Is Pluralism an Ideal or a Compromise?[1]

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I am grateful to the Hadassah-Brandeis Institute, the Project on Gender, Culture, and Religion, Shula Reinhartz, Sylvia Barack Fishman, and Sylvia Neil for arranging for this conference, and especially to Lisa Fishbayn for inviting me to participate in this fascinating day; for involving such terrific participants, and for selecting the intriguing title, "Untying the Knots." "To tie the knot" is the English idiom for getting married, and yet to "untie the knot" refers to getting out of a predicament, a pickle, or a difficulty. It is a good reminder that opposites are not always opposed and communication is itself often a large part of human difficulties—two insights that will inform my remarks here today.

We come here to discuss conflicts between women's equality advanced by national constitutions and international human rights, on the one hand, and state deference to traditional cultural and religious norms, on the other. We come together at a time when co-religionists have called for the resignation of the Dr. Rowan Williams from the post of Archbishop of Canterbury—why? Because he suggested that Great Britain consider including some parts of Sharia under a parallel jurisdiction to secular law in order to

[1] Keynote, Untying the Knots: Theorizing Conflicts Between Gender Equality and Religious Laws, Hadassah-Brandeis Institute Project on Gender, Culture, Religion and the Law, Brandeis University April 15, 2008. A version of this paper will appear in the Connecticut Law Review as a tribute to Professor Carol Weisbrod whose pathbreaking work on pluralism has inspired me and many others. See, e.g., Carol Weisbrod, Grounding Security: Family, Insurance and the State (Ashgate 2006); Carol Weisbrod, Emblems of Pluralism: Cultural Differences and the State (2002); Carol Weisbrod, Butterfly, the Bride: Essays on Law, Narrative and the Family (1999); Carol Weisbrod, The Boundaries of Utopia (1980); Carol Weisbrod, Women and International Human Rights: Some Issues under the Bridge, in Obligations of Citizenship and Demands of Faith (Nancy Rosenblum ed., 2000); Carol Weisbrod, Practical Polyphony: Theories of the State and Feminist Jurisprudence, 24 Georgia Law Review 985 (1990); Carol Weisbrod, Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 Journal of Family Law 741 (1988).

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acknowledge religious differences and also aid social cohesion.[3] This is a time when what women wear or do not wear becomes the subject of national and international political and legal debates. Recent immigrants to European and North American communities bring religious traditions that differ from the dominant ones in their host countries—and the encounter with the host country leads some of the immigrants' children seek more religious orthodoxy, and some less. Turkey's decades of secularism are under revision by a government seeking more religion in public life; the United States Supreme Court has recently reinterpreted the Establishment Clause also to allow more religion in public life, and more public aid to religion. Israel is experiencing intense debate over the exclusively religious control over family law, including women's status in that context. Meanwhile, feminists' struggles for gender equality garner some success using domestic constitutions and international human rights. But those very victories set a collision course with legal and human rights recognizing cultural and religious freedom.

In these complex contexts, in a period of massive migration and what some provocatively call a "clash of civilizations,"[4] we come to ask: how much room should a secular democracy ensure for religious and ethnic subgroups—and should it do as a matter of normative principle or instead as a compromise of principles? These are old as well as new questions. Many countries, including the U.S., embraced pluralism long ago

[3] Ruth Gledhill, Religion Correspondent, and Joanna Sugden, Archbishop of Canterbury 'should resign' over Sharia row, Times On-Line, February 8, 2008, http://www.timesonline.co.uk/tol/news/uk/article3335026.ece?token=null&offset=0

[4] Samuel P. Huntington, The Clash of Civilizations? (1996). For critiques, see Paul Berman, Terror and Liberalism (2003); Amartya Sen, Identity and Violence: The Illusion of Destiny (2006).

in allowing religious figures to officiate at marriages that have a civil effect. Prior ways of migration generated debates over pluralism and unity in this country and elsewhere.[5]

More recent examples are familiar to many at this conference. The state of New York modified its own divorce law to acknowledge religious practices; it now withholds secular divorce if there is an impediment to a religious divorce pursued by the same party. The New York law was designed to prevent husbands securing a secular divorce while withholding a document required by Jewish law for a religious divorce; it is written broadly enough to apply in comparable situations involving other religions.[6] One commentator observed: "Despite the controversial nature of the New York Get Law, it serves as an apt illustration of a compromise between competing religious and civil interests. The law recognizes the indispensability of religious law for some persons while preserving the state's interest in marriage and the ability of adults to marry freely."[7]

Some view New York's law as a compromise; is that fair, and if so, is that bad? Is the analysis the same for another accommodation, such as Ontario's now-defunct proposal to permit arbitrations of family disputes to follow Islamic law?[8] These examples prompt the question: when do accommodations for minority groups represent a compromise of principles of a constitutional democracy, and when instead do they fulfill those

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[5] See Milton Ridvas Konvitz, The Legacy of Horace M. Kallen (1987)(discuss debates in the United States in the early 20th century); Dalia Tsuk Mitchell, Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism (2007)(same); Maria Rosa Menocal, The Ornament of the World: How Muslims, Jews, and Christians Created a Culture of Tolerance in Medieval Spain (2002)(exploring pluralist tolerance , relatively speaking, in intergroup relations in 14th-century Spain).

[6] See N.Y. Dom. Rel. Law sect 236, 253 (McKinney 1999) (requiring a party married by clergy seeking a divorce to verify that no barriers to remarriage exist by the time the final court judgment is entered); and Section 236B (directing divorce courts are to consider in setting spousal maintenance (alimony) and property division ("equitable distribution") "maintenance (by one spouse) of a barrier to remarriage" (of the other spouse)). The legislature also gave courts discretion to consider the effect of a barrier to remarriage in making equitable distribution of property. Id., section 253.

[7] Laureve Blackstone, Note, Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario, 31 Brooklyn J. International Law 207, 228 (2005).

[8] See infra at text at n. 17.

principles—including gender equality and religious freedom? Do structural commitments to pluralism involve merely practical concerns or instead normative ideals? [9]

I examine here these four linked questions: 1) when should state accommodations of cultural and religious difference be viewed as a compromise?; 2) what is so bad about compromises--when are they not wrong and even admirable? 2) even better than compromise, what enables convergence in policies that attend to competing values of gender equality and respect for religious or customary practices? and 4) what can societies do when the collisions over pluralism and individual equality are too profound for either convergent or compromise solutions? This is a meditation about tensions between cultural pluralism and gender equality, and about compromise and principles. What is possible? And what should we want?

I. Comparing Treatments of Religious Difference

To anyone who thinks that state law should occupy the entire terrain of regulation, the New York divorce law is a concession, for it acknowledges that other legal systems may govern the lives of the same people governed by New York. Professor Robert Cover argued that the modern state may be especially jealous of rival normative regimes;[10] for the jealous state, even recognizing and accepting the parallel operation of religious law would seem a compromise. Tor those who want to keep the government far away from religion,[11] New York's law may seem a real compromise, in the sense of adjusting or

[9] Pluralism here means "A conviction that various religious, ethnic, racial, and political groups should be allowed to thrive in a single society." American Heritage New Dictionary of Cultural Literacy, Third Edition (2005), http://dictionary.reference.com/browse/pluralism. A system arranging a hierarchy, subordinating one group to another in terms of freedoms, status, and resources, is not pluralist.
[10] Robert Cover, Nomos and Narrative, 97 Harv. L. Rev. 4 (1983).
[11] Tanina Rostain, Permissible Accommodations of Religion: Reconsidering the New York *Get* Statute, 96 Yale L.J. 1147 (1987). Yet even in the absence of a statute like New York's, a New Jersey court approved

jeopardizing prior commitments.[12] For that very reason, courts have foreclosed questions raised by divorcing parties that appear to cross the line into religious issues.[13] Yet no secular substantive norm relevant to the availability of divorce is altered by the New York law; it simply alters the prospects for a woman whose husband otherwise could withhold a religious divorce.[14]

Under traditional Jewish law, a marriage is a contract, and the only way a married couple could be divorced would be if the husband of his own free will gives the wife a legal document dissolving the marriage—and without such a document, the marriage continues, even if the couple is granted a civic divorce. The New York law prevents secular divorce until the parties have eliminated any impediment to a religious divorce, and in so doing the state sharply reduces the risks that observant Jewish women will be cast into the difficult status of an abandoned but not divorced woman, or forced to bargain away property entitlements in exchange for avoiding that status.[15] The state thereby ensures that its gender equality norm will not be undone by the religious divorce process—and in so doing, extends some protection for women into the religious community.

In this example, the New York state law acknowledges the existence of another legal system. It ensures that the state's divorce process will not be hijacked by Jewish men to

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judicial directive that a husband deliver a get in order to permit completion of the secular divorce process. *Minkin v. Minkin*, 180 N.J. Super. 260, 434 A. 2d 665 (1981). A similar judicial approach recently emerged in Canada. See infra text at n. 13.

[12] "Compromise" carries these two basic definitions: "the process or a result of settlement or by consent reached by mutual concessions, " and "to make a shameful or disreputable concession." Webster's Seventh New Collegiate Dictionary 171 (1971).

[13] *Sieger v Sieger*, 2005 N.Y. Misc. LEXIS 1808 (Sup. Ct. Kings Co., June 29, 2005)(concluding that the Establishment Clause precluded it from inquiring into the propriety of the husband's actions in obtaining a ruling from a religious court regarding her refusal to accept the husband's notice of divorce).

[14] Rostain, supra.

[15] See Rostain, supra.

undermine the gender equality otherwise ensured in secular law. The law aligns the options available within the religious and secular settings. If this is a compromise, the chief "concession" from the secular side is to acknowledge the existence of the religious world; the secular law trumps any contrary religious practice (much to the satisfaction of many religious individuals who lobbied for the change). The state can provide the overarching umbrella within which religious freedom is protected—but so are secular values of gender equality and fairness.

The Canadian Supreme Court offered a similar analysis in December of 2007 when it decided to enforce a privately negotiated contractual term, providing "consent to corollary relief," through which a Jewish husband agreed to attend a rabbinical court to obtain a *get.*[16] His failure to comply for 15 years gave rise to a damage suit by his ex-wife, and the Canadian Supreme Court reversed an appellate decision that the obligation at issue could not be enforced by the courts because it was religious in nature.[17] In an opinion for the court, Justice Rosalie Abella reasoned that a voluntary legal agreement between two consenting adults is appropriate for judicial consideration; the agreement itself was valid under Quebec law because individuals can transform a moral obligation into a legally valid and binding one; and the agreement itself was not contrary to public order.[18] Moreover, said, the court, the agreement "harmonizes with Canada's approach to religious freedom, to equality rights, to divorce and remarriage generally," by preventing

[16] Bruker v. Markovitz, 20007 SCC 54 (Dec. 14, 2007)(Docket 31212).
[17] See id., at para. 36 (Judgement delivered by Abella, J.)
[18] Id., paragraphs 47, 51, 60-63.

impairment of the wife's freedom of religion and ability to remarry and have children according to her religious beliefs.[19]

A contrasting proposal to permit use of Islamic law in arbitration and mediation of family disputes in Ontario, Canada erupted in a firestorm of protest.[20] A 1991 law authorized private arbitration as an alternative to litigation, but did not specify its use in family law matters. Informal arbitration of family matters by Jewish and Catholic groups proceeded under the law. The Islamic Institute of Civil Justice requested religiously-based arbitrations similar to those used by Jews and Catholics; the former attorney general of the province responded to the request by developing a proposal to extend the arbitration law to include Islamic arbitration and specifically to authorize its use in divorce, custody, and inheritance disputes.[21] Attracting international attention, the proposal produced heated debate and protests.[22] Not only was it defeated; the controversy prompted the Ontario legislature to revoke authority for the use any religious law in arbitrations and required Canadian law instead.[23]

In one sense, the Ontario proposal presented no more compromise of the public law than did New York's divorce law or Canada's enforcement of a private agreement. The Ontario proposal took account of a religious world by proposing to allow lawyers, retired

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[19] Id., at para. 63. The Court also cited analogous protections for Jewish women from husbands who refuse to provide a religious divorce in the European Commission of Human Rights, France, the United Kingdom, Australian, Israel, and New York. Id., para. 64-89.

[20] CBS News, Global Groups United Against Islamic Arbitration in Ontario, Sept. 4, 3005, www.cbc.ca/story/canada/nationa/2005/09/04/islamic_arbitrati

[21] Id.; Norma Greenaway, 63 per cent oppose faith-based arbitration poll, the Ottawa Citizen, Oct. 31, 2005, available at www.canada.com/ottawa/ottawacitizen/soundoff/story.html?id.; Asian Pacific News Service, Canada to Allow Islamic Courts, http://www.asianpacificpost.com/portal2/402881910674ebab010674f.

[22] Lee Carter, Protests Over Canada Sharia Move, BBC News, Sept. 8, 2005, http://news.bbc.co.uk/2/hi/america/s4215182.stm.

[23] Jehan Aslam, Judicial Oversight of Islamic Family Law Arbitration in Ontario, 38 International Law and Politics 841, 842 (2006). Quebec similarly has prohibited arbitration of family law matters and directed that provincial law govern them—but this law does not halt informal practices.

judges, and religious scholars to serve as arbitrators in alternative dispute processes permitted by law while requiring that the process and result of any such process be consistent with Canadian law.

Yet a compromise of secular values could well result in practice if the norms used to resolve the family disputes depart from the laws of Ontario or the Canadian Charter of Rights and Freedoms. The proposal called for reference to Sharia, Islamic Law, which itself is subject to multiple interpretations and conclusions. Some of those interpretations could well depart from Canadian law, notably with regard to women's status and rights. The arbitration plan, organized to authorize private control over the selection of dispute resolution, would have permitted foreseeable departures from secular guarantees of standards. Although using Islamic law and Islamic decisionmakers in arbitration would be voluntary, the proposal lacked any government monitoring to ensure truly voluntary election of religious arbitration especially by parties lacking independent economic resources or social connections outside the Islamic sub-community. One critic declared that use of Islamic family law arbitration would create "an under-class of underprivileged people who can go into their ghettos and deal with issues and not bother them."[24] Even if intended as an accommodation for minority groups, privatized dispute resolution could permit systematic subordination of some individuals within the group, effectively undermining their individual rights.[25]

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[24] CBS News, Global Groups United Against Islamic Arbitration in Ontario, Sept. 4, 3005, www.cbc.ca/story/canada/nationa/2005/09/04/islamic_arbitrati (quoting Tarek Fatah of the Canadian Muslim Congress). See also Shayna Van Praagh, Bringing the Charter Home, Book Review of Religion and Culture in Canadian Family Law, 38 McGill L.J. 233 (1993).

[25] See Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women's Rights (Cambridge University Press 2001); Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 89 U. Chi. L. Rev. 671 (1989); Minow, About Women, About Culture: About Them, About Us, 129 (No. 4) Daedalus 125-145 (Fall 2000).

The proposal to permit Islamic arbitration emerged as an amendment of the already-existing law, and despite that law's origin in commercial matters, it had been used for family matters by Jewish and Catholic groups.[26] The argument for equal treatment for Islamic groups ultimately was persuasive-- but result was to eliminate the option of any religiously-based arbitration for any group. Unfortunately, this series of events may signal suspicion by the dominant community toward Muslims. The idea that Islamic norms rather than Canadian ones would govern triggered what a level of intense criticisms that some might describe as Islamophobia, raising question about alien norms in a way that Jewish and Christian arbitration had not. Lack of familiarity with Islam on the part of many in the community combined with the larger global setting, including rising forms of Islamic fundamentalism and terrorist activities associated with some Islamic groups. Yet in addition, when compared with the Jewish and Catholic groups, the Muslim advocates of religious arbitration may have provided less overt assurance that they would abide by Canadian law.[27] Ironically, elimination of the statutory authorization for religious arbitration does not halt private religious mediation of family disputes, including mediation by religious figures or others guided by religious principles,[28] and if anything, pushes it further from view of secular authorities.

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[26] See Arbitration Act. S.O. 1991, c. 17.

[27] Hence, the Ontario Bet Dinn—that managed Jewish arbitrations—explicitly adopted a rule to abide by Canadian law in case of a conflict with Jewish law, while at least some of the advocates of Islamic arbitration called for shielding the arbitrated disputes from Canadian law. Conversation with Professor Ayelet Shachar conversation, Dec. 20, 2007.

[28] Note this comment by on a blog by Saffiyah on Law Prohibits Religious Arbitration in Ontario:"What will this mean for Canadian Muslims? Very little. It would have been complicated to try and develop these religious tribunals for Muslims in Ontario, precisely because the supporting structures are underdeveloped and our imams do not have adequate training to be able to carry out their duties in a manner that stands up to public scrutiny. But mediation will continue despite the legal prohibition on religious tribunals. So if a couple wants to resolve a conflict and chooses to go to their imam to do so? They can go right ahead. The process will be unsupervised and informal, and one wonders whether this will not set the stage for greater rights violations than might be suffered within the context of the religious tribunal itself."

Advocates of the pluralist arbitration process thus might well have been wiser to press for meaningful judicial review of arbitrated family disputes to make the option of religious arbitration viable and consonant with the secular commitments of the constitutional democracy.[29]

Central to this story is the fear that women's rights would be compromised by enforcement of Islamic rather than Canadian principles. Feminists often treat any coordination of religious and secular norms around family and gender issues as a compromise, and imagine that either the state's norms supplant religious ones, or the religious ones supplant state norms.[30] Although framed in terms of secular values—encouraging nonjudicial private dispute resolution and multicultural respect--the Ontario Arbitration proposal seemed to allow religious norms to supplant state norms. A state ban on a religious practice, such as polygamy, would be the reverse, replacing a religious norm with a secular one. Either way, a norm is surrendered, compromised, unfulfilled. Is it ever possible to make room for religious or cultural practices without sacrificing secular values—and vice versa?

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http://www.safiyyah.ca/wordpress/ ("Thoughts, rants and passions of a young Muslim woman seeking soulful enlightenment in cyberspace")(accessed Dec. 20, 2007). In mediation, the parties design their own agreement with the help of a neutral third-party; in arbitration, the third party resolves the dispute between the couple, but only within the range of options that the parties could elect themselves; hence, neither criminal sanctions nor a divorce can be issued by arbitration. Natasha Bakht, Arbitration, Religion and Family Law: Private Justice on the Backs of Women (March 2005)(report published by Law Commission of Canada and National Association of Women and the Law, (Ottawa: LCC, 2005) 1-68. ISBN #: 0-895996-90-2, online), at 7-8. Nothing by law would prevent arbitration of disputes over child support, custody, access to children, religious education of children. Id., at 11.

[29] This would have required more explicit authorization for judicial review of arbitrated agreements; absent agreement by the parties to provide for judicial review, the Arbitration Act had limited bases for juridical review. Arbitration Act, s.45(1), s.46(1).

[30] See, e.g., Susan M. Okin, Is Multiculturalism Bad for Women?, in J. Cohen, M. Howard and M. Nussbaum, eds., Is Multculturalism Bad for Women (Princeton University Press 1999).

Sometimes, rather than compromise, convergence between competing norms is possible.[31] The New York and Canadian treatments of religious impediments to secular divorce point to possible convergence; rather than either the state supplanting of religious norms or religious norms supplanting state rules, the New York Statute and the Canadian Supreme Court decision ensured that the women involved could remain within their own minority communities while also retaining access to rights guaranteed by the government.[32] This contrasts with the choice between remaining within the religious community or else asserting individual rights and exiting the religious community. Some could object that even the New York statute and Canadian decision required compromise. Arguably, the men in these examples lost an element of the prerogative to withhold the religious divorce as permitted—but not required—under religious law; and, from the vantage point of the secular world, by taking religious law into account, secular law acknowledged the existence of an alternative normative scheme. If these defensible reconciliations of secular and religious norms appropriately deserve the label of "compromise," then compromise itself deserves examination.

II. What's Wrong with Compromise?

Compromise and accommodation imply abandonment of principles, rights, and commitments. Widespread discomfort with compromise may explain the American reliance on institutions—such as the jury--that do the compromising behind closed doors. If "compromise" means departure from principle, by definition, it produces a shortfall; it

[31] Convergence is "[t]he process of coming together or the state of having come together toward a common point." See The American Heritage Science Dictionary (2002) [online]
[32] Cf. Shachar, The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdicitonal Authority, 35 Harv. C.R.-C.L. L. Rev. 385, 400 (2007).

seems inadequate or even corrupt. Compromise in this sense means unprincipled; uncompromising means principled. Yet "uncompromising" can also mean unyielding in the less positive sense of intransigent or rigid. With this meaning, its opposite does not look so bad. Compromises should not always be castigated because they signal the flexibility that is sometimes good. Practically speaking, accommodation is indispensable in a diverse polity and between conflicting nations.

This practical need for accommodation may only suggest that compromise is inevitable, not that it is desirable. The important question is when compromise or accommodation should be resisted, and when instead it should be advanced. Compromise can seem messy, unguided, emotional, or political; it can seem to abandon what the very notion of "rights" would command. More precisely, compromise can seem undesirable for three reasons: 1) it can seem to sacrifice important ideals for the sake of avoiding conflict; 2) it can seem to involve middle positions that are more incoherent or less defensible that the rejected alternatives; or 3) require "dealing with the devil" who uses illicit tactics that should not be rewarded. Let's take each problem in turn.

1) Sacrificing important ideas to avoid conflict? Simply avoiding conflict is not a sufficient rationale for sacrificing important principles especially in the context of constitutional and human rights. The very aspiration of rights is to alter how people might be otherwise be inclined to treat one another. Constitutional or human rights fail at the starting gate if they collapse in the face of the conflicts they foreseeably provoke. Yet the ideals of human dignity and freedom animating constitutional rights also are relevant to peace and social stability; reducing or eliminating conflict cannot silence calls for human rights but nor is the cessation of conflict irrelevant to the realizing of human

rights. Women's equality requires struggle in societies that have not guaranteed it (meaning: most societies), yet women themselves often care deeply about maintaining relationships and preserving their involvement in religious and other communities, so struggle that destroys those ties can be counterproductive. Processes of accommodation and balancing are indispensable given the predicates of peace and social stability necessary for realizing all ideals and norms. Developing the capacity for accommodation is necessary for peace and social stability. Compromise does not become acceptable simply if it avoids conflict, but pursuit of peaceful relationships can be a reason to work for a compromise that is otherwise justifiable and acceptable.

Middle positions: In a perhaps apocryphal case, a judge heard a plaintiff and defendant argue over which rightfully owned a herd of cattle; unable to decide in the face of two plausible claims, the judge ordered the herd divided between the two parties—only to be reversed by the appellate court for failing to do the job of judging. It is a faulty view of judging, though, that imagines only all-or-nothing conclusions. In a sophisticated view of judging, the decision need not always result in an all-or-nothing result but instead can apportion ownership, or blame, or liability across multiple parties.[33]

Granted, at times a middle position can be simply worse than either alternative. Just as painting a room half one color and half the other may be worse aesthetically than picking one of the colors, allowing officials discretion about what private expression to permit in a public space (on a bus or on a plaza) can be worse than permitting or restricting all speech in that space. But these examples do not prove that the middle

[33] See Summer v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Page Keeton, Products Liability—some Observations About Allocation of Risks, 64 Mich. L. Rev. 1329 (1966); David Loren Sunding and David Zilberman, Allocating Product Liability in a Multimarket Setting, 1 International Review of Law and Economics 1 (1998). See also David M. Dudzinski, Tobacco Litigation: Statistics Permitted for Proof of Causation and Damages in Class Action, 31 J. Law, Medicine and Ethics 161 (2003).

ground is invariably worse. In fact, some middle positions are defensible and embody their own principles, such as: abortion should be legal but rare; and racial conscious governmental categories can be justifiable but only when narrowly tailored to serve a compelling public interest.[34] The fact that these examples reflect commitments to multiple values does not make them unprincipled; instead, a principled position can embody considered apportionment of commitments to multiple at and times competing values.

Dealing with the devil: A different objection to compromise attaches when it arises in the face of violence or other illegitimate threats. Negotiating with kidnappers or terrorists compromises principled opposition to their behavior even though it may be necessary to save lives or produce peace. Peace and life are values just as much as the principles condemning kidnapping and terrorism. But recognizing these as legitimate goals does not alter the danger that negotiating with kidnappers and terrorists creates incentives rather than deterrence for future kidnapping and terrorism. Hence, even when such negotiations are sought and heralded, they are tainted by "dealing with the devil" and failure to hold firm against tactics that should not be rewarded.[35] The problem is, however, morally complicated because refusing to negotiate can produce immediate negative effects; hence, it may be an understandable and even justifiable compromise to negotiate with kidnappers or terrorists in order to save lives, but it is a compromise in the

[34] President Bill Clinton and others in the 1990s advanced the position that abortion should be safe, legal, and rare. See Making Abortion Safe, Legal, and Rare, 370 The Lancet 291 (2003)(issue 9584). For the view that governments can use racial categories but only if narrowly tailored to serve a compelling governmental interest, see Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1., --- U.S. --- (2007)(Kennedy, J., concurring in part and concurring in the judgment) Thanks to Adrian Vermeuele for this point.

[35] Robert Mnookin, Dealing with the Devil, presentation, July 2007, Harvard law school faculty workshop.

sense of foregoing steadfast adherence to the principle that condemns the tactics pressuring for such negotiation.[36]

So what may initially seem to be an abandonment of principle may instead be an acknowledgment of and tribute to multiple values, yet what may seem an acknowledgement of multiple values may instead be capitulation to illicit pressures. Compromising in response to a threat can be defended given limited available options, but this kind of compromise is not likely to comport with the ideals of constitutional and human rights. But then the negative connotations properly apply to the poverty of the options more than to selection of one. In contrast, if accommodating multiple principles is in fact a compromise, it can be defensible precisely because comparably valuable principles compete; the effort to balance competing principles itself should not be viewed as a departure from principle itself.[37] In the context of international conflict, giving up on rights claims in order to avoid conflict does not help realize rights, but working out accords that secure peace can in fact be crucial to making human rights possible.[38] Compromise and accommodation should not be viewed as inevitably unprincipled or undesirable. In the contexts of constitutional and human rights, compromise can be part of an ongoing process of elaborating, debating, and accommodating differences. Within

[36] Similar issues arise for the prosecutor of international courts ho may be invited to negotiate with human rights abusers who offer to halt their abuse in exchange for delaying or avoiding prosecution, though here protection of the roles of the court and prosecutor may add to the reasons not to negotiate.

[37] Working out a way to acknowledge and respect two principles is itself is not a compromise unless refusal to accommodate rises to the level of a principle that itself should not be sacrificed. Sadly, such refusals often seem the price of not only adhering to principle, but being seen to do so. Even being seen talking with an opponent in some quarters can be seen as a compromise either because withholding the approval implied by the conversation is part of expected condemnation, or because the conversation may make compromise too tempting. Candidates for national political office thus argue over whether meeting with dictators or heads of rogue states would be too compromising—either because the sheer act of meeting grants too much approval or due to fear that a substantive compromise of principle could be the only outcome of such a meeting.

[38] See Gabriella Blum, Islands of Agreement (2007).

a nation state, where conflicts between a group and the nation are intense, processes of accommodation produce the stability that can hold the nation together.[39] Who speaks for the group in such accommodations is a fair question, to which I'll need to return. But it is worth pushing for something better than compromise, when possible, and that lies in the possibility of convergence.

III. The Possibility of Convergence

Of course, better compromise would be solutions where no side has to give in—because they find common ground without sacrificing principles. Rather than trimming on principle, find a point of connection. Convergence of principles may seem elusive in conflicts over cultural accommodations, but here is an example where religious and secular leaders found it in the midst of conflict in San Francisco.[40] The city adopted a policy mandating that its contracting partners provide same-sex domestic partner health care benefits equal to those that they offer married spouses.[41] The Salvation Army opposes benefits for same-sex partners but could comply with the city's policy because it provided no benefits to any employees. But the Roman Catholic Archdiocese did give benefits to its employees. It immediately registered opposition to the city's policy and sought an exemption. As Archbishop William Levada later explained:

> I pointed out that the ordinance as written created a problem of conscience for agencies of the Catholic Church (and perhaps others), because it required that we

[39] See Rhonda Parkinson, Meech Lake Accord, http://www.rhondaparkinson.com/meech-lake-accord.htm (describing failed constitutional amendments to address relationship between Quebec and rest of Canada).
[40] This discussion draws on Martha Minow, Should Religious Groups Ever Be Exempt From Civil Rights Laws?, 48 Boston College L. Rev. 781 (2007)

[41] *See* Equal Benefits for Domestic Partners and Spouses, Nondiscrimination in City Contracts, Chapters 12B and 12C of the SF Administrative Code, http://www.sfgov.org/site/sfhumanrights_index.asp?id=4584.

change our Church's internal benefits policies to recognize domestic partnership as equivalent to marriage.

This requirement, I argued, amounted to government coercion of a church to compromise its own beliefs about the sacredness of marriage, and seemed to violate the First Amendment protection guaranteed to religion by our Constitution.[42]

The Archbishop made it clear he would sue on free exercise grounds if the policy were enforced against church agencies.[43] But he also went further, and drew on church teachings to criticize the city's policy as inadequate in policy terms:

I am in favor of increasing benefits, especially health coverage, for anyone. As the Catholic bishops of the U.S. stated in 1993, "Every person has a right to adequate health care." I would welcome the opportunity to work with city officials to find ways to overcome what I believe is a national shame, the fact that so many Americans have no health coverage at all. I can be counted on to raise my voice in support of universal health coverage nationally and locally. I feel sure I could make common cause with city officials in working toward this truly urgent need.[44]

In response to Archbishop Levada's comments, Mayor Willie Brown and four members of the San Francisco Board of Supervisors asked to meet with the Archbishop

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[42] William J. Levada, *The San Francisco Solution*, 75 First Things 17–19, 17 (August/September 1997), http://www.firstthings.com/ftissues/ft9708/opinion/levada.html.

[43] *Id*. at 18.

[44] *See id*. That statement continued:

> But I reject the notion that it discriminates against homosexual, or unmarried heterosexual, domestic partners if they do not receive the same benefits society has provided to married employees to help maintain their families. If it is a question of benefits, why should not blood relatives, or an elderly person or a child who lives in the same household, enjoy these same benefits? Under the city's new ordinance, however, blood relatives are excluded from the benefits that the city's new ordinance extends to domestic partners.
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> Historically social legislation providing spousal benefits for married persons has recognized the role that women traditionally exercised as wives and mothers, and the important function they contribute to the future of society by their unpaid work in the home raising their families. Even with today's changes in the workplace, to seek to equate domestic partnership with the institution of marriage and family runs contrary to Catholic teaching, indeed to the beliefs of most religious and cultural traditions, and as recent polls have shown, to the basic convictions of the great majority of Americans. *Id*.

to see if they could reach mutually acceptable solution to the problem.[45] They met, they talked, and they negotiated a solution that addressed the concerns of both sides.[46] As a result, the city now deems a contracting party to be in compliance if it "allows each employee to designate a legally domiciled member of the employee's household as being eligible for spousal equivalent benefits."[47] As the city currently explains in its overview of the ordinance, contracting parties can achieve compliance in different ways:

> Some contractors comply with the requirements of the Ordinance by offering benefits to spouses, domestic partners and other individuals. One company, for example, has created a policy that extends some benefits to "other individuals if the relationship with [the employee] is especially close and it would be normal for them to turn to [the employee] for care and assistance." Other contractors comply by allowing each employee to extend benefits to one adult living in their household. Compliance also is possible where the benefits offered do not extend to spouses or domestic partners, or where no employee benefits are offered. [48]

The Archbishop acknowledged criticism of the solution, but he defended it. Hence, he explained:

> [T]o those like my local Catholic critic who say that we implicitly give recognition to domestic partnerships by not excluding them from benefits, I must demur. Under our plan, an employee may indeed elect to designate another member of the household to receive benefits. We would know no more or no less about the employee's relationship with that person than we typically know about a

[45] *Id*.
[46] *See id*.
[47] Levada, *supra* note 42.
[48] City and County of San Francisco Human Rights Commission, Overview and Introduction, http://www.sfgov.org/site/sfhumanrights_page.asp?id=5921 (describing the Equal Benefits Ordinance, also known as the City's Nondiscrimination in Contracts Ordinances (Chapters 12B and 12C of the San Francisco Administrative Code)).

> designated life insurance beneficiary. What we have done is to prohibit local government from forcing our Catholic agencies to create internal policies that recognize domestic partnerships as a category equivalent to marriage.[49]

The solution avoided costly and potentially bitter litigation between the City and the Church, and the two parties worked together, as the Archbishop said, to "help address many pressing social needs."[50] San Francisco's health benefit resolution kept the Catholic providers in contractual relations with the city.[51] Both the religious and governmental leaders in San Francisco proceeded with a willingness to find common ground and a stance of collaborative problem-solving—without ceding principle.[52] Crucially, the opposing sides treated on another with respect, flexibility, and humility as virtues themselves, even when the stakes seem high and the cause just.[53] Accommodating someone's religious practices through an exception to a general rule is not a compromise but an acknowledgment of higher commitments. It is not always easy to distinguish compromise from convergence. Ironically perhaps, the announcement of higher principles can sometimes get in the way. Sometimes there are also real and profound differences in beliefs, commitments, and world-views that make multicultural accommodations difficult, impossible, or paradoxical, as I explore next.

IV. When Neither Convergence Nor Compromise Is Possible

[49] Levada, *supra* note 42 at 18–19.
[50] *Id.* at 19.
[51] *See* William J. Levada, *The San Francisco Solution,* 75 First Things 17–19, 17 (August/September 1997), http://www.firstthings.com/ftissues/ft9708/opinion/levada.html.
[52] *See* Levada, *supra* note 51.
[53] Let us distinguish those who seek space for private freedom and those who seek to impose their own views on everyone else. A free society should offer not untrammeled but more latitude of the first kind than the second. Carol Weisbrod, Emblems Of Pluralism: Cultural Differences And The State (2002).

Some clashes between gender equality and religious accommodation defy compromise as well as elude convergence. Consider the dilemmas posed by the case of Leyla Sahin. She enrolled at the medical school at Istanbul University before the university issued an order excluding students if they wore clothes "symobli [zing] any religion, faith, race or political or ideological persuasion."[54] Denied the ability to pursue her studies, she filed a challenge to the university's order, pursued court action in Turkey without success, and then pressed for consideration in the European Court of Human Rights. There, the government of Turkey and the university recounted the historical background that included the effort by Turkey, alone with Senegal among all Islamic nations, elevates secularism as part of its constitution.[55] But because 99% of the population is Muslim, religious tension takes the form of conflicts over degree of orthodoxy. A woman who goes uncovered is at risk of derision or worse by fellow citizens who are more Orthodox, unless the government creates a space where she is not allowed to cover her hair. The state is deeply engaged in the project of secularism but this does not mean that it separates itself from religion; indeed, the Turkish government pays the salaries of 60,000 imams and dictates the contents of their sermons.[56] After a military coup in 1980, the political party regained democratic control in 1983 and relaxed restrictions on religious expression[57] and subsequent leaders have pressed for greater room for religious expression while trying to contain religious fundamentalism.[58]

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[54] See Christopher D. Beleliu, Comment, The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the Sahin Judgment, 12 COLUM. J. EUR. L. 573,, 606 (2006)(citing Leyla Sahin v. Turkey, App. No, 44774/98. Nov. 10, 2005, at ¶ 47)).
[55] *Id*., at 577. (on Turkish history).
[56] *Id*., at 581 (quoting NICOLE POPE & HUGH POPE, TURKEY UNVEILED: A HISTORY OF MODERN TURKEY 317 (2004)).
[57] *Id*.
[58] *Id*., at 582.

The European Court of Human Rights in 2005 agreed that the ban interfered with Sahin's right to manifest her religion but the Court nonetheless affirmed the ban—in the name of pluralism, broadmindedness, and tolerance. The European Court reasoned that to advance those values, the government of Turkey needed to act as an impartial arbiter, protecting democracy, and in that role, it could adopt the ban as a proportional means to advance such legitimate aims.[59] British, German, French, and Dutch universities would not adopt such a ban, and would instead construe pluralism, broadmindedness and tolerance to require accommodating the religious dress of its students, observed the European Court of Human Rights; nonetheless, the Court reasoned that the Turkish government would know better how to advance these goals in its national context.[60]

This result and the struggle leading up to it could be viewed as a classic example of cultural relativism at work: a specific group claims and gets exemption from otherwise prevailing norms because of its history and commitments. Yet it could instead be understood as an exemplar of the process of mediation and cross-cultural dialogue through which human rights—and the freedom and respect they are meant to effectuate--depend upon context. Turkey's rule clearly restricted religious freedom for those women who wanted to wear a head covering but also enlarged freedom for those who did not want to do so; the rule also restricted the autonomy of some individual women while enhancing the autonomy for others; centrally, the rule created a secular space, removed from religious pressures one way or the other. The very ambiguity in interpreting this example could be frustrating; the paradoxes are obvious. But the shift in attention to the

[59] *Id*., at 607 (citing Sahin v. Turkey, at ¶¶ 78, 98-99, 108, 113-114, 117-21).
[60] *Id*., at 589-592, 607-609 (citing Sahin v. Turkey, at ¶¶ 78, 98-99, 108, 113-114, 117-122, and discussing the Court's reliance on Turkey's case law, and the concept of "the margin of appreciation" used by the Court to allow latitude for member states in their decision-making and adherence to the Convention on Human Rights).

process of mediation and cross-cultural dialogue underscores that even with possibilities for compromise and convergence, real clashes will persist with no answers satisfactory to all.

The clashes arise as much within increasingly diverse societies as between them. Quebec launched a province-wide exploration of cultural accommodation in 2007, and identified sharp public controversies over whether human rights do or do not call for provision of prayer rooms at a state-supported school, exemption from the no-weapons rule for a student who wants to carry a kirpan (or ceremonial knife) to school, and permission that Muslim voters wearing the niqab or burka would be allowed to vote without showing their faces as identification.[61]

Does accommodating the veiling of a Muslim woman respect her human rights and personal liberty or subject her to internal group hierarchy and confinement? Does respect for cultural differences embody reverence for human dignity or instead compromise with powerful interest groups? How much room should a secular democracy ensure for religious and ethnic subgroups—and should it do as a matter of normative principle or instead as a compromise of principles? Does focusing on individual choice express the ultimate regard for another, or neglect the socialization effects that make it difficult or unlikely for a girl brought up in a closed, traditional, and abusive setting to know about or feel able to claim another way of life? Or does the focus on individual choice neglect the significance of group identity and tradition and risk threatening crucial sources of meaning? Is the "self" in any particular instance free to be self-determining?

[61] Consultation Commission on Accommodation Practices Related to Cultural Differences, http://www.accommodements.qc.ca

Here is an update on Turkey, as it struggles to find a path between Islamic fundamentalism and secular fundamentalism:[62] Its prime minister at the time of the Sahin decision sent his two daughters to attend school in the United States in order to avoid the headscarf restrictions in Turkish universities;[63] his wife covers her hair. This bit of irony exposes emphasizes how exit and migration possibilities alter what may have seemed simply domestic issues. Those options reflect the effects of global communications and transportation and collapse the differences in struggles over human rights within a nation and across the world. The prime minister in 2008 pushed for a revision of the country's constitution to ensure that women could cover in the universities and triggered both public protests and predictions of critical reactions by the courts and the military;[64] the constitutional amendment itself must be approved by the Turkish court.[65] This post-script also underscores deep tensions defying convergence or compromise because they operate at the level of the very building blocks for knowledge, belief, perception, and values. What should be the proper focus for analysis: individuals or groups, and rights or duties? Theorists may imagine ways to melt individuals and groups as well as rights and duties, but theoretical solutions do not overcome the perception of real differences in commitments that animate debates over cultural accommodation.

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[62] MARVINE HOWE, TURKEY TODAY: A NATION DIVIDED OVER ISLAM'S REVIVAL 248 (2000).
[63] Beleliu, *supra* note 22, at 583.

[64] *Grenville Byford, Fighting the Veil: Turkey is bitterly divided over government efforts to ease its headscarf ban. What will the courts do now?, Newsweek, Feb. 4, 2008,* ***http://www.newsweek.com/id/107941****; Noah Feldman,* Veiled Democracy? , New York Times, Feb. 8, 2008, reprinted at http://www.cfr.org/publication/15444/veiled_democracy.html.

[65] Pierre Tristan, Leila Sahin and Turkey's Battle Over the Islamic Head Scarf, http://middleeast.about.com/od/turkey/a/me080210.htm.

A. Individuals or Groups?

One of the touchiest points of contention involves whether individuals or groups are the primary unit of analysis and protection for human rights. This is the moment to return to questions about who speaks for the group, as well as to surface issues of genuine consent and voluntariness for individuals within the group when there are real risks of harm. Using "harm" as the undeniable touchstone obscures the question of harm to whom, the group, the individual? The difficulty is that for many individuals, the strength of the group matters enormously. Then, it is an individual as well as a group concern, whether and when harm to a group, whether defined by religion, ethnicity, or family—should rise to the level of harm deserving protection.[66] Even for those who view the individual as sacrosanct, the most vexing problems pertain to the group affiliations of those individuals. Professor Abdullahi An-Na'im has asked, if advocates "encourage young women to repudiate the integrity and cohesion of their own minority culture, how can the theorists then help to sustain the identity and human dignity of these women?"[67] Given the choice, some women may choose to exit their groups—but many will not. Professor Martha Nussbaum offers a particularly deft embrace of individual rights embedded in social life by framing universal human rights as a way to afford women solidarity and affiliation, often with other women.[68] Threading the group dimension through the individual rights-holder is the solution in the work of Will Kymlicka and

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[66] See Carolyn Fluehr-Lobban, Cultural Relativism and Universal Human Rights, 20 Anthro Notes (1998)(Smithsonian).

[67] Promises We Should All Keep in Common Cause, in Susan Moller Okin with respondents, Is Multiculturalism Bad for Women ed. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (Princeton University Press 1999); 59.

[68] Nussbaum, Sex and Social Justice 49 (Oxford University Press 1999).

Michael Walzer; this approach largely makes the choice between individual or group recede in questions of accommodation.

There is a paradox that makes this solution more than sleight of hand: we all share our isolation. Gary Larson, the cartoonist, has a popular image of a room full of identical penguins; one in the back has a song bubble shouting, "I gotta be me." Asked to print it up as a poster, a printer was confused, and colored the singing penguin blue; he missed the entire point of the universality of the individual experience.

But even with clever connections between individuals and groups, there remain knotty issues about the governance of self-identified groups within a liberal state. Many of the most debated issues focus on women's lives and choices, although those involving children are even more difficult. For example, should every child have access and a requirement to attend schooling devised by the state, or instead can parents or community leadings frame an education suited to a subcommunity's way of life?[69] Should a religious tribunal supervise divorce and child custody determinations with results to be accorded state recognition? Should such a tribunal be allowed to perform such a role only if its norms match those of the larger state? And when if ever can the vitality or survival of the group serve as a justification for reducing or denying protection for an individual – for example, when membership in an Indian tribe passes through the father's line, can the self-preservation and self-governance of the group justify denying access to a federal court to for a sex discrimination claim?[70] The Supreme Court of the United States, in an

[69] See Wisconsin v. Yoder, 406 U.S. 205 (1972).
[70] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978);; see Judith Resnik, supra. See "About Women, About Culture: About Them, About Us," 129 (No. 4) Daedalus: Journal of the American Academy of Arts and Sciences 125-145 (Fall 2000); and in Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies (Richard Shweder, Martha Minow, and Hazel Rose Markus, eds., New York: Russell Sage Foundation 2002), pp. 252-267.

opinion written by Justice Thurgood Marshall answered yes, and emphasized not only statutory interpretation but also the essential determination of group identity, by a group struggling with legacies of subordination and conquest, as the bases for denying Mrs. Martinez access to the federal courts so crucial to the struggle for African-American equality.

Despite the possible overlap between individual rights and group rights, there remain areas that diverge; the different starting points could prove obstacles to negotiation, mediation, or other efforts to bypass clashes around the meaning and shape of human rights. Many may think that respecting the individual is the irreducible touchstone and yet the significance of group membership. Yet the resources and coordination needed to sustain groups, at times may call for acknowledging and supporting groups apart from their affiliation through individuals. If I need to pray with 9 others, my individual right is not enough if I am not allowed to join with others; even to exercise my right to marry, I need another. And the structures of secularism and rights themselves require collective effort in order to enable individuals to exercise their rights.

C. Rights, Duties, or Compassion in the Recognition of Human Dignity?

The focus on individuals recurs in concerns about "rights" rather than "duties" or "compassion." "Rights" connote and may even entail the Western liberal tradition, associated with John Locke and others, that life, liberty from arbitrary rule, and property are inherent entitlements that people surrender to the state in order to form a social contract to protect precisely these interests. To many, this is a problematic conception if it means:

- ignoring or suppressing people's intimate and social relationships;

- entrenching pre-existing distributions and practices;
- Neglecting conflicts among rights, such as the right to protection against discrimination on the basis of gender and the right to free exercise of religion; or the right of free speech versus the right to be a target of degradation;
- Missing a focus on responsibilities and compassion, whether viewed as the necessary reciprocal to fulfill rights or the richer resource for protecting and enhancing human dignity.

Rights for many schooled in the West evoke such goals for some, while for others, the very notion of "rights" neglects and may even suppress the sense of duty, or community membership, or care and compassion that is or should be the well-spring of respect for others. A step toward reconciling these different views can come by locating rights as part of a pattern of social relationships that in turn involve duties.[71] Yet the conception of the individual at the core of a right diverges from the conception of relationships of cares and responsibilities animating duties; the concepts launch different dreams and fears, and different grounds for compromise and intransigence.

[71] See Martha Minow, Making All the Difference (1990); Jennifer Nedelsky, Reconceiving Rights as Relationships, 1 Rev. Of const. Studies 1 (1983); Martha Minow and Mary Lyndon Shanley, Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law, 11 Hypatia 2 (Winter 1996). See also "All in the Family; In All Families," 95 West VA L.R. 275 (Winter 1992-93); reprinted in David M. Estlund and Martha C. Nussbaum, eds, Sex, Preference, and Family (New York: Oxford University Press, 1997). Yet even that step may seem too tied to the metaphor of reciprocal or contractual relationships. Instead, fostering respect for human dignity may call for narratives of role models, mediation, or cultivation of an inner sense of one's own place in networks of relationships. It could be that "rights" and "compassion" are simply different routes toward the same goal of recognizing the dignity and richness available to all people when they treat one another with recognition of mutual vulnerability and embeddedness in human society.

Perhaps an overlapping consensus can emerge about how to respect human dignity, whatever the well-spring or motive.[72] Such solutions in real life require processes of negotiation, assessment, debate, and judgment require practical problems—including conflicting views about what a woman should wear in public, whether an employer should be allowed to hire children, or whether officials engaged in humanitarian military interventions should be seen as culpable of crimes against humanity for "collateral damage" (otherwise known as killing people). The stakes when cultural and religious world-views diverge can indeed include death, meaning, and fundamental beliefs. When, then, can be done when differences elude a search for points of agreement?

V. Governance Devices for Pluralism and Continuing Conflicts

When neither convergence nor compromise seem possible, lawyers actually can be helpful. It is not because lawyers are smarter than other people; it is just that lawyers have develop methods for managing interminable disputes and deep conflicts through devices like burden of proof and through institutions like the jury. Legal and political devices of governance can enable co-existence among diverging ways of life while preserving avenues for limiting that divergence. These devices include federalism, with decentralized authorities empowered to make parallel and conflicting decisions; and privatization, according power to private actors to arrange their own affairs away from public view and differently than a public process would do. Both implicitly reflect the adage: in the face of conflicting values, shift the decisionmaker. Federalism and privatization offer a way through highly charged conflicts over what fundamental rights.

[72] See John Rawls, Political Liberalism (1993). See also Cass Sunstein, Incompletely Theorized Agreements, 108 Harv. . Rev. 1733 (1995)(identifying possibilities for convergence on specific resolutions of specific problems even in the absence of greater theoretical agreement).

Each permits alternatives to all-or-nothing solutions to moral and legal conflicts; each structures avenues for co-existence of diverging groups while retaining processes for collective restrictions of extreme practices.

Decentralization in the form of federalism is a common solution. In the United States, federal courts have permitted states to adopt certain restrictions on abortion rights and vouchers authorizing public funding for religious schools but not required either; the choice is left with state governments, with the result that diverging practices emerge in different states.[73] Even without leaving decisions to the states, the national government can use decentralization to defuse a dispute over values. For example, the federal courts have incorporated reference to local community standards to resolve disputes over free speech challenges to restrictions on obscenity rather than pick one standard for the whole nation.[74] Decentralization permits multiple answers to a contested question. Therefore, this device is troubling to those who insist there is only one acceptable answer—yet it is an attractive solution for minority groups unable to win across the whole country, but present in sufficient concentrations to influence the local practice.

The distinction between public and private realms affords another as a technique for permitting and managing co-existence of diverging cultural and religious groups, even though the very notion of a "private realm" is more compatible with some world views and religious than others. Many of the current conflicts over Islamic practices in Europe reveal the particularly Christian form of the public-private distinction that has emerged in

[73] See Planned Parenthood v. Casey, 505 U.S. 833 (1992)(affirming central holding of Roe v. Wade but permitting states to require written informed consent from the woman 24 hours before the abortion); Zelman v. Simmons-Harris, 536 U.S. 639(2002). See generally Martha Minow, The Government Can't, May, or Must Fund Religious Schools: Three Riddles of Constitutional Change for Laurence Tribe, -- Tulsa L. Rev. --- (forthcoming).

[74] Miller v. California, 413 U.S. 15 (1973).

Europe.[75] Nonetheless, some form of a distinction between the shared spaces where people with different cultures, traditions, and languages should be able to co-exist and cooperate, and private spaces, where people can organize their time and practices according to their own embraced culture and tradition, offers a strategy for co-existence and vibrant pluralism.[76] If this implies a distinction between public and private that not all religious groups or nations like, it also offers a strategy for co-existence in which groups can flourish. There is a difference between the religious group's effort to use the state to impose its rules on everyone and its effort find space to practice its rules apart from the rest of the society;[77] there is still a further alternative of space for separate practice conditioned upon complying with fundamental protections that the secular state or human rights norms establish for everyone.

In this respect, law governing private ordering can construct and enhance pluralism. Carol Weisbrod has shown how utopian communities in 19th century America used contract and property laws to construct spaces for their own practices.[78] Legal structures permitting the organization of corporations, fraternal groups, and families similarly enable pluralism.[79] And in these spaces, the diversity and pluralism within a religious group can itself flourish—rather than be suppressed in a struggle against the state or other groups. What this work reveals is a more complex set of possibilities than simply one division between the public and private realm. Instead, the public resource of law can be

[75] Olivier Roy, Secularism Confronts Islam (George Holoch, Jr. trans. 2007).
[76] See Ayelet Shachar, Multicultural Jurisdictions (2001).
[77] Carol Weisbrod Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 Journal of Family Law 741 (1988) (reprinted in Kindred Matters (D. Meyers, et al., eds., 1993 Weisbrod, Carol Practical Polyphony: Theories of the State and Feminist Jurisprudence, 24 Georgia Law Review 985 (1990).

[78] Bounds of Utopia, supra.
[79] Id.

an instrument of multiple efforts by groups of people to preserve, invent, renew and redevelop distinctive ways of life. The line between "public" and "private" is not natural but instead a resources for law, politics, and advocacy. Feminists successfully moved violence in the home from the private to the public side.[80] The state's law can provide an umbrella under which individuals and groups can organize for their own purposes; besides contract and property tools, arranging their use of resources, laws permitting private schools and private dispute resolution can enable religious and cultural groups to manage their own social reproduction and conflict management.

More apt, perhaps, than an umbrella, is the image of a computer operating system which serves as a resource to users and programs, creating memory space for use, and facilitating networking and management of information, and yet it is hardly neutral in so doing. For operating systems set parameters, enabling some kind of activities and curbing others. Then users can use the operating system for their own purposes, even to alter the operating system. By analogy, varying degrees of governmental oversight can be produced to adjust the state's power to veto or influence the private communities; private communities in turn can work through public processes to influence the public norms used to supervise their conduct as well as norms applicable to everyone. The potential rivalries between such groups and the organized state will not go away.[81]

An answer given by the country's Supreme Court is not the final answer for a religious group that looks elsewhere for final authority. Conflicts over values and communal practices will arise and often remain insoluble, even with governance devices that permit

[80] See Elizabeth Schneider, Battered Women and Feminist Lawmaking (2000).
[81] Robert Cover argued that the nation state will be periodically seek to kill off normative subcommunities from jealousy or desire for overall control, even while acknowledging that the subcommunities may at times take steps that should—from an outside perspective-- be stopped. Robert Cover, Nomos and Narrative, supra.

pluralism. But the public governance devices help to channel and shape those conflicts, as well as affecting the office state positions. The field of law makes central the processes of accommodating and supervising cultural pluralism. Law itself is inevitably distorted if the only focus is on the state law and sources, and unnecessarily limited if only public norms, rather than private law or customs, are addressed. The formal law of a nation state or the convention of international law can enable, manage, and at times, restrict pluralism—and how the formal law can countenance, foster, or reject compromises along the way.

From the vantage point of a nation state, the use of governance devices like federalism and the public-private distinction ensures final control by the nation state; but from the vantage point of plural groups, enabled by and taking advantage of these legal structures, the nation state's answers are not the final ones. The group may resort to civil disobedience, conflict, or exit when they lose a battle in the courts, agencies, or legislatures. This lack of a single hierarchy of authority thus exists within nation-states. The lack of a single hierarchy of authority is even more obviously present in the international context, where conflicts between nations at best give rise to multi-lateral accords, depending on the consent of the separate nations. Negotiating is the inevitable tool to avoid or resolve such conflicts. The possibility of convergence deserves special attention; so does role of compromise as a human rights strategy sometimes borne of necessity and sometimes nourishing individual freedom and meaning in human lives. The very meanings and shapes of individual identity can shift over time, as can the contours and commitments of groups and nations.

Now, is all of this just a modus vivendi, a pattern of necessity, or instead paths to a pluralism that enriches human experience? As I end, I turn to that great philosopher and comedian, Lily Tomlin, who said, "God created language to meet the deep human need to complain." What we can't change, we complain about, and when we complain, we also shift our relationship to the difficulty. Human beings may be creatures especially adept at complaining about what we cannot change, but we are also gifted in celebrating features of our lives whether or not we can change them. When it comes to the pluralism exhibited by contrasting cultural and religious groups, the fact of diversity cannot be changed but our stance toward it can, with palpable consequences for the scale and valence of conflicts, the prospects for peaceful co-existence, and the opportunities for enriching encounters. Adlai Stevenson, a failed candidate for U.S. president, but a witty and perceptive thinker, said that he believed "that if we really want human brotherhood to spread and increase until it makes life safe and sane, we must also be certain that there is no one true faith or path by which it may spread."[82] Paradoxically, to find our shared brotherhood and sisterhood, we will have to pursue more than one path.

[82] See http://www.uua.org/uuhs/duub/articles/adlaistevenson.html.