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The Overlooked Costs of Religious Deference

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The Overlooked Costs of Religious Deference

Robin Fretwell Wilson*

Abstract

Citing the Qur'an, a German divorce court judge this year denied a fast-track divorce to a Muslim woman who had been the victim of domestic violence and death threats from her husband. The judge rejected her application because the husband's exercise of his "right to castigate does not fulfill the hardship criteria" for an expedited divorce. The decision, which sparked a firestorm of controversy, comes at an important time in the movement to embrace pluralistic understandings of family relationships. Scholars and policymakers around the world are advancing various schemes for sharing state control over domestic disputes with religious groups—ranging from proposals to share jurisdiction over family disputes with religious bodies to enforcing religious understandings, like any other prenuptial agreement.

This Article asks how women and children will fare in a system of religious deference. It maintains that the state has an important protective function to play for these traditionally vulnerable groups. Enforcing certain religious understandings of marital relationships will likely undermine a woman's ability to exit the relationship and, consequently, prevent her from policing the conduct in her own relationship and with respect to her children. Policymakers should proceed cautiously with any proposal to hand over authority for marital disputes since family violence occurs in religious communities, as it does throughout society, but is tolerated by some religious leaders and adherents. Drawing on our experience with faith-based exemptions to the duty to provide medical care for children, this Article concludes that the costs of giving greater deference to religious understandings

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of family relationships must seriously be considered before we are willing to rob women and children of the state's protections.

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I. Introduction

In March of 2007, *Der Spiegel* reported that a German divorce court judge denied a fast-track divorce based on hardship to a German citizen of Moroccan origin who had been the victim of domestic violence and death threats from her spurned husband.¹ In rejecting the application, the judge relied on a passage in the Qur'an that she read as permitting a man to castigate his wife.² The judge explained that the husband's exercise of his "right to castigate does not fulfill the hardship criteria," one of the grounds for an expedited divorce in Germany.³

1. Veit Medick & Anna Reimann, *A German Judge Cites Koran in Divorce Case*, DER SPIEGEL, Mar. 21, 2007, available at <http://www.spiegel.de/international/germany/0,1518,473017,00.html> (last visited Feb. 22, 2008) (on file with the Washington and Lee Law Review).

2. *Id.*

3. *Id.* Ironically, if the plaintiff had been a Moroccan citizen, the judge would have applied Moroccan law. See MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 83 (2004) (on file with the Washington and Lee Law Review). In Germany, the citizenship of the party to a dispute determines what family law will apply if that party is not a German citizen, although "this general principle is, of course, subject to German public order and to any international conventions to which Germany is a party." . . . [A]s a result, German courts have had to deal with the interpretation and application of foreign laws, including Sharia.

A firestorm of controversy erupted in response to the ruling.⁴ Feminists read it as giving the husband the right to beat his wife.⁵ Muslim scholars disputed whether the Qur'an authorized physical violence against a spouse.⁶

When challenged on the ruling and asked to recuse herself, the judge again cited the Qur'an—this time citing a passage that says that a man's honor is injured when his wife acts in an unchaste manner.⁷ Legislators across the spectrum then weighed in.⁸ One called the ruling "an extreme violation of the rule of law," while another labeled it a "sad example of how the conception of law from another legal and cultural environment is taken as the basis of our own notion of law."⁹

As this case unfolds, a vibrant movement is taking hold—both in the United States and outside it—to give greater deference to religious understandings of family relations.¹⁰ In the last year, numerous academics in the United States have proposed various schemes for sharing state control over domestic disputes with religious groups.¹¹ This Article argues that the effect of these proposals would be to pull the state out of marriage. While the proposals focus largely on the theoretical desirability of pluralistic understandings of marriage, they overlook pragmatic concerns that arise: What happens to women and children in a system of religious deference?

This Article maintains that the state has an important protective function to play for traditionally vulnerable groups, a function that should not be lightly set aside. Binding women who want to exit a marriage to a religious community's norms—whether by enforcing religious contracts or ceding jurisdiction over

Id. (quoting PASCALE FOURNIER, APPLICABILITY OF SHARIA/MUSLIM LAW IN WESTERN LIBERAL STATES (2004)). Under Moroccan law, the woman would have been entitled to a divorce, thanks to a series of family law reforms in 2004 that specifically allow divorce for harm, including intimate violence. FAMILY CODE pmbl., § 7 (2004) (Morocco), translated in Global Rights, *The Moroccan Family Code (Moudawana) of February 5, 2004*, at 5 (2005), http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf (last visited Jan. 29, 2008) (defining harm to include "lack of financial support, abandonment, violence, and other harm, in view of endorsing the general legal principle: 'neither harm nor be harmed,' [in order] to promote equality and equity between the two spouses") (on file with the Washington and Lee Law Review).

4. See Medrick & Reimann, *supra* note 1 (reporting that numerous politicians "voiced their horror at the verdict" and "demanded disciplinary action against the judge").

5. See *id.* (noting the opinions of members of *Terre des Femmes* and the Network for Muslim Women).

6. *Id.*; see also *infra* note 73 and accompanying text (discussing disputed interpretations of religious texts).

7. Medick & Reimann, *supra* note 1.

8. *Id.*

9. *Id.*

10. See *infra* Part II.

11. *Id.*

marriage to religious authorities—will raise the costs of exiting, undermine a woman's ability to exit, and prevent her from privately regulating the conduct in her own relationship and with respect to her children.

Part II surveys three proposals that would give greater deference to religious understandings of marriage and family relations, ranging from proposals to share jurisdiction over family disputes with religious bodies to enforcing religious understandings like any other prenuptial agreement. Part III then marshals empirical evidence showing that domestic violence occurs in religious communities, like it does in other parts of society. This Part shows not only that violence will occur, but that religious leaders and community members frequently tolerate "wife-abuse" and other forms of domestic violence.¹² This tolerance stems in part from the belief that "the marriage [must] be maintained"¹³ at all costs.

Part IV maps out important breaks between some religious understandings of marriage and the rules society would otherwise apply, and argues that religious deference will have the effect of trapping some women in abusive relationships. Although the proposals outlined in Part II would not enforce religious understandings about the care of children, this Part argues that enforcing religious understandings about the adult relationship and financial matters cannot so neatly be divorced from the child's well-being. Part V concludes with cautionary lessons from another context in which society gives great religious deference—faith-based denials of medical treatment—and urges that the human costs of deference are far greater than these proposals blithely assume.

II. Proposals for Religious Deference

Several proposals have emerged over the last year advocating greater deference to religious understandings of marriage and family relationships. In one proposal, the state would cede some of its jurisdiction over family disputes to religious groups, while other proposals advocate the total abolition of state-sponsored marriage and a move to a purely contractarian form of domestic relationships. While different in many key respects, each proposal shares a common,

12. See S. Douki et al., *Violence Against Women in Arab and Islamic Countries*, 6 ARCHIVES WOMEN'S MENTAL HEALTH 165, 168 (2003) (discussing the "conspiracy of silence" in which various community members fail to adequately report or persecute instances of domestic violence).

13. Ruksana Ayyub, *Domestic Violence in the South Asian Muslim Immigrant Population in the United States*, 9 J. SOC. DISTRESS & HOMELESS 237, 243 (2000).

dangerous assumption: that protections for women and children can be preserved in a system of greater religious autonomy *without* substantial state oversight of marriage.

One such proposal comes from Professor Joel Nichols.¹⁴ Nichols advocates that the government should cede some of its jurisdictional authority over marriage and divorce to religious communities, which, in turn, would allow for multiple understandings of family relations.¹⁵ Nichols draws on New York's get statute and the covenant marriage statutes in three states to argue for greater accommodation of Muslim, Jewish, Christian, and other religious understandings of marriage.¹⁶ Under a "multi-tiered" system of marriage, couples could choose a civil marriage with "minimal formalities" and hurdles to exit, but "capable and competent parties" would also be able to "enter more binding unions under the auspices of their religious traditions" if they so desire.¹⁷ Religious communities could then "draw upon their own theological and legal resources to aid in governing their adherents."¹⁸ Crucially, Nichols would accommodate multiple understandings of family relations *only so long as* "we are careful to balance that pluralism with protections for women and children."¹⁹

Taking the idea of removing state authority over marriage even further, Professor Edward Zelinsky sets forth a "pro-marriage case for abolishing civil marriage," largely in response to the debate about gay marriage and the future of marriage.²⁰ Under his proposal, marriage would be a religious and cultural institution with no legal definition or status.²¹ For Zelinsky, abolishing civil marriage would depoliticize and

14. See Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 140–41 (2007) ("This Article posits that . . . religious groups have an appropriate role to play in assisting the state to define the metes and bounds of the marital relationship.").

15. See *id.* at 195–96 ("[I]t is unnecessary for the state to retain sole jurisdictional control over a unitary, least-common-denominator system of marriage and divorce law.").

16. See *id.* at 148–54 (discussing the background and theory behind covenant marriage law in Louisiana, Arkansas, and Arizona and the get statute in New York).

17. *Id.* at 138, 196.

18. *Id.* at 196.

19. *Id.* at 140.

20. Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1165 (2006).

21. See *id.* at 1220 ("Whatever the arguments for civil marriage might have been in the past, today perpetuating the monopoly that is civil marriage is a mistake. The time has come to rectify that mistake by

"strengthen marriage by encouraging competition among alternative versions of marriage."²² Zelinsky sees the "law following the deregulation of marriage [as] both contractual and pluralistic."²³ He envisions a "regime [that] would be heavily contractual in nature as the secular and sectarian sponsors of marriage develop their own agreements for couples," which the courts would then enforce, as they would any other contract.²⁴ The one specific exception to enforcement for Zelinsky would be when it would impair the state's ability to protect the interests of minor children.²⁵

In a third proposal, Professor Daniel Crane also argues that states should separate religious marriage from civil unions.²⁶ He envisions a system in which "the state would no longer attempt to define the parameters of marriage or to specify mandatory rules other than those necessary to preserve the minimum values of a liberal state."²⁷ Thus, the state's role as to marriage would be limited "to enforcing contracts between private parties."²⁸ The functional result of this arrangement, Crane states, is that a couple voluntarily could delegate jurisdiction over their marriage to a specified religious institution which would apply religious law.²⁹ Like Nichols and Zelinsky, Crane would hold the parties to this religious understanding so long as it conforms to the "minimal norms of [a] liberal democratic society."³⁰

Despite their different formulations, Nichols, Zelinsky, and Crane each share the idea that society can embrace pluralism without sacrificing protections for women and children.³¹ This is a dangerous assumption. Two concerns immediately arise: first, whether family violence is likely

abolishing civil marriage.").

22. *Id.* at 1173.

23. *Id.* at 1182.

24. *Id.* at 1219.

25. *See id.* at 1184 ("[C]ourts (and legislatures) in a world without civil marriage should not invalidate voluntary arrangements except upon very compelling grounds, e.g., to protect minor children.").

26. *See* Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 *CARDOZOL. REV.* 1221, 1222 (2006) (contending that marriage is the province of the religion and not the state and arguing "against the secular legalization of marriage and in favor of the secular privatization of marriage").

27. *Id.* at 1250.

28. *Id.* at 1252.

29. *See id.* (examining the scenario in which a couple could sign a prenuptial agreement agreeing that a religious tribunal would arbitrate any dispute concerning their marriage).

30. *Id.* at 1253.

31. *See supra* notes 14, 20, and 26.

to occur in religious communities; and second, if violence is likely to occur, what effect would these proposals have on the state's ability to police that violence. As the next Part explains in detail, family violence does occur in religious communities, and the victims of violence often receive little or no support from the religious community itself for exiting the marriage.³²

III. Family Violence in Religious Communities

Deference to religious understandings would not be troubling if society could predict with confidence that the safety and welfare of traditionally vulnerable groups—women and children—would not be impaired.³³ Yet the triumvirate of family violence (domestic violence, child physical abuse, and child sexual abuse) is more likely to occur in insular, patriarchal communities in which women have little power or influence³⁴—raising questions about how women and children will fare if society hands over greater authority to religious groups.³⁵

Despite the presence of these classic risk factors, researchers have found it surprisingly difficult to measure the incidence of family violence within religious groups.³⁶ The empirical studies that have been

32. See *infra* Part III.

33. Other scholars have also argued that giving greater autonomy to cultural groups puts the less powerful in those groups, often women and children, at a further disadvantage. See, e.g., Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women*, 1 *MUSLIM WORLD J. HUM. RTS.* 1, 18 (2004) (arguing that a "regressive interpretation of *Sharia* will be used to seriously undermine the rights of women").

34. See EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 33 (1983) ("The seeds of wife beating lie in the subordination of females and their subjection to male authority and control."); David Finkelhor, *Risk Factors in the Sexual Victimization of Children*, 4 *CHILD ABUSE & NEGLECT* 265, 269 (1980) (finding in a study of 796 college undergraduates that "[w]hen a father has particularly conservative family values, for example, believing strongly in children's obedience and in the subordination of women, a daughter is more at risk for sexual abuse").

35. See VIRGINIA RAMEY MOLLENKOTT, *WOMEN, MEN, AND THE BIBLE* 23–24 (1989) (acknowledging that, while the Bible promotes mutual submission, both Roman Catholicism and many Protestant churches lend their support to patriarchal dominance and repressive authoritarianism); Muhammad M. Haj-Yahia, *Wife Abuse and Battering in the Sociocultural Context of Arab Society*, 39 *FAM. PROCESS* 237, 252 (2000) [hereinafter Haj-Yahia, *Battering in Arab Society*] ("In Arab societies, power in marital relations is based on patriarchal principles, and equality is not considered a central value.").

36. See Anahid Dervartanian Kulwicki & June Miller, *Domestic Violence in the Arab American Population: Transforming Environmental Conditions Through Community Education*, 20 *ISSUES IN MENTAL HEALTH NURSING* 199, 204 (1999) (explaining that studies on

undertaken reveal a complex pattern of intimate partner abuse and child abuse in religious communities.³⁷ As this Part documents, religious observance is, on the one hand, weakly protective of both adults and children from family violence. On the other hand, these studies show that abuse nonetheless occurs in religious communities.

A. *The Influence of Religious Participation*

Studies of family violence reveal that religion is sometimes weakly protective against the risk of domestic violence. For example, a study by Ellison and colleagues in 1999 found that men and women who attend religious services regularly are less likely to commit acts of domestic violence than persons who attend rarely or not at all.³⁸ A second study of Protestant male believers found a similar phenomenon: "[A]ctive conservative Protestant husbands are significantly less likely to commit domestic violence compared to active mainline Protestant husbands as well as nominal conservative Protestant husbands."³⁹

Although religious participation confers some protection, these same studies show that domestic violence and child abuse will occur in religious communities, like they do in any other.⁴⁰ Moreover, when they occur, the victims of the violence receive little support for exiting the relationship from community members and religious leaders.⁴¹

domestic violence among Arab American immigrants had to be conducted with home interviews "[b]ecause of the high percentage of illiteracy in both Arabic and English, and because of the cultural norm related to the reluctance of Arab Americans to discuss sensitive questions outside their homes").

37. See W. BRADFORD WILCOX, *SOFT PATRIARCHS, NEW MEN: HOW CHRISTIANITY SHAPES FATHERS AND HUSBANDS* 181–82 (2004) ("Nominal conservative Protestant husbands . . . are significantly more abusive than unaffiliated husbands, active conservative Protestant husbands, and nominal mainline Protestant husbands."); Christopher W. Dyslin & Cynthia J. Thomsen, *Religiosity and Risk of Perpetrating Child Physical Abuse: An Empirical Investigation*, 33 *J. PSYCHOL. & THEOLOGY* 291, 296 (2005) (finding that conservative Protestant religious affiliation is not related to physical child abuse, but that extrinsic religiosity among conservative Protestants is linked to child abuse risk).

38. See Christopher G. Ellison et al., *Are There Religious Variations in Domestic Violence?*, 20 *J. FAM. ISSUES* 87, 104 (1999) ("[T]he frequency of attending religious services bears an inverse relationship to the likelihood of perpetrating abuse for both men and women.").

39. WILCOX, *supra* note 37, at 182.

40. See Ellison et al., *supra* note 38, at 87 ("[I]ntimate violence is the most prevalent form of interpersonal violence in the United States.").

41. See *infra* Part III.B.

There are countless anecdotes that domestic abuse is on the rise in Muslim communities⁴² or prevalent among Conservative Protestants.⁴³ An empirical literature is also emerging. A study of 291 married Arab women in Israel by Dr. Muhammad Haj-Yahia demonstrates the prevalence of domestic violence in Arab religious communities, albeit abroad.⁴⁴ In that study, "[81%] of the participants knew of women who had experienced verbal and psychological abuse by their husbands; [while] 78% knew of Arab women who had experienced 'moderate physical violence' (slapping, pulling hair or clothes, pushing)."⁴⁵ Nearly two-thirds, 64%, knew Arab women who had experienced "severe physical violence," defined as "hard pushing at frequent intervals, attacking the wife and throwing her body against the wall, or attacking the wife with a hard object such as a chair, belt, or stick."⁴⁶

Studies of domestic violence among conservative Protestant husbands also show that domestic violence is a reality for many families.⁴⁷ Using the second National Survey of Families and Households ("NSFH2"), Professor Brad Wilcox found that "4.8 percent of conservative Protestant married men with children committed domestic violence in the year prior to NSFH2, compared to 4.3 percent of mainline Protestant married men with children and 3.2 percent of unaffiliated married men with children."⁴⁸ Although the differences for these groups were not statistically significant, when Wilcox took church attendance into account, the "differences between religious groups [became] statistically significant."⁴⁹ Wilcox

42. See Fatima Agha Al-Hayani, *Arabs and the American Legal System: Cultural and Political Ramifications*, in *ARABS IN AMERICA: BUILDING A NEW FUTURE* 74, 80 (Michael W. Suleiman ed., 1999). Al-Hayani states:

Almost all lawyers have admitted that cases of domestic violence among Arabs are on the rise. . . . Domestic violence seems to be on the rise for various reasons, such as availability of economic independence for the wife through public assistance, a situation that diminishes the husband's control over his wife and family and creates friction and discord within the family.

Id.

43. See Ellison et al., *supra* note 38, at 89 ("[I]f some popular images are accurate, Conservative Protestant (i.e., fundamentalist and evangelical) affiliation and belief may be linked with an elevated risk of domestic violence, particularly by men.")

44. See Haj-Yahia, *Battering in Arab Society*, *supra* note 35, at 242, 244 (reporting results of a survey of 291 women in Israel, 72% of whom were Muslim, 18% Christian, and 10% Druze).

45. *Id.* at 244.

46. *Id.*

47. Wilcox classified any denomination that "adhere[s] to a theologically conservative worldview as conservative," including Pentecostal, Baptists, Anabaptists, Southern Baptists, Church of God in Christ, and Reformed Churches. WILCOX, *supra* note 37, at 15.

48. *Id.* at 181.

49. *Id.*

found that "[n]ominal conservative Protestant husbands have a domestic violence rate of 7.2 percent and are significantly more abusive than unaffiliated husbands, active conservative Protestant husbands, and nominal mainline Protestant husbands."⁵⁰

Like domestic violence, child physical abuse also occurs in religious communities. Here the studies have focused less on Arab religious communities than on conservative Christian communities. One study by Professors Christopher Dyslin and Cynthia Thomsen is particularly instructive. Motivated largely by the popular belief that "Conservative Protestants"⁵¹ engage in more corporal punishment than the rest of society, Dyslin and Thomsen explored whether religious affiliation or mere religiosity was related to child physical abuse risk.⁵² Because many states specifically authorize corporal punishment of children, the researchers distinguished mere spanking from child physical abuse, which they defined to "entail[] more extreme forms of physical aggression," such as being hit with a fist, burned, or choked.⁵³

Although the results showed that conservative Protestant religious affiliation was *not* related to child physical abuse risk, the researchers found that "[i]ndividuals with high levels of *extrinsic religiosity* had higher [child abuse proneness]" than those individuals with lower extrinsic religiosity.⁵⁴ Extrinsic religiosity is akin to wearing one's religion on one's sleeve; it places an emphasis on religion as membership in a "powerful in-group,"⁵⁵ providing protection, consolation, and social status.⁵⁶

Just as domestic violence and child physical abuse occur in religious communities, so does child sexual abuse. Studies of sexual abuse have found that while religious affiliation mutes a child's risk of sexual abuse in early childhood,

50. *Id.* at 181–82.

51. Dyslin & Thomsen, *supra* note 37, at 33 (classifying the following as conservative Protestants: Adventists, Assemblies of God, Baptists, Church of God in Christ, Evangelical Free Foursquare Gospel, Full Gospel, Holiness, Missouri or Wisconsin Synod Lutheran, Nazarene, Non-denominational (Evangelical), Pentecostal, and Wesleyan).

52. *See id.* at 292–93 (employing the Child Abuse Potential Inventory to measure participants' attitudes towards abuse, as opposed to self-reports of behavior).

53. *Id.* at 292 ("[D]espite a general tendency to conflate the two, corporal punishment and [child physical abuse] are not isomorphic").

54. *Id.* at 296.

55. Vicky Genia & Dale G. Shaw, *Religion, Intrinsic-Extrinsic Orientation, and Depression*, 32 REV. REL. RES. 274, 274 (1991).

56. *See generally* Gordon W. Allport & J. Michael Ross, *Personal Religious Orientation and Prejudice*, 5 J. PERSONALITY & SOC. PSYCHOL. 432 (1967); *see also* Wilcox, *supra* note 37, at 129 (finding that "conservative Protestant fathers are more likely to report using corporal punishment," but also "are more likely to praise and hug their children and less likely to yell at them than are mainline Protestant and unaffiliated fathers").

there are nonetheless pockets of elevated risk among some religious groups in adolescence.⁵⁷

Together, these studies show not that being a member of a religious community makes one more likely to be a victim of domestic violence or child abuse, but instead that family violence will occur in religious communities like it does elsewhere. For this reason, it is important to examine the views of religious communities and their leaders toward family violence before embracing any proposal to give greater deference to religious groups.

B. Tolerance by Religious Communities of Family Violence

Studies across multiple faiths reveal that victims of family violence often find cold comfort in their religious communities, whether from religious leaders or other members. Religious groups often acquiesce in or, worse, condone family violence within the community.

Because this Symposium focuses on Gender-Relevant Legislative Change in Muslim and Non-Muslim Countries, this Part principally examines studies of family violence among adherents to the Islamic Faith.⁵⁸ A 1999 study by Professors Anahid Kulwicki and June Miller evidences the tacit acceptance of domestic violence by some Muslim communities in the United States.⁵⁹ In that survey of Arab American immigrants, nearly all of whom were Muslim,⁶⁰ the

57. See Rebecca M. Bolen, *Predicting Risk to Be Sexually Abused: A Comparison of Logistic Regression to Event History Analysis*, 3 CHILD MALTREATMENT 157, 167, 168 tbl.2 (1998) (finding that Protestant and Catholic children had odds ratios of less than one for experiencing child sexual abuse when compared to children with no religious affiliation, meaning that they were much less likely to be sexually abused, but also reporting that Protestant children, although "significantly less likely to be abused in early childhood . . . were more likely to be abused during adolescence"; this increase in their relative risk was on par with other risk factors that intuitively impact a child's risk of sexual abuse, such as living with a male in the household); Ruth Stout-Miller et al., *Religiosity and Child Sexual Abuse: A Risk Factor Assessment*, 6 J. CHILD SEXUAL ABUSE 15, 23, 30-31 (1997) (finding in a survey of 397 freshmen students at a southern university that among individuals who had been sexually abused as a child, persons who came from "fundamental Protestant" religious family backgrounds—defined as Baptist, Southern Baptist, Church of Christ, Church of God, Pentecostal, and Holiness—were more at risk of being sexually abused by a relative, and concluding that "the type of religious affiliation and involvement in religious activities (measured as frequency of church attendance and practice of religious beliefs at home) affect the nature and extent of child sexual abuse").

58. For a more in-depth look at patterns of family violence in other faiths, see Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in MULTI-TIERED MARRIAGE (Joel Nichols ed., 2008).

59. See Kulwicki & Miller, *supra* note 36, at 207 tbl.1.

60. See *id.* (reporting that 97.5% of the survey respondents were Muslim).

researchers asked women and men "when it would be appropriate for husbands to slap their wives."⁶¹ Women were more accepting of this practice than men in a number of different circumstances, ranging from when a wife disrespects her husband in the home when no one else is around⁶² to when the husband discovers that his wife is cheating.⁶³ Perhaps most shocking, 18.2% of women in the study said they would "approve" of a husband killing his wife if he discovered adultery.⁶⁴

Other studies mirror Kulwicki and Miller's findings. A study conducted by Haj-Yahia of 356 Jordanian women, 92% of whom were Muslim, found that "Jordanian women have a strong tendency to justify wife-beating."⁶⁵ Haj-Yahia found that 33.4% "agreed or strongly agreed that a husband ha[d] the right to beat his wife if she challenged [his] manhood" and 46.6% agreed or strongly agreed if a wife "constantly disobey[ed] her husband."⁶⁶ Moreover, 68.5% "agreed or strongly agreed that a husband ha[d] the right to beat his wife . . . if she [didn't] respect her husband's parents or siblings."⁶⁷ Indeed, Jordanian women often blamed the wife for violence against her. Almost half agreed that in most cases "a husband beats his wife due to her mistaken behavior, such as squandering money or neglecting the house and children," or that "the wife's behavior toward her husband or children is the cause of violence against her."⁶⁸

61. *Id.* at 209 tbl.3.

62. *See id.* (showing that 34.8% of female respondents would approve of a man slapping his wife if she insults him when they are at home alone, compared to 33.3% of male respondents).

63. *See id.* (showing that 48.4% of female respondents approve of a man slapping his wife if he learns that she has been having an affair, compared to 22.5% of men). The researchers also asked when it would be appropriate for a man to slap his wife in other circumstances and received these responses:

Would you approve of a man slapping his wife if:	% Females Who Responded Yes	% Males Who Responded Yes
She won't do what he tells her to do	20.4	5.1
She insults him in public	17.2	43.6
She comes home drunk	56.3	51.4
She hits him first when they have an argument	58.7	59.0

64. *Id.* The researchers did not have a large enough sample to present parallel statistics for men on this question.

65. Muhammad M. Haj-Yahia, *Beliefs of Jordanian Women About Wife-Beating*, 26 PSYCHOL. WOMEN Q. 282, 284-85 (2002) [hereinafter Haj-Yahia, *Jordanian Beliefs*].

66. *Id.* at 286.

67. *Id.*

68. *See id.* (reporting that 41.8% and 47.5% of the participants strongly agreed or agreed

Muslim men share these views, as well. In 1998, Haj-Yahia surveyed Palestinian men from the West Bank and Gaza Strip, the majority of whom were Muslim.⁶⁹ Nearly a quarter, and sometimes more than two-thirds of the respondents, justified wife beating when a wife engaged in sexual infidelity, insulted the husband in front of his friends, challenged the husband's manhood, disobeyed the husband, failed to meet the husband's expectations, refused to have sex with the husband, disrespected the husband's parents and relatives, or reminded the husband of his weak points.⁷⁰

It is not only community members who accept violence; religious leaders often tolerate domestic violence as well. A study by Ruksana Ayyub examining domestic violence among South Asian Muslims in the United States observed that "[v]iolence in marriage is generally condemned but when it does happen the religious community gives no clear consequences for the violent behavior."⁷¹ Acquiescence among South Asian Muslims is so pervasive that "Islamic Centers themselves fail to impart any information on domestic violence protection and prevention programs available in the community, seeing them as too radical."⁷²

This tolerance of family violence stems both from sharply-contested readings of religious texts⁷³ and from the belief that "the marriage [must] be

with the statements presented in the text, and concluding that "[t]he results revealed a strong tendency among Jordanian women to blame the wife for violence against her"). Compare Haj-Yahia, *Battering in Arab Society*, *supra* note 35, at 245 (finding that among 291 married Arab women living in Israel, 82% did not believe that husbands have a right to beat their wives in certain situations, but of the 8% who did agree, 73% felt that beating would be justified in the event of the wife's sexual infidelity; 64% said beating would be justified if the wife fails to conform with the husband's demands, requests, and expectations; and 49% believed beating would be justified if the wife talks back to the husband at home).

69. See Muhammad M. Haj-Yahia, *Beliefs About Wife Beating Among Arab Men From Israel: The Influence of Their Patriarchal Ideology*, 18 J. FAM. VIOLENCE 193, 196 (2003) [hereinafter Haj-Yahia, *Battering Beliefs in Israel*] ("Eighty two percent of the respondents were Muslim . . . , 13% were Christian . . . , and 5% were Druze . . .").

70. See *id.* at 199. Although most respondents were Muslim, men from multiple religious backgrounds justified domestic violence. See *id.* ("[A] substantial proportion of the [male] respondents justified wife beating. Fifty-eight percent strongly agreed or agreed that 'there is no excuse for a man to beat his wife' . . . whereas about 28% strongly agreed or agreed that 'sometimes it is OK for a man to beat his wife' Moreover, between 15 and 62% strongly agreed or agreed that wife beating is justified on certain occasions.").

71. Ayyub, *supra* note 13, at 242.

72. *Id.*

73. Some scholars note that portions of the Qur'an "clearly imply that obedience and respect for husbands is the Muslim wife's duty and that in some situations wife-beating is justified." Haj-Yahia, *Jordanian Beliefs*, *supra* note 65, at 283. They rely on *Sura* 4:34, which provides:

Men are the maintainers of women because Allah has made some of them to excel

maintained."⁷⁴ The emphasis on family privacy, family reputation, and family solidarity makes maintenance of the marriage and family unit of paramount importance, as a result of which "abusiveness almost becomes invisible."⁷⁵

Beyond tacit acceptance, some religious groups actually discourage women from seeking outside help.⁷⁶ Professor Ayyub explains that the Muslim community "condemns any woman who seeks legal protection from an abusive spouse."⁷⁷ Dr. Haj-Yahia notes that an Arab woman who seeks to have her husband removed from the home "may be ostracized by [her] community and blamed for undermining family stability and unity."⁷⁸ Preserving the marriage is of such great importance that physical violence is seen by some members as "preferable to divorce."⁷⁹

Tolerance of family violence is not limited to members of the Islamic faith. Similar studies of religious leaders from Christian traditions confirm that they also frequently acquiesce in physical violence between husbands and wives. A 2000 study of 158 Christian religious leaders found that many

others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded; and (as to) those on whose part you fear desertion, admonish them, and leave them alone in the sleeping-places and beat them

Under this reading of Islamic law, "a refractory wife has no legal right to object to her husband's exercising his disciplinary authority." Douki et al., *supra* note 12, at 168. Such verses are not uniformly interpreted; some scholars argue that the Qur'an allows only a "symbolic beating of a wife if she disobeys," while others "cling to a more literal meaning." Ayyub, *supra* note 13, at 242. A "selective preference of one verse from the Qur'an over many other verses that talk about kindness and justice toward women has created an atmosphere that tolerates and allows violence toward women." *Id.* Similar disputes arise about Biblical passages. See, e.g., Dyslin & Thomsen, *supra* note 37, at 295.

74. Ayyub, *supra* note 13, at 243.

75. *Id.* at 243; see also Douki et al., *supra* note 12, at 166 ("Arab families tend to emphasize mutual support, and individual members are expected to sacrifice their own needs, well-being and welfare for the benefit of the family as a unit.").

76. See Ayyub, *supra* note 13, at 239 ("Muslim women in America look for and find limited help in government-sponsored programs like shelters for battered women, support groups, and legal and social services. However, they face strong opposition from their religious and cultural institutions in utilizing these services.").

77. *Id.* at 242.

78. Haj-Yahia, *Battering in Arab Society*, *supra* note 35, at 238, 239–40 (attributing this response to "the prevailing belief that the children's best interests, the woman's personal reputation, and the reputation of her family of origin take precedence over her own well-being and safety").

79. Douki et al., *supra* note 12, at 169 ("[E]ven texts which imply that violence is permissible do not mean that it is desirable. Such a measure should always be seen as an extreme, preferable to divorce, a 'lesser of two evils' which may be used to save a marriage threatened by a wife's misconduct.").

believed "marriage must be saved at all costs"—even when domestic violence occurs—and that a realistic solution was "forgiving and forgetting the abuse."⁸⁰ Older studies of female victims show that they overwhelmingly received this type of advice from clergy. A 1981 study of abused women found that of the 28% who asked clergy for advice, 80% were told either to go back home since it's a wife's duty, to forgive their husbands, or to go to a marriage counselor; or received only religious advice.⁸¹ A 1988 survey of conservative Protestant pastors found that 92% of respondents would "never advise a woman to divorce an abuser."⁸² These same religious leaders felt that "the victim's lack of submissive behavior was in part responsible for the violence."⁸³

Clearly, no religious group is immune from violence. States should weigh carefully the risks to women and children before ceding jurisdiction over family disputes to bodies that may be unwilling or unable to vindicate their rights. The next Part demonstrates that giving deference to religious understandings of marriage will materially change the calculus a woman makes in deciding to leave, or not leave, an abusive relationship.

IV. *The Practical Effects of Religious Deference*

Society polices and regulates family relations in a number of different ways: through the criminal law; through the child abuse and neglect system; through civil domestic violence statutes; and through the law of marriage and divorce.⁸⁴ Admittedly, none of the proposals in Part II is intended to remove the existing protections of criminal law or the child abuse and neglect or domestic violence statutes. But those systems are reactive, and they have a

80. Colleen Shannon-Lewy & Valerie T. Dull, *The Response of Christian Clergy to Domestic Violence: Help or Hindrance?*, 10 *AGGRESSION & VIOLENT BEHAV.* 647, 649 (2005) (citing AL MILES, *DOMESTIC VIOLENCE: WHAT EVERY PASTOR NEEDS TO KNOW* 149–50 (2000)).

81. Mildred Daley Pagelow, *Secondary Battering and Alternatives of Female Victims to Spouse Abuse*, in *WOMEN AND CRIME IN AMERICA* 277, 287–88 (Lee H. Bowker ed., 1981).

82. Shannon-Lewy & Dull, *supra* note 80, at 651 (citing J. M. Alsdurf & P. Alsdurf, *A Pastoral Response*, in *WHEN PRAYING ISN'T ENOUGH* 165, 168 (Anne L. Horton & J. A. Williamson eds., 1990)).

83. *Id.* at 167; see also Heidi M. Levitt & Kimberly N. Ware, *Religious Leaders' Perspectives on Marriage, Divorce and Intimate Partner Violence*, 30 *PSYCHOL. WOMEN Q.* 212 (2006) (concluding from a study of 22 religious leaders in Memphis, Tennessee, across many different religious traditions, that "[a]lthough there was diversity in beliefs, most of the leaders expressed concerns related to balancing the sacredness of marriage with the urgency of divorce in cases of [interpersonal violence]. Many suggested that divorce be considered as a 'last resort' and would urge reconciliation if possible").

84. See generally HOMER H. CLARK, JR. & ANN LAQUER ESTIN, *DOMESTIC RELATIONS: CASES AND PROBLEMS* (7th ed. 2005).

woeful track record of preventing abuse before it occurs.⁸⁵ The law of marriage and divorce empowers spouses to exit relationships on equitable terms without harsh sanctions that some religious norms would impose. As a result, the state must empower women to exit abusive relationships when they are victims of violence themselves or believe their children are being victimized.

By giving deference to religious understandings that are not now held by both adults, society increases the cost to women who want to exit for their own safety or the safety of their children. To make the collision between religious norms and safety more concrete, consider Muslim practices about custody.⁸⁶ Under Islamic law, male children over the age of seven are placed in the custody of their fathers upon divorce, as are female children after the onset of puberty.⁸⁷ In some Muslim communities in the world, like Western Thrace, a geographic region of Greece, a woman must waive "her right to the custody of the children" before she can receive a divorce.⁸⁸ Presently in the United States, the best interests of the child would control this decision in nearly every jurisdiction, which may or may not result in paternal custody.⁸⁹ Imagine the catch-22 that some women may find themselves in if we enforce Muslim understandings about custody. If a father is harshly disciplining his son—discipline that outside the community might be seen as child abuse—and we enforce the religious norms about custody against the woman, she then is in a classic bind. If she stays, her child continues to be beaten. Yet if she exits, her child stays with the husband and continues to be beaten.

To avoid precisely this catch-22, the proposals for giving greater deference attempt to cherry pick—that is, they propose to give deference to some religious norms about the adult relationship but to leave decisions about children to the state.⁹⁰ Yet, the adult relationship cannot be so neatly divorced from what

85. See generally Robin Fretwell Wilson, *Sexually Predatory Parents and the Children in Their Care: Remove the Threat, Not the Child*, in HANDBOOK OF CHILDREN, CULTURE AND VIOLENCE 39 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006).

86. See O. Spies, *Hadana*, in ENCYCLOPEDIA OF ISLAM (P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel & W.P. Heinrichs eds., 2007) (describing the different schools of Islamic law pertaining to child custody).

87. M. Hashim Kamali, *Islamic Law: Personal Law*, in ENCYCLOPEDIA OF RELIGION 4705, 4711 (Lindsay Jones ed., 2d ed. 2005). While the mother maintains custody over young children in the event of divorce, she loses this right if she remarries. *Id.* at 4711.

88. Aspasia Tsaoussi & Eleni Zervogianni, *Multiculturalism and Family Law: The Case of Greek Muslims*, in COMMISSION ON EUROPEAN FAMILY LAW 1, 8 (forthcoming 2007).

89. See Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 446 (Robin Fretwell Wilson ed., 2006) [hereinafter RECONCEIVING THE FAMILY].

90. See *supra* Part II.

happens with the children. What happens between the adults affects a woman's ability to protect her children. For example, if the adult understanding would result in certain poverty for the woman and her children upon divorce, then she may not leave the relationship.

In many instances, enforcing the religious understanding about the adults' relationship would hasten just such a result. Consider property distribution under Islamic religious law. Islamic marriage contracts often include a deferred *mahr* that is to be paid upon the husband's death or a divorce.⁹¹ In some instances, payment of a *mahr* upon divorce would facilitate exit from the relationship—for example, if a *mahr* provided for half of the man's property upon divorce and he was wealthy.⁹² But some religious authorities preclude payment of the *mahr* to a wife if she initiates the divorce.⁹³ Other authorities go further, requiring a wife to "waive[] her right to alimony" before they will grant a divorce.⁹⁴ Now, if society defers to religious authorities, divorce on these terms could impoverish the wife and her child. Threatened with the prospect of certain poverty, some women will surely be forced to stay in an abusive relationship.

Not only should policymakers worry about concrete outcomes in specific cases,⁹⁵ but they should also worry about the expressive effect of giving deference to religious understandings about the adult relationship. The mere

91. See Spies, *supra* note 86 (describing *mahr* as "the gift which the bridegroom has to give the bride when the contract of marriage is made and which becomes property of the wife"). The *mahr* may be paid at the time of the contract, or alternatively, the parties may agree to defer it. Kamali, *supra* note 87, at 4707 ("A deferred dower remains a debt on the part of the husband and is payable upon the dissolution of the marriage by death or divorce.").

92. See Ann L. Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 571 (2004) (describing a California case where a court would not enforce a *mahr* because it encouraged "profiteering by divorce").

93. See Mosa Sayed, *The Muslim Dower (mahr) in Europe—with Special Reference to Sweden*, in EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW: THIRD CONFERENCE ORGANIZED BY THE COMMISSION ON EUROPEAN FAMILY LAW AND THE DEPARTMENT OF PRIVATE LAW, UNIVERSITY OF OSLO: CONFERENCE BOOKLET 23 (2007) (citing an Egyptian law that allows a woman to bypass the husband's unilateral right of divorce by initiating divorce herself but requires that she give up all her *sharia* rights and return the *mahr*); see also Kamali, *supra* note 87, at 4708 (describing a type of divorce, *khul*, that the wife initiates and in which the "wife secures her release from the marital tie by offering the husband financial consideration, commonly return of the dower").

94. Tsaoussi & Zervogianni, *supra* note 88, at 8.

95. There are other areas where religious and societal norms will diverge, including how to treat the marriage of minors, arranged marriages, and polygamous marriages. See *id.* at 11 (discussing departures between *Sharia* family law and Greek civil law). Zelinsky acknowledges in his proposal that a system of deference would have to include specific rules about such marriages. Zelinsky, *supra* note 20, at 1184.

fact that *some* religious understandings about property and other matters will be enforced may lead a woman to believe that *all* such understandings will be enforced, including those about custody. At the very least, a scheme of deference is going to require extensive public education about what receives deference and what does not.

Indeed, any scheme of deference will require numerous safeguards to ensure that the parties have knowingly bound themselves to a specific, shared understanding in advance—although the nature of the safeguards may differ depending on the particular scheme. Zelinsky argues, for example, for the enforcement of standard-form religious contracts.⁹⁶ Yet ordinary prenuptial agreements are subjected to exacting review for voluntariness, complete disclosure, representation by separate counsel, and other procedural protections before they are enforced against the parties.⁹⁷ Moreover, all the ordinary concerns that courts have over the ability of prospective spouses to bargain at arm's length and appreciate the consequences are exacerbated when a religious body, which can exert considerable influence on its members,⁹⁸ supplies the standard form contract. It is not clear from the proposals described in Part II that such protections would be in place.⁹⁹

Sharing jurisdiction with religious bodies over family matters is fraught with risk for vulnerable parties as well. Given the routine acceptance of family violence by some religious communities,¹⁰⁰ it seems unlikely that these communities will relax the application of harsh financial understandings in instances of domestic violence, as courts routinely do when there is a material change of circumstances after the execution of a prenuptial agreement.¹⁰¹

Neither is it clear that the determination of a religious body will track the parties' understanding of their duties going into the relationship, or that like cases

96. Zelinsky, *supra* note 20, at 1182–84.

97. Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, in RECONCEIVING THE FAMILY, *supra* note 89, at 372, 373–74 (2006). Importantly, covenant marriages, on which Professor Nichols relies heavily as an example of multi-tiered marriage, include numerous protections for the parties. See, e.g., Katherine Shaw Spaht, *Postmodern Marriage as Seen Through the Lens of the ALI's 'Compensatory Payments'*, in RECONCEIVING THE FAMILY, *supra* note 89, at 249, 265 (requiring premarital counseling and a Declaration of Intent).

98. See *supra* notes 72–73 and accompanying text.

99. As Professor Crane acknowledges, "leaving marriage up to families or mediating institutions [c]ould render marriage a more oppressive institution to women," as critics charge. Crane, *supra* note 26, at 1223. Crane, however, does not address these issues, finding them "outside the purview of [his] essay." *Id.*

100. See *supra* Part III.B.

101. Bix, *supra* note 97, at 373–74.

will be treated alike. A live example of shared jurisdiction operates today in Western Thrace.¹⁰² Muslims in Western Thrace are the "only official minority recognized by the Greek government"¹⁰³ and enjoy unique independence as a result of the Treaty of Lausanne, signed by Turkey and Greece in 1923 to accommodate Turks living in Greece and Greeks living in Turkey.¹⁰⁴ Muslims in Western Thrace maintain their own religious and legal institutions, headed by three religious leaders, or *Muftis*.¹⁰⁵ Under *Sharia* law, the *Muftis* "conduct all matters related to civil law."¹⁰⁶ The decisions of the *Mufti* are not final judgments unless declared enforceable by the Greek courts, but review of those judgments is "restricted: it may only be examined, whether the *Mufti* remained within his field of competence and whether the law applied contravenes the Constitution."¹⁰⁷ The judgments of the *Mufti* are routinely declared enforceable; in one study, Greek civil courts "denied enforceability in only eleven cases out of 2,679."¹⁰⁸ This was so even though *Sharia* family law departs significantly from Greek civil law in four important areas: polygamy, namely polygyny; the marriage of minors; divorce proceedings, especially the repudiation of the wife by her husband (*talaq*); and post-divorce child custody awards.¹⁰⁹ Importantly, because there is no system of appellate review for decisions under *Sharia* law as there is with other judicial systems, there is no guarantee of consistent decisions between jurisdictions.¹¹⁰ The social pressure among Muslims in Western Thrace is so strong that, even when likely facing an unfavorable outcome, "the vast majority of cases are brought before the *Mufti*, even when the plaintiff is the weaker party."¹¹¹ None of the proposals in Part II address such potential inequities.

102. A Muslim minority of about 110,000 lives in Western Thrace. Irini Lagani, *Greece's Muslim Minority in Western Thrace*, in 3 BRIEFING NOTES ON ISLAM, SOCIETY, AND POLITICS 8, 8 (2000). These Muslims of Turkish origin are Greek citizens.

103. *Id.* at 9.

104. *Id.* at 8. The treaty "was based on the principle of reciprocal obligations on the part of the two countries toward each of these minority groups," and "contains specific obligations relating to the cultural and religious rights of these communities." *Id.*

105. *Id.* at 9.

106. *Id.*

107. Tsaoussi & Zervogianni, *supra* note 88, at 5.

108. *Id.* at 11.

109. *Id.* at 7-10.

110. See David S. Powers, *On Judicial Review in Islamic Law*, 26 LAW & SOC'Y REV. 315, 315 (1992) ("The prevailing wisdom among Islamicists for over a half-century has asserted that there are no appellate structures in Islamic law, that the decision of a judge is final and irrevocable, and that a judgment may not be reversed under any circumstances.").

111. *Id.* at 12.

V. A Cautionary Tale of Deference

In the United States, deference to religious understandings of the need for medical treatment has had tragic effects. Generally, parents have a duty to provide their children all necessary medical treatment.¹¹² Two mechanisms exist to discourage and punish parental failures to treat: civil child abuse and neglect laws and criminal charges, such as manslaughter. In many states, however, parents are shielded from both civil and criminal liability by religious exemptions that "allow religious parents . . . to refuse medical care for their sick children."¹¹³ Thirty-nine states give religious exemptions to civil charges, and thirty-three states allow religious defenses to criminal charges.¹¹⁴ The costs of this deference are heart-breaking.

A 1998 study by Asser and Swan reviewed 172 child deaths across the country from 1975 to 1995 in which the children were denied medical care as a result of parental beliefs in faith healing.¹¹⁵ The results are chilling. Of the 172 children studied, 140 would have had a 90% chance of survival with medical intervention.¹¹⁶

112. See generally 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 18.03 (1993).

113. Richard A. Hughes, *The Death of Children by Faith-Based Medical Neglect*, 20 J.L. & RELIGION 247, 248 (2004–2005). The federal Child Abuse Prevention and Treatment Act originally required states to exempt faith-based denials from the child abuse statutes as a condition of receiving child abuse funds. The statute was later amended to permit states, but not require them, to have such exemptions.

114. *Id.* Only five states (Hawaii, North Carolina, Nebraska, Maryland, and Massachusetts) do not exempt faith-based denials from civil or criminal charges. *Id.*

In theory, even when there is an exemption, the state may intervene in the family to authorize the treatment on the child's behalf. See Joan H. Krause, *Freedom or Responsibility: When Spiritual Healing Fails*, 32 (Summer 1991) (unpublished paper; on file with author) (noting that while a spiritual exemption "shields the parents from liability, it does not prevent the state from aiding the children"). But in practice, the state rarely knows about the denial until after the child's death because the family does not seek any medical treatment, making civil and criminal charges essential to changing treatment practices in insular communities. See Hughes, *supra* note 113, at 247 (noting that in response to the deaths of seventy-eight children in Oregon within the Followers of Christ Church, the Oregon legislature amended Oregon's laws in 1999 to permit prosecution of parents who failed to seek medical care for their injured or sick children, and that between the time of the amendment in 1999 and 2003, there were no deaths of children whose parents belonged to the Followers of Christ Church).

Further, when there are faith-based exemptions, child protective service caseworkers and other officials often believe they cannot intervene to protect the child even when they know about the denial. See, e.g., Seth M. Asser & Rita Swan, *Child Fatalities from Religion-Motivated Medical Neglect*, 101 PEDIATRICS 625, 628 (1998) ("Believing they were powerless in the face of the parents' wishes, some teachers ignored obvious symptoms and sent lessons home to bedridden children. Some social workers and law enforcement officers allowed parents to decline examinations of children reported to be ill.").

115. Asser & Swan, *supra* note 114, at 625.

116. *Id.*

Eighteen more would have had better than a 50/50 chance.¹¹⁷ Thus, 158 of the children, or 92%, would more probably than not have survived if they had received medical treatment.¹¹⁸

Significantly, the researchers also separated cancer deaths from non-cancer deaths because the prognosis for cancer is especially hard to predict.¹¹⁹ The results for children without cancer are equally sobering. Out of 98 children who died as a result of non-cancer deaths, 92 would have had "an excellent prognosis with commonly available medical and surgical care," four would likely have had a good outcome, and only two "would not have clearly benefited from [commonly available medical and surgical] care."¹²⁰

Asser and Swan's study did not include 78 child deaths in Oregon between 1955 and 1998 or 12 child deaths in Idaho between 1980 and 1998.¹²¹ The deaths in those two states resulted from "faith healing practices that occurred within the Oregon-based Followers of Christ Church."¹²² Of the Oregon children who died, it is likely that 21 "could have lived if they had received medical treatment."¹²³

So, in just this handful of reports, more than 150 children are dead because states prized deference over the child's welfare. Clearly, children in families that practice faith healing are not more disease riddled than other children. Rather these tragic, preventable deaths arose because we removed the state's protection from some of our most vulnerable members. Given our experience with faith-based exemptions, there would seem to be no compelling reason to stand back and watch the predictable repercussions of deference unfold again.

VI. Conclusion

Religious communities are not hot spots for family violence, but they do experience family violence just like the rest of society does. The costs of giving greater deference to religious understandings of family relationships must seriously be considered before we are willing to leave the decisions about marriage and divorce to religious communities—robbing women and children of the state's protections.

117. *Id.*

118. *Id.*

119. *See id.* at 626.

120. *Id.*

121. Hughes, *supra* note 113, at 247.

122. *Id.*

123. *Id.*

