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PRIVATIZING FAMILY LAW IN THE NAME OF RELIGION

Robin Fretwell Wilson*

In pockets across the world, a movement has quietly taken hold to allow fundamentalist¹ religious norms, rather than state law, to govern family matters like divorce and inheritance. Many of these religious norms depart significantly from the state's background rules protecting individuals. Nonetheless, fundamentalist religious understandings are given the force of law, either by treating them as binding judgments arrived at through arbitration or by delegating jurisdiction to religious groups to decide family disputes, with nominal state oversight.

This Essay explores the risks to two traditionally vulnerable groups, women and children, when the state delegates its traditional oversight of the family to religious authorities.² To surface these risks, this Essay draws on two lived experiences of religious deference around the world. Specifically, this Essay examines the eighty-five

* Class of 1958 Law Alumni Professor of Law, Washington and Lee University School of Law. Thanks for thoughtful advice and critique to Kent Greenawalt, Edward Henneman, Gordon Hylton, Lash LaRue, and the participants in the William and Mary Institute of Bill of Rights Law's Symposium on *Families, Fundamentalism, & the First Amendment*, the International Society of Family Law's panel on *The Interface of Family Law and Religion*, the Southeastern Association of Law Schools' panel on *Abolishing Marriage*, and the Faculty Workshop Series at the University of Illinois College of Law. This Essay draws on Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in *MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION* (Joel A. Nichols ed., forthcoming 2010). I am especially indebted to Anna Katherine Moody for all of her diligent and tireless research.

¹ As used in this Essay, the terms "fundamentalist" or "conservative" generally refer to specific sects of Christian, Islamic, and other belief groups identified as such by the social scientists who have studied them. See, e.g., *infra* note 67 and accompanying text (discussing conservative Christian groups).

² This Essay addresses only the application of religious norms to family law matters. It does not argue against deference to all religious understandings. Society should accommodate individual religious beliefs in a range of contexts, from the wearing of beards by Muslim prisoners to the respecting of holy days in employment. See, e.g., 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* chs. 9, 10 & 13 (2006); Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson eds., 2008) (arguing for religious exemptions to same-sex marriage laws where no hardship results for same-sex couples). By embracing multiple faiths, society combats xenophobia, refuses to segment into "us" and "them," and accords respect to deeply held beliefs. See GREENAWALT, *supra*, at 3–9 (discussing various values that lie behind the Constitution's religion clauses). Much of this accommodation of individuals costs society very little. But when it comes to family matters, society has a stake in the outcome of a family's affairs. This Essay explores society's interests in family affairs involving women and children.

Sharia courts operating in Great Britain today, which apply Islamic, not British, law to divorce and inheritance.³ It also examines the system of shared jurisdiction in Western Thrace, a section of Greece where three Mufti decide family disputes for a Muslim minority of 110,000 people.⁴ While this Essay spotlights experiments to enforce Islamic rather than civil understandings of family matters, numerous scholars have advocated for deference to the religious understandings of Christian, Jewish, and other faith groups as well.⁵

In both places, the civil law supplanted by fundamentalist religious norms would provide considerably more protection to individuals in two periods of great need, upon divorce and the death of a spouse. As this Essay documents, these protections for the vulnerable are hollowed out when harsh religious understandings displace the state's more protective rules, whether in fundamentalist Islamic families or fundamentalist families of other faiths. Drawing on systems of deference operating today, Part I shows how women at divorce stand to lose custody of adolescent children and face near certain poverty if certain schools of Islamic law govern the proceeding. Part II assesses how a woman's ability to exit a marital relationship, especially a violent one, may be affected by religious deference. This Part argues that religious deference undercuts the state's ability to police family violence. Part III then shows that upon a spouse's death, women face equally grave and devastating results under Islamic law. The wealth a woman would otherwise receive upon her husband's death under civil law shrivels under Islamic law to a mere fraction of the decedent's estate, leaving many women financially at risk. Part IV rejects two articulated justifications for schemes of religious deference despite the inequitable treatment of women—namely, that a woman's natal family will support her financially when the husband does not and that women have voluntarily accepted these outcomes. Policymakers considering schemes of deference in their own countries should consider these inequities before giving effect to extreme religious views that will trap some women in poverty or abusive relationships.⁶

³ Steve Doughty, *Britain Has 85 Sharia Courts: The Astonishing Spread of the Islamic Justice Behind Closed Doors*, DAILY MAIL, June 29, 2009, available at <http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html>.

⁴ Irini Lagani, *Greece's Muslim Minority in Western Thrace*, 3 BRIEFING NOTES ON ISLAM SOC'Y & POL. 8 (2000).

⁵ See generally Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221, 1250 (2006); Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana*, 40 VAND. J. TRANSNAT'L L. 135, 140–41 (2007); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1219 (2006); see also Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel A. Nichols ed., forthcoming 2010) (on file with author).

⁶ See Wilson, *supra* note 5 (manuscript at 10 n.27), for a description of academic proposals urging greater religious deference and for a description of Canada's brief flirtation with, then rejection of, religious arbitration (noting that any arbitration in Canada by religious bodies must now apply Canadian, not religious law).

I. LIVED EXPERIENCES OF RELIGIOUS DEFERENCE

Two systems of religious deference operating today provide a snapshot of the risks to women and children in such systems. These lived experiences in Great Britain and Western Thrace demonstrate poignantly that removing state protections from the family is fraught with peril.

A. Great Britain's Embrace of "Islamic" Divorce

In 2008, the British government "quietly sanctioned the powers for sharia judges to rule on cases ranging from divorce and financial disputes to those involving domestic violence."⁷ This system of religious arbitration took root despite a firestorm of controversy that erupted in early 2008 when the Archbishop of Canterbury called for a "plural jurisdiction" in which Muslims could choose to resolve family disputes in religious tribunals or in British courts.⁸ The Bishop of Rochester predicted that "[i]t would be impossible to introduce a tradition like Sharia into [the] corpus [of British law] without fundamentally affecting its integrity."⁹

Lawmakers also reacted with alarm. Nick Clegg, Britain's Liberal Democrat leader, stated that "[e]quality before the law is part of the glue that binds our society together. We cannot have a situation where there is one law for one person and different laws for another."¹⁰ A spokesperson for the Prime Minister proclaimed that "British law should apply in this country, based on British values."¹¹

Despite the controversy, eighty-five Sharia courts now operate in Great Britain,¹² serving a Muslim population of more than 1.5 million people.¹³ These Islamic tribunals capitalize on the experience of Jewish Beth Din courts that have resolved civil cases for Orthodox Jews in Great Britain "for more than 100 years."¹⁴ Under Great Britain's Arbitration Act, the judgments are civilly enforced provided both parties agreed to binding arbitration.¹⁵

⁷ Abul Taher, *Revealed: UK's First Official Sharia Courts*, TIMES (London), Sept. 14, 2008, available at <http://www.timesonline.co.uk/tol/news/uk/crime/article4749183.ece>.

⁸ Rowan Williams, Archbishop of Canterbury, Foundation Lecture at the Royal Courts of Justice: Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), available at <http://www.bishopthorpepalace.co.uk/1575>.

⁹ Ruth Gledhill & Philip Webster, *Archbishop of Canterbury Argues for Islamic Law in Britain*, TIMES (London), Feb. 8, 2008, available at <http://www.timesonline.co.uk/tol/comment/faith/article3328024.ece>.

¹⁰ *Id.*

¹¹ Jonathan Petre & Andrew Porter, *Uproar over Archbishop's Sharia Law Stance*, TELEGRAPH (London), Feb. 8, 2008, available at <http://www.telegraph.co.uk/news/uknews/1578019/Uproar-over-Archbishop's-sharia-law-stance.html>.

¹² See Doughty, *supra* note 3.

¹³ See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2010), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (reporting that 2.7% of Great Britain's 61 million citizens are Muslim).

¹⁴ See Taher, *supra* note 7.

¹⁵ See Arbitration Act, 1996, c. 23, § 58 (Eng.).

The overwhelming majority of Great Britain's Muslim population is Sunni (ninety-six percent).¹⁶ Judging by the affiliations of Britain's mosques,¹⁷ most subscribe to the Hanafi school, one of the four Sunni schools of law and one of Islam's seven schools.¹⁸

The substantive rules applied in Sharia courts depart significantly from British law, with significant consequences for women. In some Sunni schools, there is a "strong presumption . . . that the husband will get custody of the children in the event of a divorce,"¹⁹ as Figure 1 shows.

Islamic Custody Rules	
Sunni School of Law	Custody Outcome
Hanafi	Mother retains custody of boys until age seven and girls until nine; father receives custody after this age
Shafii	Child chooses custodial parent upon the child's attainment of discretion, which has no set age limit
Maliki	Mother retains custody of boys until puberty and girls until marriage
Hanbali	Mother retains custody of boys and girls until age seven, after which the children may choose between parents

Figure 1²⁰

¹⁶ MEHMOOD NAQSHBANDI, CITY OF LONDON POLICE, ISLAM AND MUSLIMS IN BRITAIN: A GUIDE FOR NON-MUSLIMS ch. 3.3.2 (2006), available at <http://guide.muslimsinbritain.org/guide3.html#3.3.2>.

¹⁷ A majority of British mosques are controlled by a Hanafi sect, the Deobandis. DENIS MACEOIN, SHARIA LAW OR 'ONE LAW FOR ALL'? 30 (2009).

¹⁸ Islam recognizes seven distinct schools of law, four within the Sunni sect—Hanafi, Hanbali, Maliki, and Shafii—and three in the Shia sect—Ithna-Ashari, Zaidi, and Ismaili. See KRISTINE UHLMAN, OVERVIEW OF SHARI'A AND PREVALENT CUSTOMS IN ISLAMIC SOCIETIES—DIVORCE AND CHILD CUSTODY § 3.0 (2004), http://www.expertlaw.com/library/family_law/islamic_custody.html#30.

These schools differ in their approach to some substantive questions. See Mohammad H. Fadel, *Political Liberalism, Islamic Family Law and Family Law Pluralism: Lessons from New York on Family Law Arbitration*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT *supra* note 5, at 4–5, 29, available at <http://ssrn.com/abstract=1421978> (noting that "Muslims have their own profound disagreements on the nature of marriage" and describing among the four Sunni schools "material differences in their substantive legal doctrines"); Figure 1.

¹⁹ Caryn Litt Wolfe, Note, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 448 (2006) (citing Kathleen A. Portuán Miller, *The Other Side of the Coin: A Look at Islamic Law as Compared to Anglo-American Law—Do Muslim Women Really Have Fewer Rights Than American Women?*, 16 N.Y. INT'L L. REV. 65, 65, 89–90, 116 (2003)).

²⁰ See JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 187–88 (2d ed. 1990).

Of particular concern is what occurs when the Hanafi norm for custody governs. For male and female children over the age of seven and nine, respectively, a father receives custody upon divorce. By contrast, under British laws, custody of children after divorce would be determined by the child's best interests.²¹ Although it is true that in the Hanbali and Shafii schools, women do not necessarily jeopardize custody of their children by divorcing, the Hanafi school is the "most widespread and widely applied in modern Shari'a-based legislation."²²

Imagine the Catch-22 that will result for some women when Hanafi custody rules govern at divorce. Consider what would happen if a father harshly disciplines his adolescent son, discipline that might constitute child abuse outside that religious community.²³ A mother would be powerless to help her child if the Sharia court enforces the Hanafi religious norm as to custody. If she stays, her son will be beaten, and if she exits, her son remains in her husband's care.²⁴

Even if custody rules do not dissuade particular women from divorcing, Islamic rules governing a couple's finances after divorce may trap women in non-functioning marriages. As Figure 2 notes, a woman who ends the marriage sometimes has to buy her way out by paying back the *mahr*—a payment received by her for marrying—or by forfeiting the right to any deferred *mahr* that would otherwise be due.²⁵

²¹ See ALISON DIDUCK & FELICITY KAGANAS, FAMILY LAW, GENDER AND THE STATE: TEXT, CASES AND MATERIALS 312 (2d ed. 2006). In the United States, the law of child custody has undergone a "dramatic transformation over the past 150 years" beginning "with a powerful presumption for custody with fathers," which was "then turned on its head over the course of the nineteenth century" to favor mothers and finally to "recenter[] on a formally gender-neutral inquiry into the 'best interest of the child.'" David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1467–68 (2006) (citing Martha Albertson Fineman, *Fatherhood, Feminism and Family Law*, 32 MCGEORGE L. REV. 1031, 1038 (2001)).

²² UHLMAN, *supra* note 18, § 3.1.

²³ See *infra* Part II.A.

²⁴ It is not clear that the woman even would be permitted to divorce if Islamic law applied, absent a substantial payment to her husband. See *infra* note 46 and accompanying text.

²⁵ Aspasia Tsaoussi & Eleni Zervogianni, *Multiculturalism and Family Law: The Case of Greek Muslims*, in EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW 209, 216–17 (Katharina Boele-Woelki & Tone Sverdrup eds., 2008). Many Islamic schools follow this rule. See NASIR, *supra* note 20, at 122 (noting that "marriage may be dissolved by mutual consent by the wife giving the husband something for her freedom," which is known as *khula*, *mubaraat*, or ransom, but that the husband's unilateral right of divorce, the *talaq ala mal*, "does not deprive the wife of her rights under the marriage contract, e.g. deferred dower and maintenance"); M. Hashim Kamali, *Islamic Law: Personal Law*, in ENCYCLOPEDIA OF RELIGION 4705, 4708 (Lindsay Jones ed., 2d ed. 2005) (noting that the wife may "secure[] her release from the marital tie by offering the husband financial consideration, commonly the return of the dower"); Mosa Sayed, *The Muslim Dower (Mahr) in Europe—with Special Reference to Sweden*, in EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW, *supra*, at 187, 198 (citing an Egyptian law allowing a woman to bypass the husband's unilateral right of divorce but requiring that she return the *mahr*).

Islamic Understandings of Divorce

- No maintenance after *iddat* period (roughly 3 months)
- No equitable distribution of property
- In absence of man's fault, woman pays her way out of marriage

Figure 2

A woman receives no equitable distribution of the property acquired by the couple during the marriage, which is usually titled in the man's name.²⁶ The Qur'an limits the husband's duty to provide maintenance, or alimony, to the *iddat* period, which ends mere months after the divorce.²⁷ All in all, the prospect of certain poverty may tether a woman to a marriage as surely as losing her children would.

By contrast, under British law, a woman receives considerably more protection. There is no question that she would be entitled to divorce.²⁸ She would be entitled to equitable division of the couple's assets.²⁹ She may even qualify for alimony if she is unable to provide for her own support.³⁰ Thus, by deferring to religious understandings of custody or financial consequences after divorce, society increases the cost to women who seek a divorce. This is especially problematic when a woman wants to divorce for her own safety or the safety of her children.³¹

Muslim women also face unique procedural hurdles when divorcing. Women need corroboration of their claims in a divorce while men do not.³² Women pay more to file for divorce, £250 versus £100 for men.³³ Unless the husband agrees, a woman needs the imam's permission to divorce and generally needs to show the husband's fault.³⁴

²⁶ See NASIR, *supra* note 20, at 81 ("It is the duty of the husband to provide and the right of the wife to have a suitable matrimonial home according to the Quranic verse: 'Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them.' The wife should follow the husband to the matrimonial home, provided that it complies with the Sharia requirements, that is, that it should be in accordance with the husband's financial standing . . .") (quoting *Surat Talaq* 65:6).

²⁷ *Id.* at 148, 152–54 (citing to *Surat Baqara* 2:228, stating that the *iddat* lasts for "three monthly courses," but noting that individual countries have required additional compensation—*mutat*—in cases of arbitrary repudiation of the wife to mitigate the rule's harshness); see also DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 182–84 (3d ed. 1998).

²⁸ See DIDUCK & KAGANAS, *supra* note 21, at 523–26.

²⁹ See *id.* at 596–99.

³⁰ See *id.* at 605.

³¹ See *infra* Part II.

³² See Edna Fernandes, *Sharia Law UK: Mail on Sunday Gets Exclusive Access to a British Muslim Court*, DAILY MAIL, July 4, 2009, available at <http://www.dailymail.co.uk/news/article-1197478/Sharia-law-UK--How-Islam-dispensing-justice-side-British-courts.html>.

³³ *Id.*

³⁴ See NASIR, *supra* note 20, at 128 (describing Syrian law, derived from the Hanafi school, requiring divorce arbiters to "award a divorce and order the full dower or a commensurate part

For an example of the difficulties faced by women in Great Britain's Sharia courts, consider the experience of a woman identified in the *Daily Mail* as "Ameena."³⁵ Ameena sought assistance from the Islamic Sharia Council to divorce her husband. Backed by testimony of her daughter and two women's shelter workers, Ameena told the imam, Dr. Hasan, that her husband "beats me and the children."³⁶ The imam documented the abuse including beating that caused a miscarriage.³⁷ Although Ameena corroborated her claims of abuse, the imam referred Ameena's case to a council of seven imams.³⁸ The council decided Ameena's husband should be given another opportunity to reconcile with her before they would grant Ameena a divorce, if the council did so at all.³⁹ As of July 2009, "Ameena's fate remain[ed] in limbo."⁴⁰

B. Shared Jurisdiction in Western Thrace

Systems of shared jurisdiction may also result in raw deals for women. One example of shared jurisdiction operates in Western Thrace, where the Hanafi school also predominates.⁴¹ As a result of the Treaty of Lausanne, signed by Turkey and Greece in 1923, Muslims in Greece enjoy unique independence from the Greek government.⁴² They maintain their own religious and legal institutions, headed by three Muftis who "conduct all matters related to civil law" using Sharia law,⁴³ specifically Hanafi law.⁴⁴

Hanafi law departs significantly from Greek civil law in a number of important areas.⁴⁵ A recent study of divorce within Western Thrace explains: "[U]nder Islamic

thereof to the injury" if the fault falls "mostly" or "equally" on the wife but providing that "[i]f the injury, or most of it, is on the part of the husband, the arbiters, having failed to reconcile the spouses, shall award an irrevocable divorce"). Adherents have also attempted to apply religious norms to block the application of civil rules in divorce proceedings. *See Aleem v. Aleem*, 947 A.2d 489 (Md. 2008). In *Aleem*, a Muslim husband argued that his performance of *talaq* after his wife filed a civil action for divorce deprived the trial court of jurisdiction to litigate the division of the parties' marital property. *Id.* at 490. The Maryland court rejected the *talaq* as a proper method of divorce as it violated public policy. *Id.* at 502; *see also* Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment*, 66 WASH. & LEE L. REV. 467 (2010) (discussing *Aleem*).

³⁵ Fernandes, *supra* note 32.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ UHLMAN, *supra* note 18, § 3.1 (noting that the Hanafi school predominates in the Balkans, which includes Greece).

⁴² *See* Lagani, *supra* note 4.

⁴³ *Id.*

⁴⁴ *See* UHLMAN, *supra* note 18, § 3.1.

⁴⁵ *See* Tsaoussi & Zervogianni, *supra* note 25, at 209.

law the wife must compensate her husband for the termination of the marriage . . . by returning the dower (*mahr*) . . . [and] by waiving her right to alimony or even her right to the custody of the children.”⁴⁶ If the husband does not agree to the divorce, the wife can terminate the marriage only for important reasons pertaining to fault of the husband.⁴⁷ While the Greek Muftis have accepted such fault-based reasons as a husband’s violence, “the Mufti[s] often reject[] divorce applications filed by women, who thus remain trapped in non-functioning marriages.”⁴⁸

Although there is a technical possibility of divorce through Greek courts, almost no one disputes the authority of the Mufti. Even when a party likely faces an unfavorable outcome or is the weaker party, “the vast majority of cases are brought before the Mufti.”⁴⁹

On the rare occasion that someone disputes a Mufti’s decision, Greek courts routinely find the Mufti’s decision enforceable. Greek civil courts denied enforceability in less than one-half of one percent of cases.⁵⁰ This is not surprising since civil review of the Muftis’ judgments is limited to “whether the Mufti remained within his field of competence and whether the law applied contravenes the [Greek] Constitution.”⁵¹ A number of problems follow from this lack of review. There is no recourse from the Mufti’s judgment, nor is there any guarantee that like cases will be treated alike.⁵²

As the next Part explains, these harsh rules⁵³ exacerbate a woman’s ability to exit a marriage in cases of violence in the family.

⁴⁶ *Id.* at 216–17. Though academics who advocate for greater religious deference in family matters would draw the line at respecting religious understandings about custody because of the state’s paramount interest in protecting children, *see* Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363 (2007), this is not the practice in Western Thrace.

⁴⁷ *See* NASIR, *supra* note 20, at 128 (“If the injury, or most of it, is on the part of the husband, the arbiters, having failed to reconcile the spouses, shall award an irrevocable divorce.”).

⁴⁸ Tsaoussi & Zervogianni, *supra* note 25, at 217.

⁴⁹ *Id.* at 221.

⁵⁰ *Id.* at 219–20 (stating that civil courts “denied enforceability in only 11 cases out of 2,679”).

⁵¹ *Id.* at 214.

⁵² *See id.* at 221.

⁵³ In some countries, such as Egypt, Islamic courts have at times rejected rigid applications of Sharia law. *See* Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. 379, 423, 425 (2006) (noting that “[i]n dicta, the SCC [Egyptian Supreme Court] has argued that Islamic law is, for constitutional purposes, a source of general moral principles that must be interpreted anew in every day and age and must take evolving notions of human welfare into account” and that in a number of cases, the SCC has upheld “as ‘Islamic’ legislation that requires husbands to pay alimony, legislation that provides women with a right to retroactive child support and legislation that provides Egyptian women with the right to dissolve their marriage for ‘harm’ if their husband takes a second wife” (internal citations omitted)). Yet even these more “liberal”

II. THE COLLISION OF RELIGIOUS NORMS WITH FAMILY VIOLENCE

A growing body of research⁵⁴ shows that family violence occurs in religious communities, like it does throughout society. When it occurs in religious communities, the victims often receive little or no support for exiting the marriage from religious leaders and other members. This Part captions select social scientific studies of each phenomenon, drawing on empirical studies of Islamic and fundamentalist Christian communities.⁵⁵ Studies of other faith groups, such as Orthodox Jewish groups, show similar patterns.⁵⁶

A. Family Violence in Fundamentalist Religious Households

Studies of domestic violence risk factors find that religion is weakly protective of adherents from violence.⁵⁷ Nonetheless, religious observers across a number of belief systems are not free of family violence. For instance, Dr. Muhammad Haj-Yahia studied 291 married Arab women in Israel, the majority of whom were Muslim.⁵⁸ 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).”⁵⁹ Nearly two-thirds of those surveyed, sixty-four percent, knew Arab women who had

courts remain committed to Sharia. *See id.* at 418–25 (discussing the Egyptian Supreme Court’s methods of identifying rules and goals of Sharia which the state must respect). More fundamentally, the *actual* experience of women in the two systems of deference described in this Essay shows that rigid religious understandings of custody and the financial consequences of divorce, when applied, increase the cost to women who seek a divorce. *See supra* Part I.

⁵⁴ Researchers have found it difficult to measure the incidence of family violence within religious and cultural groups. *See, e.g.*, Anahid Dervartanian Kulwicki & June Miller, *Domestic Violence in the Arab American Population: Transforming Environmental Conditions Through Community Education*, 20 ISSUES MENTAL HEALTH NURSING 199, 204 (1999) (using home interviews to study domestic violence among Arab Americans “[b]ecause of the high percentage of illiteracy . . . [and] the reluctance of Arab Americans to discuss sensitive questions outside their homes”).

⁵⁵ This Part highlights the risk of family violence in a variety of fundamentalist faith groups because scholars have advocated greater religious deference for many faith groups, including Islamic, Christian, and Jewish groups. *See supra* note 46 and accompanying text.

⁵⁶ *See* Wilson, *supra* note 5 (manuscript at 41 n.128, 50 n.160).

⁵⁷ For example, a 1999 study by Christopher Ellison and colleagues 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. *See* Christopher G. Ellison et al., *Are There Religious Variations in Domestic Violence?*, 20 J. FAM. ISSUES 87, 87–113, 104 (1999) (“[T]he frequency of attending religious services bears an inverse relationship to the likelihood of perpetrating abuse for both men and women.”); *see also infra* note 77 and accompanying text.

⁵⁸ Muhammad M. Haj-Yahia, *Wife Abuse and Battering in the Sociocultural Context of Arab Society*, 39 FAM. PROCESS 237, 242 (2000).

⁵⁹ *Id.* at 244.

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.”⁶⁰

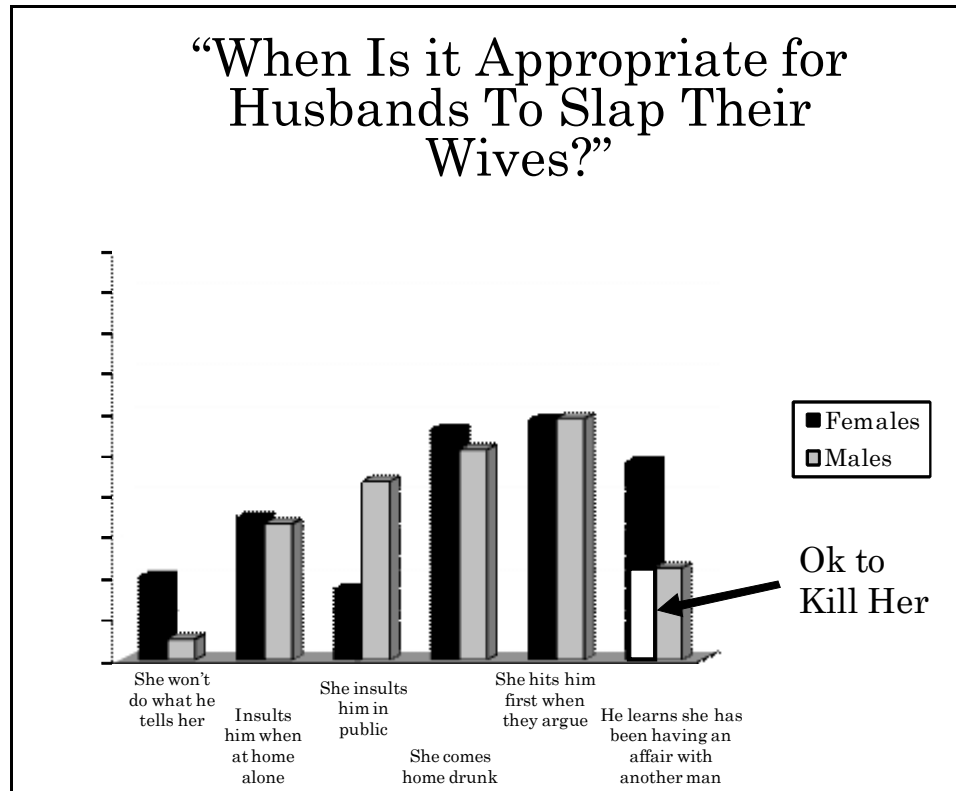


Figure 3

At least some Muslim enclaves in the United States have cultural norms accepting of domestic violence. A 1999 study by two researchers, Kulwicki and Miller, examined views of Arab American immigrants in the United States, nearly all of whom were Muslim.⁶¹ The researchers asked women and men when it would be appropriate for husbands to slap their wives.⁶² Women, shown in black in Figure 3, were more accepting of this practice than men, shown in gray, in a number of different circumstances. These circumstances ranged from when a wife disrespects her husband in the home when no one else is around, the second set of bars in Figure 3,⁶³ to when

⁶⁰ *Id.*

⁶¹ Kulwicki & Miller, *supra* note 54, at 207 tbl.1 (reporting that 97.51% of survey respondents were Muslim).

⁶² *Id.* at 209 tbl.3.

⁶³ *See id.* (showing that 34.8% of female and 33.3% of male respondents would approve of a man slapping his wife if she insults him when they are at home alone).

the husband discovers that his wife is cheating, the last set of bars in Figure 3.⁶⁴ Perhaps most alarming, 18.2% of women in the study said they would approve of a husband killing his wife if he discovered adultery,⁶⁵ as the black arrow shows.

Men share these views as well. In another study, nearly a quarter, and sometimes nearly two-thirds of the male respondents, justified wife beating because of “sexual infidelity, insulting the husband in front of his friends, challenging [his] manhood, disobeying the husband,” and a variety of other reasons.⁶⁶

Just as some adherents of Islam live with domestic violence, so, too, do members of conservative Christian sects. Using the second National Survey of Families and Households, University of Virginia Professor Brad Wilcox compared rates of family violence between conservative Protestant⁶⁷ married men with children and mainline Protestant men and unaffiliated men.⁶⁸ Wilcox found that “[n]ominal conservative Protestants 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.”⁶⁹

⁶⁴ See *id.* (showing that 48.4% of female and 22.5% of male respondents approve of a man slapping his wife if he learns that she had an affair). Researchers also asked if it would be appropriate for a man to slap his wife when:

Would you approve of a man slapping his wife if:	% Females Yes	% Males 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

Id.

⁶⁵ *Id.* The sample was not large enough to present parallel statistics for men on this question.

⁶⁶ Muhammad M. Haj-Yahia, *Beliefs About Wife Beating Among Arab Men From Israel: The Influence of Their Patriarchal Ideology*, 18 J. FAM. VIOLENCE 193, 194 (2003); *id.* at 199 (“[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.”); see also Muhammad M. Haj-Yahia, *A Patriarchal Perspective of Beliefs About Wife Beating Among Arab Palestinian Men from the West Bank and the Gaza Strip*, 19 J. FAM. ISSUES 595, 604–05 (1998).

⁶⁷ W. BRADFORD WILCOX, *SOFT PATRIARCHS, NEW MEN: HOW CHRISTIANITY SHAPES FATHERS AND HUSBANDS* 15–16 (2004) (classifying as “conservative” any denomination that “adhere[s] to a theologically conservative worldview,” including Pentecostals, Baptists, Anabaptists, Southern Baptists, Churches of God in Christ, and Reformed Churches). “Conservative” Protestants attended church more regularly than “mainline” ones. *Id.* at 16 & tbl.1.2.

⁶⁸ See *id.* at 181–82.

⁶⁹ *Id.*; see also Wilson, *supra* note 5 (manuscript at 30–32) (collecting other studies of Christian groups).

Risks of violence in religious communities extend to children as well. A study of child sexual abuse by researcher Rebecca Bolen found that Protestant and Catholic children had less child sexual abuse risk than children in other families, especially when very young.⁷⁰ But when analyzed across the years of childhood, that risk spiked in adolescence, as Figure 4 illustrates.⁷¹ Specifically, the risk of sexual abuse for children raised as Protestants, shown in Figure 4, spikes in late adolescence, while the risk for Catholic children spikes in the early teens.⁷² The increase in risk for observant adolescents is on par with other factors that one intuitively grasps can affect a child's risk of sexual abuse, as when a girl lives with males in the household after her parents divorce.⁷³

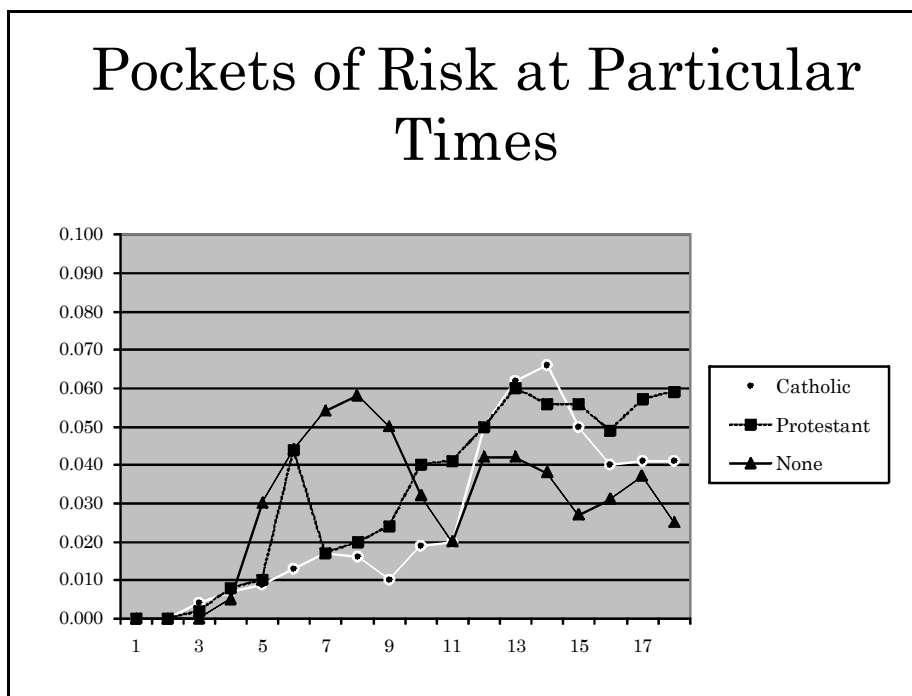


Figure 4⁷⁴

⁷⁰ See Rebecca M. Bolen, *Predicting Risk to Be Sexually Abused: A Comparison of Logistic Regression to Event History Analysis*, 3 CHILD MALTREATMENT 157, 164 fig.6, 167 (1998). Bolen did not capture the identity of the perpetrator of the abuse. Some of it may have been intrafamilial, some extrafamilial. See generally Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241 (2002). In this discussion, child sexual abuse may spark a mother's desire to exit the marriage if it occurs within the family.

⁷¹ See Bolen, *supra* note 70, at 164 fig.6.

⁷² *Id.*

⁷³ Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 255 (2001).

⁷⁴ This figure is adapted from the Bolen study. See Bolen, *supra* note 70.

Child physical abuse also marks religious communities. Professors Christopher Dyslin and Cynthia Thomsen have examined whether religious affiliation or religiosity are related to child physical abuse risk.⁷⁵ They distinguished mere spanking from child physical abuse, which they defined as “entail[ing] more extreme forms of physical aggression,” such as “being hit with a fist, burned, or choked.”⁷⁶ Dyslin and Thomsen found that while “Conservative Protestant”⁷⁷ religious affiliation was *not* related to child physical abuse risk,⁷⁸ “[i]ndividuals with high levels of *extrinsic religiosity* had higher [child-abuse tendencies]” than those with lower extrinsic religiosity.⁷⁹ 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,”⁸⁰ providing protection, consolation, and social status.⁸¹

While Dyslin and Thomsen restricted their inquiry to more severe acts of abuse, such as choking and burning, other researchers have examined links between religion and simple corporal punishment. The overwhelming weight of evidence indicates that certain religious adherents resort to corporal punishment far more often than other parents.⁸²

Clearly, family violence afflicts some religious communities, as it does society generally.⁸³ More disturbing for the idea of giving deference to religious groups

⁷⁵ Christopher W. Dyslin & Cynthia J. Thomsen, *Religiosity and Risk of Perpetrating Child Physical Abuse: An Empirical Investigation*, 33 J. PSYCHOL. & THEOLOGY 291, 292–93 (2005) (measuring participants’ attitudes towards abuse with the Child Abuse Potential Inventory rather than with self-reports of behavior).

⁷⁶ *Id.* at 292.

⁷⁷ Dyslin and Thomsen classified the following denominations as Conservative Protestants: “Adventist, Assemblies of God, Baptist, Church of God in Christ, Evangelical Free, Foursquare Gospel, Full Gospel, Holiness, Missouri or Wisconsin Synod Lutheran, Nazarene, Non-denominational (Evangelical), Pentecostal, and Wesleyan.” *Id.* at 293 n.2.

⁷⁸ Compare *id.* at 295–96, with Bette L. Bottoms et al., *Religion-Related Child Physical Abuse: Characteristics and Psychological Outcomes*, 8 J. AGGRESSION MALTREATMENT & TRAUMA 87, 90 (2003) (finding in a survey of nearly 650 members of the Christian Reformed Church that “church attendance was inversely related to reported perpetration of child abuse”).

⁷⁹ Dyslin & Thomsen, *supra* note 75, at 296 (emphasis added).

⁸⁰ Vicky Genia & Dale G. Shaw, *Religion, Intrinsic-Extrinsic Orientation, and Depression*, 32 REV. RELIGIOUS RES. 274, 274 (1991).

⁸¹ See Gordon W. Allport & J. Michael Ross, *Personal Religious Orientation and Prejudice*, 5 J. PERSONALITY & SOC. PSYCHOL. 432, 434 (1967).

⁸² See Wilson, *supra* note 5 (manuscript at 43–46 nn. 141–50 and accompanying text) (collecting studies and theological texts supporting corporal punishment).

⁸³ As I and others have argued elsewhere, religious exemptions in the context of the family will sometimes serve to rob women and children of the state’s protection. See, e.g., Wilson, *supra* note 5 (manuscript at 10) (“In a majority of U.S. states, religious understandings of family duties currently govern in one significant context, the medical treatment of children. The state’s choice to turn a blind eye to parental refusals to treat dying children has yielded tragic results.”); see also MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 274 (2005) (arguing that the rule of law should apply “to religious entities as

is that religious leaders often tolerate this domestic violence, as the next subpart documents.

B. Discouraging Exit From Abusive Relationships

Religious leaders across many traditions actively discourage the victims of family violence from exiting the marriage. A trio of studies of Christian groups illustrate the degree of this tolerance of domestic violence. A 2000 study of 158 Christian religious leaders found that many believed “marriage must be saved at all costs”—even when domestic violence occurs—and that a realistic solution for victims included “forgiving and forgetting the abuse.”⁸⁴

In a second study, eighty percent of women abused in their marriages who asked clergy for advice received only religious advice or, because it is a wife’s duty to forgive, were told to return home or to seek marriage counseling.⁸⁵ A third study, a 1988 survey of conservative Protestant pastors, found that ninety-two percent would “never advise a woman to divorce an abuser.”⁸⁶

Many Jewish and Muslim religious leaders also prize the “sanctity” of the marriage over the victim’s safety.⁸⁷ In all these settings, it is “especially difficult for

it is applied to all others” and that the “governing law should not be one that any one individual decides according to his or her own perspective, but rather a set of laws created by duly enacted legislatures charged with consideration of the public good”). For an argument that religious exemptions may be consistent with the rule of law, see Kent Greenawalt, *The Rule of Law and the Exemption Strategy*, 30 CARDOZO L. REV. 1513 (2009).

⁸⁴ Colleen Shannon-Lewy & Valerie T. Dull, *The Response of Christian Clergy to Domestic Violence: Help or Hindrance?*, 10 AGGRESSION & VIOLENT BEHAV. 647, 649 (2005) (quoting AL MILES, DOMESTIC VIOLENCE: WHAT EVERY PASTOR NEEDS TO KNOW 149–50 (2000)).

⁸⁵ 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).

⁸⁶ Shannon-Lewy & Dull, *supra* note 84, at 651 (citing James M. Alsdurf & Pamela Alsdurf, *A Pastoral Response*, in ABUSE AND RELIGION: WHEN PRAYING ISN’T ENOUGH 165, 168 (Anne L. Horton & Judith A. Williamson eds., 1988)).

⁸⁷ See Linda L. Ammons, *What’s God Got to Do With It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 RUTGERS L. REV. 1207 (1999). “Jewish women tend to stay in abusive relationships longer th[a]n non-Jews,” largely because of community pressure to maintain peace in the home or “shalom bayit.” *Id.* at 1269 n.377 (quoting Debra Darvick, *To Have and To Harm*, FORWARD FAM., Nov. 8, 1996, at 1).

In much the same way, Professor Ruksana Ayyub explains that the Muslim community “condemns any woman who seeks legal protection from an abusive spouse.” Ruksana Ayyub, *Domestic Violence in the South Asian Muslim Immigrant Population in the United States*, 9 J. SOC. DISTRESS & HOMELESS 237, 242 (2000). Professor Ayyub also notes that, among South Asian Muslims in the United States, “[v]iolence in marriage is generally condemned but when it does happen the religious community gives no clear consequences for the violent behavior.” *Id.* Researcher Haj-Yahia notes that an Arab woman who seeks removal of her husband from the home “may be ostracized by [her] community and blamed for undermining

religious victims to see the full extent of their suffering or to sound out the call for help.”⁸⁸

Obviously, the State faces significant challenges in policing family violence. The best hope for safeguarding family members is to empower women to act as private attorneys general, regulating conduct with respect to themselves and their children. Providing a financial safety net at divorce—as the state’s off-the-rack rules do—is essential to preserving a woman’s ability to exit, as are custody rules that do not automatically strip women of daily contact with and care of their children.⁸⁹

III. PROTECTION OF DEPENDENTS UPON DEATH

Just as women may be worse off when religious rules are applied upon divorce, so too are they likely to be in the context of inheritance.⁹⁰ The Anglo-American

family stability and unity.” Muhammad M. Haj-Yahia, *Wife Abuse and Battering in the Sociocultural Context of Arab Society*, 39 FAM. PROCESS 237, 238 (2000). Haj-Yahia attributes ostracism of the wife to “the prevailing belief that the children’s best interest [and her family’s reputation] take precedence over her own well-being and safety.” *Id.* at 239–40. As I noted in a previous article, “[p]reserving the marriage is of such great importance that physical violence is viewed as ‘preferable to divorce.’” Wilson, *supra* note 46, at 1376 & n.79 (quoting S. Douki et al., *Violence Against Women in Arab and Islamic Countries*, 6 ARCHIVES WOMEN’S MENTAL HEALTH 165, 169 (2003)).

⁸⁸ Nancy Nason-Clark, *When Terror Strikes at Home: The Interface Between Religion and Domestic Violence*, 43 J. SCI. STUDY RELIGION 303, 304 (2004).

⁸⁹ Importantly, raising the costs of exit for women in cases of family violence undercuts powers that liberal states have *not* ceded and will not cede to religious courts, for example, the decision to prosecute domestic violence. For instance, many states have instituted “no drop” policies for domestic violence, which “mandate prosecution of abusers, even if the victims do not wish to proceed.” Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 649 (2009). The objective of these policies is to take offenders out of the home and community. By removing the offender’s opportunity to convince a victim to dismiss the charges, such policies serve to empower victims, who can feel confident that domestic violence will not be tolerated by the state. J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT’L L. 363, 384–85 (2007).

If a legally enforceable religious tradition hobbles a battered spouse’s ability to leave the relationship, many women likely will not report family violence, undercutting the state’s scheme for sanctioning family violence. In this way, it is possible that religious deference will either (1) make things worse for women in groups the state is trying to support, or (2) dramatically affect the state’s real-world willingness to exercise the authority it has retained for itself—for example, by increasing the unwillingness of police and prosecutors to pursue charges against a violent husband if they know that the wife will be unable to exit the marriage.

⁹⁰ Muslims in Great Britain could apply Sharia law to matters of succession even before the eighty-five Sharia Courts began to operate. PEARL & MENSKI, *supra* note 27, at 486 (“Muslims in Britain who want to ensure that Muslim law applies to an inheritance in England, rather than the English legal rules, have basically two options, either to make a will laying down that succession should take place in accordance with Muslim law . . . or to distribute their property *inter vivos*.”). Presumably, if a decedent does not take these steps, his son

system protects the welfare of citizens through inheritance schemes that favor the surviving spouse, regardless of gender.⁹¹ But, as this Part documents, some religious norms preclude a widow from inheriting more than a limited fraction of the husband's estate, pushing wives onto the state's safety net. Specifically, under Islamic inheritance rules, surviving female spouses receive a fraction of what they would receive under Anglo-American law.⁹² By contrast under British law, the surviving spouse gets a substantial portion of the estate.⁹³

It is important to review briefly the modern changes in Anglo-American intestacy law before considering how the application of religious norms will significantly disadvantage women. In the United States, each state has developed its own law governing the division of property upon a spouse's death.⁹⁴ Property may be willed by

or other family member could enlist the Sharia court to apply Islamic law upon his death. *Cf.* MARION BOYD, CANADIAN MINISTRY OF THE ATTORNEY GENERAL, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION (2004) (discussing arbitration of inheritance cases before Canada prohibited religious arbitration using religious rules).

⁹¹ A relatively recent twentieth-century phenomenon, the spouse's elevation to the role of primary heir is one of the most significant changes in the American law of inheritance. Historically, spouses provided for one another through the marital estates of dower and curtesy rather than through inheritance. Through a dower, the woman would be entitled to a life estate in one-third of her deceased husband's land (or, more precisely, of the land of which he was seized of an estate of inheritance during the marriage), with title to the real estate going to the children, not to the surviving spouse. *See* RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 13–14 (2004); WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 42–43 (2d. ed. 2001). A widow could receive one-third to one-half of her spouse's personal property, depending on whether the decedent had children. A widower, on the other hand, received rights to his wife's personal property upon marriage rather than death. MCGOVERN & KURTZ, *supra*, at 43. This distribution scheme reflected society notions that “[u]nderlying a woman's status was a concept of a woman as a man's ‘property’—a concept applicable not only to the married woman, but also to the single woman, as well, who was subject to her father's control preceding her marriage.” 2 WOMEN AND THE LAW: THE SOCIAL HISTORICAL PERSPECTIVE 1 (D. Kelly Weisberg ed., 1982). In this distribution scheme, a wife's inheritance was limited to a life estate for fear that “if the surviving spouse inherited land in fee it would be permanently removed from the decedent's family, particularly if the couple had no children or if the surviving spouse remarried or had children by another marriage.” MCGOVERN & KURTZ, *supra*, at 42–43.

By contrast, the modern model generally confers an “outright (fee simple) share of the decedent's property . . . [and d]istinctions between widows and widowers have disappeared, and would be of doubtful constitutionality today.” *Id.* at 43.

⁹² Mary F. Radford, *The Inheritance Rights of Women Under Jewish and Islamic Law*, 23 B.C. INT'L & COMP. L. REV. 135, 184 (2000) (“Western cultures . . . have come close in modern times to achieving sex equality in [intestacy] law while, at the same time, a resurgence of fundamentalism in . . . Islam . . . threatens to visit new and even greater inequities on women.”). The illustrations in this Part also make this point.

⁹³ *See infra* note 113 and accompanying chart.

⁹⁴ *See* Portuán Miller, *supra* note 19, at 116–17. The underlying rationale for intestacy statutes is widely disputed. Some maintain that the statutes attempt to provide default rules

the decedent, but if the decedent does not act, his or her property will be distributed according to the state's intestacy laws. As a general rule, spouses in community property states—that is, states that consider property acquired during the marriage to be owned by both spouses⁹⁵—may devise in a will only one-half of the community property, with the other half belonging to the surviving spouse.⁹⁶ One spouse may will to the other his or her half of the community property, as well as any other property acquired outside of the marriage; but, he or she generally may also elect to omit the spouse completely.⁹⁷

In non-community property states, each spouse may devise his or her property in its entirety to whomever he or she wishes. However, with the exception of one state,

that effect the devises most decedents would have wanted to make. Others argue that the shift served societal welfare, including the protection of financially dependent family members. *See* Radford, *supra* note 92, at 136 (discussing the history of inheritance laws in Western society and concluding that the modern Anglo-American trend affords a widow the right to be supported after the death of her husband); *see also* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1033–37 (2004) (explaining the underlying reasoning behind state intestacy statute trends and concluding that “every conceivable preference—that of the decedent, that of survivors, that of society—all mixed together” factors into modern intestacy laws).

This debate over the driving force behind modern Anglo-American intestacy statutes may be an academic exercise here since both rationales will yield the same results in many instances. For example, since the Statute of Wills, property owners who fail to exercise the right of testamentary control relinquish to the state the right to distribute the property in a way that best serves the purpose of social and economic stability; in the case of spouses, this frequently will result in distributing the property to the deceased's immediate family members, who then can remain independent without need of public support. *See* Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 *AM. B. FOUND. RES. J.* 319, 324 (finding that two of the four major societal aims in estate distribution are “to protect the financially dependent family” and “to promote and encourage the nuclear family”). By the same token, presumably most spouses would intend to provide for the care of their husband or wife upon their death had they acted. *See* MCGOVERN & KURTZ, *supra* note 91, at 43 (“Empirical data suggests that most people want a larger share to pass to the spouse than the former rules provided.”).

⁹⁵ *See* LESLIE JOAN HARRIS ET AL., *FAMILY LAW* 47–49 (3d ed. 2005).

⁹⁶ *See* Portuán Miller, *supra* note 19, at 118 n.337 (citing *McMurry v. Stanley*, 6 S.W. 412, 415 (Tex. 1887), as a case that exemplifies community property rules governing the division of property).

⁹⁷ While a decedent in a community property state may disinherit his or her spouse, the surviving spouse will still retain ownership over her half of the community property. MCGOVERN & KURTZ, *supra* note 91, at 149. Thus, in instances of brief marriages in which the couple accrues minimal community assets, it may be possible for one spouse virtually to disinherit the other spouse. The harshness of this rule is muted in most community property states by statutory minimums to which the surviving spouse is entitled, even if there is no community property. *Id.* (“[S]ome have criticized the community property system for failing to give a needy surviving spouse any rights in the decedent's separate property. The Uniform Probate Code attempts to meet this objection by including in the elective share an additional amount to reflect the ‘spouses’ mutual duties of support.” (internal citations omitted)).

if the decedent does not provide a certain amount for the surviving spouse, he or she can petition to take a forced elective share, which is generally one-half to one-third of the estate.⁹⁸

In the absence of a will, Anglo-American intestate law provides significant, concrete protection for dependent spouses. In most states today in the U.S., a surviving spouse of any gender takes the entire intestate estate unless there are surviving children of the deceased who have a different parent other than the survivor.⁹⁹ British law also allows a surviving spouse to challenge a testamentary distribution in favor of an intestate one.¹⁰⁰

Unlike the Anglo-American system, which provides a generous safety net for the surviving spouse, Islamic law gives widows a slim fraction of the entire estate. Because the Qur'an limits any person from devising more than one-third of his estate,¹⁰¹ the intestacy distribution scheme affects every estate under Islamic law. Just as critical, Sunni law, which governs ninety percent of the world's Muslims, forbids any named heir, including wives, from taking under a will,¹⁰² leaving only intestate distribution

⁹⁸ See Portuán Miller, *supra* note 19, at 118 n.340 (citing JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 395 (4th ed. 1998)). Elective statutory shares are available in every state except Georgia. *See id.* at 118. In Georgia, a disinherited spouse, or one that receives very little from the deceased, is not entitled to an elective share. *Id.*

The elective share is generally a fraction of the probate estate or, in Uniform Probate Code (UPC) jurisdictions—Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, and Utah—the augmented estate. *See* UNIF. PROBATE CODE, § 2-202(a) (1993). Because elective shares in non-UPC states can vary and because the distribution of every estate involves its own unique circumstances, it ultimately may be possible to disinherit a spouse despite these legislative safeguards. *See* BRASHIER, *supra* note 91, at 14–18 (illustrating the disparate outcomes that can result from a spouse invoking the elective share).

⁹⁹ UNIF. PROBATE CODE § 2-102(1)(ii) (1993); *cf. infra* note 113 (discussing British intestacy laws). As this discussion shows, in the United States, surviving spouses with children in common with the decedent are potentially much better off under most American intestacy statutes than they are under the law of the United Kingdom. For example, in a situation where a spouse dies with \$10 million worth of real property and children by the surviving spouse only, in the United States, the surviving spouse gets it all. In the United Kingdom, the surviving spouse gets only about \$400,000 (£250,000) and a life estate in \$4.8 million worth of real estate. While this is a lot, it is not as much as under U.S. law. On the other hand, under U.K. law, the rest goes to the surviving spouse's children, which is where it would likely end up anyway after his or her death.

¹⁰⁰ *See* Inheritance (Provision for Family and Dependents) Act, 1975, c. 63, § 1 (Eng.).

¹⁰¹ PEARL & MENSKI, *supra* note 27, at 449 (“There are two restrictions on the power to make bequests. The two rules dealing with *ultra vires* bequests in Sunni law are that no bequests can be made which involve disposition beyond one third of the net estate (unless the heirs agree) and that no bequest can be made in favour of an heir.”).

¹⁰² *See id.*; *see also* Radford, *supra* note 92, at 168 (“Under Islamic law, an individual is allowed to bequeath up to one-third of his estate. The Sunni system prohibits this one-third

for wives. The Qur'an provides that the wife may never inherit more than one-fourth of the estate.¹⁰³ Her small share is slashed in half to one-eighth of the estate if her deceased husband leaves any children, whether in common with the surviving spouse or not.¹⁰⁴ In the event of multiple wives, the wife's share is split evenly among the wives, instead of each receiving her own share as a wife.¹⁰⁵ Although women may also inherit from their fathers or male relatives, their inheritance is limited by complex rules governing their fractional share.¹⁰⁶ So, for example, in inheriting from a parent, a woman may receive only half the amount received by her brother.¹⁰⁷

A series of concrete hypotheticals best illustrate the disparity in the widow's intestate share that results from applying Islamic rather than civil law.¹⁰⁸ Assume first that a Sunni man dies in Great Britain, leaving an estate of £100,000 (\$159,812.76).¹⁰⁹

from being bequeathed to any family member who is named in the Qur'anic framework." (internal citations omitted).

¹⁰³ *Surat An-Nisā'* 4:12, available at <http://quran.com/4> ("And for the wives is one fourth if you [the husband] leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt.").

¹⁰⁴ *See id.*

¹⁰⁵ *See* NASIR, *supra* note 20, at 208.

¹⁰⁶ PEARL & MENSKI, *supra* note 27, at 457 (describing the outcomes of various scenarios).

¹⁰⁷ *Surat An-Nisā'*, *supra* note 103, at 4:11 ("Allah instructs you concerning your children: for the male, what is equal to the share of two females.").

It is possible that any given woman could net more financially under Islamic rules *if* the size of her mandatory inheritance from her father, brother, son or other natal relatives—when combined with the paltry sum she receives from her deceased husband—exceeds what she would receive upon her husband's death and the death of other relatives under civil law. *See* PEARL & MENSKI, *supra* note 27, at 456–63 (discussing a woman's inheritance from her father). But because we cannot know and predict when these different deaths may occur, and what the size of each decedent's estate will be, the possibility of natal inheritance does not erase risk of grave financial need upon the death of her husband.

¹⁰⁸ The outcomes of each hypothetical were checked against the Islamic Inheritance Program. *See* IRTH: The Islamic Inheritance Program, <http://www.islamicsoftware.org/irth/irth.html> (last visited Apr. 20, 2010). The hypotheticals are set in Great Britain because a system of religious deference now operates there. *See supra* note 90 and accompanying text. This Essay focuses on intestate succession because it provides for dependents when the decedent did not make a provision himself. *See* JANET FINCH ET AL., WILLS, INHERITANCE, AND FAMILIES, 24–26 (1996) ("[T]he key restrictions on testamentary freedom introduced during the twentieth century have been intended specifically to protect the close family of the testator from the possibility of exclusion from the will. . . . [The Inheritance (Family Provision) Act 1938 and the Inheritance (Provision for Family and Dependents) Act 1975] have served to emphasise that inheritance is not only about passing property down the generations. It is also—importantly—now about marriage and the financial responsibilities of spouses for each other.").

Obviously, a testator could undercut the degree of financial support for a widow by making a will that is less generous than what she would receive in the absence of a will, cabined of course by any right the widow has to receive an elective share. *See supra* notes 89–90 (discussing wills), 97 (discussing elective shares) and accompanying text.

¹⁰⁹ All conversions from British pounds to U.S. dollars were performed on the Universal Currency Calculator, available at <http://www.xe.com/ucc/> (last visited Apr. 20, 2010).

He is survived by his wife, mother, and father. Applying Islamic intestacy law, the father receives £50,000 (\$79,906.38),¹¹⁰ the mother receives £25,000 (\$39,966.14),¹¹¹ and the wife is left with only £25,000 (\$39,966.14).¹¹² Under Islamic law, the decedent could not have forestalled this paltry award to his widow because he cannot make a devise by will to a named heir. In sharp contrast, British intestacy law would award the surviving wife the entire estate, or £100,000 (\$159,832.30).¹¹³

Even skimpier awards result in polygamous marriages, when a man leaves multiple widows. Consider the result in the first hypothetical if the man had taken four wives, which is permissible under the Qur'an.¹¹⁴ Under Islamic intestacy law, the father receives £50,000 (\$79,906.38),¹¹⁵ the mother receives £25,000 (\$39,966.14),¹¹⁶ and the wives end up with £6,250 (\$9,990.39) apiece.¹¹⁷ Under British law, the mother and father receive nothing and the wives together would receive £100,000 (\$159,812.76), with each wife presumably taking £25,000 (\$39,966.14).¹¹⁸

¹¹⁰ See *Surat An-Nisā'*, *supra* note 103, at 4:11; PEARL & MENSKI, *supra* note 27, at 457 (discussing the father as the agnatic heir). The outcomes of each hypothetical were checked against the Islamic Inheritance Program. See IRTH: The Islamic Inheritance Program, *supra* note 108.

¹¹¹ See *Surat An-Nisā'*, *supra* note 103, at 4:11; see PEARL & MENSKI, *supra* note 27, at 457.

¹¹² See *Surat An-Nisā'*, *supra* note 103, at 4:12.

¹¹³ See The Family Provision (Intestate Succession) Order, 2009, S.I. 2009/135, art 2 (U.K.), available at http://www.opsi.gov.uk/si/si2009/uksi_20090135_en_1, which provides for the following:

Size of the Estate	Survivors	Distribution to spouse
< £250,000	Spouse	All to spouse
> £250,000	Spouse and children	£250,000 to spouse, personal chattels absolutely, life interest in ½ of the remaining estate
< £450,000	Spouse and no children	All to spouse
> £450,000	Spouse and decedent's parents and/or brothers and sisters	£450,000 to spouse, personal chattels absolutely, absolute interest in ½ of the remaining estate
Of whatever value	Spouse and no children, parents, brothers or sisters	All to spouse

¹¹⁴ See *Surat An-Nisā'*, *supra* note 103, at 4:3 (“[M]arry those that please you of [other] women, two or three or four.”).

¹¹⁵ See *id.* at 4:11.

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 4:12; IRTH: The Islamic Inheritance Program, *supra* note 108.

¹¹⁸ See The Family Provision (Intestate Succession) Order, *supra* note 113. Although Anglo-American public policy generally opposes polygamy, some jurisdictions have been willing to overlook public policy if no harm would result in doing so. Thus, for example, a California Court of Appeals found that public policy would not be offended by allowing the surviving two wives of a decedent in a polygamous marriage to split the intestate share. *Kaur v. Boyes*,

A woman's fractional award shrinks further if the decedent has children. Consider the results of a £100,000 estate distributed among a surviving wife, mother, father, daughter, and two sons. Islamic law would award the father £16,600 (\$26,534.48),¹¹⁹ the mother £16,600 (\$26,534.48),¹²⁰ the daughter £10,800 (\$17,269.10),¹²¹ each son £21,600 (\$34,538.19),¹²² leaving the wife only £12,500 (\$19,980.03).¹²³ If British intestacy law applies, the wife would receive the entire £100,000 (\$159,832.30) estate.¹²⁴ If the decedent leaves four wives rather than one, under Islamic law each

188 P.2d 499, 502 (Cal. Dist. Ct. App. 1948) (“‘Public policy’ would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties.”). Neither of the man's wives contested the right of the other to share the inheritance, and the law of India, where the marriages were performed, also would have distributed the spousal share evenly between them. *Id.* at 499; *see also* C.H. SHERRIN & R.C. BONEHILL, *THE LAW AND PRACTICE OF INTESTATE SUCCESSION* 335 (2d ed. 1994) (“There is in fact no direct authority but it is submitted with some confidence that a party to a polygamous marriage would be entitled as a husband or wife on the intestacy of the other.” (internal citation omitted)).

A number of commentators have examined the public policy implications of recognizing polygamous marriages as valid. *See generally* Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449 (2009) (discussing recognition at the time of the divorce). While courts have recognized multiple spouses in the context of divorce, it is possible that a court may treat a polygamous marriage as valid for purposes of qualifying for a social welfare program but not for inheritance purposes (thus limiting inheritance rights only to the first spouse). However, I know of no jurisdiction that does this.

Kaur v. Boyes notwithstanding, it is possible that many American jurisdictions would take the position that in cases of polygamous marriage, the first marriage will be treated as the only valid one, entitling the first spouse to exclusive spousal inheritance rights, whatever they may be. In this instance, the application of Islamic law would still remove from the first wife significant protections accorded to her by civil law. In the United States, she may receive the entire intestate estate if her husband had children only with her, and in the United Kingdom, under certain dollar thresholds, she would also receive the entire estate. *See supra* note 113 and accompanying text. As this Part explains, her share shrinks dramatically if Islamic law is applied. But if the civil law refused to recognize polygamous marriages, the second, third, and fourth wives would actually do better if Islamic law was applied. They then would go from receiving nothing under Anglo-American civil law to receiving, in the case of four wives, one-sixteenth apiece. *See supra* note 105 and accompanying text. In families of modest means, and even many middle-class families, the one-sixteenth fractional share that each wife receives may not suffice to raise her above the poverty level. Of course, nothing prevents the first wife, if she receives the entire estate under civil law, from choosing unilaterally to split the estate with the other wives.

¹¹⁹ *See Surat An-Nisā'*, *supra* note 103, at 4:11 (“And for one's parents, to each one of them is a sixth of his estate if he left children.”).

¹²⁰ *See id.*

¹²¹ *See id.* (“Allah instructs you concerning your children: for the male, what is equal to the share of two females.”).

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See* The Family Provision (Intestate Succession) Order, *supra* note 113.

would only inherit a mere £3,000 (\$4,795.43) of the estate.¹²⁵ By contrast, under British law each wife would receive £25,000 (\$39,966.14).¹²⁶

One final hypothetical drives home the degree to which deference to Islamic law deliberately and needlessly jeopardizes a widow's financial security. Assume upon a decedent's death that he leaves a £100,000 estate and is survived by only his wife and a freed slave. If a court chose to apply Islamic intestacy law, the wife would receive £25,000 (\$39,966.14) and the freed slave would pocket the remaining £75,000 (\$119,893.62).¹²⁷ A court applying British law would award the entire estate to the widow.¹²⁸

In short, there are far more protections for dependents provided under British law than under Islamic law. And, ultimately under British law, the testator may always devise the entirety of his estate—something that Qur'anic law precludes.

IV. DOES THE STATE HAVE AN INTEREST HERE?

Some argue that “family law pluralism” allows religious adherents “to opt out of a jurisdiction's generally applicable norms and to pre-commit to” their own ethical conceptions of the good.¹²⁹ Implicit in this idea is the notion that the State should not impose protections on those who do not wish to be protected. Of course, the State often protects individuals from themselves and exercises especially vigorous oversight when the relationship is an intimate one.¹³⁰

This Part considers first whether cultural norms of support will suffice to assuage concern that women will be impoverished upon divorce if Muslim rules govern the break-up. It then asks whether respect for women's autonomy to choose the application of Islamic law upon divorce or a spouse's death can justify removing the protections afforded by state law.

A. Financial Support for Dependents

In theory, the state should be neutral as to the source of support for vulnerable dependents *so long as* some system of support exists for women and children. Western ideas of the family generally require spouses to shoulder a duty of support

¹²⁵ See *Surat An-Nisā'*, *supra* note 103, at 4:12.

¹²⁶ See The Family Provision (Intestate Succession) Order, *supra* note 113; see also *supra* note 105 and accompanying text (discussing recognition of multiple wives).

¹²⁷ This hypothetical is adapted from The Islamic Inheritance Program, *supra* note 108.

¹²⁸ See The Family Provision (Intestate Succession) Order, *supra* note 113.

¹²⁹ See Fadel, *supra* note 18, at 63.

¹³⁰ See Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance between Status and Contract*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 372, 373–74 (Robin Fretwell Wilson ed., 2006) (noting that most U.S. states employ “a more paternalistic and substantive test for enforceability” of premarital agreements than would be used for a “commercial agreement”).

with respect to each other and obligate parents to support their children.¹³¹ While “there is a lack of agreement on just what purpose alimony serves” after divorce, for some judges “alimony continues the support which the wife was entitled to receive while the marriage existed.”¹³²

Islam shares with this Western tradition the obligation to provide for one’s wife during an intact marriage and to provide for children without respect to whether the parents remain married.¹³³ Some Islamic schools, however, depart from Western notions regarding what happens upon divorce. In a number of schools, a divorcing husband’s obligation to maintain his former wife ends at the end of the *iddat* period, mere months after the break-up.¹³⁴ The duty of support for a divorced woman then falls to her natal family upon divorce, not her husband.¹³⁵

In Great Britain, at least, some Muslims rationally have processed the welfare state’s “readiness to foot the bill” for dependents and have begun to look to that system for a sister or daughter’s support.¹³⁶ As Pearl and Menski note, despite the family’s duty of support, cultural norms have “probably been modified by the impact of the welfare state.”¹³⁷ This shifting of the support obligation to the state means that the state necessarily has an interest in whether husbands make support payments for needy dependents after divorce, as well as in the size of a widow’s inheritance upon her husband’s death.

B. Respect for Autonomy

A second argument is frequently advanced to justify a greater role for religious norms, namely respect for a woman’s autonomy to decide whether religious law will

¹³¹ See generally JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000) (describing a paradigm shift in the legal and social regulation of the family from an emphasis on partners’ relationships with each other to an emphasis on parents’ relationships with their children); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 620–21, 252–59 (Student ed., 2d ed. 1988) (describing the scope of duties between spouses to support each other and their children).

¹³² CLARK, *supra* note 131, at 621.

¹³³ Thus, for example, fathers after divorce would provide support to their children as a function of having custody of them. See *supra* Figure 1. Husbands also have a duty to provide for their wives’ support during the marriage. See generally UHLMAN, *supra* note 18, § 5.4.

¹³⁴ See *supra* note 27 and accompanying text.

¹³⁵ PEARL & MENSKI, *supra* note 27, at 235 (noting that “during the waiting period, the wife is entitled to have full maintenance from the husband or members of his family,” but that after the *iddat* period, the traditional view, in the absence of a welfare state, holds that “the wife’s natal family has a role to play in maintaining the divorced wife or the widow”) (quoting Manazir Ahsan, *The Muslim Family in Britain*, in GOD’S LAW VERSUS STATE LAW: THE CONSTRUCTION OF AN ISLAMIC IDENTITY IN WESTERN EUROPE 21, 25 (Michael King ed., 1995)).

¹³⁶ *Id.*

¹³⁷ *Id.*

govern. As Part I illustrates, women face significant inequities in systems of deference. Despite these inequities, some scholars maintain that respect for women's autonomy can justify a system of deference.¹³⁸ Others note that prenuptial agreements have long permitted spouses to privately order their affairs.¹³⁹

Even jurisdictions most inclined to respect a couple's autonomy to privately order their marital affairs will strike an agreement that is coerced or involuntary.¹⁴⁰ In schemes of religious deference, there is every reason to worry that a woman's "choice" to have religious authorities decide family matters is not a truly voluntary, independent one. Muslim women may feel compelled to participate in Sharia courts because of their religious and cultural upbringing. "[G]ender norms that prescribe passivity and compliance make it difficult for women to enact resistance."¹⁴¹

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 acts as the arbitrator. Religious groups can exert considerable influence on their members.¹⁴² The systems of deference described in Part I provide no evidence that women can, or have, resisted such powerful influences.

Publicly available documents from Great Britain's Islamic Sharia Council do not explain how the Council ensures that the decision to religiously arbitrate is voluntary and not coerced. Canada, which recently scrapped religious arbitration, recommended forty-six safeguards and reforms to protect vulnerable parties.¹⁴³ These included public education "aimed at creating awareness of the legal system, alternative dispute resolution options, and family law provisions;"¹⁴⁴ screening parties "separately about issues of power imbalance and domestic violence, prior to entering into an arbitration agreement;"¹⁴⁵ and protections like those used with prenuptial agreements.¹⁴⁶

¹³⁸ Some scholars have argued that autonomy affords the less powerful an opportunity to "transform" their communities from within, giving those traditionally vulnerable groups greater power in the long run. *See, e.g.,* Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385 (2000). Other scholars suggest that granting greater autonomy to cultural groups places 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, under Ontario's Arbitration Act, a "regressive interpretation of Sharia will be used to seriously undermine the rights of women").

¹³⁹ *See, e.g.,* Crane, *supra* note 5, at 1250–51 (discussing a proposal to limit the state's role to enforcing contracts between private parties); Zelinsky, *supra* note 5, at 1219.

¹⁴⁰ *See* Bix, *supra* note 130, at 374.

¹⁴¹ Heidi M. Levitt & Kimberly Ware, "Anything With Two Heads Is a Monster": *Religious Leaders' Perspectives on Marital Equality and Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1169, 1170 (2006).

¹⁴² *See supra* Part II.

¹⁴³ *See* BOYD, *supra* note 90, at 133–42.

¹⁴⁴ *Id.* at 138.

¹⁴⁵ *Id.* at 136.

¹⁴⁶ *See id.* at 135.

Further, even when parties voluntarily agree to a prenuptial, the State polices the content of the agreement, asking whether it is so odious as to be unconscionable and something that no reasonable person would accept.¹⁴⁷ In twenty-six U.S. jurisdictions, an agreement's fairness is evaluated "relative to the time the agreement was signed," but in other states fairness is evaluated "relative to the time of enforcement."¹⁴⁸ Given the staggering financial and custodial consequences of divorce for women in some religious traditions, one wonders whether any court would enforce a prenuptial agreement with terms like those routinely imposed in systems of deference today.¹⁴⁹

In addition to substantive review, ordinary prenuptial agreements are subjected to exacting review for procedural fairness. Courts often require voluntariness, complete disclosure, representation by separate counsel, and other procedural protections before the agreement may be enforced against the parties.¹⁵⁰ One crucial safeguard to ensure that the parties have knowingly bound themselves to a specific, shared understanding in advance is that the agreement be in writing. Fadel urges that religious deference allows believers to pre-commit to certain conceptions of the good.¹⁵¹ Yet, as Part I details, Muslim understandings of family relationships are not a monolithic whole and can differ in nuanced but material ways from place to place and group to group. Because the ethical conceptions of the good are not always committed to writing in advance, questions immediately arise about the congruence between the parties' understandings *ex ante* and the rules applied *ex post* by arbitrators. Questions also arise about whether like cases will be treated alike.

Family violence only exacerbates the risks to vulnerable parties. Given the routine acceptance of family violence by some religious communities,¹⁵² it seems unlikely that these communities will relax the application of harsh financial understandings in cases of violence—as courts routinely do when there is a material change in circumstances after a prenuptial agreement's execution.¹⁵³ Nor is it clear that women will be allowed to exit abusive relationships at all, as Ameena's case illustrates.¹⁵⁴

Ayelet Shachar observes that violations of individual rights "in the identity group context" are sometimes justified by a supposed "right of exit" from the group rationale.¹⁵⁵ As she notes, "the right of exit rationale forces an insider into a cruel choice

¹⁴⁷ See Bix, *supra* note 130, at 373–74.

¹⁴⁸ *Id.* at 374 (citations omitted).

¹⁴⁹ See *supra* Part I; see also Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 557, 569–77 (2004) (discussing substantive limitations on enforcement of prenuptial agreements that affect child welfare or other public policies, but noting that courts have enforced some financial agreements). Some courts limit enforcement to agreements that are capable of specific performance under "neutral principles of law." See, e.g., *Odatalla v. Odatalla*, 810 A.2d 93, 95–96 (N.J. Super. Ct. Ch. Div. 2002).

¹⁵⁰ Bix, *supra* note 130, at 373–74.

¹⁵¹ See Fadel, *supra* note 18, at 77–82.

¹⁵² See *supra* Part II.B.

¹⁵³ See Bix, *supra* note 130, at 373–74.

¹⁵⁴ See *supra* notes 35–40 and accompanying text.

¹⁵⁵ AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND

of penalties: either accept all group practices—including those that violate your fundamental citizenship rights—or (somehow) leave.”¹⁵⁶ Shachar states that “this ‘solution’ never considers that obstacles such as economic hardship, lack of education, skills deficiencies, or emotional distress may make exit all but impossible for some.”¹⁵⁷ Just as women cannot easily exit the community as a means to protect their interests, they cannot easily resist the “choice” to arbitrate. More fundamentally, the state should not subject these women to such impossible choices.

C. Evaluating Possible Regulatory Responses

These welfare concerns powerfully indict the whole enterprise of applying religious norms to family matters. Perhaps most problematic is the ceding of jurisdiction to religious bodies over family questions because the risks to vulnerable women and children are so great. Western Thrace demonstrates not only that religious norms will significantly disadvantage women, but that there will be few checks on decisions at the back end.¹⁵⁸

The harder question here is whether to allow religious arbitration if a woman wants her pastor or imam or priest to arbitrate family matters using religious norms. Two overarching concerns require a regulatory response: first, the possibility of “forced,” not truly voluntary participation, and second the possibility of harsh or unconscionable outcomes. As with any enterprise, the state can address these concerns *ex ante* or *ex post*. If the state regulates *ex ante*, it could police the circumstances under which arbitration may occur or police entry into arbitration. It might, for example, follow the Canadian model and permit arbitration by religious figures using only civil law.¹⁵⁹ That regulatory approach mutes the concern about unconscionable outcomes for women but does not remove it entirely. The significant tolerance for violence in the family by fundamentalist religious believers means that the state would nonetheless have to police the substantive judgments arrived at in those proceedings to prevent overreaching. On the entry side, the state might also require proof that a woman voluntarily elects to participate in arbitration. This safeguard seems grossly inadequate in the face of cultural and religious norms that define good believers as ones who accept such unconscionable outcomes.¹⁶⁰ Presumably, very few religious leaders and adherents would embrace religious arbitration on these terms.

WOMEN’S RIGHTS 41 (2001).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (citation omitted).

¹⁵⁸ *See supra* Part I.B.

¹⁵⁹ Wilson, *supra* note 5 (manuscript at 50–51) (discussing Canada’s ban on religious arbitration using religious rules).

¹⁶⁰ In Canada, for example, one Muslim leader said that foregoing religious arbitration would make one a “bad Muslim”:

The state can also address the possibility of harm from religious arbitration *ex post*. In this scheme, for example, it could police the substantive judgments reached in arbitration with robust public policy limitations that place out of bounds certain substantive outcomes.¹⁶¹ This approach imposes on parties who are likely to be harmed, women, a duty to trigger this substantive review. Yet the same people that the state would require to trigger this review—divorced women—may not understand that they have been disadvantaged by the application of religious norms. Neither may they understand or be empowered to resist those norms given the importance of religious identity to them in their lives. This approach also would require a series of judgments by the state about when women can be made too poor as a result of divorce or be too trapped in an abusive marriage or be too threatened by the possibility of losing access

As Canadian Muslims, you have a clear choice. Do you want to govern yourself by the personal law of your own religion, or do you prefer governance by secular Canadian family law? If you choose the latter, then you cannot claim that you believe in Islam as a religion and a complete code of life actualized by a Prophet who you believe to be a mercy to all.

Interview by Rabia Mills with Syed Mumtaz Ali, President, Canadian Society of Muslims, (August 1995), <http://muslim-canada.org/pfl.htm>.

¹⁶¹ Compare EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 25 (2006) (“[T]he lengthy history of the public policy exception represents a perception that society would oppose an arbitration system in which courts would enforce awards blatantly inconsistent with public policy. . . . [While] the public policy exception is not explicitly within the text of the [U.S. Federal Arbitration Act, it] does exist in case law as part of American arbitration doctrine.”), with THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 396 (3d ed. 2009) (discussing the availability of judicial relief from unjust arbitral awards and concluding that such relief is only available in cases involving procedural deficiencies, including “manifest disregard of the law, irrationality, and violations of public policy”).

Even if a court possesses the right to review, it may be loath to set aside an arbitral award. Here, the 2006 case of a Hmong couple who voluntarily arbitrated their divorce with Hmong elders is illustrative. The Hmong are an ethnic group from Laos. See JANE HAMILTON-MERRITT, TRAGIC MOUNTAINS: THE HMONG, THE AMERICANS, AND THE SECRET WARS FOR LAOS, 1942–1992, at 4–5 (1993). When the couple, Maixee and Phia Vue, began divorce proceedings, they agreed to have their dissolution disputes settled by a panel of seven Hmong elders in accordance with Hmong beliefs. *Vue v. Vue*, No. A05-728, 2006 WL 279070, at *1 (Minn. Ct. App. Feb. 7, 2006). In order to do this, they signed an arbitration agreement, which provided for review by the divorce court in certain circumstances, such as when the arbitrators exceed their power, or are clearly partial, or when the arbitration award is obtained by fraud. *Id.*; MINN. STAT. § 572.19 (2000). The parties had independent counsel when they requested arbitration before the Hmong panel. Arbitration proceeded over the next year, with seven meetings of the panel. *Vue, supra*, at *1–*2. After settlement, Maixee Vue moved to vacate the award, claiming, among other things, that allowing the Hmong panel to arbitrate was against public policy and resulted in an inequitable settlement. *Id.* at *2. The court could “discern no public policy that prohibits the parties from agreeing to have their legal issues decided by an arbitration panel according to Hmong culture and tradition” and refused to set aside the judgment. *Id.* at *3.

to their children. Obviously some of these judgments have already been made in the context of prenuptial agreements—for instance, that decisions regarding children cannot be removed from state oversight—but a robust theory of substantive floors, below which the state will not allow religious arbitration to go, means that questions of financial and physical vulnerability would have to be addressed as well.¹⁶²

CONCLUSION

States should weigh carefully the risks to women and children before ceding jurisdiction over family matters to bodies that may be unwilling or unable to vindicate their rights. The movement to introduce religious fundamentalism into the family will have dire consequences for traditionally dependent groups, women and children, who are deserving of the state's protection.

The state plays an important role in protecting traditionally vulnerable groups, who are themselves minorities within minorities.¹⁶³ Binding women who want to exit a marriage to a religious community's norms—whether by enforcing religious arbitrations or ceding jurisdiction over family disputes to religious authorities—will erect a barrier to exit for many women and prevent them from privately regulating conduct toward themselves and their children.

Governments should be equally wary of authorizing inequitable results upon a husband's death. Some religious schools cap a woman's inheritance, both by will and by intestacy, at a fraction of the decedent's estate, plunging these women into certain poverty upon their husbands' death. At the same time, norms in some religious communities have morphed so that family members who once would have provided support to women in need now shift this responsibility to the state.

The foreseeable inequities to women and children in systems of religious deference cannot be justified on grounds that a woman voluntarily chooses to participate or that others will step up and provide support. Existing systems of religious deference strip women and children of safeguards, evolved over decades, to protect them in times of crisis from abject poverty and disruption of the parent-child relationship. Policymakers should proceed cautiously before handing over authority for family matters to religious bodies that will rob women and children of these protections.

¹⁶² In such a system, it would be useful to collect arbitral judgments so that the state can monitor outcomes across cases as well as on a case-by-case basis. This would surface inequities against women but might also incentivize incremental improvement in the substantive outcomes for women in Sharia courts. In other words, if the Sharia courts know they are operating in the shadow of a state generally suspicious of certain Islamic precepts and outcomes, it may lead to gradual liberalization of their laws.

¹⁶³ Shachar, *supra* note 138, at 386 (“Well-meaning accommodation policies by the state . . . may unwittingly allow systematic maltreatment of individuals within the accommodated minority group—an impact, in certain cases, so severe that it nullifies these individuals’ rights as citizens.” (internal citations omitted)).