

# POLICIES, FRAMEWORKS, AND CONCERNS REGARDING SHARI'A TRIBUNALS IN THE UNITED STATES—ARE THEY KOSHER?

## INTRODUCTION

Shari'a law has become the topic of much contemporary debate in the United States. The debate has largely revolved around the compatibility of shari'a law with American law and Western values.<sup>1</sup> One prominent American politician warned that proponents of shari'a law want to “impose Sharia on all of us,” and, with that in mind, has called for a federal law precluding the application of shari'a as a “replacement for American law” in any court of the United States.<sup>2</sup> On a state level, Oklahoma recently attempted to amend its constitution so as to preclude the application of shari'a law in the courts of that state.<sup>3</sup> A recent report by national security experts went so far as to warn that shari'a is a threat to the integrity and the very existence of the United States of America.<sup>4</sup> In contrast, proponents of instituting shari'a law in the United

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<sup>1</sup> See, e.g., Kai Hafez, *Islam and the West: The Clash of Politicised Perceptions*, in *THE ISLAMIC WORLD AND THE WEST* 3, 3 (Kai Hafez ed., 2000). Samuel Huntington hypothesized that the greatest conflicts of the modern world would be between civilizations rather than states. Samuel P. Huntington, *The Clash of Civilizations?*, *FOREIGN AFFAIRS*, Summer 1993, at 22, 22, 39. Specifically, he stated that Islam as a civilization would fundamentally and literally clash with the West, because “Western ideas of individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, the separation of church and state, often have little resonance in Islamic . . . cultures.” *Id.* at 40. Scholars have criticized Huntington's theory based on the origin of this “clash.” See, e.g., SHIREEN T. HUNTER, *THE FUTURE OF ISLAM AND THE WEST: CLASH OF CIVILIZATIONS OR PEACEFUL COEXISTENCE?* 19, 168 (1998) (arguing that the clash is, on one hand, a power struggle and, on the other hand, a clash of faith and secularism rather than Islam and the West); FAWAZ A. GERGES, *AMERICA AND POLITICAL ISLAM: CLASH OF CULTURES OR CLASH OF INTERESTS?* 17 (1999) (asserting that politics and security concerns, from an American policy perspective, drive the conflict with Islam more so than culture and history). Most noteworthy, for present purposes, is one scholar's hypothesis that the clash between Islam and the West will unfold in the context of law. KATHLEEN M. MOORE, *THE UNFAMILIAR ABODE: ISLAMIC LAW IN THE UNITED STATES AND BRITAIN* 4 (2010) (“Law becomes the site where . . . the clash-of-civilizations thesis finds material support . . .”).

<sup>2</sup> Newt Gingrich, Address to the American Enterprise Institute for Public Policy Research, *America at Risk: Camus, National Security and Afghanistan* 13 (July 29, 2010), available at <http://www.aei.org/files/2010/07/29/Address%20by%20Newt%20Gingrich%2007292010.pdf>.

<sup>3</sup> *Oklahoma Voters Ban Judges from Using Islamic Law*, FOX NEWS (Nov. 2, 2010), <http://www.foxnews.com/politics/2010/11/02/oklahoma-voters-ban-judges-using-islamic-law/>. A preliminary injunction to the amendment was recently upheld by the Tenth Circuit. *Awad v. Ziriax*, No. 10-6273, slip op. at 3 (10th Cir. Jan. 10, 2012).

<sup>4</sup> See TEAM B II, *CTR. FOR SEC. POLICY, SHARIAH: THE THREAT TO AMERICA: AN EXERCISE IN COMPETITION ANALYSIS* 3–4, 219 (2010).

States contend that it is neither inconsistent with nor threatening to the laws and values of the United States.<sup>5</sup> Regarding some of the United States's foundational principles, such as democracy and separation of powers, one imam stated, "Muslims are very enamored of these systems . . . because these principles and norms are completely in sync with the principles of the Quran and the teachings of the prophet."<sup>6</sup> While this controversy provides a general context for the following discussion, whether shari'a is fundamentally compatible with American law and policy is beyond the scope of this Note.

More narrowly, this Note addresses a key impetus that sparked the grander debate—the appearance of shari'a courts<sup>7</sup> in the West. The controversy over shari'a tribunals began in Canada when Muslim arbitration boards, acting under Canada's arbitration law, began settling civil and family disputes between Canadian Muslims in 2003.<sup>8</sup> Responses to the move were mixed, but ultimately, Canada decided against allowing shari'a courts to continue to make legally binding judgments.<sup>9</sup> Similarly, in 2008, Muslim arbitration tribunals began making judgments that are legally enforceable under Great Britain's arbitration statute.<sup>10</sup> As will be explained further, while the United States has similar legal mechanisms through which shari'a courts may attempt to operate, it has yet to publicly query the legality and desirability of allowing shari'a courts in the United States, or to decisively take a stand on the matter.

This Note argues that the United States must explore this issue and make an affirmative choice whether to allow shari'a courts to operate in the United States. Part I lays the foundation by defining, to the extent possible, shari'a law and the role that shari'a courts play in Muslim communities. Part II explores contemporary policy preferences in

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<sup>5</sup> See *Interview: Imam Feisal Abdul Rauf*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/muslims/interviews/feisal.html> (last visited Apr. 6, 2012).

<sup>6</sup> *Id.*

<sup>7</sup> Shari'a "courts," as they exist in the West, are not equivalent to secular courts of law. More accurately, they are tribunals or panels, which, as will be discussed later in this Note, currently derive legal force from the arbitration process. See Richard Edwards, *Sharia Courts Operating in Britain*, THE TELEGRAPH (Sept. 14, 2008), <http://www.telegraph.co.uk/news/uknews/2957428/Sharia-law-courts-operating-in-Britain.html>. However, to the extent that their judgments may be made legally binding, and to the extent that they often self-proclaim to be "courts," that term will be used in this Note interchangeably with the word "tribunal" with respect to shari'a adjudicators.

<sup>8</sup> James Thornback, *The Portrayal of Sharia in Ontario*, 10 APPEAL 1, 5–6 (2005).

<sup>9</sup> James Sturcke, *Sharia Law in Canada, Almost*, THE GUARDIAN (Feb. 8, 2008), <http://www.guardian.co.uk/news/blog/2008/feb/08/sharialawincanadaalmost>.

<sup>10</sup> Matthew Hickley, *Islamic Sharia Courts in Britain Are Now "Legally Binding,"* MAIL ONLINE (Sept. 15, 2008, 10:10 AM), [www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html](http://www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html).

American court systems that create a legal climate favorable toward shari'a tribunals in the United States. It does this in the context of two trends in American court systems that provide an apt illustration of these policy preferences as they are likely to be applied in support of shari'a tribunals. Part III discusses the framework for religious courts in Great Britain and the United States. It then sketches the development of shari'a courts within that legal framework in Great Britain, and assesses the tenability of the same occurring within the United States of America. Finally, Part IV addresses key policy concerns that must be dealt with in the national debate with respect to shari'a tribunals. Ultimately, the United States must adapt its policies and laws to adequately address the concerns implicated by shari'a tribunals.

### I. SHARI'A LAW AND SHARI'A "COURTS"

As a foundational matter, it is necessary to establish precisely what "shari'a law" means for purposes of legal analysis and what role shari'a courts typically play in Muslim communities. Shari'a law is most simply defined as Islamic law, but its composition and functions are far more complex.

The Quran is the primary source of shari'a and is considered by Islam to be the earthly impartation of the divine law, or the ideal legal order.<sup>11</sup> Hadiths, another source of shari'a, are collections of sayings and deeds that are attributed to Muhammad and are considered complementary to the Quran in substance and authority.<sup>12</sup> The Sunna, a collection of legal norms and traditions, are also regarded as authoritative and complementary to the Quran.<sup>13</sup> The Quran has been extensively interpreted and expounded by numerous Islamic jurists, which has resulted in eight competing schools of thought, each of which interprets and applies the religious text uniquely.<sup>14</sup> As a result, shari'a is substantively amorphous and may vary greatly depending upon the jurisprudential school of thought being employed.<sup>15</sup>

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<sup>11</sup> See MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 23 (1955).

<sup>12</sup> IBN WARRAQ, *WHY I AM NOT A MUSLIM* 67 (1995).

<sup>13</sup> *Id.*; see also M. Cherif Bassiouni, *The Shari'a: Islamic Law: What Muslims in the United States Have in Common*, in *IMMIGRANTS IN COURTS* 98, 101 (Joanne I. Moore ed., 1999).

<sup>14</sup> See Joseph N. Kickasola, *The Clash over the Qur'an: Qur'anic Reinterpretation and National Reformation in Islam*, 6 *REGENT J. INT'L L.* 271, 278 (2008) (listing the eight schools of jurisprudence); Bassiouni, *supra* note 13 (noting that, in addition to other differences, the various Islamic jurisprudential schools of thought have "different priorities in the rules of interpretation" of the Quran); see also KHADDURI, *supra* note 11, at 35, 38 (recounting the complex development of the various schools of thought and relating that to the Sunni-Shi'i sectarian division).

<sup>15</sup> KHADDURI, *supra* note 11, at 34-41 (reviewing a variety of differences between the schools).

According to its followers, shari'a is meant to govern all relations between men, their Creator, and the state.<sup>16</sup> Shari'a is thus political in the sense that it purports to govern the way "society is organized," and to provide "the means to resolve conflicts among individuals and between the individual and the state."<sup>17</sup> In Islam, the divine law is not just an idealistic social order incapable of being fully and practically realized on earth.<sup>18</sup> On the contrary, it is meant to govern the religious, societal, and political lives of all persons on earth.<sup>19</sup> In that sense, it may not be relegated to the status of mere religious law, governing only the private spiritual pursuits of individuals and congregations, though that is unquestionably one of its key functions.<sup>20</sup> Shari'a law is more broadly considered by many Muslims to be the ultimate authority that should govern all aspects of society, politics, and religion.<sup>21</sup>

Within Muslim communities, shari'a courts are the interpreters and enforcers of shari'a law and are charged with making the ideal a reality.<sup>22</sup> In a number of countries, shari'a courts have full authority to make binding, enforceable legal judgments.<sup>23</sup> Elsewhere, shari'a courts can usually be found wherever Muslim communities exist. In some of these countries, shari'a courts rely merely upon voluntary individual and community compliance with their judgments, while in other countries, shari'a courts enjoy quasi-authority, whereby their judgments, though not automatically binding, can be affirmed and made enforceable by

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<sup>16</sup> See Bassiouni, *supra* note 13, at 100.

<sup>17</sup> *Id.* at 100–01.

<sup>18</sup> See KHADDURI, *supra* note 11, at 23–24.

<sup>19</sup> See *id.* It is noteworthy that there are now some Muslim groups who believe that shari'a is merely a personal moral code, governing the lives of individuals, rather than something that should be institutionalized and publicly enforced. For example, the Indian group "Muslims for Secular Democracy" advocates the "clear separation between religion and politics" and "between matters of faith and affairs of the state." MUSLIMS FOR SECULAR DEMOCRACY DECLARATION 2, available at <http://www.mfsd.org/msddeclaration.pdf>. However, these groups seem to be a minority.

<sup>20</sup> KHADDURI, *supra* note 11, at 23–24.

<sup>21</sup> See *id.* But cf. Kickasola, *supra* note 14, at 287–94, 311–12 (explaining that, following from the various interpretations of the Quran, there are disagreements among Muslims regarding whether, how, and to what degree shari'a should be imposed in society and politics).

<sup>22</sup> See *id.* at 24; see also Jessica Carsen, *Do Sharia Courts Have a Role in British Life?*, TIME (Dec. 5, 2006), <http://www.time.com/time/printout/0,8816,1566038,00.html>.

<sup>23</sup> Toni Johnson, *Sharia and Militancy*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/religion-and-politics/sharia-militancy/p19155> (last updated Nov. 30, 2010) ("In some nations, sharia's use is confined to narrow questions of religion and morality, in others it is the underpinning of legislation, and in still others it is the basis for all criminal and civil law."). Nigeria, Indonesia, and Pakistan are some of the countries where shari'a courts have binding authority. See *id.*

secular courts.<sup>24</sup> In countries such as Great Britain and the United States, arbitration provides the framework for shari'a courts' authority.

## II. FAVORABLE POLICIES AND TRENDS IN U.S. COURT SYSTEMS

Proponents of shari'a tribunals in the United States are not without ground on which to stand. Two particular phenomena in American court systems exemplify current prevailing policy values with respect to the role of courts and notions of justice in the United States. If nothing more, these examples indicate that current policy preferences weigh in favor of specialized adjudicatory bodies and may be extended to include religious ones.

The first trend, often called "problem-solving courts," has become increasingly popular on both the federal and state levels to provide specialized venues for particular parties or particular issues.<sup>25</sup> Such courts may be tailored to deal specifically with, for example, drug or mental health cases.<sup>26</sup> While none of these special courts are specifically "religious," they do suggest a growing trend toward instituting specialized courts to deal with limited types of parties, issues, and legal questions. A second model that may bode well for establishing shari'a courts in the United States is the initiative of a handful of jurisdictions by which full faith and credit is exchanged between state and Native American tribal court judgments.<sup>27</sup>

### A. Increasing Appeal of Special Courts in the United States

The recent inclination toward instituting specialized problem-solving courts on both the state and federal levels may be positive precedent in favor of welcoming shari'a courts to the United States. Pilot programs such as mental health courts, juvenile courts, domestic violence courts, sex offense courts, and drug courts have arisen throughout the country in response to the inundation of court dockets by disproportionate numbers of cases involving these particular types of issues or parties.<sup>28</sup>

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<sup>24</sup> See Carsen, *supra* note 22.

<sup>25</sup> GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 31–32 (2005) ("Hundreds of new judicial experiments have opened their doors. . . . All told, more than two thousand problem-solving courts are currently in operation, with dozens more in the planning stages.").

<sup>26</sup> COUNCIL OF STATE GOV'TS JUSTICE CTR., BUREAU OF JUSTICE ASSISTANCE, MENTAL HEALTH COURTS: A PRIMER FOR POLICY MAKERS AND PRACTITIONERS 3 (2008) [hereinafter PRIMER].

<sup>27</sup> Paul Stenzel, *Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*, 2 J. CT. INNOVATION 225, 227–28 (2009).

<sup>28</sup> See PRIMER, *supra* note 26, at 2 (mental health courts launched to address overrepresentation of mentally ill defendants in the criminal justice system); LAUREN ALMQUIST & ELIZABETH DODD, COUNCIL OF STATE GOV'TS JUSTICE CTR., MENTAL HEALTH

Citing the failure of “traditional court processes” to supply effective outcomes for individual defendants and communities, proponents of problem-solving courts advocate them as “alternative[s] to the status quo.”<sup>29</sup> Many of these courts are designed to address the problems caused by certain categories of defendants cycling repeatedly through the justice system, straining local resources, and posing a continuing threat to the safety of the community.<sup>30</sup> Mental health courts, for instance, are instituted “with the hope that effective treatment will prevent participants’ future involvement in the criminal justice system and will better serve both the individual and the community . . . .”<sup>31</sup> Another incentive for implementing special courts to facilitate these goals is that traditional judges and court staff do not possess specialized knowledge of the problems facing offenders and victims, such as substance addictions, mental illnesses, family dysfunctions, or domestic violence, and are thus ill-equipped to formulate constructive solutions for those parties.<sup>32</sup>

Although they target diverse populations, these special courts share some general characteristics, including extensive orientation with the target issues and participants, community involvement, collaboration between the community and the justice system, “individualized justice,” and accountability.<sup>33</sup> As their various titles imply, each of these courts targets a specific subset of parties, usually criminal defendants, and seeks to tailor the justice process to the needs of those individuals and their communities.<sup>34</sup> What makes these courts more competent to deal with these cases than traditional courts is their ability to acquire expertise and training regarding the particular issues and individuals that they serve.<sup>35</sup> Most of these courts rely on voluntary participation by the target individuals and offer participants alternatives to traditional criminal-justice processes and punishments.<sup>36</sup> For instance, in lieu of

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COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 2 (2009) (“As of 2009, there are more than 250 mental health courts across the country, with many additional courts in the planning phase.”); ROBERT V. WOLF, CTR. FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 1 (2007) (“Today there are over 2,500 problem-solving courts in the United States.”).

<sup>29</sup> COUNCIL OF STATE GOV'TS JUSTICE CTR., BUREAU OF JUSTICE ASSISTANCE, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 11 (2007) [hereinafter IMPROVING RESPONSES].

<sup>30</sup> PRIMER, *supra* note 26, at 2, 8.

<sup>31</sup> *Id.* at 8.

<sup>32</sup> WOLF, *supra* note 28, at 2.

<sup>33</sup> *Id.* at 2–7.

<sup>34</sup> *See, e.g.*, IMPROVING RESPONSES, *supra* note 29, at 2 (describing mental health courts’ target populations); *see also* BERMAN, *supra* note 25, at 8 (describing drug courts’ target populations).

<sup>35</sup> *See* WOLF, *supra* note 28, at 2.

<sup>36</sup> *See, e.g.*, PRIMER, *supra* note 26, at 4.

traditional criminal sentencing, specialized courts tailor incentives, sanctions, treatments (in drug and mental-health circumstances), as well as punishments and protective mechanisms (in domestic violence cases) to the individuals involved.<sup>37</sup> As one proponent advised, “[a]ll responses to participants’ behavior, whether positive or negative, should be individualized,” in order to promote rehabilitation and prevent recidivism.<sup>38</sup> Furthermore, instead of placing the entire responsibility for treatment on the justice system, problem-solving courts emphasize community involvement in the participants’ treatment and supervision.<sup>39</sup> Finally, problem-solving courts seek to promote a sense of personal accountability and responsibility in each participant “by helping participants understand their public duties and by connecting them to their communities.”<sup>40</sup>

One hurdle to instituting a specialized court in any given state or locality, and perhaps a reason for the lack of uniform incidence of special courts among jurisdictions, is the practicality and demand for such courts in each local context.<sup>41</sup> For example, insufficient local resources and lack of public support may present challenges to instituting specialized courts in some jurisdictions.<sup>42</sup> Then again, overrepresentation of certain types of individuals in the court system may actually fuel the demand for problem-solving courts in other jurisdictions.<sup>43</sup> As communities and policymakers increasingly look to the needs of the community in order to formulate innovative justice mechanisms, it is likely that more categories of populations and issues will be identified and that new types of specialized courts will emerge to address their particular needs. One study alludes to the possibility of gender or ethnic-specific alternative justice mechanisms, stating that “court teams should also pay special attention to the needs of women and ethnic minorities and make gender-sensitive and culturally competent services available.”<sup>44</sup>

Although the existing special courts are not specifically religious, many of their characteristics and objectives would also serve as effective arguments in favor of instituting shari’a courts to promote justice for

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<sup>37</sup> *Id.*; see also BERMAN, *supra* note 25, at 7–8 (describing the strengthened protection domestic violence courts provide to victims as well as the additional supervision of batterers).

<sup>38</sup> IMPROVING RESPONSES, *supra* note 29, at 9.

<sup>39</sup> See *id.* at 11.

<sup>40</sup> PRIMER, *supra* note 26, at 6.

<sup>41</sup> See *id.* at 15 (noting that mental health courts may be impractical in some jurisdictions).

<sup>42</sup> *Id.*

<sup>43</sup> See *id.* at 2.

<sup>44</sup> IMPROVING RESPONSES, *supra* note 29, at 6.

Muslim Americans. As the Muslim American population increases, it may seem advantageous for communities harboring large concentrations of Muslims to institute special courts to address the particular issues faced by Islamic parties in the criminal justice system. For instance, specific challenges face immigrants who transition from Middle Eastern justice systems to the American court system, such as overcoming the notion that attorneys work only in the interest of the state; understanding unfamiliar concepts such as bail, plea bargaining, and the constitutional right against self-incrimination; as well as comprehending the myriad American legal proceedings.<sup>45</sup> Furthermore, language barriers may present yet another challenge to achieving full justice for Arabic-speaking defendants, since Arabic translators are generally scarce in the United States.<sup>46</sup> As a result of these realities, traditional judges and courts are unlikely to fully comprehend these issues, much less have the time or resources to fully educate themselves so as to be capable of effectively communicating and formulating constructive solutions for Muslim defendants or victims.

Special shari'a courts may be an attractive alternative for dealing with the challenges faced by Muslim parties in American court proceedings. Like drug courts or mental health courts, shari'a courts might theoretically be best-equipped to craft sentences and remedies that would be effective and understandable to Muslim parties. Shari'a courts would also provide a mechanism to involve the Muslim community in the treatment, punishment, and reintegration of parties into the community, as well as to address issues of personal responsibility and accountability to that community. Building on the model of specialized courts, it is thus foreseeable that shari'a courts might be advocated to address the particular needs of Muslim parties in the American justice system.

Of course, due to constitutional barriers against government entanglement with religion, a shari'a-court model could not exist in the same way that the specialized courts do, that is, as an arm of the judiciary.<sup>47</sup> Therefore, even though such specialized courts themselves are not plausible models for shari'a courts to follow, specialized courts represent a growing policy preference for adjudicatory bodies to be tailored to the "needs" of their constituencies. This growing policy preference may bolster the push for shari'a tribunals to be embraced in other frameworks.

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<sup>45</sup> See Mosabi Hamed & Joanne I. Moore, *Middle Easterners in American Courts, in IMMIGRANTS IN COURTS*, *supra* note 13, at 112, 112–16.

<sup>46</sup> *Id.* at 114.

<sup>47</sup> See U.S. CONST. amend. I; *Lemon v. Kurtzman*, 403 U.S. 602, 612–13, 615 (1971) (holding that the government action must have a secular purpose and may not excessively entangle with religion).



*B. Full Faith and Credit for Tribal-Court Judgments by Local Jurisdictions*

Another basis for advocating shari'a courts in the United States is exemplified by the approach of several states that have begun giving full faith and credit to the judgments of Native American tribal courts.<sup>48</sup> Propelled by the initiatives of tribal-state judiciary forums, these jurisdictions have experimented with expanding the constitutional principle of full faith and credit beyond the scope of state-to-state relations in order to promote conformity between the outcomes of state and tribal court judgments.<sup>49</sup> The mobilizing forums recognized the influence of tribal courts within Native American sub-communities and the need for state courts to work with those tribal units in order to achieve justice and to "help make the law work after it leaves the courtroom."<sup>50</sup> The reasons for such initiatives mirror the rationales for full faith and credit between states, namely that tribal members may live outside of or travel across the borders of the reservation, which makes it necessary for tribal-court judgments to be enforceable between the state and the reservation.<sup>51</sup> Without full faith and credit between tribal and state-court judgments, tribe members could escape tribal-court judgments merely by leaving the reservation and escape state-court judgments by fleeing to the reservation.<sup>52</sup>

To remedy this problem, Wisconsin adopted a statute by which tribal judgments are given full faith and credit as long as certain conditions are met. Those considerations include whether the tribe is organized under the Indian Reorganization Act, whether the court is a court of record, whether the judgment is a valid judgment, and whether the tribal court reciprocates full faith and credit to state-court judgments.<sup>53</sup> If those conditions are met, the recipient of a tribal-court judgment may apply for enforcement of the judgment in a Wisconsin state court, much like the process for having an arbitration award confirmed in a state or federal court.<sup>54</sup> A similar protocol adopted in New York presumes that full faith and credit will be given to judgments by an Oneida Indian Nation tribal court, absent the existence of a mitigating condition such as denial of due process to a party, lack of reciprocation

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<sup>48</sup> Stenzel, *supra* note 27, at 225.

<sup>49</sup> *Id.* at 226.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 227–28.

<sup>52</sup> *See id.* at 228.

<sup>53</sup> WIS. STAT. ANN. § 806.245 (West 1994 & Supp. 2010).

<sup>54</sup> Stenzel, *supra* note 27, at 232; *see also* Federal Arbitration Act, 9 U.S.C. § 9 (2006) (describing the confirmation process for arbitration awards in federal court).

by the tribal court for state-court judgments, fraud in obtaining the judgment, or violation of a strong public policy of the state.<sup>55</sup>

Similar initiatives have been pursued in other states such as New Mexico and Minnesota, but have yet to achieve full recognition of tribal-court judgments.<sup>56</sup> Such initiatives have garnered the most success where they were driven by a pressing need or “animating purpose.”<sup>57</sup> While some efforts have been more successful than others, together they reflect a broader concern among jurisdictions for congruence between the justice systems of the state and the justice systems of large minority communities within the state.<sup>58</sup>

The concentration of Muslim populations in the United States, resulting in substantial minority communities, may produce the same sorts of challenges that have motivated state and tribal officials to seek mutual recognition of court judgments. Muslim communities, even in America, handle many of their members’ disputes “in-house” via local shari’a tribunals.<sup>59</sup> Furthermore, the religious legitimacy of shari’a courts “gives them a degree of cultural authority in the community that [secular] courts might not have.”<sup>60</sup> As in the case of tribal-court judgments, if the judgments of shari’a courts are not applicable outside the community, the force of those decisions becomes toothless and, in effect, null. Clearly, Muslim communities do not yet possess the same legal status as Native American tribes, but the essence of the challenges to achieving justice in both communities may lead to the proposal of solutions such as full faith and credit for shari’a-court judgments.<sup>61</sup>

Another factor adding credibility to the shari’a-court/tribal-court analogy is that limitations, such as those imposed by the full faith and credit programs in Wisconsin and New York,<sup>62</sup> could be duplicated to ensure that shari’a courts are held accountable and to guarantee that state laws and vital public policies are not violated by the shari’a-court judgments. Requiring reciprocation of full faith and credit to state-court judgments may also be a way of preserving the predominance of state

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<sup>55</sup> Stenzel, *supra* note 27, at 237.

<sup>56</sup> *See id.* at 239, 243.

<sup>57</sup> *Id.* at 247.

<sup>58</sup> *See, e.g., id.* at 238–44.

<sup>59</sup> *See* YVONNE YAZBECK HADDAD & ADAIR T. LUMMIS, ISLAMIC VALUES IN THE UNITED STATES: A COMPARATIVE STUDY 59 (1987) (describing how imams in the United States often serve as judges and provide dispute resolution in their communities).

<sup>60</sup> Carsen, *supra* note 22 (discussing shari’a courts in Britain).

<sup>61</sup> One problem cited by shari’a-court supporters is that ethnic minorities in secular courts are less likely to feel that they have been judged justly and fairly, resulting in a poor regard for the state legal system. Community shari’a courts, it is argued, are a potential remedy for that concern. *Id.*

<sup>62</sup> *See* Stenzel, *supra* note 27, at 231–32, 237.

law within Muslim American communities, as in Native American tribes. Of course, the key difference between the Native American tribal courts and Islamic courts is that the Native Americans have a level of territorial sovereignty from which their courts' jurisdiction arises.<sup>63</sup> Muslims, of course, have no territorial sovereignty within the United States, and it is far-fetched to imagine the United States abdicating such sovereignty to them or to any other religious group. The phenomenon with tribal courts is still instructive with respect to the perceived value of promoting a justice system that is tailored to the local population. On one hand, the tribal-court initiatives stem from some level of necessity, due to the fact that Native Americans have a level of territorial sovereignty that the state will not transgress and the need to enforce legal judgments across the border.<sup>64</sup> On the other hand, the initiatives seem to aim at producing just results that are also culturally relevant, effective, and sustainable.

Both phenomena—the development of pilot programs, such as special courts, and the extension by some jurisdictions of full faith and credit to tribal judgments—are indicative of a trend in American law toward more individualized and culturally relevant approaches to justice. With these trends in mind, when a specific locale consists primarily of a religious community, Muslim or otherwise, an argument may be made that the local laws should bend to accommodate the needs of individuals in that community and their notions of justice.<sup>65</sup> These two models, special courts and tribal-state full faith and credit agreements, lend credibility to calls for shari'a tribunals in the United States.

### III. ARBITRATION IN THE WEST: A FRAMEWORK FOR RELIGIOUS ADJUDICATION IN THE UNITED STATES

In 2007, the Archbishop of Canterbury made the controversial declaration that allowing shari'a law to be enforced in Great Britain

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<sup>63</sup> See S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 662–63 (2010) (noting that Native American tribes have jurisdiction over their members and arguably over non-Native Americans on Native American land due to their territorial authority).

<sup>64</sup> See Gordon K. Wright, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1408 (1985) (“If tribal court decisions are not recognized and enforced by state courts, tribal courts are effectively made impotent.”).

<sup>65</sup> See Barbara Bradley Hagerty, *Religious Laws Long Recognized by U.S. Courts*, NPR (Sept. 8, 2010), <http://www.npr.org/templates/story/story.php?storyId=129731015>. (“Right now Islam is expanding in the United States. . . . Now suppose that Muslims become a majority in a particular state; I think then the state laws would reflect Islamic law.” (internal quotation marks omitted)).

“seems unavoidable.”<sup>66</sup> Although viewed as a controversial argument at the time, his statement was in reality a logical statement of fact. Because of Britain’s existing laws, there was no question as to the foundational policy: The issue was not *whether* shari’a courts should be allowed in Britain, but *when* shari’a followers would finally avail themselves of the existing legal mechanism.<sup>67</sup> The Archbishop’s words were still hanging in the air when the Muslim Arbitration Tribunals of Great Britain announced they were beginning to participate in the arbitration process.<sup>68</sup>

Shari’a courts have not yet developed in the United States to the same extent that they have in Britain, but since the U.S. arbitration framework closely parallels Great Britain’s, similar results should not be surprising. This Part explores the structure of arbitration in Great Britain and the modern emergence of shari’a courts within that framework. It then discusses the United States’s own arbitration system, and how it has accommodated religious tribunals. Ultimately, the framework for religious arbitration and the previously explored policy preferences and trends are amenable to shari’a tribunals being able to operate in the United States as they do in Britain.

#### *A. Religious Courts in Britain*

Great Britain has long allowed ecclesiastical courts of various denominations to settle civil disputes between willing parties.<sup>69</sup> Before the nineteenth century, even to the twelfth century, ecclesiastical courts throughout Britain settled private disputes regarding religious matters as well as non-religious matters such as will, probate, and behavioral disputes.<sup>70</sup> Following the ecclesiastical court model, Jewish courts began settling disputes between British Jews in accordance with Jewish law around the beginning of the eighteenth century.<sup>71</sup> Though state-run ecclesiastical courts were eventually abolished, the Jewish rabbinical courts became even more entrenched in English society and still play an important and legitimate role in the lives of British Jews to this day.<sup>72</sup>

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<sup>66</sup> Nick Tarry, *Religious Courts Already In Use*, BBC NEWS (Feb. 7, 2008, 16:36 GMT), <http://news.bbc.co.uk/2/hi/7233040.stm>.

<sup>67</sup> Shari’a tribunal decisions can be enforced in Britain under the Arbitration Act of 1996. Hickey, *supra* note 10.

<sup>68</sup> The Muslim Arbitration Tribunal was established for England and Wales in 2007. MUSLIM ARBITRATION TRIBUNAL, <http://matribunal.com/> (last visited Apr. 6, 2012).

<sup>69</sup> See Polly Botsford, *Sharia Unveiled*, LAW SOCIETY GAZETTE (Feb. 28, 2008), <http://www.lawgazette.co.uk/features/sharia-unveiled>.

<sup>70</sup> *Id.*; M. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 109–10 (Archon Books 1964) (1942).

<sup>71</sup> See *About the London Beth Din*, THE UNITED SYNAGOGUE, [http://www.theus.org.uk/the\\_united\\_synagogue/the\\_london\\_beth\\_din/about\\_us/](http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/about_us/) (last visited Apr. 6, 2012).

<sup>72</sup> *Id.*

Beth Din rabbinical courts are the continuing legacy of religious courts in England.<sup>73</sup> Under Great Britain's modern arbitration laws, two parties may contract to have civil disputes between them settled by a rabbinical court.<sup>74</sup> The Beth Din courts may then hear parties' cases and issue judgments using Jewish law, which are in turn enforceable in British courts of law.<sup>75</sup> To that extent, Jews in Britain may freely choose between secular litigation or religious arbitration to settle certain types of disputes.<sup>76</sup> Furthermore, Britain does not require Beth Din courts to apply only British law when settling disputes, but allows them instead to apply Jewish law to the extent that it does not conflict with British law or public policy.<sup>77</sup> If such a conflict does exist, British courts may vacate the arbitration award rather than enforce it.<sup>78</sup> In addition, Beth Din may only decide a limited range of disputes, including civil matters such as financial or contractual disputes.<sup>79</sup> But family law and criminal law matters are beyond the competency of rabbinical courts in Britain and religious courts in general.<sup>80</sup> In such cases as divorce, the Jewish law is not an alternative to British law.<sup>81</sup> In order for a Jewish couple to be legally divorced, obtaining a religious divorce (referred to as a *get*) from a Beth Din court will not suffice; the couple must also obtain a civil divorce from the state.<sup>82</sup>

In 2008, following the model of the Beth Din courts, a handful of Islamic Arbitration Tribunals began issuing dispute settlements under the British Arbitration Act.<sup>83</sup> These tribunals, as well as numerous others, had already been operating and deciding disputes between Muslim parties for years, but up until that time, their judgments were

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<sup>73</sup> *See id.*

<sup>74</sup> Clare Dyer, *Jewish Beth Din Could Be Archbishop's Model*, THE GUARDIAN (Feb. 8, 2008), <http://www.guardian.co.uk/politics/2008/feb/09/uk.religion2/print>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Innes Bowen, *The End of One Law for All?*, BBC NEWS (Nov. 28, 2006, 12:12 GMT), [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/6190080.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/6190080.stm).

<sup>78</sup> An English court of appeal overturned an award by the Beth Din, which purported to grant a man £500,000 under a smuggling "deal" with his father, because such a deal was illegal and would not have been enforceable if originally brought in the English courts. Dyer, *supra* note 74.

<sup>79</sup> THE CTR. FOR SOC. COHESION, THE BETH DIN: JEWISH LAW IN THE UK 1 (2009), available at [http://www.socialcohesion.co.uk/files/1236789702\\_1.pdf](http://www.socialcohesion.co.uk/files/1236789702_1.pdf).

<sup>80</sup> *Id.* In England and Wales, family and criminal law matters may not be resolved by arbitration. Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] cl. 4 (Eng. & Wales), available at <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf> (amending the Equality Act of 2010).

<sup>81</sup> Dyer, *supra* note 74.

<sup>82</sup> *Id.*

<sup>83</sup> Hickley, *supra* note 10.

not legally enforceable in British courts of law.<sup>84</sup> Previously, the force of the tribunals' judgments depended entirely on voluntary submission and self-policing (or community-policing) by the parties involved.<sup>85</sup> The change occurred when the tribunals decided to tap into Britain's arbitration mechanism.<sup>86</sup> The Arbitration Act of 1996 allows the decisions of any arbiter conforming to the Act's procedural requirements to be enforced, as long as the recipients of the judgment mutually and voluntarily agreed that the tribunal's judgment would be binding.<sup>87</sup> The shari'a tribunals discovered that by conforming with Britain's Arbitration Act,<sup>88</sup> they could issue enforceable judgments in the same way Beth Din courts do. Like Beth Din and all other arbiters, shari'a tribunals in Britain are not authorized to settle family law or criminal matters.<sup>89</sup>

This recent integration of shari'a courts into the British legal system should hardly come as a surprise, given the historical precedents of Jewish and ecclesiastical courts in Great Britain. Considering the large and still-growing British Muslim population and the long-established legitimacy of religious arbiters in Britain, such as Beth Din, it was foreseeable that British Muslims would seek for their own laws and courts to achieve comparable legal competency. Although controversial, the Archbishop's statement of inevitability was merely the recognition of a logical reality: Equality would seem to dictate that Great Britain's Muslim courts be accorded the same privilege of enforceability under the arbitration laws that is enjoyed by the Jewish and Christian religious panels.<sup>90</sup>

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<sup>84</sup> MOORE, *supra* note 1, at 105.

<sup>85</sup> *Id.*

<sup>86</sup> Hickley, *supra* note 10.

<sup>87</sup> MOORE, *supra* note 1, at 105; Arbitration Act 1996 c. 23, § 1(b) (Eng., Wales, & N. Ir.).

<sup>88</sup> See Arsani William, Note, *An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England*, 11 STAN. J. INT'L REL., no. 2, 2010, at 40, 43.

<sup>89</sup> Arbiters like shari'a tribunals and Beth Din are not permitted to decide family or criminal matters. See, e.g., THE BETH DIN: JEWISH LAW IN THE UK, *supra* note 79, at 1; Arbitration and Mediation Services (Equality) Bill, 2010-12, H.L. Bill [72] cl. 4 (Eng. & Wales), available at <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf>.

<sup>90</sup> It is noteworthy that the same argument was made when the shari'a debate was taking place in Canada. Like Great Britain, Canada had also permitted Jewish and Christian ecclesiastical courts to make legally binding judgments via Canada's Arbitration Act, and it was argued that fairness required the same for Canadian Muslims. William, *supra* note 88, at 42.

### B. Religious Arbitration in the United States

Ecclesiastical tribunals also have historical roots in the United States. Rabbinical and Christian arbiters, for example, have long enjoyed legitimacy in the United States.<sup>91</sup> As in Britain, arbitration is the vehicle through which religious “courts” operate in the United States.

The Federal Arbitration Act (“FAA”) defines the procedural framework with which arbiters, whether religious or secular, must conform in order for their judgments to be enforceable in U.S. courts.<sup>92</sup> Most states also have arbitration statutes, based on the Uniform Arbitration Act (“UAA”),<sup>93</sup> that permit parties to opt for civil dispute settlement through arbitration rather than litigation.<sup>94</sup> The arbitration process is a highly favored method of alternative dispute resolution in the United States, both because it honors the principle of freedom of contract and because it provides a means of efficiently resolving disputes without burdening the already clogged court dockets.<sup>95</sup>

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<sup>91</sup> See Lee Ann Bambach, *The Enforceability of Arbitration Decisions Made by Muslim Religious Tribunals: Examining the Beth Din Precedent*, 25 J.L. & RELIGION 379, 381–82 (2010) (“As a result of [the] long-established Jewish presence in the United States, as well as the system of religious courts . . . that the Jewish immigrants brought with them, a significant body of case law has developed in which the secular courts have been called on to enforce or vacate decisions adjudicated under Jewish law by rabbinical Jewish courts in the United States.”); Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to “Ordinary” ADR*, 29 CUMB. L. REV. 583, 585, 588 (1999) (describing a method of Christian dispute resolution in the United States called “conciliation” which dates back to the 19th century).

<sup>92</sup> See Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2006).

<sup>93</sup> See UNIF. ARBITRATION ACT (amended 2000), available at [http://www.nccusl.org/Act.aspx?title=Arbitration Act \(2000\)](http://www.nccusl.org/Act.aspx?title=Arbitration Act (2000)). The 2000 version of the UAA has been adopted in fourteen states and the District of Columbia, and the 1956 version was adopted in forty-nine states. *Legislative Fact Sheet - Arbitration Act*, U. L. COMMISSION, [http://www.nccusl.org/LegislativeFactSheet.aspx?title=Arbitration Act \(2000\)](http://www.nccusl.org/LegislativeFactSheet.aspx?title=Arbitration Act (2000)) (last visited Apr. 6, 2012).

<sup>94</sup> See, e.g., ALASKA STAT. § 09.43.010 (2010); 42 PA. CONS. STAT. ANN. § 7303 (2007); VA. CODE ANN. § 8.01–581.01 (2007).

<sup>95</sup> See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (“Noting that the California rules were ‘manifestly designed to encourage resort to the arbitral process,’ and that they ‘generally fostered the federal policy favoring arbitration,’ we concluded that such an interpretation was entirely consistent with the federal policy ‘to ensure the enforceability, according to their terms, of private agreements to arbitrate.’” (citations omitted) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 & n.5 (1989))); Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 397, 400 (2009) (“Only a true failure in procedural fairness may lead to a viable appeal. In other words, arbitration personifies due process and justice. It enables society to resolve disputes and to prosper by dedicating its resources to other activities. . . . Parties in the marketplace should be at liberty to agree to any exchange to which they mutually consent and which complies with the minimal requisites of public policy.”).

A valid agreement to arbitrate a dispute requires that both parties freely enter the agreement and voluntarily agree to be bound by the arbitrator's decision.<sup>96</sup> Parties to an arbitration agreement may also include a "choice of law" provision designating the law that they wish to be applied to their case, such as Jewish law or the law of another country or state.<sup>97</sup> While the parties are free to choose a law other than a federal or state law to govern the arbitration, the chosen law may not operate as an evasion of otherwise mandatory state or federal laws or policies.<sup>98</sup> In other words, the chosen religious law must not undermine the policies and laws of the land.<sup>99</sup> Under the UAA, arbitrators have considerable discretion in the arbitration proceeding itself.<sup>100</sup> An arbitrator may have conferences with the parties prior to the hearing and may make judgments on the admissibility of evidence.<sup>101</sup> Under the FAA, within a year after an award has been issued, either party may seek to have the award confirmed by a court, at which point the award will be legally enforceable.<sup>102</sup>

A secular court may, in certain limited circumstances, review and vacate an arbitration award instead of enforcing it.<sup>103</sup> The FAA provides courts limited power to review the judgments of an arbitrator to ensure that the parties to the arbitration received a fair, just, and equitable judgment.<sup>104</sup> Statutory grounds for vacating an arbitrator's award under the

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<sup>96</sup> Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167 (2004) ("The FAA requires courts to apply contract-law standards of consent to arbitration agreements . . .").

<sup>97</sup> See Kristine M. Paden, Case Note, *Choice of Law, Choice of Forum and Arbitration Clauses Override U.S. Security Rights: Riley v. Kingsley Underwriting Agencies, Ltd.*, 6 TRANSNAT'L LAW. 431, 442 (1993). A noteworthy difference between choice-of-law clauses in litigation and in arbitration is that a court will only consider the law of another territorial jurisdiction, such as another state or country. An arbitrator, however, may consider a religious or non-territorial "law." For this reason, arbitration may be particularly attractive to religious groups and individuals seeking to be judged by a religious standard. See generally Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 169–87 (2007).

<sup>98</sup> Paden, *supra* note 97, at 443.

<sup>99</sup> *Id.*

<sup>100</sup> See UNIF. ARBITRATION ACT § 15(a) (amended 2000).

<sup>101</sup> *Id.*

<sup>102</sup> Federal Arbitration Act, 9 U.S.C. § 9(a) (2006).

<sup>103</sup> *Id.* § 10(a).

<sup>104</sup> See BETH DIN OF AMERICA, RULES AND PROCEDURES OF THE BETH DIN OF AMERICA 1, available at [http://www.bethdin.org/docs/PDF2-Rules\\_and\\_Procedures.pdf](http://www.bethdin.org/docs/PDF2-Rules_and_Procedures.pdf) (last visited Apr. 6, 2012) ("These Rules . . . are designed to provide for a process of dispute resolution . . . which are in consonance with the demands of Jewish law that one diligently pursue justice . . . This will be done in a manner consistent with the requirements for binding arbitration so that the resolution will be enforceable in the civil courts of the United States of America.").



FAA and UAA include partiality or corruption of the arbiter, fraud or corruption in obtaining the award, awards that exceed the scope of the arbiter's authority, or "any other misbehavior by which the rights of any party have been prejudiced."<sup>105</sup> These grounds are strictly construed, however, and are only met in extraordinary circumstances.<sup>106</sup> Additionally, courts have developed narrow common-law grounds for vacating arbitration awards, such as manifest disregard for the law by the arbiter and awards that violate public policy,<sup>107</sup> but even these grounds are narrowly construed and rarely found to be met.<sup>108</sup> Because of the voluntariness of the arbitration process, courts are highly deferential to arbitration awards.<sup>109</sup>

Courts' power of review is particularly limited with respect to the judgments of religious tribunals due to the constitutional prohibition on government entanglement with religion.<sup>110</sup> According to the religious question doctrine, courts may not decide disputes involving religious doctrine or interpretation.<sup>111</sup> For instance, shari'a law and Jewish law are not appropriate standards for consideration in federal- or state-court judgments.<sup>112</sup> In fact, the principle that state and federal court judges

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<sup>105</sup> Federal Arbitration Act § 10(a); *see also* UNIF. ARBITRATION ACT § 23(a) (amended 2000).

<sup>106</sup> *Hall St. Assocs., v. Mattel, Inc.*, 128 S. Ct. 1396, 1400 (2008) (holding that the grounds for vacation outlined in the FAA are exclusive); *see also* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) ("Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error. 'It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice' that his decision may be unenforceable." (citations omitted) (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)) (internal quotation marks omitted)).

<sup>107</sup> *See, e.g., Am. Postal Workers Union AFL-CIO v. U.S. Postal Serv.*, 682 F.2d 1280, 1284 (9th Cir. 1982) (noting that arbitrators' conclusions are not upheld when they manifestly disregard the law); *Diapulse Corp. of Am. v. Carba, LTD.*, 626 F.2d 1108, 1110–11 (2d Cir. 1980) (recognizing that an arbitration award may be set aside if it violates public policy).

<sup>108</sup> *See, e.g., Brown v. Rauscher Pierce Refsnes, Inc.* 796 F. Supp. 496, 503 (M.D. Fla. 1992) (noting that "[o]nly after it is determined that there could be no proper basis for the award, should a court consider looking beyond the statute to determine the applicability of court made standards for the vacatur of an arbitration award" and "that a district court considering vacatur of an arbitration award should proceed along a slender and carefully defined path." (quoting *Robbins v. Day*, 954 F.2d 679, 684 (11th Cir. 1992))).

<sup>109</sup> *See, e.g., Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 690 (Cal. 2000) (noting that voluntariness is a "bedrock justification" for arbitration).

<sup>110</sup> *See supra* note 47 and accompanying text.

<sup>111</sup> *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

<sup>112</sup> *See, e.g., Klagsburn v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp. 2d 732, 739 (D.N.J. 1999) (declining to issue an opinion on the merits of a defamation claim against an association of Orthodox rabbis because it would require the court to "delve dangerously

may not decide cases based on religious laws has recently been reiterated in the precise context of considering shari'a law.<sup>113</sup> Since courts are not competent to decide religious matters, the Supreme Court has developed a policy of deferring to the judgment of the highest authority in the religious hierarchy of the relevant religious body.<sup>114</sup>

Yet, courts may review a religious arbitration award to the extent that it can “apply neutral principles of law,” such as property or contract principles, “to determine disputed questions that do not implicate religious doctrine.”<sup>115</sup> Under the neutral principles doctrine, a court may, for instance, enforce the parties’ agreement to arbitrate, even if the designated arbitrator is religious.<sup>116</sup> But in reviewing the substance of the award, the court may not consider the religious basis for the award.<sup>117</sup> Therefore, when arbitration is religious in nature, neutral grounds for substantive review are likely to be sparse. While judicial review and vacation of an arbitration award is possible, it is a rarity that parties should not count on, especially where the arbitration is of a religious nature. Ironically, as explained in this Part, arbitration awards based on religious law are enforceable by the same state and federal courts that are themselves prohibited from considering religious laws. In this manner, the current system essentially provides a back door for state enforcement of religious law, with limited potential for appeal or review.

Within this framework, religious arbiters, such as rabbinical courts, have long operated in the United States of America. The Beth Din of America operates very similarly to its British counterpart, settling civil

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into questions of doctrine and faith”); *El-Farra v. Sayyed*, 226 S.W.3d 792, 793–94 (Ark. 2006) (declining to issue an opinion on the merits of a defamation claim by an Islamic minister against an Islamic center because determination of the claim would involve consideration of ecclesiastical issues); *S.D. v. M.J.R.*, 2 A.3d 412, 422 (N.J. Super. Ct. App. Div. 2010) (reversing a trial court judgment that took into consideration the defendant’s religious beliefs and excepted him from an applicable state statute on that basis). *But see* *Odatalla v. Odatalla*, 810 A.2d 93, 96–97 (N.J. Super. Ct. Ch. Div. 2002) (enforcing a Mahr agreement contained in the parties’ Islamic marriage license because it could be enforced under neutral principles of secular contract law without consideration of religious principles).

<sup>113</sup> *E.g.*, *El-Farra*, 226 S.W.3d at 793–94; *S.D.*, 2 A.3d at 422.

<sup>114</sup> *Jones*, 443 U.S. at 604 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976)).

<sup>115</sup> *Encore Prods. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112 (D. Colo. 1999) (quoting *Jones*, 443 U.S. 595).

<sup>116</sup> *See* Grossman, *supra* note 97, at 186.

<sup>117</sup> *See supra* note 47 and accompanying text; *see also* Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 *FORDHAM L. REV.* 427, 445–46 (2006) (describing the First Amendment implications that arise with judicial review of faith-based arbitration).

disputes between parties who voluntarily agree to submit their disputes to arbitration and who select Beth Din as the arbiter.<sup>118</sup> The scope of subject matters that may be heard by these religious courts is strictly civil, including commercial, religious, familial, and other private disputes.<sup>119</sup> Beth Din judgments also must conform to the policies of the forum in which they are to be enforced. As the rabbinical court explains, “Cases are decided under Jewish law, through the prism of contemporary commercial practice and secular law.”<sup>120</sup>

As in Britain, the American arbitration framework has made it possible for shari’a courts to operate in the United States. It would not work to allow Christians and Jews to utilize the arbitration process but not allow Muslims to do so as well. Shari’a courts may operate within the same parameters as the rabbinical courts or any other arbiter in the United States, and their judgments may be applied “[n]o different from how religious laws and customs are already applied.”<sup>121</sup> Currently, the network of shari’a tribunals in the United States seems less extensive than in Great Britain,<sup>122</sup> but some shari’a tribunals, such as the Texas Islamic Court,<sup>123</sup> have already begun operating in the United States.

In answer to concerns about shari’a in the United States,<sup>124</sup> proponents of shari’a tribunals contend that the regulations contained in the FAA and UAA, together with the potential for judicial review of arbitration awards, limited as it is, are sufficient to ensure that shari’a arbitration results do not contravene U.S. law or oppress Muslim Americans.<sup>125</sup> According to these advocates, shari’a courts will be no

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<sup>118</sup> BETH DIN OF AMERICA, AGREEMENT TO ARBITRATE, *available at* [http://www.bethdin.org/docs/PDF3-Binding\\_Arbitration\\_Agreement.pdf](http://www.bethdin.org/docs/PDF3-Binding_Arbitration_Agreement.pdf).

<sup>119</sup> Beth Din of America, *Arbitration and Mediation*, BETHDIN.ORG, <http://www.bethdin.org/arbitration-mediation.asp> (last visited Apr. 6, 2012).

<sup>120</sup> *Id.*

<sup>121</sup> Hagerty, *supra* note 65 (quoting American Jewish Committee religion law expert Marc Stern).

<sup>122</sup> See Steve Doughty, *Britain Has 85 Sharia Courts: The Astonishing Spread of the Islamic Justice Behind Closed Doors*, MAIL ONLINE (June 29, 2009, 10:25 AM), <http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html> (describing eighty-five operating shari’a courts in Britain as an “astonishing” figure compared to what was commonly thought to be the number of functioning tribunals); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1249 (2011) (“Muslim communal groups have recently begun pursuing initiatives to institute a network of Islamic arbitration courts around the United States; however, no such network currently exists.” (footnotes omitted)).

<sup>123</sup> See *Jabri v. Qaddura*, 108 S.W.3d 404, 407, 413–14 (Tex. App. 2003) (upholding an arbitration agreement choosing the Texas Islamic Court as the site for arbitration).

<sup>124</sup> See *infra* Part IV (detailing policy concerns over the use of shari’a in the United States).

<sup>125</sup> See Hagerty, *supra* note 65.

more dangerous than Christian or Jewish courts have been. “So we’re not going to see hand chopping off [or] polygamous marriage,” says one proponent.<sup>126</sup> “The U.S. court wouldn’t do it. It’s contrary to public policy, and they would refuse to apply that particular [award based on shari’a law].”<sup>127</sup>

Indeed, those guarantees, in combination with the interest in favor of treating Muslims equally with Christians and Jews under arbitration laws, make it unlikely that shari’a courts will be categorically denied equal status to rabbinical courts in American arbitration. Legally, there is no strong argument for disallowing shari’a arbitration.

In terms of policy, however, there is room to reevaluate where the law is and where it should be with regard to shari’a tribunals.<sup>128</sup> Given that the FAA and UAA regulations on arbitration are hands-off at best, and that the judiciary’s power of review is confined to little more than procedure, a cautious and well-informed approach to shari’a tribunals is warranted.

#### IV. POLICY CONCERNS WITH EMBRACING SHARI’A TRIBUNALS IN THE UNITED STATES

It is obvious that, under the status quo, shari’a arbitration is legal in the United States. In addition to current trends in favor of specialized courts and personalized justice that weigh on the side of adjudicatory bodies, such as shari’a tribunals, being tailored to serve particular populations, the arbitration mechanism provides a ready framework within which shari’a tribunals may authoritatively adjudicate according to the customs of Muslim communities. Despite the legality of religious arbitration and the existence of a procedural framework designed to ensure conformity of arbitration awards with domestic law and policy, caution is still in order.

First, consistency and predictability are values of the secular legal system that may be sacrificed in a religious tribunal, which may employ one or any number of religious doctrinal interpretations. Second, the manifest danger that individuals may be coerced into submitting to these tribunals undermines the protections to which those persons are entitled under U.S. law. Further, such tribunals risk allowing an alternative, parallel justice system to compete with, undermine, and delegitimize the law of the land. The British experience demonstrates that these concerns are not merely speculative. This Part explains why American law and policy makers must carefully consider whether or how

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *See infra* Part IV.B.

shari'a tribunals should be allowed to continue to operate in the United States.

*A. Implications of Shari'a Arbitration on the Rule of Law*

While consistency and judicial accountability are central values in a rule-of-law system, neither value is furthered by religious arbitration. Consistency is problematic when judgments are based on religious law because of the multiplicity of diverse interpretations that may derive from any given religious text. For instance, as noted earlier, at least eight schools of thought exist within Islam.<sup>129</sup> Such plurality may facilitate subjectivity in the decisions of religious arbiters and inconsistency between them. Moreover, such decisions have little or no predictive value, and are in that way inconsistent with the rule of law, which the U.S. legal system otherwise exemplifies.

Moreover, the substance of arbitration awards is more or less shielded by the limitations on judicial review of such awards.<sup>130</sup> Religious tribunals are particularly veiled from scrutiny by the constitutional constraints against courts considering religious matters.<sup>131</sup> Particularly since arbiters are given quasi-judicial authority, such a result does not reconcile easily with traditional judicial values in America.

As one commentator stated, "The issue of religious communities having their own set of rules, even their own courts governing areas such as marriage and divorce within the secular state, is a complex one, not least because each community has many voices and, naturally, they are not all seeking the same thing."<sup>132</sup> Multiplicity of interpretations is in fact a common characteristic of major text-based religions, including Christianity,<sup>133</sup> Judaism,<sup>134</sup> and Islam.<sup>135</sup> In Great Britain, Muslims who are opposed to shari'a tribunals have criticized British policymakers for failing to take into account the "major differences over the interpretation and implementation of Sharia" between different schools of

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<sup>129</sup> See *supra* note 14 and accompanying text.

<sup>130</sup> See *supra* note 47 and accompanying text.

<sup>131</sup> See *supra* Part III.B.

<sup>132</sup> Botsford, *supra* note 69.

<sup>133</sup> See MICHAEL P. SCHUTT, LAW AND THE BIBLICAL TRADITION: SELECT BIBLIOGRAPHY FOR CHRISTIAN LAW STUDENTS 3–4 (2001).

<sup>134</sup> See Jonathan Romain, *Why Britain Needs An Alternative Beth Din*, JEWISH CHRON. ONLINE (Aug. 28, 2008, 2:27 PM), <http://www.thejc.com/judaism/judaism-features/why-britain-needs-alternative-beth-din> (contrasting Orthodox and Reformed rabbinical courts).

<sup>135</sup> See Bassiouni, *supra* note 13, at 101–02. Notably, some of the most important differences between the two major Islamic jurisprudential schools of thought relate to divergent interpretations of the primary Islamic text, the Quran. *Id.*

jurisprudence.<sup>136</sup> With multiple schools of Islamic jurisprudence, clearly no single interpretation of shari'a law will fit all Muslims.

Minority Muslim sects in particular fear that legitimization of any single interpretation or school of thought through arbitration would result in the marginalization or oppression of minorities by more "hard-line" majority sects.<sup>137</sup> Of course the other side of the argument is that parties to arbitration must voluntarily agree to arbitrate in the first place and that they also have the freedom to choose what law or religious discipline they wish to have applied as well as the specific arbiter they wish to have preside over the proceedings.<sup>138</sup> However, as will be discussed shortly, a problem with arbitration within Muslim communities is that women and other vulnerable individuals are being coerced into submitting to shari'a arbitration.<sup>139</sup> In such cases, it is even less likely the individual will have any meaningful control over which law is applied or which arbiter is chosen. Although duress is a ground for vacating an arbitration award,<sup>140</sup> the coercion itself may not be readily ascertainable since the court cannot examine religious matters that may play into psychological coercion. More likely, a party coerced to submit to arbitration in the first place would never even try to exercise her right to appeal to court due to continuing coercion, further shielding the arbiter and the coercive parties from scrutiny.

Even where an individual has had a meaningful opportunity to specify the law to be applied in his arbitration, due to courts' limited power of review, there is no practical way to ensure that the chosen law is actually applied. The religious question doctrine prevents courts from examining the religious components of the arbitration proceeding, such as the religious principles that were (or were not) applied. For instance, a party may contract for an arbitration to be governed by the Hanbali school of jurisprudence,<sup>141</sup> but a court is powerless to ensure that the arbiter actually employed Hanbali jurisprudence in his judgment.<sup>142</sup> While arbitration awards are generally given deference based on the principle of freedom of contract, in the case of religious tribunals, there is no way to guarantee that a person got what he contracted for.

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<sup>136</sup> *British Muslims for Secular Democracy (bmsd) Reaction Over Lord Philip's Views About the Incorporation of Sharia Law in Britain*, BRITISH MUSLIMS FOR SECULAR DEMOCRACY (Apr. 7, 2008), <http://www.bmsd.org.uk/articles.asp?id=18>.

<sup>137</sup> *Id.*

<sup>138</sup> *See supra* notes 96–97.

<sup>139</sup> *See infra* Part IV.B.

<sup>140</sup> Federal Arbitration Act, 9 U.S.C. § 10(a) (2006).

<sup>141</sup> The Hanbali school is characterized by an "austere" life which prohibits its followers from taking positions in the State and from accepting gifts from supporters. KHADDURI, *supra* note 11.

<sup>142</sup> *See supra* note 111.

Unlike courts, arbiters are not arms of the state and consequently are not publicly accountable for their decisions. For instance, arbitration awards, unlike decisions by a court, are not systematically published for public review.<sup>143</sup> Yet, some argue that permitting shari'a arbitration may be a solution to the problems of inconsistency and accountability.<sup>144</sup> Rather than viewing inconsistency as a reason to preclude secular legitimization of shari'a courts, these proponents contend that legal recognition might actually serve as an incentive for shari'a courts to unify and to streamline their diverse interpretations.<sup>145</sup> This would also facilitate publicizing unethical shari'a-court judgments and would promote greater public and legal accountability for such proceedings.<sup>146</sup> On the other hand, some argue that because of the lack of accountability or potential for appellate review, religious arbitration curtails an individual's right to due process of law.<sup>147</sup> Ultimately, the American justice system does not exist to improve religious discipline but to protect the rights of individuals. That end of law should not be compromised in the context of arbitration, particularly where arbitration awards are to be given legal force.

*B. Assimilation or Apartheid?: The Problem of Coercion and Evasion of the Law in Parallel Justice Systems*

Another key consideration with respect to shari'a arbitration is the problematic nature of parallel or alternative justice systems. Advocated under the guise of giving equal representation to religious minorities, state enforcement of religious-court judgments may actually have the effect of curtailing the fundamental civil rights of individuals within those religious communities.<sup>148</sup> For instance, although arbitration requires "voluntary" agreement by both parties in order for the arbiter's judgment to be binding, Muslim parties may face pressures from their families and communities to submit to shari'a tribunals rather than seek relief in civil courts, effectively robbing them of any "voluntary" choice in the matter.<sup>149</sup> These Muslims may be told, for instance, that appealing to a secular court when a shari'a tribunal is available would be sinful and perhaps even punishable. Psychological coercion may also be used to force individuals to relinquish their rights to a hearing in court and to

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<sup>143</sup> See Amy J. Shmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) ("[A]rbitration proceedings generally are private and do not produce published opinions that courts infuse into public law.").

<sup>144</sup> William, *supra* note 88, at 46.

<sup>145</sup> *Id.*

<sup>146</sup> *See id.*

<sup>147</sup> See Grossman, *supra* note 97, at 208.

<sup>148</sup> See William, *supra* note 88, at 43.

<sup>149</sup> *See id.* at 44.

submit instead to shari'a arbitration. For instance, Muslim women have been particularly vulnerable to such psychological coercion by their families and communities or by their abusive husbands in domestic violence cases.<sup>150</sup> In other situations, Muslims may not have a meaningful choice in deciding to arbitrate if they are not made aware of their right to litigate or at least their right not to submit to shari'a arbitration.<sup>151</sup> Consequently, Muslims that move to the United States with the expectation of liberation from oppressive religious regimes may actually find themselves still bound in similarly coercive situations.<sup>152</sup>

Even when a person's submission to shari'a arbitration is truly voluntary, if that individual is a woman, she may nevertheless be denied true justice by the court's judgment. Because shari'a law treats women as unequal to men, women may be disadvantaged in shari'a-court proceedings in which a man is the opponent.<sup>153</sup> Furthermore, the community and familial pressures to submit to shari'a law are even more severe for Muslim women living in a male-dominated community.<sup>154</sup> Although the argument for accommodating shari'a tribunals appeals to sensibilities of fairness and tolerance, such accommodation could effectually isolate a vulnerable segment of the population and deprive them of equal justice under law.<sup>155</sup>

Similarly, allowing shari'a tribunals may be advocated as a welcoming gesture to remedy the fact that many Muslims "tend to come here with a little bit of a guest mentality."<sup>156</sup> However, embracing shari'a tribunals may have precisely the opposite effect—encouraging segregation and "ghettoization" of Muslim communities rather than integration to American society.<sup>157</sup> Facilitating shari'a courts in the United States may in fact work against helping Muslim Americans feel like stakeholders in the mainstream legal system.<sup>158</sup> It may also result in unbridled forum shopping, whereby individuals may choose the system

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<sup>150</sup> EQUAL AND FREE, ARBITRATION AND MEDIATION SERVICES (EQUALITY) BILL SUMMARY BRIEFING 1–2 [hereinafter BRIEFING], [http://equalandfree.org/download-file/downloads/ArbitrationBill\\_SummaryBriefing.pdf](http://equalandfree.org/download-file/downloads/ArbitrationBill_SummaryBriefing.pdf) (last visited Apr. 6, 2012).

<sup>151</sup> *See id.* at 2.

<sup>152</sup> *See British Muslims for Secular Democracy*, *supra* note 136.

<sup>153</sup> *See Bassiouni*, *supra* note 13, at 109.

<sup>154</sup> William, *supra* note 88, at 43–44.

<sup>155</sup> Bowen, *supra* note 77; *see also* William, *supra* note 88, at 45 ("While the case for multiculturalism is appealing, it is overly outweighed by the pressing concern concerning discrimination against women.").

<sup>156</sup> *Interview: Imam Feisal Abdul Rauf*, *supra* note 5.

<sup>157</sup> MOORE, *supra* note 1, at 108 ("Parallel justice systems would in effect be a denial of inclusion and basic rights.").

<sup>158</sup> *See British Muslims for Secular Democracy*, *supra* note 136 (expressing concern that the incorporation of shari'a law in Britain will only create harmful social barriers).



of law that they believe will procure them the most favorable outcome.<sup>159</sup> Moreover, while the preference for arbitration reflects a strong interest in relieving the burden on overextended court dockets, the interest in guaranteeing individuals a fair and just adjudication of their rights must surely be stronger. Cumulatively, the negative characteristics of a parallel shari'a-law justice system outweigh any potential benefits that may be achieved. At a minimum, if such tribunals are to exist, the arbitration framework must be more tightly regulated and the opportunity for appeal and substantive review of arbitration awards must be extended.

*C. British and Canadian Responses to the Problems Posed by Shari'a Tribunals*

A number of these very concerns have manifested among the shari'a tribunals operating in Britain.<sup>160</sup> First, some shari'a tribunals falsely purported to be "courts" with inherent legal authority, rather than merely arbitration panels whose judgments are subject to affirmation or vacation by secular courts.<sup>161</sup> There has also been evidence that shari'a tribunals have, on a number of occasions, exceeded their authority by purporting to decide cases that are reserved for state courts.<sup>162</sup> For instance, although the scope of an arbiter's authority is limited to settling civil disputes, British Muslim tribunals boast of having decided at least six cases of domestic violence in 2008 alone.<sup>163</sup> The tribunals also purported to "settle" a criminal stabbing case in 2006.<sup>164</sup> Advocates of women's rights in Britain also fear that Muslim women are being coerced into submitting to shari'a arbitration and are then being discriminated against under shari'a law during the proceedings.<sup>165</sup>

To address these concerns, Baroness Cox, member of the House of Lords, introduced a bill that would amend the Arbitration Act and several other English laws, thus affecting the parameters and requirements for religious arbitration.<sup>166</sup> The bill proposes amendments

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<sup>159</sup> William, *supra* note 88, at 46; *see also* Doughty, *supra* note 122.

<sup>160</sup> *See* Christopher Hope, *Plans to Curb Influence of Sharia Courts to be Unveiled*, THE TELEGRAPH (June 8, 2011, 6:30 AM), <http://www.telegraph.co.uk/news/uknews/law-and-order/8561979/Plans-to-curb-influence-of-sharia-courts-to-be-unveiled.html>; *EM v. Sec'y of State for the Home Dep't*, [2008] UKHL 64, [6] (appeal taken from Eng.), *available at* <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd081022/leban.pdf>.

<sup>161</sup> BRIEFING, *supra* note 150, at 1.

<sup>162</sup> *See id.* at 1–2.

<sup>163</sup> Hickley, *supra* note 10.

<sup>164</sup> BRIEFING, *supra* note 150, at 2.

<sup>165</sup> *Id.* at 1–2; Hope, *supra* note 160.

<sup>166</sup> Arbitration and Mediation Services (Equality) Bill, 2010–12, H.L. Bill [72] (Eng. & Wales), *available at* <http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0072/2012072.pdf> (amending the Equality Act of 2010).

to the Arbitration Act of 1996 and several other acts to explicitly prohibit sex discrimination in arbitration and mediation proceedings.<sup>167</sup> Specifically, it prohibits treating a man's testimony as more weighty than a woman's or treating men and women unequally with respect to property rights,<sup>168</sup> both of which are allowed, or even required, under shari'a.<sup>169</sup> Under the proposed amendment to the Family Law Act, courts may set aside arbitration awards if it finds evidence that one party's consent to arbitrate was not "genuine."<sup>170</sup> When assessing the sincerity of a party's consent, courts would be encouraged to look especially at whether the party was informed of her legal rights, including the right to litigate rather than submit to arbitration or mediation.<sup>171</sup> Courts would also be encouraged to examine whether "any party was manipulated or put under duress, including through psychological coercion, to induce participation in the mediation or [arbitration] process."<sup>172</sup> One provision seeks to prevent intimidation of domestic abuse victims from testifying.<sup>173</sup> Another provision of the proposed amendment would clarify that British courts have exclusive jurisdiction over criminal and family matters, and thus, those cases may not be arbitrated.<sup>174</sup> Finally, the bill would penalize, with a sentence of imprisonment up to five years, anyone who "falsely purports to be exercising a judicial function or to be able to make legally binding rulings, or . . . otherwise falsely purports to adjudicate on any matter which that person knows or ought to know is within the jurisdiction of the criminal or family courts."<sup>175</sup> Baroness Cox's proposed approach would permit shari'a tribunals to continue arbitrating disputes in Britain but would aim to impose more government regulation and oversight so as to ensure equality and legality in the proceedings.

In contrast, Ontario, Canada amended its arbitration laws in 2006 so as to effectively end religious arbitration in Canada.<sup>176</sup> The amended act provides that only Canadian law may be chosen to govern an

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<sup>167</sup> *Id.* cl. 1(2).

<sup>168</sup> *Id.* cls. 1(2), 3(2).

<sup>169</sup> In certain Quranic interpretations the testimony of a man is worth twice that of a woman, and a man inherits twice as much property. *See, e.g.,* WARRAQ, *supra* note 12, at 309–11.

<sup>170</sup> H.L. Bill [72], cl. 5(2).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* cl. 6(2).

<sup>174</sup> *Id.* cl. 4(2).

<sup>175</sup> *Id.* cl. 7(2).

<sup>176</sup> DENIS MACEOIN, SHARIA LAW OR 'ONE LAW FOR ALL?' 7 (David G. Green ed., 2009), available at <http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf>.

arbitration proceeding, thereby excluding religious laws.<sup>177</sup> Additionally, the arbitration must be conducted by approved, specially trained arbiters. The amendment was the culmination of Canada's own debate over the advisability of allowing shari'a arbitration. Most notable in opposition to permitting shari'a tribunals in Canada were Muslim women who said they came to Canada precisely in order to escape shari'a law.<sup>178</sup>

The British and Canadian experiences, and their respective approaches to shari'a tribunals, may be instructive for the United States, which has yet to adopt a specific posture toward domestic shari'a tribunals. Most importantly, they demonstrate that the policy concerns raised in this Note are legitimate and should be squarely addressed in the national debate. Ultimately, an informed and coherent policy with respect to shari'a tribunals must be developed for the United States, and it must be one that ensures true justice, equality, and respect for the rule of law.

#### CONCLUSION

Shari'a tribunals are legal in the United States under current federal and state arbitration laws. This result is bolstered by contemporary policy trends among American court systems, which promote courts that are tailored to serve narrow subsets of the population. However, that should not be the end of the discussion. The policy values and justifications underlying U.S. arbitration laws and recent court trends must be weighed against the policy problems entailed in shari'a arbitration. The experiences of our neighbors in the West demonstrate the reality of these concerns. First, it is imperative that America continue to engage in national debate about the place of shari'a courts in the United States. Second, lawmakers and policymakers must explore different solutions and ultimately develop a practical and well-reasoned approach toward shari'a tribunals in the United States. Two possible approaches have been tested in Great Britain and Canada, respectively.

The Canadian "all-or-nothing" approach to barring shari'a courts entails disabling the vehicle for all religious arbitration. Because Christian, Jewish, and Muslim tribunals operate through the same arbitration mechanism, any effort to challenge the operation of shari'a tribunals in the United States will have to challenge other religious tribunals as well. For instance, disallowing shari'a courts to enforce judgments through arbitration would require that the same privilege be retracted from rabbinical courts, a measure that would be painful and

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 6–7.

contentious considering the longstanding legitimacy rabbinical courts have enjoyed in the United States. Moreover, disallowing shari'a tribunals in the United States would require critical reevaluation of contemporary policy values that support the religious-arbitration and special-court movements. While relieving overloaded court dockets may be a strong interest, the guarantee of freedom and the rule of law must not be sacrificed in its favor.

The approach currently being considered in Great Britain represents a less extreme approach that attempts to address the key concerns raised by shari'a courts, while still allowing them to operate legally. These measures have yet to be adopted and implemented in Great Britain, so it cannot yet be said whether the measures adequately address the problems presented by shari'a courts. But since current U.S. policies favor specialized courts that serve narrow populations and relieve the burden on judicial dockets, the British approach seems most likely to succeed in the United States. Under this approach, shari'a courts could still operate in the United States, thereby relieving some strain on the courts and also providing services particularly relevant to Muslim communities. However, the approach would call for more clearly defined and limited parameters to ensure the integrity and transparency of the process. Furthermore, measures promoting accountability of shari'a judges and their rulings must be put in place to ensure conformity with the law. Religious tribunals may be beneficial, but priority must be given to preserving the rights and liberties of American citizens and to upholding the rule of law.

Even though shari'a tribunals are technically legal, serious concerns exist. Americans must not shift to auto-pilot and allow shari'a courts to operate unchecked. Americans must cautiously weigh the policies in favor of shari'a tribunals against the serious concerns that they implicate. Proponents of shari'a courts must also critically evaluate the impact of such courts upon Muslim Americans and be transparent about those risks and how best to address them. Together, Americans must affirmatively decide on an approach that preserves the integrity of the legal system, that protects the American people, and that best serves American policies and values.

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