

5-2010

# Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship

Linda McClain

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)

 Part of the [Family Law Commons](#)

---

## Recommended Citation

Linda McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship*, No. 10-14 Boston University School of Law, Public Law and Legal Theory Research Paper Series (2010).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/238](https://scholarship.law.bu.edu/faculty_scholarship/238)

This Book Chapter is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



**MARRIAGE PLURALISM IN THE UNITED STATES:  
ON CIVIL AND RELIGIOUS JURISDICTION AND THE  
DEMANDS OF EQUAL CITIZENSHIP**

Boston University School of Law Working Paper No. 10-14  
(May 24, 2010)

Linda C. McClain

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty/scholarship/workingpapers/2010.html>

**Marriage Pluralism in the United States:  
On Civil and Religious Jurisdiction and the Demands of Equal Citizenship**

Linda C. McClain

**I. Introduction: The Call for More Pluralism and Shared Jurisdiction in U.S. Family Law**

“Legal pluralism” is hot. Indeed, “legal pluralism is everywhere.”<sup>1</sup> As Brian Tamanaha observes, not only is there, “in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level,” but, in the last few decades, legal pluralism itself “has become a major topic in legal anthropology, legal sociology, comparative, law, international law, and socio-legal studies.”<sup>2</sup> But problems with defining and understanding legal pluralism continue to “plague” its study.<sup>3</sup>

What of legal pluralism in family law? Is such pluralism already “everywhere,” if we just look closely? A common observation is that family law -- and family law practice -- in the United States have become global due to “the globalization of the family.”<sup>4</sup> As people form families cross geographic and national boundaries, lawyers and courts routinely must deal with

---

1. Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review*, 30 (September 2008): 375-411, 375.

2. *Ibid.*

3. *Ibid.*

4. Ann Laquer Estin and Barbara Stark, *Global Issues in Family Law* (St. Paul, MN: Thomson-West, 2007), 1.

complex questions of jurisdiction and comity with respect to marriage, divorce, child custody, and the like.

Has the time come, at the normative level, to embrace more legal pluralism in family law within the United States? If so, what form should it take? To answer these questions, clarifying what is meant by “legal pluralism” in family law is crucial. Broadly defined, legal pluralism acknowledges that there are multiple sources of normative ordering in every society. Such sources include not only the “official” legal system, embodied in civil cases, statutes, and constitutions, but also, as Ann Estin describes in this Volume, the “unofficial family law” of religious tribunals, rules, customs, and the like.<sup>5</sup> This “unofficial family law” has a formative effect on persons and communities even if it is not buttressed by binding state authority.

More narrowly defined, *legal* pluralism refers not to this broader *normative* pluralism but to questions of jurisdiction and juridical power.<sup>6</sup> Sally Engle Merry explains that “state law” is “fundamentally different” than non-state forms of ordering because “it exercises the coercive power of the state and monopolizes the symbolic power associated with state authority.” She urges that the study of legal pluralism attend to the interaction of state law with these other forms of ordering.<sup>7</sup>

---

5. Ann Laquer Estin, "Unofficial Family Law" (in this volume).

6. Tamanaha, "Understanding Legal Pluralism."

7. Sally Engle Merry, "Legal Pluralism," *Law and Society Review* (1988): 869-896, 869, 879.

The Multi-Tiered Marriage Project calls for a national conversation on this interaction between state and non-state power with respect to jurisdiction over marriage and divorce. To the “ought” question about whether there should be more jurisdictional pluralism, it answers “yes.” Project convenor Joel Nichols proposes that, in the U.S., “civil government should consider ceding some of its jurisdictional authority over marriage and divorce law to religious communities that are competent and capable of adjudicating the marital rites and rights of their respective adherents.”<sup>8</sup> He finds, already within the United States, some forms of a multi-tiered system, described elsewhere in this Volume: covenant marriage, available in three states, and New York’s *get* statutes.<sup>9</sup> In Louisiana, for example, key proponents of covenant marriage self-consciously sought to instantiate a covenant model of marriage in keeping with “God’s intended purpose for marriage.”<sup>10</sup>

To usher in more legal pluralism in the U.S., Nichols proposes to learn from other legal systems. He spins the globe and finds many instructive ways to share jurisdiction over marriage

---

8. Joel A. Nichols, "Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community," *Vanderbilt Journal of Transnational Law* 40 (January 2007): 135-196, 135. See also the chapter by Joel A. Nichols in this volume.

9. Nichols, “Multi-Tiered Marriage,” 148. The three states are Arkansas, Arizona, and Louisiana.

10. Katherine Shaw Spaht, "Covenant Marriage: An Achievable Legal Response to the Inherent Nature of Marriage and Its Various Goods," *Ave Maria Law Review* 4 (Summer 2006): 467-496, 470.

and divorce law, such as multiple systems of personal law, in which religious tribunals have jurisdiction; legal recognition of customary marriage; and allowing religious bodies to arbitrate family law matters.<sup>11</sup>

What form would a new jurisdictional pluralism in U.S. family law take? Nichols proposes a “more robust millet system.”<sup>12</sup> The analogy is to the Ottoman Empire’s millet system, in which personal law (including marriage) was administered by religious tribunals, a system still operating to varying degrees in some countries that Nichols canvasses. His model, which envisions “semi-autonomous” religious entities and the state acting as the over-arching sovereign that intervenes only when basic minimum guidelines are not met, seems to reject a model of complete autonomy of religious tribunals. However, the reference to “basic minimum guidelines” suggests a thin supervisory role for the state.

In this Chapter, I will concede the descriptive point that “legal pluralism is everywhere” and challenge -- or at least raise cautions about -- the normative claim that there should be more of it in U.S. family law. An exercise in comparative law readily *does* reveal many different ways of allocating jurisdiction over family law. This does not, however, answer the normative question of whether these are good models for U.S. family law.

One normative concern over civil law ceding authority to religious and other tribunals to regulate marriage and divorce regards the place of key commitments, values, and functions of civil family law. What authority will civil government have in the modified system to advance

---

11. Nichols, “Multi-Tiered Marriage,” 164-195.

12. *Ibid.* at 164.

family law's functions of protecting the best interests of children and other vulnerable parties? What will happen if its model of marriage as an equal partnership premised on gender-neutral and reciprocal (rather than complementary and hierarchical) rights and duties conflicts with religious models? What will happen if there is a gap between religious law on marital dissolution and civil law's norm of equitable distribution of marital property and rationales for spousal support?

Another pressing concern is whether such a millet system can adequately protect the equal citizenship of women. I am skeptical that it can, for reasons I elaborate below. Nearly every foreign example that Nichols offers of jurisdictional pluralism concerning family law raises troubling question about how to reconcile sex equality with religious freedom.<sup>13</sup> Feminist scholars highlight the importance of claims of national and constitutional citizenship -- or "public citizenship" -- as a strategy for redressing sex inequality, even as they affirm the value of membership in religious and cultural groups.<sup>14</sup> Will a new jurisdictional pluralism accommodate

---

13. On clashes between religious liberty and sex equality in India, see Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000), 167-240. For a critical evaluation of the millet systems in Canada, India, Israel, and Kenya, see Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001). In this Volume, Werner Menski posits "postmodern Indian family law" as a realistic, functioning model of legal pluralism.

14. See Audrey Macklin, "Particularized Citizenship," in *Migrations and Mobilities: Gender, Citizenship, and Borders*, ed. Seyla Benhabib and Judith Resnik (New York: New York

this dual membership? Training a gender lens on the question of jurisdictional pluralism would better inform the national conversation that the Multi-Tiered Marriage Project invites.

Nichols assures readers that “[m]oving toward multi-tiered marriage” system is compatible with family law's protective functions and with “core values of equality.”<sup>15</sup> But his international examples contradict this reassurance. They call into question whether the proper model should be “ceding” authority or recognizing plural forms of authority, but only subject to constitutional and civil limiting principles. When government forms a partnership with religion, we might contrast two competing models of this relationship: unleashing, in the sense of turning loose or freeing; versus harnessing, in the sense of utilizing by yoking or restricting in light of important constitutional and public values.<sup>16</sup> This distinction between unleashing and harnessing may prove useful when considering calls for shared, or multiple, jurisdiction.

Family law, to be sure, already allows persons to opt-out, to some extent, from its protective “default rules” through private ordering (such as premarital agreements and arbitration). Thus, in assessing the demand for jurisdictional pluralism, it is important to consider the place family law already accords to individual choice and freedom of contract.<sup>17</sup>

---

University Press, 2009).

15. Nichols, “Multi-Tiered Marriage,” 195.

16. Linda C. McClain, “Unleashing or Harnessing ‘Armies of Compassion’?: Reflections on the Faith-Based Initiative,” *Loyola University Chicago Law Journal* 39 (Winter 2008): 361-426, 363-364.

17 See the chapter by Brian Bix in this volume.



This Chapter first asks precisely what form of marriage pluralism in the U.S. is sought and what might be motivating this demand. It examines differing views about the relationship between religious and civil marriage and notes how public norms of sex equality in the family may be in tension with religious traditions. It then examines some of the case law in which state courts within the U.S. have dealt with religious and foreign family law in resolving civil disputes about marriage and divorce. It asks what this case law suggests about the prospects for a multi-tiered marriage law in the U.S. and what tension points might arise. Finally, it takes up one of Nichols’s comparative examples: the controversy over religious family law arbitration (or “sharia arbitration”) in Ontario. Guided especially by Canadian feminist commentary on this controversy, I ask what lessons this example might teach about the possibilities for more pluralism in U.S. family law.

## **II. Whither the Demand for More Marriage Pluralism in the U.S.?**

### *A. An Initial Question: Should Religious and Civil Family Law Be Congruent?*

Is there a demand, within the United States, for “multi-tiered marriage”? It may clarify matters to distinguish two types of demands for more legal pluralism: First, particular religious communities might challenge the authority of the state to regulate marriage and argue either for sole or shared authority. This demand could arise either from religious communities that are long-established within the U.S. or, as a part of multicultural accommodation, from newer immigrant religious communities. A solution that Nichols floats is a millet system in which religious tribunals have jurisdictional autonomy with minimal state oversight. Second, religious communities might express discontent with the substance of civil marriage law and desire to instantiate, with more binding force *in civil law*, religious understandings of marriage so that the

two are congruent. If this latter strategy is preferred, the question arises: which religious understandings? That of majority religious institutions? What place will there be for the many minority religions practiced in America? And what place for minority views within the respective religious traditions?

The political and legal battles over same-sex marriage seem to be one motivating factor in the demand for both forms of legal pluralism. One response to the prospect of states redefining civil marriage to permit same-sex couples to marry (as Massachusetts and now five other states have done) is to propose that the state “get out of the marriage business” and leave it to religious institutions to define and regulate marriage. Offering a “Judeo-Christian” argument for “privatizing marriage,” legal scholar Daniel Crane proposes that civil law permit couples to make civil contracts assigning jurisdiction over their marriage to religious authorities.<sup>18</sup> That way, religious believers and institutions would not cede the power to define marriage to the state. Edward Zelinsky offers a different “pro-marriage case” for abolishing civil marriage: government should shed its monopoly on marriage in favor of a “market for marriage” in which civil marriage competes with other models of marriage offered by religious and other sponsoring institutions.<sup>19</sup>

---

18. See Daniel A. Crane, "A 'Judeo-Christian' Argument for Privatizing Marriage," *Cardozo Law Review* 27 (January 2006): 1221-1259.

19. Edward A. Zelinsky, "Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage," *Cardozo Law Review* 27 (January 2006):1161-1220, 1164.

Given the role of religious understandings of marriage in opposition to extending civil marriage to same-sex couples, another way to clarify that religious and civil marriage are distinct would be to cede the term “marriage” to religious traditions and replace it with a new status like civil unions or civil partnerships to which would attach various benefits and obligations now linked to civil marriage.<sup>20</sup> More typically, religious opponents of same-sex marriage seek *congruence* between religious and civil law. Appeals to religious tradition have animated efforts by religious institutions and lawmakers to “defend” marriage by enshrining in state and federal constitutions a definition of marriage as one man and one woman. The argument for congruence is that if the legal definition of marriage is so altered that it no longer recognizes the goods and purposes of marriage as understood in religious traditions, marriage law will not rest on a true conception of marriage.<sup>21</sup> A comparative example may be found in Canada. After Parliament passed a law redefining marriage as being “between two persons,” a group of religious leaders issued a “Declaration on Marriage” urging members of Parliament and Canadian citizens to reconsider such redefinition because it severed marriage from its “nature and purpose,” and faith communities could not promote an institution “when the identifying language has been stripped

---

20. See also the chapter by Stephen Presser in this volume. This option was considered but rejected in the Law Commission of Canada’s report, *Beyond Conjugality* (2001).

21. See, e.g., The Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (Princeton, New Jersey, 2006).

of its real meaning.”<sup>22</sup> These opponents of re-defining marriage seek greater congruence between religious and civil marriage, *not* marriage pluralism.

Covenant marriage also reflects a congruence strategy: it harnesses state power to instantiate an ideal of marriage in keeping with Christian traditions about permanence and mutual sacrifice.<sup>23</sup> In this Volume Katherine Shaw Spaht, an architect of Louisiana’s law, defends covenant marriage as offering a “dissident culture the opportunity to live under a stricter moral code reinforced by law.” In effect, this introduces pluralism into the law of marriage and divorce, since the state recognizes “two forms of marriage.” In establishing covenant marriage, she argues, the state invites religion into the public square to help preserve marriages; by contrast, privatizing marriage – the state “ceding jurisdiction” to other authorities – risks marriage losing its “public” character and purposes. She also acknowledges that advocates of covenant marriage statutes envisioned that if couples widely embraced it the paradigm would shift from no-fault to covenant marriage.<sup>24</sup> (For this reason, Spaht and some proponents of

---

22. *Declaration on Marriage* (November 9, 2006), available at [http://www.cccb.ca/site/Files/Declaration\\_Marriage\\_En.pdf](http://www.cccb.ca/site/Files/Declaration_Marriage_En.pdf)

23. See Spaht, "Covenant Marriage: An Achievable Legal Response," (discussing how covenant marriage is closer to God’s purpose for marriage). Spaht reports that the Catholic Bishops of Louisiana, while agreeing with the ideal of permanence, disagreed with the law’s allowance of divorce. Katherine Shaw Spaht, "Louisiana’s Covenant Marriage: Social Analysis and Legal Implications," *Louisiana Law Review* 59 (Fall 1998): 63-160, 76.

24. See Spaht, "Covenant Marriage: An Example of a Single Alternative" (in this

covenant marriage express disappointment that religious authorities have not embraced it and required members to enter into this model of marriage.)<sup>25</sup> Moreover, requiring premarital counseling and specifying that it may be performed by religious functionaries draws attention to the unique capacity of religious communities to preserve marriages.<sup>26</sup> Congruence is evident in Spaht's argument that conceding a difference between civil and religious marriage fails to recognize that "[n]atural moral law applies equally to the religious and non-religious alike" and is accessible through the exercise of reason.<sup>27</sup>

If covenant marriage is a way for religion to harness state power, the state also harnesses -- and does not simply unleash -- religion. *Civil* officials issue marriage licenses and *civil* courts adjudicate divorces and rule on custody, property distribution, and the like. Covenant marriage proponents are not making the argument that the state should cede this authority to religious tribunals so that civil courts no longer have jurisdiction in such matters.

In the U.S. family law system, civil and religious authorities already share jurisdiction over marriage to a degree, as other chapters in this Volume explain. In contrast to some legal systems (like France or the Netherlands), in the U.S. religious leaders may perform marriage

---

volume).

25. *Ibid.*

26. Spaht, "Louisiana's Covenant Marriage," 75-77.

27. Spaht, "Covenant Marriage: An Example of a Single Alternative" (in this volume).

See also Charles J. Reid, "And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?" 27 *Cardozo Law Review* (2006): 1277-1307.

ceremonies that will be recognized as civil marriages provided the couples comply with civil formalities. Through this “simultaneously . . . secular and . . . religious event,” which incorporates “unofficial law and norms into the civil rite” and “reinforces the solemnity of the occasion,” the state might be said to harness religious power for its own ends.<sup>28</sup> If religious leaders or couples do not follow these civil formalities, however, the resulting religious marriage generally will not have civil effects. This highlights the status of religious marriage as independent of the secular government but also carries risk for the participants in such a marriage. It shuts them off from the protections of civil family law with respect to the incidents of marriage and procedures for marital dissolution, property distribution, spousal support, and the like.<sup>29</sup>

Within the U.S., certain religious faiths (for example, Catholicism, Judaism, and Islam, but notably not the Protestant traditions) have their own system of courts that handle certain family matters.<sup>30</sup> Parties to such proceedings already ask civil courts to enforce or decline to enforce religious marriage contracts, divorce orders, arbitration agreements, and custody and support orders.<sup>31</sup> One motivating factor for the demand for “multi-tiered marriage” might be the perception that such courts are failing at this task, either out of a lack of understanding of the

---

28. Estin, "Unofficial Family Law" (in this volume).

29. See Lynn Welchman, ed., *Women's Rights and Islamic Family Law: Perspectives on Reform* (London, New York: Zed Books Ltd., 2004), 188.

30. See Ann Laquer Estin, "Embracing Tradition: Pluralism in American Family Law," *Maryland Law Review* 63 (2004):540-604.

31. *Ibid.*, 35.

particular religious tradition at issue or out of an over-zealous view of separation of church and state. Some Islamic scholars, for example, critique civil courts in the U.S. and Canada for ignorance about Islamic traditions and for failure to adjudicate properly claims arising from Islamic marriage contracts.<sup>32</sup> But these analyses generally call for civil courts to do a better job when they confront Islamic family law, rather than to cede authority to religious courts and cease exercising jurisdiction over family law.<sup>33</sup> Thus, in this Volume, Mohammad Fadel asserts that Muslims have a “keen interest” in a pluralistic system of family law, but concludes that “orthodox Muslims are better served through marginal changes to the current family law regime” than by “any proposals that would award religious institutions greater jurisdiction over family life.”<sup>34</sup> Notably, in the recent controversy in Ontario over so-called “sharia arbitration” of family law, many Muslim groups stressed the religious obligation of Muslims to obey civil authority and urged that any religious arbitration should be subject to proper civil law norms.

---

32. See Pascale Fournier, "The Erasure of Islamic Difference in Canadian and American Family Law Adjudication," *Journal of Law and Policy* 10 (2001): 51-95, (critiquing *Kaddoura v. Hammond*, 168 D.L.R. (4th) 503 (Ont. Gen. Div., 1999)); see also Asifa Quraishi and Najeeba Syeed-Miller, "The Muslim Family in the USA: Law in Practice," in *Women's Rights and Islamic Family Law: Perspectives on Reform*, ed. Welchman, 199-212 (offering praise and criticism of how civil courts in the U.S. have handled Islamic family law).

33. Quraishi and Syeed-Miller, "Muslim Family in the USA," 199-212.

34. Mohammad H. Fadel, "Political Liberalism, Islamic Law, and Family Law Pluralism" (in this volume).

The demand for a more “robust” millet system in the United States, therefore, is not evident. What is evident is that some religious groups seek greater congruence between civil and religious family law. Others seek greater accommodation of or at least appreciation by civil courts of religious law.

A complicating factor in considering calls for congruence between civil and religious marriage is that although *civil* marriage, as distinct from religious marriage, is in a sense a creature of state law and regulation,<sup>35</sup> America’s history reveals the strong influence of Christian conceptions of marriage on the secular law.<sup>36</sup> As the late Lee Teitelbaum observed: “For most of American history, . . . the law of marriage was consistent with and supported -- if not created -- by the views of dominant religious communities.”<sup>37</sup> The incompatibility of polygamy with Western, Christian understandings of marriage animated governmental campaigns against Mormons and Native Americans. Thus, “to the extent that the majority faith communities were

---

35. Most vividly, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), repeatedly refers to “civil marriage” and describes it as a “wholly secular institution.” For a critique of *Goodridge* on this point, see Perry Dane, “A Holy Secular Institution,” *Emory Law Journal* 58 (2009): 1123-1194.

36. See John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville, Ky.: Westminster John Knox Press, 1997).

37. Lee E. Teitelbaum, “Religion and Modernity in American Family Law,” in *American Religions and the Family: How Faith Traditions Cope with Modernization and Democracy*, ed. Don S. Browning and David A. Clairmont (Columbia University Press, 2006), 227-243, 229.



oppositional, it was to value sets that argued for change in the formation of families,” whether it be polygamy in the nineteenth century or, in the late twentieth, the values of secular humanism.<sup>38</sup> Even today, as Estin observes, although U.S. family law is thought to be secular and universal, traces of its religious roots are apparent in aspects of the law of marriage and divorce, which may look Christian, exclusive, or sectarian to people of other faiths.<sup>39</sup>

Once again, the issue of same-sex marriage is a crucible for sorting out marriage’s dual status. Some religious authorities and lawmakers oppose extending marriage to same-sex couples because such a redefinition would be contrary to “millennia” of cultural and religious tradition as well as to the created order.<sup>40</sup> However, a dissenting theological view is that insisting on congruence by calling for a national definition of marriage risks “reifying marriage as a legal, rather than religious, construct” and concedes to the state -- rather than religious traditions -- the power to say what marriage *is*.<sup>41</sup>

I will not attempt to resolve this theological debate about congruence. I believe that, notwithstanding the religious roots of contemporary civil law, distinguishing religious and civil marriage is necessary to clarify government’s interest in recognizing and regulating marriage.

---

38. *Ibid.*, 229-230.

39. Estin, "Embracing Tradition: Pluralism in American Family Law," 543-546.

40. See Linda C. McClain, "God’s Created Order, Gender Complementarity, and the Federal Marriage Amendment," *Brigham Young University Journal of Public Law* 20 (2006): 313-343.

41. Crane, "A 'Judeo-Christian' Argument for Privatizing Marriage," 1221-1222.

Indeed, state legislatures and governors that have opened up civil marriage to same-sex couples stress this distinction as they declare support both for equality in civil marriage and for protecting religious freedom.<sup>42</sup> Making this distinction follows from constitutional principles and from liberal political principles about the fact of reasonable moral pluralism and toleration of religious difference.<sup>43</sup> Furthermore, the nature of civil marriage has evolved over time. As Mary Anne Case observes, what “marriage licenses” today is quite different from what it licensed in an earlier era, when marriage entailed a hierarchical set of rights and duties of husband and wife (*baron and feme*) and the criminal law prohibited non-marital, non-procreative, and non-heterosexual sexual expression.<sup>44</sup> Today, much of that criminal law has given way to understandings of a realm of constitutionally-protected liberty and privacy. And, pursuant to the transformation of family law spurred by the Supreme Court’s series of Equal Protection rulings, the rights and obligations of civil marriage are stated in gender-neutral terms. Spouses are much freer to choose how to live their marital life, and the rules of exit are far less strict.<sup>45</sup>

---

42. Examples include Maine, New Hampshire, and Vermont.

43. On these tenets of political liberalism, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993, 1996).

44. Mary Anne Case, "Marriage Licenses," *Minnesota Law Review* 89 (June 2005): 1758-1797, 1765-1768.

45. Indeed, some argue that these legal changes create a “vacuum . . . of legally mandated meaning” of marriage precisely because individuals have more latitude to decide or negotiate the content of marriage. Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency*

*B. Tensions Between Civil and Religious Law: Gender Roles and Gender Equality*

What civil marriage licenses is at odds with at least *some* religious conceptions of marriage. Considerations of a more pluralistic approach to legal regulation, should attend to these possible tension points. One example is sex equality and gender roles in the family. Contemporary family law rejects the common law's model of husbandly rule and wifely obedience. Sex equality is also an important political value and constitutional principle.<sup>46</sup> Civil family law's model of equal spousal and parental rights and responsibilities may be in tension with religious conceptions of proper gender ordering.

In the recent book *American Religions and the Family: How Faith Traditions Cope With Modernization and Democracy*,<sup>47</sup> nearly every religious tradition examined includes a tenet that men are to exercise authority and leadership in the home (and, often, in the broader society) and that women have special duties in the home including (in some traditions) submission to or respect for male authority. In coping with modernization, religious leaders and adherents confront how to reconcile such traditional religious beliefs with contemporary American values

---

(New York: New Press, 2004), 99.

46. Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Cambridge, Mass.: Harvard University Press, 2006).

47. Don S. Browning and David A. Clairmont, eds., *American Religions and the Family: How Faith Traditions Cope with Modernization and Democracy* (Columbia University Press, 2006).

about equality of the sexes and marriage as a partnership.<sup>48</sup> Similarly, another recent book, *Muslim Women in America: The Challenge of Islamic Identity Today*, identifies a central tension between support in Muslim cultural and religious traditions for male authority in the home and in society and “the general climate of American discourse about equality and justice between the sexes,” including equal responsibility and decision making in the family.<sup>49</sup> (The fact that American social practice may vary from these ideals is not the point; the discourse and public attitudes themselves serve as identifiable contrasts to religious and cultural traditions.)

Religious communities have diverse responses to this challenge. Some religious traditions (for example, mainline Protestantism) have moved away from teachings about male dominance and female submission, fixed gender roles, and the marital, nuclear family to more egalitarian and pluralistic visions of marriage and family forms.<sup>50</sup> In various religions, women -- and men -- have engaged in efforts to generate less patriarchal interpretations of religious texts and to critique subordinating practices that have been justified by religious teaching. By contrast,

---

48. Examples of this tension are found in *American Religions and the Family*, ed. Browning and Clairmont, in the chapters on mainline Protestantism, evangelical Christianity, Hinduism, Islam, Confucianism, and Buddhism.

49. Yvonne Yazbeck Haddad, Jane I. Smith, and Kathleen M. Moore, *Muslim Women in America: The Challenge of Islamic Identity Today* (Oxford University Press, 2006), 90-91.

50. See W. Bradford Wilcox and Elizabeth Williamson, "The Cultural Contradictions of Mainline Family Ideology and Practice," in *American Religions and the Family*, ed. Browning and Clairmont, 37-55, 42.

some religious groups embrace traditional gender roles as part of an “oppositional” stance to American culture and the perceived weakening of family values.<sup>51</sup> Various immigrant communities contrast the morals and family values of their own societies of origin favorably with perceived American values, similar to how many religious conservatives in America view feminism and challenges to traditional gender roles as part of a longer litany of forces (for example, individualism and secularism) that threaten strong families.<sup>52</sup>

Muslim communities in America illustrate this diversity of responses to ideals of equality. On the one hand, “[m]uch of the contemporary discourse, joined by both men and women, portrays the liberal Western model of ‘equality’ between the sexes as unrealistic, unnatural and leading ultimately to many Western women trying to raise children alone and below the poverty level.”<sup>53</sup> On the other, women and men attempt to “reinterpret Qur’anic texts that seem to support male dominance over women, trying to argue that the justice of God affirmed in the holy text cannot allow women to be subordinated in any way to men.”<sup>54</sup> Generational differences are also a relevant factor. One study reports that “[y]oung Muslims in

---

51. See Paul D. Numrich, "Immigrant American Religions and the Family," in *American Religions and the Family*, ed. Browning and Clairmont, 20-34; Margaret Bendroth, "Evangelicals, Family, and Modernity," in *American Religions and the Family*, ed. Browning and Clairmont, 56-69.

52. Numrich, "Immigrant American Religions," 27.

53. Haddad, Smith, and Moore, *Muslim Women in America*, 91.

54. Ibid.

America struggle both to respect the honor of the family and to break free of expectations it imposes on them. Muslim girls are becoming more articulate about their own frustrations at the double standards that their parents seem to apply to the girls and their brothers.”<sup>55</sup>

This diversity of views and these generational tensions are pertinent to the proposal for multi-tiered marriage. They raise questions about how to define and interpret religious family law and whose voice will prevail if there are conflicting interpretations.

### **III. Pluralism in U.S. Family Law: Jurisdiction, Location, and Citizenship**

Some likely tension points in moving to a multi-tiered marriage system may be evident from reasoning by analogy from case law in the U.S. in which courts already consider the relationship between civil and religious family law and are asked to enforce terms of a religious marriage contract, recognize a foreign or religious marriage or divorce, or assume jurisdiction over child custody disputes. The case law suggests a certain capaciousness already at work as courts have embraced pluralism to a degree. But it also suggests important limiting principles about when courts will not and should not cede authority to religious or foreign courts or apply religious family law. At issue also are questions of how to relate membership and location in particular communities to citizenship.<sup>56</sup> In this Chapter, I can discuss only a handful of

---

55. Jane I. Smith, "Islam and the Family in North America," *American Religions and the Family*, ed. Browning and Clairmont, 211-224, 215.

56. On tensions between group membership and national citizenship, see Shachar, *Multicultural Jurisdictions*.

illustrative cases about marriage and divorce and must direct readers elsewhere for a more complete survey of this body of multicultural family law.<sup>57</sup>

Finding multiculturalism in the context of civil family law may come as a surprise, even though, as Estin observes, it should not, given the religious heterogeneity within the United States and the migration of people across national borders.<sup>58</sup> This “growing body of multicultural family law,” she concludes, demonstrates the potential to embrace both “a number of fundamentally different family law traditions” and “deeper values that structure and constrain the process of accommodation,” such as “principles of due process, nondiscrimination, and religious freedom” as well as family law’s “protective policies.”<sup>59</sup> Estin calls for courts and lawmakers to develop a framework for a multicultural family law that would “allow individuals greater freedom to express their cultural or religious identity and negotiate the consequences of these commitments,” but also “protect the rights of individuals to full membership and participation in the larger political community.”<sup>60</sup>

---

57. See, e.g., Estin, "Embracing Tradition: Pluralism in American Family Law"; Asifa Quraishi and Najeeba Syeed-Miller, "Islamic Family Law in US Courts," in *Women's Rights and Islamic Family Law*, ed. Welchman, 199-212. One important area of law that I omit is the care, custody, and support of children.

58. Estin, "Embracing Tradition: Pluralism in American Family Law," 540.

59. *Ibid.*, 603-604.

60. *Ibid.*, 542.

This twin focus on expressing identity and safeguarding rights captures an important challenge posed to legal pluralism: how to provide space for living according to and negotiating within the framework of religious law while also ensuring that membership in the political community is a source of entitlement and obligation that coexists with, and may put constraints on, other forms of affiliation. Bringing a feminist perspective -- indeed a multicultural feminist perspective<sup>61</sup> -- to bear on this challenge may fortify analysis.

Because Nichols proposes a robust millet system of religious courts with civil government, upholding basic minimal guidelines, what civil courts have done may not be a useful model for what religious tribunals would do. But this case law is instructive on how civil family law's concerns for procedural and substantive fairness shape the accommodation now afforded to religious law. Religious family law often has gender asymmetries in the rights and duties of husbands and wives (including the power to initiate a divorce) and of fathers and mothers. Rules concerning the economic consequences of marriage and divorce also differ from the economic partnership model of civil family law. How have civil courts handled such tensions between civil and religious law?

*A. Civil Enforcement of Religious Marriage Contracts and Religious Arbitration*

Courts are sometimes asked to enforce -- or to decline to enforce -- terms of marriage contracts entered into pursuant to Jewish or Islamic marriages. In the instance of Jewish marriage

---

61. Ayelet Shachar, "Feminism and Multiculturalism: Mapping the Terrain," in *Multiculturalism and Political Theory*, ed. Anthony Simon Laden and David Owen (New York: Cambridge University Press, 2007).



contracts, these cases generally involve seeking to enforce an agreement to submit to religious arbitration.<sup>62</sup> This case law should be put in context of a general trend in family law away from hostility to premarital agreements about property distribution in the event of divorce -- on the public policy ground that such agreements encourage divorce -- to permitting parties to a marriage to make contracts with each other, that is, to engage in private ordering. At the same time, these Jewish and Islamic marriage contracts are not technically premarital agreements, although courts sometimes mistakenly treat them as such.<sup>63</sup>

Another relevant trend in family law is to allow, and sometimes require, arbitration and other alternatives to divorce litigation. However, there are limits to private ordering, rooted in process concerns and in substantive concerns about fairness or protection of vulnerable or dependent parties. When private ordering also entails religious law, courts face additional questions about whether enforcing such agreements excessively entangles a civil court with religion, in contravention of the First Amendment.

#### 1. Religious Marriage Contracts, Religious Arbitration, and the *Get* Statutes

A leading case for the proposition that a civil court may properly exercise jurisdiction in an action arising out of a religious marriage contract is *Avitzur v. Avitzur*.<sup>64</sup> In that case, New

---

62. See Michael J. Broyde, "Some Thoughts on New York State Regulation of Jewish Marriage: Covenant, Contract or Statute?" (in this volume).

63. Quraishi and Syeed-Miller, "Islamic Family Law in US Courts," 202 (critiquing *Dajani v. Dajani*, 204 Cal. App. 3d 1387 (Cal. App. 4th Dist. 1988)).

64. *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983).

York's highest court held that secular terms of a religious marriage contract, the Jewish *ketubah*, may be enforceable as a contractual obligation. Relying on U.S. Supreme Court precedents, the court said it could apply "neutral principles of contract law" and need not consider religious doctrine.<sup>65</sup> The specific contract term was an agreement to appear before the Beth Din, a Jewish religious tribunal, to allow it to "advise and counsel the parties" in matters concerning their marriage. The wife had already obtained a civil divorce but, under Jewish law, was not religiously divorced and was therefore unable to remarry and have legitimate children until her husband granted her a Jewish divorce decree, a *get*.<sup>66</sup>

Jewish tradition refers to women whose husbands do not give them a *get* as an "*agunah*," a chained woman (chained to the dead marriage).<sup>67</sup> Jewish tradition has developed ways to address this problem, such as putting a clause in the *ketubah* to agree to arbitration. *Avitzur* rationalized enforcing such an agreement as simply compelling a husband "to perform a secular obligation to which he contractually bound himself."<sup>68</sup> As Michael Broyde discusses in this Volume, the New York legislature subsequently enacted two statutes aimed at addressing the plight of the *agunah*.<sup>69</sup>

---

65. *Ibid.*, 138 (citing to *Jones v. Wolf*, 443 U.S. 595, 602 (1979)).

66. *Ibid.*

67. Broyde, "Some Thoughts on New York State Regulation of Jewish Marriage" (in this volume).

68. *Avitzur*, 446 N.E.2d at 139.

69. "Removal of Barriers to Marriage," N.Y. Dom. Rel. L § 253(6), *McKinney's*

Nichols offers the *get* statutes as an example of multi-tiered marriage<sup>70</sup> but I think *Avitzur* and these statutes could better be understood as an attempt by civil government to remedy a disadvantage arising out of gender asymmetry in religious law that disproportionately affects religious women and has troubling spillover effects in the civil realm, such as unequal bargaining power and one-sided settlements.<sup>71</sup> Broyde, in this Volume, suggests that these statutes seek to harmonize civil and religious divorce law, with the encouragement of religious leaders, based on advancing the “purpose and function of the secular divorce law” -- that its citizens “are in fact free to remarry after they receive a civil divorce.”<sup>72</sup>

Thus, civil law’s attempt to solve the *get* problem seems less an argument for civil government ceding more authority to religious tribunals than for shared or cooperative jurisdiction: religious and secular authorities cooperate to solve a problem that neither can solve entirely on its own.<sup>73</sup> Analysis of Canada’s *get* statutes suggests a similar concern on the part of

---

*Consolidated Laws of New York Annotated* (Thomson-West, 2008); "Special Controlling Provisions; Prior Actions or Proceedings; New Actions or Proceedings," N.Y. Dom. Rel. L. § 236(6)(d), *McKinney's Consolidated Laws of New York Annotated* (Thomson-West, 2008). See Broyde, "Some Thoughts on New York State Regulation of Jewish Marriage" (in this volume).

70. Nichols, "Multi-Tiered Marriage," 163.

71. Estin, "Embracing Tradition: Pluralism in American Family Law," 583-84.

72. Broyde, "Some Thoughts on New York State Regulation of Jewish Marriage" (in this volume).

73. *Ibid.*

civil authority both to ameliorate disadvantages for religious women and to cooperate with religious authorities to solve the problem.<sup>74</sup>

## 2. Adjudication of Islamic Marriage Contracts: the *Mahr*

Scholars of Islamic family law describe the marriage contract as a protective mechanism that affords a Muslim woman a chance to customize her marriage through provisions that guarantee her rights with regard to her spouse (for example, to work outside the home without her husband's permission, to initiate divorce, or not to clean the house). Many Muslim women, unaware of their rights, underutilize this protective device.<sup>75</sup>

Some state courts (including New York) have enforced a wife's right in Islamic marriage contracts to *mahr*, a bridal gift or dower.<sup>76</sup> *Mahr* is customarily divided into two parts: one "payable immediately on the marriage . . . sometimes only a token amount or symbol," and a

---

74. Lisa Fishbayn, "Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce," *Canadian Journal of Law and Jurisprudence* 21 (January 2008): 71-96. The Supreme Court of Canada recently spoke of how the *get* problem impinged on the dignity and equality interests of religious Jewish Canadian women. *Marcovitz v. Bruker*, 2007 SCC 54.

75. Haddad, Smith, and Moore, *Muslim Women in America*, 114 (discussing the work of Azizah al-Hibri and her organization, KARAMAH: Muslim Women Lawyers for Human Rights, in educating women about marriage contracts).

76. *Aziz v. Aziz*, 488 N.Y.S.2d 123 (Sup. Ct. Queens County 1985). For this definition, see *Women's Rights and Islamic Family Law*, 188. In the case law I discuss, courts sometimes refer to *mahr* as "dowry," or "postponed dowry," rather than "dower."

second part, which is “deferred to a later date, either specified or more usually payable on the termination of the marriage by death or divorce.”<sup>77</sup> Islamic traditions regarding whether a woman is entitled to *mahr* at divorce are complex and differ based on who initiates divorce, the type of divorce at issue, and the school of interpretation.<sup>78</sup> Nonetheless, some civil courts have stated that the fact that these contracts were entered into in the context of Islamic religious ceremonies does not render them unenforceable.

An illustrative case is *Odatalla v. Odatalla*.<sup>79</sup> In that case, a New Jersey court rejected the husband’s argument that the court could not order specific performance of his obligation to pay \$10,000 in postponed dower because (1) the First Amendment doctrine of separation of church and state precluded a civil court’s review of the agreement and (2) the agreement was not a valid contract under New Jersey law. Instead, the court ruled that it could specifically enforce the terms of the agreement, which was entered into during an Islamic marriage ceremony. The court reasoned that the agreement could be enforced “based upon ‘neutral principles of law’ and not on religious policy or theories.”<sup>80</sup> Applying those neutral principles, the court held that the agreement had the elements of a valid contract. Rejecting the husband’s argument that the term

---

<sup>77</sup> *Women’s Rights and Islamic Family Law*, 188-189.

78. See Pascale Fournier, "In the (Canadian) Shadow of Islamic Law: Translating Mahr as a Bargaining Endowment," *Osgoode Hall Law Journal* 44 (Winter 2006): 649-677. See also Fadel, “Political Liberalism, Islamic Law, and Family Law Pluralism” (in this volume).

79. *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. 2002).

80. *Ibid.*, 95-96 (citing *Jones v. Wolf*, 443 U.S. 595 (1979)).

“postponed” made the contract too vague, the court found persuasive the wife’s offer of testimony concerning Islamic custom in which the sum could be demanded by the wife at any time, although it usually is not unless there is a death of the husband or a divorce.<sup>81</sup> The court also suggested that interpreting the demands of the First Amendment requires attending to the contrast between the more religiously homogenous community of the late 1700s “when our Constitution was drafted” and the more religiously and ethnically diverse “community we live in today.”<sup>82</sup>

A Florida appellate court, in *Akileh v. Elchahal*,<sup>83</sup> similarly looked to New York precedents and to testimony about Islamic law to uphold a husband’s agreement in an Islamic marriage contract to pay his wife a “postponed dowry” of \$50,000. The wife demanded payment in a divorce proceeding brought in civil court. The court concluded that the *sadaq*, the postponed dowry incorporated into the couple’s marriage certificate when they married in Florida in a Moslem ceremony, could be enforced using principles of Florida contract law. The court heard four witnesses, including Islamic experts, as to the meaning of “sadaq,” and was persuaded that the parties understood the *sadaq*’s protective function and that the wife’s right to receive it was not negated if she filed for divorce.

Some courts, by contrast, have declined to enforce the obligation to pay *mahr*. One ground has been that although in principle such an obligation could be enforced by a civil court,

---

81. *Ibid.*, 97-98.

82. *Ibid.*, 96.

83. *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. App. 1996).

a particular contract failed to satisfy general contract principles such as stating the material terms of the agreement.<sup>84</sup> A different ground is that the *mahr* agreement offends public policy because it provides an incentive for the wife to seek divorce. In *Dajani v. Dajani*, the California court declined, on public policy grounds, to enforce a foreign proxy marriage contract (entered into in Jordan) involving what the court called a “foreign dowry agreement,” under which the husband was obliged to pay the balance of the wife’s dowry either when the marriage was dissolved or the husband died. The court bypassed the conflicting expert testimony over whether the husband had an obligation to pay if the wife initiated the divorce, and, analogizing the contract to a premarital agreement, ruled that it “clearly provided for [the] wife to profit by a divorce.”<sup>85</sup>

The court found “apt” the rationale of the earlier California case, *In re the Marriage of Noghrey*,<sup>86</sup> in which the court declined on public policy grounds to enforce an agreement entered into before a Jewish religious ceremony that the husband would give his wife a house and \$500,000 or “one-half of my assets, whichever is greater, in the event of a divorce.” The *Dajani* court noted that, in *Noghrey*, the protective function of the *ketubah* -- to discourage divorce by

---

84. See, e.g., *Habibi-Fahnrich v. Fahnrich*, 1995 WL 507388 (Sup. Ct. Kings County 1995) (not reported in N.Y.S.2d).

85. *Dajani v. Dajani*, 251 Cal. Rptr. 871, 872 (Cal. App. 4th Dist. 1988). The court used the term “dowry” to refer to “a bride’s portion on her marriage,” explaining that the state of California no longer recognized the “estate of dower,” a widow’s provision on her husband’s death. *Ibid.* at 871.

86. *In re the Marriage of Noghrey*, 215 Cal. Rptr. 153 (Cal. App. 6th Dist. 1985).

making it costly for the husband and to provide economic security for the wife because the husband “could apparently divorce his wife at will” -- did not matter to the holding.<sup>87</sup> In effect, both the *ketubah* term in *Noghrey* and the Islamic dower agreement in *Dajani* encouraged divorce “by providing wife with cash and property in the event the marriage failed.”<sup>88</sup>

These cases raise difficult questions about how civil courts should grapple with a religious tradition’s protective devices adopted in light of vulnerabilities that women face due to gender asymmetry in religious law and broader cultural norms. For example, in *Noghrey* the wife testified that this economic protection was necessary because “it is hard for an Iranian woman to remarry after a divorce because she is no longer a virgin.”<sup>89</sup> She testified that in return for the agreement, she gave the groom “assurances that she was a virgin and was medically examined for that purpose.”<sup>90</sup> Like Estin,<sup>91</sup> I wonder if the courts in these cases were too inattentive to this protective function and whether they couldn’t find an analogy to protective measures of U.S. divorce law. Furthermore, as some Muslim scholars point out, had the *Dajani* court not taken such a “superficial” approach to Islamic law, it might have recognized that its “profiteering”

---

87. *Dajani*, 251 Cal. Rptr. at 872.

88. *Ibid.*

89. *Noghrey*, 215 Cal. Rptr. at 154.

90. *Ibid.*, 154-55.

91. Estin, "Embracing Tradition: Pluralism in American Family Law," 584-85.



assumptions about *mahr* did not apply uniformly to the rules about the wife's entitlement to *mahr*.<sup>92</sup>

### 3. Resolving Conflicts between Civil and Religious Divorce Law: Two Contrasting Cases

How would a modern millet system handle clashes between civil and religious laws concerning the process due when spouses seek to divorce each other? Or concerning whether divorcing spouses have a right to support or to equitable distribution of property? Would civil family law's protective rules be part of a "minimum" insisted upon by civil law or would private ordering prevail? For example, in Islamic family law, husband and wife generally maintain their separate property and, unless the contract specifies, there is no presumption of property division.<sup>93</sup> This contrasts with notions in civil family law either of community property during marriage and equal or equitable division of such property at divorce (in community property states) or, in common law states, of deferred community property in the form of equitable distribution at divorce.

To explore these questions and to illustrate how challenging questions about the interplay of religious and civil law intertwine with geographical location, family mobility, and citizenship, I will discuss two contrasting cases. In *Chaudry v. Chaudry*,<sup>94</sup> the wife filed suit in New Jersey civil court for separate maintenance and child support, alleging unjustified abandonment by her

---

92. Quraishi and Syeed-Miller, "Islamic Family Law in US Courts," 202.

93. See Fadel, "Political Liberalism, Islamic Law, and Family Law Pluralism" (in this volume).

94. *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. App. Div. 1978).

husband. The husband's defense was that he had obtained a valid divorce in Pakistan in accordance with Pakistani law. Both husband and wife were Pakistani citizens; the wife and children resided in Pakistan (but had lived in the U.S. for a few years early in the marriage), and the husband resided and practiced medicine in New Jersey.

The appellate court held there was not an “adequate nexus” between the marriage and the state of New Jersey to justify a New Jersey court awarding the wife alimony or equitable distribution. Second, it saw “no reason of public policy” not to interpret and enforce the marriage contract in accordance with the law of Pakistan “where it was freely negotiated and the marriage took place.”<sup>95</sup> Expert testimony established that alimony “does not exist under Pakistan law” and that providing for it by contract is “void as a matter of law” in Pakistan. Conversely, the agreement could have given the wife an interest in her husband’s property, but did not.

Had there been a sufficient nexus, the court observed, a New Jersey court could consider a claim for alimony or equitable distribution, even though such relief could not be obtained in the state or country granting a divorce. Location is of obvious significance for jurisdiction: the wife’s insufficient connection to the state of New Jersey (evidently due in part to husband's conduct) barred relief. Husband and wife remained citizens of Pakistan, and expert testimony indicated that such citizenship was a “sufficient basis” for a divorce judgment in Pakistan. In concluding that the lower court should have applied comity to recognize the decree, the

---

95. *Ibid.*, 1006.

reviewing court stressed: “The need for predictability and stability in status relationships requires no less.”<sup>96</sup>

An instructive example of when such a nexus *does* exist, also involving the law of Pakistan and a mobile family, is *Aleem v. Aleem*.<sup>97</sup> There, a Maryland appellate court upheld a lower court’s ruling that it need not give comity to a Pakistani *talaq* divorce and was not barred from ruling that a wife receive equitable distribution of her husband’s pension. The appellate ruling was affirmed by Maryland’s highest court. This case illustrates how migration gives rise to jurisdictional questions and the possibility of forum shopping. Husband, 29, and wife, 18, married in Pakistan after their families arranged a meeting. They never lived together in Pakistan and had been living in Maryland over twenty years at the time the wife initiated a civil divorce proceeding. They had two children, both born in the U.S. and U.S. citizens.

When the wife filed for divorce, the husband moved to dismiss on the ground that “all issues have already been decided in Pakistan.” He referred to the parties’ marriage contract, entered into in Pakistan, which called for a deferred dowry of about \$2,500 U.S. dollars. He also informed the court that, subsequent to the wife filing her action, he obtained a *talaq* divorce at the Pakistani Embassy in Washington, D.C. by pronouncing three times that he divorced his wife. The wife was served with the “Divorce Decree” and an attached notice from the “Union Council” about whether the parties wanted to reconcile.

---

96. *Ibid.*, 1005.

97. *Aleem v. Aleem*, 931 A.2d 1123 (Md. Spec. App. 2007), *aff’d*, 947 A.2d 489 (Md. 2008).

The lower court declined to give comity to the divorce, stating that it “offends the notions of this Court in terms of how a divorce is granted.”<sup>98</sup> On appeal, Maryland’s highest court (the Court of Appeals of Maryland) invoked Maryland’s Equal Rights Amendment to indicate that “a foreign *talaq* divorce provision, . . . where only the male, i.e., husband, has an independent right to utilize *talaq* and the wife may utilize it only with the husband’s permission, is contrary to Maryland’s constitutional provisions and . . . to the public policy of Maryland.”<sup>99</sup> Moreover, allowing such strategic forum shopping by the husband would defeat the local civil law’s protective purposes:

a husband who is a citizen of any country in which Islamic law, *adopted as the civil law*, prevails could go to the embassy of that country and perform *talaq*, and divorce her (without prior notice to her) long before she would have any opportunity to fully litigate, under Maryland law, the circumstances of the parties’ dissolution of their marriage.<sup>100</sup>

Thus, public policy -- including concern for due process -- justified denial of comity to the foreign divorce.

The conflict between Maryland and Pakistan’s rules concerning post-divorce property distribution afforded the ground for a second ruling: that, as a form of spousal support, the husband must pay his wife fifty percent of his monthly pension benefit until the death of either

---

98. *Aleem*, 931 A.2d at 1127.

99. *Aleem*, 947 A.2d at 500-501.

100. *Ibid.*, at 501.

party. The husband argued that by virtue of the marriage contract and the governing Pakistani law, his wife was not entitled to any portion of his pension. Both reviewing courts upheld the pension award and concluded that comity should be denied because Pakistani statutes were in conflict with Maryland's public policy about property distribution.<sup>101</sup> Under Pakistani law, the "default" was that the wife had no rights to property titled in husband's name, while under Maryland law, the "default" is that she has such rights. The Court of Special Appeals also cautioned against equating the Pakistani marriage contract with "a premarital or post-marital agreement that validly relinquished, under Maryland law, rights in marital property."<sup>102</sup>

In *Aleem*, the location of the family anchored the judicial assertion that "it is clear that this State has a sufficient nexus with the marriage to effect an equitable distribution of marital property."<sup>103</sup> By contrast to the facts in *Chaudry*, the *Aleem* court noted the couple's long residence in Maryland, the birth and rearing of their children in Maryland, and the permanent resident status of the wife, who sought the equitable distribution. There was also no plausible basis for Pakistani personal jurisdiction over the wife with respect to the *talaq* divorce. The decisions in *Aleem* express a public policy against strategic forum shopping -- which would allow a domiciliary, while continuing that domicile, to seek to "avoid the incidents of his

---

101. *Aleem*, 931 A.2d at 1130; 947 A.2d at 502.

102. *Ibid.*, 1134.

103. *Ibid.*, 1131.

domiciliary law and to deprive the other party to the marriage of her rights under that law” and of due process by traveling elsewhere to invoke another state’s jurisdiction.<sup>104</sup>

The link between the protections, benefits, and obligations of civil marriage and domicile seems important to a consideration of marriage pluralism in which a religious tribunal might not be in another country, but within the territorial boundaries of the state of which the party is a resident. How might this concern for strategic exploitation of nationality and of favorable religious law apply in a millet system within the U.S.? Would a new system of personal law mean that persons, no matter where they were located as citizens or resident aliens, would carry on their backs the religious law applicable to them? Would this regime resemble the legal pluralism of an earlier Europe, of which a ninth century bishop observed that “[i]t often happened that five men were present or setting together, and not one of them had the same law as another”?<sup>105</sup>

One criticism of the traditional millet system and its contemporary vestiges is the lack of choice in jurisdiction. One’s religious affiliation determines the religious court to which one may go. In a more contemporary system of legal pluralism, to what extent would people who are members of religious communities have rights, in terms of being free to leave that community or

---

104. Ibid., 1135 (quoting *Chaudhary v. Chaudhary*, [1985] 2 W.L.R. 350, [1984] 3 All E.R. 1017, [1985] Fam. 19, 1984 WL 282941 (CA (Civ. Div.))).

105. Tamanaha, "Understanding Legal Pluralism," 6 (quoting Bishop Agobard of Lyons as quoted in John B. Morrall, *Political Thought in Medieval Times* (Toronto: University of Toronto Press, 1980)).

to stay but seek the protection of civil law? When adults exercise those exit rights, what is the impact on the rights of their children?<sup>106</sup> Shachar proposes that what is needed is a form of multiple jurisdiction that attempts to respect membership in religious communities as well as rights of citizenship and resists affording religious tribunals a monopoly.<sup>107</sup> Considering the recent controversy in Ontario, Canada over so-called “sharia arbitration” may help to elaborate the challenges of finding a useful model of contemporary legal pluralism.

#### **IV. International Models?**

##### *A. Assessing Multi-Tiered Marriage through a Gender Equality Lens*

Training a gender lens on the comparative enterprise the Multi-Tiered Marriage Project proposes would better inform the national conversation it invites. A significant body of feminist work identifies problems of gender inequality and discrimination in legal systems that cede jurisdiction to religious tribunals or apply religious and customary family law. As Helen Irving’s recent comparative study of constitutional design concludes, when women have participated in the process of constitution-making in societies adopting new constitutions they have “consistently asked” for constitutional equality and full citizenship, including “the supremacy of the constitution over tradition and custom, including over customary laws that perpetuate

---

106. One critical question is how robust legal pluralism would reconcile civil law’s commitments to equal parental rights and responsibilities with religious law systems that have asymmetrical treatment of the rights of fathers and mothers.

107. Shachar, *Multicultural Jurisdictions*. See also the chapter by Ayelet Shachar in this volume.

subordination.”<sup>108</sup> In another comparative work on gender and constitutions, Beverley Baines and Ruth Rubio-Marin, speaking of Israel, India, and South Africa (three of Nichols’s examples), note that governmental decisions “to recognize customary or religious jurisdiction over certain relationships, often including those which are the most intimate and intense, such as marriage, divorce, custody, property, and succession,” have been of particular concern to feminists.<sup>109</sup> In that volume, Shachar and comparative constitutional law scholar Ran Hirschl argue: “[a] major obstacle to establishing women’s full participation as equals in all spheres of life in Israel . . . continues to be the intersection of gender and religious/national tensions.”<sup>110</sup> Israel’s contemporary millet system, they contend elsewhere, grants religious communities “a license to maintain intragroup practices that disproportionately injure vulnerable group members, such as women,” for example through “gender discrimination in the religious divorce process.”<sup>111</sup> To

---

108. See Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (New York: Cambridge University Press, 2008), 21.

109. Beverley Baines and Ruth Rubio-Marin, "Introduction: Toward a Feminist Constitutional Agenda," in *The Gender of Constitutional Jurisprudence*, ed. Beverley Baines and Ruth Rubio-Marin (New York: Cambridge University Press, 2005), 1-21, 12.

110. Ran Hirschl and Ayelet Shachar, "Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel: Tentative Progress through the Obstacle Course," in *Gender of Constitutional Jurisprudence*, ed. Baines and Rubio-Marin, 205-229, 220.

111. Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales," *Texas Law Review* 82 (June 2004): 1819-1860, 1840 (citing Shachar,



afford redress, Israel has made recent efforts “to enforce secular and gender egalitarian norms over the exercise of religious tribunals.”<sup>112</sup> In the constitution-building process of various nations, bringing constitutional commitments to sex equality to bear on family law has been viewed as a sign of progressive change.<sup>113</sup>

As the ongoing debate about accommodation of multiculturalism reveals, “the status of women in distinct cultural communities” is often at stake because “[w]omen and their bodies are the symbolic-cultural site upon which human societies inscript their moral bodies.”<sup>114</sup> Calls to preserve religious or cultural autonomy often target the family and women’s roles as core features that must be preserved, even as other aspects of religion and culture adapt to modernization.<sup>115</sup> In response, some women and women’s groups (such as Women Living Under Muslim Laws) contest patriarchal interpretations of culture and religion and reveal the actual

---

*Multicultural Jurisdictions*, 57-60).

112. Shachar, "Feminism and Multiculturalism: Mapping the Terrain," 134.

113. Linda C. McClain and James E. Fleming, "Constitutionalism, Judicial Review, and Progressive Change," *Texas Law Review* 84 (December 2005), 433-470 (reviewing Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004)).

114. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, NJ: Princeton University Press, 2002), 83-84.

115. See Uma Narayan, *Dislocating Cultures: Identities, Traditions, and Third World Feminism* (New York and London: Routledge, 1997); Shachar, *Multicultural Jurisdictions*.

diversity of religious laws and customs and the possibility for greater equality within particular traditions.<sup>116</sup>

If civil government is to cede authority to religious tribunals, who within the religious tradition has authority to say what constitutes religious law, and what room will there be for dissenting voices that contest the most patriarchal interpretations of religious family law?<sup>117</sup> A millet system that relegates religious women to the primary or exclusive jurisdiction of religious tribunals is not likely to facilitate such dissent, by contrast to a jurisdictional model that attempts to secure women's rights both as members of religious communities and as citizens. Shachar proposes a form of "multicultural feminism" that "treats women as *both* culture-bearers and rights-bearers."<sup>118</sup> It is attentive to the risks to women's rights to equality and full citizenship that arise both from privatizing family law (e.g., through such devices as private arbitration) and from granting public and binding authority to religious codes. These risks inform my own concerns about developing a millet system in the U.S.

*B. Canada: Membership and Citizenship in Ontario's Faith-Based Arbitration*

*Controversy*

---

116. See Linda C. McClain, "Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations," *Fordham Law Review* 72 (April 2004): 1569-1698; Madhavi Sunder, "Piercing the Veil," *Yale Law Journal* 112 (April 2003): 1399-1472.

117. See Sunder, "Piercing the Veil."

118. Shachar, "Feminism and Multiculturalism: Mapping the Terrain," 115-148, 115.

See also the chapter by Shachar in this volume.

Among his examples of alternative ways to arrange jurisdiction over marriage, Professor Nichols briefly mentions the recent controversy in Ontario over family law allowing individuals to “‘opt’ into an arbitral board of their choosing to resolve disputes -- including a religious arbitral board with binding authority.”<sup>119</sup> In Ontario, pursuant to the Arbitration Act of 1991, parties could choose the law under which the arbitration would be conducted. The law referred to the law of Ontario or of another Canadian jurisdiction, but was interpreted, in practice, to mean that “Christians, Jews, Muslims, and people of other faith traditions could arbitrate their disputes according to the principles of their faith.”<sup>120</sup> Nichols further explains that Ontario courts were required to “uphold arbitrators’ decisions if both sides enter the process voluntarily and if results are fair, equitable, and do not violate Canadian law.”<sup>121</sup>

My discussion of the religious arbitration controversy draws on the detailed report, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (“Boyd Report”), written by Marion Boyd, a former Attorney General, at the request of the Attorney General and the Minister Responsible for Women’s Issues.<sup>122</sup> A trigger of the controversy was when, in 2003,

---

119. Nichols, "Multi-Tiered Marriage," 193.

120. *Ibid.*, 193-94 (citing Arbitration Act, 1991, S.O. 1991, c. 17 (Can.)).

121. *Ibid.*, 194 (citing Arbitration Act, 1991).

122. Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (2004), hereafter cited as *Boyd Report*.

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> . For additional discussion of this controversy, see the chapters by Daniel Cere, Fadel, Shachar, and Robin

Syed Mumtaz Ali, a retired Ontario lawyer, announced the establishment of the new Islamic Institute of Civil Justice, which would conduct arbitrations according to Islamic personal law.<sup>123</sup> As Boyd notes, Ali's statements about the obligations of "good Muslims" to use these tribunals and of the Secular Court to enforce their decisions "raised acute alarm." The Report notes "intense fear that the kind of abuses, particularly against women, which have been exposed in other countries where 'Sharia Law' prevails . . . could happen in Canada," and that "[t]he many years of hard work, which have entrenched equality rights in Canada, could be undone through the use of private arbitration, to the detriment of women, children, and other vulnerable people."<sup>124</sup>

Given a mandate "to explore the use of private arbitration to resolve family and inheritance cases, and the impact that using arbitrations may have on vulnerable people," Boyd conducted an extensive, several month review.<sup>125</sup> The Boyd Report recommended that "arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases," and that "[t]he Arbitration Act should continue to allow disputes to be arbitrated using religious law." However, it qualified its support by insisting that

---

Fretwell Wilson in this volume.

123. Ibid., 3.

124. Ibid.

125. Ibid., 5.

arbitration be subject to various “safeguards,” not only those already in the Act but also many others.<sup>126</sup>

The Boyd Report sparked protest. Ultimately, as Nichols recounts, Ontario’s premier made a public announcement that “[t]here will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.”<sup>127</sup> The legislature amended the Arbitration Act so that “[i]n a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied.”<sup>128</sup> An explanatory note to the amendment states: “[t]he term ‘family arbitration’ is applied only to processes conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction. Other third-party decision-making processes in family matters are not family arbitrations and have no legal effect.”<sup>129</sup>

Presumably, from the perspective of a call to a more robust legal pluralism, this outcome is regrettable. Nichols comments: this “effectively cut off not only the rights of Muslims to settle disputes in family matters under Islamic law, but . . . the rights of other religious traditions as

---

126. Ibid., 133.

127. Nichols, "Multi-Tiered Marriage," 194.

128. Ibid., 194-95 (citing to Family Statute Law Amendment Act, R.S.O. 2006, ch. 1, s. 2.2. (Can.)).

129. Ibid. (citing to Explanatory Note).

well, including the rabbinic courts present and practicing in Ontario since 1889.”<sup>130</sup> How does this controversy and its resolution look from a feminist perspective, particularly a multicultural one that aims to honor both community membership and citizenship?

A thorough evaluation of this controversy is beyond the scope of this Chapter. My aim is to consider some salient themes in the Boyd Report and commentary on it (particularly by Canadian feminists) with a view to what light this sheds on the likely tension between gender equality as a core commitment of civil family law and religious jurisdiction in a system of multi-tiered marriage.

One notable feature of the Boyd Report is its presentation of a diversity of views among Canadian Muslims, including women’s groups, about the desirability of religious arbitration and its appropriate jurisdictional limits. Concern about the status of women in various interpretations of Islam featured in many of Boyd’s interviews, particularly when women had emigrated to Canada from nations in which Islamic law was applied in family law matters. Respondents also worried about women being pressured into choosing religious arbitration.

Canadian feminist scholar Audrey Macklin observes that, with one exception, all the women’s groups of self-identified Muslim women opposed religious arbitration. Indeed, the Canadian Council of Muslim Women, “the dominant institutional voice opposing Muslim arbitration,” successfully formed an alliance with Women Living Under Muslim Laws (WLUML), a transnational network: “With the benefit of personal experience living in Islamic states and through the global clearinghouse of data gathered by WLUML, local opponents of

---

130. Ibid., 194.

Muslim arbitration tacitly encouraged the public to situate the Ontario proposal against a transnational landscape of Muslim governance.”<sup>131</sup> This was a “politically astute and effective tactic” (albeit “arguably somewhat inattentive to national context”) because “it appealed to the fears of an uninformed public that enforcement of faith-based dispute resolution would somehow push Canada onto a slippery slope toward theocracy.”<sup>132</sup>

The Boyd Report’s handling of this issue of theocracy is also notable. Although some of Ali’s statements suggest a model of religious authority independent of state review, most Muslim groups with whom Boyd spoke stressed that Muslims have a religious duty to obey the secular law in the nation in which they reside.<sup>133</sup> Moreover, the Boyd Report characterized any demand for Muslim political supremacy or a separate Muslim state within Canada as off the table:

[U]nder the current legal structure, establishing a separate legal regime for Muslims in Ontario is not possible. Creating a separate legal stream for Muslims would require change to our justice system on a level not easily contemplated from a practical, social, legal, or political point of view. In addition, it must be clearly understood that arbitration is not a parallel system, but a method of alternative dispute resolution that is subject to judicial oversight, and is thus subordinate to the court system.<sup>134</sup>

---

131. Macklin, "Particularized Citizenship"; see *Boyd Report*, 42 (discussing WLUMML).

132. Macklin, "Particularized Citizenship."

133. *Boyd Report*, 54.

134. *Ibid.*, 88.

A millet system that relegates people of particular religious faiths to religious tribunals is also inconsistent with the Charter:

Ontarians do not subscribe to the notion of "separate but equal" when it comes to the laws that apply to us . . . A policy of compelling people to submit to different legal regimes on the basis of religion or culture would be counter to *Charter* values, values which Ontarians hold dear, and which the government is bound to follow. Equality before and under the law, and the existence of a single legal regime available to all Ontarians are the cornerstones of our liberal democratic society.<sup>135</sup>

This reasoning insists that membership in a polity must not be trumped by membership in particular religious and cultural communities. A number of the individual Muslims and Muslim groups that Boyd interviewed similarly resisted any advent of a personal law system, arguing that it would deprive them of the benefits and protections of citizenship.<sup>136</sup> Similarly, Macklin notes how "encultured women" managed to express political citizenship in the sphere of law reform, insisting that their rights as members of the broader polity be protected.<sup>137</sup>

The Boyd Report thoughtfully discusses membership and citizenship in a multicultural and democratic society in which individuals are "at the intersection of various identities."<sup>138</sup>

---

135. Ibid.

136. Ibid., 42-55.

137. Macklin, "Particularized Citizenship."

138. *Boyd Report*, 91.



Drawing on Shachar's work, it states that it is of "crucial importance" to recognize that persons are "always caught at the intersection of multiple affiliations" -- members of groups and citizens of the state.<sup>139</sup> "It is citizenship that allows membership in the minority community to take shape," the Report declares, and "the foremost political commitment of all citizens, particularly those who wish to identify at a cultural or religious level with a minority outside of the mainstream, must be able to respect the rights accorded to each one of us as individual Canadians and Ontarians."<sup>140</sup>

Women's rights are a particular concern. This focus is not accidental. Much of the public reaction to Ali's announcement concerned the possible negative impact on women. Boyd's mandate was to explore the impact of arbitration on vulnerable people. Ontario's statutes, and in particular the preamble of its Family Law Act, include, Boyd notes, "some of the strongest legislative statements about gender equality in Canadian law."<sup>141</sup>

---

139. Ibid., 92 (quoting Ayelet Shachar, "Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation," *Journal of Political Philosophy* 6:3 (1998): 285, 296). Shachar's ideas about multiple jurisdiction and citizenship are featured in the Archbishop of Canterbury's recent lecture, in which he pondered a more accommodationist stance in Britain toward Muslim law. See Dr. Rowan Williams, "Civil and Religious Law in England: A Religious Perspective."

<http://www.archbishopofcanterbury.org/1575>

140. *Boyd Report*, 92.

141. Ibid., 19 (quoting Family Law Act, R.S.O., 1990, ch. F.3, "Preamble" (Can.)).

The Report “did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues.”<sup>142</sup> This conclusion, however, seems contradicted by various testimonies that Marion Boyd heard about gender disadvantage and pressures on women to participate in such tribunals.<sup>143</sup>

Another striking feature of the Boyd Report is its discussion of what role the Canadian Charter of Rights and Freedoms, with its comparatively robust commitment to equal citizenship and religious and cultural rights, played in this debate. Boyd concludes that the Charter’s important guarantees are limits on public power, not private power, and that “[a]greeing to be bound by an arbitrator’s decision falls into the category of an action that is private and therefore, in my view, is not subject to *Charter* scrutiny.”<sup>144</sup> Government has an obligation to ensure that the legal rules concerning the breakdown of private relationships do not perpetuate gender roles and stereotypes; however, “if the participants choose not to follow that law, and instead make private arrangements, the government is not required to interfere.”<sup>145</sup> She further observes: “[n]othing in the *Charter* requires an equal result of private bargaining. Parties may choose an apparently unequal result for many reasons and may think a deal fair that outsiders think is unfair.”<sup>146</sup>

---

142. *Ibid.*, 133.

143. *Ibid.*, 39-55.

144. *Ibid.*, 72.

145. *Ibid.*

146. *Ibid.*, 73.

The Boyd Report also notes that the Charter's commitment to freedom of religion is to be interpreted to enhance the multicultural heritage of Canadians. Some respondents argued that Section 27 of the Charter not only permits but demands that multicultural communities be allowed "to use their own form of personal law to resolve disputes."<sup>147</sup> Boyd states that a commitment to enhancing the multicultural heritage "suggests respect for people's choices as long as those choices or the results are not illegal."<sup>148</sup> In a move familiar to liberalism, she continues: "People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law. In the areas where the state has chosen to allow people to order their lives according to private values, the state has no place enforcing any particular set of values, religious or not."<sup>149</sup>

These strong assumptions about choice made in "private" have drawn thoughtful criticism by Canadian feminists. For example, Pascale Fournier critiques the Boyd Report's "neo-liberal vision" of choice -- that Muslim women "should be free to live as they wish in the private sphere" -- because it "disregards the overall socioeconomic and distributive background of Muslim women living in Canada."<sup>150</sup> She notes such factors as Muslim women's "susceptibility to marriage at a younger age, the precariousness of immigration status, the higher

---

147. Ibid., 72.

148. Ibid., 74.

149. Ibid., 75. Ronald Dworkin's account of liberalism is one example.

150. Fournier, "In the (Canadian) Shadow of Islamic Law," 659.

rate of unemployment, and the segregation into sectors of low-income jobs.”<sup>151</sup> She faults the Boyd Report’s “abstract vision of multiculturalism,” which is attentive to issues of identity and religious freedom but inattentive to the broader landscape in which religious subjects live. Lost in the celebration of “protecting choice” is attention to “the distributive stakes involved for Muslim women in allowing religious law through the Arbitration Act” and issues of gender equality and economic fairness.<sup>152</sup>

Fournier’s critique invites attention to the relationship between family law’s default rules and the scope of private choice. In the United States, for example, current constitutional law bars states from enacting laws that require a gendered division of labor in the home or return to the common law’s model of marriage as a gender hierarchy. But U.S. constitutional law does not bar individuals from choosing to order their family life a particular way, subject, of course, to legal protections against violence, child abuse, and neglect.<sup>153</sup> At the same time, family law has adopted default rules that reflect an ideal of marriage as an economic partnership and, through doctrines like equitable distribution of property at divorce, serve (not always very well) to alleviate some of the economic vulnerability that women who choose more traditional gender roles may suffer at divorce.

A similar dilemma arises in the arbitration context: what if people, in dissolving their marriages, choose not to avail themselves of the economic protections of civil family law’s rules

---

151. Ibid.

152. Ibid., 677.

153. McClain, *Place of Families*, 78-79.

concerning property distribution and spousal support? Macklin argues that the controversy over faith-based arbitration needs to be understood in the broader context of the extent to which Canadian law allows parties to “opt out” of family law’s default positions of protecting the vulnerable and promoting gender equality when it allows and encourages parties to arbitrate and to make domestic contracts concerning matters relating to property and support.<sup>154</sup> It is important not to exaggerate the protection that civil law’s default rules afford, in view of this ability to opt out.<sup>155</sup>

The broader move to look to the relationship between default rules and the latitude for opting out is a cogent one because it invites attention to whether courts may compromise default rules of gender equality in the name of upholding freedom of contract.<sup>156</sup> This move helps guard against an automatic assumption that civil law is more protective of gender equality and fairness than religious law. At the same time, Shachar cautions that the analogy between religious

---

154. See Audrey Macklin, "Privatization Meets Multiculturalism: The Case of Faith-Based Arbitration," (unpublished paper presented at Annual Meeting of the Canadian Political Science Association).

155. She writes critically (as have other Canadian feminists) of the recent Canadian Supreme Court decision, *Hartshorne v. Hartshorne*, 1 S.C.R. 550, 2004 SCC 22 (2004), in which the court upheld a marital agreement concerning property distribution that independent legal counsel advised the wife-to-be was “grossly unfair,” and the record, the dissent argued, suggested the wife was more vulnerable and in a position of relative dependence.

156. Shachar, "Feminism and Multiculturalism: Mapping the Terrain," 139.

tribunals and secular courts upholding freedom of contract may be overly simple if it suggests “that religious pressures are no different in kind than economic or related pressures imposed on women in our society.”<sup>157</sup> It may discount “the communal pressures that may be imposed on a devout believer to comply with what is presented as a *religious duty*.”<sup>158</sup>

All of this feminist commentary offers useful avenues of inquiry for considering possible models of legal pluralism in the U.S. Within the U.S., standards for when to uphold a premarital or marital contract vary considerably, with a robust commitment to freedom of contract (even in the face of substantive unfairness) on one end of the spectrum and a protective regime that insists on both procedural and substantive unfairness (or at least a very informed waiver of rights) on the other.<sup>159</sup>

What might be said in favor of Boyd’s report? Would the safeguards have been sufficient? A liberal model that recognizes agency by allowing choice, even incorrect ones, puts a high premium on fostering informed choice. Thus, the Boyd Report recommended many

---

157. Ibid.

158. Ibid.

159. For a robust freedom of contract approach, see *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990); by contrast, California’s statutory law and the American Law Institute’s *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002) take a more protective approach. The ALI rejects a contract analysis because intimate bargaining is different from other sorts of bargaining. For further discussion of the ALI, see the chapter by Bix in this volume.

safeguards to facilitate informed choice.<sup>160</sup> The Report also calls for a legal education campaign to inform the public in general, and vulnerable women in particular, about their legal options for resolving disputes. Such a campaign would include education about “general rights and obligations under the law,” “family law issues,” ADR, the Arbitration Act, “immigrant law issues,” and “community support.”<sup>161</sup> All of these measures aim to ensure that choice is both informed and voluntary. These assumptions about the power of Muslim women’s groups to carry out such educational efforts and the likely impact of such a campaign may be too robust, as some feminist commentators note.

Would it have been better, from the perspective of fostering equal citizenship and religious freedom, if the Boyd Report had been adopted? Should the state have tried to harness religion by allowing religious arbitration, but subject to state-imposed procedural and substantive limits? What if, Beverley Baines asks, Canadian feminists, particularly Muslim feminists, had “expended more energy on the question: what is needed to safeguard faith-based arbitration for women?”<sup>162</sup> The fact that Ontario law now specifies that arbitration that takes place pursuant to

---

160. *Boyd Report* 21 (citing Family Law Act, R.S.O. 1990, ch. F.3, s. 56(4), "Domestic Contracts" (Can)); see Macklin, "Privatization Meets Multiculturalism," 133-36.

161. Macklin, "Privatization Meets Multiculturalism," 138.

162. Beverley Baines, "Must Feminists Identify as Secular Citizens?" in Linda C. McClain and Joanna L. Grossman, eds., *Gender Equality: Dimensions of Women's Equal Citizenship* (New York: Cambridge University Press, 2009) (noting that the Canadian feminist group Women's Legal Education and Action Fund (LEAF) and some Canadian Muslim feminists

religious law is *not* family law arbitration (that is, it does not carry any civil effects does not mean that parties will not pursue religious arbitration.<sup>163</sup> It will, instead, as Estin notes in this Volume, be “unofficial family law” and the parties will lack whatever protections they would have had if Boyd’s recommendations were adopted.<sup>164</sup> These mediated solutions, Shachar argues, may “never be subject to regulation by state norms if they remain unchallenged by the parties.” A cost of this outcome is that it leaves “extremely vulnerable precisely those women who may be most in need of joint-governance in the regulation of family affairs,” women who “for either economic or cultural reasons might feel obliged to have at least some aspects of their marriage and divorce regulated by religious principles.” By contrast, a “joint governance” solution might have helped address this vulnerability by facilitating a process of reform from within a religious tradition. As she explains:

the decision of the tribunal will not become legally binding and enforceable if it breaches the basic protections to which each woman is entitled by virtue of her equal citizenship status . . . [T]his resolution may eventually prove to offer effective, non-coercive measures to encourage a process of “change from within” the religious tradition.<sup>165</sup>

---

did pursue this strategy).

163. See Shachar, "Feminism and Multiculturalism: Mapping the Terrain"; Estin, "Unofficial Family Law."

164. Estin, "Unofficial Family Law."

165. Shachar, "Feminism and Multiculturalism: Mapping the Terrain," 142. See also the



## V. Conclusion

In this Chapter, I have argued that the call for multi-tiered marriage, or a “robust” modern millet system, in the U.S. should be resisted. I have raised questions about whether there actually is such a demand in the U.S. I contrasted two possible strategies for giving more voice to religious models of marriage: securing congruence between religious and civil law by instantiating religious law in civil law or recognizing the binding authority of religious tribunals to adjudicate family law. Normative pluralism is indeed everywhere, including in the “unofficial” family law that shapes many people’s lives. Translating this into more legal pluralism, however, warrants concern. U.S. courts already give official, or civil, effect to certain aspects of religious family law. But they also decline to do so based on certain limiting principles rooted in concerns for due process and for the substance of civil family law’s commitments.

Civil law’s concerns for gender equality and for protecting vulnerable parties are salient reasons to be cautious about new forms of legal pluralism. Any system of “multi-tiered marriage” that does not attend adequately to the equal protection and equal citizenship of women as well as men conflicts with the commitments of the U.S. family law system and constitutional principles. Moreover, lending the state’s imprimatur to models of family based on male authority and female submission or on other forms of gender privilege and preference may educate children as to the legitimacy of those models in broader society. This implicates the state’s interest in children as future citizens. As the recent controversy over faith-based arbitration in

---

chapter by Shachar in this volume.

Ontario suggests, what is needed is a model of legal pluralism that holds fast both to the value of religious membership and to the rights and duties of equal citizenship.