

RELIGION, MARRIAGE, AND PLURALISM

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INTRODUCTION

On November 2, 2010, Oklahoma citizens overwhelmingly voted to amend their state constitution by adopting the “Save Our State Amendment.”¹ According to the amendment, it was needed to prevent state courts from “look[ing] to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.”² By implication, then, the amendment was needed to save Oklahoma from the allegedly impending threat of imposition of international or Sharia law. Only two days after seventy percent of the electorate voted in favor of the amendment, Muneer Awad sued to enjoin it from taking effect. He claimed that the amendment violates both the Establishment Clause and the Free Exercise Clause of the U.S. Constitution. The U.S. District Court agreed and issued a preliminary injunction less than four weeks later.³ Notwithstanding, several other states have moved to ban Sharia law⁴ and some conservative groups have sought to make rejection of Sharia law a litmus test for 2012 Republican presidential candidates.⁵

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¹ Awad v. Ziriax, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010).

² Okla. House Joint Resolution No. 1056 § 1(C) (2d Sess. 2010).

³ The case is now on appeal before the Tenth Circuit. For a discussion of the amendment from a conflict of laws perspective, see John T. Parry, *Oklahoma's Save Our State Amendment and the Conflict of Laws* (Lewis & Clark Law Sch., Research Paper No. 2011-21, July 23, 2011), available at <http://ssrn.com/abstract=1893707>.

⁴ See, e.g., Symeon Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 320–21 (2011).

⁵ Family Leader, *The Marriage Vow: A Declaration of Dependence upon Marriage and Family*, available at http://www.politico.com/static/PPM187_marriage.html (calling for “[r]ejection of Sharia Islam and all other anti-woman, anti-human rights forms of totalitarian control”); see also Maggie Haberman, *The*

It is unclear what such bans on Sharia law add to the civil law. Could a court use, rely upon, or enforce Sharia law without such a ban? Would reliance upon Sharia law ever be permitted or mandated (by a private choice of law provision by parties, for example)? For that matter, is a clear differentiation between civil law and Sharia law possible? Further, it is unclear what such a ban might realistically accomplish. Some committed Muslims who believe their faith commands application of Sharia law would surely still follow Sharia principles regardless of the validity of an amendment. They might do so according to the dictates of their own conscience, but they will surely still encounter disputes and two religiously observant Muslim parties would almost certainly seek dispute resolution via Sharia principles. This conceivably could mean that the parties desire a Muslim judge or arbitrator, or that the parties desire the decision-maker to apply substantive principles of Sharia to resolve the dispute, or both. Such dispute resolution would occur outside the civil legal system and one could presume that a losing party would appeal to the civil court. Would a civil court adjudicate *de novo* a claim brought by the losing party or would civil courts instead give some deference to religious tribunals' decisions? Does the answer turn on whether it was merely a choice of forum (with arbitration chosen rather than a civil lawsuit) or a choice of law?

Roughly speaking, Muslims (or any other religious group) might be interested in deciding three categories of internal disputes according to religious law.⁶ First, there are internal disputes about doctrine and leadership. Such internal decisions are plainly protected by the First Amendment.⁷ Second, there are commercial or business disputes. Traditionally, freedom of contract principles have allowed religious believers to agree to arbitrate such disputes before a religious arbitrator. The arbitrator's decision is enforceable in court on the same basis as any other arbitral decision.⁸ Third, there are family law

Family Leader Pledge, POLITICO (July 8, 2011), <http://www.politico.com/news/stories/0711/58591.html> (reporting on U.S. representatives' endorsement of the pledge).

⁶ I am grateful to Michael Broyde for this tripartite distinction of disputes, as discussed at a January 2011 presentation at the Association of American Law Schools Section on Jewish Law meeting in San Francisco, California. This Essay omits discussion of a fourth possible area—decisions made by the criminal law. One could even posit a fifth area, namely decisions about international law. See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (SHARI'A) 1307–83 (2011) (discussing the international law area). These latter two categories pertain much more strongly to the state vis-à-vis individuals, or vis-à-vis other states, and thus this Essay focuses on private dispute resolution rather than public.

⁷ See JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 241 (3d ed. 2011).

⁸ See Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. (forthcoming 2011) (discussing cases focusing especially on commercial

disputes. This is the most contested area because the civil state seeks to exercise its power over citizens and to enforce norms of equality and nondiscrimination, especially on behalf of weaker parties, historically women and children. At the same time, this is the most personal of all spheres. The family is arguably the foremost arena in which citizens resist the state and are free to form their own allegiances.⁹ Further, a person's identity as a member of his or her religious community is bound up with that community's norms regarding marriage and divorce. Believers will feel a strong pull to follow the norms of their immediate community rather than overarching state norms if there is a conflict.

Academic discussions (and often court decisions) in the United States operate as if there is a one-size-fits-all model of family law and domestic relations.¹⁰ This is coupled with the assumption that the civil state has exclusive jurisdiction over domestic relations matters.¹¹ Both of these assumptions are wrong descriptively because the United States is increasingly multicultural and religiously plural, and its positive laws on marriage and divorce are already more plural than is often discussed. Moreover, both assumptions deserve to be challenged normatively because they overstate the power and reach of the civil law and because they arguably do not match the goods and goals of liberal democracy, which seeks not only to foster liberty and equality but also to promote and respect religious liberty and decisions of conscience and autonomy.

This Essay briefly illustrates the descriptive deficiency in typical discussions about family law, especially relating to religious citizens, and also describes new possible pathways and developments. Because this Symposium is focused on *Sharia, Family, and Democracy: Religious Norms and Family Law in Pluralistic Democratic States*,¹² this Essay particularly draws on

disputes). There is a burgeoning literature on Islamic banking. See, e.g., MUNAWAR IQBAL & PHILIP MOLYNEUX, THIRTY YEARS OF ISLAMIC BANKING: HISTORY, PERFORMANCE AND PROSPECTS (2005).

⁹ See F.C. DeCoste, *Caesar's Faith: Limited Government and Freedom of Religion in Bruker v. Marcovitz*, 32 DALHOUSIE L.J. 153, 175 (2009) ("[O]nly if faith and family are secure from state management and predation is a state a constitutional state.").

¹⁰ See Barbara Stark, *Marriage Proposals, From One-Size Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479 (2001).

¹¹ See Joel A. Nichols, *Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note *, at 11; AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 708(1) (2002); cf. Stark, *supra* note 10, at 1482.

¹² See John Witte, Jr., *Foreword*, *supra* this issue.

examples from Islam. Part I outlines tensions faced by members of both minority and majority religious communities, who view their family issues as controlled by both their religious community and by the demands of the civil state. Part II explores possible paths ahead for the intersection of religious beliefs and civil law on marriage and divorce in the United States. The Essay then offers some concluding reflections.

I. LEGAL PLURALISM,¹³ MARRIAGE, AND JURISDICTIONAL OVERLAP

For many religious individuals (indeed, even for many nonreligious individuals), marriage is not merely a private law contract between two individuals but also an important familial and community event.¹⁴ It is not merely an avenue by which the state confers status benefits on a couple, but often serves as an entrance marker into various forms of adulthood and community. It is not merely an act to which compliance with state procedural forms of adequate notice and consent are sufficient, but often acts as the marker of union between two families requiring a religious ceremony, a qualified officiant, and capable and willing parties. Indeed, for many people, marriage is more important as a religious matter than a civil matter. For them, a marriage is not valid unless it is between two similarly religious individuals who have received appropriate solemnization by qualified religious authorities. Moreover, a marital dissolution is not valid unless granted by competent religious authorities on adequate grounds via appropriate procedures. A statement by a civil authority—regarding either marriage or divorce—is simply not a conclusive statement.

This is partly because, as Ayelet Shachar and others have detailed at length, individuals exercise complex “citizenships,” whereby they are simultaneously members of multiple communities.¹⁵ Individuals frequently possess strong citizenship affiliations to a religious group at the same time that they possess a

¹³ Professor An-Na'im prefers to discuss this in terms of normative pluralism because part of the description below lumps together positive legal pluralism and social pluralism. Because of space limitations, this Essay has placed both together here and also has given short shrift to other potentially important distinctions in the literature on legal pluralism. Cf. Abdullahi Ahmed An-Na'im, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?*, *supra* this issue.

¹⁴ See SEX, MARRIAGE AND FAMILY IN WORLD RELIGIONS (Don S. Browning et al. eds., 2005). See generally John Witte, Jr. & Joel A. Nichols, *More than a Mere Contract: Marriage As Contract and Covenant in Law and Theology*, 5 U. ST. THOMAS L.J. 595 (2008).

¹⁵ See generally AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001).

citizenship affiliation to the civil state.¹⁶ If those two communities lack alignment on a critical matter, individuals may feel competing normative pulls and it is not a given that the civil state's normative stance will control.¹⁷ Instead, sometimes the “unofficial law” of the community has a stronger hold on individuals and communities than the sanctioned, official civil law of the polity.¹⁸ This can and does create dissonance where there is a lack of alignment between religious precepts and civil law.

This gives rise to two key questions that the United States and other Western democracies must face about family law. First, how are the norms of minority religious groups to be accommodated, whether they are those of the newer, rapidly growing Muslim population or those of more traditional minorities like Orthodox Jews? Second, how are religious norms of historically majority groups such as conservative Christians to be accommodated (if at all) when those norms seem to be out of step with liberal notions of gender equality or, increasingly, the ability of same sex individuals to marry?

A. *Minority Religious Groups: Muslims*

Muslims today “represent the second largest religion in Europe and the third in North America.”¹⁹ But Muslims are also on the receiving end of a great deal of cultural antipathy, allegedly because of their religion; this backlash has had a substantial uptick after the tragic events of September 11, 2001.²⁰ For

¹⁶ See, e.g., *id.* at 25–28.

¹⁷ In the United States, for example, 70% of Muslims “with a high level of religious commitment . . . consider themselves to be Muslims first But among those with a low religious commitment, just 28% see themselves this way while a 47% plurality identifies first as American and 12% say they consider themselves equally Muslim and American.” PEW RESEARCH CTR., MUSLIM AMERICANS: MIDDLE CLASS AND MOSTLY MAINSTREAM 31 (2007), available at <http://pewresearch.org/assets/pdf/muslim-americans.pdf>. This is not a uniquely Islamic notion, as a significant portion of American Christians also identify with their religion first before identifying with their country. Richard Wike & Greg Smith, *Little Support for Terrorism Among Muslim Americans*, PEW RESEARCH CTR. (Aug. 25, 2011), <http://pewresearch.org/pubs/1445/little-support-for-terrorism-among-muslim-americans>.

¹⁸ Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 456 (2009); cf. Sarah Beresford, *Seeking Secularism: Resisting Religiosity in Marriage and Divorce. A Comparative Study of England and America*, 3 WEB JCLI (2011), <http://webjcli.ncl.ac.uk/2011/issue3/beresford3.html> (advocating for a secular marriage law and assuming that non-recognition by the state would lead to compliance and adherence to civil law norms).

¹⁹ See KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 141–87 (2000) for an examination of Muslims in modern society and recent conflict between Muslim and Western culture. See generally JANE I. SMITH, ISLAM IN AMERICA (1999) for a discussion of the growing Muslim community in the United States.

²⁰ See, e.g., LORI PEEK, BEHIND THE BACKLASH: MUSLIM AMERICANS AFTER 9/11, at 16 (2011) (“In the aftermath of the terrorist attacks, Muslims experienced a dramatic increase in the frequency and intensity of these hostile encounters.”).

example, television commentator Bill O'Reilly compared the Quran, Islam's holy book, to Adolf Hitler's *Mein Kampf*.²¹ Talk radio host Michael Savage told his listeners that lawmakers should institute an "outright ban on Muslim immigration" in order "to save the United States"; he also recommended making "the construction of mosques illegal in America."²² Such verbal disparagement is not only from talk radio and television hosts, as there was an enormous public outcry in 2010 against the construction of a mosque near the site of the World Trade Center attacks in New York.²³ Even more recently, Republican presidential hopeful Herman Cain has insisted that he would not hire Muslims as part of his administration and has also firmly opposed the construction of mosques, wrongly justifying this stance on First Amendment grounds.²⁴ And in March 2011, nearly a decade after 9/11, Representative Peter King held congressional hearings on terrorism and Islam.²⁵ Indeed, as Professors Sisk and Heise have said, "We are all living in the shadow of 9/11, but that shadow appears to be longer and darker for Muslim Americans."²⁶ To be sure, there have been calls for accommodation, toleration, and better incorporation of Muslim beliefs into liberal democracies via respect for dialogue and respect for multiculturalism. But even these conversations and actions have, at times, tragically given rise to extreme violence, as recently

²¹ Deborah Amos, *Students Discuss Koran Book After Battle*, ABC NEWS (Aug. 25, 2002), <http://abcnews.go.com/Nightline/story?id=128548&page=1>.

²² *Savage: To "Save the United States," Lawmakers Should Institute "Outright Ban on Muslim Immigration" and on "the Construction of Mosques,"* MEDIA MATTERS FOR AM. (Nov. 29, 2006, 11:20 AM), <http://mediamatters.org/mmtv/200611290005>.

²³ E.g., Laurie Goodstein, *Around Country, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1. For part of the vision of Islamic law from the imam primarily behind the mosque near the site of the World Trade Center attacks, see Imam Feisal Abdul Rauf, *A Cordoba Initiative Project: Justification and Theory of Sharia Law: How the American Declaration of Independence, Bill of Rights and Constitution are Consistent with Islamic Law*, 7 U. ST. THOMAS L.J. 452 (2010).

²⁴ See, e.g., Interview by Neil Cavuto with Herman Cain, CEO, The New Voice, *Your World with Neil Cavuto* (Mar. 28, 2011) (Fox News Television broadcast).

²⁵ David A. Fahrenthold & Michelle Boorstein, *Hearing Brings Debate on Islam to the Fore*, WASH. POST, Mar. 9, 2011, at A1 (contending that the hearings implicitly asked the "most important question: How should America talk about Muslim Americans?"); see also PEEK, *supra* note 20, at 17–35 (including examples of controversial Quran burning by a Florida pastor, violent physical acts against Muslims, harassment, etc.).

²⁶ Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9-11: Empirical Evidence from the Federal Courts* 59 (Univ. of St. Thomas Legal Studies Research Paper No. 11-23, 2011), available at <http://ssrn.com/abstract=1917057>. The paper shows that Muslims face a "distinct and substantial disadvantage" when asserting U.S. constitutional free exercise or religious accommodation claims, in addition to the cultural challenges mentioned above. *Id.*

witnessed in Norway when Anders Breivik slaughtered dozens of people, ostensibly because they supported the Muslim population in Norway.²⁷

To date, most political controversies in the United States have not extended directly to family law matters. They focus instead on the building of mosques or on generic charges of the imposition of Sharia law in general.²⁸ In Canada and the United Kingdom, however, Islamic family law has been a flashpoint. In both places, the focus has been whether to permit Muslims to adjudicate family law disputes according to religious principles through religious arbitration. In both places, opposition has centered, in part, on political opposition to the principles of Sharia law and the fear of its possible “imposition” upon citizens of those countries.²⁹ And in both places, Islamic religious arbitration of family law disputes has continued, despite opposition.

1. Canada

In Ontario, Canada, legislators passed the Arbitration Act of 1991 to provide an alternative to settling disputes within the court system.³⁰ The act allowed parties to choose the law under which the arbitration would be conducted. The plain language of the statute seemed to indicate that any law, not just various provincial laws, would be permitted.³¹ This meant that, in practice, Christians, Jews, Muslims, and people of other faiths could arbitrate their disputes, including family law disputes, according to the principles of their faith. In fact, this statute simply formalized what was already a settled practice, in which “family matters [had been] arbitrated based on religious teachings for many years in Jewish, Muslim, and Christian settings.”³² In addition, the act required Ontario courts to “uphold arbitrators’ decisions if both sides enter the process voluntarily and if results are fair, equitable, and do not violate Canadian law.”³³

²⁷ Miguel Marquez & Lee Ferran, *Norway Shooting Suspect Anders Breivik: Attacks Were ‘Price of Their Treason,’* ABC NEWS (July 25, 2011), <http://abcnews.go.com/Blotter/anders-breivik-hearing-closed-pulpit-alleged-shooter/story?id=14152129>.

²⁸ See *supra* text accompanying notes 20–26.

²⁹ See Arsani William, *An Unjust Doctrine of Civil Arbitration: Sharia Courts in Canada and England*, 11 STAN. J. INT’L REL. 40, 42–43 (2010).

³⁰ Arbitration Act, S.O. 1991, c. 17.

³¹ *Id.* art. 32(1) (“In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties.”).

³² MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 4 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

³³ Arbitration Act, arts. 34, 46.

This system functioned without fanfare until fall 2003, when Syed Mumtaz Ali announced that the Islamic Institute of Civil Justice (“IICJ”) had been established “to ensure that Islamic principles of family and inheritance law could be used to resolve disputes within the Muslim community in Canada.”³⁴ Mumtaz Ali’s statements to the media about the IICJ created public concern that Ontario had granted special rights to Sharia courts to settle disputes between Muslims.³⁵ Citizens and citizens’ groups brought their concerns to the Ontarian government, which authorized former Attorney General Marion Boyd to investigate the current system of arbitration.³⁶ Thorough investigation led to a 2004 report endorsing the continued use of arbitration as an alternative dispute resolution mechanism in family law, albeit with certain recommendations for improvement to ensure consent and promote equality.³⁷

The public did not favorably receive the report.³⁸ The province adopted many of the Boyd Report’s procedural recommendations,³⁹ but it firmly rejected the notion that a choice of law clause selecting religious law for the family law arbitration could be valid.⁴⁰ Instead, all family law arbitration in the province must be conducted exclusively under Ontarian and Canadian law.⁴¹ This decision was proclaimed on the inauspicious date of September 11, 2005, when Premier Dalton McGuinty announced: “There will be no Sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians.”⁴² Ontarian law now states that “[i]n a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian

³⁴ See BOYD, *supra* note 32, at 3.

³⁵ For further discussion of the controversy, and especially about Syed Mumtaz Ali, see Daniel Cere, *Canadian Conjugal Mosaic: From Multiculturalism to Multi-Conjugalism?*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note *, at 284, 297–300); see also Faisal Kutty, *The Myth and Reality of “Sharia Courts” in Canada: A Delayed Opportunity for the Indigenization of Islamic Legal Rulings*, 7 U. ST. THOMAS L.J. 559 (2010).

³⁶ See BOYD, *supra* note 32, at 3–6.

³⁷ *Id.* Boyd’s recommendations call for more government involvement to oversee and evaluate arbitration, education, and training for arbitrators, education for the public about the arbitration process, and a requirement that parties to arbitrations obtain independent legal advice.

³⁸ See Estin, *supra* note 18, at 468.

³⁹ *Id.* at 469.

⁴⁰ See *id.*

⁴¹ *Id.*

⁴² Prithi Yelaja & Robert Benzie, *McGuinty: No Sharia Law*, TORONTO STAR, Sept. 12, 2005, at A1; see also Les Perreux, *Quebec Rejects Islamic Law*, TORONTO STAR, May 27, 2005, at A8. Quebec has taken the same position. While Ontario was still debating its use, lawmakers in Quebec “unanimously rejected use of Islamic tribunals in its legal system.” *Id.*

jurisdiction, in which case that substantive law shall be applied.”⁴³ Although formal Ontarian law is once again uniform and civil courts will not enforce family arbitrations that purport to apply religious law, this does not mean that religious arbitrations have ceased. Rather, Muslim arbitrations have “merely becom[e] invisible to official law without ceasing operations.”⁴⁴

2. *United Kingdom*

In the United Kingdom, family law disputes are resolved, at times, by religious arbitration. At present, religious arbitration tribunals “do not have binding legal authority,” but courts “already do take notice of th[eir] proceedings occasionally.”⁴⁵ Islamic arbitration tribunals in the United Kingdom are particularly strong in the London and Birmingham areas.⁴⁶ “These councils generally acknowledge the legitimacy of each others’ judgments,” and they offer regularized procedures and provide advice and decision-making for applicants.⁴⁷ Generally, civil courts in the United Kingdom claim exclusive jurisdiction over divorce.⁴⁸ Marriage is generally thought to be a civil matter and thus the state arrogates to itself the entirety of

⁴³ Family Statute Law Amendment Act, S.O. 2006, c. 1, art. 32, available at http://www.onla.on.ca/bills/bills-files/38_Parliament/Session2/b027ra.pdf. In addition, the explanatory note to the amendment states that “[t]he term ‘family arbitration’ is applied only to processes conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction. Other third-party decision-making processes in family matters are not family arbitrations and have no legal effect.” *Id.* This not only effectively cut off the rights of Muslims to settle disputes in family matters under Islamic law, but also eliminated the rights of other religious traditions as well, including the rabbinic courts that had been present and practicing in Ontario since 1889. See, e.g., Ron Csillag, *Jewish Groups Say New Bill Targets Beit Dins*, CANADIAN JEWISH NEWS (Toronto), Jan. 26, 2006, <http://www.cjc.ca/2006/01/25/jewish-groups-say-new-bill-targets-beit-dins>.

⁴⁴ Prakash Shah, *A Reflection on the Shari’a Debate in Britain*, in 13 *STUDIA Z PRAWA WYZNANIOWEGO* [STUD. ECCLESIASTICAL L.] 71, 82 (2010) (citing Marion Boyd, *The Past, Present and Future of Arbitration in Religious Contexts: Reflections on Ontario Law in a Comparative Context*, Lecture at the Institute of Advanced Studies, London (July 10, 2009)).

⁴⁵ John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 *U. ST. THOMAS L.J.* 411, 412–13 (2010); see also GILLIAN DOUGLAS ET AL., *SOCIAL COHESION AND CIVIL LAW: MARRIAGE, DIVORCE AND RELIGIOUS COURTS* (2011), available at <http://www.law.cf.ac.uk/clr/Social%20Cohesion%20and%20Civil%20Law%20Full%20Report.pdf>.

⁴⁶ See Bowen, *supra* note 45, at 418.

⁴⁷ *Id.* at 418–19. If a couple is only religiously married, only an Islamic divorce is needed. If a couple has registered their marriage or used their marriage as part of their immigration status, then they usually also pursue a civil divorce. *Id.* at 419. Sometimes these councils provide full adjudication of the parties’ divorce issues, for many Islamic couples that come to them have not married civilly, but only religiously. For example, one study indicated that twenty-seven percent of all Muslim marriages in the United Kingdom were not officially married under English law. Werner Menski, *Law, Religion and Culture in Multicultural Britain*, in *LAW AND RELIGION IN MULTICULTURAL SOCIETIES* 43, 46 (Rubya Mehdi et al. eds., 2008) (citing S.N. SHAH-KAZEMI, *UNTying THE KNOT: MUSLIM WOMEN, DIVORCE AND THE SHARIAH* (2001)).

⁴⁸ See *Divorce (Religious Marriages) Act, 2002*, c. 27.

power to dissolve a marriage.⁴⁹ But this is not entirely effective, leading at times to “‘limping divorces’ whereby a union may be regarded as dissolved (or not) in religious law but not in civil law, and vice versa.”⁵⁰ This kind of disconnect between religious law and civil law, when combined with premises of multiculturalism and the deep commitments of religious believers, has led to calls for greater legal recognition of the decisions of religious tribunals.

The most significant call for such “recognition” came in February 2008 by Anglican Archbishop Rowan Williams. In a lecture at the Royal Courts of Justice, the Archbishop suggested that some “accommodation” of Muslim family law was “unavoidable” in England.⁵¹ He carefully explored the “growing challenge” of “the presence of communities which, while no less ‘law-abiding’ than the rest of the population, relate to something other than the British legal system alone.”⁵² He considered “what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes” and explored avenues of potential “plural jurisdiction” that might lead the civil legal system to “recognize sharia.”⁵³ Although these remarks gave rise to a firestorm of criticism in the press (with some alleging that England would be countenancing “licensed polygamy” if it adhered to the remarks),⁵⁴ Britain’s highest Justice, Lord Phillips, joined the Archbishop four months later in public remarks.⁵⁵ He stated that certain elements of Sharia law, including family law, needed to be embraced—in part because this could be done contractually and on an equal basis with other choice of law matters. Such a suggestion was “not very radical,” he said, “and our system already goes a long way towards accommodating the Archbishop’s suggestion.”⁵⁶

⁴⁹ See *id.*, as now contained in Section 10A of the Matrimonial Causes Act 1973, which provides that a court may delay issuing a civil divorce decree if the parties fail to certify that a Jewish religious divorce has been granted by an appropriate authority. See also Menski, *supra* note 47, at 58–59 (discussing history of the law and its possible application to Muslim marriages as well as Jewish marriages).

⁵⁰ See DOUGLAS, *supra* note 45, at 14–15.

⁵¹ See Rowan Williams, Archbishop of Canterbury, Civil and Religious Law in England: A Religious Perspective (Feb. 7, 2008), reprinted in SHARI’A IN THE WEST 293 (Rex Ahdar & Nicholas Aroney eds., 2010).

⁵² *Id.*

⁵³ *Id.* at 294, 298.

⁵⁴ See, e.g., Catherine Bennett, *It’s One Sharia Law for Men and Quite Another for Women*, GUARDIAN, Feb. 9, 2008, <http://www.guardian.co.uk/commentisfree/2008/feb/10/religion.law>.

⁵⁵ Lord Phillips, Lord Chief Just. England & Wales, Equality Before the Law (July 3, 2008), reprinted in SHARI’A IN THE WEST, *supra* note 51, at 309–18.

⁵⁶ *Id.* at 317.

The Archbishop was not calling for the establishment of a parallel system of independent Muslim courts in England, and he certainly was not calling for the direct enforcement of Sharia law by English civil courts.⁵⁷ He was, instead, raising a whole series of hard but “unavoidable” questions about marital, cultural, and religious identity and practice in Western democratic societies committed to human rights for all,⁵⁸ and about the boundaries of multiculturalism and identity in a liberal society.⁵⁹ What forms of marriage should citizens be able to choose and what forums of religious marriage law should state governments be required to respect? How should Muslims and other religious groups with distinctive family norms and cultural practices that vary from those espoused by the liberal state be accommodated in a society dedicated to religious liberty, equality, self-determination, and nondiscrimination? Is legal pluralism, or even “personal federalism,” necessary to protect Muslims and other religious believers who are conscientiously opposed to the liberal values that inform modern state laws on sex, marriage, and family? Must there instead be “legal universalism” with its attendant “exclusionary consequences”?⁶⁰ Are these really the only options or instead is a “dance” between religious and civil law, with a series of “regulated interactions” that inform each sphere, more appropriate and necessary?⁶¹

3. *United States*

In the United States, there is less experience with the application of Sharia family law and there are fewer reported conflicts between civil courts and Islamic religious tribunals. When civil courts run into matters of Islamic law, such as application of the *Mahr* (the gift of a bridegroom to his bride at the beginning of marriage) and its division at divorce, they have attempted to treat

⁵⁷ “[The Archbishop] was not arguing in favour of a full-fledged application of the Sharia in the United Kingdom, but he was rather pleading in favour of a better inclusion of religious sensitivities into the British legal process.” Jean-François Gaudreault-DesBiens, *Religious Courts’ Recognition Claims: Two Qualitatively Distinct Narratives*, in SHARI’A IN THE WEST, *supra* note 51, at 59, 59.

⁵⁸ See Williams, *supra* note 51, at 302.

⁵⁹ Cf. Michael Boulette, *An Apology for the Archbishop: Shari’ah Law and the Jurisprudence of Multiculturalism*, 2 GEO. J.L. & MOD. CRIT. RACE PERSP. 1 (2010).

⁶⁰ See Gaudreault-DesBiens, *supra* note 57, at 59; cf. 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 *, at 164.

⁶¹ See Michael J. Broyde, *New York’s Regulation of Jewish Marriage: Covenant, Contract, or Statute?*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note *, at 138, 163 (“dance”); Ayelet Shachar, *State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation*, in SHARI’A IN THE WEST, *supra* note 51, at 115, 127 (“regulated interaction”).

the Islamic law contract like any other premarital contract.⁶² Islam has largely cooperated with this, for it treats marriage primarily like a contract. Drawing upon this notion of autonomy and freedom of contract, Professor Mohammad Fadel has argued that a “liberal family law” in the United States and Canada is ideal and that a proper understanding of a liberal family law would allow for “arbitration of family law disputes.”⁶³ Under his vision, this would allow for enforcement of arbitral awards by civil courts. Those courts would not have to delve into any issues of religious interpretation, such as varying interpretations of the *Mahr*, because such matters would have been decided by freely chosen arbitration.⁶⁴ Whether such a vision is, or would be, acceptable in the U.S. political climate seems unlikely given the other cultural backlash against Muslims.⁶⁵

B. Historically Majority Religion: Christianity

The common law in the United States has, for years, been predicated on notions of Christian marriage and divorce.⁶⁶ The norms of liberal society, however, have recently seemed to move increasingly out of alignment with traditional norms, especially for conservative Christians and other cultural conservatives. These battles are not just about same-sex marriage but, more broadly, about the American family.⁶⁷ A host of family issues, including contraception, abortion, and privacy rights in general, has contributed to the perception of competing norms in society for many years.⁶⁸ The onset of no-fault divorce (and the lack of any “grandfathering” provisions for those

⁶² See, e.g., *Chaudry v. Chaudry*, 388 A.2d 1000, 1003 (N.J. Super. Ct. App. Div. 1978); see also PASCALLE FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION* 42–50 (2010) (discussing marriage laws in the United States in reference to the *Mahr*); cf. Nathan Oman, *Bargaining in the Shadow of God’s Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 580 (2010) (criticizing the *Chaudry* court for failing to understand the actual intentions of the parties).

⁶³ See generally Fadel, *supra* note 60.

⁶⁴ *Id.* (“The space liberalism creates for private ordering within the family is sufficient for robust manifestations of Islamic family life that are also consistent with the minimum requirements of liberalism.”). Other writers are quite concerned that any sort of delegation or decentralization of this nature will lead to adverse effects for women and children. See, e.g., Robin Fretwell Wilson, *The Perils of Privatized Marriage, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT*, *supra* note *, at 253.

⁶⁵ The Jewish minority community in the United States has long faced issues at the intersection of civil and religious law of marriage and divorce. See Broyde, *supra* note 61.

⁶⁶ See, e.g., JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 194 (1997).

⁶⁷ Cf. June Carbone, *Marriage As a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49.

⁶⁸ See, e.g., Commentary, *Conservatism, Privacy, and Abortion*, N.Y. TIMES, Oct. 12, 1981, at A22.

married under other regimes), the adverse effects of divorce on weaker parties (especially women and children), the sheer number of divorced individuals, the increased judicial solicitude toward cohabitation, and the attendant creation of alternative legal norms for the same all contribute to a perceived conflict for conservative Christians, who are increasingly *not* the majority political group.⁶⁹

Two situations from the past fifteen years exemplify the conservative Christian response to cultural dissonance about marriage. The first, and more recent, response involves ballot initiatives against same-sex marriage. For many conservative Christians, marriage is solely between a man and a woman.⁷⁰ This has led to efforts to reify that view of marriage and divorce in the law through seeking to enact statutes at both the federal and state levels (Defense of Marriage Act (“DOMA”) and mini-DOMAs), opposing judicial decisions that are favorable to same-sex marriage, and various other political campaigns.⁷¹

A second, slightly older response is the legislative enactment of an alternate structure of marriage within the civil law. These alternate structures are called “covenant marriage statutes” and they are currently in place in Louisiana, Arkansas, and Arizona.⁷² Beginning in the late 1990s, these covenant marriage statutes were enacted to encourage long-term marriage by offering a voluntary alternative to the legal standard of no-fault divorce.⁷³ Covenant marriage statutes enact two versions of marriage in the law of any given state: regular, easy-in and easy-out marriage, and a covenant marriage.⁷⁴ Couples desiring to enter covenant marriages must undergo additional premarital counseling or waiting periods and attest that they understand that marriage is a lifelong commitment. If covenant couples desire to divorce, they face longer waiting

⁶⁹ See, e.g., NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 67–73 (2009).

⁷⁰ See PEW RESEARCH CTR., *SUPPORT FOR SAME-SEX MARRIAGE EDGES UPWARD: MAJORITY CONTINUES TO FAVOR GAYS SERVING OPENLY IN MILITARY* 6 (2010), available at http://pewforum.org/uploadedFiles/Topics/Issues/Gay_Marriage_and_Homosexuality/same-sex-marriage-10-full-report.pdf (describing substantial resistance to same-sex marriage among a number of religious groups, especially among those considered to be more conservative).

⁷¹ See, e.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); IND. CODE ANN. § 31-11-1-1 (2011); *Smelt v. Cnty. of Orange*, 447 F.3d 673, 676 (9th Cir. 2006).

⁷² See John Witte, Jr. & Joel A. Nichols, *Introduction*, in *COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE* 1, 1–25 (John Witte, Jr. & Eliza Ellison eds., 2005).

⁷³ *Id.* at 1–2.

⁷⁴ *Id.*

periods or a requirement of fault, and they have an obligation to seek counseling to encourage reconciliation.⁷⁵

These are two *opposite* moves by Christian groups, but both seek to regain or recapture a Christian understanding of marriage in the civil law. The first seeks an exclusive, exclusionary definition of marriage. The second seeks a state-sanctioned, alternative definition. There is also a third option, which has yet to gain as much traction. A few conservative commentators have begun to seek to unwind the traditional Protestant reliance on the civil law. They have begun to talk about separating civil marriage and religious marriage, with the former belonging to the province of the state and the latter to the province of the church.⁷⁶ There is virtually no political appetite for this at the moment, and it remains to be seen whether one will develop. Christians have also not much availed themselves of religious arbitration for family law matters (at least not in the way that Muslims and Jews have),⁷⁷ and have certainly not often sought civil court enforcement of their own religious arbitration of family law.

Taken together, the responses of both the minority Islamic communities and the majority Christian communities underscore the centrality of religion to marriage. Whether members of a majority religious group, currently Christians, or a minority group, like Muslims or others, believers live with claims made upon them both as citizens of the civil state and as citizens of their religious belief systems. As they seek to live out their faith, they may, at times, be forced to choose between competing normative orders.

II. POSSIBLE PATHS AHEAD

As Professor Brian Tamanaha recently wrote, “The longstanding image of a uniform and monopolistic law that governs a society is plainly obsolete.”⁷⁸ If this is true as a descriptive matter, what does it mean for family law in the

⁷⁵ *Id.* at 1–2, 23–24.

⁷⁶ *Cf. Kmiec Proposes End of Legally Recognized Marriage*, CATHOLIC NEWS AGENCY (May 28, 2009, 4:41 AM), http://www.catholicnewsagency.com/news/kmiec_proposes_end_of_legally_recognized_marriage (reporting the views of Douglas Kmiec, who argues that we should turn over the concept of marriages to churches and allow any couple to get a “civil license”).

⁷⁷ See Azizah Y. Al-Hibri, *The Nature of Islamic Marriage*, in COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE, *supra* note 72, at 182, 215; Michael J. Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, in COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE, *supra* note 72, at 53, 63–64.

⁷⁸ Brian Z. Tamanaha, *A Framework for Pluralistic Socio-Legal Arenas*, in CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD 381, 400 (Marie-Claire Foblets et al. eds., 2010).

United States? Will we as a society find ways to recognize and accommodate believers with differing understandings of marriage and divorce? Given the dissonance internal to family law for many religious believers, such as Muslims in the United States, what are the possible avenues for interaction between civil law and religion in the United States?⁷⁹ Four possibilities immediately suggest themselves.⁸⁰

First, and in some ways the most extreme, is that one could “take the state out of the business of deciding what is a marriage and leave that question to the churches” and other religious groups.⁸¹ This approach would attempt to divide conclusively the notions of “civil marriage” and “religious marriage,” which lie at the heart of many of the debates about marriage. It would disentangle the state and, by enacting civil unions, the state would presumably prioritize the value of equality. Proposals of this nature have been floated by those on both the left and right of the political spectrum.⁸² This seems an unlikely political result, though, in part because a somewhat similar concept was bandied about in Canada (which is often more liberal on family law matters than most U.S. states) in recent years and gained very little political traction even there.⁸³

Second, a quite different approach might be that the state should remain involved in regulating marriage and that it should do so according to one’s particular religious, moral, or political views. This used to be the avenue of choice for Christians, but it has increasingly led to conflict as society has become more liberal on both entrance to and exit from marriage and conservative Christian groups have felt alienated. This conflict has been

⁷⁹ Critics might broadly contend that the First Amendment of the U.S. Constitution completely prohibits direct involvement of religion in matters of family law. Such an assertion is both an overreading of Supreme Court precedent and a misunderstanding of the principle of separation of church and state in the United States. For further discussion, see John Witte Jr. & Joel A. Nichols, *The Frontiers of Marital Pluralism: An Afterword*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note *, at 357.

⁸⁰ Of course, there may be more than four, or a different grouping of possibilities. See, e.g., Brian H. Bix, *Pluralism and Decentralization in Marriage Regulation*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note *, at 60, 64 (listing alternative ways the regulation of marriage could become more decentralized); see also Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 173–200 (1998).

⁸¹ Stephen B. Presser, *Marriage and the Law: Time for a Divorce?*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note *, at 78, 81.

⁸² See, e.g., Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29–69 (Anita Bernstein ed., 2006); Martha C. Nussbaum, *A Right to Marry?* 98 CALIF. L. REV. 667, 671–72 (2010); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006).

⁸³ LAW COMM’N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), available at http://www.samesexmarriage.ca/docs/beyond_conjugalty.pdf.

substantially exacerbated by the same-sex marriage debates over the past decade and it has resulted in reignited culture wars. There have been DOMAs, state level mini-DOMAs, state court decisions in favor of same-sex marriage, sometimes (in California, for example) democratic reversal of such decisions, and, occasionally (in New York, for example) democratic reinstatement of the possibility of same-sex marriage.⁸⁴ Perhaps these winner-take-all political battles will continue to be the norm, but at present they show little promise of settling in one position. Religious conservatives seem to be on the “losing” side of public opinion about same-sex marriage and may feel more isolated as they lose political clout on these matters.⁸⁵

Third, a variation on the instantiation of one’s religious values into civil law as the exclusive governing law for marriage and divorce would be to have *some* state law conform to one’s desires. One possibility is that civil marriage and divorce law could be a political compromise on its internal points, even at the risk of internal incoherence. A much stronger possibility would be an explicit recognition that religious groups may want or need a closer relationship with the civil law. Thus, a state might enact more than one comprehensive scheme of marriage and divorce law. Louisiana’s “covenant marriage law” is an example through which couples choose whether to enter into a regular marriage with easy entrance and no-fault divorce, or enter into a covenant marriage, which requires, *inter alia*, premarital counseling and has correspondingly higher exit requirements.⁸⁶ A state might enact parts of civil legal schemes necessary to assist or bridge the space between civil and religious marriage and divorce for its citizens. New York’s “get” statutes are an example of this model.⁸⁷ By enacting those statutes, New York’s legislature sought to prevent a situation whereby a Jewish woman was civilly divorced but not religiously divorced; it did so by fostering greater cooperation between civil and religious authorities in an “invisible dance,” as Professor Michael Broyde has described it.⁸⁸ But neither covenant marriage statutes nor

⁸⁴ CAL. CONST. art. I, § 7.5, *invalidated* by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)); Defense of Marriage Act, 1 U.S.C. § 7, 18 U.S.C. § 1738C (2006); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *e.g.*, N.C. GEN. STAT. § 51-1.2 (2009); N.Y. DOM. REL. LAW §§ 10-a, 10-b, 11, 13 (McKinney, 2010), *amended* by Marriage Equality Act (June 24, 2011).

⁸⁵ As another proposed advancement for same-sex marriage, some have suggested choice of law proposals across state lines whereby couples in one state could “choose” the marriage law of another state to govern them. *See, e.g.*, Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 MICH. J. L. REFORM 735 (2011).

⁸⁶ Witte & Nichols, *supra* note 72, at 1–2.

⁸⁷ N.Y. DOM. REL. LAW § 253.

⁸⁸ *See* Broyde, *supra* note 61, at 159.

legislatively enacted “get” statutes seem promising as practical solutions. Only three states have enacted covenant marriage statutes (and none since 2001) and few couples in those states have availed themselves of the covenant marriage option; only New York has passed a “get” statute despite other states’ attempts in the past twenty years.⁸⁹

Fourth, one could draw upon the increased solicitude in the law for the parties to insert their own values into the law through pre- and post-marital agreements. Couples might do so directly—by placing restrictions on when they could divorce, for example, directly into the premarital contract, but a state would typically still find such restrictions against public policy.⁹⁰ Or a couple could use such contractual methods to designate an arbitration forum to resolve their disputes. Such a choice of forum is typically enforceable, but—as seen above with the Ontario and United Kingdom examples—is more controversial when a religious forum is designated in family law matters. Even more controversial could be the parties’ designation of a choice of law within that choice of forum. It is this latter item, the choice of law, that would matter greatly to religious individuals, for then they would be able better to align their commitments as both religious and political citizens. But such religious arbitration, especially on choice of law matters, would itself likely be contested by the state—because conservative religious principles may be out of alignment with the political state’s norms and aspirations, especially regarding gender equality matters.⁹¹ Such religious arbitration has recently started to receive increased scholarly attention⁹² and seems poised to give rise to

⁸⁹ See STEVEN L. NOCK, LAURA A. SANCHEZ & JAMES D. WRIGHT, COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA 3 (2008) (describing how only two percent of couples entered covenant marriages during the first five years of the law’s enactment (1998–2001)). This has been attributed to a lack of interest by couples, a lack of knowledge of the law (partly due to the failure of clerks to inform engaged couples), and the failure of institutionalized religion to encourage or mandate covenant marriages. There is also a “get” statute in the United Kingdom. Matrimonial Causes Act 1973, 1973, c. 18, § 10A (inserted by Divorce (Religious Marriages Act), 2002, c. 27).

⁹⁰ 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, 372 (Robin Fretwell Wilson ed., 2006).

⁹¹ See, e.g., *Aleem v. Aleem*, 947 A.2d 489, 500–502 (Md. Ct. App. 2008) (disapproving of Islamic religious marital dissolution because it gave right to divorce only to the husband; the civil court revisited issues and decided marital property matters anew); see also Rajni K. Sekhri, *Aleem v. Aleem: A Divorce from the Proper Comity Standard—Lowering the Bar that Courts Must Reach to Deny Recognizing Foreign Judgments*, 68 MD. L. REV. 662, 677–690 (2009) (criticizing decision for denying comity to Pakistani divorce and suggesting the same result could have been reached by relying on the state’s interest in equitable division of property).

⁹² See, e.g., Helfand, *supra* note 8; Nicholas Walter, *The Status of Religious Arbitration in the United States and Canada*, SANTA CLARA L. REV. (forthcoming 2011).

additional articles and court opinions as U.S. society becomes more mobile and multicultural, even as it seeks to balance the role of the civil state with individuals' adherence to their own religious norms. Whether U.S. courts will treat religious arbitrations of family law matters the same as arbitrations of other matters is still an open question.⁹³

One avenue that is *not* viable, however, is to presume that Professor Brian Tamanaha is incorrect and that, in family law matters, there can be one "uniform and monopolistic law"⁹⁴ that has robust effect and implementation. We would be better served to recognize, as Professor Werner Menski has said, that "we must all be conscious pluralists, whether we like it or not."⁹⁵ This means that "unofficial law" will operate regardless of what the civil law says. That is, some individuals are going to feel bound by their communal (religious) norms, regardless of what the civil law says. And some individuals are going to seek religious adjudication of their disputes (as Muslims in Ontario and the United Kingdom do), even if the civil law refuses to enforce those arbitral judgments. Failing to understand these matters means that a liberal state may protect vulnerable parties the *least* when the state claims and seeks to exercise hegemonic control over marriage and divorce. Instead, it may be that *only* through recognizing and respecting alternate norm systems may the state have more of an avenue to affect change and protect vulnerable parties.⁹⁶

⁹³ Compare John Witte, Jr. & Joel A. Nichols, *Faith-Based Family Laws in Western Democracies?*, 2010 FIDES ET LIBERTAS 122, 123 (2010) ("The United States . . . has become the least accommodating of its Muslim citizens [compared to some other nations, and has not] readily accommodated Muslim family law."), with Luke W. Goodrich, *Sharia Across the Pond*, GUARDIAN WKLY, July 6, 2009, available at <http://www.guardian.co.uk/commentisfree/belief/2009/jul/06/sharia-courts-us-islam> (claiming that U.S. law has "long recognised Sharia tribunals").

⁹⁴ Tamanaha, *supra* note 78, at 400.

⁹⁵ Werner Menski, *Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, *supra* note *, at 219, 222.

⁹⁶ This raises two other significant issues, which are unhappily relegated to a footnote because of space. First, there are (or should be) very serious concerns *from a religious perspective* of any conversation about joint governance (to use Ayelet Shachar's term) with the state because this suggests less than full respect for religious liberty and separation of church and state; it runs a very serious risk of the state co-opting religion and shaping that religion. Indeed, that would be one aim of the state, presumably—and would be exactly the kind of thing a religious person would want to avoid. *See, e.g.*, DeCoste, *supra* note 9, at 165. Second, there is an issue about whether religious liberty is a natural right or whether it instead is derivative of the state. *See, e.g., id.* at 167.

CONCLUSION

Oklahoma's Save Our State Amendment purports to disallow Sharia law entirely, but even if that amendment is held to be constitutional, it will not eliminate adherence to Sharia law among faithful Muslims. Merely proclaiming that Sharia law will be disallowed does not mean that it will not be followed; it would mean, at most, that it would not be enforced by civil courts. At least for some observant Muslims, the effect will be the same as in the United Kingdom or Ontario: Islamic religious arbitrations will continue to exist, but outside the protection of the law. There are hard and yet unresolved questions about how a liberal democracy like the United States is going to incorporate all its citizens into the polity and promote values of liberty, equality, and nondiscrimination while also respecting and promoting religious liberty and personal autonomy. These questions pertain not only to the growing Muslim population in the United States, but equally to the majority Christian population.

In short, we must face the question whether it is possible for our law to recognize the dual nature of marriage for many citizens in society, whereby they are bound not only to civil norms regarding marriage and divorce but also to religious norms. Can we take seriously those dual allegiances while also hewing to the overarching norms of equality and protection for vulnerable parties that are part of the fabric of the larger civil society itself? These dual allegiances *will* exist, even if we are reluctant to talk about them. Whether and how we choose to acknowledge those allegiances and deal with the tensions remains to be seen.