *Charges Dismissed in Pennsylvania Prosecution for Attack on “Zombie Mohammed” Atheist Parader*, THE VOLOKH CONSPIRACY (Feb. 24, 2012, 12:12 AM), <http://www.volokh.com/2012/02/24/charges-dismissed-in-pennsylvania-prosecution-for-attack-on-zombie-mohammed-atheist-parader/>.

12. Eugene Volokh, *The Twelve Mohammed Cartoons, in Detail*, THE VOLOKH CONSPIRACY (Mar. 10, 2006, 6:01 PM), <http://www.volokh.com/posts/1142035265.shtml>.

13. Eugene Volokh, *Cultural Defense Accepted as to Nonconsensual Sex in New Jersey Trial Court, Rejected on Appeal*, THE VOLOKH CONSPIRACY (July 23, 2010, 5:45 PM), <http://www.volokh.com/2010/07/23/cultural-defense-accepted-as-to-nonconsensual-sex-in-new-jersey-trial-court-rejected-on-appeal/>. Searching for *new jersey and morocc!* in Lexis Advance, limited to 7/20/2010 to 7/25/2010, finds no earlier stories; a 7/24/2010 post on an anti-Sharia site, Atlas Shrugs, links to the volokh.com post. Pamela Geller, *Sharia (Islamic) Law in New Jersey Court: Muslim Husband Rapes, Beats, Sexually Abuses Wife, Judge Sees No Sexual Assault Because Islam Forbids Wives to Refuse Sex*, ATLAS SHRUGS (July 24, 2010, 11:35 PM), http://atlasshrugs2000.typepad.com/atlas_shrugs/2010/07/sharia-islamic-law-in-new-jersey-court-muslim-husband-rapes-beats-sexually-abuses-wife-judge-sees-no.html.

14. 2 A.3d 412, 418-19 (N.J. Super. Ct. App. Div. 2010). The husband was later indeed convicted of rape. Michaelangelo Conte, *Bayonne Husband Convicted of Sexually Assaulting Wife; She Testified He Told Her “This Is According to Our Religion”*, JERSEY J. (Sept. 23, 2010), <http://www.nj.com/news/jjournal/bayonne/index.ssf?/base/news-6/128522312420240.xml&coll=3>.

II. Enforcing Contracts and Wills That Are Motivated by Islamic Law

People sometimes write contracts or wills motivated by their desire to follow or accommodate their felt obligations under Islamic law. A union and a business might, for instance, negotiate a contract that gives a day off for a Muslim holiday.¹⁵ A lender and a borrower may structure a financial transaction in a way that complies with Islamic law related to financing and insurance, but still gives the lender the economic payoff it seeks.¹⁶

People may contract for binding arbitration of their agreements under Islamic law.¹⁷ A father may leave a will that, following Islamic law, leaves each daughter only half as much as it leaves each son.¹⁸ A groom may enter into a customary Islamic agreement that commits him to pay a “mahr,” an agreed-on amount of money to be given his future wife in the event of a divorce.¹⁹ And these contracts or wills can then be enforced by secular, American courts.

As some of the footnotes above note, many people have expressed concern about the enforcement of such arrangements, arguing that this is an example of “stealth Sharia” making its way into American law, or arguing

15. See *Tyson Plant Drops Labor Day for Muslim Holiday*, FOX NEWS (Aug. 5, 2008), <http://www.foxnews.com/story/2008/08/05/tyson-plant-drops-labor-day-for-muslim-holiday> (reporting on the incident, and reporting on people criticizing this as alleged intrusion of Sharia into American law); Bob Unruh, *Tyson Chicken Replaces Labor Day With Muslim Eid al-Fitr—Workers Wanted Islamic Religious Event Recognized*, NEVILLE AWARDS (Aug. 2, 2008), http://www.nevilleawards.com/stealth_sharia7.shtml (criticizing this as supposed “stealth Sharia”); Eugene Volokh, *Tyson Plant Drops Labor Day for Muslim Holiday*, THE VOLOKH CONSPIRACY (Aug. 6, 2008, 5:42 PM), <http://www.volokh.com/posts/1218058942.shtml>.

16. See *Murray v. Geithner*, 763 F. Supp. 2d 860 (E.D. Mich. 2011); Eugene Volokh, *Lawsuit Alleging That AIG’s Use of Sharia-Compliant Financing Violates the Establishment Clause Survives a Motion to Dismiss*, THE VOLOKH CONSPIRACY (May 27, 2009, 6:55 PM), <http://www.volokh.com/posts/1243464959.shtml>; see also creeping, *Bahraini Bank Buying “Shariah-Compliant” Real Estate . . . in the U.S.*, CREEPING SHARIA (Nov. 28, 2011), <http://creepingsharia.wordpress.com/2011/11/28/bahraini-bank-buying-shariah-compliant-real-estate-in-the-u-s/>.

17. See Eugene Volokh, *Religious Arbitration of Civil Disputes*, THE VOLOKH CONSPIRACY (Sept. 11, 2009, 2:30 PM), <http://volokh.com/posts/1252693856.shtml>.

18. *Alkhafaji v. TIAA-CREF Individual & Inst. Servs.*, 10 Pa. D. & C. 5th 449, 462-63 (Pa. Com. Pl. Jan. 14, 2010), *rev’d*, 24 A.3d 454 (Pa. Super. Ct. 2011); Eugene Volokh, *Will Calls for Distribution “According to Islamic Laws and Sharia”*; *Pennsylvania Court Gives Twice as Much to Each Son as to Each Daughter*, THE VOLOKH CONSPIRACY (Apr. 29, 2011, 5:44 PM), <http://www.volokh.com/2011/04/29/will-calls-for-distribution-according-to-islamic-laws-and-sharia-pennsylvania-court-gives-twice-as-much-to-each-son-as-to-each-daughter/>.

19. creeping, *Islamic Divorce in the U.S.*, CREEPING SHARIA (Apr. 17, 2011), <http://creepingsharia.wordpress.com/2011/04/17/islamic-divorce-in-the-u-s/>.

that Muslims are often pressured by their communities or families into creating such arrangements. But all we see here is the application of American secular law, and in particular American principles of freedom of contract and freedom of testamentary disposition. Those principles should apply as much to Muslims as to Jews, Christians, or members of other religions.

Jews and Christians may enter into contracts providing for religious arbitration of their disputes²⁰ (including in situations where there is a good deal of community pressure to enter into such contracts). Jews and Christians may negotiate with employers to get days off on their religious holidays, such as Rosh Hashanah or Good Friday.²¹

Jews and Christians may organize their investments in ways influenced by their religions, for instance investing in funds that promise not to participate in projects that the religion views as sinful.²² A Jewish couple may agree that, if the husband gets a secular divorce, he will nonetheless pay the wife \$100/day until he gives her a Jewish religious divorce.²³ Muslims are just as entitled to take advantage of the American tradition of freedom of contract as are the nonreligious or members of other religions.

Of course, not all contracts are enforceable. No American court would enforce a contract provision requiring that someone found guilty of theft by an arbitration tribunal have his hand chopped off. American courts won't order an action that constitutes a crime (in this instance, the crime of mayhem). Indeed, they won't enforce contractual provisions that call for

20. See, e.g., *Gen. Conference of Evangelical Methodist Church v. Evangelical Methodist Church of Dalton, Ga., Inc.*, 807 F. Supp. 2d 1291 (N.D. Ga. 2011) (Christian arbitration); *Glatzer v. Glatzer*, 905 N.Y.S.2d 607 (App. Div. 2010) (Jewish arbitration); *Spivey v. Teen Challenge of Fla., Inc.*, 122 So.3d 986 (Fla. Ct. App. 2013) (Christian arbitration); Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to "Ordinary" ADR*, 29 CUMB. L. REV. 583 (1998).

21. See, e.g., Charlotte Anthony, *Rosh Hashanah: At New Year, Jews Grapple with Work-Faith Conflicts*, JWEELY (Sept. 13, 2012), <http://www.jweekly.com/article/full/66457/at-new-year-jews-grapple-with-work-faith-conflicts/>.

22. See, e.g., Ezra Reichman, *Jerusalem—First-Ever Halacha-Compliant Approval for Investment Firm*, VOS IZ NEIAS (Mar. 22, 2009, 8:47 AM), <http://www.vosizneias.com/29170/2009/03/22/jerusalem-first-ever-halacha-compliant-approval-for-investment-firm/>; *New Look at Ethical Investing*, THE LUTHERAN (July 2005), https://www.thelutheran.org/article/article.cfm?article_id=5179.

23. See *Light v. Light*, No. NNHFA124051863S, 2012 WL 6743605, at *6 (Conn. Super. Ct. Dec. 6, 2012) (upholding such an agreement).

unreasonable penalties rather than compensation, even when only monetary penalties are at issue.²⁴

Likewise, a prenuptial contract that waives one party's child support obligations, or provides for a particular decision about future child custody, is generally not enforceable.²⁵ Most state courts take the view that such contracts between spouses cannot decide the rights of children, who are not parties to the contract.²⁶ Similarly, many state courts don't allow for arbitration of child custody questions.²⁷

It is also possible that an arbitration decision might be invalidated if there is evidence that the arbitrators discriminated based on race, religion, or sex against one of the parties to the arbitration.²⁸ In some situations, rules of Islamic and Orthodox Jewish law can call for discriminatory treatment of witnesses based on sex (and of course other arbitrators can discriminate for their own reasons, quite apart from religion).²⁹ If such rules are applied in a way that affects the outcome of an arbitration, then it is possible that secular courts will refuse to enforce the result of the arbitration.³⁰

American law, then, already provides tools for refusing to enforce contracts that are deemed improper; there is no need for some special contract law rule focused on Sharia. Religious motivation cannot validate contracts that are invalid for the reasons described above. But neither should religious motivation invalidate contracts that would otherwise be valid.

So the proper approach to Sharia-motivated contracts or wills should be simple: continue to follow traditional American contract law principles. The strong presumption in American law is freedom of contract and freedom to dispose one's property by will; an Islamic motivation, or any other religious

24. See, e.g., *Crosby Forrest Prods., Inc. v. Byers*, 623 So. 2d 565, 567 (Fla. Dist. Ct. App. 1993); RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981).

25. See, e.g., *Grimes v. Grimes*, 621 A.2d 211, 213-14 (Vt. 1992); *Mendoza v. Mendoza*, 870 P.2d 421, 423 (Ariz. Ct. App. 1994).

26. See, e.g., *Grimes*, 621 A.2d at 214.

27. Elizabeth Jenkins, Annotation, *Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R.5TH 69 (current through 2009).

28. See, e.g., *Betz v. Pankow*, 20 Cal. Rptr. 2d 834 (Ct. App. 1993). I say "might" because the matter seems not to be settled under American law.

29. See Eugene Volokh, *Orthodox Jewish Arbitrations, Islamic Arbitrations, and Discrimination Against Witnesses Based on Sex or Religion*, THE VOLOKH CONSPIRACY (Oct. 21, 2010, 6:05 PM), <http://www.volokh.com/2010/10/21/orthodox-jewish-arbitrations-and-discrimination-against-witnesses-based-on-sex-or-religion/>.

30. *Id.* (citing *Betz*, 20 Cal. Rptr. 2d at 837).

motivation, doesn't make a contract or a will unenforceable. But if the contract or will violates established public policy principles, for instance if it calls for improper remedies (the chopped-off hand), or violates family law limitations on prenuptial agreements, then it is unenforceable—again, without regard to its religious motivation.

III. Enforcing Contracts or Wills That Call for Courts to Interpret Islamic Law

Parties can also write contracts or wills that call for the interpretation and application of Islamic law by courts (rather than just by arbitrators). Thus, a contract among the founders of a mosque might call for interpretation under Islamic law,³¹ or a man's will might call for his property to be divided under Islamic law.³²

Here, too, there is well-settled American law—but under this law, these contracts are *not* enforceable, though merely religiously motivated contracts (see Part II) are enforceable.³³ The difference is that, under the Supreme Court's Establishment Clause precedents, secular judges are not allowed to interpret Islamic law (or Jewish law or Biblical law), and to decide what it "really" means.

If parties want to order their relationships through religious legal rules, they can set forth the rules themselves in their contracts or wills, for instance by saying, "I leave my daughter Deborah 1/3 of my property and my son Samuel 2/3." There is no antidiscrimination rule for testators, obligating them not to play favorites among their children, whether based on sex or any other reason.

Likewise, parties can provide for the contract or will to be authoritatively interpreted by some private party. They can, for instance, say, "I ask the head Imam of [a particular named mosque] to arrange for the distribution of my property according to Islamic law." Or they can provide that disputes

31. See William R. Levesque, *Appeals Court Won't Stop Hillsborough Judge From Considering Islamic Law*, TAMPA BAY TIMES (Oct. 24, 2011, 12:40 PM), <http://www.tampabay.com/news/courts/civil/appeals-court-wont-stop-hillsborough-judge-from-considering-islamic-law/1198321>; Eugene Volokh, "The Case Should Proceed Under Ecclesiastical Law" / Jews, Ketubahs, and Gets, THE VOLOKH CONSPIRACY (Oct. 26, 2011, 10:14 AM), <http://www.volokh.com/?p=52120>.

32. See *supra* note 18.

33. *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Central Coast Baptist Ass'n v. First Baptist Church of Las Lomas*, 65 Cal. Rptr. 3d 100, 116-17 (Ct. App. 2007).

under an agreement be arbitrated by a particular Islamic arbitral organization. But parties cannot ask secular courts to interpret Islamic law themselves, by saying, “I leave my property to be distributed according to Islamic law.”³⁴

Again, though, there is no reason to create any special rules for Sharia here. First Amendment law already precludes secular courts from deciding what Islamic law calls for—just as it precludes them from determining what other religions’ rules call for.

IV. Use of Foreign Law That Incorporates Religious Law

While American courts cannot and should not decide what Sharia calls for, and thus cannot enforce contracts that call for the application of Sharia, American courts rightly do consider the law of *foreign countries* that apply Sharia. In doing so, courts don’t purport to decide what Islamic law actually requires. They simply try to identify what law would be applied by the courts of the foreign country, whether that country is Saudi Arabia, Israel, or Greece.

A. Example: Family Law

Let’s begin with a common scenario: A family legally moves to America from Israel. American law will often ask the question: Are the father and mother married to each other? That’s relevant under immigration law.³⁵ It’s

34. I’ve sometimes heard people argue that such contracts (or wills) can be enforced if the court seeks only to determine what *the parties* (or the testator) understood “Islamic law” to require, rather than what Islamic law supposedly actually requires. But I don’t think this can work.

If the question is, “What did the decedent understand Islamic law [or Presbyterian teachings] to require?,” there will rarely be clear evidence to answer that question based on the decedent’s personal views (e.g., a letter in which he explained his views of his religion as applied to the particular will). Rather, there will be evidence that the decedent belonged to some particular denomination, and that that the religious law of that denomination is this-and-such—plus likely rival views from some more “reformed” or more “orthodox” branch of the denomination saying that the true religious law of that denomination is something else. This is not the sort of “neutral principle” inquiry that “promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice,” which was endorsed by *Jones*, 443 U.S. at 603. Rather, it’s closer to the inquiry into “religious doctrine and practice” condemned by *Presbyterian Church*, 393 U.S. at 449.

35. *See, e.g., Hassan v. Holder*, 604 F.3d 915, 925 (6th Cir. 2010) (“Nabil was granted an F-24 Immigrant Visa as an unmarried child of a lawful permanent resident. Under [federal immigration regulations], Nabil (and Sawsan, derivatively) would be deportable . . . if Nabil and Sawsan were actually married when Nabil entered the United States. Accordingly, the government had the burden to show by clear and convincing evidence that

relevant under family law, for instance if one of them wants to marry someone else, claiming that they were never married. It's relevant under other laws, such as a spouse's legal right not to testify against the other spouse in court.

Now if the couple had married in America, a court could easily verify their marriage by determining whether they obtained the proper license and met the proper legal formalities. But they got married in Israel, long before they came to America. Unsurprisingly, their marriage therefore does not comply with the usual American formalities. (Neither would a Canadian marriage nor a German marriage.) How can we tell whether they are indeed married?

American law has long had a well-settled rule on these matters: a purported marriage is valid under American law so long as it is valid under the law of the country where the marriage was entered into.³⁶ There are of course exceptions for marriages that are considered contrary to public policy, such as polygamous marriages.³⁷ But setting those aside, a purported marriage entered into in Israel is valid for our purposes if it was valid under Israeli law.

Yet Israeli law provides that family law questions must be resolved under the law of the religious community to which the parties belong.³⁸ A Muslim couple's marriage is thus evaluated to see if it complies with the formalities required by Sharia. Thus, under normal American legal principles, deciding whether two people married in Israel are legally married for American purposes requires determining whether the Sharia formalities were complied with in Israel. (Of course, this is even more clearly true as to marriages entered into in countries that generally incorporate Sharia rules into their family law, such as Saudi Arabia, Iran, and Pakistan.³⁹)

There's no grand or controversial issue of multiculturalism involved here. It's just our legal system's normal accommodation to the longstanding reality that people come to America from all over the world. Our system

the marriage between Petitioners occurred before their entry into the country. The validity of a marriage is determined by the law of the place of celebration. Pursuant to Israeli law, the Sharia courts (and Sharia law) control personal status matters of Muslims residing in Jerusalem.") (citations omitted).

36. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2) (1971).

37. *Id.* § 283(2) cmt. k.

38. *See* Hirschorn v. Hait, 2008 WL 695892, at *7-8 (N.J. Super. Ct. App. Div. Mar. 17, 2008) (noting this and enforcing the order of an Israeli Rabbinical Court entered in an Israeli Jewish divorce).

39. *See* L. Ali Khan, *The Qur'an and the Constitution*, 85 TUL. L. REV. 161, 168 (2010).

provides the same accommodation to people from England, Poland, Israel, and Saudi Arabia.

In some situations, this accommodation indirectly requires the application of Sharia, but it provides no greater deference to Sharia than it would to the application of any country's law. And while our legal system rejects some aspects of Sharia, such as the allowance of polygamy, it tolerates other aspects, such as the specification of what formalities are required to create a marriage. This is no different from how American law does not categorically reject Canadian opposite-sex marriages, even though Canadian same-sex marriages are not recognized under the law of most American states.⁴⁰

B. Example: Tort Law

Now let's turn to another scenario: An American tourist goes to Saudi Arabia on a trip and gets injured at the hotel where she's staying. She returns to America and sues the hotel in American courts.⁴¹ (Assume the hotel company does enough business in America that American courts have jurisdiction over it.)

In most states, the well-settled rule in such cases is to apply the tort law of the place in which the injury occurred. (Some states follow this as a pretty rigid rule,⁴² while in others it is a usual outcome of the balancing of several factors.⁴³) After all, we shouldn't expect Guatemalan, Taiwanese, or Saudi hotels to be subject to American rules as to injuries to their American tourists, German rules as to their German tourists, and so on. It makes more sense to accept that Saudi hotels' actions are to be judged under Saudi law and subject to Saudi rules with respect to, say, punitive damages or reduction of liability owing to the patron's negligence.

But in order to do that, American courts have to follow Saudi law, which is Sharia. Naturally, they wouldn't follow Sharia procedural rules, especially ones that violate American public policy (such as the devaluing of the testimony of female witnesses).⁴⁴ But other Sharia rules, for instance

40. *E.g.*, *O'Darling v. O'Darling*, 2008 OK 71, 188 P.3d 137.

41. *See Rhodes v. ITT Sheraton Corp.*, 9 Mass. L. Rptr. 355 (Super. Ct. 1999).

42. *See, e.g.*, *Precision Gear Co. v. Cont'l Motors, Inc.*, No. 1110786, 2013 WL 3481949, at *3 (Ala. 2013).

43. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(2)(a) (1971).

44. *See, e.g.*, JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* 61, 62, 178 (3d ed. 2009); Perry S. Smith, *Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence*, 11 TUL. J. INT'L & COMP. L. 21, 44 (2003).

those related to the kind and magnitude of damages allowed,⁴⁵ should be applied, just as similar French or Greek rules⁴⁶ would be applied in other cases.⁴⁷

There are other such examples, for instance involving contract law or the law of judgments.⁴⁸ But I think the family law and the tort law examples suffice to illustrate the point—to decide whether American courts should apply foreign law that incorporates Sharia, we should simply follow traditional American choice-of-law principles that cover all foreign law.

*V. Allowing Muslims to Claim Broadly Available Religious Exemptions
from Generally Applicable Laws or Work Rules*

Many states have legal rules that call for religious exemptions from generally applicable state and local laws.⁴⁹ Some such rules are enacted by statute, using so-called “Religious Freedom Restoration Acts.”⁵⁰ Other such rules have stemmed from state courts’ interpretations of the state constitution’s religious freedom provisions.⁵¹ Likewise, the federal Religious Freedom Restoration Act mandates similar exemptions from federal laws.⁵²

By and large, such “religious accommodation” regimes provide that religious objectors may get exemptions even from generally applicable laws unless denying the exemption is necessary to serve a compelling government interest.⁵³ So if a government action requires someone to do something that he sees as religiously forbidden (e.g., working on the Sabbath), then sometimes—but not always—the objector will be able to get an exemption.⁵⁴ The same is true if a government action forbids someone from doing something he sees as religiously required (e.g., wearing

45. *See, e.g.*, *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1422 (9th Cir. 1989).

46. *See, e.g.*, GEORGE A. BERMAN & ETIENNE PICARD, *INTRODUCTION TO FRENCH LAW* 261 (2008) (“French law formally rejects the notion of punitive damages.”); *GreenEarth Cleaning, L.L.C. v. Collidou Invest Fr.*, No. 09-0329-CV-W-GAF, 2009 WL 1766716, at *1 (W.D. Mo. June 23, 2009) (“[P]unitive damages are generally unrecoverable under French law . . .”).

47. *See also* *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893 (Tex. App. 2000).

48. *See* *Volokh*, *supra* note 6, at 228-30 & nn.37-44; *id.* at 230-31 & nn.47-49.

49. *See, e.g.*, Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. REV.* 1465, 1468 & n.6 (1999).

50. *Id.*

51. *Id.* at 1550 n.272.

52. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

53. *See infra* notes 65-72 and accompanying text.

54. *See generally* *Volokh*, *supra* note 49.

religiously mandated dress or facial hair, or using peyote in a religious ceremony). The federal Civil Rights Act similarly gives employees, public or private, the right to an exemption from generally applicable work rules that interfere with the employees' religious practices, unless the exemption would work an "undue hardship" on an employer.⁵⁵

Under these rules, Muslim employees could sometimes claim exemptions from some employer dress codes or hairstyle rules.⁵⁶ Muslim litigants or witnesses could claim exemptions from court rules that require people to keep their heads uncovered in court.⁵⁷ Muslims could ask for time off to pray⁵⁸ or days off for religious holidays.⁵⁹ Muslim cab drivers could ask for the right to refuse to carry passengers who are visibly carrying alcohol, despite a generally applicable policy requiring cab drivers to take all comers.⁶⁰

But again, the Muslim claimants would simply be seeking an application of *American* law, though based on their felt religious obligation to comply with Sharia. In this respect, Muslims are again just like Christians, Jews, and others. Christians, Jews, and Sikhs have on many occasions claimed exemptions from employer uniform or grooming requirements.⁶¹ Jews and Sikhs have claimed exemptions from requirements that they take off their

55. 42 U.S.C. §§ 2000e(j), 2000e-2(a); *see also* *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

56. *See* Eugene Volokh, *Security Guard's Right to Wear a Religious Headscarf*, THE VOLOKH CONSPIRACY (Dec. 12, 2011, 6:00 PM), <http://volokh.com/2011/12/12/security-guards-right-to-wear-a-religious-headscarf/>.

57. *See, e.g.*, *Tyson v. Damore*, No. Civ.A. 03-5297, 2004 WL 1837033 (E.D. Pa. Aug. 13, 2004); *In re Palmer*, 386 A.2d 1112 (R.I. 1978).

58. *Haliye v. Celestica Corp.*, 717 F. Supp. 2d 873 (D. Minn. 2010).

59. *See, e.g.*, Press Release, U.S. Dep't of Justice, Justice Department Settles Religious Discrimination Lawsuit Against Berkeley School District in Illinois (Oct. 13, 2011), *available at* <http://www.justice.gov/opa/pr/2011/October/11-crt-1362.html>; Eugene Volokh, *\$75,000 Settlement for Muslim Teacher Denied 19 Days' Unpaid Leave for Hajj (Pilgrimage to Mecca)*, THE VOLOKH CONSPIRACY (Oct. 14, 2011, 10:05 PM), <http://volokh.com/2011/10/14/75000-settlement-for-muslim-teacher-denied-19-days-unpaid-leave-for-hajj-to-mecca/>.

60. John Reinan, *Got Wine at the Airport? It's Harder to Grab a Cab*, MINNEAPOLIS STAR TRIB., Sept. 28, 2006; Eugene Volokh, *Cabs and Alcohol*, THE VOLOKH CONSPIRACY (Sept. 29, 2006, 12:31 PM), <http://volokh.com/2006/09/29/cabs-and-alcohol/>.

61. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Jewish Air Force psychologist who objected to a no-headgear rule); *Jenkins v. N.Y.C. Transit Auth.*, 646 F. Supp. 2d 464 (S.D.N.Y. 2009) (female Pentecostal employee who objected to having to wear pants); *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1988) (Sikh employee who objected to a hardhat requirement when that interfered with his ability to wear a religiously prescribed turban).

headgear in court.⁶² Christians, Jews, and members of other religions have claimed the right not to work on their Sabbaths and holy days, or even to take religious trips of a week or longer.⁶³ Christians have at times asked for the right to refuse to do certain job tasks that they see as religiously forbidden.⁶⁴

Of course, not all these claims are accepted. In some situations, a court may conclude that denying a religious exemption is indeed necessary to serve a compelling government interest. Florida, for instance, has a Religious Freedom Restoration Act,⁶⁵ but when a Muslim woman who wore

62. *See* *Atkin v. Parana*, No. CIV-86-1075E, 1987 WL 16459 (W.D.N.Y. Sept. 1, 1987); *Close-It Enters. v. Weinberger*, 407 N.Y.S.2d 587 (App. Div. 1978); Plaintiff's Original Petition, *Singh v. Cercone* (n.d.), available at <http://www.aclutx.org/files/070831.SinghFinalPetition.pdf>; *Dallas County Changes Policy to Settle Turban Case*, SIKH AM. LEG. DEF. & EDUC. FUND (Sept. 30, 2008), <http://www.saldef.org/saldef-news/dallas-county-changes-policy-to-settle-turban-case/>.

63. *See, e.g.,* *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 452, 455 (7th Cir. 2013) (concluding that an employer may have had a duty to accommodate an employee's request for a three-week unpaid leave coupled with a week of accrued vacation, so the employee, who apparently adhered to a mix of Christianity and local Nigerian practices, could return to Nigeria to perform funeral rites for his father); *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 683 (9th Cir. 1998) (involving a request for accommodation of a two-week-long pilgrimage to a visitation of the Virgin Mary, but concluding that this particular claimant didn't show that she had a religious obligation to go on this pilgrimage at this particular time); *EEOC v. Universal Mfg. Corp.*, 914 F.2d 71, 74 (5th Cir. 1990) (concluding that an employer may have a duty to accommodate a Christian employee's religious obligation to not work during a seven-day holiday period).

64. *See, e.g.,* *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776-77 (9th Cir. 1986) (concluding that the postal service had a duty to reasonably accommodate, through transfer to a comparably paid job, postal workers who had a religious objection to processing draft registration forms); *Gavin v. Peoples Natural Gas Co.*, 613 F.2d 482, 483-84 (3d Cir. 1980) (discussing, but not resolving, a Jehovah's Witness employee's objection to part of his job tasks, which involved having to raise and lower a flag); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D.D.C. 1979) (concluding that the IRS had an obligation to exempt an employee from having to work on tax-exempt status applications from abortion clinics and other organizations that the employee thought it sinful to deal with); *Best v. Cal. Apprenticeship Council*, 207 Cal. Rptr. 863, 868 (Ct. App. 1984) (concluding that an apprentice training organization—which was treated by state law as an employer—had an obligation to accommodate an apprentice's religious objection to working in a nuclear power plant); David Haldane, *Panel Backs Fired Vegetarian Bus Driver*, L.A. TIMES, Aug. 24, 1996, at A18 (discussing a case in which the EEOC concluded that a transportation agency must accommodate a vegetarian bus driver's religious objections to "hand[ing] out coupons for free hamburgers as part of a promotion to boost ridership"); Felhaber, Larson, Fenlon, & Vogt, P.A., *Bits and Pieces*, MINN. EMP'T L. LETTER, Sept. 1997 (reporting that the case against the transportation agency was settled for \$50,000).

65. FLA. STAT. §§ 761.01-.05 (1998).

a full veil sought an exemption from the requirement that every driver have a license with an uncovered photograph, a trial court found that there was a compelling safety interest in denying the exemption.⁶⁶

Similarly, a court may conclude that denying a religious exemption from a workplace policy would impose an “undue hardship” on an employer. The Third Circuit, for instance, rejected the Title VII religious accommodation claim of a Muslim policewoman who sought to wear a headscarf.⁶⁷ Such an accommodation, the court concluded, would pose an undue hardship for the police department, because it would undermine the “image of a disciplined, identifiable and impartial police force.”⁶⁸ The uniform, the court said, was an important “symbol of neutral government authority, free from expressions of personal religion, bent or bias.”⁶⁹

Likewise, the Eighth Circuit rejected a headscarf accommodation claim brought by a woman who sought placement as a temporary worker at a commercial printing company.⁷⁰ Such an accommodation, the court reasoned, could cause safety problems because the scarves could get caught up in machinery; the accommodation therefore was not required by Title VII.⁷¹ Many objectors will have their accommodation claims rejected, depending on the particular accommodation that is being claimed and the particular burdens it imposes.⁷²

66. *Freeman v. State*, No. 2002-CA-2828, 2003 WL 21338619, at *6 (Fla. Cir. Ct. June 6, 2003), *aff'd on other grounds*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006). For litigation involving non-Muslims who likewise sought a religious exemption from the photograph requirement, compare *Valov v. Dep't of Motor Vehicles*, 34 Cal. Rptr. 3d 174, 184 (Ct. App. 2005) (denying exemption because granting exemption would undermine the compelling interest in safety), and *Johnson v. Motor Vehicle Div., Dep't of Revenue*, 593 P.2d 1363, 1366 (Colo. 1979) (same); with *Quaring v. Peterson*, 728 F.2d 1121, 1127 (8th Cir. 1984) (2-1 decision) (granting exemption on the theory that the government had other means of adequately promoting this interest), *aff'd by an equally divided court sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985), *Dennis v. Charnes*, 646 F. Supp. 158, 163 (D. Colo. 1986) (same), and *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225, 1229 (Ind. 1978) (same).

67. *Webb v. City of Philadelphia*, 562 F.3d 256, 264 (3d Cir. 2009).

68. *Id.* at 261 (quoting the unchallenged testimony of Sylvester Johnson, police commissioner).

69. *Id.*

70. *EEOC v. Kelly Servs., Inc.*, 598 F.3d 1022, 1033 (8th Cir. 2010).

71. *Id.* at 1032.

72. *See, e.g., Eugene Volokh, Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 642-52 (1999) (giving many examples).

Indeed, this helps illustrate why accepting one religious exemption claim—for instance, from a no-beards rule or from an airport cab driver regulation—won't put us on a "slippery slope" to accepting all exemption claims, such as claims related to spousal rape or female genital mutilation.⁷³ Courts dealing with Christian and Jewish religious accommodation claims have long drawn lines between claims that should be accepted, because the claims don't interfere with compelling government interests or pose an undue hardship to employers, and claims that should be rejected. Courts have not slipped down the slope towards accommodating heinous religious practices that seriously harm others. If anything, religious accommodations have generally been granted rather sparingly.⁷⁴ There's little reason to think that there'd be any more slippage towards bad results when it comes to Muslim religious accommodation claims.

Of course, devout Muslims might not distinguish among Muslim religious beliefs, choosing some to follow and some to ignore. Instead they may seek to follow all such beliefs. Likewise, Orthodox Jews sometimes disapprove of a focus on the Ten Commandments, reasoning that the Torah contains 613 commandments, all of them God's will.⁷⁵ But that's the religious believers' view; it is not the view of our legal system.

If a Muslim woman seeks to keep her headscarf on while in court, despite a no-head-covering rule, a court should deal with that request on its own terms and should likely grant it, much as courts have granted similar requests for other religions.⁷⁶ If a Muslim woman seeks to have her driver's license photograph taken with her veil on, a court should deal with that request on its own terms, and may reject it; lower courts dealing with similar claims by non-Muslims have been split on that question.⁷⁷ That the

73. I generally think slippery slope arguments are often sound and need to be taken seriously. See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003). But they have to be evaluated in light of the risk of slippage in each particular scenario, and in this instance, it seems to me that the risk of slippage is slight for reasons given in the text.

74. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 481-82 (2010); James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1427-28 (1992).

75. See, e.g., *A List of the 613 Mitzvot (Commandments)*, JUDAISM 101, <http://www.jewfaq.org/613.htm> (last visited Sept. 20, 2013).

76. See *supra* notes 57, 62.

77. See *supra* note 66.

courtroom headscarf request is accepted doesn't mean the license veil request must be accepted, too. That the license veil request is rejected doesn't mean that the courtroom headscarf request must be rejected as well.

And again the important point is that Muslims are using the same laws to seek religious exemptions that Christians, Jews, and others have long had available. In dealing with Muslim accommodation requests, there's no need to create special rules, either "pro-Sharia" or "anti-Sharia." Rather, all that courts must do is apply the well-established American religious accommodation rules the same way they do for members of other religions.

My point here is not to defend broadly applicable religious accommodation rules or to suggest that they should be broadened further. Some readers may disapprove of such rules and conclude that religious objections shouldn't entitle the objector to exemption from generally applicable laws or work rules. But my point here is simply that there's nothing nefarious about applying existing American law to Muslim Americans' accommodation requests just as it applies to other Americans' accommodation requests.

VI. Providing Accommodations That Benefit Muslim Customers, Employees, Students, or Clients

Government entities also often provide accommodations that benefit religious customers, employees, students, or clients, beyond what is mandated by religious exemption regimes. Many such accommodations seek not to create exceptions from rules that forbid religiously motivated behavior (as in Part V), but rather to generally make life easier for the religious practitioner. And in the process they make the government entity's services more appealing or more efficient at serving client needs.

For instance, some public schools in areas with many Muslim students have added some Muslim holidays to their school closing days (rather than just letting students who celebrate those holidays take the day off).⁷⁸ Likewise, some universities have provided foot-washing basins for Muslim

78. *Illinois School District Is Slowly Becoming Sharia-Compliant*, BARE NAKED ISLAM (Feb. 2, 2013), <http://www.barenakedislam.com/2013/02/02/illinois-school-district-is-slowly-becoming-sharia-compliant/>; *Creeping, NYC Dem Mayoral Candidates Pander to Muslims, Promise Muslim School Holidays*, CREEPING SHARIA (July 16, 2013), <http://creepingsharia.wordpress.com/2013/07/16/nyc-dem-mayoral-candidates-pander-to-muslims-promise-muslim-school-holidays/>; William J. Murray, *Mass. School District to Close Tuesday for Islamic Religious Holiday*, SHARIA AWARENESS ACTION NETWORK (Nov. 7, 2011), <http://shariafreeusa.com/mass-school-district-to-close-tuesday-for-islamic-religious-holiday/> (reprinting an article authored by Billy Hallowell for TheBlaze.com).

students, which make it easier for them to wash before prayer.⁷⁹ San Francisco International Airport has provided a foot-washing station for cab drivers.⁸⁰ Government-run cafeterias might stock halal food.⁸¹ Government lenders have offered to structure loans in ways that formally avoid the payment of interest, while giving the lender an economic return identical to what interest-paying borrowers would provide.⁸²

All this has led to complaints about the government supposedly enforcing or following Sharia.⁸³ But, again, these incidents simply involve Muslims following in a long tradition of Christians' and Jews' asking for, and often getting, similar accommodations. Thus, for instance, in places where there are many Jewish students and teachers, schools close on Jewish holidays, because that's more convenient for everyone given the likely absenteeism on those days.⁸⁴ Some schools likewise close on Good

79. Carol Iannone, *How Muslim Footbaths Threaten America's Social Fabric*, N.Y. DAILY NEWS (Feb. 12, 2008, 7:11 PM), <http://www.nydailynews.com/opinion/muslim-footbaths-threaten-america-social-fabric-article-1.311574>.

80. Matier & Ross, *Airport's Garage Now Muslim House of Worship*, SFGATE.COM (June 9, 2013, 4:02 AM), <http://blog.sfgate.com/matierandross/2013/06/09/airports-garage-now-muslim-house-of-worship/>; Thomas Lifson, *City of San Francisco Funds Religious Place of Worship*, AMERICAN THINKER (June 10, 2013), http://www.americanthinker.com/blog/2013/06/city_of_san_francisco_funds_religious_place_of_worship.html.

81. Emily Smith, *Colorado State Dining Halls Now Serve Halal Meat*, COLLEGIAN.COM (Oct. 22, 2012), <http://www.collegian.com/2012/10/colorado-state-dining-halls-now-serve-halal-meat-2/15073/>; creeper, *Sharia Compliant Meals Now Served at Colorado State Univ . . . for 26 Muslims*, CREEPING SHARIA (Oct. 23, 2012), <http://creepingsharia.wordpress.com/2012/10/23/sharia-compliant-meals-now-served-at-colorado-state-univ-for-26-muslims/>.

82. See, e.g., *Murray v. Geithner*, 763 F. Supp. 2d 860, 863-64 (E.D. Mich. 2011).

83. See, e.g., Iannone, *supra* note 79; Lifson, *supra* note 80.

84. Kerry Brown, *Mount Laurel Moves School Start to Accommodate Rosh Hashanah*, CENTRAL RECORD (July 16, 2013), <http://www.southjerseylocalnews.com/articles/2013/07/16/news/doc51e555030f34d908743658.txt> (quoting a district spokeswoman as saying, "The first day of Rosh Hashanah is a school holiday each year, not specifically for religious reasons, but because of the rate of absenteeism. Traditionally, the second day of Rosh Hashanah is not a high absenteeism day for our district, and it's never a school holiday."); *Opening of School Term Postponed Because of Rosh Hashanah*, JTA (July 23, 1953), <http://www.jta.org/1953/07/23/jewish-holidays/rosh-hashanah/opening-of-school-term-postponed-because-of-rosh-hashanah>; *Portland School Board Revises Calendar to Avoid Rosh Hashanah Conflict*, JP UPDATES (May 30, 2013, 7:01 AM), <http://jpuupdates.com/2013/05/30/portland-school-board-revises-calendar-to-avoid-rosh-hashanah-conflict/>; Stephen Prothero, *Should Schools Scrap Religious Holidays?*, USA TODAY, Dec. 19, 2010.

Friday,⁸⁵ and the school calendar of our majority Christian nation automatically provides for days off on Christmas and Sundays.⁸⁶

Some cities let Jewish groups use city property to support an “eruv,” which is basically a string connecting various poles that is seen by Orthodox Jews as giving them more flexibility to do various things on the Sabbath within the boundaries delimited by that string.⁸⁷ Likewise, government-run liquor stores might stock kosher wine,⁸⁸ and government-run cafeterias might provide kosher food.⁸⁹ There is no reason to categorically reject Muslims’ requests for these sorts of accommodations when Jews’ and Christians’ requests are often accepted.

To be sure, one can’t just say here, as I’ve said above, that courts should apply the same existing legal rules for Muslims as for others. The accommodations discussed in this section are implemented not by courts pursuant to some generally available law—such as a Religious Freedom Restoration Act or the Civil Rights Act—but by other government agencies on an ad hoc basis, as the agencies learn of such needs or desires among their students, customers, clients, or employees.

85. *Good Friday—School Closed*, SADDLE BROOK SCH. DISTRICT, <http://www.saddlebrookschoools.org/good-friday-school-closed> (last visited Sept. 7, 2013).

86. Some Good Friday closing laws have been struck down as violations of the Establishment Clause. *See, e.g., Metz v. Leininger*, 57 F.3d 618, 622-24 (7th Cir. 1995). But when schools have a secular justification for the closing, such as the high rate of absences on a particular holiday, the closing is permissible. *Id.* at 621, 623 (noting that the problem with the law was that “all public schools throughout the state are forced to close on Good Friday regardless of the preference of local school districts and no matter how small the number of students or teachers in a particular district who want to use the day for religious observances”); *Granzeier v. Middleton*, 173 F.3d 568, 575-76 (6th Cir. 1999) (upholding Good Friday closing, partly because it is proper for government officials to consider the “practicalities of school or court attendance that might otherwise be disrupted”).

87. *See, e.g., Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 152 (3d Cir. 2002).

88. *See Festive Wines for Your Passover and Easter Tables*, N.H. LIQUOR COMM’N, <http://www.nh.gov/liquor/wineforeaster.pdf> (last visited Sept. 7, 2013); *Product Inventory: 11296 Herzog Merlot Kosher 750ml*, N.H. LIQUOR COMM’N, <http://ice.liquor.nh.gov/public/default.asp?Category=inquiries&Service=prodfindpost&req=11296> (last visited Sept. 7, 2013).

89. *Museum Cafe*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/information/museum-cafe> (last visited Sept. 20, 2013); *Massachusetts State Agency Food Standards*, MASS. EXEC. OFFICE OF HEALTH & HUMAN SERVS., <http://www.mass.gov/eohhs/docs/dph/com-health/nutrition-phys-activity/eo509-state-agency-food-standards.pdf> (last visited Sept. 20, 2013); *Metropolitan Food Services*, BROOKLYN COLLEGE, <http://www.brooklyn.cuny.edu/web/about/offices/metropolitan.php> (last visited Sept. 7, 2013).

But government agencies can, and should, try to deal with such ad hoc requests without regard to whether they came from Muslims, Christians, or Jews. Flexible agencies will generally implement such an accommodation if:

- many of the employees, students, customers, or clients have a particular preference (religious or otherwise),
- accommodating that preference will substantially improve customer, client, or employee relations, or help better serve the public that the agency is trying to serve (something government agencies generally try to do), and
- such an accommodation will impose only modest costs on the agency and on other customers, clients, or employees.

And decisions to grant such accommodations should not turn on which religion motivated the request for the accommodation.

VII. Exempting Muslims from Generally Applicable Laws Because of Their Religious or Cultural Background, Even in the Absence of Any Interference with Religious Practice

Occasionally, American laws have exempted members of certain religious groups simply on the grounds that the law is a law for the majority, and the minority deserves its own legal system. These exemptions are distantly related to the “millet” family law model in countries such as Israel and India, discussed in Part IV.A, where family law questions are delegated to each religious group’s own religious courts.

For instance, one of the religious accommodations enacted in 1700s America was a Rhode Island statute that exempted Jews from the ban on uncle-niece marriage.⁹⁰ Nothing in Orthodox Judaism *requires* uncles to marry nieces, so this was not the sort of exemption for religious objectors to generally applicable laws that the preceding Part discussed. Still, historically Judaism hasn’t forbidden uncle-niece marriage, because the Leviticus passages prohibiting incest do not include uncles and nieces.⁹¹

90. An Act Regulating Marriage and Divorce, 1798 R.I. Pub. L. 477, 481; Benjamin H. Hartogensis, *Rhode Island and Consanguineous Jewish Marriages*, 20 PUBLICATION AM. JEWISH HIST. SOC’Y 137, 144 (1911) (asserting that the statute dates back to 1764).

91. Leviticus 8:6–18.

And the Rhode Island legislature apparently took the view that the Christian laws of incest made sense for Christians, but the Jews should have their own rules.

This seems to be what happened in the New Jersey case that rejected a restraining order against a Moroccan Muslim husband who had allegedly raped his wife.⁹² The Muslim couple entered into an arranged marriage in Morocco when the wife was seventeen.⁹³ They moved to New Jersey a month later, but within two months the wife sought a restraining order, alleging that her husband had raped her, saying, “This is according to our religion. You are my wife, I c[an] do anything to you. The woman, she should submit and do anything I ask her to do.”⁹⁴ The trial judge agreed that the husband had sex with the wife against her will, but concluded,

This court does not feel that, under the circumstances, that [*sic*] 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 something that was consistent with his practices and it was something that was not prohibited.⁹⁵

And because, in the judge’s view, the defendant lacked “a criminal desire to or intent to sexually assault,” the judge found there had been no sexual assault and refused to issue a restraining order.⁹⁶

Unsurprisingly, the appellate court reversed and remanded for entry of a restraining order, writing (among other things):

Defendant’s conduct in engaging in nonconsensual sexual intercourse was unquestionably knowing, regardless of his view that his religion permitted him to act as he did.

As the judge recognized, the case thus presents a conflict between the criminal law and religious precepts. In resolving this conflict, the judge determined to except defendant from the operation of the State’s statutes as the result of his religious beliefs. In doing so, the judge was mistaken.⁹⁷

92. He was later convicted of rape. *See* Conte, *supra* note 14.

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

94. *Id.* at 416.

95. *Id.* at 418.

96. *Id.*

97. *Id.* at 422.

The trial judge's decision was wrong and has rightly been condemned. But the error was *not* that decisions should never consider a party's religious beliefs. As we saw in Part V, some American legal rules do call for exempting people from some generally applicable laws based on their religious beliefs.

Rather, the error is that the court made this decision *without* any authorization from American law. Whether an act constitutes sexual assault or justifies a restraining order does not turn on whether the person knew that his actions were criminal or mistakenly believed that he was entitled to act as he did—ignorance of the law is no excuse here. And Religious Freedom Restoration Acts and similar rules do *not* exempt husbands from the prohibition on rape, regardless of their religious beliefs.⁹⁸ There is obviously a compelling government interest in preventing rape, and granting an exemption would interfere with that interest (the RFRA standard for when an exemption should be denied).⁹⁹

Indeed, the trial judge's decision seems to rest on a sort of mistake-of-law “cultural defense”—because the defendant came from a culture in which some conduct wasn't a crime and therefore didn't realize that it was a crime in America, he should not be held culpable. But these kinds of cultural defenses have generally been rejected by American courts, precisely because mistake of law is usually *not* a defense to criminal liability, whether the mistake stems from one's cultural background or something else.¹⁰⁰ The New Jersey appellate court thus rightly overturned the trial court's decision.

A hypothetical, dealing with statutory rape rather than forcible rape, can help illustrate the difference between an improper use of Islamic law as a way of trumping American law, and a proper use of Islamic law when American law makes it relevant.

Consider a thirty-year-old man who visits the United States with a seventeen-year-old woman and has consensual sex with her. In most American states, that wouldn't be a crime, since all but twelve states set the general age of consent at sixteen or seventeen (regardless of the age of the

98. Cf. *Fraley v. State*, No. 97,823, 2008 WL 3367566, at *8 (Kan. Ct. App. Aug. 8, 2008) (characterizing “the argument that the marriage vows between Fraley and his wife rendered Fraley's conduct not the crime of rape but rather the free exercise of religion guaranteed by our constitution” as “a claim that appellate counsel wisely chose to ignore in this appeal”).

99. *E.g.*, 51 OKLA. STAT. § 253(B) (2012).

100. *See, e.g.*, *State v. Al-Hussaini*, 579 N.W.2d 561, 563 (Neb. Ct. App. 1998).

other partner).¹⁰¹ But in California, which sets the age of consent at eighteen, sex with a seventeen-year-old would be a crime—unless the parties were married.¹⁰²

Now if a California court excused the thirty-year-old on the grounds that he's from a Muslim culture that doesn't forbid such conduct, that decision would be quite wrong. But say his claim is that the two were married under the law of Israel, where the parties were married and now live, and from which they were visiting Los Angeles on their honeymoon.

To determine whether the man committed a crime under California law, a court would have to decide whether the two parties were indeed validly married under Israeli law; California law provides that a couple is married for California purposes if their marriage was valid where it was celebrated.¹⁰³ In Israel, the marriage age is seventeen.¹⁰⁴ And since Israeli law for Muslims is Islamic law,¹⁰⁵ a California court applying California law would be obliged to consult Islamic law.

So if under Islamic law, as applied in Israel, the couple was validly married in Israel, then under California law they were married as well. This means they haven't committed a crime under California law. (Recall that California statutory rape law expressly excludes sex with one's legal spouse.) An acquittal on *those* grounds would be quite right—indeed, it would be required under existing California law.

What matters, then, isn't whether a court making a decision is considering a person's country or culture of origin. Nor does it matter whether the court is considering Sharia. What matters is whether the decision is authorized by standard, religiously neutral principles of American law. The New Jersey trial court's decision was wrong, because it wasn't authorized by American law; the error was the judge's, not that of New Jersey law more generally, precisely because New Jersey law doesn't authorize that sort of cultural defense. But a California court would be quite correct to dismiss the charges in the statutory rape hypothetical if the couple was married under the laws of Israel.

101. See Eugene Volokh, *What Are the Ages of Consent Throughout the Western World?*, THE VOLOKH CONSPIRACY (Apr. 30, 2008, 2:25 PM), <http://www.volokh.com/posts/1209579954.shtml>.

102. CAL. PENAL CODE § 261.5 (Deering 2008).

103. CAL. FAMILY CODE § 308(a) (effective Jan. 1, 2010).

104. U.S. DEP'T OF STATE, ISRAEL 2012 HUMAN RIGHTS REPORT 20 (2012), available at <http://www.state.gov/documents/organization/204575.pdf>.

105. *Hassan v. Holder*, 604 F.3d 915, 925 (6th Cir. 2010).

VIII. Passing Laws That Track Muslim Law Rules, or Enforcing Laws in a Way That Tracks Such Rules

A city with a large Muslim population might—if state law allows it—dramatically limit sales of alcohol, impose heavy restrictions (short of total bans) on strip clubs or pornography stores, or crack down on prostitution.¹⁰⁶ Or such a city could try to ban material that blasphemes against Islam or against religions generally. Or a city could use laws banning “disturbing the peace” to suppress allegedly blasphemous or anti-Islam speech,¹⁰⁷ and a university could use campus speech codes to do the same.¹⁰⁸ Or a city or school could mandate that women wear headscarves in public. What should our legal system do about this?

Here again we should recognize that similar laws have been enacted in jurisdictions with large populations of Christian groups. Laws restricting alcohol sales, strip clubs, pornography stores, prostitution, blasphemy, and consensual sexual behavior, as well as laws that treat women differently from men, are familiar in American history. Some such laws are familiar in the American present as well, including in overwhelmingly non-Muslim jurisdictions.¹⁰⁹ When those laws violate specific constitutional constraints, such as the Free Speech Clause or the Equal Protection Clause, they are struck down. But when they don’t violate such constraints, they are simply democracy in action.

Nor is there anything inherently improper with people trying to enact their religiously based moral beliefs—e.g., about abortion, prostitution, alcohol, and the like—into law. Secular American voters and legislators are

106. State law often leaves local governments free to enact such laws within their own boundaries.

107. See, e.g., Volokh, *supra* note 10; Volokh, *supra* note 11.

108. Cf., e.g., Coll. Republicans at S.F. State Univ. v. Reed, 523 F. Supp. 2d 1005, 1007-09 (N.D. Cal. 2007) (discussing discipline of anti-Hamas students for stepping on the Hamas flag, which contains the word “Allah” in Arabic); Nat Hentoff, ‘Free Speech’ Cries Ring Hollow on College Campuses and Beyond, USA TODAY (Apr. 18, 2006, 10:31 PM), http://usatoday30.usatoday.com/news/opinion/editorials/2006-04-18-free-speech_x.htm (reporting on censorship of Mohammed cartoons at New York University and Century College); Aaron Brown, Prophet Cartoon on Door Prompts Action, THE CHICAGO MAROON (Feb. 17, 2006, 4:30 AM), <http://chicagomaroon.com/2006/02/17/prophet-cartoon-on-door-prompts-action/> (reporting on disciplinary investigation of a student who posted Mohammed cartoon on his dormitory door).

109. E.g., ABC Commission North Carolina, *Legal Sales Areas*, <http://abc.nc.gov/xo/> (indicating which counties in North Carolina generally ban a wide range of alcohol sales); 37 OKLA. STAT. § 591.B.1 (2012) (providing that counties may ban alcoholic beverage sales on Sundays).

entitled (subject to the Free Speech Clause, the Equal Protection Clause, and similar constraints) to use the law to implement their views about what is right or wrong and harmful or useful, even if the views rest on moral assumptions that are unproven and unprovable. Christian voters and legislators are similarly entitled to implement their views, even when those views rest on Christian religious beliefs.¹¹⁰ Muslim voters and legislators are entitled to do likewise.

IX. The “Islam Is Different” Argument

I have argued that many (though not all) of the things that are condemned as intrusions of Islamic law into American law are actually the applications of traditional American legal principles. Those who believe in equal treatment without regard to religion, I have argued, should extend to Muslims the benefits of those principles just as Christians, Jews, and others can take advantage of those principles.

Some, however, have argued that Islam should *not* be treated the same as those other religions. One line of argument goes so far as to say (in the words of noted televangelist and political figure Pat Robertson) that “Islam is not a religion. It is a political system bent on world domination.”¹¹¹

It’s hard to figure out exactly what the first part of this means. What constitutes a religion for legal purposes can be fuzzy around the edges,¹¹² but surely Islam—a prominent system of beliefs about God and God’s supposed commands to mankind—must qualify.¹¹³ The argument, I assume,

110. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (upholding Sunday closing laws); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (upholding denial of tax exemption to university that discriminated based on race); *Harris v. McRae*, 448 U.S. 297, 319–20 (1980) (upholding ban on government funding of abortion).

111. *The Ed Show with Ed Schultz* (MSNBC television broadcast Dec. 20, 2011); *see also* WILLIAM J. DELL, *OUR CONSTITUTIONAL REPUBLIC: SEEDS OF BIRTH - SEEDS OF DESTRUCTION* 156 (2011); JR Dieckmann, *Islam Is Not a Religion, It Is Foreign Law*, CANADA FREE PRESS (Sept. 1, 2010), <http://www.canadafreepress.com/index.php/article/27211>.

112. *See generally* Jesse H. Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579; Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984).

113. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (characterizing Islam as a religion protected by the First Amendment); *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) (likewise). Indeed, Pat Robertson’s statement came a few sentences after he had called Islam a “violent religion,” which seems to admit that it is a religion (though the other sources I cite do not make such an admission). *The Ed Show*, *supra* note 111.

must be that Islam, though it is a religion, is not simply a religion but is also a political ideology and therefore loses its status as a religion for, say, religious accommodation purposes.

But that can't be right. Many religions, especially many strands of Christianity, are "political system[s]" in the sense that they create an agenda for political action. The conservative Christian political program of Jerry Falwell, Pat Robertson, and others is one example.¹¹⁴ The "liberation theology" followed by some liberal Catholics is another.¹¹⁵

Nor is this surprising. Religions often teach adherents that certain conduct (such as slavery, abortion, or failure to help the poor) is against God's will, morally wrong, and a violation of the rights with which people are endowed by their creator. In such situations, many of the adherents and their leaders understandably think it imperative to implement those religious commands into secular law.

And of course many strands of Christianity seek "world domination" in the sense of seeking to have the world convert to that strand of Christianity (hence the Christian missionary tradition). That too is entirely understandable. If one believes that one knows God's true will, and if one believes that following a particular understanding of God is the key to salvation, one might reasonably want to persuade everyone to embrace that understanding.

This doesn't mean that Christianity and Islam are equally sound, morally or theologically. Most Christians and most Muslims would disagree with any such equation, thinking their religion to be better than the other. But whatever the difference between the religions, it can't be that one is a "political system" and the other is not, or that one seeks "world domination" and the other does not.

Sometimes, one hears more specific objections to equal legal treatment from Islam, such as the argument that Islam does not respect religious freedom for other religions, and that if America became dominated by Muslims, then Christians and Jews would be relegated to second-class status. This is indeed true of many Muslim countries, where conversion from Islam to another religion is criminally punishable, theoretically by

114. *See generally* SUSAN FRIEND HARDING, *THE BOOK OF JERRY FALWELL: FUNDAMENTALIST LANGUAGE AND POLITICS* (2001).

115. *See generally* GUSTAVO GUTIÉRREZ, *A THEOLOGY OF LIBERATION: HISTORY, POLITICS, AND SALVATION* (Sister Caridad Ina & John Eagleson trans., 15th ed. 2012).

death.¹¹⁶ Likewise, in Saudi Arabia, Christian churches are not allowed to publicly operate.¹¹⁷

But nothing in the First Amendment limits its protection (including its protection against discrimination based on religion¹¹⁸) to those who support religious freedom. People who support punishment for blasphemy—as many American Christians had in the past¹¹⁹—are protected by the First Amendment. Pre-Vatican-II Catholics who believed that the religious freedom of non-Catholics could properly be restricted were nonetheless protected by the First Amendment.¹²⁰

People who want to set up Christianity as an official state religion are protected by the First Amendment.¹²¹ So are people who overtly call for constructing a “theocracy” that “denies the religious liberty of the enemies of God.”¹²²

116. See U.S. DEP’T OF STATE, CHALLENGES TO RELIGIOUS FREEDOM AND EXECUTIVE SUMMARY OF INDIVIDUAL COUNTRY REPORTS 2 (2011), available at <http://www.state.gov/documents/organization/172440.pdf> (“[B]lasphehy and conversion from Islam, which is considered apostasy, are punishable by death in Afghanistan, Iran, Pakistan, and Saudi Arabia.”).

117. See U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2012: EXECUTIVE SUMMARY 4 (2013), available at <http://www.state.gov/documents/organization/208324.pdf>.

118. See *Lukumi*, 508 U.S. 520; *Larson v. Valente*, 456 U.S. 228 (1982).

119. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Zeisweiss v. James*, 63 Pa. 465 (1870); *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (1838); *State v. Chandler*, 2 Del. (2 Harr.) 553 (1837); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824); *People v. Porter*, 2 Park. Crim. Rep. 14 (N.Y. Ct. Oyer & Terminer 1823); *Jared W. Bell’s Case*, 6 N.Y. City Hall Rec. 38 (Ct. Gen. Sess. 1821); *Commonwealth v. Murray* (Phila. Mayor’s Ct. 1818), reported at *Law Intelligence*, FRANKLIN GAZETTE, Nov. 17, 1818, at 2; *People v. Ruggles*, 8 Johns. Cas. 290 (N.Y. Sup. Ct. 1811).

120. “Catholic support for religious freedom was a historic reversal of the Catholic Church’s traditional view that ‘error has no rights.’ Prior to Vatican II, there was little religious freedom in Catholic countries.” Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 307 (2006) (footnote omitted).

121. This includes 32% of respondents in an April 2013 poll, who said they favored “a Constitutional amendment which would make Christianity the official religion of the United States,” and 34% who said they favored “establishing Christianity as the official state religion in [their] state.” YouGov, *Omnibus Poll*, HUFFINGTON POST, http://big.assets.huffingtonpost.com/toplines_churchstate_0403042013.pdf (last visited Sept. 22, 2013); Emily Swanson, *Christianity as State Religion Supported by One-Third of Americans, Poll Finds*, HUFFINGTON POST (Apr. 6, 2013, 9:19 AM), http://www.huffingtonpost.com/2013/04/06/christianity-state-religion_n_3022255.html.

122. See Gary North, *The Intellectual Schizophrenia of the New Christian Right*, 1 CHRISTIANITY & CIVILIZATION 1, 25 (1982):

People who want to restrict speech that the First Amendment has been held to protect are likewise protected by the First Amendment. So are people who want to ban guns. So are people who want to abolish private property.¹²³ So are people who want to ban abortions.

So are people who want the government to discriminate based on religion or race—discrimination that would very likely be seen by courts as unconstitutional—including those who want the government to discriminate against Islam.¹²⁴ So are people who want to ban homosexuality (contrary to the Court's interpretation of the Constitution). Neither the freedom of speech nor the freedom of religion is limited to people who believe in values that are compatible with American constitutional guarantees.

Of course, when people try to turn their beliefs into actions, the law may well intervene. If legislators, whether Muslim or Christian, enact a blasphemy ban, it will be struck down.¹²⁵ If citizens, whether Muslim or Christian, decide to attack blasphemers, they will be guilty of assault and should be criminally punished.

Even if they try to claim a religious exemption from assault law, they will lose, because granting the exemption will undermine the compelling government interest in protecting the victims of the assault. The same is true if extremist Christians or Jews read Leviticus as calling for private violence against adulterers, homosexuals, or blasphemers.¹²⁶

But having wrongheaded or even dangerous beliefs doesn't strip people of their other rights. Say someone feels a religious obligation to wear religiously mandated headgear, whether a Jewish yarmulke, a Catholic nun's habit, a Sikh turban, an Orthodox Jewish woman's headscarf, or a

So let us be blunt about it: we must use the doctrine of religious liberty to gain independence for Christian schools until we train up a generation of people who know that there is no religious neutrality, no neutral law, no neutral education, and no neutral civil government. Then they will get busy in constructing a Bible-based social, political, and religious order which finally denies the religious liberty of the enemies of God. Murder, abortion, and pornography will be illegal. God's law will be enforced. It will take time. A minority religion cannot do this. Theocracy must flow from the hearts of a majority of citizens, just as compulsory education came only after most people had their children in schools of some sort.

123. *See, e.g.,* *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974).

124. *See, e.g.,* *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977).

125. *E.g.,* *Kalman v. Cortes*, 723 F. Supp. 2d 766, 806 (E.D. Pa. 2010).

126. *See* Leviticus 20:10, 20:13, 24:16.

Muslim woman's headscarf, and therefore claims an exemption from a no-headgear rule. That person's exemption claim is judged—and should be judged—without regard to whether the rest of the person's religious beliefs are considered good or bad.

X. Conclusion

Generally, our legal system has long reached sensible results when it comes to accommodating religious believers. It has generally accepted modest claims to exemptions. It has generally accepted most manifestations of freedom of contract and freedom to dispose property by will. It has generally left people at the local level free to engage in democratic self-government, including in places where religious minorities have political power. At the same time, it has generally rejected excessive claims, or claims that unduly interfere with others or with the interests of society as a whole.

Our legal system's recent interactions with Muslim claimants have largely followed the same pattern. Our traditional legal rules can function just as well in the coming years, whether as to Muslims or as to others, so long as the legal system subjects Muslims to the same rules under which Christians, Jews, and others live.