A Holey Cause: Sharia as a Cultural Defense

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ABSTRACT

States have the power to ban cultural defenses under the police powers doctrine. However, any attempt to ban the use of Sharia as a cultural defense presents a serious problem. Because Sharia is a religious doctrine, any statute regulating Sharia must survive scrutiny under the religion clauses of the First Amendment. As a result of Supreme Court precedent, states are only permitted to ban the use of Sharia as a cultural defense if the statute is neutral and of general applicability. This Comment analyzes *Awad v. Ziriax*, in which the United States District Court for the Western District of Oklahoma struck down an amendment to the Oklahoma Constitution barring the use of Sharia in courtrooms. This Comment then proposes a statutory solution that would survive First Amendment scrutiny, allowing states to ban Sharia as a defense to criminal offenses.

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I. INTRODUCTION

It is a scenario that could keep a majority of citizens in Oklahoma awake at night.[1] The prosecutor has put together a strong case, and there is no question that the defendant, on trial for murder, has committed the crime. The case is given to the jury, which quickly returns a guilty verdict. This monster will be put away for his crime. His punishment seems imminent. Then, in a remarkable turn of events, the judge gives the defendant new life. During sentencing, the judge invokes the defendant's culture to diminish the defendant's sentence so that it does not involve jail time. The defendant receives a minor slap on the wrist, and he is free to strike again.[2]

While perhaps overly dramatic, the preceding illustration demonstrates a scenario that legitimately concerns people in many states.[3] Courts have not established a uniform definition of what constitutes a "cultural defense."[4] However, *Black's Law Dictionary* defines the term as either: (1) "a criminal defendant's assertion that because an admitted act is not a crime in the perpetrator's culture or native land, it should not be judged by the laws of the place where it was committed"; or (2) a "defense that the actor's mental state at the time the alleged crime was committed was heavily influenced by cultural factors."[5] Under these two definitions, a cultural defense can be used as

1. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010) (noting that an amendment banning consideration of Sharia and international law passed with 70% of the vote).

2. One such case where a cultural defense was invoked to mitigate an otherwise guilty defendant's sentence is *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988). For further discussion of *Chen*, see *infra* text accompanying notes 16-17.

3. *See* Donna Leinwald, *More States Enter Debate on Sharia Law*, USA TODAY (Dec. 9, 2010, 10:29 AM), http://usat.ly/OFy2WK (noting that six states in addition to Oklahoma have enacted laws or drafted proposals to ban Sharia or other cultural defenses).

4. Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize A "Cultural Defense"?*, 99 DICK. L. REV. 141, 144 (1994).

5. BLACK'S LAW DICTIONARY 483 (9th ed. 2009).

a complete defense to an alleged crime or as a means to negate the *mens rea* element of a crime.[6]

Although courts have been dealing with cultural defenses since 1851,[7] the use of Sharia as a cultural defense has only recently emerged to the forefront of public debate.[8] Sharia has become a hot-topic issue both at the local level and in nationwide elections.[9] Former Speaker of the House Newt Gingrich recently called for federal legislation aimed at limiting the use of Sharia in courts.[10] Additionally, if recent events are any indication of the future,[11] the debate regarding the place of Sharia in American society may have only begun.

The first major challenge to a law banning Sharia as a cultural defense in courtrooms occurred in *Awad v. Ziriax*.[12] *Awad* concerned an amendment to Oklahoma's Constitution.[13] In *Awad*, the court issued a preliminary injunction against Oklahoma amendment State Question 755, which would have prohibited state courts from considering Sharia and international law when deciding cases.[14] The court in *Awad* found a strong showing that State Question 755 violated both the Establishment

6. *See* Jisheng Li, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense*, 18 U. HAW. L. REV. 765, 767 (1996) (stating that use of the cultural defense is not always to exculpate but rather to cancel *mens rea*).

7. *See* Goldstein, *supra* note 4, at 145.

8. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 320-21 (2011) (stating that legislators in six states have recently proposed legislation to ban consideration of Sharia in some form).

9. *See* Leinwald, *supra* note 3.

10. *See id.*

11. *See* Karen Zraick, *Ground Zero Mosque Opened to the Public Wednesday*, CHRISTIAN SCI. MONITOR, Sept. 22, 2011, *available at* http://bit.ly/nmXzUs (discussing the uproar over plans to open a Mosque near the World Trade Center site).

12. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1301-02 (W.D. Okla. 2010).

13. *See id.* at 1298 (discussing the history of State Question 755, which was the proposed amendment that would ban Sharia as a cultural defense).

14. *See id*. at 1308. State Question 755 read:

> This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.
>
> International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.
>
> The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.
>
> Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.

Id. at 1301.

and Free Exercise Clauses of the First Amendment to the United States Constitution.[15]

The intention of Oklahoma voters in banning Sharia as a cultural defense via State Question 755 may be better understood after examining an instance in which the cultural defense was used in New York. In *People v. Dong Lu Chen*,[16] Chen killed his wife with a hammer after learning that she had been having an affair.[17] Chen then invoked a cultural defense, claiming that he was driven to murder because of traditional Chinese values. The judge agreed.[18] Chen received only five years' probation for his crime,[19] even though he was facing a prison term of 5 to 15 years.[20]

Given the outcome in *Chen*, Oklahoma voters may be justified in their concerns over allowing defendants to invoke cultural defenses to crimes. Indeed, one commentator has suggested that the court's ruling in *Chen* may have even encouraged violence against other women in the community.[21] Therefore, by passing State Question 755, Oklahoma voters may have intended to eliminate an easily identifiable cultural defense for their own safety.

This Comment will illustrate why cultural defenses should have no place in our justice system, at least in criminal cases. While there are many arguments against the use of cultural defenses,[22] this Comment will discuss only two that are commonly advanced.[23] First, cultural defenses provide an excuse for a small minority of people that is not available to the average person. Indeed, the majority of the population is held to the maxim that "ignorance of the law is no excuse."[24] Second, a primary goal of our justice system is deterrence.[25] Recognizing a cultural defense does not promote deterrence.[26] By failing to punish defendants because of their culture, society may be encouraging others of the same background to engage in illegal activities with little repercussion.[27]

15. *See id.* at 1306-07.
16. People v. Dong Lu Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988).
17. *See id.*
18. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Woman and the "Cultural Defense*," 17 HARV. WOMEN'S L.J. 57, 64 (1994).
19. *See id.* at 64.
20. *See id.* at 64 n.26.
21. *See* Goldstein, *supra* note 4, at 161.
22. *See id.* at 158.
23. *See id.* (stating that the recognition of a cultural defense would imperil fairness and deterrence, two of the most compelling goals of the justice system).
24. Goldstein, *supra* note 4, at 161.
25. *See id.* at 160.
26. *See id.*
27. *See id.* at 161 (quoting a Chinese woman saying that the lenient sentence in *Chen* led to her husband threatening her with violence).

Although this Comment will argue for limitations on cultural defenses, including Sharia, states must be careful not to attack specific religious groups. Because of the unique nature of Sharia,[28] any regulation on its use in courtrooms will have to withstand First Amendment scrutiny.[29] This Comment will address the question of whether a law that targets cultural defenses, but has the effect of burdening religious practice, can survive First Amendment scrutiny.[30]

In exploring why the amendment in Oklahoma was struck down, Part II will introduce Sharia and examine the effects that a ban might have on Muslim citizens.[31] In Part III, this Comment will analyze the reasons the *Awad* court gave for striking down State Question 755.[32] Part III will argue that the *Awad* court correctly applied Supreme Court precedent[33] because Oklahoma formulated State Question 755 in such a way as to single out Muslims for detrimental treatment,[34] excessively entangling government and religion. Lastly, Part III will argue that the Oklahoma amendment was not neutral, of general applicability, or supported by a compelling state interest.

Part IV will suggest a statutory solution, allowing states to ban the use of cultural defenses such as Sharia in courtrooms without violating the First Amendment. Part V will examine a proposed bill in Pennsylvania and discuss the various constitutional challenges that the bill may face. This Comment will conclude in Part VI by arguing that states may be able to pass laws banning cultural defenses that would withstand First Amendment scrutiny.

28. REX AHDAR & NICHOLAS ARONEY, SHARI'A IN THE WEST 3 (2010).

29. The First Amendment has two clauses dealing with religion: "Congress shall make no law respecting an establishment of religion, or [2] prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

30. Most traditional cultural defenses do not have to clear this hurdle because most cultural defenses are based on a defendant's experiences in his native cultural environment. However, in terms of Sharia, it may be difficult to separate cultural defenses from religious defenses because they often overlap. Nonetheless, it is not essential to make the distinction for this Comment's purposes.

31. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. 2010).

32. For example, Muslims rely on Sharia for purposes other than defense at trial, such as for drafting wills and testaments. *See id.* at 1305-07; *see also* Part II.B.

33. *See Lemon*, 403 U.S. 602, 613-14 (1971) (holding that Establishment Clause was violated by state giving aid to church-related institutions); *Smith*, 494 U.S. 872, 878-79 (1989) (holding that the Free Exercise Clause was not violated by the enforcement of a neutral and generally applicable criminal prohibition); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 542 (1993) (holding that the Free Exercise Clause was violated by ordinances that were neither neutral nor generally applicable).

34. *Awad*, 754 F. Supp. 2d at 1303.

II. BACKGROUND

A. What is Sharia?

The definition of Sharia is subject to a variety of interpretations.[35] The term itself appears only once in the Qur'an.[36] The root of the word Sharia means "the way," or an understanding of scriptural sources to determine "how to be a Muslim."[37] On the other hand, many jurists think of Sharia as Islamic law[38] derived from the Qur'an and the Sunnah.[39]

Muslims use Sharia for matters other than defense at trial. For example, Awad claimed that State Question 755 would effectively void his last will and testament.[40] Because Awad's last will and testament was based partially on the teachings of Mohammed, it would fall under the umbrella of Sharia according to State Question 755. As a result, Awad's will would likely be banned from probate,[41] disrupting both the burial method and distribution of assets that is required by his religious beliefs.[42]

While Sharia is used interchangeably with Islamic Law,[43] and is commonly referred to as Sharia law, Sharia is distinct from "law" in the traditional sense. The plaintiff in *Awad* testified, and the court agreed, that Sharia is a set of religious beliefs that provide guidance without imposing legal obligations.[44] Sharia imposes not legal obligations but "obligations of a personal and private nature dictated by faith."[45] Accordingly, any law seeking to regulate Sharia is automatically thrust into First Amendment domain.

B. Constitutional Considerations

Because a large majority of voters enacted State Question 755,[46] it is necessary to discuss in what cases a federal court may override the will

35. AHDAR & ARONEY, *supra* note 28, at 3.
36. *Id.*
37. *Id.*
38. *Id.*
39. Sunnah is the "body of traditional social and legal custom and practice of the Islamic community." *Sunnah Definition*, BRITANNICA.COM, http://bit.ly/JkWFpV (last visited Oct. 16, 2012).
40. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. 2010).
41. *Id.* at 1307.
42. The plaintiff explained that his religion directs him to donate a certain amount of money to charity after his death and directs him to be buried in a particular manner. *See* Pl.-Appellee Resp. Brief at 28, Awad v. Ziriax, No. 10-6273 (10th Cir. 2011).
43. AHDAR & ARONEY, *supra* note 28, at 3.
44. *Awad*, 754 F. Supp. 2d at 1306.
45. *Id.*
46. *See id.* at 1302.

of voters. In *Cantwell v. Connecticut*,[47] the U.S. Supreme Court applied the First Amendment's Free Exercise Clause to the states through the Fourteenth Amendment.[48] In 1947, the Court also extended the protection of the Establishment Clause to the states.[49] After the extension of the religion clauses, a state may no longer block a person's free exercise of religion.[50] While State Question 755 may have been the will of an overwhelming majority of Oklahoma voters, it nevertheless has to meet the minimum floor of protection set by the Establishment and Free Exercise Clauses. The judiciary must ensure that constitutional rights are protected, even if that means striking down a popular provision of a state constitution.[51]

The Supreme Court's First Amendment jurisprudence regarding religion varies according to the clause involved. First, there is the Establishment Clause, which states: "Congress shall make no law respecting an establishment of religion."[52] The seminal case dealing with the Establishment Clause is *Lemon v. Kurtzman*.[53] *Lemon* involved two statutes, one from Pennsylvania and one from Rhode Island, that were challenged under the Establishment Clause for providing taxpayer money to church-related elementary and secondary schools.[54] The Court created a three-part test for determining when a law violates the Establishment Clause.[55] The Court then used this test to declare both statutes unconstitutional.[56]

47. Cantwell v. Connecticut, 310 U.S. 296 (1940).

48. *See id.* at 303 (finding that states are prohibited from violating the Free Exercise Clause in the same manner as the federal government).

49. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16-17 (1947) (holding that taxpayer funds could be used to pay for busing of students to parochial schools without violating the Establishment Clause).

50. *See supra* note 48 and accompanying text. *But see* ELLIS M. WEST, THE RELIGION CLAUSES OF THE FIRST AMENDMENT 3 (2011) (arguing that the First Amendment religion clauses were meant to guarantee states' freedom from federal government interference with such rights).

51. *See* Cooper v. Aaron, 358 U.S. 1, 16-17 (1958) (stating that desegregation would continue in Arkansas in the face of opposition by state officials because the federal Constitution is the supreme law of the land and every state legislator and executive is bound to support it).

52. U.S. CONST. amend. I.

53. Lemon v. Kurtzman, 403 U.S. 602 (1971).

54. *See id.* at 606.

55. The three-part test says, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citation omitted).

56. *See id.* at 615.

However, *Lemon* has been maligned since its inception.[57] Although the Court has not consistently applied *Lemon* to Establishment Clause cases,[58] it has not overruled the decision either.[59] Constitutional scholar Erwin Chemerinsky suggests that Establishment Clause cases are often decided on a particular justice's theory of interpretation.[60] Three basic theories of interpretation exist: (1) strict separation,[61] (2) neutrality,[62] and (3) accommodation.[63]

Complicating matters further, the Supreme Court has limited *Lemon* to instances in which the law being challenged is not facially discriminatory.[64] If the law is facially discriminatory, meaning that it favors one religion over another, then strict scrutiny applies, and the state must prove a compelling government interest.[65] For example, in *Larson v. Valente*,[66] the Court struck down a Minnesota law that imposed registration requirements on charitable organizations but did not impose such sanctions on religious institutions if they received at least half of their financial support from their members.[67] The Court stated that this requirement was "precisely the sort of official denominational preference that the Framers of the First Amendment forbade."[68]

57. Justice Scalia, in his entertaining concurrence, compared *Lemon* to a "ghoul in a late-night horror movie" that refuses to die. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

58. *See* Lee v. Weisman, 505 U.S. 577, 588 (1992) (using a coercion test to declare clergy-led prayer at graduation as unconstitutional); Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (holding nativity scene on government property constitutional); Marsh v. Chambers, 463 U.S. 783, 786 (1983) (holding that government may pay for a legislative chaplain).

59. *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 859-60 (2005) (applying *Lemon* in its entirety).

60. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1192 (3d ed. 2006).

61. *Id.* at 1192.

62. The neutrality approach entails applying an endorsement test to see whether the government practice equals an endorsement or disapproval of religion. The Justices disagree as to whether the test is whether it should be applied from the perspective of a well-educated and informed observer or whether it should look to the perceptions of a reasonable passerby. *Id.* at 1195.

63. *Id.*

64. *Id.* at 1200.

65. *See* Larson v. Valente, 456 U.S. 228, 255 (1982) (striking down a Minnesota law that imposed registration requirements on certain charitable organizations because there was no compelling state interest). Strict scrutiny is the most intensive level of review the Court uses. Under strict scrutiny, a law will be upheld only if the government can show a compelling interest for the law. *See* CHEMERINSKY, *supra* note 60, at 541.

66. Larson v. Valente, 456 U.S. 228 (1982).

67. *Id.* at 255.

68. *Id.*

The U.S. Court of Appeals for the Tenth Circuit recently used the *Larson* test to affirm the district court's decision in *Awad*.[69] The court never reached the point of analyzing State Question 755 under *Lemon* because it reasoned that State Question 755 discriminated facially among religions and should be subjected to strict scrutiny.[70] The court pointed out that Sharia was the only religious doctrine mentioned in the amendment.[71] Moreover, the court said that the violation of rights under State Question 755 was arguably more flagrant than the violation in *Larson* because the law at question in *Larson* did not name any specific religion.[72] Having determined that State Question 755 was facially discriminatory, the court then analyzed whether the amendment at issue furthered a compelling government interest.[73] The court concluded that there was no such interest because the state could not prove that Sharia had ever been used in Oklahoma courts.[74]

The history and application of the Free Exercise Clause is more defined than that of the Establishment Clause. The Supreme Court was initially reluctant to use the Free Exercise Clause and rejected pleas to apply it in numerous situations.[75] However, in 1990, the Court fundamentally changed Free Exercise Clause jurisprudence with its decision in *Employment Division v. Smith*.[76] In *Smith*, the Court held that the Free Exercise Clause could not be used to challenge a neutral law of general applicability.[77] The Court upheld a law banning the use of peyote because it applied to everyone and did not single out Native Americans because of their religion.[78] The Court also said that strict scrutiny would not apply to neutral laws that were generally applicable even if they burdened religion.[79] Instead, such laws would be subject only to rational basis review.[80]

69. Awad v. Ziriax, 670 F.3d 1111, 1128 (10th Cir. 2012).
70. *See id.* at 1128.
71. *See id.* at 1129.
72. *See id.* at 1128.
73. *See id.* at 1129-30.
74. Awad v. Ziriax, 670 F.3d 1111, 1130 (10th Cir. 2012).
75. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 700 (1986) (holding that there is no religious exception to the requirement that welfare recipients provide social security numbers); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) (holding that religious group is not exempt from sales and use tax on religious materials).
76. CHEMERINSKY, *supra* note 60, at 1257.
77. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990).
78. *See id.*
79. *See id.* at 888.
80. *See id.* at 879 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law that the state is free to regulate.").

In *Church of Lukumi Babalu Aye v. City of Hialeah*,[81] however, the Court struck down a number of ordinances that banned animal sacrifice because they targeted only one religious group.[82] The target of the ordinances, the Santeria, was a religious group based in Florida, and animal sacrifice was a traditional part of its teachings.[83] When the group formed a church in 1973 for the purpose of practicing the Santeria faith, the City of Haileah held an emergency public session and decided to pass enactments and resolutions banning animal sacrifice.[84] The ordinances made numerous exceptions for other religious groups and were tailored to ban only sacrificial killings by the Santeria.[85] The Court held that, because the ordinances were neither neutral nor generally applicable, they had to further a compelling state interest, which they failed to do.[86] Consequently, the Court considered the ordinances overbroad or underinclusive because they did not attempt to achieve their objective with the analogous nonreligious conduct.[87]

Based on *Smith* and *Lukumi*, a law that is neutral and of general applicability has to undergo rational basis review; by contrast, a law that on its face is directed at a specific religious practice will be subject to strict scrutiny.[88] Once strict scrutiny is applicable, the government must show a compelling state interest for the law to be upheld.[89]

C. History of State Question 755

On November 2, 2010, Oklahoma voters approved an amendment to the state constitution, State Question 755, which would ban courts from considering or using Sharia and international law.[90] The amendment would also ban Oklahoma courts from applying the laws of any other state that allowed consideration of Sharia, even though courts would still be free to look to other states that considered international law.[91] Two days later, the plaintiff, Muneer Awad, filed suit in federal court asserting that the ban on consideration of Sharia violated the

81. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
82. *Id.* at 524-25.
83. *See id.*
84. *Id.* at 525-28.
85. *Lukumi*, 508 U.S. at 536.
86. *Id.* at 545-46.
87. *See id.* For example, although stating that the purpose of the ordinance was to prevent animal cruelty, the ordinance failed to ban other conduct such as fishing or euthanasia of stray animals. *Id.* at 543-44.
88. *See* CHEMERINSKY, *supra* note 60, at 1261.
89. *Lukumi*, 508 U.S. at 531.
90. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010)
91. *See id.* at 1306.

Establishment and Free Exercise Clauses of the First Amendment.[92] Awad asked the court to issue a preliminary injunction against the amendment's enactment.[93]

The district court agreed that State Question 755 violated both the Establishment and Free Exercise Clauses of the First Amendment.[94] The court reasoned that the amendment violated the Establishment Clause because "its primary effect was to inhibit religion" and that the amendment would involve excessive government entanglement with religion because it would require judges to determine the content of religious doctrines.[95] In addition, the court found that the amendment violated the Free Exercise Clause because it singled out Sharia and was not backed by a compelling state interest.[96]

III. ANALYSIS

Part III will now examine why State Question 755 violated both the Establishment Clause and the Free Exercise Clause.

A. Establishment Clause[97]

Out of the three approaches to Establishment Clause questions, the district court in *Awad* applied the neutrality theory.[98] The district judge also used the endorsement test in conjunction with the three prongs of the *Lemon* test.[99] Justice Sandra Day O'Connor's endorsement test assesses a government practice to determine if it constitutes an endorsement or disapproval of religion.[100] Under the *Lemon* test, State Question 755 would be unconstitutional if it had the purpose or effect of "conveying the message that religion or a particular religious belief is favored or

92. *See id.* at 1302.
93. *See id.*
94. *See id.* at 1306-07.
95. *See Awad*, 754 F. Supp. 2d at 1306-07.
96. *Id.* at 1307.
97. The analysis here concerns the *Lemon* test, meaning that the amendment is assumed to not differentiate among religions on its face. This Comment applies the *Lemon* test to more robustly examine the constitutional analysis in *Awad*. The Tenth Circuit exclusively used the *Larson* test in its analysis and did not remand the case to the district court. Awad v. Ziriax, 670 F.3d 1111, 1126-30 (10th Cir. 2012) (applying the *Larson* test and holding that the amendment did not serve any compelling government interest).
98. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1306 (2010) (using Justice O'Connor's endorsement test).
99. *See Awad*, 754 F. Supp. 2d at 1306.
100. Some Justices use an endorsement test under the neutrality theory. *See* CHEMERINSKY, *supra* note 60, at 1194 (discussing the endorsement test with respect to the neutrality theory); *see also supra* text accompanying note 62.

preferred."[101] The government's actual purpose would not matter; instead, the test focuses on the result.[102] The amendment would also be unconstitutional if it involved an excessive government entanglement with religion.[103] According to the Supreme Court, a law entails excessive government entanglement if it involves a "comprehensive, discriminating, and continuing state surveillance."[104] Although the district judge in *Awad* did not discuss the purpose prong of the *Lemon* test in her analysis, this Comment will conclude that the amendment also violated that prong.

1. The Effect Prong

To determine whether a law lacks a primary effect that "neither advances nor inhibits religion,"[105] courts look at the law through the eyes of the reasonable observer.[106] The district court in *Awad* concluded that the Oklahoma amendment's primary effect was to inhibit religion.[107] The court rejected the state's contention that the amendment was a choice of law provision and noted that the language of the provision singled out Sharia.[108] The amendment specifically addressed only one religion: Islam.[109] Such singling out of Islam constituted a specific attack on Awad's faith.[110] The legislative history of State Question 755 made it clear that the amendment was exclusively targeting Sharia.[111] While the state might contend that statements of the legislators should not be considered, Justice O'Connor's reasonable observer would be

101. *See* CHEMERINSKY, *supra* note 60, at 1194. *But see* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) (stating that, for the effects prong to be violated, the government itself has to advance religion).

102. *See Awad*, 754 F. Supp. 2d at 1306.

103. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

104. *Id.* at 619.

105. *Id.* at 612-13.

106. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring) (stating that the government action should be judged through the eyes of a reasonable observer).

107. *Awad*, 754 F. Supp. 2d at 1306.

108. *Id.*

109. State Question 755 read, in pertinent part, "This measure amends the State Constitution. . . . It forbids courts from considering or using international law. It forbids courts from considering or using Sharia law." *Id.* at 1301.

110. The amendment explicitly mentions Islam twice; both the text of the amendment and the statement of purpose mention Sharia law. *See id.* at 1298.

111. State representatives from Oklahoma made clear that the amendment was aimed at Sharia. *See* Brief of the Am. Jewish Comm. as Amici Curiae Supporting Pl.-Appellee at 35, Awad v. Ziriax, No-6273 (10th Cir. 2011).

familiar with such statements.[112] Moreover, because Sharia lacks a legal character, it was the only "non-legal content" that was subject to the amendment.[113] As a result, the amendment conveyed a message of disapproval of the plaintiff's faith.[114]

2. The Entanglement Prong

The district court in *Awad* found that the Oklahoma amendment would foster excessive government involvement with religion.[115] In order to comply with the amendment, the courts would have to determine the content of Sharia.[116] This analysis, in turn, would force courts to determine the content of the plaintiff's religious doctrines.[117] Such a court-led venture into the content of the plaintiff's religion would be a clear violation of the entanglement factor of the *Lemon* test.[118] The Supreme Court has established that it will not interfere in cases where it has to decide whether a party deviated from its faith.[119] In addition, if State Question 755 had been enacted, not only would Oklahoma courts have had to determine what constitutes Sharia in Oklahoma, but courts would also have had to make preliminary determinations about whether the laws of other states contained elements of Sharia.[120]

In its Establishment Clause analysis of State Question 755, the district court noted that, by singling out Sharia, the state had in effect singled out the plaintiff's religion.[121] By implying that the plaintiff's religious beliefs were discouraged, the state was essentially promoting other religions. The amendment conveyed "an official government message of disapproval."[122] State Question 755 therefore failed the endorsement test.[123]

112. *See* CHEMERINSKY, *supra* note 60, at 1195 (stating that the hypothetical observer possesses a "certain level of information that all citizens might not share").
113. *Awad*, 754 F. Supp. 2d at 1306.
114. *See id.*
115. *Id.* at 1306-07.
116. *Id.* at 1307.
117. *Awad*, 754 F. Supp. 2d at 1307.
118. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
119. *See* Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) (holding that the First Amendment was violated when a civil court determined the title to church property based on its interpretation of church doctrine).
120. *Awad*, 754 F. Supp. 2d at 1306-07.
121. *Id.* at 1306.
122. *Id.* at 1303.
123. *Id.* at 1306.

3. The Purpose Prong

While the district court did not consider the purpose prong of the *Lemon* test, the amendment fails to satisfy this prong because the amendment does not have a secular legislative purpose.[124] It is not enough for the state to claim a defense of a secular purpose at trial; instead, in *McCreary County v. ACLU*,[125] the Supreme Court noted that the "secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."[126] In addition, the context of the government action is relevant under the purpose prong.[127] State Question 755 fails to meet the purpose prong both on its face and in light of the legislative history of the amendment.[128]

First, the amendment singles out Sharia in its text.[129] This plain reading of the amendment leads to the conclusion that Sharia was a specific target. Second, even if the state argues that the plain language of the amendment should not determine the legislative purpose, the amendment still fails to meet the *Lemon* standard of neutrality. The legislative history clearly shows that Sharia was the primary target.[130] For example, State Representative Rex Duncan declared that State Question 755 was a "preemptive strike against Sharia law."[131]

B. Free Exercise Clause

The district court in *Awad* also granted a preliminary injunction because State Question 755 violated the Free Exercise Clause of the First Amendment.[132] The violations of rights that would have occurred under State Question 755 were as flagrant as those rights advanced by the ordinances in *Lukumi*.[133] In addition, all of the ordinances were both broad and underinclusive.[134] Unlike the law at issue in *Smith*,[135] the

124. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
125. McCreary Cnty. v. ACLU, 545 U.S. 844 (2005).
126. *Id.* at 864.
127. *See id.* at 874 (stating that the purpose "needs to be understood in light of context").
128. *See* Brief of the Am. Jewish Comm. as Amici Curiae Supporting Pl.-Appellee at 27-30, Awad v. Ziriax, No-6273 (10th Cir. 2011).
129. *See* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010).
130. Amicus Brief, Awad v. Ziriax at 29, No-6273 (10th Cir. 2011).
131. *Id.*
132. *See Awad*, 754 F. Supp. 2d at 1307.
133. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 542 (1993) (holding that the Free Exercise Clause was violated by ordinances that were neither neutral nor generally applicable).
134. *Id.* at 546.

Oklahoma amendment was neither generally applicable nor facially neutral.[136] Accordingly, a court will strike down such a law unless it can survive strict scrutiny analysis.[137]

Just as the ordinances in *Lukumi* exclusively targeted the Santeria religion,[138] State Question 755 only targeted Sharia.[139] The ordinances in *Lukumi* included numerous exceptions for other religious groups and practices.[140] For example, the ordinances prohibited the killing of animals for sacrifice but permitted kosher slaughter.[141] In addition, Ordinance 87-52 prohibited the possession, sacrifice, or slaughter of an animal during a ritual if the intent was to eat the animal.[142] The ordinance then exempted any licensed food establishment if zoning or similar laws permitted the activity, effectively making the ordinance only applicable to the Santeria religion.[143]

The Oklahoma amendment operated in a very similar fashion to the ordinances in *Lukumi*. Sharia was the only religious doctrine mentioned in the amendment; the remainder of State Question 755 forbade the use of international law.[144] Only Muslims would be adversely affected by the ban on Sharia. As Awad contended, the ban would inhibit his last will and testament from probate because it was based on Sharia.[145] Awad would have the choice of either changing his will to remove all religious and Islamic references or risk invalidation.[146] In addition, only Muslims would be affected by the ban against consideration of laws of another state if the state allowed consideration of Sharia.[147] There was no equivalent language in the amendment banning the consideration of laws from states that allowed international law or cultures.[148]

135. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990) (holding that the Free Exercise Clause was not violated by the enforcement of a neutral and generally applicable criminal prohibition).

136. *Awad*, 754 F. Supp. 2d at 1307.

137. *Lukumi*, 508 U.S. at 531.

138. *Id.* at 525-26.

139. *See Awad*, 754 F. Supp. 2d at 1307 (stating that the law was not facially neutral). In addition, the amendment banned consideration of international law, but such a ban does not affect a particular religious group the way that a ban on Sharia affects Muslims. *See id.*

140. *See Lukumi*, 508 U.S. at 536.

141. *See id.*

142. *See id.*

143. *See id.*

144. *See Awad*, 754 F. Supp. 2d at 1301 (discussing the text of State Question 755).

145. *Id.* at 1304.

146. Pl.-Appellee Response Brief, Awad v. Ziriax at 46, No. 10-6273 (10th Cir. 2011).

147. *Awad*, 754 F. Supp. 2d at 1306.

148. *See id.*

State Question 755 was neither facially neutral nor generally applicable.[149] In fact, while it is arguable that the ordinances in *Lukumi* were facially neutral,[150] State Question 755 fails the test by explicitly naming Sharia.[151] Even if Oklahoma contended that the law was neutral on its face, the court's inquiry would not have ended there; rather, the Court in *Lukumi* declared that the Free Exercise Clause extends beyond facial discrimination.[152] The Court in *Lukumi* noted, "[O]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliances with the requirement of facial neutrality."[153] Therefore, the reviewing court would examine the effect of the amendment upon the plaintiff's religion.[154] As a result, the judge in *Awad* would have found the amendment unconstitutional regardless.[155]

Neutrality and general applicability are interrelated. When a law is not neutral, it is also unlikely to be generally applicable.[156] Having failed the neutrality test, the amendment in *Awad* also fails the general applicability test. State Question 755 was not generally applicable because it named only Sharia and did not apply to any other religious groups beside Muslims.[157]

When seeking to regulate religious conduct, a law must not be overbroad or underinclusive so as to disproportionally burden religion.[158] In *Lukumi*, all of the ordinances were either overbroad or underinclusive.[159] For example, two of the purposes of the ordinances were to protect the public health and to prevent cruelty to animals.[160] However, as the Court pointed out, the Santeria could have accomplished these purposes in a manner that fell short of a prohibition on all

149. *See id.* at 1301.

150. *Lukumi*, 508 U.S. at 533-34.

151. *See Awad*, 754 F. Supp. 2d at 1307 (stating that the amendment may be viewed as singling out Sharia law).

152. *See Lukumi*, 508 U.S. at 534 (stating that facial neutrality is not determinative).

153. *Id.*

154. *See id.* ("[A]ction that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

155. *See Awad*, 754 F. Supp. 2d at 1307 (stating that the amendment would have prevented the plaintiff's will from being put into effect and may have prevented the plaintiff from bringing actions in Oklahoma state courts for violations of the Constitution if those violations were based upon his religion).

156. *Lukumi*, 508 U.S. at 531.

157. *See Awad*, 754 F. Supp. 2d at 1307 (stating that the amendment singled out Sharia law).

158. *See Lukumi*, 508 U.S. at 543 (stating that the government cannot impose burdens on religious beliefs in a selective manner).

159. *Id.* at 546.

160. *See id.* at 537 (stating that ordinance 87-40 incorporated the Florida animal cruelty statute).

sacrifices.[161] Similarly, if State Question 755 was placed on the ballot to prevent the consideration of foreign laws, this could have been accomplished without singling out Sharia. For instance, the amendment could have banned all cultural defenses or stated that no foreign law may be considered.[162]

When a law is neither facially neutral nor generally applicable, it must pass strict scrutiny to be valid.[163] To pass strict scrutiny, the government must show a compelling state interest, and the law must be narrowly tailored to advance that interest.[164] In *Lukumi*, the Court said, "[W]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling."[165] In other words, a state cannot claim a compelling interest if it fails to prohibit equivalent non-religious conduct.[166]

Because most of the ordinances at issue in *Lukumi* were underinclusive, no compelling state interest existed.[167] Furthermore, the Court reasoned that even if there was a compelling state interest in passing the ordinances, the ordinances were not drawn in sufficiently narrow terms to accomplish those interests.[168] The judge in *Awad* found that the Government presented no compelling state interest.[169] In fact, members of the Oklahoma state legislature acknowledged that Oklahoma courts had never used Sharia as a cultural defense.[170]

Applying the *Lukumi* reasoning, even if Oklahoma had a compelling state interest, the amendment would be unconstitutional because it was overbroad and underinclusive.[171] The amendment did not mention any other religious doctrine nor did it ban other forms of cultural

161. *See id.* at 538 (noting that, if preventing improper disposal was the goal, it could have been achieved by regulating garbage disposal).

162. An example of a neutral law is the ban in *Smith*. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990) (upholding a law banning the possession of illegal substances); *see also infra* Part IV (attempting to formulate a neutral statute that would survive strict scrutiny analysis).

163. *See Lukumi*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interest only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

164. *See id.*

165. *Id.* at 546-47.

166. *See id.*

167. *Id.* at 547.

168. *Id.*

169. Awad v. Ziriax, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010).

170. Brief of the Am. Jewish Comm. as Amici Curiae Supporting Pl.-Appellee at 37, Awad v. Ziriax, No-6273 (10th Cir. 2011).

171. *See Awad*, 754 F. Supp. 2d at 1307 (stating that the amendment was not narrowly tailored).

defenses.[172] In addition, the purpose that the amendment purported to serve—failing to recognize a foreign judgment when it went against public policy—is arguably already served by courts.[173] Therefore, the state presented no compelling state interest that justified passing the amendment.

C. What if a Law Burdens Religious Practice?

The key to enacting legislation that could ban cultural defenses yet pass First Amendment scrutiny may lie in the Supreme Court's decision in *Employment Division v. Smith*.[174] *Smith* dealt with Native American employees of an Oregon drug rehabilitation company who contended that their dismissal from employment and subsequent loss of unemployment benefits resulting from their use of peyote was unconstitutional.[175] The workers claimed that their use of peyote was for religious purposes and that the law against peyote burdened their religious practices.[176] In rejecting the Free Exercise claim of the workers, the Court said, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[177] The Court noted that previous cases striking down laws as violating the Free Exercise Clause involved "hybrid situations,"[178] or circumstances in which a state law burdened multiple constitutional rights. Here, there was only a question of the Free Exercise Clause versus the right of the state to regulate controlled substances.[179] In addition, the Court held that strict scrutiny would not apply to neutral laws of general applicability, even if they burdened religion.[180] Under this ruling, a neutral law of general applicability would only have to meet rational basis review regardless of how much it burdened religion.[181]

172. *See id.* (stating that the amendment singled out Sharia).

173. *See* Pl.-Appellee Response Brief at 52, Awad v. Ziriax, No. 10-6273 (10th Cir. 2011) (arguing that a husband could not, for example, cite Sharia law in declaring that his wife would receive no property after his death despite state intestacy laws).

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

175. *See id.*

176. *Id.* at 878.

177. *Id.* at 878-79.

178. *Id.* at 882; *see, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (holding that licensing system for religious solicitations would violate both the Free Exercise and Free Speech Clauses of the First Amendment); Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that requiring Amish children to attend school was a violation of both the Free Exercise Clause and the rights of parents to raise children).

179. *Smith*, 494 U.S. at 872, 882.

180. *See id.* at 888.

181. *See* CHEMERINSKY, *supra* note 60, at 1259. For example, Dean Chemerinsky mentions that, after *Smith*, a priest would not be able to successfully challenge a state law

Under the standard articulated in *Smith*, some federal circuit courts have refused to strike down laws burdening religion because the laws are neutral and of general applicability.[182] For instance, in 2001, the Tenth Circuit ruled that the Bald and Golden Eagle Protection Act did not violate the rights of Native Americans because it was a neutral law of general applicability.[183]

A state would normally be within its power in banning cultural defenses.[184] However, Sharia's unique nature as a religious doctrine presents a problem. Nevertheless, a law that is neutral and of general applicability should survive judicial scrutiny even if it has the incidental effect of burdening Muslims. While the Supreme Court will not strike down a law for incidentally burdening religion,[185] the Court's inquiry for neutrality goes beyond the face of the statute.[186] In addition to the text of the bill, the legislative history of the statute must be void of any intent to prohibit a particular religious practice.[187]

In light of the requirements of both the Establishment and Free Exercise Clauses, Part IV will describe a potential law banning cultural defenses—including Sharia when used as such—that would survive judicial scrutiny. Part IV attempts to describe a law that is not only neutral and generally applicable but also one that has a secular purpose, whose primary effect is not to inhibit or advance religion.

IV. A POSSIBLE STATUTORY SOLUTION

> All Connecticut courts are prohibited from taking into consideration the following during the sentencing of a criminal defendant: any cultural defense designed to mitigate the defendant's culpability for the offense. A cultural defense is any defense in which the defendant claims that he or she should not be judged by the laws of the country in which the crime occurred because the defendant was raised in a different culture or follows different cultural norms. Culture is defined as the attitudes, beliefs (including religious beliefs), or traits of a particular social, economic, ethnic, or racial group. This statute

prohibiting the consumption of alcoholic beverages under the Free Exercise Clause, even for communion. *Id*.

182. *See* CHEMERINSKY, *supra* note 60, at 1259.

183. *Id.* at 1262.

184. The power to ban cultural defenses would fall under a state's "police powers." *See* Manigault v. Springs, 199 U.S. 473, 480 (1905) (defining police powers as "an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals").

185. *See* CHEMERINSKY, *supra* note 60, at 1259.

186. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993) (stating that facial neutrality is not determinative).

187. *Id.*

> does not affect the ability of the defendant to introduce at trial, subject to the approval of the judge,[188] any evidence that the defendant feels is necessary to a proper defense.[189]

This statute would likely survive Establishment Clause scrutiny because it satisfies all three elements of the *Lemon* test.[190] First, the secular purpose of the statute is to protect the integrity of the judicial system and to ensure that criminals are punished for their crimes. Second, the primary purpose of the statute is not to inhibit a religion. Finally, the statute would not involve excessive government involvement with religion because it bans all cultural defenses. Thus, although religious defenses are included in the statute, courts would not have to determine the contents of any particular religion, thereby passing constitutional scrutiny.[191]

This statute would likely survive Free Exercise scrutiny because it is both neutral and generally applicable.[192] A law that is neutral and generally applicable must only satisfy rational basis review.[193] Because the law is neutral on its face, the state would only need to provide a legitimate state interest. As previously noted, the interest would be to uphold public policy regarding the judicial system and to insure that criminals are adequately punished. This interest would be protected under the broad police powers of the state.[194] If an individual wanted to show that there was intent to discriminate, they would likely need statements from the legislature or some other form of legislative history that suggested such intent.[195]

188. The judge will then determine whether to allow the evidence pursuant to the state's rules of evidence.

189. This language is entirely from the author.

190. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In addition, the proposed statute does not facially discriminate between two religions. *See* Larson v. Valente, 456 U.S. 228 (1982).

191. *Cf.* Awad v. Ziriax, 754 F. Supp. 2d 1298, 1307 (W.D. Okla. 2010) (holding that State Question 755 would require judges to discern the content of the plaintiff's religious beliefs).

192. *See* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990) (holding that a neutral and generally applicable law would be constitutional even if it burdened religion).

193. *See* CHEMERINSKY, *supra* note 60, at 1259.

194. *See* Manigault v. Springs, 199 U.S. 473, 480 (1905).

195. Both the *Lukumi* and *Awad* cases included evidence of legislative intent to discriminate against a particular religion. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 525-28 (1992) (stating that the City held emergency meetings to discuss action against the Santeria); Brief of the Am. Jewish Comm. as Amici Curiae Supporting Pl.-Appellee at 35, Awad v. Ziriax, No-6273 (10th Cir. 2011).

V. A STATE'S ATTEMPT AT OUTLAWING CULTURAL DEFENSES: PENNSYLVANIA HB-2029

Contrast the statute in the preceding section with a proposed bill in Pennsylvania.[196] The proposed Pennsylvania law, HB-2029, would prohibit Pennsylvania tribunals from considering any foreign legal code or system which "does not grant the parties affected by the ruling or decision the same fundamental liberties, rights and privileges granted under the United States Constitution and the Constitution of Pennsylvania."[197] Although HB-2029 would likely survive *Larson* scrutiny because it does not facially discriminate among religions,[198] the bill would have difficulty overcoming the *Lemon* test.[199] While HB-2029 has a provision asserting that no tribunal shall adjudicate a claim if it will violate the Establishment Clause,[200] this provision is not likely to protect the bill from a constitutional attack under the purpose and entanglement prongs of the *Lemon* test.[201] Like the legislative history of State Question 755, the legislative history of HB-2029 mentions Sharia several times.[202] In addition, courts will need to determine what constitutes a religion in order to enforce HB-2029. This type of inquiry will require courts to pass judgment on religious beliefs, a practice that the Supreme Court explicitly admonishes.[203] In contrast, the statute proposed in the previous section survives entanglement prong scrutiny because it bans all cultural defenses.

VI. CONCLUSION

While states are free to ban the use of cultural defenses in courtrooms, and should ban them in criminal cases, states must be careful when attempting to ban Sharia as a cultural defense. Sharia is unique in that it is a religious doctrine.[204] Therefore, it falls under the protection of the First Amendment. To survive First Amendment

196. H.B. 2029, 2011 Gen. Assemb., Reg. Sess. 2011-12 (Pa. 2011).
197. *Id.*
198. *Id.*
199. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
200. The provision states that no tribunal or arbitrator would be required to "adjudicate an ecclesiastical matter if adjudication would violate the establishment clause of the First Amendment of the United States." H.B. 2029.
201. *Lemon*, 403 U.S. at 612-13.
202. Randy LoBasso, *Sharia Law Bill Declared Unconstitutional in OK, What Does That Mean for PA Legislation?*, PHILADELPHIA WEEKLY BLOG (Jan. 12, 2012), http://bit.ly/zfkpPn (discussing the mention of Sharia in a legislative memo).
203. *See* Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).
204. AHDAR & ARONEY, *supra* note 28, at 3.

scrutiny, any law attempting to outlaw Sharia as a cultural defense must survive both an Establishment and Free Exercise Clause analysis.

To pass Establishment Clause scrutiny, the law would need a secular purpose, the primary effect of which is not to inhibit or advance religion, and be one that would not involve an excessive government entanglement with religion.[205] To survive Free Exercise Clause scrutiny, the law would have to be neutral and generally applicable.[206] If the law is not neutral and generally applicable, the government would need to show that there is a compelling state interest and that the law is narrowly tailored to achieve such purpose.[207] As this Comment's proposal suggests, a state may ban the use of Sharia as a cultural defense. However, to survive constitutional scrutiny, the ban must be motivated by the desire to eliminate cultural defenses in general, not by a desire to attack any particular religion.

205. *See Lemon*, 403 U.S. at 612-13.
206. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990).
207. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1992).