

Unofficial Family Law

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ABSTRACT: This Essay explores a type of legal pluralism found in secular societies, including the United States, in which minority groups adhere to unofficial religious law norms within a larger framework of state family law. Official and unofficial law are sometimes closely interwoven, as with the formalization of marriage, and sometimes stand directly in opposition, as with laws prohibiting the practice of polygamy. In an intermediate position, these societies have seen a complex interaction between secular and religious law in the context of marriage dissolution. The different opportunities presented by each legal system may generate significant strategic behavior by individuals, and these risks have prompted careful collaboration between religious and secular authorities in a number of jurisdictions. In this collaboration, the secular state helps religious communities to define a space and an identity, and simultaneously seeks to establish the basic guarantees of citizenship within the larger society for all group members.

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I. INTRODUCTION

Marriage and family practices around the world are embedded in a rich matrix of cultural norms, generated by legal rules, religious traditions, and social expectations. In homogenous societies, these different normative frameworks reflect widely shared values, reinforcing a common understanding of what marriage and family life should be. In more diverse societies, the range of normative variation expands, and individuals may face contrasting opportunities and constraints from official and unofficial norms of family behavior.

Some advocates of multiculturalism argue for accommodating the distinct values and traditions of religious or other minority groups through a formal legal pluralism in which governments would delegate aspects of state authority over marriage, divorce, and inheritance to separate legal authorities with power to apply their own law to members of their groups.¹ Legal pluralism, in this classic sense, is an artifact of empire and colonialism that has remained important in the contemporary world as a tool for managing deep and persistent cultural and legal differences in post-colonial nations such as India and South Africa.²

Over the past generation, new migration patterns have brought these questions of multiculturalism and legal pluralism from the periphery to the centers of colonial power, where the debate provokes profound uneasiness among the mainstream or majority society. In the liberal democracies of Europe and North America, the legal system is understood to be based on universal and secular principles, affording the same rights to all citizens and rejecting any formal differentiation on cultural or religious grounds. The rules of official family law are far from neutral, however, and define a

1. See, e.g., John F. Burns, *Top Anglican Seeks a Role for Islamic Law in Britain*, N.Y. TIMES, Feb. 8, 2008, at A10. For a specific proposal, see Syed Mumtaz Ali & Enab Whitehouse, *The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada*, 13 J. MUSLIM MINORITY AFF. 156, 166–72 (1992); see also Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 929 (2002) (suggesting that the government could grant extensive powers of self-governance within territorial enclaves created on federal land to “insular communities with norms radically different from those of general society”); cf. Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT’L L. 135, 136 (2007) (advocating some form of “more robust pluralism” that would incorporate a greater role for religious understandings of marriage in American law). Although Nichols argues that his proposal “need not mean—indeed, *should* not mean—abandoning protections for women and children that the states have assiduously worked to implement,” *id.* at 195, he does not offer a specific proposal. The international precedents Nichols cites are jurisdictions including India, Kenya, and South Africa, where these issues remain enormously complex and problematic.

2. See, e.g., M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 58–84, 303–12 (1975). In the terms utilized by Merry, see *infra* note 9, at 872, this is the classical or juristic type of legal pluralism.

culturally specific set of minimum requirements and expectations for family formation and behavior. This lack of neutrality creates different tensions for those whose practices or traditions diverge from the predominant legal and cultural norms.

There are important reasons to facilitate multicultural accommodation in family law. All individuals are embedded in families and communities, which are important to their stability, happiness, and to the successful nurture of the next generation. A multilayered approach to family regulation builds on the notion that many families have a complex identity and experience, shaped and defined by many different cultural, legal, and political ties. It supports a richer notion of citizenship in which individuals are understood not only in terms of their relationship to the state, but also as members of families and religious communities.

Greater accommodation of cultural and religious diversity is possible within the framework of our legal and political systems,³ but there are also important reasons to be cautious with this project. Throughout our history, and in many places around the globe, the definition of a separate sphere of private or family life has subjected some members of the community to the risk of violence or abuse that goes unnoticed and unaddressed by any effective means of social or legal control. It has also created the risk that these group members will be prevented from participating in the wider currents of education, employment, and citizenship. Both of these are risks that have fallen primarily on women and girls, who are simultaneously celebrated as the carriers of culture and excluded from opportunities to exit or shape their communities.⁴ In light of these risks, any policy that fostered multicultural or multi-tiered approaches to family law in the United States would have to include protections for vulnerable family members.⁵ In

3. See Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 598–603 (2004); see generally also ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004). Our distinct traditions and historical experiences dictate that multicultural accommodation will follow a different path from the legal pluralism of Asia or Africa. In the United States, the self-governance of federally recognized Native American communities extends to family-law matters, but non-indigenous minority groups have no official status. See Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 593–95 (2000). For an argument that governments should extend this type of pluralism to religious minority groups as well, see Rosen, *supra* note 1, at 929–34.

4. See AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* 55–57 (2001). For an introduction to this debate, see SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 12–17 (1999).

5. Judges and other decisionmakers can learn to understand and respect different cultural, religious, and legal traditions, recognizing that many families are deeply connected to communities with distinct norms and practices that shape their behavior as mothers and fathers, daughters and sons, wives and husbands. At the same time, judges and legislators have the responsibility and obligation to adhere to the fundamental norms of our legal and political system, including our commitments to equality, due process, freedom of religion and belief, and the right of access to courts for protection from serious physical and financial harm. See generally Estin, *supra* note 3.

circumstances of formal legal pluralism, the risks are substantial enough that state authorities would need to remain involved with families at some level in order to accomplish the important protective functions now performed by family law.⁶

Beyond the argument for a pluralized marriage law, other writers have argued for abolishing or “privatizing” marriage law.⁷ These proposals sometimes suggest that civil marriage should be replaced with civil union or another substitute regime, and sometimes suggest that a status approach should be entirely rejected in favor of general principles of contract, property, and tort law. Advocates of privatization sometimes argue that these alternatives would give greater scope to the unofficial law of religious communities.⁸ As with a pluralization of marriage law, however, the state would remain involved in family regulation in either of these scenarios. Most discussions never reach the more specific, pragmatic questions of how a system of pluralized or privatized marriage could be implemented.

While the multiculturalism debate has become a familiar one, much less attention has been paid to the legal pluralism that already flourishes in the United States. As anthropologists have observed, the official legal system in any society exists in tandem with other forms of social ordering.⁹ This understanding of legal pluralism recognizes the proceedings of an ecclesiastical court, rabbinic tribunal, or Muslim dispute resolution center as a form of law, even without the backing of any official state authority. Once our lens widens to include this broader landscape of legal phenomena, other practices come into view, including religiously based marital counseling or prenuptial agreements, as well as more informal social

6. This would pose substantial constitutional challenges, which are beyond the scope of this Essay. Beyond the free-exercise and establishment questions, a millet system, in which individuals are assigned to the legal and regulatory authority of distinct religious communities, also requires some method by which religious membership and affiliation are determined and regulated by the state. These are very substantial problems. *See, e.g.*, Nadim Audi, *Egyptian Court Allows Return to Christianity*, N.Y. TIMES, Feb. 11, 2008, at A11; Gershom Gorenberg, *How Do You Prove You're a Jew?*, N.Y. TIMES MAG., Mar. 2, 2008, at 46.

7. *See generally, e.g.*, MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2006); MARY LYNDON SHANLEY, JUST MARRIAGE (2004); Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537 (2007); Edward Stein, *Symposium on Abolishing Civil Marriage: An Introduction*, 27 CARDOZO L. REV. 1155 (2006).

8. *E.g.*, Daniel A. Crane, *A “Jude-Christian” Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221, 1222 (2006).

9. *See* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 872 (1988). Merry notes that “[a] legal system is pluralistic in a juristic sense when the sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system.” *Id.* at 873. Merry contrasts this with the “new legal pluralism,” which holds that plural normative orders are found in all societies, and other forms of ordering connect with, but are in some ways separate from and dependent upon, the official legal system. *Id.*

ordering through community sanctions such as gossip or ostracism.¹⁰ The fact that these practices may have no secular legal effect serves to begin, rather than to end, the inquiry.¹¹ One important insight of this work is that state law and legal institutions have only a limited degree of control over society, and do not necessarily dominate or displace other social systems.¹² Another is that individuals may be simultaneously subject to different systems of rules, and these systems may not be coordinated or hierarchically arranged.¹³

This Essay takes a different approach to the question of multicultural accommodation and legal pluralism in family law, beginning with the dynamics of unofficial family law as it is already practiced in the United States. Ethnographic research that would provide a rich description or understanding of these practices has not been readily available, but other evidence indicates that different modes of family regulation operate here.¹⁴ Official case reports in a number of states reflect the ongoing importance of religious legal traditions, including Jewish and Islamic regulation of marriage and divorce.¹⁵ Websites and other literature promote the services of alternative tribunals for resolving disputes within the context of particular religious communities.¹⁶ In the popular media, stories of polygamous

10. See generally Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719, 719-46 (1973).

11. How, when, and why do participants choose to develop and pursue this form of private ordering or dispute resolution? How are religious or customary laws and norms defined, created, and enforced in these settings? To what extent do these other forms of social ordering function independently of or in some relation to state authority? See Franz & Keebet von Benda-Beckmann, *The Dynamics of Change and Continuity in Plural Legal Orders*, 53-54 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 17-32 (2006) (considering "the elements of plural legal orders and the different ways in which they can be said to 'co-exist'").

12. See generally SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (1978).

13. *Id.* at 24-25.

14. For a sociological study of the religious divorce practices of Jews in France, see GABRIELLE ATLAN, LES JUIFS ET LE DIVORCE: DROIT, HISTOIRE ET SOCIOLOGIE DU DIVORCE RELIGIEUX 127-202 (2002).

15. For a survey of the American case law discussing enforcement of religious marital agreements, see Estin, *supra* note 3, at 569-77. See also *id.* at 578-82 (discussing civil cases and statutes concerning a Jewish divorce *get*); *id.* at 582-86 (discussing divorce cases arbitrated before a Jewish *bet din*); CAROLYN HAMILTON, FAMILY, LAW AND RELIGION 337-42 (1995) (discussing England and the United States); Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in WOMEN'S RIGHTS & ISLAMIC FAMILY LAW 177, 177-229 (Lynn Welchman ed., 2004).

16. See, e.g., Beth Din of America, <http://www.bethdin.org> (last visited Nov. 9, 2008); The Canadian Soc'y of Muslims, Muslim Marriage Mediation & Arbitration Service, <http://muslim-canada.org/brochure.htm> (last visited Nov. 9, 2008) (in Canada); Institute for Christian Conciliation/Peacemaker Ministries, <http://www.hispeace.org> (last visited Nov. 9, 2008); Islamic Sharia Council, <http://www.islamic-sharia.org> (last visited Nov. 9, 2008) (in the United Kingdom); see also Adam Liptak, *When God and the Law Don't Square*, N.Y. TIMES, Feb. 17, 2008, at

households have become a staple of news and entertainment.¹⁷ Beyond the United States, there is a more extensive literature on unofficial family law, particularly with respect to Muslim communities in Britain.¹⁸ In Australia, the Law Reform Commission has studied questions of legal pluralism and multicultural accommodation,¹⁹ and in Ontario, the prospect of “Sharia arbitration” in family-law matters has generated significant public attention and debate.²⁰ From these sources, it is apparent that religious law continues to serve important purposes for many Roman Catholics, Jews, and Muslims, operating as an unofficial complement or alternative to the law of the state. The evidence suggests that members of these communities generally follow official marriage and divorce laws in order to have their family status recognized by the state, but that they also utilize unofficial law mediated by ecclesiastical courts, rabbinic tribunals, or Muslim dispute-resolution centers.

In the Sections that follow, this Essay considers the interaction of official and unofficial family law in three situations. Part II addresses marriage celebration, a point at which official and unofficial law have similar goals and are often closely interwoven. Part III considers the dissolution of marriage, a more complex problem that generates significant conflict between normative systems, resulting in an often intricate interaction of official and unofficial law. Part IV centers on the substantive regulation of marriage. Here, official law functions as a gatekeeping tool to define the shape of both family life and the broader social and political community. To the extent that official law deems unacceptable certain family or marriage

A3 (discussing enforcement by a Texas court of an agreement to arbitrate divorce issues in a local Islamic tribunal).

17. While these accounts usually focus on fundamentalist Mormon communities, see, for example, JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* (2003) and HBO, *Big Love: About the Show*, <http://www.hbo.com/biglove/about/index.html> (last visited Jan. 6, 2009), recent news accounts have also reported on polygamous households among immigrant communities from Africa. See, e.g., Nina Bernstein, *In Secret, Polygamy Follows Africans to N.Y.*, N.Y. TIMES, Mar. 23, 2007, <http://www.nytimes.com/2007/03/23/nyregion/23polygamy.html>.

18. See, e.g., HAMILTON, *supra* note 15, at 88, 302–03; DAVID PEARL & WERNER F. MENSKI, *MUSLIM FAMILY LAW* 51–80 (3d ed. 1998); SEBASTIAN POULTER, *ENGLISH LAW AND ETHNIC MINORITY CUSTOMS* (1986); IHSAN YILMAZ, *MUSLIM LAWS, POLITICS AND SOCIETY IN MODERN NATION STATES: DYNAMIC LEGAL PLURALISMS IN ENGLAND, TURKEY AND PAKISTAN* 49–81 (2005). English lawmakers have rejected proposals for a system of Islamic personal law. See Sebastian Poulter, *The Claims to a Separate Islamic System of Personal Law for British Muslims*, in *ISLAMIC FAMILY LAW* 147, 147–66 (Chibli Mallat & Jane Connors eds., 1990).

19. E.g., AUSTRALIAN LAW REFORM COMM’N, *MULTICULTURALISM AND THE LAW*, REPORT NO. 57, §§ 1.15–1.18 (1992) (providing an overview of multiculturalism); AUSTRALIAN LAW REFORM COMM’N, *THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS*, REPORT NO. 31, at 95–125, 164 (1986) (discussing discrimination, equality, and pluralism as well as multiculturalism).

20. See generally MARION BOYD, OFFICE OF CANADIAN ATTORNEY GEN., *DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION* 29–68 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

practices that unofficial norms recognize, individuals or communities with those practices are kept outside or at the edges of law and society. Thus, although polygamy is permitted in Islam, it may be punished by the state. The practice of polygamy nevertheless continues underground, regulated largely by custom or unofficial law, leaving family members outside the boundaries of protections that are ordinarily available under official law.

Many writers have discussed the parallel between legal prohibitions of polygamy and the bar against same-sex marriage.²¹ Like polygamists, gay and lesbian couples in most states find that their family relationships fall outside the protection of official law. As the debate over same-sex marriage proceeds, and as some states have moved to establish an official legal status for same-sex couples, members of religious groups whose marriage traditions have not previously conflicted with official marriage laws find the prospect of a divide between official law and their unofficial norms to be deeply unsettling.²² One response has been the call to privatize marriage so that religious understandings would not be tainted or compromised by a secular definition that is inconsistent with religious norms.²³

The religious argument for abolishing civil marriage assumes the possibility of a clear separation of the secular and religious spheres. But as long as many aspects of family life are legitimately of concern to the state, plural and overlapping normative orders are unavoidable. This reality has important consequences for both the debate over multiculturalism and the current controversy over the definition of marriage. A privatization of marriage would not eliminate the difficulties described here. Similar tensions would appear at the intersection of religious marriage law and contract law, or whatever secular law was enlisted to structure and regulate family relationships, because the dynamic interplay of official and unofficial law is a necessary attribute of social life, particularly in a multi-religious and multicultural society.

II. CONVERGENCE AND INCORPORATION

Laws in the United States make it relatively simple for religious clergy of all denominations to conduct wedding ceremonies that have both civil and religious effect. Civil marriage requirements are based on the Christian ecclesiastical tradition, which contributes to the common understanding of

21. *E.g.*, David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997).

22. Mary Anne Case suggests that this is particularly true for Protestant conservatives, who “have essentially abdicated the definition, creation and, above all the dissolution of marriage to the state,” leaving them more dependent on the state’s definitions of marriage and “far less able to distinguish conceptually between marriage as their religion defines it and as state law does.” Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1795 (2005).

23. *See, e.g.*, Crane, *supra* note 8, at 1240; David Novak, *Jewish Marriage and Civil Law: A Two-Way Street?*, 68 GEO. WASH. L. REV. 1059, 1077 (2000).

weddings as simultaneously secular and sacred. In some communities, however, secular legal norms do not fit as closely with religious traditions and law. For members of these groups, the separate demands of official and unofficial law may complicate the process of family formation and leave some family members without the protection of the state.

A. MARRIAGE CELEBRATION

For most couples, there is very little distinction between the secular and religious aspects of marriage. Marriage licenses are required in almost all states, except for a few that still recognize the validity of informal marriage.²⁴ There is no need for two separate ceremonies, as in France, and generally no restriction on the words that must be used or the places a wedding can take place, as in England.²⁵ Most weddings in this country are still celebrated with a religious ceremony.²⁶

In a number of jurisdictions, state legislators have enacted statutes that explicitly accommodate the practices of particular religious groups. The same New York statute that requires the parties entering a marriage to “solemnly declare . . . that they take each other as husband and wife,” also provides that this requirement “shall not affect marriages among the people called Friends or Quakers; nor marriages among the people of other denominations having as such any particular mode of solemnizing marriages.”²⁷ A Rhode Island statute permits Jews to marry those “within the degrees of affinity or consanguinity allowed by their religion” even if state law would otherwise prohibit those marriages.²⁸ When statutory language is so narrow as to exclude some religious clergy or groups, courts have insisted that it be read more inclusively in order to prevent constitutional difficulties.²⁹

24. See, e.g., IOWA CODE § 595.11 (2007); N.Y. DOM. REL. LAW § 11(4) (McKinney 1999).

25. On the French law, see Edwige Rude-Antoine, *Muslim Maghrebian Marriage in France: A Problem for Legal Pluralism*, 5 INT'L J.L. & FAM. 93, 97–99 (1991). On the English law, see JOCELYNE CESARI, WHEN ISLAM AND DEMOCRACY MEET: MUSLIMS IN EUROPE AND IN THE UNITED STATES 59–60 (2004); HAMILTON, *supra* note 15, at 38–51; NIGEL LOWE & GILLIAN DOUGLAS, BROMLEY'S FAMILY LAW 41–45 (10th ed. 2007).

The West Virginia statutes define the ritual that civil officials must use in formalizing a marriage, using words drawn from the traditional Anglican wedding ceremony. Compare W. VA. CODE § 48-2-404 (2002), with THE BOOK OF COMMON PRAYER 303–08 (1928).

26. Religious authorities perform an estimated sixty to eighty percent of the marriages in the United States. See MARTIN KING WHYTE, DATING, MATING, AND MARRIAGE 56 (1990); Cathy Lynn Grossman & In-Sung Yoo, *Civil Marriage on Rise Across USA*, USA TODAY, Oct. 7, 2003, at 1A.

27. N.Y. DOM. REL. LAW § 12; see also UNIF. MARRIAGE & DIVORCE ACT § 206, 9A U.L.A. 182 (1998) (allowing marriage solemnization “in accordance with any mode of solemnization recognized by any religious denomination, Indian Nation or Tribe, or Native Group”).

28. R.I. GEN. LAWS § 15-1-4 (2003).

29. See, e.g., *Persad v. Bahram*, 724 N.Y.S.2d 560, 563 (Sup. Ct. 2001); *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997).

Given the ease with which civil and religious marriage can be combined, most individuals and clergy understand and treat the occasion as simultaneously a secular and a religious event. By incorporating unofficial law and norms into the civil rite, the state appropriates and reinforces the solemnity of the occasion for its own purposes.³⁰ The twining of secular and sacred operates to impress the couple and the community with the seriousness of the marriage commitment.³¹

In England, with its established church and more complex requirements for solemnizing marriage, members of many minority religious groups cannot readily combine civil and religious marriage ceremonies.³² Among these groups, most couples marry twice, often treating the civil ceremony as a preliminary to the religious wedding.³³ The civil marriage may be important for immigration or other reasons, and problems may arise if one member of the couple later refuses to follow through with a religious ceremony.³⁴ Ihsan Yilmaz argues that Muslim communities in England do not consider a couple with only a civil marriage to be truly married, and they are “expected to abstain from all kind of intimate interactions, and by all means should most definitely not consummate the marriage,” until the religious marriage is concluded.³⁵

Alternatively, couples may marry in a religious ceremony without following the requirements of the civil law, generating a different set of problems. Communities often understand the potential for abuse and the

30. For religious groups, there are corresponding benefits that result from public rituals that reaffirm and transmit group norms. *Cf.* OSCAR G. CHASE, LAW, CULTURE, AND RITUAL 125–37 (2005). Chase writes:

Consider a marriage ceremony conducted under religious auspices. Its primary function is to celebrate and create a particular social relationship, but in the course of doing so, the participants implicitly proclaim and embrace a particular worldview and set of traditions, cement or impair relations with kin, display attitudes toward gifts and food, and, of course, endorse or disclaim a source of sacral authority. The ceremony becomes a way of accomplishing all of those unstated purposes.

Id. at 128–29.

31. Religion is an important dimension of the social and community norms that reinforce marital commitments. On the general importance of these norms, see Scott, *supra* note 7, at 562–65. For empirical evidence that shared religious participation is an important support for marriage, see PAUL R. AMATO ET AL., ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING 193–97 (2007).

32. See HAMILTON, *supra* note 15, at 47–51 (noting that very few Muslim mosques, Hindu or Buddhist temples, or Sikh gurdwaras are registered and approved as places for civil marriages).

33. See PEARL & MENSKI, *supra* note 18, at 168–69.

34. See *id.* at 73–77; see also HAMILTON, *supra* note 15, at 73–79 (discussing refusal to participate in religious ceremony as a basis for annulment of a civil marriage).

35. YILMAZ, *supra* note 18, at 72–74.

risks this poses for women who have no civil status as a wife.³⁶ Despite these risks, some observers report that substantial numbers of Muslim couples are only religiously married.³⁷ For a couple whose marriage would be valid in religious law but not in civil law, as in the case of polygamy, there are obviously additional reasons to avoid civil registration.

The same problems occur in the United States, despite the closer identification of official and unofficial marriage law. Most states broadly define who can officiate at a wedding, with many state statutes providing that a marriage may be solemnized “in accordance with any mode of solemnization recognized by any religious denomination, Indian Nation or Tribe, or Native Group.”³⁸ Civil courts sometimes recognize religious or other ceremonial marriages as valid, even if they were solemnized without a license, under common-law-marriage doctrines and other rules designed to uphold the validity of marriages.³⁹ But these doctrines do not always convert unofficial marriages into official ones. For example, *Farah v. Farah* involved a Muslim wedding conducted in three stages.⁴⁰ After the couple signed a *nikah* agreement in Virginia, there was a proxy ceremony in London, and then a wedding reception and celebration in Pakistan. The couple lived together in Virginia for a year before separating; although they had intended to have a civil marriage ceremony, they never did so. When the wife sought a divorce and equitable distribution of property, the husband challenged the validity of their marriage and persuaded the court not to recognize the marriage because the process of formalization did not meet the requirements of the official law in Virginia, England, or Pakistan.⁴¹

B. THE INTERACTION OF RELIGIOUS AND CIVIL LAW

American statutes create the opportunity for celebrating civil and religious marriage simultaneously, but generally do not attempt to enforce a requirement of civil marriage.⁴² Determining how to coordinate official and

36. *See id.*

37. *Id.* at 74; *see also* Stéphanie Le Bars, *Des jeunes musulmans veulent s'affranchir du mariage civil*, LE MONDE, June 9, 2007, available at <http://www.lemonde.fr/web/article/0,1-0@2-3224,36-920659,0.html>.

38. UNIF. MARRIAGE & DIVORCE ACT § 206(a), 9A U.L.A. 182 (1998); *see also* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 37–39 (2d ed. 1988).

39. *See, e.g.*, *Carabetta v. Carabetta*, 438 A.2d 109, 111–13 (Conn. 1980); *State v. Phelps*, 652 N.E.2d 1032, 1035–36 (Ohio Ct. App. 1995).

40. *Farah v. Farah*, 429 S.E.2d 626 (Va. Ct. App. 1993).

41. *Id.* According to the decision, the marriage contract stipulated that the wife should receive a \$20,000 deferred dower payment, but the opinion does not address whether this right could be enforced under civil law. Because the appellate court ruled that the divorce was improper, it also vacated the trial court's order for equitable distribution of the jointly owned residence, with the appellate court noting: “We leave the parties free to seek such other remedies as are appropriate to determine and resolve their property rights.” *Id.* at 630.

42. In many civil-law countries, like France, religious clergy are prohibited from marrying a couple who have not already been married in a civil ceremony. Only a few states in the United

unofficial law is left primarily to the members of each religious community. Different groups take different approaches to the interaction between religious and secular laws, but official and unofficial law function relatively harmoniously together in the celebration of marriages.⁴³

For many centuries, Jewish communities located within non-Jewish states or empires were treated as separate and autonomous enclaves, exercising internal authority over marriage and divorce.⁴⁴ As David Novak explains, Jewish law developed principles of deference to non-Jewish law in most civil and criminal matters, except for marriage and divorce.⁴⁵ As he writes, these areas “are considered to be matters too far within the interior of covenantal Jewish life to be allowed any non-Jewish jurisdiction over them whatsoever.”⁴⁶ Once European Jews were emancipated, however, they lost many of their communal privileges and became simply private associations or local congregations with limited power over community members. Jewish communities accepted the new institution of civil marriage, and most Jews now marry under both civil and religious law.⁴⁷

Novak points out the paradox of two separate jurisdictions, each asserting its own priority: “Even though the secular state has made participation in a religious marriage something *subsequent* to participation in civil marriage, traditional Jews have regarded their involvement in civil marriage as a necessity of their participation in civil society, but a necessity to which their subordination to Jewish law is *prior*.”⁴⁸ As he notes, the state

States take this approach. *E.g.*, N.Y. DOM. REL. LAW § 17 (McKinney 1999) (defining misdemeanor offense for solemnization of marriage without a civil license). As Michael Brody notes, any prosecution under this statute would raise significant First Amendment questions. MICHAEL J. BRODY, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW 144 (2001).

An English statute prohibits solemnizing a marriage in a place other than a building registered for that purpose, but the law has not been applied to clergy who perform only religious marriages in such a place. HAMILTON, *supra* note 15, at 40–41.

43. International conflict-of-laws rules address related, and more complex, questions for transnational families. *See, e.g.*, Marie-Claire Foblets, *Moroccan Women in Europe: Bargaining for Autonomy*, 64 WASH. & LEE L. REV. 1385, 1399–1407 (2007) (describing the interaction of French and Moroccan marriage law).

44. Jews did not receive full citizenship in many Western European countries until the second half of the nineteenth century. *See generally* PATHS OF EMANCIPATION: JEWS, STATES, AND CITIZENSHIP (Pierre Birnbaum & Ira Katznelson eds., 1995); Lois C. Duban, *Jewish Women, Marriage Law, and Emancipation: A Civil Divorce in Late-Eighteenth-Century Trieste*, 13 JEWISH SOC. STUD. 65, 67–70 (2007) (describing the early interaction of Jewish and civil marriage laws).

45. *See generally* Novak, *supra* note 23, at 1061–68 (discussing the Talmudic principle that “the law of the Government is law”).

46. *Id.* at 1064. A traditional exception to this principle allows the use of civil authority to compel a man to follow the order of a Jewish rabbinical court to give his wife a *get*, or bill of divorce, discussed below.

47. *Id.* at 1070–71 (discussing the council of rabbis convened by Napoleon in 1807 to consider this point); *see also* SIMON SCHWARZFUCHS, NAPOLEON, THE JEWS, AND THE SANHEDRIN 191 (1979).

48. Novak, *supra* note 23, at 1071.

requires only compliance with secular authority, and religious people can determine “whether or not such compliance is consistent with their ultimate commitment to the authority of their God as revealed and transmitted to them by their own tradition.”⁴⁹

Islamic jurisprudence concerning the obligations of individual Muslims who live in non-Muslim nations is complex, “characterised by ambivalence and great diversity of thought,” but requires at a minimum that Muslims live where they can fulfill their religious obligations.⁵⁰ David Pearl and Werner Menski describe the development of an English Islamic law, or *angrezi shariat*, as an effort to allow British Muslims “to restructure their lives in accordance with *shari’a* as well as the requirements of English law.”⁵¹

Among Islamic communities in non-Muslim countries, there are different practices concerning marriage. While many Muslim clergy solemnize marriages under both religious and civil law, some Muslim weddings may not meet the requirements of state marriage laws.⁵² Marriage in Islam, or *nikah*, is based on a contractual principle and may be formalized without religious clergy, with an exchange of consents before two qualified witnesses. Couples may not be aware of the difference between civil and religious marriage, or of the legal benefits of marriage under state law.⁵³ In France, despite laws that require completion of civil marriage formalities before a religious marriage is performed, a recent report suggests that many young Muslim couples marry only under religious law.⁵⁴ Having a religious but not a civil marriage allows a couple to have sexual relations and cohabit without violating community norms. This choice may be a political statement, and it clearly reflects a world view in which compliance with religious law is felt to be more important than adherence to civil law. In some cases, a religious marriage without secular formalities may be more attractive because it allows couples to avoid the complexities of civil divorce or because it facilitates the practice of polygamy.⁵⁵

49. *Id.*

50. PEARL & MENSKI, *supra* note 18, at 62–65.

51. *Id.* at 65.

52. For example, see *Farah v. Farah*, 429 S.E.2d 626 (Va. Ct. App. 1993), discussed *supra* at notes 40–41. See also, e.g., CESARI, *supra* note 25, at 57–60; Quraishi & Syeed-Miller, *supra* note 15, at 188.

53. In unusual cases, the decision to marry only religiously reflects a rejection of civil marriage. The argument that Muslims are not permitted to conclude civil marriages is an extreme position, taken by Sheikh Omar Bakri Muhammad, a London-based cleric. Omar Bakri Muhammad, *The Islamic Verdict on Civil/Registered Marriages* (Mar. 9, 2000), http://www.mrc.org.uk/marriage_2.php.

54. Le Bars, *supra* note 37.

55. *Id.* In some traditions, couples may choose to marry after a betrothal period to allow an opportunity for courtship consistent with community norms. See, e.g., GENEIVE ABDO, *MECCA AND MAIN STREET: MUSLIM LIFE IN AMERICA AFTER 9/11*, at 31–32 (2006) (describing the use of the *katbil kitab* ceremony by an Egyptian-American couple).

These issues are not limited to individuals living in a few insular ethnic enclaves. Several years ago, a law student came to my office after our discussion of the *Farah* case.⁵⁶ He told me that he had recently signed a *nikah* agreement with a woman, and that a wedding celebration was planned to take place in California the following summer. He and his fiancée, as he referred to her, had slept together after they signed the *nikah*, but he was having second thoughts about going through with the marriage. Were they already married?⁵⁷

Broadening the marriage-celebration rules of official law to take account of the distinct traditions of formalization in different cultural and religious groups is an important means of incorporating members of all groups into the wider social and political community. This is a useful point of convergence and consensus in a multicultural community. Here, religion and the state can speak together. Marriage is clearly understood across secular and religious frames to be a good thing, something to be encouraged, upheld, and validated. For families, the opportunity to celebrate civil and religious marriage simultaneously is beneficial at both a symbolic level and a pragmatic one: concluding marriages with a single ceremony prevents the ambiguity and potential complications of different status in civil and religious law.

III. CONFLICT AND ACCOMMODATION

Advocates of pluralized or privatized marriage may imagine a system in which public and private regulation dovetail in the relatively harmonious manner of marriage-celebration rules. Civil and religious laws come into more substantial conflict at the point of marriage dissolution, however. Divorce disputes involve two individuals with different interests; these individuals may also have different rights under official and unofficial law, different understandings of their religious tradition and practice, and different motivations to seek recourse from the state. In this setting, official law operates to protect a range of individual rights that may stand opposed to religious norms, and unofficial law operates to define and defend the boundaries and membership of those communities.

56. See *supra* notes 40–41 and accompanying text.

57. As a matter of official law, the question was complicated by the fact that these events took place in a common-law-marriage state. See, e.g., *State v. Phelps*, 652 N.E.2d 1032, 1035–36 (Ohio Ct. App. 1995) (sustaining a marriage based on Islamic ceremony as a common-law marriage). The question whether there was a common-law marriage should depend on whether they had expressed a present intention to be married by signing the *nikah*. In a common-law-marriage state, the official law consequences of a religious wedding ceremony should correspond with the predominant understanding of their status under the unofficial law of their community.

A. DIVORCE

Divorce presents a more complicated arena of interaction because of the conflict between civil divorce laws and the religious laws or norms of many groups. For Catholics and Hindus, whose religions prohibit divorce, secular laws that narrowly limited access to divorce were a better fit with unofficial religious norms. For this reason, the Roman Catholic Church worked strenuously for many years against the easing of official divorce laws in the United States.⁵⁸ Once lawmakers enacted no-fault divorce laws, some individuals attempted without success to resist civil divorce actions on religious grounds, arguing that entry of a no-fault divorce decree would violate their rights under the First Amendment.⁵⁹ Citing free-exercise and establishment barriers, courts identified the central problem with this defense as a conflict between religious views: to deny a divorce based on one partner's religious convictions would impose those religious values on the other partner. One of these decisions quotes from the New Testament: "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's."⁶⁰ Implicit in this response is the court's conclusion that civil divorce belongs to the state, as a purely secular matter, and that questions of religious belief and practice are entirely beyond its ken.

Religious communities have maintained the norms that discourage or prohibit divorce; yet as divorce rates have risen across societies, they have also increased for the membership of these groups. For members of groups that prohibit divorce, a civil dissolution of marriage creates the possibility of a limping marriage, terminated in official law but still binding in religious law. This is a concern for Roman Catholics, divorced in the civil courts, who cannot participate fully in the religious life of their community if they remarry without first obtaining an annulment of their marriage under canon law.⁶¹ To accommodate this concern, the numbers of annulments granted

58. See NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 203–25 (1962); see also Melinda Henneberger, *John Paul Says Catholic Bar Must Refuse Divorce Cases*, N.Y. TIMES, Jan. 29, 2002, at A4. The position of the Church was elaborated in the 1931 encyclical of Pope Pius XI, *Casti conubii*, and in a statement in 1958 by American bishops. BLAKE, *supra*, at 229.

59. E.g., *Sharma v. Sharma*, 667 P.2d 395, 395 (Kan. Ct. App. 1983); *Wikoski v. Wikoski*, 513 A.2d 986, 986 (Pa. Super. Ct. 1986); *Waite v. Waite*, 150 S.W.3d 797, 801 (Tex. App. 2004); *Trickey v. Trickey*, 642 S.W.2d 47, 49 (Tex. App. 1982); see also *Hunt v. Hunt*, 648 A.2d 843, 846 (Vt. 1994) (husband refusing to pay child support because his religion does not permit him to support his children who were taken outside their religious commune; imposition thus violated his right to the free exercise of religion).

60. *Wikoski*, 513 A.2d at 989 (quoting *Matthew* 22:21).

61. See generally CHESTER GILLIS, *ROMAN CATHOLICISM IN AMERICA* 163–66 (1999) (describing Catholic teachings on marriage).

by the Church have increased dramatically over the past thirty years, and this trend has been a source of internal debate.⁶²

For Muslims and Jews, whose religious law has permitted divorce for many centuries, civil divorce laws create a different limping marriage problem. Both systems of law permit divorce, but just as the state does not recognize a religious divorce, the religious community does not recognize a civil divorce as ending a religious marriage. The intersection of civil and religious law is made more complicated by the fact that in these systems the legal rights of husbands are different than the legal rights of wives. These differences create opportunities for strategic behavior in civil divorce proceedings.⁶³

To conclude a divorce, Jewish law requires that a husband deliver a document known as a *get* to his wife in a process carried out before a rabbinic tribunal.⁶⁴ As this requirement has been implemented in rabbinic tradition, both husband and wife must participate willingly in the process, and neither party is free to remarry until the *get* has been given and accepted. A married woman who no longer lives with her husband but has not received a *get* is known as an *agunah*, a woman “chained” or “anchored” to her husband. The consequences for a married woman who remarries without a *get* are much more serious than the consequences for a married man.⁶⁵ Many writers have described the dilemma created when a spouse refuses to cooperate in a *get* proceeding unless his or her demands for custody or a financial settlement are met.⁶⁶ Traditional Jewish communities take the *agunah* problem quite seriously, and may attempt to pressure a spouse to participate in a *get* procedure through the use of sanctions such as shaming or ostracism.

62. See generally *id.* For a sense of the controversy, see generally ROBERT H. VASOLI, WHAT GOD HAS JOINED TOGETHER: THE ANNULMENT CRISIS IN AMERICAN CATHOLICISM (1998). Generally, an individual can obtain a religious annulment only after the civil marriage has been dissolved. See generally JOSEPH P. ZWACK, ANNULMENT: YOUR CHANCE TO REMARRY WITHIN THE CATHOLIC CHURCH 13–36 (1983).

63. There are fewer opportunities for strategic behavior in the Roman Catholic context, since annulment is under the control of church authorities and does not depend on the consent of the parties to the marriage. This does not eliminate conflict between spouses over the annulment question, however. See, e.g., SHEILA RAUCH KENNEDY, SHATTERED FAITH: A WOMAN'S STRUGGLE TO STOP THE CATHOLIC CHURCH FROM ANNULING HER MARRIAGE, at xii–xvi (1997).

64. See *Deuteronomy* 24:1. See generally IRVING BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY (1993); BROYDE, *supra* note 42; Novak, *supra* note 23.

65. Although it is controversial, there is an alternative available under Jewish law to assist a husband whose wife has improperly refused to accept a *get*. See BREITOWITZ, *supra* note 64, at 13–14 (describing the *heter meah rabbanim* or “permission of 100 rabbis”).

66. See, e.g., *id.* at 20–23; Estin, *supra* note 3, at 578.

At its core, the *agunah* problem derives from the split between religious and secular authority over marriage.⁶⁷ Local communities and Jewish courts do not have sufficient power or authority to force the cooperation of a recalcitrant spouse. When *get* controversies spill over into official divorce proceedings, state judges have confronted the question of whether these disputes can be remedied under the official law, using secular principles of contract, property, or matrimonial law.

In these cases, state courts have considered whether the written agreement signed by a Jewish couple prior to their marriage, known as a *ketubah*, can be construed as a promise to cooperate in a *get* proceeding before a rabbinic tribunal should the marriage come to an end, and whether such a promise can be enforced by a secular court.⁶⁸ Courts have reached different conclusions in these cases, and the problem is made more complex by the fact that a *get* given or accepted under pressure from a civil court may be invalid as a matter of Jewish law.⁶⁹ One innovative approach, approved by the New York Court of Appeals in *Avitzur v. Avitzur*, was the inclusion of explicit language in a *ketubah* that recognized the jurisdiction of a specific rabbinic tribunal or *bet din* over marital disputes.⁷⁰ The court viewed this provision as analogous to an arbitration clause and held that it provided the civil court with authority to order the parties to appear before the *bet din*. Since *Avitzur*, a broad range of Orthodox and Conservative Jewish communities have experimented with premarital and arbitration agreements intended to secure the assistance of the civil courts in bringing Jewish couples before a rabbinic tribunal.⁷¹

B. LEGISLATIVE RESPONSES TO RELIGIOUS DIVERSITY

Jewish communities in New York and elsewhere have attempted to address the *agunah* problem by seeking civil statutes that prevent a Jewish spouse from securing a secular divorce until the *get* process has been concluded. Under New York's *get* law, enacted in 1979, a court cannot grant

67. In Israel, where religious courts exercise jurisdiction over marriage and divorce, the *agunah* problem is much smaller and "revolves around the decision of the rabbinical courts to not impose sanctions encouraging or mandating divorce except where it is absolutely clear that the marriage is irreconcilably over, or where there is clearly demonstrable hard fault present." BROYDE, *supra* note 42, at 10.

68. Compare *Mayer-Kolker v. Kolker*, 819 A.2d 17, 20–21 (N.J. Super. Ct. App. Div. 2003), and *In re Marriage of Victor*, 866 P.2d 899, 902 (Ariz. Ct. App. 1993), with *In re Marriage of Goldman*, 554 N.E.2d 1016, 1021–22 (Ill. App. Ct. 1990).

69. See BREITOWITZ, *supra* note 64, at 20–40.

70. *Avitzur v. Avitzur*, 446 N.E.2d 136, 137 (N.Y. 1983). This provision, known as a "Lieberman clause," developed within the Conservative movement to attempt to prevent the *agunah* problem.

71. See, e.g., Marc D. Stern, *A Legal Guide to the Prenuptial Agreement for Couples About to Be Married*, in THE PRENUPTIAL AGREEMENT: HALAKHIC AND PASTORAL CONSIDERATIONS 37, 37–44 (Basil Herring & Kenneth Auman eds., 1996).

a divorce or annulment to any petitioner whose marriage was solemnized in the state by a religious official until the petitioner provides a sworn statement that he or she has “taken all steps solely within his or her power” to remove any religious barriers to the other party’s remarriage.⁷² A second law, enacted in 1992, permits the civil courts to take religious barriers to remarriage into account in determining the financial incidents of a divorce decree.⁷³

Avitzur and the *get* laws exemplify the complex and dynamic relationship between official and unofficial law that has followed the expansion of civil divorce laws. Together, these developments have established a framework for interaction between secular and religious courts, presenting numerous First Amendment questions that have seen considerable discussion in case law and other literature.⁷⁴ From this process, a new model has emerged in which religious courts or clergy function as arbitrators to resolve marriage and divorce disputes. After arbitration, one member of the couple may bring the settlement or judgment to a secular court for enforcement as an arbitration award.⁷⁵

A number of these cases that have reached the courts raise a concern that the applicable religious or customary law or procedures put women at a disadvantage.⁷⁶ Courts have set aside arbitration awards when there is evidence of undue pressure or overreaching, and courts generally refuse to enforce agreements to arbitrate custody or child-support matters.⁷⁷ In practice, in order to ensure that their orders will be upheld and enforced by secular courts, religious arbitrators have learned to address these concerns.

72. N.Y. DOM. REL. LAW § 253(3) (McKinney 1999) (discussed in *Sieger v. Sieger*, 829 N.Y.S.2d 649, 651–52 (App. Div. 2007); *Friedenberg v. Friedenberg*, 523 N.Y.S.2d 578, 580–81 (App. Div. 1998)). The legislature carefully formulated the statute to apply only to Jews married in a religious ceremony and accomplished this despite the fact that the statute makes no explicit reference to Jews or the Jewish religion. Canada and England have enacted similar legislation. JOHN SYRTASH, *RELIGION AND CULTURE IN CANADIAN FAMILY LAW* 147–67 (1992); *Divorce (Religious Marriages) Act, 2002, c. 27* (Eng.).

73. The first *get* law had broad support across the Jewish community in New York, but the second law was more controversial because of a concern that a *get* given or accepted by a spouse in response to financial pressure from a civil court might not be valid under Jewish law. See BROYDE, *supra* note 42, at 103–17; Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703, 703 (1995).

74. See, e.g., BREITOWITZ, *supra* note 64, at 251–76; Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 811–39 (1998).

75. E.g., *Kovacs v. Kovacs*, 633 A.2d 425, 429 (Md. Ct. Spec. App. 1993).

76. E.g., *Stein v. Stein*, 707 N.Y.S.2d 754, 759 (Sup. Ct. 1999). See generally Estin, *supra* note 3, at 583–86. Cf. *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607, 641 (Can.) (upholding a wife’s claim for damages based on her former husband’s breach of his agreement to provide her with a *get* and concluding that his religious-freedom claim was outweighed by the substantial harm to the wife personally and to the public interest in protecting fundamental values of equality and “autonomous choice in marriage and divorce”).

77. E.g., *Kovacs*, 633 A.2d at 431–32; *Stein*, 707 N.Y.S.2d at 758.

Some Muslim groups in Canada and England have sought to go further and establish a separate system of Muslim personal law with a semi-official status, available to those group members who choose to invoke religious or customary law norms.⁷⁸ According to Pearl and Menski, one important reason for the development of an informal Muslim dispute-resolution process in England was the problem created when a woman sought and obtained a civil divorce, but could not obtain her husband's consent to an Islamic divorce.⁷⁹

Under Islamic law, a husband has the power to divorce his wife unilaterally by pronouncing *talaq*, but a wife's options for obtaining a divorce are more limited. Typically, she must obtain her husband's consent to a *khula* divorce, which usually requires that she relinquish her right to the marriage payment (or *mahr*) promised by the husband in their marital agreement.⁸⁰ Informal conciliation or arbitration within the Muslim community may achieve a settlement, but some disputes over *mahr* reach the official courts, where the question is whether the courts can enforce a Muslim marital agreement as a civil contract.⁸¹ In countries with Islamic courts, judges have developed a judicial *khula* divorce that may be available to a wife whose husband refuses to consent to divorce.⁸² Where there are no recognized Islamic courts, a wife may have no means to overcome her husband's refusal to agree to a divorce, and no leverage to negotiate over keeping her *mahr* or obtaining a financial settlement.⁸³

In London, the Islamic Shari'a Council is a well-established organization, providing conciliation services and also acting as a court to grant such a *khula* divorce.⁸⁴ Development of this unofficial forum for dispute resolution was facilitated by the fact that the Muslim minority

78. E.g., Ali & Whitehouse, *supra* note 1, at 168. See generally YILMAZ, *supra* note 18, at 59–61; POULTER, *supra* note 18. According to Cesari, “in general, such extremely marginal demands have come from radical, highly politicized groups, whose objective is to establish an Islamic State—thus making any effort to reflect upon *Shari'a* in a non-Muslim context irrelevant.” CESARI, *supra* note 25, at 56.

79. PEARL & MENSKI, *supra* note 18, at 79–80.

80. See *id.* at 283–84.

81. See, e.g., Marriage of Noghrey, 215 Cal. Rptr. 153, 155 (Ct. App. 1985); Odatalla v. Odatalla, 810 A.2d 93, 94 (N.J. Super. Ct. Ch. Div. 2002); see also Estin, *supra* note 3, at 569–77; Quraishi & Syeed-Miller, *supra* note 15, at 200–08.

82. See Nadya Haider, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J.L. & FEMINISM 287, 316, 326–38 (2000).

83. On this point, see Lucy Carroll, *Muslim Women and Judicial Divorce: An Apparently Misunderstood Aspect of Muslim Law*, 5 ISLAMIC & COMP. L.Q. 226, 1226–27 (1985). Carroll is critical of the Islamic Sharia Council in London for insisting that women obtain a *khul* divorce and make financial concessions even after obtaining a civil divorce. See Lucy Carroll, *Muslim Women and 'Islamic Divorce' in England*, 17 J. MUSLIM MINORITY AFF. 97, 105–11 (1997).

84. PEARL & MENSKI, *supra* note 18, at 74–80. While unofficial, the Sharia Council also provides advice to lawyers and judges in some cases. See *id.* at 78. For more information, see Islamic Sharia Council, <http://www.islamic-sharia.org> (last visited Nov. 9, 2008).

population in England is relatively concentrated and that it originated with South Asian immigrants with similar legal traditions.⁸⁵ The Orthodox Jewish community in England also operates in a relatively centralized manner, with a Chief Rabbi and rabbinic court that have been based in London for two hundred years.⁸⁶ The London *Beth Din* is available as an arbitration tribunal for all types of civil disputes; it requires that parties sign an arbitration agreement before any hearing takes place, so that the order of the *Beth Din* has the force of an arbitration award enforceable in the civil courts.⁸⁷ In both the Muslim and Jewish communities, religious tribunals are now conducting arbitrations under religious law as a form of alternative dispute resolution within the larger framework of English law.⁸⁸

In Canada, public controversy erupted after the announcement in 2003 that a new Islamic Institute of Civil Justice would begin conducting binding arbitration of disputes under Islamic law and Ontario's Arbitration Act, leading Ontario's Attorney General to appoint Marion Boyd to review the question of religious arbitration in family disputes.⁸⁹ After extensive consultations, Boyd's report in December 2004 summarized a wide range of

85. PEARL & MENSKI, *supra* note 18, at 59–61. Muslim communities in Europe tend to be more homogenous, with a predominance of South Asian immigrants in Britain, Muslims from the Maghreb in France, and Turks in Germany.

86. For more information, see The Chief Rabbinate, http://www.chiefrabbi.org/rabbinate/the_chief.html (last visited Nov. 6, 2008) and The United Synagogue: The London Beth Din, http://www.unitedsynagogue.org.uk/the_united_synagogue/the_london_beth_din/about_us (last visited Nov. 6, 2008). For the Consistoire Israélite de Paris in France, see Consistorie de Paris, <http://www.consistoire.org> (last visited Nov. 6, 2008). *See also* ATLAN, *supra* note 14, at 99–113.

87. *See* The United Synagogue: Litigation, http://www.theus.org.uk/the_united_synagogue/the_london_beth_din/litigation (last visited Nov. 6, 2008).

88. Elaine Sciolino, *Britain Grapples with Role for Islamic Justice*, N.Y. TIMES, Nov. 19, 2008, at A1; Abul Taher, *Revealed: UK's First Official Sharia Courts*, SUNDAY TIMES (London), Sept. 14, 2008, at 2. In July 2008, Lord Phillips of Worth Matravers, the Lord Chief Justice, commented in a speech:

“There is no reason . . . why principles of sharia law, or any other religious code, should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales.”

Minette Marrin, *Tolerate Sharia, Yes, But Never Respect It*, SUNDAY TIMES (London), July 6, 2008, at 20 (quoting the Lord Chief Justice, Lord Philips); *see also* Steve Doughty, *Islam Law 'Can Be Used': Sharia Code Is Fine for Solving Disputes, Says the Top Judge*, DAILY MAIL (London), July 4, 2008, at 11, available at <http://www.dailymail.co.uk/news/article-1031611/Sharia-law-SHOULD-used-Britain-says-UKs-judge.html>; Christopher Hope & James Kirkup, *Muslims in Britain Should Be Able to Live Under Sharia, Says Top Judge*, DAILY TELEGRAPH (London), July 4, 2008, <http://www.telegraph.co.uk/news/uknews/2242340/Muslims-in-Britain-should-be-able-to-live-under-Sharia-law,-says-top-judge.html>.

89. *See generally* BOYD, *supra* note 20. The issues are also discussed in Jehan Aslam, Note, *Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship*, 38 N.Y.U. J. INT'L L. & POL. 841, 842 (2006).

opinions and concerns. She recommended that religious arbitration should continue to be available as a form of alternative dispute resolution in family law and inheritance cases, subject to an extensive series of safeguards outlined in her report.⁹⁰ The province subsequently adopted many of Boyd's recommendations in legislation that permits arbitration by religious arbitrators, but the legislation rejected the prospect of arbitration based on religious law, mandating instead that all family-law arbitration in the province be conducted exclusively under Ontario and Canadian law.⁹¹

The debate around religious arbitration in Ontario, and the detail of Marion Boyd's recommendations to the Ontario Attorney General, are indications of the enormous challenges involved in integrating systems of official and unofficial law. The process Boyd outlined was based on principles of contract, but her recommendations suggest that an agreement to submit to the jurisdiction of religious authorities poses particular problems not found in other arbitration agreements or marital contracts.⁹² Boyd proposed that if arbitrators intended to apply a form of law other than Ontario law to decide the dispute, that law should be identified in the written arbitration agreement and accompanied by a written "statement of principles of faith-based arbitration that explains the parties' rights and obligations and available processes under the particular form of religious law."⁹³ In addition, she recommended a requirement that any agreement to arbitrate in a cohabitation agreement or marriage contract must be reconfirmed in writing at the time of the dispute and before arbitration occurred.⁹⁴

Boyd's recommendations were intended to assure the genuine consent of participants to a religious arbitration proceeding, and also to address the

90. The report explained background principles of Ontario's arbitration law, family law, and inheritance law, and carefully reviewed the implications of the Canadian Charter of Rights and Freedoms. See BOYD, *supra* note 20, at 133–42. Boyd made detailed recommendations for legislation and regulations that would address issues including the grounds for setting aside arbitration agreements or awards, screening for domestic violence, independent legal advice for those participating in family or inheritance arbitration, training and education for arbitrators and mediators, and mechanisms for oversight of private arbitration and mediation. *Id.*

91. Family Statute Law Amendment Act, S.O. 2006, ch. 1 (Ont.) (assented to Feb. 23, 2006). The Act and new regulations came into force on April 30, 2007. Ontario, Ministry of the Attorney General, <http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration> (last visited Oct. 7, 2008).

92. Boyd recommended that mediation and arbitration agreements should be in writing, signed by the parties and witnessed, and subject to scrutiny on the same grounds as other domestic contracts, including review for duress and unconscionability. See BOYD, *supra* note 20, at 133–37. She also recommended development of forms and procedures governing arbitration that would provide extensive disclosures to the parties of the rights and remedies available under Ontario law. *Id.*

93. *Id.* at 136–37. These issues were mooted by subsequent legislation, which does not permit enforcement of arbitration orders based on religious law.

94. *Id.* at 134.

problem of exit rights and the risk that one member of a couple or family might have conscientious or religious objections to appearing before a religious tribunal. This is the most difficult problem in a contract-based approach to legal pluralism.

C. CONSENT, DISSENT, AND EXIT

In nations with civil marriage and divorce laws, individual members of religious communities may turn to the secular legal system even when these laws are at odds with religious or other group norms. These choices are protected by the official family-law system as well as constitutional principles of freedom of religion. Some group members make this choice even as they intend to maintain their membership in the religious community. Religious groups, which cannot use the power of the state to enforce their internal norms, are then challenged to find other means of influencing or responding to the choices of group members.

The requirement to obtain a religious annulment or divorce as a condition of remarriage within the community is one response that is often, but not always, successful in maintaining the group norm. Sanctions such as shunning or excommunication are a stronger response. Thus, husbands or wives who refuse a summons to appear before a rabbinic tribunal may be subject to a *siruv*, or communal ostracism.⁹⁵ This type of sanction poses complex questions of religious law, which are not subject to the interference or regulation of civil authorities.⁹⁶

Over time, groups may come to accommodate the choices made by their members with new institutions and practices. In the United States, this type of change is reflected in the very high rate of marriage annulments now granted by the Roman Catholic Church,⁹⁷ and the different approaches to religious divorce and intermarriage that characterize the liberal branches of

95. See *Greenberg v. Greenberg*, 656 N.Y.S.2d 369, 370 (App. Div. 1997) (rejecting a wife's duress argument after she signed a release to avoid the issuance of *siruv*).

96. See *Lieberman v. Lieberman*, 566 N.Y.S.2d 490, 496 (Sup. Ct. 1991) (holding that the threat of ostracism does not invalidate a party's agreement to religious arbitration of marital disputes). Civil courts also refuse to question the ruling of religious authority on issues of marriage and divorce. See, e.g., *Sieger v. Union of Orthodox Rabbis*, 767 N.Y.S.2d 78, 80 (App. Div. 2003); see also N.Y. DOM. REL. LAW § 253(9) (McKinney 1999).

Courts typically reject tort-law challenges brought by group members to shunning orders. See, e.g., *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 879 (9th Cir. 1987); *Gruenwald v. Bornfreund*, 696 F. Supp. 838, 841 (E.D.N.Y. 1988); *Thomas v. Fuerst*, 803 N.E.2d 619, 625 (Ill. App. Ct. 2004); *Neiman Ginsburg & Mairanz, P.C. v. Goldburd*, 684 N.Y.S.2d 405, 406 (Sup. Ct. 1998). But see *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107 (Pa. 1975) (holding that excommunication from church might constitute excessive interference with areas of paramount state concern like marriage). See generally Michael J. Broyde, *Forming Religious Communities and Respecting Dissenters' Rights: A Jewish Tradition for a Modern Society*, in *HUMAN RIGHTS IN JUDAISM* (Michael J. Broyde & John Witte, Jr. eds., 1998).

97. See sources cited *supra* note 62.

Judaism.⁹⁸ In the term used by Madhavi Sunder, this is a process of “cultural dissent” that gives rise to new interpretations of religious and cultural norms and a plurality of practices within these traditions.⁹⁹ Pluralism within a broad tradition provides individuals with important alternatives to a complete exit from the group.¹⁰⁰

Legal pluralism creates opportunities for forum shopping, and individuals respond creatively to these opportunities.¹⁰¹ Law becomes relevant only when people have to deal with problematic situations, and the choices individuals will make cannot be inferred from the normative demands of the different legal orders within which they operate.¹⁰² The dialogue within and between traditions unfolds within parameters set by both official and unofficial law. It has generated interesting and creative solutions to problems of marriage and divorce in a number of communities. These include the development of new types of premarital agreements in different Muslim and Jewish communities, designed to be enforceable in secular courts, which address some of the gender inequalities of traditional practices.¹⁰³ These developments reflect a dynamism that is typical of legal pluralism.¹⁰⁴

Beyond the norms of divorce law constructed in the interactions of official and unofficial law, the process through which actors in these systems negotiate the relationship of distinct legal orders has consequences for their self-definition as a community and their authority and power within the broader society.¹⁰⁵ For some participants, official recognition of unofficial

98. See generally Jack Wertheimer, *What Is a Jewish Family? Changing Rabbinic Views*, in MARRIAGE, SEX AND FAMILY IN JUDAISM 244, 254–56 (Michael J. Broyde ed., 2005).

99. Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498 (2001).

100. See, e.g., ABDO, *supra* note 55, at 37–43.

101. For an interesting early example, see Duban, *supra* note 44, at 80 (describing a woman’s successful effort to procure both civil and religious divorces in the late eighteenth century).

102. Benda-Beckmann, *supra* note 11, at 24–25.

103. On contemporary Muslim marriage contracts, see YVONNE YAZBECK HADDAD ET AL., MUSLIM WOMEN IN AMERICA: THE CHALLENGE OF ISLAMIC IDENTITY TODAY 113–19 (2006); Quraishi & Syeed-Miller, *supra* note 15, at 188–92. On the use of new types of premarital agreements to address the *get* problem in different Jewish communities, see BROYDE, *supra* note 42, at 66–68, 82, 86, 127–36. See also CESARI, *supra* note 25, at 56–63 (describing the process of “secularization” of Shari’a family law in Europe and the United States). See generally Estin, *supra* note 3, at 598–603 (describing the process of dialogue and accommodation between secular and religious traditions).

104. Benda-Beckmann, *supra* note 11, at 19 (“Under conditions of legal pluralism elements of one legal order may change under the influence of another legal order, and new, hybrid or syncretic legal forms may emerge and become institutionalized, replacing or modifying earlier legal forms or co-existing with them.”).

105. Cf. *id.* at 26–27 (discussing the relation between legal arenas and the conflict between them); see also *supra* note 30 (describing the use of the marriage ceremony to transmit group norms).

law is itself a goal to be accomplished by claiming jurisdiction over families and family members.¹⁰⁶

These conflicts would also exist in the context of privatized or pluralized marriage law. Just as secular family law does not map perfectly on religious or other unofficial norms, a regulatory regime based on contract or arbitration would sometimes diverge from religious rules and understandings. Debates over the context of religious and cultural traditions and the scope and meaning of group membership might shift, but they would not disappear. These conflicts would intensify if more were at stake, a phenomenon that is well-known in nations with explicitly pluralist family-law systems.¹⁰⁷ Just as there are reasons to believe that religious communities are more vibrant and individual religious commitments stronger in contexts where religion is not established by the state,¹⁰⁸ there are reasons to believe that the fluidity of belief, practice, and membership in religious communities in these circumstances may contribute to their flourishing.¹⁰⁹

In conditions of official legal pluralism, there is the further need for rules by which the state defines the scope of group jurisdiction and addresses the conflict of laws between different authorities. More problematically, these systems also require rules to assign group membership, and to define the circumstances in which individuals are permitted to change their group membership.¹¹⁰ Here as well, religious authorities and the civil state have different interests, and conflicts over subgroup membership and rights can undermine the sense of broader national affiliation.

IV. PROHIBITIONS AND GATEKEEPING

Historically, norms of marital capacity in the United States have been strenuously contested.¹¹¹ More than a century ago, the Supreme Court denied First Amendment protection to religiously based polygamy in

106. See Benda-Beckmann, *supra* note 11, at 32 (“[U]nderstanding change in plural legal constellations requires looking at the connections between the various co-existing substantive and procedural legal norms, the actors using them, and in particular the political and administrative authorities and decision-making institutions of the respective systems.”).

107. See, e.g., Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT’L L. & FOREIGN AFF. 339, 347–52 (2000); Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women’s Rights in India*, 23 BERKELEY J. INT’L L. 201, 209–19 (2005).

108. See NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 212 (2000).

109. See SHACHAR, *supra* note 4, at 120–26.

110. See generally e.g., Audi, *supra* note 6 (reporting a ruling that permitted twelve Coptic Christian men, who had converted to Islam in order to be able to divorce, to return formally to their original faith); Gorenberg, *supra* note 6 (discussing the proof of Jewish identity required by rabbinic courts for Jewish immigrants seeking to marry in Israel).

111. See generally COTT, *supra* note 108 (examining the history of public policies on marriage).

Reynolds v. United States, characterizing it as an “odious” practice that, except for Mormons, was “almost exclusively a feature of the life of Asiatic and African people.”¹¹² A generation ago, after a twenty-year debate, the Court placed interracial marriage firmly in the ambit of constitutional right in *Loving v. Virginia*, holding that state laws limiting marriage rights on the basis of race violated the Due Process and Equal Protection Clauses.¹¹³ By the late twentieth century, conflicts over multiculturalism and civil recognition for same-sex-partner relationships had prompted a broad new debate over the official definition of marriage. As in the past, the present marriage debate reveals a close connection between marriage norms and the definition of citizenship or membership in the broader social and political community.¹¹⁴

In America, marriage law has always served a gatekeeping function. Most group members adhere to these broader norms, even if their religious beliefs would allow different practices. The experience of living within a larger society, in which families are defined by different norms, may eventually lead to different practices within the tradition.¹¹⁵ For individuals who maintain practices that deviate from prevailing norms, family life is lived underground within the unofficial law of a small community. These individuals must evade and manipulate—or challenge and transform—official law.¹¹⁶

A. MARRIAGE NORMS

Even under official law, substantive limits on marriage vary notably from state to state. Although most states set the age of consent for marriage at eighteen, many permit sixteen- or seventeen-year-olds to marry with their parents’ consent. In some states, younger teenagers can marry with parental consent or judicial approval, and a few set the limit as low as thirteen or fourteen.¹¹⁷ States may prosecute parents who attempt to evade these limits.¹¹⁸

112. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

113. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

114. See generally COTT, *supra* note 108 (examining the relationship between marriage norms and the shape of the American polity).

115. See CESARI, *supra* note 25, at 60–61. This occurred in Europe during the eleventh century, when the Ashkenazi Jewish tradition abandoned polygamy and unilateral divorce under decrees of Rabbi Gershom. See SEX, MARRIAGE, AND FAMILY IN WORLD RELIGIONS 40–42 (Don S. Browning et al. eds., 2006) (quoting rabbinic sources).

116. Advocates of privatized marriage may or may not intend to challenge the current norms of marital capacity in official law, or the roles that these norms have played in defining our broader political community. These are questions that have been central to the debate over marriage in the United States for generations, however.

117. *E.g.*, N.H. REV. STAT. ANN. § 457:4 (2007) (minimum marriage age of thirteen for girls and fourteen for boys). The age of marital capacity set by the English common law was twelve for girls and fourteen for boys; this appears to be the lower age limit in Kansas and

States are also divided in their definition of what family relationships trigger incest prohibitions. All states bar marriage between ancestor and descendant or between two siblings, and most states prohibit marriages between uncle and niece or aunt and nephew. State laws vary on the legality of first-cousin marriage, and a few states retain other restrictions that trace to the traditional marriage impediments of ecclesiastical law.¹¹⁹ Beyond the core prohibition of sexual or marital relationships within the nuclear family, these are questions on which different legal systems reach different conclusions.¹²⁰ The shape and variety of these rules are significantly shaped by religious tradition and reflect a range of policy choices and historical circumstances.¹²¹

Because these laws are not uniform across the United States, our law includes an extensive body of case law on conflict-of-laws questions that arise after couples cross state lines in order to be able to marry.¹²² Substantive marriage prohibitions in some state statutes are unavoidable. Another law student once posed a question about Iowa's marriage-evasion statute, amended in response to the prospect of legalized same-sex marriage, which invalidates any marriage solemnized in another state that would be void under Iowa law.¹²³ The student had married the previous summer in Egypt, where his family lived, to a woman who was his first cousin. Under the Iowa statutes, which prohibit first-cousin marriages, was their marriage void?

The law governing marital capacity and consent also presents potential conflicts with practices of ethnic and religious communities. In rare instances, some conflicts are acknowledged and accommodated by state law.¹²⁴ Historically, the practice of arranged marriage was a source of

Massachusetts. See *State v. Wade*, 766 P.2d 811, 815 (Kan. 1989). Most states increased their minimum marriage age during the nineteenth century, but several, including Maryland and North Carolina, have only done so in recent years. Estin, *supra* note 3, at 568 n.168.

118. *E.g.*, *People v. Benu*, 385 N.Y.S.2d 222, 226 (Crim. Ct. 1976); *State v. Moua*, 573 N.W.2d 202, 206 (Wis. Ct. App. 1997).

119. *E.g.*, MASS. GEN. LAWS ch. 207, §§ 1–2 (2006). See generally CLARK, *supra* note 38, at 23–24 (describing ecclesiastical-law prohibitions based on family relationships).

120. The American prohibition of cousin marriage contrasts with the legal practice in Europe, Canada, and many countries in Asia and Africa. See Martin Ottenheimer, *Lewis Henry Morgan and the Prohibition of Cousin Marriage in the United States*, 15 J. FAM. HIST. 325, 325–33 (1990). While the conventional explanation for these prohibitions is a genetic one, recent research suggests that the genetic risks are smaller than is often assumed.

121. See CLARK, *supra* note 38, at 82–84. Religious legal systems impose other marriage impediments, often including prohibitions on religious intermarriage. See, *e.g.*, Wertheimer, *supra* note 98, at 245.

122. See CLARK, *supra* note 38, at 41–44, 85–88, 96–98.

123. See IOWA CODE § 595.19.2 (2007) (defining first-cousin marriages as void); *id.* § 595.20 (declaring that marriages valid in the place where they are solemnized are valid in Iowa, if “the marriage would not otherwise be declared void”).

124. See *supra* note 28 and accompanying text. This result can also be accomplished by statutes that recognize the validity of any marriage that is valid in its place of celebration.

conflict between official and unofficial norms. Nancy Cott describes the growth of restrictive immigration policies targeted at single women during the late nineteenth and early twentieth centuries, designed to prevent trafficking and prostitution, which cast particular suspicion on Asian and Jewish women migrating for marriage purposes.¹²⁵ Marriages arranged by a matchmaker or the families of the bride and groom seemed to violate basic American norms of marital consent.¹²⁶ Concerns with immigration fraud, sham marriage, and trafficking in women still complicate the international marriage practices of families in some religious minority groups. Conversely, young women with citizenship or residence status in the United States or similar nations may be pressed by their families to marry men seeking admission as immigrants.¹²⁷

International human-rights instruments protect the right to marry.¹²⁸ As a corollary, they prohibit forced marriage,¹²⁹ as well as child marriages, suggesting that the minimum acceptable marriage age should be fifteen.¹³⁰ These treaties establish some baseline requirements for marriage law, but leave other important questions open. In this debate, the hardest questions involve polygamy, which is not expressly proscribed or limited in international law and which is recognized as a valid form of marriage in dozens of nations.¹³¹ Because polygamy is prohibited in much of the world,

125. COTT, *supra* note 108, at 132–55; *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 656–60 (2005).

126. COTT, *supra* note 108, at 149–52.

127. *See* Catherine Raissiguier, *Troubling Mothers: Immigrant Women from Africa in France*, JENDA: J. CULTURE & AFR. WOMEN STUD., Issue 4, 2003, at n. 17, <http://www.jendajournal.com/issue4/raissiguier.html>. The distinction between arranged marriage and forced marriage is crucial in this setting, but it sometimes proves hard to draw. *See generally* Alison Symington, *Dual Citizenship and Forced Marriages*, 10 DALHOUSIE J. LEGAL STUD. 1 (2001).

128. *E.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”).

129. *See id.* (“Marriage shall be entered into only with the free and full consent of the intending spouses.”).

130. *See* United Nations Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, G.A. Res. 2018, at 36, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A16014 (Nov. 1, 1965). Most countries have outlawed child marriage, even those countries of the world where the practice persists. *See* JAYA SAGADE, *CHILD MARRIAGE IN INDIA: SOCIO-LEGAL AND HUMAN RIGHTS DIMENSIONS* 37 (2005).

131. *But see, e.g.*, U.N. Comm. on the Elimination of All Forms of Discrimination Against Women, *Gen. Recommendation 21: Equality in Marriage and Family Relations*, U.N. Doc. A/49/38 (13th Sess. 1994) (concluding that the continuing practice of polygamy violates human-rights norms including article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women). For a recent examination of the treatment of polygamy in Muslim countries, *see* Javid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT’L J.L. POL’Y & FAM. 108, 114 (2007). On the Jewish tradition, *see supra* note 115.

however, the practice goes underground when polygamous families form and migrate across international boundaries.¹³²

Polygamous families of various cultural backgrounds live in many European and North American countries, presenting a complex problem in the interaction of official and unofficial law.¹³³ Official laws in the United States prohibit and sanction polygamy at every level, from national immigration statutes to local criminal law.¹³⁴ News reports indicate that there are substantial numbers of polygamous families in North American and European countries living beneath the radar of the official law, but nonetheless within communities and a framework of unofficial legal norms.¹³⁵

B. FAMILIES UNDERGROUND

In the United States, the largest polygamous communities are composed of fundamentalist Mormon families found mostly in several western states. Academic and journalistic accounts describe the norms of these communities, which apparently range from ordinary-seeming, middle-class, suburban families to isolated groups regularly accused of abusive treatment of women and children.¹³⁶ In the more extreme cases, state officials pursue criminal convictions,¹³⁷ but when there is no evidence of

132. Note also that North American courts have not been willing to recognize the validity of *mut'a*, or temporary, marriages, which are accepted in Shiite Islamic communities. See, e.g., *Vyronis v. Vyronis*, 248 Cal. Rptr. 807, 815 (Ct. App. 1988) (finding that *mut'a* marriage is not a "lawful" marriage); *Y.J. v. N.J.*, [1994] O.J. No. 2359 (Can.); see also HADDAD ET AL., *supra* note 103, at 90 (describing the different types of *mut'a* marriage arrangements).

133. See generally ANGELA CAMPBELL ET AL., *POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN* (2005) (collection of policy research reports published by Status of Women Canada).

134. Under the Immigration and Nationality Act, polygamists are ineligible to receive visas and are excluded from admission into the United States. 8 U.S.C. § 1182(a)(10)(A) (2000). For state criminal law, see, for example, UTAH CODE ANN. § 76-7-101 (2003) (punishing polygamy as a third-degree felony). All states prohibit bigamous marriages, but not all states criminalize bigamy.

135. See generally Pauline Bartolone, *For These Muslims, Polygamy Is an Option*, S.F. CHRON., Aug. 5, 2007, at E3 (describing the increase of African-American Muslims practicing polygamy); Nina Bernstein, *Polygamy, Practiced in Secrecy, Follows Africans to New York*, N.Y. TIMES, Mar. 23, 2007, at A1 (describing the increasing prevalence of polygamy in New York); Kirsten Scharnberg & Manya A. Brachear, *Polygamy (Utah's Open Little Secret)*, CHI. TRIB., Sept. 24, 2006, at C1 (noting estimates that 40,000 people in the western United States live in polygamous relationships).

136. See generally IRWIN ALTMAN & JOSEPH GINAT, *POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY* (1996) (discussing everyday life in polygamous families); Scharnberg & Brachear, *supra* note 135 (discussing the range of polygamous families).

137. E.g., *State v. Holm*, 137 P.3d 726 (Utah 2006) (conviction for bigamy and unlawful sexual contact with a minor), *cert. denied*, 127 S. Ct. 1371 (2007); see also John Dougherty & Kirk Johnson, *Sect Leader Is Convicted as an Accomplice to Rape*, N.Y. TIMES, Sept. 26, 2007, at A18 (reporting a jury verdict in a prosecution for pressuring a fourteen-year-old girl to enter a

other crimes or fraud, state officials generally do not bring polygamy prosecutions.¹³⁸ In other countries, the issue of polygamy was centered on immigrant communities, an aspect of the question that is relatively less prominent in the United States. Although France also prohibits polygamous marriages, it had family reunification policies in the 1970s and 1980s that permitted polygamous immigrants from African nations such as Mali, Senegal, and Gambia to bring multiple wives and their children to live in France. As a result, there is a large African polygamous community in France today, estimated to include as many as 15,000 households.¹³⁹ In 1993, French policy changed, and new legislation permitted immigrants with multiple wives to obtain legal residence papers for only one wife and her children. For the large numbers of polygamous households already residing in France, the new legislation created incentives and sanctions designed to break families into smaller units, including pressures to divorce (or “de-cohabit”), and denial of renewed residency permits.¹⁴⁰ The changes in policy were prompted by official concern for the overcrowded living conditions of large polygamous families and the difficult situation of women in these households, as well as rising political sentiment against immigration.¹⁴¹

In places where polygamy is practiced without official approval, families use various strategies to avoid detection or prosecution. A husband may

religious marriage); Gretel C. Kovach, *Polygamous Sect to Defend 6 Members in Court and Its Practices on Capitol Hill*, N.Y. TIMES, July 24, 2008, at A22 (reporting indictments by a Texas grand jury).

138. Jason Szep, *Fundamental Mormons Seek Recognition for Polygamy*, REUTERS, June 12, 2007, <http://www.reuters.com/article/domesticNews/idUSN0627314820070612>. *But see* State v. Green, 99 P.3d 820, 834 (Utah 2004) (affirming convictions of criminal nonsupport and four counts of bigamy).

139. *See* Frank Renout, *Immigrants' Second Wives Find Few Rights*, CHRISTIAN SCI. MONITOR, May 25, 2005, at 16. *See generally* Edwige Rude-Antoine, *Muslim Maghrebian Marriage in France: A Problem for Legal Pluralism*, 5 INT'L J.L. POL'Y & FAM. 93 (1991) (discussing the interactions between Islamic marriages among immigrants and the French legal system); Adrian Pennink, *Thousands of Families in Despair as France Enforces Ban on Polygamy*, INDEP. ON SUNDAY (London), Apr. 1, 2001, at 22 (discussing the troubles that face a “second wife” in France). For a useful study of the Muslim community in France, *see generally* JONATHAN LAURENCE & JUSTIN VAISSE, *INTEGRATING ISLAM: POLITICAL AND RELIGIOUS CHALLENGES IN CONTEMPORARY FRANCE* (2006).

140. Pennink, *supra* note 139, at 22 (describing the penalties as deportation for the second wife and loss of a work permit for the husband); *see also* Raissiguier, *supra* note 127 (discussing the effect that changes in French law have had in polygamous families); Sonja Starr & Lea Brillmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 243–59 (2003) (discussing the impact of new legislation on polygamous immigrants in France).

141. These problems have persisted despite the changes in policy, and the debate intensified in 2005 after rioting in immigrant neighborhoods. *See, e.g.*, Molly Moore, *France Weighs Immigration Controls After Riots*, WASH. POST, Nov. 30, 2005, at A14; Elaine Sciolino, *Citing of Polygamy as Cause of French Riots Causes Uproar*, N.Y. TIMES, Nov. 17, 2005, <http://www.nytimes.com/2005/11/17/international/europe/17cnd-france.html>. Polygamous communities also flourish in other European countries. *See generally* PASCALE FOURNIER, *THE RECEPTION OF MUSLIM FAMILY LAW IN WESTERN LIBERAL STATES* (2004), *available at* <http://www.ccmw.com/documents/Pascalepaper.doc>.

marry only one wife under the official law, cohabiting with the others with no secular legal formality.¹⁴² This strategy, apparently typical of the Fundamentalist Mormon communities of the western states,¹⁴³ leaves subsequent plural wives without most of the protections that come from the civil marriage laws.¹⁴⁴ For example, an unofficial spouse would not be able to rely on the marital tie for immigration purposes, but might qualify more readily for public-assistance payments.

Alternatively, a husband might obtain a divorce under civil law from his first wife and continue to live with her, leaving their religious marriage intact, and then marry a second wife who would have a status recognized under official law. When immigration rights are at stake, this approach would allow the parties to obtain family preferences based on the new relationship.¹⁴⁵ Although the first wife would not have any ongoing protections as a spouse, her legal position would be similar to that of other divorced women.

Based on these strategic choices, polygamous households formed under religious or customary law are sometimes within and sometimes outside the scope of official marriage law. Individual household members might rely on other aspects of civil law to structure their property rights or to approximate other aspects of the secular law relating to family relationships. In this respect, they would be similar to same-sex-couple families, who have worked to create parallel legal structures that mimic aspects of the work ordinarily done by official family and marriage laws. Polygamous households have a wider array of strategic alternatives, however, since civil marriage laws are available to formalize at least one husband–wife bond.¹⁴⁶

142. In Utah, prosecutors have defeated this strategy by using the state's "unsolemnized marriage" statute, which was initially enacted to prevent welfare fraud. *See, e.g., State v. Green*, 99 P.3d 820, 833 (Utah 2004).

143. *See, e.g., State v. Holm*, 137 P.3d 726, 732 (Utah 2006) (affirming the defendant's conviction for bigamy despite the defendant's contention that the phrase "purport to marry" under Utah's bigamy statute only included state-sanctioned matrimony); *Green*, 99 P.3d at 822 (describing how ten women considered themselves married to the defendant, where the defendant avoided being in more than one licensed marriage at a time by terminating each prior to obtaining a license for a new marriage); *see also In re Marriage of Kunz*, 136 P.3d 1278, 1280 (Utah Ct. App. 2006) (describing a couple that continued to reside together following their divorce even though the husband remarried).

144. These would include property, support, and inheritance rights, rights to a share of public or private insurance coverage or benefits, and the possibility of wrongful death or other tort recovery as a spouse. Traditionally, official law would have treated children of such a marriage as illegitimate, but courts have held most classifications based on legitimacy to be unconstitutional since *Levy v. Louisiana*, 391 U.S. 68 (1968). Contemporary paternity and child support laws extend equally to marital and nonmarital children once paternity has been established.

145. This was one response to the French campaign against polygamy in the 1990s. *See supra* notes 139–41 and accompanying text.

146. It is not my purpose here to reprise the general debate over recognition for same-sex marriage or to analyze the parallels between same-sex marriage and polygamy. Rather, my point

Any move toward expanding the role of religious laws and norms in regulating marriage would necessarily confront these difficult questions of definition and capacity. Because of the strong public-policy interests that the state has asserted in marriage, these questions are pervasive in both private and public law. General norms of contract law include rules governing capacity to contract and public-policy rules that place some bargains off-limits. Without a specialized marriage law to regulate these questions, what rules would contract law supply? Beyond the universe of contract, public-benefit laws, immigration laws, bankruptcy, and tax laws are all built on commonly held marriage norms that have emerged and evolved through broad social and political debate. Here as well, our present marriage law does a lot of regulatory hard work. Privatizing marriage would require construction of new rules, a new official law, in each of these different frameworks.

V. CONCLUSION

Proposals to remove the state from the regulation of marriage are generally framed at a high level of abstraction and suggest with no evidence, against the history and practice of several centuries, that we could cleanly separate the universe of official law from an unofficial, private sphere of human relations.¹⁴⁷ These are not proposals to withdraw the state entirely from the sphere of family life, however, and these writers typically suggest that general principles of contract law, property law, tort law, and criminal law would be adequate for the tasks now performed by marriage and family law.¹⁴⁸

For those who would prefer to allow religious communities to define the scope of marriage, contract law might seem to provide the basis for creating a legal space within which religious authority could flourish. Unless the state entirely relinquishes its protective role, there is no reason to believe that pluralism in this form would escape the dynamics described here. As

is that both same-sex marriage and polygamy are practices that are structured by unofficial norms operating against a background of official law. Although these practices have been heavily suppressed, the current legal climate allows numerous opportunities for unofficial households to make use of official law.

147. *E.g.*, Stein, *supra* note 7, at 1157–59 (discussing arguments for the deregulation of marriage); *cf.* Lawrence Rosen, *Anthropological Perspectives on the Abolition of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS, *supra* note 7, at 147, 162 (arguing that removing the state from marriage would have vast and unpredictable effects).

148. It is worth noting here that we have no legal tradition or experience in applying these general principles in the setting of families. For centuries, our law has constructed marital relationships based on the principle of coverture, which explicitly displaced property, contract, or tort law and aspects of criminal law in regulation of families. *See generally* CLARK, *supra* note 38, at 286–89 (describing principles of coverture). In more recent decades, we have attempted, without making much progress, to use general principles to regulate the private-law aspects of cohabitation relationships. *See generally* Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001) (considering the social and legal norms of cohabitation).

with our present law, there would be circumstances in which official and unofficial norms converge and circumstances in which they conflict, as well as points at which religious or unofficial norms fall entirely outside the boundaries of our fundamental legal and political commitments.

Whether or not we could expect to find any benefits from a radical restructuring of the law of families, we should expect that privatizing marriage would increase the frequency and complexity of the interactions between official and unofficial family law. In a context of legal pluralism, individuals and communities find means to adapt their behaviors and norms within the spaces created by multiple normative systems. That process is unavoidable, particularly so long as the state maintains control over domains such as immigration, the allocation of social welfare benefits, and the traditional tools of property, contract, criminal, and tort law.

In our society, the dynamic relationship of official and unofficial family law serves useful purposes. At the point of marriage celebration, the convergence of official and unofficial norms expresses a powerful consensus in support of marriage and family commitments. Making room for a wide variety of religious traditions in this consensus supports an ideal of shared membership in the larger national community. State support for religious marriage celebrations also affirms the important support that religious communities provide for marriage and family life.

At divorce, conflict between family members may be expressed through a conflict between the realms of official and unofficial law. Our norms of religious freedom address individual rights as against the state and are not adapted to resolving disputes between individuals or within religious communities. Both levels of conflict are mediated in the interaction between secular and religious divorce systems. This process balances the divergent values and interests of families and groups, and helps preserve the vitality of religious communities and the cohesion of the state.

In our society, as in many others, the definition of marriage and the space accorded to unofficial marriage norms has been central to our self-definition as a community. Debates over marriage policy have been intensely joined because these are debates over who we are. Accommodation of the traditions and practices of different religious communities helps to define our national character, just as limitations on what family practices are acceptable helps to define the rights and meaning of citizenship. None of this is carved in stone: as our shared understandings have changed, as we have moved toward a richer and more diverse conception of our national character, the boundaries of official and unofficial family law have shifted as well.