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Marriage Pluralism, Family Law Jurisdiction, and Sex Equality in the United States

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Chapter Three Marriage Pluralism, Family Law Jurisdiction, and Sex Equality in the United States

Introduction

Gender justice remains unfinished business. How is family law, in particular the relationship between civil and religious family law, relevant to the challenge of securing gender justice both in the United States and around the globe? This question has received comparatively little attention when measured against the by-now voluminous literature on whether multiculturalism and feminism (and sex equality) are in conflict, as well as on how constitutional democracies should accommodate members of minority groups, including religious minorities, within their borders. It should receive more, for as some feminist contributors to this literature explain, family life and family law are arenas in which women may experience special vulnerabilities and where commitments to religious freedom and to sex equality may conflict.[1] How do constitutional democracies regulate family life and allocate jurisdiction over family law in a way that honors important public values and shows respect for citizens — and other members of the polity — who have multiple sources of affiliation, including to religious communities whose norms shape family life?[2]

In recent years, controversies over veiling are perhaps the most visible example of an evident clash between religious norms and civil norms of sex equality. What is at stake, for example, when women and girls in constitutional democracies are barred, in the name of constitutional values and democratic principles such as secularism, neutrality, and gender equality, from wearing the veil in certain public settings? What happens when such restrictions seem to disregard women's agency and conscientious religious practice? Barring

women from veiling contrasts with another potent example of the apparent clash between sex equality and religion: the specter, in some Islamic countries, of forced veiling and punishments exacted on women for not veiling or violating norms of modesty.

The multiple meanings of the veil continue to engender political and scholarly debate.[3] The most dramatic recent examples of the apparent clash between sex equality as a political value and veiling as a religious commitment come from France. As Joan Scott, in her study of the veiling controversy in France, observed, one prominent rationale for targeting the veil is its symbolic clash with sex equality: in "removing *the* sign of women's inequality from the classroom," French lawmakers were "declaring that the equality of women and men is the first principle of the Republic."[4] One notable news story was of the denial of citizenship to a veiled Muslim woman, Faiza Silmi, on the grounds of "insufficient" assimilation to French values.[5] Mary Anne Case points out, however, that although the press reports made it seem as though the mere fact of Silmi's wearing a niqab barred her from citizenship, and her lawyers framed the issue as a clash between her religious practices and the French value of *laicite*, "the record highlights 'in particular the equality of the sexes' as one of 'the essential values of the French community' she had failed 'to make her own.'"[6]

In June of 2009, in a remarkable "state of the nation" speech, President Sarkozy, in effect, declared war on the burka, asserting that "in our country we cannot accept that women be prisoners behind a screen, cut off from all social life, deprived of all identity."[7] Again, the symbol itself seemed an affront to French values: "The burka is not a religious sign. . . . It is a sign of subservience, a sign of debasement. It will not be welcome on the territory of the French republic."[8] Somewhat contradictorily, he also called for a "debate" on the issue in which "[a]ll views must be expressed," while admonishing Parliament that "we must not be ashamed of our values, we must not be afraid of defending them."[9] Closer to home here in North America, a stated concern both with loss — or concealment — of identity and with the evident clash between veiling and a message of equality between women and men featured in the recent call by the Canadian Muslim Congress for the Ottawan government to ban women wearing the burka and niqab in public. The Congress further contended that such practices are rooted in culture, rather than religion.[10]

Another arena of evident conflict between religious law and practice and civic norms of sex equality is the relationship between religious and civil fam-

ily law, even though it less frequently spills into news headlines. This is the subject of my chapter. Pressing questions include the respective jurisdiction of religious and civil courts, whether religious law should be accommodated in civil courts, and how pluralistic or multicultural a society should be when it comes to regulating the family. One area of tension is between terms of religious family law that seem to be patriarchal and diverge from secular family law's principles of gender neutrality and equal spousal and parental rights and responsibilities. As with the veiling controversy, religious family law can take on symbolic importance as an arena of troubling sex inequality. So, too, with the contrast between restricting versus compelling veiling, women's agency may be at stake both in civil rules, on the one hand, that bar them from resorting to religious tribunals or seeking civil enforcement of religious family law and, on the other, that consign them to such tribunals at the expense of access to civil courts and the remedies afforded by civil family law.[11]

The challenging question of the relationship between religious and civil family law received international attention when, on February 7, 2008, the archbishop of Canterbury gave what proved to be a controversial lecture on civil and religious law in England. He explained that his aim was "to tease out some of the broader issues around the rights of religious groups within a secular state, with a few thought[s] about what might be entailed in crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom."[12] In this lecture, he explained that within Britain, there are communities "which, while no less law-abiding than the rest of the population, relate to something other than the British legal system alone." Noting that this issue is not peculiar to Islam, but also about other faith groups, he used the example of the place of Muslims in British society as a way to open up the discussion to wider issues about the uncertainty over "what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes."[13]

Other contributors to this volume make reference to the archbishop's lecture. I note it here, as they do, to suggest the prominence given in recent years to the question of the relationship between civil and religious law. It also usefully presents in a highly public — and publicized — way how this relationship raises issues about the meaning, rights, and protections of citizenship, especially women's equal citizenship, and the meaning of and sources constituting individual and group identity. The swift reaction to the archbishop's

remarks — including calls for his resignation — suggests how fraught these issues are and how readily fears of "extreme applications of Shariah . . . in some Muslim countries"[14] make serious conversation about accommodation and legal pluralism difficult.

After the archbishop's speech, press coverage in the United States opened, as it were, a window for readers into a world of "Islamic justice," in which Islamic tribunals or councils hear divorce cases.[15] One news story details that Islamic councils in Britain have expanded significantly and seen a large increase in cases and that "almost all of the cases involved women asking for divorce." Women's success in their cases is tempered by expression of concerns about their vulnerability under this system. Critics "point to cases of domestic violence in which Islamic scholars have tried to keep marriages together by ordering husbands to take classes in anger management, leaving the wives so intimidated that they have withdrawn their complaints from the police."[16] A founding director of a women's help group, Fatima Women's Network, charges that such women are "hostages to fortune" and says of the courts, "There is no outside monitoring, no protection, no records kept, no guarantee that justice will prevail."[17] That one source of protection is the woman's father seems, from a feminist point of view, simply to highlight this vulnerability.

This news story reveals a form of legal pluralism — side by side civil courts, there are religious courts in Britain granting religious divorce. It also raises the issue of religious women's agency and vulnerability. Increasingly, women seek out these courts to obtain a religious divorce when their husbands do not want one; and yet, the patriarchal aspects of this system are evident in descriptions of the greater weight given to the women's father's testimony than hers and the fact that it is (apparently) solely male scholars who sit in these councils or tribunals. Moreover, there are glimpses of ways in which religious law itself favors men over women. Women's very recourse to these tribunals stems from the fact that a "woman needs the blessing of a scholar of Islamic jurisprudence to be divorced, while a man can simply say three times that he is divorcing his wife."[18]

Finally, the news story introduces the complicated issue of the relationship between civil and religious authority: religious divorces are not civil divorces, and "most of the [Islamic] courts' judgments have no standing under British civil law." This does not mean that all religious tribunals in Britain lack capacity to issue rulings with civilly binding effects. Longstanding are ecclesiastical

courts of the Church of England and *beth din* courts for British Jews. Because they comply with Britain's arbitration law, the latter courts can function as an "official court of arbitration in the consensual resolution of other civil disputes, like inheritance or business conflicts." The story implies that Islamic councils could do the same thing but notes the potential for a clash between principles of civil law and religious law and the supremacy of British law in such a conflict. Thus, the British justice minister explains this latitude: "There is nothing whatever in English law that prevents people abiding by Shariah principles if they wish to, provided they do not come into conflict with English law;" but British law would "always remain supreme." He further states, "Regardless of religious belief, we are all equal before the law."[19]

As these stories from France and Britain illustrate, this issue of family law jurisdiction lends itself to many different framings of what is at stake in these conflicts. One is the struggle of minority communities to preserve, identify, and live according to their values. Another is a clash between religious and civil norms about family life and the status of men and women in the family and broader community. Another framing stresses the meaning of legal pluralism: How much sovereignty and authority should religious courts have in a society with a secular legal system? Should civil courts give civil effects to rulings of religious courts? Do civil courts have authority to adjudicate the terms of a religious marriage contract? What happens when civil rules about family dissolution conflict with those of religious law? Does, or should, secular law — and its commitments to equality — "reign supreme"?

For the last few years, I have participated in an interdisciplinary scholarly conversation (called "The Multi-tiered Marriage Project") about whether the United States should move toward a more robustly pluralistic system of family law, in which civil courts more readily share jurisdiction with religious courts.[20] A basic premise of that project is that the United States could find many instructive examples of such pluralism in other legal systems. While I do not deny the value of learning from other legal systems, I argue that a substantial body of feminist work on those very legal systems urges caution about transporting such models to the United States. In this chapter, I examine the lure of pluralism and situate the call for more pluralism in the context of the current system of U.S. family law. It may not be evident that, in the United States, there is already a notable degree of intermingling of religious and civil family law. I illustrate this by examining the interplay of civil and religious

marriage in the ongoing controversy over same-sex marriage. I also canvass some of the ways that courts in the United States already do enforce religious rulings and the terms of religious marriage contracts. At the same time, core commitments of civil family law, including to sex equality, limit the extent of such accommodation. To use the terms introduced in Martha Minow's contribution to this volume, sometimes there is "convergence" between secular and religious norms, and no evident "compromise" of principles.[21] But sometimes, courts must limit accommodation because they cannot compromise on core family law principles. I conclude that a call for legal pluralism in the form of a modern millet system in the United States clashes with basic political and family law norms of sex equality.

The Call for More Pluralism and Shared Jurisdiction in U.S. Family Law

As Brian Tamanaha observes, "Legal pluralism is everywhere."[22] 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."[23] But problems with defining and understanding legal pluralism continue to "plague" its study.[24]

What of legal pluralism in family law? 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."[25] As people who form families cross geographic and national boundaries, lawyers and courts routinely must deal with 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, the "unofficial family law"

of religious tribunals, rules, customs, and the like.[26] 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.[27] 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.[28]

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 Professor Joel Nichols, of St. Thomas University, proposes that, in the United States, "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."[29] He finds, already within the United States, some forms of a multi-tiered system: covenant marriage, available in three states, and New York's *get* statutes.[30] 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."[31]

To usher in more legal pluralism in the United States, Nichols proposes to learn from other legal systems. He spins the globe and finds many instructive ways to share jurisdiction over marriage and divorce law, such as multiple systems of personal law, in which religious tribunals have jurisdiction (as in India, Kenya, and Israel); legal recognition of customary marriage (as in South Africa); and allowing religious bodies to arbitrate family law matters (an issue of recent controversy in Ontario, Canada). [32]

What form would a new jurisdictional pluralism in U.S. family law take? Nichols proposes a "more robust millet system."[33] 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 overarching

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 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.[34] Feminist scholars highlight the importance of "encultured women's" claims of national and constitutional citizenship — or "public citizenship" — as a strategy for redressing sex inequality, even as such women affirm the value of membership in religious and cultural groups.[35] Will a new jurisdictional pluralism accommodate this dual membership? Training a gender lens on the question of jurisdictional pluralism would better inform a national conversation on the subject.

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."[36] 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.[37] 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.

This chapter first asks precisely what form of marriage pluralism in the United States 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 United States 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 United States and what tension points might arise. Finally, it concludes by asking what lessons this might teach about the possibilities for more pluralism in U.S. family law.

Whither the Demand for More Marriage Pluralism in the United States?

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 United States 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 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.[38] 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.[39]

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 for states 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.[40] 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.[41] 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 of its real meaning."[42] These opponents of redefining 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.[43] An architect of Louisiana's law, Katherine Shaw Spaht, describes covenant marriage as a step toward a "robust pluralism" in marriage and divorce law but 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.[44] (For this reason, Spaht and some proponents of covenant marriage express disappointment that religious authorities have not embraced it and required members to enter into this model of marriage.)[45] Moreover, requiring premarital counseling and specifying that it may be performed by religious functionaries draw attention to the unique capacity of religious communities to preserve marriages.[46] 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.[47]

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. In contrast to some legal systems (like France or the Netherlands), in the United States, religious leaders may perform

marriage 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.[48] On the other hand, if religious leaders or couples do not comply with these civil formalities, the resulting religious marriage generally will not have civil effects.[49] 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.[50]

Within the United States, 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.[51] 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.[52] 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 particular religious tradition at issue or out of an overzealous view of separation of church and state. Some Islamic scholars, for example, critique civil courts in the United States and Canada for ignorance about Islamic traditions and for failure to adjudicate properly claims arising from Islamic marriage contracts.[53] 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.[54] Thus, a participant in the Multi-tiered Marriage Project, Mohammad Fadel, asserts that Muslims have a "keen interest" in a pluralistic system of family law but concludes that "orthodox Muslims' interests in family law pluralism are better served through marginal reforms to the current family law regime" than by "more robust proposals that would award religious institutions greater jurisdiction over family life."[55] 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.[56]

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,[57] America's history reveals the strong influence of Christian conceptions of marriage on the secular law.[58] 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."[59] 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 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.[60] 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.[61]

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.[62] 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*.[63]

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. 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 — that is, equal access to — civil marriage and for protecting religious freedom.[64] Making this

distinction follows from constitutional principles and from liberal political principles about the fact of reasonable moral pluralism and toleration of religious difference.[65] Furthermore, the nature of civil marriage has evolved over time. As 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.[66] 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.[67]

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.[68] 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 book *American Religions and the Family: How Faith Traditions Cope With Modernization and Democracy*,[69] 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 about equality of the sexes and marriage as a partnership.[70] 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.[71] (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.[72] 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, some religious groups embrace traditional gender roles as part of an "oppositional" stance to American culture and the perceived weakening of family values.[73] 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.[74]

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."[75] 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."[76] Generational differences are also a relevant factor. One study reports that "[y]oung Muslims in 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."[77]

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.

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 United States 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.[78] In this chapter, I can discuss only a handful of illustrative cases about marriage and divorce and must direct readers elsewhere for a more complete survey of this body of multicultural family law.[79]

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.[80] 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."[81] 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."[82]

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[83] — 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 these tensions between civil and religious law?

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 contracts, these cases generally involve seeking to enforce an agreement to submit to religious arbitration.[84] 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 *pre*marital agreements, although courts sometimes mistakenly treat them as such.[85]

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.

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*.[86] In that case, New 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.[87] 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, would not be religiously divorced and thus able to remarry and have legitimate children until her husband granted her a Jewish divorce decree, a *get*.[88]

Jewish tradition refers to women whose husbands do not give them a *get* as *agunah*, "a chained woman" (chained to the dead marriage).[89] 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."[90] The New York legislature subsequently enacted two statutes aimed at addressing the plight of the *agunah*.[91]

Nichols offers the *get* statutes as an example of multi-tiered marriage,[92] 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.[93] Broyde 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" — "ensuring that all of [New York's] citizens are in fact free to remarry after they receive a civil divorce."[94]

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.[95] In this volume, Minow argues that though some may see these statutes as an objectionable compromise because New York acknowledges the parallel existence of a religious legal system, New York actually aligns the two systems by extending protection for religious women while holding fast to "its gender equality norm."[96] Lisa Fishbayn Joffe's analysis of Canada's *get* statutes finds a similar concern on the part of civil authority both to ameliorate disadvantages for religious women and to cooperate with religious authorities to solve the problem.[97]

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.[98]

Some state courts (among them, New York) have enforced a wife's right in Islamic marriage contracts to *mahr*, a bridal gift or dower.[99] 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.[100] 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*.[101] In this 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 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."[102] Applying those neutral principles, the court held that the agreement had the elements of a valid contract.[103] Rejecting the husband's argument that the term "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.[104] The court also suggests 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."[105]

A Florida appellate court, in *Akileh v. Elchahal*,[106] 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, a particular contract failed to satisfy general contract principles such as stating the material terms of the agreement.[107] An alternate ground for nonenforcement, under contract principles, illustrated in a recent Ohio appellate decision, is that the husband "entered into the marriage contract as a result of overreaching or coercion." Analogizing to case law concerning when a prenuptial agreement will be invalid, the court noted that the husband did not have a chance to consult an attorney, was presented with the agreement just a few hours before the ceremony, and signed only because he was "embarrassed and stressed."[108]

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*,[109] the

California court declined, on public policy grounds, to enforce a foreign proxy marriage contract (entered into in Jordan) involving an Islamic dower 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 or not 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."[110]

The court found "apt" the rationale of the earlier California case, *In re the Marriage of Noghrey*,[111] 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 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.[112] 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."[113]

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 *Noghreyi*, 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."[114] 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."[115] Like Estin, 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.[116] 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" assumptions about *mahr* did not apply uniformly to the rules about the wife's entitlement to *mahr*.[117]

In some recent cases, judges seem comfortable handling claims based on Islamic marriage contracts and capable of making fine distinctions when necessary. For example, in a Texas case, *Ahmed v. Ahmed*, an appellate court

considered a trial court ruling that the husband's agreement, in a *nikah nama*, Islamic marriage certificate, to pay a deferred *mahr* of $50,000 was a marital contract executed in contemplation of a forthcoming marriage and was a "valid, binding, and enforceable contract" under the Texas statutory law governing premarital agreements.[118] On appeal, the husband argued that the *mahr* agreement could not be enforced as a *premarital* agreement because the parties were already married in a civil ceremony six months *before* the religious ceremony and "the terms of the *mahr* agreement are too vague and uncertain to be enforced," because he could not understand his obligation under the contract. The appellate court agreed with his first argument and rejected the wife's argument that the date of the religious ceremony controlled: "if the legal requirements for a ceremonial marriage are satisfied, Texas does not distinguish between civil and religious marriage ceremonies." Thus, the parties were spouses, not "prospective spouses," at the time they signed the *mahr* agreement.[119] The former wife argued in the alternative that the *mahr* agreement could be enforced as a "postmarital partition and exchange agreement" under other provisions of Texas's family law statutes.

The court rejected the husband's second argument, finding that the agreement was "sufficiently specific." It looked to "the relationship between the parties and the circumstances surrounding the contract" on this question. Both parties "were raised in the Islamic faith"; the former wife testified that "the *mahr* agreement is a contract based on Islamic custom and religious principles," a promise of an amount to be paid to the bride and must be paid at the time of a divorce, if not given before. Husband offered no testimony, and the reviewing court noted that if wife's testimony were credited by the trial court, then the evidence established that the parties understood the agreement and that the terms were sufficiently specific enough to be enforced.[120] However, wife faced a further hurdle because of failure to meet other statutory requirements for a partition and exchange agreement. Nonetheless, the court exercised its "broad discretion" to remand because "it serves the interest of justice to allow [the wife] another opportunity on remand to prove that the *mahr* agreement is enforceable on grounds other than as a premarital agreement, be it a partition and exchange agreement or otherwise" — theories of enforcement not fully explored in the earlier proceedings.[121]

Another interesting feature of some recent case law is that it is not always the husband who seeks to thwart the relief a wife obtains in civil court. Nor,

in the case of a migratory couple, is it always the husband who is more acclimated and economically successful in the United States. For example, in *Mir v. Birjandi*, an Ohio appellate court considered the wife's argument that the trial court lacked jurisdiction to issue a divorce because, while the civil case, initiated by the husband, was pending in Ohio, she obtained a divorce in an Iranian court.[122] She argued that the Ohio court erred in awarding her husband spousal support, challenged the court's division of marital assets, and argued that it abused its discretion in "ordering her to return the $17,000 *mahr* that [husband] paid to her in order to obtain a release from Iran," where he was allegedly detained (after traveling there) due to the wife's divorce proceedings initiated in Iran.

The couple married in Iran in 1982 but soon immigrated to the United States. The wife earned a PhD in engineering and worked for a military technology institute. The husband, an agriculture engineer in Iran, had difficulty finding work in his field in the United States, due to his poor English skills. He worked as a tow truck driver and taxi driver to support the family. By the time of divorce, the wife earned "substantially more income."[123]

The appellate court affirmed the trial court's ruling that the Iranian divorce decree was not binding on the court. The wife argued, with respect to the order that she pay her ex-husband spousal support for ten years, that the court wrongly imputed income to her based on her prior income although she quit her job during the course of the trial. Testimony suggested she would not have been renewed in her current job because of poor performance and difficulty getting security clearance due to her dual citizenship. The trial court did not elaborate reasons for the award but apparently based it on the fact that the husband's income was $18,200 per year, while the wife's was $118,000–120,000. It did not credit her testimony that medical conditions prevented her from working. On appeal, the court concluded that the trial court could reasonably have concluded that the husband, who soon after filing for divorce had moved to a new city, was "not capable of earning substantially more income," while the wife "was capable of finding another engineering position" in which she would have earnings comparable to her previous job.

With respect to the issue of *mahr*, the court noted, "In Iran, *mahr* is money paid to the bride by the groom or his family for the financial protection of the bride in case of divorce."[124] The court noted the husband's testimony that he paid the *mahr* in Iran (using his credit cards) because he was not

allowed to leave the country unless he did so. The reviewing court found no error in crediting the husband for this payment as part of the division of marital assets.

Notably, the reviewing court upheld the ruling that the wife pay the husband's attorney's fees and costs, stressing the inequality of their economic positions and her misconduct in the litigation process. She had all the marital assets in her name; during the divorce process, he "was forced to live on credit cards, low-wage employment, and charity." Implicitly, the court was critical of her resort to the Iranian forum, which required him to incur credit card debt to secure release from Iran.[125]

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.[126] 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*,[127] the wife filed suit in a New Jersey civil court for separate maintenance and child support, alleging unjustified abandonment by her 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 United States 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."[128] 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 it 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 reviewing court stressed, "The need for predictability and stability in status relationships requires no less."[129]

An instructive example of when such a nexus *does* exist, also involving the law of Pakistan and a mobile family, is *Aleem v. Aleem.*[130] 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. The husband, at age twenty-nine, and wife, eighteen, 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 United States 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.

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."[131] 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."[132] Moreover, allowing such strategic forum shopping by the husband would defeat civil law's protective purposes if the process to which a wife would be entitled under state law would be denied to her:

> 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.[133]

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

The conflict between Maryland's 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 50 percent of his monthly pension benefit until the death of either party. The husband argued that by virtue of the marriage contract and governing Pakistani law, his wife was not entitled to any portion of his pension. Both reviewing courts upheld the pension award and concluded that because Pakistani statutes were in conflict with Maryland's public policy about property distribution, comity should be denied.[134] 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.[135] 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."[136]

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."[137] By contrast to the facts in *Chaudry*, in *Aleem* the 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. Nor was there any 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 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.[138]

This point about 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 United States? 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"?[139]

One criticism of the traditional millet system and of 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 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? Thus, 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. 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.[140] These concerns indicate the challenges of finding a useful model of contemporary legal pluralism.

International Models? Assessing Jurisdictional Pluralism 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 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 subordination."[141] 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.[142] 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."[143] 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."[144] To afford redress, Israel has made recent efforts "to enforce secular and gender egalitarian norms over the exercise of religious tribunals."[145] 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.[146] Frances

Raday argues that human rights norms of women's equality are translated into a "normative paradigm," within states, in such constitutional law, although there is often a clash between these norms and "traditionalist religion and culture, especially as they bear on family law."[147]

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."[148] 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.[149] 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 diversity of religious laws and customs and the possibility for greater equality within particular traditions.[150]

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?[151] 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."[152] 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 United States.

Conclusion

In this chapter, I have argued for greater attention to how the interplay between civil and religious jurisdiction over family law bears on women's equality. I have 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. I have concluded that the call for multi-tiered marriage, or a "robust" modern millet system, in the United States should be resisted. 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 and to broader legal and political principles of sex equality.

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. 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.

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Notes

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1. For example, Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

2. Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law," *Theoretical Inquiries in Law* 9 (2008): 573.

3. See Lila Abu-Lughod, "Do Muslim Women Really Need Saving?" *American Anthropologist* 104 (2002): 783.

4. Joan Scott, *The Politics of the Veil* (Princeton, NJ: Princeton University Press, 2007): 131; see also a review of Scott's work, in Anita L. Allen, "Undressing Difference: The Hijab in the West," *Berkeley Journal of Gender Law & Justice* 23 (2008): 208, 221.

5. Mary Anne Case, "Feminist Fundamentalism and Constitutional Citizenship," in *Gender Equality: Dimensions of Women's Equal Citizenship*, ed. Linda McClain and Joanna L. Grossman (Cambridge: Cambridge University Press, 2009): 114 (citing the Conseil d'Etat Decision in the case of Mme. M., 286798, delivered June 27, 2008).

6. Ibid., 114 (quoting from Case's own translation of the official French version of the conclusions of Government Commissioner Mme. Prada Bordenave, adopted by the Counseil d'Etat, available at http://www.conseil-tat.fr/ce/jurispd/conclusions/conclusions_286798.pdf). For an example of such media coverage, see Karen Bennhold, "A Veil Closes France's Door to Citizenship," *New York Times,* July 19, 2008, A1.

7. Charles Brenner, "Burka Makes Women Prisoners, says President Sarkozy," *Times Online*, June 23, 2009, accessed September 8, 2011, http://www.timesonline.co.uk/tol/news/world/europe/article2600320.ece.

8. Ibid.

9. Ibid.

10. See "Canadian Muslim Group Calls for Burka Ban," accessed October 22, 2011, http://www.alarabiya.net/save_print.php?print=1&cont_id=87402&lang=en; "Muslim Group Calls for Burka Ban," CBC News, accessed

October 29, 2009, www.cbc.ca/canada/story/2009/10/08/canada-muslim-burka-niqb-ban-government.html.

11. Contributors to this volume detail the controversy over religious arbitration of family law disputes in Ontario.

12. Rowan Williams, "Archbishop's Lecture — Civil and Religious Law in England: A Religious Perspective," February 7, 2008, accessed September 8, 2011, http://www.archbishopofcanterbury.org/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective.

13. Ibid.

14. John F. Burns, "Top Anglicans Rally to Besieged Archbishop," *New York Times*, Feb. 12, 2008, A7.

15. Elaine Sciolino, "Britain Grapples with Role for Islamic Justice," *New York Times*, Nov. 19, 2008, A6. I use these news items to illustrate the framing of these jurisdictional tensions in the press, not for the truth of the matter.

16. Ibid.

17. Ibid.

18. Ibid.

19. Ibid.

20. The result of that conversation is a book, Joel A. Nichols, ed., *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge: Cambridge University Press, 2011). My contribution to that volume, on which this chapter draws, is entitled "Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship."

21. Martha Minow, "Principles or Compromises: Accommodating Gender Equality and Religious Freedom in Multicultural Societies," chapter 1 in this volume.

22. Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 29 (2007).

23. Ibid.

24. Ibid.

25. Ann Laquer Estin and Barbara Stark, *Global Issues in Family Law* (St. Thompson, MN: Thompson/West, 2007): 1, 14.

26. Ann Laquer Estin, "Unofficial Family Law," in Nichols, *Marriage and Divorce in a Multicultural Context*, 92.

27. Tamanaha, "Understanding Legal Pluralism."

28. Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22 (1988): 869.

29. Joel A. Nichols, "Multi-tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community," *Vanderbilt Journal of Transnational Law* 40 (2007): 135.

30. Ibid., 148. The three states are Arkansas, Arizona, and Louisiana.

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

32. Nichols, "Multi-tiered Marriage,"164–95.

33. Ibid., 164.

34. On clashes between religious liberty and sex equality in India, see Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000): 167–240. For a critical evaluation of the millet systems in Canada, India, Israel, and Kenya, see Shachar, *Multicultural Jurisdictions*.

35. See Audrey Macklin, "Particularized Citizenship," in *Migrations and Mobilities: Gender, Citizenship, and Borders*, ed. Seyla Benhabib and Judith Resnik (New York: New York University Press, 2009): 276, 284–92.

36. Nichols, "Multi-tiered Marriage," 195.

37. Linda C. McClain, "Unleashing or Harnessing 'Armies of Compassion'? Reflections on the Faith-Based Initiative," *Loyola University Chicago Law Journal* 39 (2008): 361.

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

39. Edward A. Zelinksy, "Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage," *Cardozo Law Review* 27 (2006): 1164.

40. This was considered but rejected in the Law Commission of Canada's report, *Beyond Conjugality*, 2001, available at Equal Marriage for Same Sex Couples, accessed September 8, 2011, http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf.

41. See, e.g., The Witherspoon Institute, *Marriage and the Public Good: Ten Principles*, 2006, accessed September 8, 2011, http://www.w.inst.org/family_marriage_and_democracy/WI_Marriage.pdf.

42. "Declaration on Marriage" (November 9, 2006), accessed September 8, 2011, http://www.cccb.ca/site/Files/Declaration_Marriage_En.pdf.

43. See Spaht, "Covenant Marriage" (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 (1998): 63.

44. Spaht, "Covenant Marriage."

45. Ibid.

46. Spaht, "Louisiana's Covenant Marriage," 75–77.

47. Spaht, "Covenant Marriage."

48. Estin, "Unofficial Family Law."

49. I say "generally" because some states are lenient if the parties have a good faith belief they were complying. Some states also will forgive failure to get a license as long as there was solemnization. See, e.g., Estate of Cygniel, 2006 N.Y. Misc. LEXIS 4145, 237 N.Y.L.J. 9 (Surr. Ct., Kings County, 2006) ("as long as a facially valid religious ceremony was performed by a clergyman, the marriage is a valid one"; applying this rule to uphold marriage performed in accordance with Orthodox Jewish ritual by someone authorized to solemnize a marriage, but without a marriage license); Estate of Harold H. Whitney, 2007 N.Y. Misc. LEXIS 5497 (Surr. Ct., N.Y. County 2007) ("although persons who intend to be married in New York State must secure a marriage license from a town or city clerk in the state . . . , a failure to procure such a license will not render a duly solemnized marriage void"; upholding civil effect of Orthodox Jewish ceremony). Other states are stricter in treating a religious marriage performed without a license as void. See, e.g., Yaghoubinejad v. Haghighi, 384 N.J. Super. 339, 894 A.2d 1173 (Sup. Ct., App. Div., N.J. 2006) (holding marriage "absolutely void" where ceremony was "performed in accordance with the Islam religion" and was solemnized but "the parties never obtained a marriage license"); In re Kulmiye & Ismail, Opinion Letter (Cir. Ct. Fairfax County, VA Aug. 26, 2008) (Roush, J.) (denying petition to affirm a marriage because, although parties were married in an Islamic ceremony by a religious official authorized in the county to perform marriages, they "did not obtain a marriage license").

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

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

52. Ibid.

53. See Pascale Fournier, "The Erasure of Islamic Difference in Canadian and American Family Law Adjudication," *Journal of Law & Policy* 10 (2001): 51 (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 Lynn Welchman, *Women's Rights and Islamic Family Law*

(London: Zed Books, 2004), 199–212 (offering praise and criticism of how civil courts in the United States have handled Islamic family law).

54. Quraishi and Syeed-Miller, "The Muslim Family in the USA," 199–212.

55. Mohammad H. Fadel, "Political Liberalism, Islamic Family Law, and Family Law Pluralism," in Nichols, *Marriage and Divorce in a Multicultural Context*, 164, 197.

56. Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General, 2004).

57. 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).

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

59. 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 (New York: Columbia University Press, 2007), 227, 229.

60. Ibid., 229–30.

61. Estin, "Embracing Tradition," 543–46.

62. 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.

63. Crane, "A 'Judeo-Christian' Argument for Privatizing Marriage," 1221–22.

64. Examples include New Hampshire, New York, Vermont, Washington, and the District of Columbia.

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

66. Mary Anne Case, "Marriage Licenses," *Minnesota Law Review* 89 (2005): 1758, 1765–68.

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

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

69. Browning and Clairmont, eds., *American Religions and the Family*.

70. Examples of this tension found are found in Browning and Clairmont, eds.,

American Religions and the Family, in the chapters on mainline Protestantism, evangelical Christianity, Hinduism, Islam, Confucianism, and Buddhism.

71. Yvonne Yazbeck Haddad, Jane I. Smith, and Kathleeen M. Moore, *Muslim Women in America: The Challenge of Islamic Identity Today* (New York: Oxford University Press, 2006): 90–91.

72. 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, 42.

73. 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.

74. Numrich, "Immigrant American Religions and the Family," 27.

75. Haddad et al., *Muslim Women in America*, 91.

76. Ibid.

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

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

79. See, e.g., Estin, "Embracing Tradition"; Quraishi and Syeed-Miller, "The Muslim Family in the USA," 199–212. One important area of law that I omit is the care, custody, and support of children. I also do not discuss the most familiar instance in which civil family law within the United States is not accommodating of religious law or of conduct justified by appeal to religious teaching: its steadfast refusal to allow or to recognize polygamous marriages.

80. Estin, "Embracing Tradition," 540.

81. Ibid., 603–4.

82. Ibid., 542.

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

84. See Michael J. Broyde, "New York's Regulation of Jewish Marriage: Covenant, Contract or Statute?" in Nichols, *Marriage and Divorce in a Multicultural Context*, 138, 146-48.

85. Quraishi and Syeed-Miller, "The Muslim Family in the USA," 202 (critiquing Dajani v. Dajani, 204 Cal. App. 3d 1387 [Cal. App. 4th Dist. 1988]).

86. 446 N.E.2d 136 (N.Y. 1983).

87. Ibid., 138 (citing to Jones v. Wolf, 443 U.S. 595, 602 [1979]).

88. Ibid.

89. Estin, "Unofficial Family Law," 104–5 (giving sources).

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

91. Removal of Barriers to Marriage, N.Y. Dom. Rel. L. § 253(6), *McKinney's Consolidated Laws of New York Annotated* (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* (2008).

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

93. Estin, "Embracing Tradition," 583–84 (discussing cases).

94. Broyde, "New York's Regulation of Jewish Marriage," 158.

95. Ibid, 158-59.

96. Minow, "Principles or Compromises."

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

98. Haddad et al., *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).

99. Aziz v. Aziz, 488 N.Y.S.2d 123 (Sup. Ct. Queens County 1985). In the case law I discuss, courts sometime refer to *mahr* as "dowry" or "postponed dowry," rather than "dower."

100. See Pascale Fournier, "In the (Canadian) Shadow of Islamic Law: Translating *Mahr* as a Bargaining Endowment, "*Osgoode Hall Law Journal* 44 (2006): 649.

101. 810 A.2d 93 (N.J. Super. 2002).

102. *Id*. at 95–96, citing Jones v. Wolf, 443 U.S. 595 (1979).

103. *Id*. at 97.

104. *Id*. at 97–98.

105. *Id*. at 96.

106. 666 So. 2d 246 (Fla. Dist. App. 1996).

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

108. Zawahiri v. Alwattar, 2008 3474; 2008 Ohio App. LEXIS 2928 (Ct. App. Ohio, 10th App. Dist. 2008).

109. 251 Cal. Rptr. 871 (Cal. App. 4th Dist. 1988).

110. *Id*. at 872.

111. 215 Cal. Rptr. 153 (Cal. App. 6th Dist. 1985).

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

113. *Id*.

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

115. *Id*. at 154–55.

116. Estin, "Embracing Tradition," 584–85.

117. Quraishi and Syeed-Miller, "The Muslim Family in the USA," 202.

118. Ahmed v. Ahmed, 261 S.W.3d 190, 2008 Tex. App LEXIS 4660 (Ct. App., 14th Dist., Tex, 2008).

119. *Id*. at *6.

120. *Id*. at *8–*9.

121. *Id.* at *10–*11.

122. Mir v. Birjandi, 2007 Ohio 6266; 2007 Ohio App. LEXIS 5517 (Ct. App. Ohio, 2nd App. Dist., 2007).

123. *Id*. at **3.

124. *Id*. at **19.

125. *Id*. at **22.

126. See Fadel, "Political Liberalism, Islamic Family Law, and Family Law Pluralism," 188–90.

127. 388 A.2d 1000 (N.J. Super. App. Div. 1978).

128. *Id*. at 1006.

129. *Id*. at 1005.

130. 931 A.2d 1123 (Md. Spec. App. 2007), *aff'd*, 947 A.2d 489 (Md. 2008).

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

132. *Aleem*, 947 A.2d at 500–501.

133. *Id*. at 501.

134. 931 A.2d at 1130; 947 A.2d at 502.

135. *Id*. at 1134.

136. *Aleem*, 931 A.2d at 1134. Another case illustrating how a U.S. civil court will affirm a state's public policy favoring equitable distribution of property when a party attempts to avoid those rules by asserting a religious marriage contract is *In re Marriage of Altayar*, 2007 Wash. App. LEXIS 2102 (Ct. App. 2007). The couple's marriage was arranged by their families in Iraq and took place in Jordan in 2000. The husband had lived in the United States since 1982, and the wife joined him after the marriage. The religious marriage contract specified a dowry of "one Quran and a payment of 19 grams of 21 karat gold due in the event of divorce of death." The dowry was accepted by the bride's brother. The couples divorced pursuant to a *talaq* divorce and then pursuant to a civil dissolution in Washington. The

husband asserted that Washington's community property laws should not apply because his wife's recovery was limited to her dowry. The wife countered that the Islamic marriage contract was enforceable under Islamic law but "does not limit her community property rights under Washington law." In the alternative, she argued that even if her Islamic marriage contract was a premarital agreement, it was "economically unfair" and a result of unequal bargaining power. The court held for the wife on both her substantive and procedural fairness arguments: "on its face, the exchange of 19 pieces of gold for equitable property rights under Washington is not fair"; and the wife also had no independent legal advice about the agreement. *Id*. at *7–8.

137. *Aleem*, 931 A.2d at 1131.

138. *Id*. at 1135.

139. 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]).

140. Shachar, *Multicultural Jurisdictions*.

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

142. 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 (Cambridge, UK: Cambridge University Press, 2005), 1.

143. Ran Hirschl and Ayelet Shachar, "Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel: Tentative Progress through the Obstacle Course," in *The Gender of Constitutional Jurisprudence* , ed. Beverley Baines Martha Rubio-Marin (Cambridge: Cambridge University Press, 2004), 205, 220.

144. Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales," *Texas Law Review* 82 (2004): 1819, 1840 (citing Shachar, *Multicultural Jurisdictions*, 57–60).

145. Shachar, "Feminism and Multiculturalism,"134.

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

147. Frances Raday, "Traditionalist Religious and Cultural Challenges — International and Constitutional Human Rights Responses," *Israel*

Law Review (2008): 596 (offering examples from many countries, including Israel and India). She would resolve this clash by asserting the hierarchy of rights to equality.

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

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

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

151. Sunder, "Piercing the Veil."

152. Shachar, "Feminism and Multiculturalism: Mapping the Terrain," 115.