Gender, Religion, and Family Law

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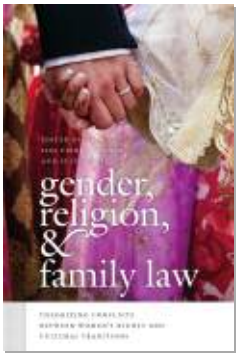

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Introduction Theorizing Conflicts between Women's Rights and Religious Laws

Why Are Women's Equality Claims So Often at the Heart of Multicultural Conflicts?

Open the newspaper or surf the net any day and you will find a range of stories, both domestic and international, involving conflicts between women's rights and religious or cultural traditions. Many of these raise challenging questions about the scope of freedom of religion and the role of the state in balancing the rights of individuals, religious authorities, and the broader community. A representative sample might include stories like these:

- Women who ride the B110 bus from Williamsburg to Borough Park in Brooklyn are made to sit in a women's section at the back of the bus to prevent immodest mixing with men.[1] The bus operates with a license from the state of New York. Does this policy violate the rights to equality of women who ride the bus? Would putting a stop to it deny the freedom of religion of those who support separate seating? Does allowing this practice to go on mean that the state is supporting the establishment of religion?
- The Iranian women's soccer team is banned from competing in Olympic trials because team members wear headscarves in violation of the sport's uniform rules.[2] Should an exemption be made when participants believe the rule is in conflict with their religious obligations? Should the rule be rethought, with a more diverse group of participants in mind?
- An immigrant couple now living in the United States is divorcing. They were married in Pakistan, and the husband has divorced the wife there under Islamic laws that provide her with no right to alimony. The wife sues in a Maryland court for the maintenance and property she would be entitled to under state law. Can the state courts help her or does respect for

the integrity of other states or of other religions mean they must honor the terms of the Islamic marriage contract?[3]

- A suburban family in Utah that practices polygamy agrees to be part of a reality show about their lives, in part to show how ordinary they are. Prosecutors in Utah begin an investigation into whether the husband is violating state laws against bigamy.[4] The family flees the state but later sues, arguing that the law is being used to persecute polygamists unfairly. Does polygamy harm women by allowing them to be treated as unequals? Does a ban on polygamy violate the freedom of religion of those who freely choose to practice it?
- The leader of a fundamentalist Mormon sect is given a life sentence for the statutory rape of young girls he took as his "spiritual brides." Should polygamous marriages be viewed differently when they involve underage girls in a closed fundamentalist community? Can these girls be said to freely choose polygamy if they are given limited education and are groomed to marry men chosen for them by the "prophet"?[5] Should respect for religious difference excuse practices that would otherwise be characterized as heinous crimes?

The challenge of accommodating religious and cultural difference pervades many areas of our shared public life. An awareness of the central role that our religious faith and cultural ties play in the formation of personal identity and the pursuit of a satisfying life has prompted a broad range of legal and policy reforms and a continuing stream of new controversies. Our religious identity affects what we wear, how we educate our children, how we marry and divorce, and how we engage with or avoid the world around us. Whether accommodation takes the form of public financial support for faith-based institutions, affirmation of the right to wear religiously required attire in public spaces, or the integration of religious norms into aspects of state law, the impact of these strategies on the rights and roles of women is frequently at issue.

Asserting control over family law and the lives of women that are so intimately regulated by it is a frequent feature of demands for religious toleration. Whether by discouraging community members from using civil courts, demanding recognition of religious courts or contracts in liberal states, or seeking to replace secular law with religious law, how we regulate relationships

in marriage and family says a lot about who we understand ourselves to be. Shifts in the way we regulate the family send a clear message to ourselves and others about this changed identity. Two recent examples demonstrate how this ideological shorthand has been used. In post-apartheid South Africa, recognizing African customary marriages and Muslim marriages that had been treated as legally invalid during the apartheid era was an important symbol of what it meant to be a new, nonracial, South Africa.[6] In the period after the Arab Spring of 2011, reasserting the primacy of Sharia law was also an important sign that power had shifted to the people. For example, one of the first acts of the transitional government in Libya after the overthrow of the Qaddafi regime was to announce that laws prohibiting polygamy had been abolished in order to restore Sharia as the basic source of the nation's laws.[7] While this act and similar alterations of religious law made clear that a new regime was in power, Muslim feminists warn that it will be women who pay a disproportionate price for these changes.[8]

Concern over the impact that policies for accommodating religious difference might have on women is expressed both by cultural insiders and by external observers. In the eyes of members of a religious or cultural group, women's rights often appear at the heart of conflicts between tradition and equality because women bear a disproportionate share of the burden of representing a community's collective identity to itself.[9] Anthropologist Anne McClintock has described this as a gendered distribution of symbolic labor, which solves the riddle of how a group can exist, simultaneously, as the natural embodiment of age-old traditions and as a self-conscious, modern community seeking worldly political power. The community may see men as representing growth and responsiveness to changing contemporary circumstances, while women are characterized as expressing the natural, authentic, and essential nature of a community and its traditions.[10] This association of women with a communal essence can have negative consequences for women. It may be overtly expressed in doctrines that deem women the repository of family or communal honor, which requires that women's behavior be carefully monitored and controlled.[11] It may also justify the exclusion of women from participation in the culture's rituals of public worship or structures of public power, on the theory that women do not need the experience of being shaped by these cultural institutions because they naturally manifest the virtues such practices are meant to inculcate.[12]

Leaving the symbolic realm and returning to the practical world, women may actually follow a more traditional lifestyle than men in their communities precisely because they have been excluded from the public sphere of work and politics and from exposure to alternative ways of being. Women's symbolic association with the notion of tradition may be enhanced because women play an important role in creating cultural continuity through their role as mothers who reproduce and educate a new generation.[13] Given these deep and pervasive associations, initiatives to change women's status under religious or customary law may be perceived as threats not only to entrenched power relations within the group, but also to the very possibility of perpetuating a shared set of social practices and the shared narrative of identity that justifies it.

For outsiders to the religious or cultural group, concern over the place of women in minority cultures can provide an apparently legitimate avenue for the expression of ambivalence, if not outright hostility, toward the distinctive practices and worldviews of these groups.[14] Such ambivalence may be expressed in popular media, academic discourse, or official state policy regarding the social and political integration of minorities. The content of a recent Canadian citizenship guide for prospective immigrants is instructive in this regard. In Canada, it explains, "men and women are equal under the law. Canada's openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, 'honour killings,' female genital mutilation, or other gender-based violence. Those guilty of these crimes are severely punished under Canada's criminal laws."[15] While a laudable (if perhaps somewhat aspirational) statement of contemporary civic values, this account says as much about the suspicions of the fearsome practices of incoming minorities as it does about the values of the receiving country. Similar guides, reflecting similar anxieties, have been published in recent years in other Western countries.[16]

Outright expressions of contempt for religious and racial minorities, allegedly justified in part by the poor treatment they accord to women, is often now part of racist "White nationalist" discourse in Europe and North America. A controversial "Code of Conduct" passed by the rural town of Herouxville, Québec in 2007 instructed immigrants to adapt to the local culture and abandon their "barbaric cultural practices" that victimize women.[17] English racists calling themselves the English Defence League have defended race rioting against Muslims in the town of Luton by citing their suspicions that Muslims

beat their wives and want to impose Sharia law.[18] Similar concerns may lie behind proposals to pass legislation barring the application of Sharia law in Canada[19] and in a dozen jurisdictions in the United States.[20]

For scholars of political and legal theory, women's rights are often at the heart of multicultural toleration debates because they are key issues in legal disputes involving regulation of the family. For members of the cultural majority and religious minorities, the family is an important nexus between private practices and public values. The resolution of family law disputes often involves reconciling competing desires for individual flourishing and familial and communal solidarity. Arguments over the rights of women to exert power over property and children in the family, to set the terms for their entry into marriage, and to seek to exit from marriage, often bring competing worldviews about the role of women into sharp relief.

These disputes are sometimes characterized as involving irreconcilable clashes of cultural visions, but lawyers, judges, policymakers, religious leaders, and the individuals involved can and do find ways of working through these conflicts, often in creative and innovative ways. The work collected in this anthology reflects this commitment to find effective solutions to these intractable problems. The authors move beyond polemics to seek concrete strategies to integrate the dual commitments to women's rights to gender equality and multicultural toleration. The anthology brings together the work of an international and interdisciplinary group of scholars grappling with knotty questions at the intersection of civil rights and religious law. Should religious law be an entirely private matter, or should it be recognized by the state? If the state chooses to recognize religious family laws, should these be interpreted and applied by the state's own courts or by religious courts staffed by clergy? Regardless of whether the courts are secular or religious in nature, should they also be required to comply with the rights contained in the Constitution? If the religious laws conflict with constitutional norms, which should take precedence? When commitment to equality demands changes to religious norms, how can these be implemented in ways that community members will find legitimate?

The contributions to this volume go beyond theory to explore in concrete terms how conflicts between women's rights and religious law are being addressed in a range of nations around the world. While demonstrating a sophisticated grasp of developments in legal and political theory, these authors also

bring to bear their expertise as lawyers, activists, and religious authorities to provide fresh insight into how these theories translate into real change on the ground. While much past work in this field has pointed to case studies to illustrate the ways in which women can be disadvantaged by religious and cultural norms, the pieces in this anthology explore what happens when proposals for multicultural toleration and initiatives to improve women's rights are actually applied in states around the world. In their chapters, leading theorists Martha Minow and Ayelet Shachar address the challenge of finding the right balance between commitment to the principles of equality between men and women and equality between religious groups by exploring how these competing concerns are reflected in a number of recent public controversies. The conflicts discussed in these chapters and those that follow emerge from several different religious traditions. Susan Weiss, Michal Roness, and Irit Koren discuss Jewish law in Israel. Rashida Manjoo and Pascale Fournier explore how Muslim law is applied in the secular states of South Africa, the United States, and Canada, while Fatou Kiné Camara looks at strategies for changing women's status in Senegal, where Islamic law is the law of the land. Likhapha Mbatha and I consider the case of African Customary Law, the traditional, tribally based quasi-religious, quasi-political rules used to govern the family relationships of Black Africans in South Africa. Linda C. McClain provides a comparative evaluation of how American courts deal with disputes emerging from a range of traditions, including cases involving conservative interpretations of Christian marriage doctrine that are no longer embodied in American law.

The case studies also deal with a variety of ways of configuring the relationship between religious law and state law. In Israel and Senegal, religious norms are enforced by the state as part of a regime of personal law. In the United States and Canada, religious norms are, at least formally, relegated to the private sphere but can be brought into the legal realm through the private acts of the spouses if they decide to make and rely on a religious marriage contract or refer their family law dispute to a religious tribunal for arbitration. Several authors make the point that enhanced recognition of religious tribunals or religious doctrines by civil courts would create a new hybrid of these two models. These case studies provide an occasion to interrogate the utility of recent theoretical models for engaging with gender and multicultural conflicts, to explore contextual differences, and to analyze and celebrate stories of successful initiatives that have transformed legal and cultural norms.

The Place of Gender in Multicultural Theory

While the challenge of negotiating the place of gender in religious and multicultural conflicts is now widely recognized by theorists in law and political theory,[21] this has not always been the case. A brief account of this history will set the stage for the exploration of conflicts over gender and religious accommodation that is the focus of this book. There have been three moments in the development of the political theory of multiculturalism that have culminated in a focus on questions of gender. The first stage saw the emergence of a communitarian critique of the notion of cultural identity in liberal political theory. In the second stage, theorists responded to the communitarian challenge by elaborating a distinctly liberal justification for multicultural toleration. A third phase has been marked by attempts to identify the lacunae in this liberal conception with regard to the rights of minorities within minorities and has resulted in an approach that seeks to grapple with the concerns of women.[22]

The communitarian critique developed as a corrective to what its proponents took to be an overemphasis on the role of the autonomous individual in liberal theory. Communitarians object both to a liberal ethics that prioritizes respect for rights over the pursuit of the good and the phenomenology of consciousness upon which these ethics are based. Liberalism relies upon a conception of the person as one whose capacity for reasoned autonomy preexists any determinate objectives she might have. If one accepts this model, communitarians argue, a vision of the good life, whether drawn from secular reason or religious revelation, cannot be constitutive of an individual's identity in any deep way. All commitments are seen as being deliberately adopted at some discrete point in time by an individual whose primary identity is merely that of a choosing consciousness.

Communitarians argue that our actual experience of consciousness is quite different, in that it includes a sense of being encumbered by the values, connections, and points of view in which we are embedded as members of familial, religious, cultural, and political communities. Moreover, the exercise of autonomy relies on our already having these commitments in order to be able to engage in the process of evaluation and action through which a liberal self is constructed. While one may define oneself in opposition to one's social context, one cannot do so independent of any context. One cannot in fact

exercise the power of choice without some preexisting evaluations and preferences that one aims to satisfy and develop in so choosing.[23]

If their critique stopped there, few liberals would object to this corrective account. However, communitarians go on to argue that the state ought to be structured to protect these cultural conceptions from outside influence and from destructive internal critique and revision. Rather than encouraging people to exercise autonomy in the quest for some illusory critical distance upon their values, political life should create conditions under which individuals can gain a deeper and more complex understanding of these constitutive attachments. Thoroughgoing rejection of one's cultural values is undesirable, as it would see individuals render themselves rudderless in a moral universe to no great advantage.[24] In this second moment in the development of multicultural theory, liberal multiculturalists accept the need of each individual for a cultural context but argue that if culture is important because it is instrumental to autonomy, culture's claims will pale when cultural practices themselves place unreasonable limits on autonomy.

Liberal multiculturalists do not characterize the duty to respect and accommodate cultural difference as a counterpoint to liberalism but as derivative of the central liberal commitment to autonomy. They argue that this commitment is both the source of the duty to respect cultural difference and the limit upon the extent of the duty to do so. The liberal political vision is organized around creating the conditions under which individuals can exercise their capacity to develop and revise conceptions of the good life. One of these conditions is the opportunity to be involved in a cultural community.

In developing a conception of the good, we do not create conceptions out of whole cloth, but contemplate and critique the values, roles, and institutions revealed to us by our socialization into our cultural community.[25] A complex awareness of the traditions of our community is thus a precondition for making intelligent choices about how to live our lives.[26]

A commitment to autonomy is supplemented by a commitment to secure benefits such as autonomy to all on an equal basis. Liberals are thus obliged to equalize the capacities of individuals who are disadvantaged through no fault of their own. The fact that most modern nations are culturally plural, containing a range of religious, ethnic, and cultural groups, means that there is often inequality in access to culture understood as a resource in this way. While members of the dominant cultural group can meet their need for a

cultural structure with little effort because it is woven into the fabric of public life, members of minority cultural groups must expend financial, political, and emotional resources to create a sphere in which they can participate in their own culture. The values of the dominant cultural group are reflected in everything from the rhythm of the workweek, to the content of school curricula and the obligations of the laws of marriage. While it might be difficult, in practical terms, to avoid conferring such benefits on the majority group, it is appropriate to offer exemptions from general rules or additional assistance to members of minorities who are disenfranchised by these rules.

On this model, a group might be entitled to seek assistance from the state in resisting apparently neutral state policies that have the effect of disabling the capacity of minorities to participate in their own cultural structures. This might mean that the state should change what was intended to be a neutral rule barring wearing scarves while playing in a soccer match because it prevents observant Muslim women from participating. The rule might be an attempt to achieve an unobjectionable goal but has an unfair impact on members of some religious groups. If the same objective can be achieved through a less restrictive rule, the law should be changed to accommodate this difference.

Conversely, a group cannot claim to be entitled to seek assistance or immunity from the law in order to prevent individual dissentient members from seeking to change the character of the community by revising or rejecting its traditional values.[27] The young girls coerced into "spiritual marriage" by Warren Jeffs in accordance with his sect's interpretation of Mormon doctrine are entitled to characterize this treatment as rape and to have the state prosecute it as such, without deference to the sensibilities of Jeffs or his adherents. A liberal state may thus be obligated to cushion the impact of policies set outside the community but not to take positions that thwart processes of internal change within the community or deny the rights of community members. In practice, it has often proved difficult to map this distinction. Is the regulation of family life under religious regimes of marital law a central cultural practice that should be protected from the impact of inconsistent national family and human rights legislation, or should the gender differentiated rights under such regimes be seen a prime example of internal restrictions that the state is justified in redressing?[28]

The third moment in the development of multicultural theory is the emergence of this feminist critique regarding the rights of minorities within minori-

ties. If the duty to tolerate and accommodate religious and cultural difference is predicated on the important roles these institutions play in fostering personal autonomy, then customs and traditions that obstruct the development or exercise of this capacity for some members of the community based on their sex cannot be justified.

The Place of Individual Agency in Debates over Gender, Law, and Multiculturalism

Some of the questions that emerge in translating a commitment to women's rights into the transformation of impugned aspects of religious law are highly theoretical: How can philosophical conceptions of a good life that are predicated on enabling individual autonomy be reconciled with religious or cultural conceptions that are organized around pursuing virtue, often by complying with highly gendered normative codes? In the context of a multicultural society, how should a concern for equality between religious and cultural groups be balanced against claims for equality among men and women within a particular group? How should courts understand the nature of women's interests when women themselves hold a diverse range of views on the merits of such practices?

Some of the questions that arise are more tactical in nature: How should courts and commentators respond to the fact that some women and men may choose to exercise their personal autonomy to comply with religious rules that others might finding limiting and even demeaning? How can advocates for legal change devise strategies to ameliorate women's disadvantage that will be both subtle enough to take account of the role that cultural and religious practices play in people's lives and effective enough to make a real difference?

In the opening chapter of this collection, Martha Minow elegantly frames the challenge to reconcile the tactical and theoretical questions that run through the book as the "paradox of liberalism." The accommodation of religious groups may sometimes be read as a compromise of principle; in others, it may be the expression of a principled embrace of the ideal of the coexistence of multiple normative traditions. Minow argues that approaching these conflicts in a spirit of humility, flexibility, and cooperation can lead to outcomes that are both more satisfying and more effective. This supple approach to identify-

ing and developing opportunities for change informs the narratives of diverse legal regimes' responses to cultural difference that follow.

While there may be general agreement that just laws and social policies should demonstrate respect for women's individual autonomy, in practice there is often ambivalence about how such respect should be manifested. Regardless of gender, the actual choices we make may not reflect our deepest preferences, for a range of reasons. Everyone's choices are constrained by their circumstances, their entitlements, and their conflicting obligations. However, women's choices may be constrained in ways that are distinctly unfair. They may be educated to believe that few preferences they might hold are legitimate and that few choices are open to them. They may also be prevented by illegitimate coercion from pursuing some preferences that they do genuinely hold. In situations where women appear to make choices that reflect a diminished sense of possibility for their lives or an acquiescence to coercion, those committed to respecting women's capacity to make their own lives must consider whether this is best achieved through accepting women's actual choices without comment or by also trying to identify and change the background circumstances that condition these unappealing choices.[29]

This ambivalence is expressed very clearly in the persistent debates about the acceptability of wearing Islamic veils in public spaces. Nations with very different attitudes toward the toleration of cultural and religious difference seem to agree that this mode of attire is a problem that needs to regulated. In nations committed to state neutrality toward all religious practices, the wearing of veils is seen as a symbol of cultural difference that impedes commitment to shared civic values. In nations committed to policies of multicultural accommodation, some more restrictive forms of veiling, like the niqab, which covers the face, are prohibited where they are found to impede job performance or impair legitimate government interests in identifying individuals at the voting booth or airport check-in line.

Feminist commentators differ on their evaluations of whether such policies enhance or impair the autonomy of women. Some Islamic feminists praise such bans, like those on headscarves in Turkey and face veils in France, because it empowers women who are inclined to resist community pressure to adopt a practice they do not believe in. However, others argue that such bans prevent them from manifesting their genuine belief that veiling is a binding religious obligation. Indeed, they suggest that such bans harm the prospects

for altering objectionable elements of Islamic practice because it may force powerful, educated women who could provide leadership in negotiating the tension between traditional norms and women's educational, professional, and political aspirations out of the public sphere.

Something that may go unremarked in these debates is the way in which such bans valorize the treatment of women's bodies and women's attire as potent cultural symbols rather than as expressions of the intentions and aspirations of the individuals who wear them. The women who may themselves accept or reject the veil for complex reasons can disappear from these debates as anything other than mute pawns carrying the banner for one or another ideological viewpoint. Their actions may have multiple and contradictory meanings, perhaps as affirmations of tradition, rejection of what they perceive to be the racism or sexism of the dominant culture, or a personal bid to occupy space as a powerful political actor on the public stage.[30] Observing this practice may also allow them to be taken more seriously by those in authority as they try to transform discriminatory practices in their community.[31]

Recognizing women's agency thus entails recognizing the ways in which women may deploy tradition strategically. Religious and cultural norms may be invoked, subverted, or transformed as community members seek to achieve their personal and collective objectives. In the context of her analysis in this collection of the way doctrines from foreign religious law regimes are enforced in American courts, Linda McClain points out not only how the distribution of power between religious bodies and civil courts can serve to disadvantage women by empowering male elites, but also how women can and do use the interplay between regimes strategically to secure their best advantage. Attempts to shop among available forums in order to seek one's advantage are a constant factor in such plural family law regimes. Any changes made to distribution of powers over family law jurisdiction between these regimes will not end competition and conflict between plural regimes, but will channel it in a different fashion that may have different impacts on different stakeholders.

Like McClain, Pascale Fournier's chapter analyzes the ways in which American and Canadian courts deal with doctrines drawn from religious family law. She parses the range of doctrinal approaches developed toward Islamic *mahr* contracts, which provide for financial gifts from husband to wife upon marriage, in conflicts of laws jurisprudence. Fournier focuses on the ways these doctrines enable or hamper the agency of the parties. While courts may treat

these complex issues as ones requiring the careful reconciliation of legal and moral principle, the parties themselves are generally acting strategically to maximize their personal material benefit. Fournier asks us to consider these cases from the perspective of the "bad man" or "bad woman" who seeks to maximize his or her economic advantages at the expense of coherence between the moral and legal principles invoked. Viewed from the perspective of those who care "only about what the law might *do* to him, not what it *is* abstractly for him," she urges us to consider the distributive impacts of legal decisions as of equal importance to their ideological significance.

It is possible, however, to push this interest in identifying the capacity for agency of individuals in even the most constrained circumstances too far. In her chapter in this anthology, Ayelet Shachar cautions that many of the features that make negotiating disputes with the help of lawyers or mediators rather than taking a case before a judge a desirable option in the context of civil family law may not be present in religious courts. Women may lack an effective voice, effective representation, or access to legal language in which to frame their claims in proceedings before religious tribunals. The law applied may be substantively unfair, however able the woman is in presenting her case. Even the possibility of review by a civil court judge of suspect decisions by religious bodies may fail to adequately compensate for the disadvantage women may experience before religious courts. Shachar argues for what she has called "transformative accommodation" of these religious tribunals, such that recognition of their decisions as binding law is made contingent upon their applying state-sanctioned human rights norms to their own actions and doctrines.

The parties may not be the only ones seeking their best advantage when decisions are being made about whether to resolve family law disputes with the help of religious authorities or through the civil courts. Religious law authorities also have a stake in the resolution of these conflicts. Patriarchal elites are motivated to defend both their institutional power and the substantive discriminatory doctrines that secure that power. From her perspective as a "cause lawyer" litigating to develop a feminist divorce jurisprudence in Israel, Susan Weiss provides an intriguing example of how women can get caught up in the struggle over jurisdiction between secular and religious courts in plural law regimes. While the modern state of Israel initially granted exclusive jurisdiction over family law matters to religious courts, this power has

been gradually whittled down, as civil courts have been granted concurrent jurisdiction over most matters, with the exception of the dissolution of marriage. Many couples engage in a race to the courthouse[32] where women seek to bring their cases under the more egalitarian civil law, while men seek their best advantage by bringing their actions in rabbinical courts. Weiss describes how rabbinical courts react to the erosion of their sphere of influence through developing ever more draconian devices for asserting their authority. Through a series of civil suits in tort for damages for failure to grant a religious divorce, Weiss explains how her Center for Women's Justice is enabling women to use secular law as a platform to comment upon and redress their mistreatment under religious law.

Resolving Conflicts between Multicultural Toleration and Women's Rights

Feminist critics of multiculturalism agree that in cases of conflict, guarantees of gender equality must take precedence over claims rooted in culture and religion. While it has sometimes been argued that it might be best if cultures wedded to the patriarchal oppression of women within their midst were to become extinct, most theorists argue that the primacy of equality should be established by encouraging communities to identify ways in which their discriminatory practices can be integrated with gender equality norms.[33] Several chapters in this book consider the attempt to develop institutional forms that will ensure the priority of gender equality and make such reflection possible. The opportunity for judicial review of the actions of religious courts by civil tribunals can both alleviate disadvantage at the hands of religious law courts and encourage dialogue between legal regimes and within law-following communities about the possibilities for law reform.

A key theme that runs through the book is a consideration of the role structural devices for dividing jurisdiction can play in alleviating conflicts between public equality and private religious or cultural norms.[34] Religious law may operate in at least three ways. It may be the basis for general family law throughout the nation, as it was in eighteenth-century England[35] and as it is now in many Muslim majority states.[36] In a second model, multiple regimes of religious family law may be permitted to operate side by side within an

otherwise secular state, exercising jurisdiction over members of those religious communities, as in contemporary Israel, India, and Kenya. In modern versions of these plural law regimes, some elements of family law, like the distribution of property or custody of children, may also be covered by civil laws, giving rise to the possibility of the sort of race to the courthouse described by Weiss. In a third approach, principles of religious family law may be incorporated into an otherwise secular regime by the private acts of individuals, who may choose to contract marriages solemnized under religious law and to take family law or other disputes to religious tribunals. Shachar has pointed out how rules for resolving conflicts between jurisdictions can be used to create or alleviate pressure on religious law bodies to change their norms or risk losing recognition for their authority and the allegiance of their followers.[37] In her chapter for this volume, Minow suggests that the creative and critical deployment of traditional governance devices for the management of plural nations may serve to contain or defer conflicts that cannot or need not be resolved through state coercion or state deference. McClain cautions, however, that enhanced recognition of religious law may throw the fragile balance struck by American courts between civil rights and religious norms out of balance in ways that will disadvantage women.

To illustrate the risks involved in delegating power over family law to religious authorities in the name of accommodating religious or cultural difference, chapters by Rashida Manjoo and by Likhapha Mbatha and myself consider recent efforts to address women's inequality while reforming the plural family law regime in South Africa. Until the demise of apartheid, South Africa divided jurisdiction over family law between the state and tribal authorities but provided only partial recognition to a stunted conception of African tribal family law and refused all recognition to marriages contracted under Islamic law. Both chapters address the tension between seeking to affirm equality between previously disenfranchised Black and Muslim communities and the privileged White minority in the face of a history of grievous disenfranchisement and the need to turn a critical eye on the internal practices of both the African and Muslim legal regimes. The fact that neither regime was recognized under apartheid has had the perverse effect of making it more difficult to change the official accounts of patriarchal legal doctrine, as no formal mechanisms have existed for doing so. In this difficult context, Mbatha and I examine the decision of post-apartheid South Africa to grant recognition to

the institution of polygamous marriage. We explore the reasons that a newly democratic South Africa chose to recognize this practice in the face of clear evidence of its pernicious effects on African women. We also consider how such recognition has, nevertheless, formed the basis for incremental reforms to the institution of polygamy.

Manjoo, a former member of the South African Gender Commission and now UN Special Rapporteur on Violence against Women, describes another legislative proposal in the new South Africa, which would redress the refusal to recognize Islamic law by codifying the principles of Muslim Sharia family law and the role of Islamic tribunals in resolving family disputes. She argues that equality between religious traditions can be achieved through affirming the legitimacy of Islamic law institutions without entrenching the more extreme patriarchal norms that have been promulgated by legally unrecognized Sharia courts. She urges the adoption of mechanisms that will ensure that a recognized South African conception of Sharia can be reshaped in the light of the equality guarantees in the new Constitution and South Africa's commitments under international human rights laws.

Contesting the Notion of "Culture" in Multiculturalism

It is sometimes argued that eradicating practices that deny women power over key aspects of their lives is fundamentally inconsistent with essential elements of some cultural traditions. Changing these practices may thus put at risk the possibilities of perpetuating important forms of life in which they are enmeshed. However, this notion elides the ways in which religious and cultural traditions constantly undergo a process of interpretation, selection, and refinement. While certain elements may be conceived of as essential to a cultural worldview at a given point in time, the nature of the practice, its meaning, and its role have often changed over time. The tradition may also have been variously shaped by the practices of the broader communities in which minorities live. Even within the official discourse of a religion, there are often recognized countertendencies, alternative interpretations, and insurgent schools of thought competing for dominance.[38]

Arguments that multicultural toleration requires the uncritical preservation of authentic, traditional practices thus rely on an anthropologically naïve

conception of how cultural identities are formed and maintained.[39] This naïve conception characterizes culture as the way of life of a discrete people whose essence is expressed through a coherently interlinked set of ideas and practices. Individuals are slotted into defined roles within the community and express what agency they have in elaborating the performance and meaning of these roles and the rules that undergird them. On this model, culture is a fragile organic structure that flourishes if left alone, but can be destroyed through even small changes.[40]

A model of culture that captures the genuine dynamism of cultural practice and cultural identity through time looks rather different. A culture is not an organic whole but a shifting set of religious and cultural texts, symbols, and practices that has no central core features. The link between these materials and a particular people is wrought by history rather than logical or biological necessity. A cultural group maintains this sense of identity through collaborative elaboration of a narrative that pulls these materials together in a coherent way. The group identity is constituted by this collaborative activity, but it is predicated on the shared effort to find meaning together, not on a shared consensus of what these materials meant in the past or what their implications are for the future. Legal and policy interventions by outside authorities may change the terms of this struggle over meaning in the community, empowering some and disadvantaging others who previously enjoyed more privileged positions, but this does not render the culture thereby produced necessarily less authentic in an anthropological sense.

It may, however, be substantially less legitimate in the eyes of key stakeholders in the community because it has been produced outside the accepted mechanisms for normative change within the community and does not appear to cohere with its stated values.[41] A key strategy for working through conflicts between women's rights to equality and the preservation of religious and cultural structures is, therefore, to explore the dissonant voices within the tradition in order to uncover ways in which human rights values might be seen as consistent with internal cultural values.[42] Even where such analysis reveals that there is no indigenous norm that parallels important human rights norms, this process of collaborative deliberation may reduce the scope of the apparent inconsistency. This dialogue may be initiated through public policy discussions, through internal educational campaigns, or through women's increased involvement in areas of ritual or legal life. It may also come about

through the law reform process itself. Litigation or legislative reform aimed at bringing religious and cultural practices in line with human rights norms may provide the impetus for working through conflicts that might otherwise remain inchoate and therefore apparently intractable.

While we all need cultural materials to do the work of identity formation and normative deliberation, these materials do not need to come from a single integrated normative vision and rarely do so.[43] Many women experience their normative lives as constituted by the interweaving of obligations from multiple sources. As Minow notes, a legal approach that seeks to work through this complexity rather than slide over it may be more effective in resolving both women's real-life conflicts and conflicts of principle.

How do women seek to change the practices of their culture from within? The chapters by Koren, Roness, and Camara take a deeper look into the experience of religiously observant women who seek to transform the religious law that governs them. The authors describe both the ways in which women involved in initiating legal change understand their practices and how they endeavor to justify them to other stakeholders in their religious and cultural communities. These pieces discuss women defining new roles as participants in key religious rituals, in developing the credentials to be recognized interpreters of religious doctrine, and as designers of new institutions to articulate egalitarian cultural narratives. As Irit Koren describes it, these are women who may have the option to exit their religious community to join the secular world but who make a conscious decision to seek change from within. Koren's work explores women's attempt to transform the Jewish marriage ritual, particularly the symbolic motifs that reflect the notion that the husband is acquiring rights of ownership and dominion over the wife. Just as Minow urges legal theorists to live with the tension between affirming equality and accommodating difference, Koren argues that these transgressive brides are distinguished by their ability to contain the dissonance in their own identities between their religious and feminist selves.

From her unique perspective as a member of one of the first cohorts of trained *yoatzot halakhah*, or female Jewish law advisors, Michal Roness describes the emerging recognition of women as authorities on the application of Jewish laws relating to menstruation and marital intimacy. She considers how proponents of this novel legal role for women were able to successfully negotiate the shoals of expanding women's authority as guides to the application of

religious law and securing acceptance by the community and rabbinate in the Modern Orthodox world. Roness demonstrates how social change initiated by religious women with detailed knowledge of the community, high status among existing leadership, and commitment to its values can be successful. She suggests that attempts to fraction legal transformation agendas into incremental steps may thereby reduce the potential for conflict that may accompany it.

In the final chapter in this section, Fatou Kiné Camara writes about an innovative program to undermine resistance to feminist reform of Muslim family law in Senegal. Camara demonstrates how notions of an indigenous matriarchal and egalitarian tradition are disseminated as a corrective to invocations of Islamic heritage. Like Mbatha and Fishbayn Joffe, she argues that the legacy of colonialism for African family law can only be eroded through careful attention to the role the commingled values of indigenous custom and formal law play in the regulation of African family life.

This anthology aims both to capture a sense of the diversity of forms that conflicts between gender equality and practices justified in terms of cultural and religious norms might take and to offer a sense of the creative and innovative theoretical models and practical strategies that are being deployed to understand and deal with these conflicts. The contributors demonstrate a complex grasp of the challenges posed by having multiple religious and civil normative systems operating within one society. They reflect with sophistication upon the interplay between individual agency and the structures that distribute power to religious groups or centralize power in a secular state. They consider the legacy that relations of colonial domination, racial hierarchy, and gender inequality have on the possibilities for effective transformation of laws that disadvantage women. Finally, they provide examples of the ways in which women within communities that retain discriminatory patriarchal norms are working from the inside to integrate their personal commitments to both gender equality and religious law. The role of law may not always be to resolve the tensions between women's rights and religious law, but it can shift the terms of the debate in ways that put greater power into the hands of the female leaders, plaintiffs, and advocates who seek to implement these changes.

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Notes

1. Christine Haughney, "At Front of Brooklyn Bus, a Clash of Religious and Women's Rights," *New York Times*, October 19, 2011. Women on the #56 bus in Jerusalem are subject to the same coercion, even though the Supreme Court of Israel has declared the practice illegal. Maayan Lubell, "'Women Fight 'Back of the Bus' Battle in Jerusalem: Segregation of Sexes Has Been Spreading in Ultra-Orthodox Jewish Areas," MSNBC.com, November 14, 2011.

2. Thomas Erdbrink, "Olympics 2012: FIFA Bans Headscarves for Iranian Women's Soccer Team," *Washington Post*, June 6, 2011.

3. See discussion of the *Aleem* case in Linda C. McClain's chapter in this volume.

4. "'Sister Wives' Family: Bigamy Law Hurting, Not Helping," Associated

Press, October 18, 2011. For an extended discussion, see Janet Bennion, *Polygamy in Primetime: Media, Gender and Politics in Mormon Fundamentalism* (Waltham, MA: Brandeis University Press, 2012).

5. *Texas: Polygamist Leader Gets Life Sentence*, Associated Press, August 9, 2011.

6. See chapters in this volume by Rashida Manjoo and by Likhapha Mbatha and Lisa Fishbayn Joffe.

7. Richard Spencer, "Libya's Liberation: Interim Ruler Unveils More Radical than Expected Plans for Islamic Law," *Telegraph*, October 23, 2011. http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8844819/Libyas-liberation-interim-ruler-unveils-more-radical-than-expected-plans-for-Islamic-law.html

8. *Women Living under Muslim Laws Statement on Libya*, October 25, 2011, http://www.wluml.org/action/women-living-under-muslim-laws-statement-libya.

9. Ayelet Schachar, "Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation," *Journal of Political Philosophy* 6 (1998): 285, 293.

10. Anne McLintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (New York: Routledge 1995), 359.

11. L. Abu-Odeh, "Comparatively Speaking: The 'Honor' of the 'East' and the 'Passion' of the 'West,'" *Utah Law Review*, 1997, 287–307.

12. Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Boulder, CO: Westview Press, 1998), 225.

13. Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001), 50.

14. Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008), 146.

15. *Discover Canada* (Citizenship and Immigration Canada). http://www.cic.gc.ca/english/resources/publications/discover/section-04.asp.

16. See, for example, *Life in the United Kingdom: A Journey to Citizenship*, 2nd ed. (United Kingdom Stationery Office, 2009).

17. See 2007 Herouxville Town Charter. A slightly amended version is at http://herouxville-quebec.blogspot.com/2007/03/about-beautiful-herouxville-quebec.html.

18. Lauren Collins, "England, Their England," *New Yorker*, July 4, 2011, 30. Interestingly, a Muslim leader rejects the notion of assimilation on much the same basis, saying, "We're not required to look like you, be like you—especially when we look at the state of you. You get drunk, you beat up your wives, you sell drugs" (ibid., 32).

19. See discussion of debates over faith-based arbitration in family law in Ontario in the chapters by Minow, Shachar, and McClain in this volume.

20. Michel Martin, "States Move to Ban Islamic Sharia Law," NPR, March 11, 2011, http://www.npr.org/2011/03/11/134458058/States-Move-To-Ban-Islamic-Sharia-Law.

21. See, for example, Shachar, *Multicultural Jurisdiction*; Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford: Oxford University Press, 2006); Sarah Song, *Justice, Gender and the Politics of Multiculturalism* (Cambridge: Cambridge University, 2007); Anne Phillips, *Gender and Culture* (Cambridge: Polity Press, 2010).

22. Susan Moller Okin, "Is Multiculturalism Bad for Women?" in *Is Multiculturalism Bad for Women?* ed. Joshua Cohen et al. (Princeton: Princeton University Press, 1999); Avigail Eisenberg and Jeff Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press 2005).

23. Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1998), 161–65.

24. Ibid., 214.

25. Will Kymlicka, *Liberalism Community and Culture* (Oxford: Oxford University Press, 1989), 164–65.

26. Ibid.

27. Ibid., 198.

28. Okin, *Is Multiculturalism Bad for Women?*, 13.

29. "In order to account for women's consciousness . . . feminism must grasp that male power produces the world before it distorts it. Women's acceptance of their condition does not contradict its fundamental unacceptability if women have little choice but to become persons who freely choose women's roles." Catharine A. MacKinnon, "Feminism, Marxism, Method and the State," *Signs: Journal of Women in Culture and Society* 7 (1983): 515–42.

30. Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006), 53. Wearing the veil may be a strategic choice that allows women to be taken seriously while advocating for reform of religious norms. Asifa Quirashi, "Western Advocacy for Muslim Women: It's Not Just the Thought That Counts," paper presented at *Working from the World Up: Equality's Future,* University of Wisconsin Law School, Madison, WI, March 14–15, 2008.

31. This ambivalence about women's capacity for autonomous decision making is not limited to the sphere of religious law disputes. See, for example, recent moves by American courts to protect women from the possibility of making abortion

decisions about which they may someday feel remorse or regret; Jeannie Suk, "The Trajectory of Trauma: Bodies and Minds of Abortion Discourse," *Columbia Law Review* 110 (2010): 1193.

32. Susan Weiss and Netty Gross, *Israel's Civil War: Jewish Marriage and Divorce* (Brandeis University Press, forthcoming 2012).

33. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 408; Okin, *Is Multiculturalism Bad for Women?*, 7. Okin emphasized her preference for using human rights law as a guidepost for internal reform of discriminatory practices in her later work. See Susan Okin, "Multiculturalism and Feminism: No Simple Questions, No Simple Answers," in *Minorities within Minorities*, 67–89 at 72–75. See also Martha Nussbaum, "A Plea for Difficulty," in *Is Multiculturalism Bad for Women?*

34. A role elegantly highlighted by Shachar, *Multicultural Jurisdictions*.

35. Between the passage of *Lord Hardwicke's Marriage Act* of 1753 and the *Marriage Act* of 1836, valid marriages could only be solemnized under the auspices of the Church of England, with special dispensations made for Jews and Quakers; Carolyn Hamilton, *Family, Law and Religion* (London: Sweet and Maxwell, 1995), 43.

36. It is not a coincidence that this model persists in these former English colonies once subject to indirect rule. See Lisa Fishbayn, "Litigating the Right to Culture: Family Law in the New South Africa," *International Journal of Law, Policy and the Family* 13, no. 2 (1999): 147. Nations throughout the Arab world, for example, developed family law codes based on Sharia law throughout the last century, beginning with the Ottoman Empire in 1917 and continuing, most recently, with Qatar in 2006; Lynn Welchman, *Women and Muslim Family Laws in Arab States* (Amsterdam: Amsterdam University Press, 2007), 12–13.

37. Shachar, *Multicultural Jurisdictions*.

38. See, for example, Jan Feldman's discussion of the assumption in Jewish law that conflicting opinions about interpretation are inevitable and potentially simultaneously correct; Jan Feldman, *Citizenship, Faith and Feminism: Jewish and Muslim Women Reclaim Their Rights* (Waltham, MA: Brandeis University Press, 2011), 57–58.

39. Will Kymlicka, *Multicultural Odysseys* (Oxford: Oxford University Press, 2007), 101.

40. See Lisa Fishbayn, "Culture, Gender and the Law: Recent Thinking and Practical Strategies," in *Gender and Human Rights in the Commonwealth* (London: Commonwealth Secretariat, 2004), 36–37.

41. Commenting on the recent judgment of the Supreme Court of the

United Kingdom in *R (E) v Governing Body of JFS* [2010] 2 AC 728, [2010] 2 WLR 153, that a school admissions policy based on the doctrines of Jewish law was discriminatory based on race, Simon Hochhauser, president of the United Synagogue for Orthodox Judaism, commented, "Essentially, we must now apply a non-Jewish definition of who is Jewish." Jewish School Loses Appeal," Guardian Online December 16, 2009.

42. James Tully, *Constitutionalism in the Age of Diversity* (Cambridge: Cambridge University Press, 1995); Thandabantu Nhlapo, "African Family Law under an Undecided Constitution: The Challenge of Law Reform in South Africa," in *The Changing Family: Family Forms and Family Law*, ed. John Eekelaar and Thandabantu Nhlapo (Oxford: Hart Publishing, 1998), 625; Abdullahi An-Naim, *Islam and the Secular State* (Cambridge: Harvard University Press, 2008).

43. Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), 93, 99–101.