

Marriage Pluralism in the United States: Multiple Jurisdictions and the Demands of Equal Citizenship

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Note to participants in Brandeis University Conference, “Untying the Knots,” 4/14 & 15/08:

*This conference paper is a working draft of a chapter that I was invited to contribute to an anthology growing out of the Project on Multi-tiered Marriage. This Project was organized by Professor Joel Nichols, St. Thomas University School of Law, and John Witte, Emory, and is co-sponsored by Emory University, St. Thomas, and Pepperdine University. The Project aims to bring together an interdisciplinary group of scholars to engage in a conversation about whether the U.S. should move to a more robustly pluralistic system of family law, whether by ceding control and authority over marriage and divorce to other tribunals or by embracing, within its civil law, more than one understanding of marriage (e.g., customary and religious marriage). It asks scholars to consider whether the United States should look to the practices of other countries to consider alternative ways to allocate jurisdiction over marriage and divorce among the civil state and other mediating structures of society, particularly, religious institutions. The convenor, Joel Nichols, argues for this pluralism in Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community, 40 *Vanderbilt Journal of Transnational Law* 135 (2007).*

In addition to writing a chapter for the anthology on Multi-Tiered Marriage, I am considering writing a law review article responding to Professor Nichols’s article or addressing, more generally, the call for marriage pluralism. I am in the process of sorting out the division of labor between those two projects, as the book chapter will need to be shorter than this draft paper.

In this draft, Part I (pp. 1-8) explains the premises of the Multi-Tiered Marriage Project and previews my basic argument; Part II (pp. 8-19) poses some questions about the demand for marriage pluralism and notes examples of such pluralism; Part III (pp. 19-51) discusses how U.S. courts address questions of religious and foreign family law; it needs some sharpening and pruning; Part IV (pp. 51-65) is on the controversy in Ontario over religious arbitration and will need further analytical development. I welcome feedback on any part of the paper; if readers are pressed for time, I recommend reading Parts I and II and either III or IV, depending on your interest.

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

“Legal pluralism” is hot. Indeed, as Brian Tamanaha recently observed, “legal pluralism is

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everywhere.”¹ 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 past two decades, the notion of legal pluralism itself is gaining popularity” and “has become a major topic in legal anthropology, legal sociology, comparative, law, international law, and socio-legal studies.”² And what of family law? Is such pluralism already “everywhere” in family law, in practice, if we just look closely? At the level of theory, has the time come for the embrace of a more robust form of legal pluralism in family law?

As I understand the goals of the Project on Multi-tiered Marriage, the answer to this “ought” question is a firm yes. Professor Joel Nichols, a principal convenor of the Project, calls for a national conversation, in the United States, about alternative ways to allocate jurisdiction over family law matters. In a recent article, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, he proposes that “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.”³ Already within the United States, he observes, are some forms of a multi-tiered system, which provide a groundwork for a closer look at the proper roles of the state and other groups with respect to marriage and divorce law. For example, three states within the U.S. now offer a new form of marriage, covenant marriage, with heightened entrance requirements and more restricted exit

¹Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, St. John’s University Legal Studies Research Paper Series, Paper #07-0080, August 2007, available at: <http://ssrn.com/abstract=1010105>.

²*Id.*

³Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 135 (2007).

rules, as an option alongside marriage, simpliciter.⁴ 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,” as a a sacrament and an indissoluble union with distinctive goods (as in Catholic traditions about marriage).⁵ As Katherine Shaw Spaht, a primary author of the law, explains, covenant marriage also invites religion back “into the public square” through provisions permitting religious personnel to perform the required premarital counseling.⁶ Nichols also points to New York’s *get* statutes, which address a problem arising from the Jewish law of divorce (when a husband refuses to provide his wife a *get*, or Jewish writ of divorce), as implicitly recognizing “that there are multiple understandings of the marital relationship already present among members of society.”⁷ These *get* statutes, arguably, are an even earlier example of covenant marriage statutes, since they try to harmonize civil and religious divorce law.⁸

Looking beyond U.S. borders, Nichols contends, could help usher in such pluralism: the practices of various nations offer examples of legal systems that have “ensconced multiple understandings of marriage in their own civil laws.”⁹ Studying these alternative ways to allocate jurisdiction over marriage and divorce among the civil state and other mediating structures of

⁴*Id.* at 148. The three states are Arkansas, Arizona, and Louisiana.

⁵Katherine Shaw Spat, *Covenant Marriage: An Achievable Legal Response to the Inherent Nature of Marriage and Its Various Goods*, 4 AVE MARIA L. REV. 467 (2006).

⁶Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 La. L. Rev. 63 (1998).

⁷Nichols, *supra* note 4, at 135.

⁸*See* Michael J. Broyde, *Some Thoughts on New York State Regulation of Jewish Marriage: Covenant, Contract or Statute?* (unpublished papers presented at Conference on Multi-Tiered Marriage, St. Thomas University School of Law, Nov. 15 & 16, 2007).

⁹*Id.* at 135-36.

society, particularly, religious institutions, he submits, would further serious discussion about whether a more robust pluralism within the U.S. is in order. Spin the globe and many instructive international models are available to inform this “national conversation” about the boundaries of civil authority: his article canvasses jurisdictional pluralism in the law of marriage and divorce in India, Kenya, South Africa, Israel, Egypt, and, closer to home, Canada.¹⁰ All of these nations, he argues, evince “shared jurisdiction in marriage and divorce law in more profound ways than current U.S. practice,” whether it be through multiple systems of personal law, in which religious tribunals have jurisdiction (as in India, Kenya, and Israel), through legal recognition of customary marriage (as in South Africa), or through allowing religious bodies to arbitrate family law matters (a matter of recent controversy in Ontario, Canada).¹¹

What form would a new jurisdictional pluralism in U.S. family law take? Nichols does not offer a comprehensive plan. He seems to endorse, however, a “more robust millet system” which “would allow religious systems to function as semi-autonomous entities with the state acting as the over-arching sovereign that intervenes only when basic minimum guidelines are not met.”¹² 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 of the countries that Nichols canvasses. The qualified autonomy of religious entities and the ultimate sovereignty of the state seem to reject a model of complete autonomy of religious tribunals, but the reference to “basic minimum guidelines” also suggests a rather thin supervisory role for the state.

In this paper, I will concede the descriptive point that “legal pluralism is everywhere” and

¹⁰*Id.* at 164-95.

¹¹*Id.*

¹²*Id.* at 164.

I will challenge – or at least raise cautions about – the normative claim that there should be more of it in U.S. family law. In agreeing with the descriptive point, I mean, first, to acknowledge that an exercise in comparative law readily *does* reveal many different ways of allocating jurisdiction over marriage and divorce, and family law more generally. This does not, however, answer the normative question of whether these are good models for U.S. family law. Second, I mean to point out that there are already, within the United States, more forms of legal pluralism, or, marriage pluralism, than simply the covenant marriage and *get* statutes. Recognizing this broader landscape of marriage pluralism may help better to situate the invitation to consider more jurisdictional pluralism. Thus, in this paper, I will pose the question of whether there is actually a demand for more family law pluralism in the U.S. and what form this demand takes.

On this point, it may be helpful to clarify this question by imagining two different 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. Or they might demand that the civil law of marriage better reflect their own religious conception of marriage.

My normative concerns about a form of legal pluralism that entails civil law ceding authority to religious and other tribunals to regulate marriage and divorce stem from a few sources. One is a concern over the place, in such a system, of key commitments and values of civil family law and of the impact of a modern “robust” millet system on the various protective and expressive functions of family law. What authority will civil government have, in this system, to advance key public purposes of U.S. family law, such as protecting the best interests of children and viewing marriage as an equal partnership in which spouses have gender-neutral and reciprocal (rather than complementary and hierarchical) rights and duties and parents have equal rights and responsibilities? A similar concern is over a possible gap between civil and religious law on marital dissolution and

post-divorce property distribution. U.S. family law has moved from a title-based system of property distribution to a model of equitable distribution, which has the protective function of recognizing a spouse's nonmonetary contribution to the household. Similarly, spousal support payments aim at ameliorating vulnerabilities and disadvantage that developed during marriage.

A second concern is that, as a feminist scholar, I have initial skepticism and resistance to the call for developing a robust millet system within the U.S. because I doubt whether such a millet system can adequately protect the equal citizenship of women and the interests of children. This skepticism is informed by a significant body of work by feminist scholars and women's organizations, including religious women's organizations, on problems of gender inequality and discrimination in legal systems that cede jurisdiction to or embody norms of religious and customary family law.¹³ Such work also highlights the importance of the claims of national and constitutional citizenship as a strategy for redressing such inequality, even as it affirms the value of membership in religious and cultural groups.¹⁴ Thus, a third concern is whether and how a new jurisdictional pluralism can accommodate this dual membership.

Nichols assures readers: "Moving toward multi-tiered marriage need not mean – indeed, should not mean – abandoning protections for women and children that the states have assiduously worked to implement. Nor should it mean that the state must sanction actions and behavior that will undermine core values of equality."¹⁵ But the various international examples that he offers up to

¹³See *infra* for discussion.

¹⁴Audrey Macklin, for example, explores how "encultured women" have sought to bring about law reform by engaging in acts of "public citizenship" while holding on to their cultural citizenship. See Audrey Macklin, *Particularized Citizenship*, in *MIGRATIONS AND MOBILITIES: GENDER, CITIZENSHIP, AND BORDERS* (Seyla Benhabib and Judith Resnik, eds., forthcoming 2008).

¹⁵Nichols, *supra* note 4, at 195.

advance the conversation about more legal pluralism seem to contradict this reassurance, or at least to 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. My contention is that training a gender lens on the comparative enterprise the Multi-Tiered Marriage Projects would better inform the national conversation it invites. 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 broader commitments of the U.S. family law system and our constitutional principles. Moreover, to the extent that 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 these models in the broader society, then this also implicates the state’s interest in children as future citizens.

Having raised these concerns, I should also concede that family law already does allow 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 paper proceeds as follows: Part II poses the question of whether there is actually a demand for more marriage pluralism in the U.S. It also examines some forms of marriage pluralism already within the U.S., including the covenant marriage and *get* statutes. Part III examines some of the case law in which state courts within the U.S. have dealt with religious and foreign family law in resolving civil disputes about marriage, divorce, and child custody. My focus will be on what this existing multicultural case law might tell us about the prospects for and tension points in a multi-tiered marriage law in the U.S. In Part IV, I examine why many feminist scholars and women’s

organizations have identified systems of personal and religious law as sources of gender discrimination and disadvantage. I take up one of the comparative law examples discussed by Professor Nichols: the controversy over religious family law arbitration (or “sharia arbitration”) in Ontario. I then ask what lessons one might learn about the possibilities of more pluralism in U.S. family law.

II. Family Law Pluralism, Descriptive and Normative, in the U.S.

A. An Initial Question: Whither the Demand for More Legal Pluralism?

In considering the call for more legal pluralism, I would like to begin with a practical, empirical question: is there a demand, within the United States, for “multi-tiered marriage”?

It is becoming common to observe that family law has gone global. Thus, one recent family law text book begins: “the globalization of the family is transforming family law” and “American lawyers need new skills to respond” to the new demands of a more global family law practice.¹⁶ In this era of globalization, when people who form families cross various geographic and national boundaries, courts routinely must deal with complex questions of jurisdiction and comity with respect to marriage, divorce, child custody, and the like. I will discuss some of this case law in Part III. My point here is to note this extant form of jurisdictional pluralism and ask how it relates to the call for civil government to cede or share jurisdiction. The multi-tiered marriage proposal seems to focus not so much on persons crossing national boundaries and asking that the law of a different legal system (whether religious or not) be applied to them as that persons living within the U.S. who are members of particular religious communities be accorded access to religious tribunals with binding authority to hear their family law matters. In a modern millet system is the aim, then the answer is that, instead of civil courts hearing such matters, jurisdiction would rest in religious courts,

¹⁶ANN LAQUER ESTIN AND BARBARA STARK, GLOBAL ISSUES IN FAMILY LAW 1 (2007).

subject to, as Nichols suggests, some basic minimum guidelines.

Is there a demand for such a millet system in the U.S. in which religious tribunals have either sole or shared authority to adjudicate marriage and divorce? Or is there, alternatively, discontent with civil marriage and a desire to instantiate, with more binding force *in civil law*, religious understandings of marriage? And if so, whose understandings? That of majority religious institutions? What place will there be for the many minority religions practiced in America?

The political and legal battles over same-sex marriage raise both of these issues: religious understandings of marriage animate 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. Some religious figures, faced with the prospect of state law allowing same-sex marriage, propose that the state “get out of the marriage business,” and leave it to religious institutions to define and regulate marriage.¹⁷ On this view, if the state plays any role, it might create a form of civil union or civil partnership, to which would attach various benefits and obligations now linked to civil marriage. But more typically, opponents of same-sex marriage appeal to preserving “traditional marriage” in civil law. Appealing to religious understandings of the goods and purposes of marriage, they warn that if the legal definition of marriage is so altered that it no longer recognizes those goods and purposes, marriage law will not rest on a true conception of marriage.¹⁸ A comparative example may be found in Canada, where, after Parliament passed a law redefining marriage as being “between two persons,” a group of religious leaders and institutions put forth a “Declaration on Marriage,” urging members of Parliament and Canadian citizens to re-consider such redefinition because it severed marriage from its “nature and purpose” and faith communities could not promote an

¹⁷Need e.g. of this.

¹⁸*See, e.g., Witherspoon Institute, Marriage and the Public Good: Ten Principles* (2006).

institution “when the identifying language has been stripped of its real meaning.”¹⁹ Far from seeking marriage pluralism, these opponents of re-defining marriage wish a greater congruence between religious and civil definitions of marriage.

Along these lines, covenant marriage, an example Nichols offers of multi-tiered marriage, may be seen as an effort to use state power to instantiate an ideal of marriage in keeping with Christian traditions (particularly, Catholicism) about marital permanence and mutual sacrifice.²⁰ Proponents hope that this model of marriage, like a city on a hill, will, in effect, be a witness to others, who, up to now, have only seen marriage in a regime of no-fault divorce.²¹ Katherine Shaw Spaht, for example, 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 covenant marriage, it would shift the paradigm from no-fault to covenant marriage.²² Moreover, proponents believe that the symbolic effects of 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.²³ Indicative of the goal of congruence between religious and civil marriage, Spaht argues that to concede that there is a difference between civil and religious marriage would be to fail to recognize “the imperative of

¹⁹*Declaration on Marriage* (Nov. 9, 2006), available at _____. Thanks to Daniel Cere for bringing this document to my attention.

²⁰*See Spaht, supra note ** (discussing Catholic view of marriage and how covenant marriage is closer to God’s purpose for marriage)..

²¹Get cite to Katherine Shaw Spaht.

²²Katherine Shaw Spaht, *Covenant Marriage: A Model for Compromise that Retains Traditional Marriage and Recognition of the Public’s Interest in It* (abstract prepared for Conference on Multi-Tiered Marriage Project).

²³Spaht, *supra note **.

natural law as a foundation for human law” along with the notion that such natural law is accessible through the exercise of reason.²⁴

Covenant marriage may be seen as an example of religion harnessing state power. Notably, some proponents of covenant marriage have been disappointed that religious authorities have not embraced it and required members to enter into this model of marriage that is more compatible than no-fault marriage with a traditional Judeo-Christian understanding of the institution.²⁵ But covenant marriage laws also entail state power harnessing – not simply unleashing – religion: it is still civil officials that issue marriage licences and state courts that adjudicate divorces and rule on custody, property distribution, and the like. Do some religious leaders make the further argument that the state should cede this authority to religious tribunals so that civil courts no longer have jurisdiction in such matters?²⁶

Shared jurisdiction exists, to a degree. For example, by contrast to some legal systems (like France or the Netherlands), the U.S. family law system allows religious leaders to perform marriage ceremonies that, provided the couple complies with civil formalities, will be recognized as civil marriages. In addition, already, within the U.S., certain religious faiths (for example, Catholicism, Judaism, and Islam, but notably, not the Protestant traditions) have their own system of courts authorized to handle certain family matters, such as religious marriage, annulment, divorce, and

²⁴*Id.* As I understand the Catholic teaching about marriage, “the Catholic Church proposes a single understanding of marriage and proposes further than this vision of marriage has the support of the unchanging and always valid natural law.” Charles J. Reid, Jr., *Multi-Tiered Marriage and the Catholic Tradition in the Early Middle Ages: A Narrative in Three Parts* (unpublished paper presented at Conference on Multi-Tiered Marriage Project, Nov. 15 & 16, St. Thomas University School of Law).

²⁵Spaht, Abstract [Try to find this same position in a published article by Spaht.]

²⁶NOTE: I need to find this out!

attendant matters concerning children.²⁷ Civil courts are already asked by parties to such proceedings to enforce or adjudicate religious marriage contracts, divorce orders, arbitration agreements, and custody and support orders.²⁸ Or they are asked to decline to do so. Perhaps a demand for “multi-tiered marriage” might arise from 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 over too zealous a view of separation of church and state. Some Islamic scholars, for example, have faulted civil courts in the U.S. and Canada for ignorance about Islamic traditions and for failing to adjudicate claims arising from Islamic marriage contracts.²⁹ Is there a demand that civil courts should simply cede authority to religious courts and cease to exercise any independent oversight of civil marriage, or, rather, that they should do better at adjudicating such family law matters?³⁰

A complicating factor in considering the issue of legal pluralism with respect to marriage is that, although contemporary discourse about marriage emphasizes that *civil* marriage, as distinct from religious marriage, is, in a sense, a creature of state law and regulation,³¹ America’s history

²⁷See Estin, *supra* note*; Nichols, *supra* note 4.

²⁸See Estin, *supra* note *.

²⁹Cite to Pascale Fourniere; Azizah al-Hibri. For example, cite to case analogizing Muslim marriage contract to Christian vows given at marriage ceremony and, therefore, unenforceable in a legal court. Al-Hibri has also spoken of the problem that some Muslims in the U.S. are ignorant about the fact that an Islamic marriage ceremony that does not comply with civil formalities will not have civil effects and thus will not have the protections of civil law when they terminate the marriage. [cite]

³⁰Again: would like to have answer to this.

³¹Most vividly, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), repeatedly refers to “civil marriage.”

reveals the strong influence of Christian conceptions of marriage on the secular law.³² Indeed, 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.”³³ That polygamy was incompatible with Western, Christian understandings of marriage animated governmental campaigns against Mormons and Native Americans. Thus, as Teitelbaum observes, “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 19th century, or, in the late 20th, the values of secular humanism.³⁴ 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 – and thus secular family law may look Christian and exclusive to people of other faiths.³⁵

Today, both religious authorities and some lawmakers oppose extending marriage to same-sex couples because it would redefine marriage in a way that is contrary to “millennia” of cultural and religious tradition, as well as to the divine order. The impetus to “get the state out of the marriage business,” then, is that if civil law contradicts a proper religious understanding of marriage, it would be better if civil authorities left marriage alone. This raises the challenging question of the relationship between civil marriage as a *legal status* and marriage as a *social institution*. Strikingly, both the majority and dissents in the same-sex marriage cases affirm that

³²John Witte helpfully describes this in *FROM SACRAMENT TO CONTRACT* (Westminster John Knox Press, 1997).

³³Lee E. Teitelbaum, *Religion and Modernity in American Family Law*, in *AMERICAN RELIGION AND THE FAMILY*, *supra* note *, at 229.

³⁴*Id.*

³⁵Estin, *supra* note *.

marriage is a *fundamental social institution*.³⁶ Both sides agree that redefining marriage will affect the social meaning of marriage; they disagree over whether this changed social meaning is a good or bad thing for the social institution of marriage.

This debate raises the intriguing question of what, today, the conception of civil marriage is. As noted above, in the context both of same-sex marriage and of covenant marriage, some religious people argue against distinguishing civil and religious marriage, and warn that redefining marriage will threaten religious understandings of, and thus, ultimately, societal support for marriage as an institution. By contrast, I believe that distinguishing religious and civil marriage is important when discussion government's interest in recognizing and regulating marriage.. This seems to follow not only from constitutional principles but also from liberal political principles about the fact of reasonable moral pluralism and toleration of religious difference.³⁷ It is also important to recognize that what civil marriage is has evolved over time.. As Mary Anne Case has observed, what "marriage licenses" today is quite different 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 nonmarital, nonprocreative, and nonheterosexual sexual expression.³⁸ Today, by contrast, much of that criminal law has given away 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, although civil marriage does entail certain rights and obligations, they are stated in gender-neutral terms. Spouses are much freer to choose how to live

³⁶See *Goodrige*, [add cites to majority and dissents].

³⁷On these tenets of political liberalism, John Rawls, *Political Liberalism*.

³⁸Mary Anne Case, *Marriage Licenses*, 89 *Minn. L. Rev.* 1758 (2005).

their marital life, and the rules of exit are far less strict.³⁹

What civil marriage licenses, thus, is, no doubt, at considerable odds with at least *some* religious conceptions of marriage. If we are to consider a more pluralistic approach to legal regulation, then we need to give attention to possible points of tension between these models.

I suspect that one point of tension will be the issue of gender roles in the family. Contemporary family law has rejected the common law's model of husbandly rule and wifely obedience. As I argued in my book, *The Place of Families: Fostering Capacity, Equality, and Responsibility*, sex equality is an important political value and constitutional principle as well as a commitment of family law.⁴⁰ Yet resistance to and ambivalence about sex equality in the family and gender neutrality in allocating, as a legal matter, spousal and parental rights and responsibilities, remains.

In the recent anthology, *American Religions and the Family: How Faith Traditions Cope With Modernization and Democracy*,⁴¹ a theme in nearly every chapter is that a traditional tenet in religious understandings of the home and family is that men are to exercise authority or leadership in the home (e.g., "headship") and that women have special duties in the home, including (in some traditions) some form of submission to or respect for male authority. In coping with modernization, religious leaders and religious adherents face the challenge of how to reconcile traditional religious beliefs about male authority in the family with contemporary American values about equality of the

³⁹Martha Albertson Fineman has argued, in fact, that there is now a "vacuum" of meaning about marriage precisely because there is so much more latitude today for individuals to decide what marriage means to them. *The Autonomy Myth* ___.

⁴⁰LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006).

⁴¹BROWNING AND CLAIRMONT, *supra* note *.

sexes and marriage as a partnership. To be sure, some religious traditions themselves have moved away from teachings about male dominance and female submission and fixed gender roles to more egalitarian visions of marriage and family. By contrast, some embrace traditional gender roles as part of an “oppositional” stance to American culture and the perceived weakening of family values.⁴²

B. Other Form of Marriage Pluralism?: The Emerging Law of Nonmarriage and Governmental Marriage Promotion

Although they are not the focus of the multi-tiered marriage project, some other intriguing and challenging forms of emerging marriage pluralism in U.S. family law warrant consideration in considering the call for marriage pluralism. One is what I will call the emerging law of nonmarriage, by which I mean the creation, in a minority of states, of new legal statuses that are alternative to, but modeled significantly on, marriage: civil unions, domestic partnerships, and reciprocal beneficiaries laws. These new legal forms contribute to a new law of nonmarriage that nonetheless looks to the law of marriage even as it eschews the name “marriage. Some of these new legal forms were created by legislatures pursuant to rulings by state supreme courts that the state constitution required according gay men and lesbians the rights to the benefits and obligations, if not the name of, marriage. Other state legislatures have created these legal forms without the spur of a judicial ruling. Reminding us of the vision of states as experimental laboratories, these new state-created statuses express diverse messages about the state’s interest in families and diverse rationales for remedying the exclusion of same-sex couples from marriage, even as they differ in who (beyond same-sex couples) is eligible to enter into these status relationships and what benefits and obligations those

⁴²Cite to essay in the volume on this point.

new statuses entail.⁴³ And as couples move from one state to the next, further complicated questions of conflicts of laws and jurisdiction arise, particularly when parental rights and responsibilities are at stake. It may be helpful to expand a discussion of marriage pluralism to consider this emerging law of nonmarriage. Religion is also at stake here, since longstanding religious traditions about the definition and meaning of marriage seem to be one important reason that states that have developed these alternative statuses simultaneously affirm respect for the “tradition” about what marriage has been and commitment to the principles of equality and anti-discrimination.⁴⁴ Another area that arguably fits into a law of nonmarriage would be how courts and legislatures treat nonmarital cohabitants and the extent to which the benefits and obligations of marriage may attach to those relationships.⁴⁵

A second example of multi-tiered marriage within the U.S. grows out of the federal government’s campaign to promote “healthy marriage” and “responsible fatherhood.” Federal funding, through welfare law as well as through the faith-based initiative , is now available to nongovernmental actors (including faith-based groups) to engage in efforts to strengthen families. These public-private partnerships are part of a broader effort of the Bush Administration to “unleash” faith-based groups to address social problems on the rationale that they have a unique capacity to

⁴³I recognize that one interpretation of this law of nonmarriage is that it simply reflects discrimination against gay men and lesbians.

⁴⁴Cite here to Vermont, New Jersey civil union laws; Oregon domestic partnership law.

⁴⁵This is not my project in this paper, but a comparative study of the law of marriage, registered partnerships, and unmarried cohabitation is illuminating to see how nations vary on which of the legal consequences of marriage attach to these alternative statuses. Cite to nine country study of the level of legal consequences by Kees Waaldijk.

“get results.”⁴⁶ Many faith traditions in the U.S. already have existing educational and service organizations whose mission includes helping to strengthen families and preserve marriage.⁴⁷ As the federal government – and various state governments with marriage initiatives – fund faith-based groups, to what extent will they be supporting religious conceptions of marriage? The Establishment Clause puts a constitutional restraint on direct governmental funding of religious messages about marriage, but does not bar funding religious entities to deliver social services.⁴⁸ But current constitutional jurisprudence allows indirect funding, through methods like vouchers, of religious entities providing social services in ways that are suffused with or integrated with religious messages and practices, on the theory that individual choice breaks the connection between government and religion.⁴⁹

Governmental promotion of healthy marriage seems to open the door for a form of marriage pluralism in which government funds, whether directly or indirectly, religious models of how to save marriages. As I have written elsewhere, these public-private partnerships raise some questions, particularly when religious models of “healthy marriage” entail a vision of gender roles, whether gender complementarity, “soft” patriarchy, or gender hierarchy sharply at odds with the conception of marriage as an equal partnership in contemporary family law. Would proponents of more marriage pluralism urge that we readily embrace such governmentally-funded pluralism or insist that religions

⁴⁶I examine these partnerships in a forthcoming article, *Unleashing or Harnessing “Armies of Compassion”?: Reflections on the Faith-Based Initiative*, 39 Loyola Chi. L.J. __ (2008).

⁴⁷This infrastructure is discussed in *AMERICAN RELIGIONS AND THE FAMILY* 229 (Don S. Browning and David A. Clairmont, eds., 2007).

⁴⁸*Bowen v. Kendrick*.

⁴⁹*Zelman v. Harris*.

may freely promote such visions, but must do so without the aid of civil government?

It may be useful, as I have elaborated in other work, to view this issue of public-private partnerships as involving two competing models of the relationship between government and religion: unleashing – in the sense of turning loose – versus harnessing – in the sense of utilizing but also putting restrictions on – the power of faith.⁵⁰ I have urged that the latter model better accords with important constitutional and public values. It is useful to bear this question of unleashing versus harnessing in mind when considering calls to a more expansive form of legal pluralism and shared, or multiple, jurisdiction.

III. Pluralism in U.S. Family Law: Jurisdiction, Comity, and Location

In this Part, I will argue that some of the likely tension points over a multi-tiered marriage system may be evident from reasoning by analogy from a body of case law in the U.S. in which courts already must consider issues of legal pluralism and multiple and often conflicting jurisdictional authority in resolving matters of marriage, divorce, and child custody. In such cases, the relationship between civil and religious authority arises as civil courts 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.⁵¹ The case law suggests a certain capaciousness already at work as courts have embraced pluralism consistent with those commitments, but it also suggests some important limiting principles about when courts will not and should not cede authority. At issue, also, are questions of how to relate issues of membership and location in particular

⁵⁰McClain, *Unleashing or Harnessing “Armies of Compassion,”* *supra* note __.

⁵¹For an informative overview of this case law, see Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 Md. L. Rev. 540 (2004).

communities to issues of citizenship.⁵²

As Ann Estin observes, in her informative article, *Embracing Tradition: Pluralism in American Family Law*,⁵³ “[c]ourts deciding family law disputes [in the U.S.] regularly encounter unfamiliar ethnic, religious, and legal traditions, including Islamic and Hindu wedding celebrations, Muslim and Jewish premarital agreements, divorce arbitration in rabbinic tribunals, and foreign custody orders entered by religious courts.”⁵⁴ Given the religious heterogeneity within the United States and the migration of people across national borders, this should not be surprising. Yet, Estin contends, finding this multiculturalism in the context of family law, which we think of as “secular and universal,” does come as a surprise.⁵⁵ Estin herself concluded that the “growing body of multicultural family law” in the U.S. demonstrated the potential to embrace both “a number of fundamentally different family law traditions” and to embrace “deeper values that structure and constrain the process of accommodation.”⁵⁶ Those values embedded in the American system, and “paralleled by norms of international human rights,” include “principles of due process, nondiscrimination, and religious freedom,” as well as family law’s “protective policies.”⁵⁷ After canvassing this multiculturalism, Estin called for courts and lawmakers to develop a framework for

⁵²For a sophisticated analysis of the problem of tensions between group membership and national citizenship, see AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS* (2001).

⁵³*Id.*

⁵⁴Estin, *supra* note *, at 540.

⁵⁵*Id.*

⁵⁶*Id.* at 603-04.

⁵⁷*Id.*

a multicultural family law that would both “allow individuals greater freedom to express their cultural or religious identity and negotiate the consequences of these commitments” and “protect the rights of individuals to full membership and participation in the larger political community.”⁵⁸ This formulation well 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.

In this section, I will revisit some of the cases that Estin canvassed and look at some more recent cases with the aim of asking what light this body of multicultural family law sheds on the call for multi-tiered marriage. Nichols’s proposal suggests a more robust millet system with the civil government as an overarching system to uphold some basic minimal guidelines. Thus, what civil courts have done may not be a useful model for what religious tribunals would do. But this case law may be instructive on how commitments of civil family and constitutional law shape the existing decree of accommodation now afforded religious law. How will this accommodation work when religious family law has asymmetries in the rights and duties of husbands and wives, and of fathers and mothers, or when its notions of the economic consequences of marriage and divorce differ from the economic partnership model of civil family law?

A. Civil Enforcement of Religious Marriage Contracts and Religious Arbitration

A sizable body of case law involves courts being 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

⁵⁸*Id.* at 542.

submit to religious arbitration.⁵⁹ 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 greater latitude for parties to a marriage to make contracts with each other. One could express this in terms of allowing more room for private ordering of marriage and divorce. Another relevant trend in family law is to allow and encourage (and sometimes require) arbitration as an alternative to divorce litigation.⁶⁰ In both of these contexts, however, there are limits to private ordering, some of which are rooted in process concerns and others, in substantive concerns about fairness or protection of vulnerable or dependent parties. States vary in the degree to which they accord freedom of contract and allow opt out from the protective default rules of family law, that is, the rules that will apply absent a private agreement to the contrary.

When the issue of private ordering also entails the added dimension of religion, additional questions arise. Does it excessively entangle a civil court with religion, in contravention of the First Amendment, if a court is asked to enforce a *religious* marriage contract or the judgement of a religious tribunal? And does it deny a person's free exercise of religion if a civil court declines to recognize the outcome of religious arbitration or to enforce contractual obligations and benefits undertaken by parties to a marriage pursuant to their religious beliefs and traditions?

1. *Religious marriage contracts, religious arbitration, and the get statutes*

A leading case for the proposition that a civil court may properly exercise jurisdiction in an

⁵⁹Broyde, *supra* note * (arguing that he has found no case in which a civil court was asked to uphold the financial terms of a Jewish marriage contract and that the cases generally were about enforcing an arbitration clause).

⁶⁰Give cites on these trends.

action arising out of a religious marriage a contract is *Avitzur v. Avitzur*,⁶¹ now over twenty years old. 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, using "neutral principles of contract law." Here the court relied on a U.S. Supreme Court precedent, *Jones v. Wolf*, which, in holding "that a State may adopt any approach to resolving religious disputes which does not entail consideration of doctrinal matters, specifically approved the use of the 'neutral principles of law' approach."⁶² The specific contract term that the *Avitzur* court held could be enforced 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 divorced until her husband granted her a Jewish divorce decree, a *get*.⁶³

The problem that this Jewish woman, similar to other Jewish women faced, was that without the *get*, even though she had a civil divorce, she could not legally remarry pursuant to Jewish law, and without a *get*, any subsequent children she might have would be considered illegitimate (*mamzerin*).⁶⁴ Jewish tradition referred to such women as "Aguna," a chained woman (chained to the dead marriage).⁶⁵ Jewish tradition has developed ways to address the problem of the agunah, and the clause in the Ketubah to agree to arbitration, which *Avitzur* enforced, is one such reform.

⁶¹446 N.E.2d 136 (N.Y. 1983).

⁶²*Id.* at 138 (citing to *Jones v. Wolf*, 443 U.S. 595, 602 (___)).

⁶³*Id.* at 137.

⁶⁴*Id.* at 140 (Jones, J., dissenting).

⁶⁵Broyde, *supra* note *, at ___ (using image of chained to dead marriage).

New York courts developed a body of case law, as both Nichols and Estin discuss, that rationalized the relief sought by such women as simply compelling a husband “to perform a secular obligation to which he contractually bound himself.”⁶⁶ The New York legislature also adopted some statutes aimed at addressing the plight of the *agunah*. The first statute conditioned a spouse’s entitlement to civil divorce upon his taking steps to remove any religious barriers to remarriage.⁶⁷ The second gave a court discretion to consider, in making equitable distribution of property, the effect of a “barrier to remarriage,” as defined in the earlier statute.⁶⁸

Whether the *get* statutes are constitutional has been the subject of extensive commentary⁶⁹ and is not a topic I will take up here. Rather, I mention them because Nichols offers them as an example of multi-tiered marriage: they “introduce a radical element into U.S. family law because they acknowledge that there is more than one jurisdictional model and method of marriage and divorce.”⁷⁰ Michael Broyde, in fact, refers to the *get* statutes as the first examples, within the U.S., of covenant marriage laws in the sense that they represent, with the encouragement of religious leaders, a secular, statutory solution to a problem of Jewish marriage law.⁷¹ He also speaks of these laws as efforts to harmonize civil and religious divorce law based on a secular interest: “New York

⁶⁶446 N.E.2d at 139. [cite to some other NY cases, like *Aziz v. Aziz*.]

⁶⁷McKinney’s Consolidated Laws of New York Annotated, N.Y. Dom. Rel. L § 253 (“Removal of Barriers to Remarriage”).

⁶⁸McKinney’s Consolidated Laws of New York Annotated, N.Y. Dom. Rel. L. § 236.

⁶⁹Cite some examples.

⁷⁰Nichols, *supra* note __, at 163.

⁷¹Broyde, *supra* note __, at __.

understands that if a group of its citizens will not, in fact, conduct themselves as if they are divorced unless they are divorced according to Jewish law, the state becomes legitimately concerned, as the purpose and function of the secular divorce law [e.g., that its citizens “are in fact free to remarry after they receive a civil divorce”] is now defeated by the absence of a religious rite.”⁷²

I think that *Avitzur* as well as the *get* statutes could just as plausibly be understood as an attempt by a civil government to remedy a disadvantage, arising out of religious law, that disproportionately affects women within the religion and has troubling spillover effects in the civil realm. One such spillover effect, as Broyde notes, is the inability (due to religious conviction) to remarry after a secular divorce. Another is strategic behavior during the civil divorce process. As Nichols notes, “examples abound of abuses of the inequitable bargaining position of husband and wife due to the sole power of the man to issue the *get* and thus effectuate a religious divorce.”⁷³ An exacerbating problem in some cases was a tribunal agreeing to or imposing such one-sided terms in order for the women to receive the *get*.⁷⁴ Thus, this is hardly an argument for civil government ceding more authority to religious tribunals. As Broyde argues, it appears to be more one of shared jurisdiction: religious and secular authorities cooperate to solve a problem that neither can solve entirely on its own.

2. Adjudication of Islamic marriage contracts: financial consequences

New York courts have also enforced a wife’s right, in Islamic marriage contracts, to *mahr*,

⁷²*Id.* at 20.

⁷³Cite to cases; Nichols, *supra* note *, at __ (discussing cases).

⁷⁴Give a case example.

a postponed dowry.⁷⁵ Civil courts in other states have, often citing to New York precedents, also enforced marriage agreements entered into in the context of Islamic religious ceremonies. In such cases, courts sometimes have to evaluate conflicting testimony about Islamic law as it bears on the marriage contract.

In *Odatalla v. Odatalla*,⁷⁶ a New Jersey court addressed the “novel issue” of whether a civil court may specifically enforce the terms of an Islamic Mahr Agreement. Before husband and wife were married in a religious ceremony in New Jersey, their families negotiated the terms of the Mahr Agreement, under which the sum the husband would pay the wife was one golden pound coin at the outset, and, postponed, \$10,000. In a divorce action in which both husband and wife alleged extreme cruelty, husband argued that the court could not order specific performance of his obligation under the Agreement because (1) the doctrine of separation of church and state, under the First Amendment, precluded a civil court’s review of the Agreement and (2) the Agreement was not a valid contract under New Jersey law.

The court disagreed, ruling that it could specifically enforce terms of the Agreement provided, first, that it could be enforced “based upon ‘neutral principles of law’ and not on religious policy or theories,”⁷⁷ and second, that, applying those neutral principles, the Agreement had the elements of a valid contract.⁷⁸ On the first prong, the court cited the Supreme Court precedents drawn

⁷⁵Give e.g. of a case.

⁷⁶810 A.2d 93 (Super. Ct. N.J. 2002).

⁷⁷*Id.* at 95-96 (citing *Jones v. Wolf*, 443 U.S. 595 (1979)).

⁷⁸*Id.* at 97.

upon in *Avitzur*.⁷⁹ It argued that a “logical extension of this principle” was to enforce a Mahr Agreement contained within an “Islamic marriage license at the time of the marriage ceremony.” Notably, given the current interest in legal pluralism as an apt reflection of society’s heterogeneity, the court suggests it is relevant, in interpreting the demands of the First Amendment, to bear in mind the contrast between the community of the late 1700s “when our Constitution was drafted” and the “community we live in today”:

At that time, our founding fathers were concerned with a state sponsored church such as existed in many European communities that they had sought to escape when they came to this country. Today’s community is not as concerned with issues of a state sponsored church. Rather, the challenge faced by our courts today is in keeping abreast of the evolution of our community from a mostly homogenous group of religiously and ethnically similar members of today’s diverse community. The United States has experienced a significant immigration of diverse people from Japan, China, Korea, the Middle East, and South America of various religious beliefs. Can our constitutional principles keep abreast of these changes in the fabric of our community?⁸⁰

The court answers this question in the affirmative, invoking Justice Brennan (also a former New Jersey Supreme Court justice) on the notion of a living constitution, whose “great principles” maybe be adapted “to cope with current problems and current needs.”⁸¹

The court also found that the requirements of a valid contract were satisfied. A videotape of the entire process suggested that the Agreement was entered into freely and voluntarily. 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, by which the sum could be

⁷⁹*Id.* at 95-96 (citing *Jones v. Wolf*, 443 U.S. 595 (1979)).

⁸⁰*Id.* at 96.

⁸¹*Id.*

demanded by the wife at any time, although it usually was not unless there is a death of the husband or a divorce.⁸²

A Florida appellate court, in *Akileh v. Elchahal*,⁸³ similarly looked to the New York cases (discussed above) about civil enforcement of religious antenuptial agreements and upheld a husband's agreement, in an Islamic marriage contract, to pay the wife a postponed dowry of \$50,000. Here, the wife demanded payment in a divorce proceeding brought in civil court. Calling the matter a case of first impression, the court concluded that the *sadaq*, the postponed dowry, which was incorporated into the couple's marriage certificate when they married in Florida in a Moslem ceremony, was a secular term, and that this secular term 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 it was analogous to dowry and the wife's right to receive it was not negated if she filed for divorce (contrary to the husband's testimony about his belief on this point). The court concluded that the parties understood the protective function of the *sadaq*: to protect the wife in the event of a divorce. The court rejected the husband's argument that because of different interpretations of the *sadaq* – that is, his subjective – and "unique" – understanding that he would not have to pay in the event the wife initiated divorce, there was no meeting of the minds sufficient to form a contract. The husband never made this understanding known, the court observed, and the wife already performed her obligations under the contract.

Sometimes marriage contracts limit a spouse's entitlement to post-divorce property or support. This is an interesting issue because civil law and religious law may differ on whether a

⁸²*Id.* At 97-98.

⁸³666 So. 2d 246 (Dist. Ct. App. Fl. 1996).

spouse is entitled to such support, thus raising the question of whether private ordering will prevail or whether family law's protective function will put limits to such ordering. In the context of Islamic marriage, husband and wife generally maintain their separate property and, unless the contract specifies, there is no presumption of property division. This contrasts with the notion, in secular 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.⁸⁴

Courts have reached different conclusions as to whether to enforce these contract terms. In *Chaudry v. Chaudry*,⁸⁵ a wife filed suit in New Jersey civil court for separate maintenance and child support, alleging unjustified abandonment by her husband. The husband defended based on already obtaining a valid divorce in Pakistan in accordance with the laws of Pakistan. Both husband and wife were Pakistani citizens; the wife and children resided in Pakistan (but had lived in the U.S. for a few years early in the marriage), and the husband resided and practiced medicine in New Jersey. The lower court refused to recognize the Pakistani divorce and also concluded that the antenuptial agreement, in which the wife was entitled to about \$1,500, but made no provision for alimony or support upon divorce (for which she would not otherwise be eligible under Pakistani law) was contrary to New Jersey's public policy.

The appellate court, however, reversed on several grounds. First, it found there was not an "adequate nexus" between the marriage and the state of New Jersey to justify a New Jersey court

⁸⁴Need to determine : do some forms of Islamic family law require or permit spousal support; do others not allow?

⁸⁵388 A.2d 1000 (Super. Ct. N.J., App. Div. 1978).

awarding the wife alimony or equitable distribution – residing in New Jersey for two years earlier in the marriage was insufficient. 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.”⁸⁶ Expert testimony established that alimony “does not exist under Pakistan law,” and that providing for it by contract is “void as a matter of law” in Pakistan. Conversely, the agreement could have given the wife an interest in her husband’s property, but did not, giving her instead \$1,500 (15,000 rupees).

Had there been a sufficient nexus, the court observed, a New Jersey 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. Note here the obvious significance of location for jurisdiction: it was the wife’s insufficient connection to the State of New Jersey that barred relief. The husband, after all, had been residing in the state for some time and, troublingly, it appears that his conduct was responsible for her not returning to New Jersey. But both husband and wife remained citizens of Pakistan, and expert testimony was given indicating 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.”⁸⁷

⁸⁶*Id.* at 1006.

⁸⁷*Id.* at 1005. The issue of nexus seems to account for other court decisions to uphold antenuptial agreements entered into in other countries, in which spouses agree to give up rights. In *Mehta v. Mehtar*, 20 Conn. L. Rptr. 251 (Super. Ct. Conn. 1997) (unpublished opinion), a Connecticut lower court upheld an antenuptial agreement entered into in South Africa, by a citizen of South Africa and a native of South Africa, who was a U.S. citizen. The agreement, in which they opted out of community provisions of South African marital law, was entered into pursuant to their religious beliefs as Muslims. At the time they made the agreement, they knew they would be living

An instructive example of when such a nexus *does* exist, also involving the law of Pakistan, is the recent case, *Aleem v. Aleem*,⁸⁸ in which a Maryland appellate court upheld a lower court's ruling that it need not give comity to a Pakistani divorce as a bar to a wife receiving equitable distribution of her husband's pension. This case well illustrates the ways in which migration and resultant jurisdictional questions and the possibility for forum shopping are features with which contemporary family law has to deal. Husband, 29, and wife, 18, married in Pakistan after their families arranged a meeting. They never lived together in Pakistan because the husband shortly moved to England to complete his studies, and wife then joined him. Four years later, they moved to the United States, and had been living in Maryland over twenty years at the time the wife initiated a civil divorce proceeding. They had two children, both born in the U.S. and U.S. citizens.

When the wife filed for divorce, the husband did not raise any jurisdictional issues and paid temporary child support. When she filed for absolute divorce, he moved to dismiss on the ground that "all issues have already been decided in Pakistan." He referred to the parties' marriage contract, entered into at the time of their marriage 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 had obtained a *talaq* divorce at the Pakistani Embassy in Washington, D.C., by pronouncing three times

in Connecticut and the relevant property was there. Although Connecticut requires financial disclosure for such agreements, and South Africa does not when such agreements are intended to give effect to religious beliefs, the court upheld the agreement, stating that: "the protection of the justified expectations of the parties should take precedence over the imposition of Connecticut law on a marriage negotiated and entered into under a South African law allowing for recognition of religious principles." Connecticut did have an interest in the marriage, however short, because the parties now lived there, that interest did not outweigh "the interest of the parties in their jointly held expectations, certainly, and predictability."

⁸⁸931 A.2d 1123 (Ct. Spec. App. Md. 2007).

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.”⁸⁹ It also rejected husband’s motion that it must hold an evidentiary hearing on the issue of comity. When the court granted the wife an absolute divorce, on the ground of a two-year separation, it also issued an order for spousal support, directing husband to pay wife 50% of his month pension benefit until the death of either party. (Because all of his employment at the bank had been during the marriage, the marital share of the pension was 100%.)⁹⁰

The husband challenged the pension award, arguing that by virtue of the marriage contract and Pakistani law as it governs the contract, his wife was not entitled to any portion of his pension. He introduced an affidavit by a Pakistani lawyer explaining that under the laws of Pakistan, a wife can make no claim to “money, property, or assets titled in the name of the husband on the date of the divorce,” and that they remain his property *unless* such a claim is mentioned in the marriage contract (the *Nikah Nama*) – which the pension was not.⁹¹ The court declined to hold an evidentiary hearing on Pakistani law. The court was not persuaded by the husband’s reliance on *Chaudry v. Chaudry* case, discussed above, where the New Jersey appellate court upheld the premarital agreement and found insufficient nexus between the marriage and New Jersey to order equitable distribution.

On review, the appellate court upheld the lower court in *Aleem*, noting that the substantive

⁸⁹*Id.* at 1127.

⁹⁰*Id.* at 1128.

⁹¹*Id.* at 1128.

law of Pakistan, as represented by the husband, was “so contrary to Maryland public policy that it is not entitled to comity.”⁹² Maryland’s public policy, as stated by the legislature, is that “when a marriage is dissolved the property interests of the spouses should be adjusted fairly and equitably, with careful consideration being given to both monetary and nonmonetary contributions made by the respective spouses to the well being, of the family.. . .”⁹³ Pakistani and Maryland law were in substantial conflict on this: 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 does have such rights.⁹⁴ If a Pakistani marriage contract is silent about property, Pakistani law does not recognize marital property; the opposite is true about a pre- or post-marital agreement in Maryland. Given this “substantial conflict,” it would be contrary to Maryland public policy to apply Pakistani law. The court notes the lower court findings that, while it did not find anything “suspect” about the marriage contract, it also did not find anything of substance in the contract that would bar the court from dividing marital property.⁹⁵

⁹²931 A.2d at 1130.

⁹³*Id.* at 1135.

⁹⁴*Id.* at 1134.

⁹⁵Of note on the question of whether a marriage contract speaks to property distribution is *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (Ct. App. 4th Dist. 2001), in which a husband unsuccessfully attempted to avoid the application of California’s laws of community property by reference to a supposed premarital agreement that signified an intention by the parties to have property relations governed by “Islamic law.” Husband argued that under such law, each party’s earnings and accumulations during the marriage remain each party’s separate property. The court ruled that the term at issue was “hopelessly uncertain as to its terms and conditions.” The marriage took place in Egypt in 1974; by the time the parties sought to dissolve their marriage in California, they had lived in the U.S. for about 17 years. The court noted that, within Egypt itself, two of the four Islamic schools of interpretation had been influential. Thus, the notion of “Islamic law” itself had some uncertainty and, if the court were to allow expert testimony, an expert would have to opine

The issue of nexus and strategic forum shopping also featured in the appellate court's ruling. By contrast to the facts of the *Chaudry* case, the *Aleem* court stated that "it is clear that this State has a sufficient nexus with the marriage to effect an equitable distribution of marital property."⁹⁶ Relevant facts were 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 personal jurisdiction over the wife with respect to the *talaq* divorce. The court noted that it would not be obligated to give preclusive effect, even under the Full Faith and Credit Clause, "to the decision of a sister state that purported to absolve one former spouse from any marital property obligation to the other former spouse."⁹⁷

Interestingly, the court found analogous and agreed with the rationale of a British case, *Chaudhary v. Chaudhary*, in which the court spoke of a wife's entitlement to the protection of her domiciliary law and spoke disapprovingly of the husband's travel to Kashmiri to enable himself "to rely upon his nationality to procure an effective [talaq] divorce there without her cooperation."⁹⁸ The Maryland court quotes a striking passage on the significance of location: "it must plainly be contrary to the policy of the law in a case where both parties to a marriage are domiciled in this country to

based on his own knowledge of Egyptian society and law in the early 1970s, "whether the parties agree to have their marriage governed by a school of doctrine disembodied from any system of national law (general 'Islamic law' as distinct from codified Egyptian law or the law of some other nation state), but if he concluded that it was the former, he would have had to opine what particular school of Islamic law was to govern the contract." The court adds a comparative note: England has rejected recognition of Muslim "personal law" because "there were so many variants of Muslim personal law that choosing from among them was untenable."

⁹⁶*Id.* at 1131.

⁹⁷*Id.* at 1131.

⁹⁸*Id.* at 1134 (quoting from *Chaudhary v. Chaudhary*, [1985] 2 W.L.R 350.

permit one of them, whilst continuing his English domicile, to avoid the incidents of his domiciliary law and to deprive the other party to the marriage of her rights under that law by the simple process of taking advantage of his financial ability to travel to a country whose laws appear temporarily to be more favorable to him.”⁹⁹

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 apply in a more robust legal pluralism within the U.S.? Would a new millet system insist that Pakistani law, rejecting equitable distribution, should apply to the parties, even though they had never lived as a married couple in Pakistan and Maryland was the location of their family life? What will the relationship between personal law and state family law be in such a case, where a strong state public policy does not use title as the basis for property interests if the relationship dissolves but looks at monetary and nonmonetary contributions by both parties?¹⁰⁰

To go back to Estin’s notion of allowing people space to negotiate the consequences of their religious commitments while also affording them the protection of their citizenship, how much private ordering would a more robust legal pluralism allow? Given that making marriage contracts that determine certain financial and other consequences of the marriage and of divorce is a normal part of Jewish and Islamic marriages, there could be private ordering on many points. If there are limits to parties’ ability to opt out of family law’s protective rules, will those limits be sufficiently

⁹⁹*Id.* at 1135.

¹⁰⁰*Id.*

drawn from existing case law about premarital agreements? Does the fact that religious beliefs shape the bargaining have any significance for assessing whether such agreements were freely and voluntarily made? What does it mean to negotiate in this context?

3. Cases Declining to Recognize Rights to Financial Payment Made in Marriage Contracts

Sometimes, courts have declined to enforce a wife's right in a religious marriage contract to a financial payment in the event of divorce on the grounds that such an agreement offends public policy.¹⁰¹ Here, a court may not be willing to uphold a practice that has a protective function with the religious tradition. One such case is *In re the Marriage of Noghrey*.¹⁰² Prior to a Jewish religious ceremony, the groom and some of his male relatives apparently negotiated a premarital agreement with the family of the bride. In the agreement, the husband agreed to settle on his wife a house and \$500,000 or "one-half of my assets, whichever is greater, in the event of a divorce." The wife filed for divorce seven and one half months later and, in the divorce proceeding, testified, according to the court, that she signed the document "because a husband has to give some protection to a new wife in case of divorce," and that "it is hard for an Iranian woman to remarry after a divorce because she is no longer a virgin."¹⁰³ Her testimony was that in return for the premarital agreement, she gave the groom "assurances that she was a virgin and was medically examined for that

¹⁰¹ Another basis for declining to enforce financial terms of a religious marriage contract has been that the terms are too vague to satisfy the Statute of Frauds. *See Habib-Fahrnich v. Fahrnich*, 1995 WL 507388 (N.Y. Supp. 1995) (unreported opinion) (finding that term, "The SADAQ being: a ring advanced and half of husband's possessions postponed," failed on "three different points of law": "materiality, specificity, and insufficiency.")

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

¹⁰³ *Id.* at 154.

purpose.”¹⁰⁴ The court agreed with the husband that the antenuptial agreement “encourages and promotes divorce” and is therefore contrary to California’s public policy and unenforceable. The court traces such a policy all the way back to the inception of California’s statehood. While antenuptial agreements by which parties address how to dispose of property and earnings are generally valid, an agreement, like this, where husband promises to give the wife “a very substantial amount of money and property, but only upon the occurrence of a divorce,” creates a one-way incentive for the wife to initiate a divorce. The court noted that the bride and her parents did not possess great wealth, and that “the prospect of receiving a house and a minimum of \$500,000 by obtaining the no-fault divorce available in California would menace the marriage of the best intentioned spouse.”¹⁰⁵

A subsequent California case, *Dajani v. Dajani*,¹⁰⁶ relied on *Noghrey* to decline on public policy grounds to enforce a foreign proxy marriage contract involving an Islamic dower agreement, under which husband was obliged to pay the balance of the wife’s dowry either when the marriage was dissolved or husband died. Husband and wife married by proxy in Jordan; husband was residing in the U.S., and the wife joined him the next year, when they were married in a civil ceremony. The wife petitioned for dissolution two years later, and sought payment under the contract. In contrast to courts that have enforced such an obligation in Islamic marriage contracts after hearing expert testimony that the husband has an obligation to pay even if wife initiates the divorce, this court ruled -- based on similar evidence presented in this case by the wife -- that the contract was one “designed

¹⁰⁴*Id.* at 154-55.

¹⁰⁵*Id.* at 157.

¹⁰⁶251 Cal. Rptr. 871 (Ct. App. 4th Dist. Cal. 1988).

to facilitate divorce.” It stated: “The contract clearly provided for wife to profit by a divorce, and cannot be enforced by a California court.”¹⁰⁷ Although the *Dajani* court noted that the protective function of the payment in the ketubah, at issue in *Noghrey*, was both to discourage divorce by making it costly for the husband and also to protect the wife in the event of divorce, this seemed of no consequence to its policy ruling. In effect, both the Ketubah in *Noghrey* and this Islamic dower agreement had the effect of encouraging a dissolution “by providing wife with cash and property in the event the marriage failed.”¹⁰⁸ 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 in protective measures of U.S. divorce law.

4. Divorce decrees and separation agreements

Another area of case law that may prove a useful analogy in trying to fathom a more robust legal pluralism concerns U.S. courts deciding whether or not to recognize foreign divorce decrees or decrees issued by religious tribunals. Concerns for both process and for substantive fairness shape this case law. Where agreements or decrees fail to accord procedural fairness or sharply conflict with U.S. family law policies concerning equitable distribution of property and marriage as an economic partnership, courts may decline to give comity to foreign decrees.

One example, discussed above, is the *Aleem v. Aleem* case, in which the wife, a U.S. citizen, filed for divorce in Maryland and the husband, also a U.S. citizen, then obtained a *talaq* divorce at the Pakistani Embassy in Washington, D.C.¹⁰⁹ As noted above, the court declined to recognize that

¹⁰⁷*Id.* at 872.

¹⁰⁸*Id.* 872-73.

¹⁰⁹931 A.2d 11123 (Ct. Spec. App. 2007), discussed *supra* pages ____.

religious divorce and its financial terms on procedural and jurisdictional grounds, as well as due to the substantial gap between Pakistani law and Maryland law on the relevant default rule about whether or not a spouse is entitled to distribution of marital property. Maryland's law expressed a policy of fair and equitable distribution, in light of the notion that both spouses contributed to family well being.

Another example in which a court declined to recognize a divorce decree is *Tal v. Tal*,¹¹⁰ which also seems to involve strategic forum shopping as well as procedural and substantive unfairness. In that case, the parties were married in Iran in an orthodox Jewish religious ceremony, moved to Israel, and then moved to the U.S. , where they had lived for several years at the time of this legal action. They had four minor children.

At issue was whether the court should enforce a set of separation agreements entered into by the parties, giving husband custody of the children, and, if the wife later had custody, specifying monthly child support, and also providing the wife a lump sum of money instead of maintenance. The wife filed for divorce in New York state court and challenged the terms of the separation agreements on both procedural and substantive grounds. As to process, she alleged that the agreements were achieved through "fraud, diversion of assets, brutalization, duress and threats." As to substance, she claimed the agreements were "unconscionable" given her husband's net worth of over \$500,000. The husband asserted that the court should dismiss the action either because they already had a valid divorce issued in Israel or, in the alternative, because the separation agreements were binding.

The general rule, the court stated, was that New York courts will accord recognition to

¹¹⁰601 N.Y.S.2d 530 (Sup. Ct. 1993).

bilateral foreign judgments of divorce, along with their terms, under the doctrine of comity, unless there was fraud in procuring the judgment or recognizing the judgment would violate a strong public policy.¹¹¹ The New York court said that its task was not to determine whether the various religious proceedings in the rabbinical courts resulted in a religious divorce – a task beyond a civil court’s purview. But it did have jurisdiction to determine whether the separation agreement executed in the context of a religious proceeding is enforceable in civil court and whether to deny comity to a foreign country judgment procured by extrinsic fraud or which violates strong public policy.

Applying that test, the court declined comity to the Decree of Divorce issued by the State of Israel, noting that the wife had not resided in Israel since 1985, was not given notice of any proceeding in Israel and did not personally appear, and that the foreign judgment did not incorporate the separation agreement by reference. As for the separation agreement, the court further found a “rebuttable inference of overreaching” by the husband. The wife was not afforded any financial disclosure prior to the agreement and was not represented by counsel. It also found the terms of the agreement “manifestly unfair” given the respective financial circumstances of the parties at the time the agreements were made – e.g., the husband had full control of all marital assets and income and the wife had no assets or income. The wife was a housewife, had never been employed, and was not fluent in the English language, while the husband owned and operated clothing stores in Manhattan and earned rental income from commercial properties in Manhattan. In a system of multi-tiered marriage, would civil courts retain jurisdiction to protect against this kind of procedural unfairness and substantive overreaching? Would religious tribunals afford such protections or be mandated to

¹¹¹*Id.* at 532.

do so by civil authority?¹¹²

Child Custody

Child custody is at issue in many cases in which civil courts are asked to assert jurisdiction over custody or, in the alternative, to recognize and enforce a foreign court's – including a religious court's – custody order. Matters of child custody and child support are ones in which, by contrast to aspects of divorce involving adults, there is far less capacity for divorcing parties to opt out of the law's protective policies. This insistence on judicial oversight stems from the state's *parens patriae* power and the overarching standard in custody matters in U.S. family law, the best interests of the child. One area of conflict is when U.S. family law's commitment to equal parental rights and responsibilities, rather than gendered presumptions about parental roles, differs from some religious law's maternal or paternal preference (for example, in Islam). Here, contemporary U.S. family law has evolved from prior paternal and then maternal preferences to, in light of Equal Protection concerns, gender-neutral intermediary standards, like primary caretaker or joint custody.

The basic legal framework relevant in custody cases involving foreign court rulings is supplied by general principles of comity as well as uniform laws adopted by the states, some federal statutes, and international conventions. Relevant uniform laws are The Uniform Child Custody Jurisdiction Act, approved and recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1968, and adopted with some variations in all fifty states and the District of Columbia, and the more recent Uniform Child Custody Jurisdiction and Enforcement Act,

¹¹²Question to address: what kind of procedural and substantive protections are now afforded in religious tribunals in terms of whether they inquire into the terms of separation agreements or into the divorce process? Some of the case law Estin addresses involves husbands getting what seem like pretty one-sided rulings from rabbinical tribunals.

which was promulgated by NCCUSL in 1997 and intended to supercede the UCCJA.¹¹³ The Full Faith and Credit Clause applies to sister states, not foreign jurisdictions.¹¹⁴ Comity, to begin, “in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other.”¹¹⁵ In addition, in the context of child custody, the UCCJA advises that a state court should enforce a valid custody decree rendered in other states. With respect to foreign custody orders, the UCCJA provides that its “general policies” about recognition and enforcement of sister states’ custody decrees will apply “to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.” The UCCJEA more forcefully directs respect for foreign custody decrees, and indicates that a foreign country should be treated as a “state” for purposes of applying the Act’s general provisions. It states that: “[A] child-custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this [Act] must be recognized and enforced.” The exception to this requirement is that a state need not apply the Act “if the child custody law of a foreign country violates fundamental principles of human rights.”¹¹⁶

¹¹³D. Marianne Blair and Merle H. Weiner, *Family Law in the World Community* 653-54 (2003). Drafters thought that the UCCJEA was necessary to bring state laws into conformity with the Parental Kidnaping Prevention Act, enacted by Congress in 1980, which imposes requirements on states to recognize and enforce custody orders rendered by sister states provided that those sister states’ courts had jurisdiction under the PKPA guidelines. *Id.*

¹¹⁴*Aetna Life Ins. Co. v. Tremlay*, 223 U.S. 185, 190 (1912). This case is cited in various state court opinions addressing the status of a foreign court judgement.

¹¹⁵*Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987).

¹¹⁶UCCJEA Section 105.

Within this framework, courts of particular states apply varying limiting principles as to when they will not enforce foreign custody decrees. If, for example, a foreign court judgment does not appear to be based on the standard, best interests of the child, courts have declined to enforce it.¹¹⁷ Illustrative is *Ali v. Ali*,¹¹⁸ in which a New Jersey court declined to enforce a divorce and custody decree obtained by husband, a Palestinian national, from the Sharia Court in Gaza against the wife, a New Jersey resident and American citizen. In asking for comity, the husband submitted evidence that “under Muslim law, a father is automatically entitled to custody where a boy is seven . . . ; the mother can apply to prolong custody until the boy is nine . . . ; however, at that time, the father or the paternal grandfather are irrebuttably entitled to custody.”¹¹⁹ The New Jersey court opined: “Such presumptions in law cannot be said by any stretch of the imagination to comport with the law of New Jersey whereby custody determinations are made based upon the ‘best interests’ of the child and not some mechanical formula.”¹²⁰ The court contrasted such mechanical presumptions that either the mother or father is entitled to custody with New Jersey’s statutory law, which declares that “it is in the public interest to encourage parents to share the rights and responsibilities of child rearing . . . In any proceeding involving the custody of a minor child, the rights of both parents shall be equal.”¹²¹

¹¹⁷Question to address in later draft: how does UCCJEA change this appeal to best interests, if at all? It says it has removed reference to “best interests” in order to “clearly distinguish between the jurisdictional standards and the substantive to standards relating to custody and visitation.” Prefatory Note, Item 5. Role of “Best Interests.”

¹¹⁸279 N.J. Super. 154 (Sup. Ct. N.J. 1994).

¹¹⁹*Id.* at 167.

¹²⁰*Id.*

¹²¹*Id.* at 167-68.

Under a best interests standard, the court may give a preference – but not use a presumption – to the parent with the “strongest psychological bond with the child,” or consider the child’s preference, along with a number of other factors, such as a child’s age. The court would not “place its imprimatur” on a custody decree so “diametrically opposed to the law of New Jersey” and “repugnant to all case law” about what factors to consider in determining custody.¹²²

By contrast, a different assessment of the repugnancy of Islamic rules of maternal and paternal preferences in custody determinations is found in *Hosnian v. Malik*, in which a Maryland appellate court gave comity to a Pakistani court’s custody order where such preferences were only *one* factor in an overall best interests of the child test.¹²³ In a prior proceeding, the court had ruled that a Maryland lower court should not exercise jurisdiction over custody (given the Pakistani ruling) unless the Pakistani court did not apply the best interests of the child standard in awarding custody to the father or, in arriving at its decision, applied a law (substantive, evidentiary, or procedural) “so contrary to Maryland public policy as to undermine confidence in the outcome of the trial.”¹²⁴

The trial court heard conflicting expert testimony about what the custody standard was in Pakistan, but was more persuaded by the father’s expert that, while Islamic “personal law” was a factor to be considered under the Act, child custody disputes are governed by the “welfare of the minor” standard, and that Pakistani courts look to various factors, many of which paralleled the factors used in Maryland under the best interest standard.¹²⁵

¹²²*Id.* at 169.

¹²³671 A.2d 988 (Ct. Spec. App. Md. 1996).

¹²⁴*Id.* at 991.

¹²⁵*Id.* at 991-92.

Far from finding the Pakistani doctrine of Hazanit, or maternal and paternal preference, repugnant to Maryland public policy, the reviewing court instead found a similarity between Hazanit and the traditional maternal preference (in the case of children of tender years) once followed in Maryland. In any case, Hazanit was not applied, because the Pakistani court ruled that the mother lost this preference when she removed the child to the U.S. (where the father could not exercise his right of control as the child's natural guardian). But the Maryland court went on to note that, even if Hazanit were considered as a factor, it would be "simply unprepared to hold that this longstanding doctrine of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world, as applied as one factor in the best interest of the child test, is repugnant to Maryland public policy."¹²⁶

Notable in this case is the court's attention to the cultural and spatial location in which best interest or welfare of a minor is to be determined. *Ali* involved a dispute about a child who was born in the United States and lived the first part of his life, with both parents, in Gaza and the next segment back in the United States, where both his parents lived. By contrast, the *Hosain* case involved a "long and bitter dispute" between two citizens of Pakistan about a child reared most of her life in Pakistan. After eight years of marriage, the mother moved in with her parents, taking the child with her. The father sued for custody and the mother left Pakistan, again taking the child with her. The mother did not appear in court (saying that she feared being arrested for adultery, since she had since lived with and conceived a child with another man¹²⁷), but she was represented by counsel.

¹²⁶*Id.* at 1005.

¹²⁷The court does not find persuasive her argument that the effect of her admission to adultery prevented her return to Pakistan. *Id.* at 1000.

After the father obtained custody, the mother hid the child until, after two years, the father's private detectives found the mother (who had obtained a student visa) and child in Baltimore County. At this point, the mother filed for custody and a restraining order in a Baltimore court, and was successful in getting that court to assert jurisdiction and deny comity to the father's custody order.¹²⁸ In reversing this ruling and finding that the best interest standard was applied in the Pakistan proceeding, the reviewing court stressed the connection of mother, father, and child, at the time of that ruling, to Pakistan:

[W]e believe it is beyond cavil that a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, religion, and mores of the community and country of which the child and – in this case – her parents were a part, i.e., Pakistan. Furthermore, the Pakistani court could only apply the best interest standard as of the point of time when the evidence is being presented, not *in futuro*, the Court having no way of predicting that the child would be spirited away to a foreign culture. In other words, how could a Pakistani trial court apply any other standard pre-supposing – as it was constrained to – that the minor child would continue to be raised in Pakistan under the Islamic culture and religion? Thus, faced with the factors of a Pakistani child of two Pakistani parents who had been raised in the culture of her parents all of her life, not only did the Pakistani court properly utilize the only mores and customs by which the family had been inculcated, but it used the only principles and teachings available to it at the time.¹²⁹

The court went on to observe that, “Bearing in mind that in the Pakistani culture, the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teachings, one would expect that a Pakistani court would weigh heavily the removal of the child from that influence as detrimental.”¹³⁰

In this case, the legal pluralism evident in the court opinion relates closely to geographical

¹²⁸*Id.* at 990.

¹²⁹*Id.* at 1000-1001.

¹³⁰*Id.* at 1001.

location: a U.S. court may defer to a foreign court adjudicating a matter involving persons within that foreign nation's boundaries when it applies an analogous standard, but in a local context, that is, in accordance with Islamic, customs, culture, and mores. How might this translate to a regime of more legal pluralism *within* the U.S., in which parents in a custody dispute have multiple memberships and communities: a religious as well a local community, as well as the broader state and national polities? Would a new millet system of personal law mean that persons, no matter where they were located as citizens or resident aliens, would carry on their back, as it were, 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: "It often happened that five men were present or setting together, and not one of them had the same law as another."¹³¹ At least two concerns warrant attention: First, to what extent do people who are members of religious communities have exit rights, in terms of being free to leave that community or to seek the protection of civil law? When adults exercise those exit rights, what is the impact on the rights of their children? Second, how would a robust legal pluralism reconcile civil law's commitments to equal parental rights and responsibilities and religious law's systems asymmetrical treatment of the rights of fathers and mothers?

A familiar tension in family law is that between the desire for uniformity among states and the recognition of the sovereignty of diverse and independent states. For example, the Full Faith and Credit Clause itself pulls states in the direction of uniformity and away from being competing, foreign sovereignties. Various federal custody statutes, such as the Parental Kidnaping Prevention Act, aim to reduce the problem of forum-shopping by parents who, dissatisfied with the custody

¹³¹Tamanaha, *supra* note *, at 6 (quoting Bishop Agobard of Lyons as quoted in J.B. Morall, *Political Thought in Medieval Times* (1980)).

ruling of one forum state, seek to invoke the jurisdiction of another state.¹³² Human rights instruments evidence another push toward uniformity, or universals. And the UCCJEA allows courts to consider human rights in deciding whether to afford recognition to a foreign custody award. Notably, as Estin points out, “laws that do not give men and women ‘[t]he same rights and responsibilities as parents] violate both the principles of CEDAW and other human rights instruments that prohibit discrimination on the basis of sex.”¹³³ The Convention on the Rights of the Child also expresses commitment to equal respect for boys and girls and the end of practices that discriminate against girls. UNICEF, for example, has asserted that gender inequality hinders not only women’s full development as equal citizens but also the well-being of children and that fostering gender equality would yield a “double dividend” for women and children.¹³⁴

This push to universals encounters a countervailing pull toward affirming religious particularity – a number of nations have opted out of or taken exceptions to provisions in CEDAW and in the Convention on the Rights of the Child concerning a commitment to gender equality.¹³⁵ Family law is also an area in which nations have issued reservations from these treaties. Unfortunately, the U.S. stands alone (with Somalia) in not ratifying the Convention on the Rights of the Child and also has declined to ratify CEDAW. This puts some limits on the ability of U.S. courts to appeal to human rights norms as a ground for not enforcing a custody judgement, although

¹³²The recent interstate jurisdictional custody battle at issue in *Miller-Jenkins v. Miller-Jenkins* is a great example of how the PKPA shapes state custody jurisdiction and limits strategic forum shopping.

¹³³Estin, *supra* note __, at 597. The U.S. has signed, but not ratified CEDAW.

¹³⁴UNICEF, *State of the World’s Children 2007: The Double Dividend of Gender Equality*.

¹³⁵Blair and Weiner, *supra* note *, at __.

some human rights instruments to which the U.S. is a party do affirm gender equality.

Legal pluralism, as Tamanaha observes, can lead to different legal bodies making competing claims of authority upon individuals, thus creating uncertainty or jeopardy if individuals or groups “cannot be sure in advance which legal regime will be applied to their situation.”¹³⁶ But this very conflict – this abundance of possible legal authorities – “also creates opportunities for individuals and groups within society, who can opportunistically select from among coexisting legal authorities to advance their aims.”¹³⁷ This opportunism or strategic invocation of jurisdiction is evident in some of the cases involving international custody disputes.

If religious tribunals within the U.S. are now, under a multi-tiered system of marriage and divorce, to have authority to issue binding judgements with civil consequences, this potential for both uncertainty and opportunism multiplies.

Religious tribunals within the U.S. already do hear many family law matters, but under the present regime of family law, when those tribunals issue rulings affecting children, there are limits to the obligation of a civil court to treat such rulings as binding. There are limits, in other words, to private ordering. For example, by contrast to a civil court’s willingness to accept (subject to certain limits) religious arbitration of a marriage contract or of economic matters pertaining to divorce, civil courts strongly assert their inherent authority, under the doctrine of *parens patriae*, to make the ultimate ruling on child custody. Thus, in some states, child custody may not be arbitrated by divorcing parties, whether by a secular or a religious arbitration body. In *Stein v. Stein*,¹³⁸ a wife

¹³⁶Estin, *supra* note *, at 1.

¹³⁷*Id.* at 1-2.

¹³⁸707 N.Y.S.2d 754 (Sup. Ct. 1999).

successfully challenged in civil court an arbitration award by a Beit Din, a Jewish religious tribunal, awarding custody to the husband, as well as all the marital assets titled either in his name or held jointly, and prohibiting her from moving outside New York. The wife apparently had tried to withdraw from the proceeding, but the arbitration continued without her.¹³⁹ The wife brought an action, in civil court, for divorce. The husband moved for confirmation of the religious tribunal's decision, which the wife sought to vacate.

The court affirmed that an agreement between spouses to arbitrate marriage matters “suffers no inherent invalidity,” and that arbitration “is a favored method of resolution.”¹⁴⁰ But there are exceptions carved out, and one is that public policy no longer considers custody of children to be a proper subject of arbitration.¹⁴¹ Thus, “contracts entered into by parents with regard to the fate of their children are not binding on the courts.” New York’s law imposes on courts a “superseding” responsibility, whatever bargain has been struck, to make an independent review and findings, bearing in mind the best interests of the child standard.¹⁴² In *Hirsch v. Hirsch*, a New York appellate court reiterated, in declining to enforce a Bais Din’s award of joint custody pursuant to arbitration, that “disputes about custody and visitation are not subject to arbitration as ‘the court’s role as *parens patriae* may not be usurped.’”¹⁴³ Evidence of the strength of this state interest is seen in the fact that, when divorcing parties agree upon custody, it is still subject to review by the court, charged with

¹³⁹*Id.* at 757-58.

¹⁴⁰*Id.* at 758.

¹⁴¹*Id.* at 278-79.

¹⁴²*Id.* at 758.

¹⁴³*Hirsch v. Hirsch*, 774 N.Y.S.2d 48 (App. Div. 2nd Dept. 2004).

responsibility to determine the child's best interests.¹⁴⁴

In a new system of legal pluralism, in which civil courts are to cede authority, would courts retain this responsibility? This is an issue of considerable concern, to the extent that contemporary U.S. family law espouses policies of equal parental rights and responsibilities and a duty to educate and provide equal financial support for male and female children. A spur to this evolution in family law was a series of U.S. Supreme Court rulings, beginning in the 1970s', that the Equal Protection Clause of the U.S. constitution puts limits on states' abilities to use gender-based classifications in allocating family entitlements and duties. If a gap exists between this understanding of gender in family law and religious family law, which prevails?

[in later draft, give brief wrap up of this section]

IV. International Models? Canada

A. Assessing Multi-tiered Marriage Viewed Through a Gender Equality Lens

In this Part, I contend that training a gender lens on the comparative enterprise the Multi-tiered Marriage Project proposes would better inform the national conversation it invites. In support of this contention, I note that when women (for example, through women's organizations) have participated in the process of constitution making in societies in transition or in societies adopting new constitutions, one consistent demand has been that the constitution, with its declaration of equality, be supreme over tradition and custom, including customary laws that entail forms of the subordination of women.¹⁴⁵ As Beverly Baines and Ruth Rubio-Marin note, in their book, *The Gender of Constitutional Jurisprudence*, speaking of Israel, India, and South Africa (three of

¹⁴⁴See, e.g., *Lombardo v. Lombardo*.

¹⁴⁵See HELEN IRVING, *SEX AND THE CONSTITUTION* (forthcoming book with Cambridge).

Nichols's examples), 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.¹⁴⁶

In Iran, for example, there is now a grass-roots campaign by women's organizations and their allies, "One Million Signatures Demanding Changes to Discriminatory Laws," to collect a million signatures in support of changing discriminatory laws, including discriminatory family laws.¹⁴⁷

Writing of Israel's contemporary millet system, comparative constitutional law scholar Ran Hirschl states that "the state has granted these [religious] communities a license to maintain intragroup practices that disproportionately injure vulnerable group members, such as women," and notes (drawing on the work of Ayelet Shachar) "the fundamental problem of women's heightened vulnerability to gender discrimination in the religious divorce process."¹⁴⁸ And Shachar and Hirschl, in the Baines and Mario-Rubin volume, argue that: "[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

¹⁴⁶Beverly Baines & Ruth Rubio-Marin, *Introduction: Toward a Feminist Constitutional Agenda*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 12 (Beverly Baines & Ruth Rubio-Marin eds., 2005).

¹⁴⁷A web search of Iran, Million Signatures campaign, will bring up many website with information about this campaign, e.g., www.we-change.org. An example of the grassroots nature of this campaign is that one method of collecting signatures is going door to door to speak with individual women. The symbol of this campaign is simple but powerful, a set of scales with the symbol for female on one side and for male on the other, set at a level of balance. Thanks to Dr. Shahla Haeri for sharing her research with me about this Campaign.

¹⁴⁸Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 *Texas L. Rev.* 1819, 1840-41 (2004) (citing Eyelet Shachar, *Multicultural Jurisdictions* 57-60 (2001)).

and religious/national tensions.”¹⁴⁹ As I have elaborated elsewhere, bringing constitutional commitments to sex equality to bear on family law has been, in the constitution-building process of various nations, viewed as a sign of progressive change.¹⁵⁰

Another useful orienting idea that a feminist lens provides is that, as scholarship in the ongoing debate about multiculturalism details, “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.”¹⁵¹ Moreover, because the family features as a crucial site of religious and cultural transmission, and women’s roles within the family are often prescribed and constrained in many ways, 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.¹⁵² But rather than view this issue as a battle between sex equality and multiculturalism or between rights and a monolithic, static “culture” that is inevitably patriarchal, some women and women’s groups (such as Women Living Under Muslim Laws) contest patriarchal interpretations of culture and religion and work to reveal the actual

¹⁴⁹Ran 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*, supra note *, at 220.

¹⁵⁰Linda C. McClain and James E. Fleming, *Constitutionalism, Judicial Review, and Progressive Change*, 84 *Texas L. Rev.* 433 ((2005) (reviewing RAN HIRSCHL, *TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004)). For Hirschl’s response to this review, see [give cite].

¹⁵¹SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 83-84 (2002).

¹⁵²See UMA NARAYAN, *DISLOCATING CULTURE* (1997); AYELET SHACHAR, *MULTITULCURAL JURISDICTIONS* (2001).

diversity of religious laws and customs and the possibility for greater equality within particular traditions.¹⁵³ If civil government is to cede authority to religious tribunals, the practical problem arises: who within the religious tradition has authority to say what religious law is, and what room will there be for dissenting voices that contest the most patriarchal interpretations of religious family law?¹⁵⁴

For all of these reasons, I bring a feminist skepticism to the call for developing a more robust millet system in the U.S.

B. Canada: the Faith-Based Arbitration Controversy and the Recent Get Decision

One example that Professor Nichols offers of ongoing debates within Canada about religious pluralism with respect to family law is a model of allowing individuals to “‘opt’ into an arbitral board of their choosing to resolve disputes – including a religious arbitral board with binding authority.”¹⁵⁵ In Ontario, for example, pursuant to the Arbitration Act of 1991, parties could choose the law under which the arbitration would be conducted, which (even though the statute referred to laws of another Canadian jurisdiction) was interpreted, in practice, to mean that “Christians, Jews, Muslims, and people of other faith traditions could arbitrate their disputes according to the principles of their faith.”¹⁵⁶ Quoting the Act, Nichols further explains that Ontario courts were required to “‘uphold arbitrators’ decisions if both sides enter the process voluntarily and if results are fair,

¹⁵³I discuss this in Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 Ford. L. Rev. 1569 (2004). One such group is Women Living Under Muslim Laws. See also Madhavi Sunder, *Piercing the Veil*, 112 Yale L.J. 1399 (2003).

¹⁵⁴See Sunder, *supra* note *.

¹⁵⁵Nichols, *supra* note *, at 193.

¹⁵⁶*Id.* at 193-94. Arbitration Act, 1991, S.O. 1991, c. 17.

equitable, and do not violate Canadian law.”¹⁵⁷

I base my summary here of the controversy about the Arbitration Act on the detailed report written by Marion Boyd, a former Attorney General, at the request of the Attorney General and the Minister Responsible For Women’s Issues, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*.¹⁵⁸ The controversy arose in 2003, when Syed Mumtaz Ali, a retired Ontario lawyer “determined to ensure that Islamic principles of family and inheritance law could be used to resolve disputes within the Muslim community in Canada,” announced the establishment of the new Islamic Institute of Civil Justice, which would conduct arbitrations according to Islamic personal law.¹⁵⁹ Some of Ali’s statements and media interviews “raised acute alarm,” and “intense fear that the kind of abuses, particularly against women, which have been exposed in other countries where ‘Sharia Law’ prevails, such as Afghanistan, Pakistan, Iran, and Nigeria, could happen in Canada.” There was also fear that “[t]he many years of hard work, which have entrenched equality rights in Canada, could be undone through the use of private arbitration, to the detriment of women, children, and other vulnerable people.”¹⁶⁰ The gist of the statements apparently triggering this alarm had to do both with the claim that, once an arbitration decision was reached, and a party asked a “local secular Canadian court” to enforce it, “the court has no discretion in the matter,” and that once the “Sharia Court was available to Muslims, Muslims would be required, if they were to be regarded as “good

¹⁵⁷*Id.*

¹⁵⁸MARION BOYD, *DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION* (2004).

¹⁵⁹*Id.* at 3.

¹⁶⁰*Id.*

Muslims,” to settle their disputes only in that forum.¹⁶¹ Commentators on this controversy have noted that Ali’s statements were hardly reflective of the views of most Muslims in Ontario, but nonetheless gave rise to fears of a parade of horrors.

Given a mandate “to explore the use of private arbitration to resolve family and inheritance cases, and the impact that using arbitrations may have on vulnerable people,” Boyd conducted an extensive, several month review, in which she met with nearly 50 groups and spoke with many individuals, and received “countless letters and submissions from concerned citizens across Canada.”¹⁶² As Nichols recounts the sequence of events, her resulting report (which I discuss below) “was not received with great favor,” and in spite of her endorsement of arbitration, Ontario’s premier made a public announcement that: “There will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.”¹⁶³ The legislature also amended the Arbitration Act so that, instead of allowing disputes to be decided under “the rules of law designated by the parties,” which, in practice, had been interpreted to include religious law, “[i]n a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied.”¹⁶⁴ An explanatory note to the amendment states: “[t]he term ‘family arbitration’ is applied only to processes conducted exclusively in accordance with the law

¹⁶¹*Id.*

¹⁶²*Id.* at 5.

¹⁶³Nichols, *supra* note *, at 194.

¹⁶⁴*Id.* at 194-95 (citing to Family Statute Law Amendment Act, R.S.O. 2006, ch. 1, s. 2.2. (Can.).

of Ontario or of another Canadian jurisdiction. Other third-party decision-making processes in family matters are not family arbitrations and have no legal effect.”¹⁶⁵ Nichols concludes that this “effectively cut off not only the rights of Muslims to settle disputes in family matters under Islamic law, but . . . the rights of other religious traditions as well, including the rabbinic courts present and practicing in Ontario since 1889.”¹⁶⁶ Presumably, from the perspective of a call to a more robust legal pluralism, this is an outcome to be regretted.

In the confines of this paper, I cannot hope to offer a thorough evaluation of this controversy. Nichols mentions it very briefly. Doing it full justice would require an appreciation both of the broader jurisdictional landscape of Canadian family law, including the division of jurisdictional authority over marriage and divorce between the federal and the provincial governments, how religious arbitration fits into the broader trend in Canadian law to privatize family law and allow parties to opt out from its protective default rules, as well as “on the ground” dynamics of contemporary Canadian society. My more limited aim is to examine some of the themes in the extensive report, *Dispute Resolution in Family Law*, and some of the commentary on the controversy, with a view to what light the report sheds on the likely tension between gender equality in family law and multi-tiered marriage.

– *Continue arbitration based on religious law.* At the outset, it is notable – and one reason for the controversy the report engendered – that the report recommended both that “arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases,” and that “[t]he Arbitration Act should continue to allow disputes to be

¹⁶⁵*Id.* (citing to Explanatory Note).

¹⁶⁶*Id.* at 194.

arbitrated using religious law.” But the report’s support for such arbitration was qualified by insistence that arbitration be subject to various “safeguards,” some already in the Act but many others recommended in the report (as I discuss below).¹⁶⁷ To allude to a memorable Clintonism, this stance is akin to “mend it, don’t end it.”

– *Family law, women’s voices, and religious and legal pluralism – within Islam itself.* The report details the gist of numerous meetings with an array of Muslim groups. Evident is diversity of views among Muslims themselves about the desirability of religious arbitration and what the appropriate jurisdictional limits should be. Concern about the status of women in various interpretations of Islam featured in many of Boyd’s interviews, particularly when women had emigrated to Canada from nations in which Islamic law was applied in family law matters. Respondents also worried about women being pressured into choosing religious arbitration.

Analyzing this controversy and Boyd’s reports, Canadian feminist scholar Audrey Macklin comments on the fact that, with one exception, all the women’s groups of self-identified Muslim women opposed religious arbitration. Indeed, she notes how the Canadian Council of Muslim Women, “the dominant institutional voice opposing Muslim arbitration,” successfully found alliance with Women Living Under Muslim Laws, a transnational network: “With the benefit of personal experience living in Islamic states and through the global clearinghouse of data gathered by WLUML, local opponents of Muslim arbitration tacitly encouraged the public to situate the Ontario proposal against a transnational landscape of Muslim governance.”¹⁶⁸ This was, she argues, a “politically astute and effective tactic,” but “arguably somewhat inattentive to national context”: “it

¹⁶⁷BOYD, *supra* note *, at 133.

¹⁶⁸Macklin, *Particularized Citizenship*, *supra* note *.

appealed to the fears of an uninformed public that enforcement of faith-based dispute resolution would somehow push Canada onto a slippery slope toward theocracy” (in other words, the parade of horrors).¹⁶⁹

While some of Ali’s statements suggest a model of religious authority independent of state review, of what Shachar (quoted by Boyd) calls, “religious particularism,” most Muslim groups with which Boyd spoke stress that Muslims have a religious duty to obey the secular law in the nation in which they reside.¹⁷⁰ Boyd herself notes that, to the extent some groups quest for a political supremacy or a separate Muslim state within Canada, that is simply off the table. In other words, any system of multi-tiered marriage must not be one of parallel, and co-equal political sovereignty:

[U]nder the current legal structure, establishing a separate legal regime for Muslims in Ontario is not possible. Creating a separate legal stream for Muslims would require change to our justice system on a level not easily contemplated from a practical, social, or legal point of view. In addition, it must be clearly understood that arbitration is not a parallel system, but a method of alternative dispute resolution that is subject to judicial oversight, and is thus subordinate to the court system.¹⁷¹

A millet system, in other words, which relegates people of particular religious faiths to religious tribunals, is also inconsistent with the Charter:

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

¹⁶⁹*Id.* In later draft, address Macklin’s stocktaking about how broader focus on problems with opt-out were lost in resolution of the controversy.

¹⁷⁰Boyd, *supra* note *, at ___.

¹⁷¹*Id.* at 88.

Ontarians are the cornerstones of our liberal democratic society.¹⁷²

This reasoning insists that membership in a polity must not be trumped by membership in particular religious and cultural communities. A number of the individual Muslims and Muslim groups that Boyd interviewed similarly resisted any advent of a personal law system, arguing that it would deprive them of the benefits and protections of citizenship.¹⁷³ Similarly, Macklin’s analysis of the controversy notes how “encultured women” managed to express political citizenship in the sphere of law reform, insisting that their rights as members of the broader polity be protected. Boyd’s report includes a thoughtful discussion of membership in a multicultural and democratic society in which individuals are “at the intersection of various identities.”¹⁷⁴ Drawing on Shachar’s work on the “intersectionist” view of identity, in which personal identity is “fragmented, discursive, positional, and imbued with multiple ascriptions,” the report states that it is “crucial importance” to recognize the persons are “always caught at the intersection of multiple affiliations” – members of groups and citizens of the state. For, Boyd notes, “it is citizenship that allows membership in the minority community to take shape” and “the foremost political commitment of all citizens, particularly those who wish to identify at a cultural or religious level with a minority outside of the mainstream, must be to respect the rights accorded to each of us as individual Canadians and Ontarians.”¹⁷⁵

¹⁷²*Id.*

¹⁷³Give examples.

¹⁷⁴*Id.* at 91.

¹⁷⁵*Id.* at 92. In next draft, add Shachar’s commentary on this controversy: *Feminism and Multiculturalism: Mapping the Terrain*.

– *Women’s equality as a commitment of family law.* Prefacing the recommendation to continue allowing arbitration was the statement that “[T]he Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues.”¹⁷⁶ This focus on the impact on women was not accidental. Much of the public reaction, as noted above, to Ali’s announcement concerned the possible negative impact on women. The report’s mandate was to explore the impact of arbitration on vulnerable people. Ontario’s statutes, and in particular, the preamble of its Family Law Act include, Boyd notes, “some of the strongest legislative statements about gender equality in Canadian law”:

Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of spouses upon the breakdown of their partnership, and to provide for other mutual obligations in family relationships, including equitable sharing by parents of responsibility for their children;¹⁷⁷

– *The Charter, Family Law, and Women’s Equality:* How does the Canadian Charter of Rights and Freedoms, with its (in the eyes of this U.S. scholar, anyway) robust commitment to equal citizenship as well as to religious and cultural rights feature in this debate? In the report, Boyd notes that in her discussions and in the correspondence she received, “I was impressed and touched by the extent to which respondents relief on their understanding of the *Canadian Charter of Rights and Freedoms* . . . and its role in protecting the rights of Canadians.”¹⁷⁸ But Boyd also concluded that the Charter’s important guarantees are limits on public power, not private power, and that, “agreeing to

¹⁷⁶*Id.* at 133.

¹⁷⁷*Id.* at 19 (quoting Family Law Act, R.S.O., 1990, c.F.3, Preamble).

¹⁷⁸*Id.* at 69.

be bound by an arbitrator's decision falls into the category of an action that is private and therefore, in my view, is not subject to *Charter* scrutiny."¹⁷⁹

In a passage that probably troubled some feminist readers, Boyd acknowledged the "resonance" the public/private divide has for feminist scholars, but stated that, "where people create legal relationships between themselves on their own authority, as legally capable individuals, it seems that a private legal relationship has arisen. Although government has a role in ensuring that the law that applies to the breakdown of that private relationship does not perpetuate gender roles and stereotypes, if the participants choose not to follow that law, and instead make private arrangements, the government is not required to interfere."¹⁸⁰ Nothing in the Charter, she observes, "requires an equal result of private bargaining. Parties may choose an apparently unequal result for many reasons and may think a deal fair that outsiders think is unfair."¹⁸¹

The report also notes the Charter's commitment to freedom of religion and that this guarantee is to be interpreted to enhance the multicultural heritage of Canadians. Thus, some respondents argued that Section 27 of the Charter not just permits but demands that multicultural communities be allowed "to use their own form of personal law to resolve disputes."¹⁸² Boyd states that a commitment to enhancing the multicultural heritage "suggests respect for people's choices as long as those choices or the results are not illegal."¹⁸³ In a move familiar from liberalism, she continues:

¹⁷⁹*Id.* at 72.

¹⁸⁰*Id.* at 72.

¹⁸¹*Id.* at 73.

¹⁸²*Id.* at 72.

¹⁸³*Id.* at 75.

“People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law. In the areas where the state has chosen to allow people to order their lives according to private values, the state has no place enforcing any particular set of values, religious or not.”¹⁸⁴

In *The Place of Families*, I have commented that while current constitutional law bars states from enacting laws that require a particular gendered division of labor in the home or that return to the common law’s model of marriage as a gender hierarchy, the constitution does not bar individuals from choosing to order their family life a particular way, subject, of course, to legal protections against violence and child abuse and neglect. At the same time, family law has adopted certain default rules that reflect an ideal of marriage as an economic partnership and, through doctrines like equitable distribution of property at divorce serve (not always very well) to alleviate some of the economic vulnerability that women who choose more traditional gender roles may suffer at divorce.¹⁸⁵ A similar dilemma is at work in the arbitration context: what if people, in dissolving their marriages, choose to reject family law’s commitments to equal parental rights and responsibilities or choose not to avail themselves of the economic protections of property distribution and spousal support? Some Canadian feminist scholars argue that the controversy over faith-best arbitration needs to be understood in the broader context of the extent to which Canadian law, by allowing and encouraging arbitration as well as making domestic contracts concerning matters relating to property and support allows parties to “opt out” from family law’s default positions of protecting the

¹⁸⁴*Id.* Think of liberal theorists like Ronald Dworkin, for example.

¹⁸⁵Similarly, Susan Moller Okin proposed remedies like income-splitting as a way that a liberal political order could tolerate, but try to ameliorate, family structures that followed a gendered division of labor.

vulnerable and gender equality.¹⁸⁶

-Insuring Choice and Consent as “Safeguards”. A liberal model of recognizing agency by allowing choice, even incorrect ones, nonetheless puts a high premium of fostering informed choice. This is also evident in the report, where many of the recommended safeguards concern facilitating choice and informed consent. The report recommends that the same procedural requirements that apply to “domestic contracts,” such as being in writing, signed by the parties, and witnessed, apply to arbitration agreements.¹⁸⁷ It allows courts to set agreements aside if a party did not have or did not waive “independent legal advice.”

The report also recommends that parties choosing arbitration under religious law be given “a statement of principles of faith-based arbitration” as well as details of any waiver of rights or remedies under the Arbitration Act. There must also be an explicit statement that certain sections of the Family Law Act apply to the agreement and cannot be waived.¹⁸⁸ The report also called for a public legal education campaign to inform the public in general, and vulnerable women, in particular, about their legal options to resolve disputes. Such a campaign would include education about “general rights and obligations under the law,” “family law issues,” ADR, the Arbitration Act, “immigrant law issues,” and “community support.”¹⁸⁹ All of these measures aim at ensuring that

¹⁸⁶See Audrey Macklin, *Privatization Meets multiculturalism: The Case of Faith-Based Arbitration* (unpublished draft paper presented at Annual Meeting of the Canadian Political Science Association). Question for later draft: how to U.S. safeguards and limits to opting out compare with Canadian ones?.

¹⁸⁷Family Law Act, R.S.O. 1990, Chapter F.3, Part IV. Domestic Contracts. [Q: What sort of substantive grounds are there for court to set aside domestic contracts?]

¹⁸⁸Macklin, *supra* note 186, at 133-36.

¹⁸⁹*Id.* at 138.

choice is an informed and voluntary one.

While I believe that Boyd's assumptions about agency and choice are too strong, and wonder if implementing the safeguards would be feasible, I believe that any discussion of more legal pluralism in the U.S. could learn from the report's thoughtful examination of the interplay among identity, group membership, and citizenship. Would it have been better, from the perspective of fostering equal citizenship and religious freedom, if the Boyd report had been adopted? As some observers note, the fact that Ontario law now specifies that arbitration that takes place pursuant to religious law is not family law arbitration, that is, does not carry any civil effects, does not mean that parties will not pursue religious arbitration¹⁹⁰. They will simply lack whatever protections they might have had if Boyd's recommendations were adopted.

[UPDATE: In next draft, conclude discussion of arbitration and of recent *get* decision, *Bruker v. Marcovitz*, 2007 SCC 54, in which majority articulates public interests and values at stake in protecting equality rights and dignity of Jewish women in their independent ability to divorce and remarry, as well as public benefit in enforcing contract; court notes that because husband failed to honor the contract, she suffered an "unjustified and severe impairment of her ability to live her life in accordance with this country's values and her Jewish beliefs;" and deemed his freedom of religion "inconsequential" compared with disproportionate disadvantage she suffered. Dissent, notably, argued that the ground of plaintiff's claim "conflicts with gains that are dear to civil society" and might begin a "Quiet Regression" on the religion-state balance; it also pointed out conflict between status of women in Jewish law and in civil law with respect to equal rights in marriage and divorce and status of nonmarital children.]

¹⁹⁰See Ayelet Shachar, *Feminism and Multiculturalism*; Ann Estin, *Unofficial Family Law*.