Gender, Religion, and Family Law

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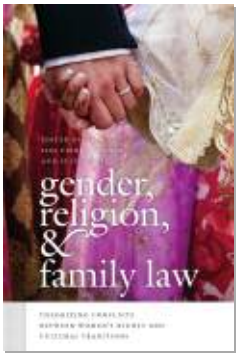

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Chapter One Principles or Compromises Accommodating Gender Equality and Religious Freedom in Multicultural Societies

Introduction

The "paradox of liberalism," often phrased as the problem of how to "tolerate the intolerant,"[1] is not only a problem of theorists but a practical problem for those who are committed both to gender equality and to religious freedom. To pursue gender equality is to encounter the frequent objections that challenged practices rest on religious grounds; to defend religious freedom is to confront objections that a religious school's decision to fire a pregnant teacher or religious practices such as covering a woman's hair, or face, or entire body discriminate or degrade individuals on the basis of gender.[2] Middle-ground solutions — like exempting private religious schools but not public schools from gender discrimination norms and permitting women to cover their hair but not their faces — may offer practical working solutions but not a strong rationale. Is there a principled way to resolve apparent conflicts between gender equality and religious freedom — and if not, can compromises be justified?

A prime context for this question arises with conflicts between women's equality advanced by national constitutions and international human rights, on the one hand, and state deference to traditional cultural and religious norms, on the other. These conflicts lie just beneath the surface of recent high-profile debates in Great Britain and Canada. Calls for the resignation of the Dr. Rowan Williams from the post of Archbishop of Canterbury erupted after he suggested that Great Britain consider including some parts of Sharia

(Islamic religious law) under a jurisdiction parallel to secular law in order to acknowledge religious differences and also aid social cohesion.[3] A firestorm of protest terminated a proposal to permit use of Islamic law in arbitration and mediation of family disputes in Ontario, Canada.[4]

The treatment of women is a central concern here; social and legal regulation of what women wear or do not wear, for example, has become the subject of national and international political and legal debates. Largely secular democracies in particular are struggling to maintain gender equality while respecting religious freedom, as recent immigrants to European and North American communities bring religious traditions that differ from the ones dominant in their host countries — and the encounter with the host country leads some of the immigrants' children to seek more religious orthodoxy and some to seek less.

Some of the tensions arise within religious communities over degrees of overt religious observance and as advocates on various sides use the arenas of public policy as well as community and peer pressure. Hence, a growing majority seeks greater room for religious expression in public life in Turkey and threatens to dismantle the constitutionally mandated secularism in that country. A ban on religious head coverings in the public university has given rise to action by Turkey's highest court and by the European Court of Justice, with reactions by the Turkish parliament and then more reaction by the nation's supreme court — and then due to political support, universities in Turkey now informally permit women to wear headscarves.

The United States Supreme Court's recent reinterpretations of the Establishment Clause also allow more religion in public life[5] and more public aid to religion,[6] but the courts and hence public officials continue to debate the precise line to draw between religious accommodation and guarding against governmental establishment of religion.[7] Israel is experiencing intense debate over that country's assignment of exclusively religious control over family law, including women's status in that context.[8] Meanwhile, feminists' struggles for gender equality in South Africa, Ethopia, and Central Asia garner some success using domestic constitutions and international human rights. But those very victories set a collision course with legal and human rights recognizing cultural and religious freedom.

Québec launched a province-wide exploration of cultural accommodation in 2007 and identified sharp public controversies over whether human rights

call for the provision of prayer rooms in state-supported schools, whether there should be an exemption from the no-weapons rule for a student who wants to carry a Kirpan (ceremonial knife used by Sikhs) to school, and whether Muslim voters wearing the niqab or burka should be allowed to vote without showing their faces as identification.[9] Incidents in Québec, Istanbul, Paris, and London raise the question whether accommodating the veiling of a Muslim woman respects her human rights and personal liberty or subjects her to internal group hierarchy and confinement. How much room should a secular democracy ensure for religious and ethnic subgroups, and should it do this as a matter of normative principle or instead as a compromise of principles? Does focusing on individual choice express the ultimate regard for another, socialization pressures, the neglect of the significance of group identity and tradition, or the imposition of Western imperialism? Is the "self" in any particular instance free to be self-determining?

These problems emerge because of growing encounters between people who identify with different religious or ethnic traditions — and also between people within the same tradition who develop contrasting views about how to navigate local and cosmopolitan worlds. Potentially tense encounters due to these kinds of diversity increasingly arise, given immigration patterns to North America and Europe; increasing religious diversity within local communities produces clashes between new groups and dominant rules while also offering options — and potential conflict — within religious communities.[10] In this period of massive migration and what some provocatively call a "clash of civilizations,"[11] we need to ask how much room a secular democracy should ensure for religious and ethnic subgroups. Given enough room to be exempt from otherwise emerging norms against gender discrimination, religious groups could claim protection under principles of religious freedom, personal autonomy, or freedom of association, but from the perspective of gender equality concerns, such exemption could be understood as a compromise of principles, however explained. When do accommodations of religious groups represent compromise of principle,[12] and when instead do they represent a further principle of pluralism, affirmatively embracing as a positive good the coexistence of multiple normative traditions?

These are old as well as new questions. Many countries, including the United States, embraced pluralism — a commitment to respecting multiple religious and secular traditions — long ago in allowing religious figures

to officiate at marriages that have a civil effect and in permitting parents to select religious schools to satisfy their children's compulsory schooling requirement. Nonetheless, prior and contemporary waves of migration generated heated contests over the scope of pluralism and the requisites of unity in this country and elsewhere.[13] These contests, past and present, raise issues about coordination and conflict between secular and religious legal arrangements.

Do accommodations of cultural or religious subgroups, such as Ontario's now-defunct proposal to permit arbitrations of family disputes to follow Islamic law, fall short of defensible principle in pursuing a form of coexistence and recognition for different religious groups within a country committed to preventing gender discrimination? When do accommodations for minority groups represent a compromise of principles of a constitutional democracy, and when do they fulfill those principles, which include both gender equality and religious freedom? And do structural commitments to preserving pluralism involve merely practical concerns or instead normative ideals?[14] What is possible when societies encounter tensions between cultural pluralism and gender equality?[15] Should we want compromise, steadfast ideals, or something else?

Buried within these questions are five linked but still distinct issues that I pursue in this chapter: (1) when should state accommodations of cultural and religious difference be viewed as a compromise; (2) what is so bad about compromises: when are they not wrong and when even admirable; (3) if compromise is suboptimal, when might convergence be possible in the form of solutions that both attend to gender equality and accord respect for customary practices, rather compromise of one or the other; (4) when are differences too profound to find points of convergence; and (5) in the absence of convergence and due to concerns about compromised principles, what alternatives can be devised to manage or avoid collisions over pluralism and guarantees of individual equality?

Comparing Two Treatments of Religious Difference

At the urging of reformers concerned with the treatment of women, the state of New York modified its own divorce law to withhold secular divorce if there is an impediment to a religious divorce pursued by the same party. The New

York law was designed to prevent husbands from securing a secular divorce while withholding a document required by Jewish law for a religious divorce; it is written broadly enough to apply in comparable situations involving other religions.[16] One commentator observed, "Despite the controversial nature of the New York Get Law, it serves as an apt illustration of a compromise between competing religious and civil interests. The law recognizes the indispensability of religious law for some persons while preserving the state's interest in marriage and the ability of adults to marry freely."[17]

Hence, some people view New York's law as a compromise, although it might better be described as an effort to align secular and religious laws. The New York divorce law is a concession to religious law, in the sense that it acknowledges and makes room for religious legal systems rather than treating only the law of New York and the United States as the exclusive source of norms. Such acknowledgment of other normative systems could seem threatening to a government that seeks to be the exclusive source of binding norms for the people in its realm. Professor Robert Cover suggested that the modern state may be especially jealous of rival normative regimes.[18] For the jealous state, even recognizing and accepting the parallel operation of religious law would seem a compromise. The New York law could seem a compromise in a different sense to those who want to keep the government far away from particular religious practices to ensure there is no hint of government endorsement of that religion or religion in general, given the constitutional ban on government establishment of religion.[19] Due to this concern about staying far from religious matters, courts have foreclosed questions raised by divorcing parties that appear to cross the line into religious issues.[20]

In this example, the state law acknowledges the existence of another legal system. It ensures that the state's divorce process will not be used in conjunction with religious practices to undermine the gender equality otherwise ensured in secular law. Under traditional Jewish law, a marriage is a contract, and the only way a married couple could divorce would be if the husband of his own free will gives the wife a legal document dissolving the marriage — and without such a document, the marriage continues, even if the couple is granted a civic divorce. The New York law prevents secular divorce until the parties have eliminated any impediment to a religious divorce, and in so doing the state sharply reduces the risks that observant Jewish women will be cast into

the difficult status of an abandoned but not divorced woman or forced to bargain away property entitlements in exchange for avoiding that status.[21] The state thereby ensures that its gender equality norm will not be undone by the religious divorce process — and in so doing, extends some protection for women into the religious community. New York takes a religious community's laws and practices into account and aligns the options available within the religious and secular settings.

If this is a compromise, the sole "concession" from the secular side is to acknowledge the existence of the religious world; the secular law trumps any contrary religious practice (much to the satisfaction of many religious individuals who lobbied for the change). There is no compromise of or departure from a requirement of otherwise existing New York law. No secular substantive norm relevant to the availability or terms of divorce is altered by the New York law; it simply alters the prospects for a woman who otherwise would risk real problems without a religious divorce.[22] The state provides the overarching umbrella within which religious freedom is protected, but so are secular values of gender equality and fairness.

The Canadian Supreme Court offered a similar analysis in deciding to enforce a privately negotiated "consent to corollary relief," in which a Jewish husband agreed to attend a rabbinical court to obtain a *get*.[23] His failure to comply for fifteen years gave rise to a damage suit by his ex-wife, and the Canadian Supreme Court reversed an appellate decision that the obligation at issue could not be enforced by the courts because it was religious in nature.[24] The judgment delivered by Justice Abella reasoned that a voluntary agreement meant to have legal consequences by two consenting adults is appropriate for judicial consideration; the agreement itself is valid under Québec law because individuals can transform a moral obligation into a legally valid and binding one; and the agreement itself is not contrary to public order.[25] Indeed, the agreement "harmonizes with Canada's approach to religious freedom, to equality rights, to divorce and remarriage generally," preventing impairment of the wife's freedom of religion and ability to remarry and have children according to her religious beliefs.[26]

A contrasting proposal to permit use of Islamic law in arbitration and mediation of family disputes in Ontario, Canada, erupted in a firestorm of protest.[27] The former attorney general of the province developed the proposal after the Islamic Institute of Civil Justice requested religiously based arbitrations similar

to those used by Jews and Catholics under a 1991 law permitting voluntary arbitrations, subject to court ratification.[28] Attracting international attention, the proposal produced heated debate and protests.[29] Not only was it defeated; the controversy prompted the Ontario legislature to revoke authority for the use of any religious law in arbitrations and to require Canadian law instead.[30]

In one sense, the Ontario proposal presented no more compromise of the public law than did New York's divorce law or Canada's enforcement of a private agreement. The Ontario proposal took account of a religious world by proposing to allow lawyers, retired judges, and religious scholars to serve as arbitrators in the alternative dispute process already established by law while requiring that the process and result of any such process be consistent with Canadian law.

Yet, a compromise of secular values would in fact emerge if the norms used to resolve the family disputes depart from the laws of Ontario or the Canadian Charter of Rights and Freedoms and if the arbitration plan foreclosed access to a Canadian-government decision maker to ensure compliance with Canadian law. The proposal called for reference to Sharia (Islamic law), which itself is subject to multiple interpretations and conclusions. Some of those interpretations could well depart from Canadian law, notably with regard to women's status and rights. The arbitration plan, organized to authorize private control over the selection of dispute resolution, would have permitted foreseeable departures from secular guarantees. Although resort to arbitration formally would be voluntary, the proposal lacked any provision for government monitoring to ensure truly voluntary election of religious arbitration. The absence of government oversight would be especially a concern with regard to parties lacking independent economic resources or social connections outside the Islamic subcommunity, and many women within immigrant communities would fit that description. One critic declared that use of Islamic family law arbitration would create "an under-class of underprivileged people who can go into their ghettos and deal with issues and not bother them."[31] Even if intended as an accommodation for minority groups, privatizing dispute resolution could permit systematic subordination of some individuals within the group, effectively undermining their individual rights.[32]

Opposition to the proposal, however, raised concerns about anti-Islamic attitudes because the arbitration option had already been used by members of other religious groups. The proposal to permit Islamic arbitration emerged

as an amendment of the already existing law, and despite that law's origin in commercial matters, it had been used for family matters by Jewish and Catholic groups.[33] The argument for equal treatment for Islamic groups ultimately was persuasive, but given the new concerns raised about how the Islamic arbitration could depart from Canadian norms, the government decided to treat the religious subcommunities equally by eliminating altogether the option of any religiously based arbitration for any group.

This series of events signaled suspicion by the dominant community toward Muslims. Concerns that Islamic norms depart from Canadian ones raised questions about alien norms in a way that Jewish and Christian arbitration had not. Lack of familiarity with Islam on the part of many in the community combined with the larger global setting. Domestic fears of rising forms of Islamic fundamentalism and terrorist activities associated with some Islamic groups affected local Canadian politics. Yet it is also possible that as compared with the Jewish and Catholic groups, the Muslim advocates of religious arbitration may have provided less overt assurance that they would abide by Canadian law.[34]

This episode at the same time reveals the limitations of government law in a society with vibrant religious subgroups. When Ontario ended statutory authorization for religious arbitration, it did not prohibit and did not halt the use of even more informal private religious resolution of family disputes, including mediation by religious figures or others guided by religious principles.[35] If anything, foreclosing public recognition of private family arbitration in effect pushes the use of informal mediation, remote from secular legal guarantees, further from oversight of government authorities or public knowledge than the arbitration option would have produced. Advocates of the pluralist arbitration process — and advocates of women's equality — thus might well have been wiser to press for meaningful judicial review of arbitrated family disputes to make the option of religious arbitration viable and consonant with the secular commitments of the constitutional democracy.[36]

Central to this story is the fear that women's rights would be compromised by enforcement of Islamic rather than Canadian principles. Feminists often treat as a compromise any coordination of religious and secular norms around family and gender issues and imagine that either the state's norms supplant religious ones or the religious ones supplant state norms.[37] Although the Ontario Arbitration proposal expressed the secular values of private dispute resolution,

religious freedom, and multicultural accommodation, it seemed to open an avenue for religious norms supplanting state ones. A state ban on a religious practice, such as polygamy, would be the reverse, supplanting of a religious norm by a secular one. Either way, a norm is surrendered, compromised, unfulfilled. The negative meanings of compromise deserve attention here; do they invariably accompany efforts to make room for religious and cultural groups within a constitutional democracy? When is it possible to make room for religious or cultural practices without sacrificing secular values — and vice versa?

Yet sometimes, rather than compromise, convergence between competing norms is possible.[38] The New York and Canadian treatments of religious impediments to secular divorce exemplify convergence, not the state supplanting religious norms or religious norms supplanting state rules. In these examples, the women involved were able to remain as active members in their own minority communities while also retaining access to rights guaranteed by the government.[39] This contrasts with other settings where women face the choice between remaining within a religious community or else asserting their rights guaranteed by the state at the cost of remaining within the religious community. For many religious communities would view the judicial exercise of individual rights, guaranteed by the state, as a decision to exit the religious community and reject religious law and religious institutions.

Some might object that even the New York statute and Canadian decision involved compromises of religious norms. The men in New York and the husband in the Canadian case lost the prerogative to withhold the religious divorce. That prerogative was permitted — but not required — under religious law. Leave it to theological debates within the Jewish tradition to explore when it is just or fair to withhold the *get* and when it is instead an act of unfairness or abuse. From the vantage point of New York or Canadian law, no burden on religious belief or practice is required to eliminate an option (withholding the *get*) in order to ensure equal access to the divorce for religious as well as nonreligious members of the community. Members of the religious community may view forgoing an option in order to comply with secular law as a compromise, and some secularists may see compromise in the effort to frame state law with cognizance of religious norms. If these minimal forms of accommodation are compromise, what is troubling about compromise itself? The very assumption that compromise involves second-best or worse deserves scrutiny.

What's Wrong with Compromise?

If "compromise" means departure from principle, by definition, it produces a shortfall; measured by principle, compromise is definitionally inadequate or even corrupt. Compromise in this sense means unprincipled; uncompromising means principled. Compromise and accommodation imply abandonment of principles, rights, and commitments.[40] Widespread discomfort with compromise may explain the American reliance on institutions, such as the jury, that do the compromising behind closed doors.

Yet "uncompromising" can also mean "unyielding" in the less positive sense of intransigent or rigid. With this meaning, its opposite does not look so bad. Compromises should not always be castigated when they signal the flexibility that is often a virtue and a concomitant of good results. Flexibility involves creativity, willingness to change, or dexterity in achieving accommodations between prior commitments and justifiable impediments. Practically speaking, accommodation is indispensable for stability and mutual learning in a diverse polity and for peace between diverse nations.

The practical need for accommodation may only suggest that compromise is inevitable, not that it is desirable. The important question is when compromise or accommodation should be resisted and when instead it should be advanced. Compromise can seem messy, unguided, emotional, or political; it can seem to abandon what the very notion of "rights" would command. More precisely, compromise can seem undesirable for three reasons: (1) it can seem to sacrifice important ideals for the sake of avoiding conflict; (2) it can seem to involve middle positions that are more incoherent or less defensible than the rejected alternatives; or (3) it can require "dealing with the devil" who uses illicit tactics that should not be rewarded. Let us take each problem in turn.

Sacrificing important ideas to avoid conflict? Simply avoiding conflict is not a sufficient rationale for sacrificing important principles, especially in the context of constitutional and human rights. The very aspiration of rights is to alter how people might be otherwise inclined to treat one another. Constitutional or human rights fail at the starting gate if they collapse in the face of the conflicts they foreseeably provoke. Yet the conflict that rises to the level of violent instability itself can jeopardize the realization of any rights. Peace and social stability are potentially the predicates and the outcome of a functioning constitutional society. Desire to reduce or eliminate conflict cannot

silence calls for human rights, but nor is cessation of conflict irrelevant to the realizing of human rights.

Women's equality requires struggle in societies that have not guaranteed it (that is, most societies), yet women themselves often care deeply about maintaining relationships and involvement in religious and ethnic communities where gender equality has not prevailed. Struggles that destroy those ties are counterproductive both for those women and for the society as a whole. Struggles for women's equality that force women to disrupt or depart their own communities violate women's dignity, choice, and meaning, as well as alienate the intended beneficiaries. Processes of accommodation and balancing are indispensable given the multiple values of importance in people's lives. Accommodation and balancing are techniques that help individuals navigate multiple commitments.

Accommodation of competing principles similarly is often the predicate of peace and social stability necessary for realizing all ideals and norms for a society as whole. Compromise does not become acceptable simply if it avoids conflict, but pursuit of peaceful relationships can be a reason to work for a compromise that is otherwise justifiable and acceptable.

Middle positions: In a perhaps apocryphal case, a judge heard a plaintiff and defendant argue over which one rightfully owned a herd of cattle; unable to decide in the face of two plausible claims, the judge ordered the herd divided between the two parties — only to be reversed by the appellate court for failing to do the job of judging. It is a faulty view of judging, though, that imagines only all-or-nothing conclusions. In a sophisticated view of judging, the decision need not always result in an all-or-nothing result but instead can apportion ownership, or blame, or liability across multiple parties.[41]

Granted, at times a middle position can be simply worse than either alternative. Just as painting a room half one color and half the other may be worse aesthetically than picking one of the colors, allowing officials discretion about what private expression to permit in a public space (on a bus or on a plaza) can be worse than permitting or restricting all speech in that space. But these examples do not prove that the middle ground is invariably worse. In fact, some middle positions are defensible and embody their own principles, for example: abortion should be legal but rare; race-conscious governmental categories can be justifiable but only when narrowly tailored to serve a compelling

public interest.[42] The fact that these examples reflect commitments to multiple values does not make them unprincipled; instead, a principled position can embody considered apportionment of commitments to multiple and at times competing values.

Dealing with the devil: A different objection to compromise attaches when it arises in the face of violence or other illegitimate threats. Negotiating with kidnappers or terrorists compromises principled opposition to their behavior even though it may be necessary to save lives or produce peace. Peace and life are values just as much as the principles condemning kidnapping and terrorism. But recognizing peace and life as legitimate goals does not alter the danger that negotiating solutions with kidnappers and terrorists creates incentives rather than deterrents for future kidnapping and terrorism. Hence, even when such negotiations are sought and heralded, they are tainted by charges of "dealing with the devil" and warnings of failure to hold firm against tactics that should not be rewarded.[43] The problem is, however, morally complicated. Refusing to negotiate can produce immediate and potentially severe effects. Hence, it may be an understandable and even justifiable compromise to negotiate with kidnappers or terrorists in order to save lives. It is a compromise in the sense of forgoing steadfast adherence to the principle that condemns the tactics pressuring for such negotiation even as it may be a victory for the protection of human life.[44]

So what may initially seem to be an abandonment of principle may instead be an acknowledgment of and tribute to multiple values, yet what may seem an acknowledgment of multiple values may instead be capitulation to illicit pressures. Compromising in response to a threat can be defended given limited available options, but this kind of compromise is not likely to comport with the ideals of constitutional and human rights. But then the negative connotations properly apply to the poverty of the options more than to the selection of one. In contrast, if accommodating multiple principles is in fact a compromise, it can be defensible precisely because comparably valuable principles compete; the effort to balance competing principles itself should not be viewed as a departure from principle itself.[45] In the context of international conflict, giving up on rights claims in order to avoid conflict does not help realize rights, but working out accords that secure peace can in fact be crucial to making human rights possible.[46] Compromise and accommodation should not be viewed as inevitably unprincipled or undesirable in general, and in the context of human

rights, these are important elements of an ongoing process for elaborating, debating, and accommodating differences.

Similarly, in a domestic context, where conflicts between a group and the nation are intense, processes of accommodation produce the stability that can hold the nation together.[47] Who speaks for the group in such accommodations is a fair question, to which I will need to return. But it is worth pushing for something better than compromise, when possible, and that lies in the possibility of convergence.

The Possibility of Convergence

Of course, better than compromise would be solutions where no one on competing sides has to give in because each finds common ground without sacrificing principles. That is convergence. Rather than trimming on principle, find a point of connection. Convergence of principles may seem elusive in conflicts over cultural accommodations, but religious and secular leaders found convergence despite a conflict over San Francisco's policy mandating that its contracting partners provide domestic partner benefits equal to those that they offer spouses.[48] Among the organizations affected, the Salvation Army did not have a direct problem with the policy because it provided no benefits, but the Roman Catholic Archdiocese immediately registered opposition and sought an exemption. As Archbishop William Levada later explained:

> I pointed out that the ordinance as written created a problem of conscience for agencies of the Catholic Church (and perhaps others), because it required that we change our Church's internal benefits policies to recognize domestic partnership as equivalent to marriage.
>
> This requirement, I argued, amounted to government coercion of a church to compromise its own beliefs about the sacredness of marriage, and seemed to violate the First Amendment protection guaranteed to religion by our Constitution.[49]

The archbishop made it clear he would sue on free exercise grounds if the policy were enforced against church agencies.[50] But he also went further and drew on church teachings to criticize the city's policy as inadequate in policy terms:

> I am in favor of increasing benefits, especially health coverage, for anyone. As the Catholic bishops of the U.S. stated in 1993, "Every person has a right to adequate health care." I would welcome the opportunity to work with city officials to find ways to overcome what I believe is a national shame, the fact that so many Americans have no health coverage at all. I can be counted on to raise my voice in support of universal health coverage nationally and locally. I feel sure I could make common cause with city officials in working toward this truly urgent need.[51]

In response to Archbishop Levada's comments, Mayor Willie Brown and four members of the San Francisco Board of Supervisors asked to meet with the archbishop to see if they could reach "a mutually acceptable solution to the problem."[52] They met, they talked, and they negotiated a solution that addressed the concerns of both sides.[53] As a result, the city now deems a contracting party to be in compliance if it "allows each employee to designate a legally domiciled member of the employee's household as being eligible for spousal equivalent benefits."[54] As the city currently explains in its overview of the ordinance, contracting parties can achieve compliance in different ways:

> Some contractors comply with the requirements of the Ordinance by offering benefits to spouses, domestic partners and other individuals. One company, for example, has created a policy that extends some benefits to "other individuals if the relationship with [the employee] is especially close and it would be normal for them to turn to [the employee] for care and assistance." Other contractors comply by allowing each employee to extend benefits to one adult living in their household. Compliance also is possible where the benefits offered do not extend to spouses or domestic partners, or where no employee benefits are offered.[55]

The archbishop acknowledged criticism of the solution, but he defended it. Hence, he explained:

> [T]o those like my local Catholic critic who say that we implicitly give recognition to domestic partnerships by not excluding them from benefits, I must demur. Under our plan, an employee may indeed elect to designate another member of the household to receive benefits. We would know no more or no less about the employee's relationship with that person than we typically

> know about a designated life insurance beneficiary. What we have done is to prohibit local government from forcing our Catholic agencies to create internal policies that recognize domestic partnerships as a category equivalent to marriage.[56]

The solution avoided costly and potentially bitter litigation between the city and the church, and the two parties worked together, as the archbishop said, to "help address many pressing social needs."[57] San Francisco's health benefit resolution kept the Catholic providers in contractual relations with the city.[58] Both the religious and governmental leaders in San Francisco proceeded with a willingness to find common ground and a stance of collaborative problem solving — without ceding principle.[59] Crucial to the outcome, the opposing sides treated one another with the virtues of respect, flexibility, and humility, even when the stakes seemed high and the cause just.[60] Accommodating someone's religious practices through an exception to a general rule is not a compromise but an acknowledgment of higher commitments. Yet, it is not always easy to distinguish compromise from convergence. Ironically, perhaps the announcement of higher principles can get in the way. Sometimes there are also real and profound differences in beliefs, commitments, and worldviews that make multicultural accommodations difficult, impossible, or paradoxical, as I explore next.

What Disagreements Undermine Both Convergence and Compromise?

Some clashes between gender equality and religious accommodation defy compromise as well as elude convergence. Consider the dilemmas posed by the case of Leyla Sahin. She enrolled at the medical school at Istanbul University before the university issued an order excluding students if they wore clothes "symobli[zing] any religion, faith, race or political or ideological persuasion."[61] Denied the ability to pursue her studies, Sahin filed a challenge to the university's order, pursued court action in Turkey without success, and then pressed for consideration in the European Court of Human Rights. There, the government of Turkey and the university recounted the historical background that included the effort by Turkey, alone with Senegal among all

other Islamic nations, to elevate secularism as part of its constitution.[62] But because 99 percent of Turkey's population is Muslim, religious tension often takes the form of conflicts over degrees of religious observance. A woman who goes uncovered is at risk of derision or worse by fellow citizens who are more orthodox, unless the government creates a space where she is not allowed to cover her hair. The state is deeply engaged in the project of secularism, but this does not mean that it separates itself from religion; indeed, the Turkish government pays the salaries of sixty thousand imams and dictates the contents of their sermons.[63] After a military coup in 1980, the political party regained democratic control in 1983 and relaxed restrictions on religious expression.[64] Subsequent leaders have pressed for greater room for religious expression while trying to contain religious fundamentalism.[65]

In 2005, the European Court of Human Rights agreed that the ban interfered with Sahin's right to manifest her religion, but the court nonetheless affirmed the ban — in the name of pluralism, broad-mindedness, and tolerance. The European Court reasoned that to advance those values, the government of Turkey needed to act as an impartial arbiter protecting democracy, and in that role, it could adopt the ban as a proportional means to advance such legitimate aims.[66] British, German, French, and Dutch universities would not adopt such a ban and would instead construe pluralism, broad-mindedness, and tolerance to require accommodating the religious dress of its students, observed the European Court of Human Rights.[67] Nonetheless, the court reasoned that the Turkish government would know better how to advance these goals in its national context.[68]

This result and the struggle leading up to it could be viewed as a classic example of cultural relativism at work: a specific group claims and gets exemption from otherwise prevailing norms because of its history and commitments. Yet, it could instead be understood as an exemplar of the process of mediation and cross-cultural dialogue through which human rights — and the freedom and respect they are meant to effectuate — depend upon context. Turkey's rule clearly restricted religious freedom for those women who wanted to wear a head covering but also enlarged freedom for those who did not want to do so; the rule also restricted the autonomy of some individual women while enhancing the autonomy for others. Centrally, the rule created a secular space, removed from religious pressures one way or the other. The very ambiguity in interpreting this example could be frustrating; the paradoxes are obvious. But

the shift in attention to the process of mediation and cross-cultural dialogue underscore that even with possibilities for compromise and convergence, real clashes will persist, with no answers satisfactory to all.

The struggle within Turkey continues. The Parliament in February 2008 approved a potential constitutional amendment removing the ban on Islamic headscarves in universities, but then in June 2008, the Constitutional Court rejected the Parliament's proposed amendment and ruled that removing the ban would run counter to official secularism — even though the court historically only assessed proposed amendments in terms of procedural correctness.[69] The government — reflecting electoral pressure — asserted support for students wearing headscarves on university campuses, and informally, universities in Turkey by 2011 permitted women to wear headscarves.[70]

This issue in Turkey reflects growing conflict between an earlier generation's vision of secularism and emerging power of overtly religious practices in the lives of voters even as it also implicates a struggle over what kind of Turkey would Europeans welcome into the European Union. Disputes over the relationship between state and religion and between gender equality and religion thus can implicate relationships among coreligionists in one country, relationships between different countries that have majority populations of different religions and background, and relationships within societies confronting new kinds and degrees of population diversity.

The relationship between the individual and overlapping groups is unavoidably altered by the approach taken by a nation to the issues of gender equality and religious freedom. Once again, Turkey provides a vivid example as it struggles to find a path between Islamic fundamentalism and secular fundamentalism.[71] Recep Tayyip Erdoğan, Turkey's prime minister at the time of the Sahin decision, sent his two daughters to attend school in the United States in order to avoid the headscarf restrictions in Turkish universities.[72] This bit of irony exposes and emphasizes how exit and migration possibilities alter what may have once seemed simply domestic issues. Those options reflect the effects of global communications and transportation and collapse the differences in struggles over human rights within a nation and across the world. Erdoğan, still prime minister in 2008, pushed for a revision of the country's constitution to ensure that women could cover in the universities and triggered both public protests and rejection of the amendment by critical reactions by the courts and the military;[73] the constitutional amendment

itself must be approved by the Turkish court.[74] When an electoral response ushered in an administrative solution, permitting headscarves on campus, the issue of majority versus minority views resurfaced. What should be the proper focus for analysis: individuals or groups, and rights or duties? Theorists may imagine ways to meld individuals and groups as well as rights and duties, but theoretical solutions do not overcome the perception of real differences along just these lines, differences that track commitments animating debates over cultural accommodation.

INDIVIDUALS OR GROUPS?

One of the touchiest points of contention involves whether individuals or groups are the primary unit of analysis and protection for human rights. This is the moment to return to questions about who speaks for the group, as well as to surface issues of genuine consent and voluntariness for individuals within the group when there are real risks of harm. Using "harm" as the undeniable touchstone obscures the question of harm to whom: the group or the individual? The difficulty is that for many individuals, the strength of the group matters enormously. It is, therefore, of concern to both individuals and groups whether and when harm to a group defined by religion, ethnicity, or family should rise to the level of harm deserving protection.[75] Even for those who view the individual as sacrosanct, the most vexing problems pertain to the group affiliations of those individuals. Professor An-Na'im has asked, if advocates "encourage young women to repudiate the integrity and cohesion of their own minority culture, how can the theorists then help to sustain the identity and human dignity of these women?"[76] Given the choice, some women may choose to exit their groups, but many will not. Martha Nussbaum offers a particularly deft embrace of individual rights embedded in social life by framing universal human rights as a way to afford women solidarity and affiliation, often with other women.[77] Threading the group dimension through the individual rights-holder is the solution in the work of Will Kymlicka and Michael Walzer; this approach largely makes the choice between individual or group recede in questions of accommodation.[78]

There is a paradox that makes this solution more than sleight of hand: we all share our isolation. Gary Larson, the cartoonist, has a popular image of a room full of identical penguins; one in the back has a song bubble shouting,

"I gotta be me." Asked to print it up as a poster, a printer was confused and colored the singing penguin yellow; he missed the entire point of the universality of the individual experience.[79]

But even with clever connections between individuals and groups, there remain knotty issues about the governance of self-identified groups within a liberal state. Many of the most debated issues focus on women's lives and choices, although those involving children are even more difficult. For example, should every child face a requirement to attend schooling devised by the state, or instead can parents or community leaders frame an education suited to a subcommunity's way of life?[80] Should a religious tribunal supervise divorce and child custody determinations, with results to be accorded state recognition? Should such a tribunal be allowed to perform such a role only if its norms match those of the larger state? And when if ever can the vitality or survival of the group serve as a justification for reducing or denying protection for an individual — for example, when membership in an Indian tribe passes through the father's line, can the self-preservation and self-governance of the group justify denying access to a federal court for a sex discrimination claim?[81] The Supreme Court of the United States, in an opinion written by Justice Thurgood Marshall, answered yes, relying on a reading of congressional action.[82] The court relied on statutory interpretation in denying Mrs. Martinez access to the federal courts, but the court also pointed to the crucial role of the tribe itself in determining who could be its members. This self-determination is both definitional and also especially important for a group struggling with legacies of subordination and conquest.[83]

Despite the possible overlap between individual rights and group rights, there remain areas that diverge; the different starting points could prove obstacles to negotiation, mediation, or other efforts to bypass clashes around the meaning and shape of human rights. Many people may think that respecting the individual is the irreducible touchstone and also the significance of group membership. Yet, the resources and coordination needed to sustain groups at times may call for acknowledging and supporting groups apart from their affiliation through individuals. If I need to pray with nine others, my individual right is not enough if I am not allowed to join with others. Even to exercise my right to marry, I need another. And the structures of secularism and rights themselves require collective effort in order to enable individuals to exercise their rights.

RIGHTS, DUTIES, OR COMPASSION IN THE RECOGNITION OF HUMAN DIGNITY?

The focus on individuals recurs in concerns about "rights" rather than "duties" or "compassion." "Rights" connote and may even entail the Western liberal tradition, associated with John Locke and others, that life, liberty from arbitrary rule, and property are inherent entitlements that people surrender to the state in order to form a social contract to protect precisely these interests. To many, this is a problematic conception if it means:

- Ignoring or suppressing people's intimate and social relationships
- Entrenching preexisting distributions and practices
- Neglecting conflicts among rights, such as the right to protection against discrimination on the basis of gender versus the right to free exercise of religion; or the right of free speech versus the right to not be a target of degradation
- Missing a focus on responsibilities and compassion, whether viewed as the necessary reciprocal to fulfill rights or the richer resource for protecting and enhancing human dignity

These goals may seem consonant with "rights." Yet some people find the very notion of "rights" neglects and may even suppress the sense of duty, or community membership, or care and compassion that is or should be the wellspring of respect for others. A step toward reconciling these different views can come by locating rights as part of a pattern of social relationships that in turn involve duties toward and care of others.[84] Yet the conception of the individual at the core of a right diverges from the conception of relationships of care and duty. Different dreams and fears as well as different grounds for compromise and intransigence emerge when relationships rather than individuals are the focus.

Perhaps an overlapping consensus can emerge about how to respect human dignity, whatever the wellspring or motive.[85] Such solutions in real life require processes of negotiation, assessment, debate, and judgment to overcome conflicting views about what a woman should wear in public, whether an employer should be allowed to hire children, or whether officials engaged in humanitarian military interventions should be seen as culpable of crimes against humanity for "collateral damage" (otherwise known as killing people).

The stakes when cultural and religious worldviews diverge can indeed include death, meaning, and fundamental beliefs. What, then, can be done when differences elude a search for points of agreement?

When Neither Convergence Nor Compromise Is Possible: Governance Devices for Pluralism

When neither convergence nor compromise seems possible, legal frameworks and lawyers can be helpful. It is not because lawyers are smarter than other people; it is just that lawyers have developed methods for managing interminable disputes and deep conflicts through devices like burden of proof and through institutions like the jury. Legal and political devices of governance can enable coexistence among diverging ways of life while preserving avenues for limiting that divergence. These devices include federalism, with decentralized authorities empowered to make parallel and conflicting decisions, and privatization, according power to private actors to arrange their own affairs away from public view and differently than a public process would do. Both implicitly reflect the adage: in the face of conflicting values, shift the decision maker. Federalism and privatization offer a way through highly charged conflicts over what constitute fundamental rights. Each permits alternatives to all-or-nothing solutions to moral and legal conflicts; each structures avenues for coexistence of diverging groups while retaining processes for collective restrictions of extreme practices. Each allows multiple answers to coexist.

Decentralization in the form of federalism is a common solution in the United States. In the United States, federal courts have permitted states to adopt certain restrictions on abortion rights and vouchers authorizing public funding for religious schools, but they do not require either; instead the choice is left with state governments, with the result that diverging practices emerge in different states.[86] Even without leaving decisions to the states, the national government can use decentralization to defuse a dispute over values. For example, the federal courts have incorporated reference to local community standards to resolve disputes over free speech challenges to restrictions on obscenity rather than pick one standard for the whole nation.[87] Decentralization permits multiple answers to a contested question. This

device is troubling to those who insist there is only one acceptable answer. However, it is an attractive solution for minority groups unable to win across the whole country, but with sufficient concentration to influence the local practice.

The distinction between public and private realms affords another a technique for permitting and managing coexistence of diverging cultural and religious groups, even though the very notion of a "private realm" is more compatible with some worldviews and religions than others. Many of the current conflicts over Islamic practices in Europe reveal the particularly Christian form of the public-private distinction that has emerged in Europe.[88] Nonetheless, some imagined distinction can separate the shared spaces where people with different cultures, traditions, and languages coexist and cooperate from private spaces where people can organize their time and practices according to their own embraced culture and tradition.[89] Even if this implies a distinction between public and private that not all religious groups or nations use, it also offers a strategy for coexistence in which groups can flourish. There is a difference between the religious group's effort to use the state to impose its rules on everyone and its effort to find space to practice its rules apart from the rest of the society.[90]

In this respect, law governing private ordering can construct and enhance pluralism. Law professor Carol Weisbrod has shown how utopian communities in nineteenth-century America used contract and property laws to construct spaces for their own practices.[91] Legal structures permitting the organization of corporations, fraternal groups, and families similarly enable pluralism.[92] The legal structures create spaces where the diversity and pluralism within a religious group can itself flourish rather than be suppressed in a struggle against the state or other groups. A more complex set of possibilities emerges than simply one division between the public and private realm. Instead of a single public/private divide, the line between "public" and "private" is not natural but instead a resource for law, politics, and advocacy. The public resource of law can be an instrument of multiple efforts by groups of people to preserve and invent distinctive ways of life. The line between workplace and home has warranted regulation of the workplace that would not proceed in the family, even though both are "private" in relation to government itself. Yet over time, feminists successfully moved violence in the home from the private to the public side.[93] Public laws governing tort and crime now apply in the United

States to conflicts within families. Government enforcement of private arrangements through contract and property tools allows groups to arrange their use of resources; laws permitting private schools and private dispute resolution can enable religious and cultural groups to manage their own social reproduction and conflict management. In a sense, the government's law in all these ways can provide an umbrella under which individuals and groups can organize for their own purposes.

Yet the image of the state as umbrella is too static to capture the dynamism permitted by negotiation over public and private spaces; it also implies wrongly that the harsh elements come only from outside the state rather than acknowledging that the state itself can be a threat to those it claims to protect. More apt, perhaps, than an umbrella is the image of a computer operating system that serves as a resource to users and programs, controlling and allocating memory for use, facilitating networking and management of information, and permitting other programs and devices to send inputs and outputs. The operating system is hardly neutral. For operating systems set parameters, enabling some kind of activities and curbing others. Then users can deploy the operating system for their own purposes, even to alter the operating system, although like a constitution, an operating system can have a protected mode, limiting the content and procedures for changes to itself. By analogy, varying degrees of governmental oversight can be produced to adjust the state's power to veto or influence the private communities; private communities in turn can work through public processes to influence the public norms used to supervise their conduct as well as norms applicable to everyone. The potential rivalries between such groups and the organized state will not go away.[94]

An answer given by the U.S. Supreme Court is not the final answer for a religious group that looks elsewhere for final authority. Conflicts over values and communal practices will arise and often remain insoluble, even with governance devices that permit pluralism. But the public governance devices help to channel and shape those conflicts. The field of law makes central the processes of accommodating and supervising cultural pluralism. Law itself is inevitably distorted if the only focus is on the state law and sources, and unnecessarily limited if only public norms, rather than private law or customs, are addressed. The formal law of a nation-state or the convention of international law can enable, manage, and at times restrict pluralism, while the formal law can also countenance, foster, or reject compromises along the way.

From the vantage point of a nation-state, the use of governance devices like federalism and the public-private distinction ensures final control by the nation-state; but from the vantage point of plural groups, enabled by and taking advantage of these legal structures, the nation-state's answers are not the final ones. The group may resort to civil disobedience, conflict, or exit when they lose a battle in the courts, agencies, or legislatures. This lack of a single hierarchy of authority thus exists within nation-states. The lack of a single hierarchy of authority is even more obviously present in the international context, where conflicts between nations at best give rise to multilateral accords, depending on the consent of the separate nations. Negotiating is the inevitable tool to avoid or resolve such conflicts. The possibility of convergence deserves special attention. So does the potential use of compromise as a human rights strategy sometimes borne of necessity and sometimes nourishing individual freedom and meaning in human lives. The very meanings and shapes of individual identity can shift over time, as can the contours and commitments of groups and nations.

Now, is all of this just a modus vivendi, a pattern of necessity, or instead a path to a pluralism that enriches human experience? To begin to answer so big a question, I turn to the wisdom of that great philosopher and comedian Lily Tomlin, who said, "It's my belief we developed language because of our deep inner need to complain."[95] What we can't change, we complain about, and when we complain, we also shift our own stances toward the difficulty. Human beings may be creatures especially adept at complaining about what we cannot change, but we are also gifted in celebrating features of our lives whether or not we can change them. When it comes to the pluralism exhibited by contrasting cultural and religious groups, the fact of diversity cannot be changed, but our stance toward it can, with palpable consequences for the scale and valence of conflicts, the prospects for peaceful coexistence, and the opportunities for enriching encounters. Adlai Stevenson, a failed candidate for U.S. president, but a witty and perceptive thinker, said that he believed "that if we really want human brotherhood to spread and increase until it makes life safe and sane, we must also be certain that there is no one true faith or path by which it may spread."[96] Paradoxically, to find our shared brotherhood and sisterhood, we will have to pursue more than one path.

Notes

1. See, e.g., Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy and Public Affairs* 16 (1987): 215–401; Jeremy Waldron, "The Theoretical Foundations of Liberalism," *Philosophical Quarterly* 37 (April 1987): 147.

2. For discussion of the tension and spirited argument about the right response, see the essays collected in Susan Moller Okin et al., *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999). See also Gila Stopler, "A Rank Usurpation of Power: The Role of Patriarchal Religion and Culture in the Subordination of Women," *Duke Journal of Gender Law & Policy* 15 (2008); Gila Stopler, "Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate against Women," *Columbia Journal of Gender and Law* 12 (2003): 154. For an argument that dominant institutions have accentuated gender hierarchies within minority communities, see Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (Cambridge: Cambridge University Press, 2007).

3. Ruth Gledhill and Joanna Sugden, "Archbishop of Canterbury 'Should Resign' Over Sharia Row," *The Times,* February 8, 2008, accessed June 27, 2011, http://www.timesonline.co.uk/tol/news/uk/article3335026.ece?token=null&offset=0.

4. CBC News, "Global Groups Unite against Islamic Arbitration in Ontario," *CBC News*, September 4, 2005, accessed June 27, 2011, http://www.cbc.ca/canada/story/2005/09/04/islamic_arbitration20050904.html.

5. See Van Orden v. Perry, 545 U.S. 677 (2005).

6. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

7. Current disputes include whether public officials can approve a Ten Commandments monument while disapproving a proposed monument with seven aphorisms from the religious group (see Pleasant Grove City v. Summum, No. 07–665); whether religious groups should be exempt from employment discrimination laws when the groups receive public funding (see Martha Minow, "Should Religious Groups be Exempt from Civil Rights Laws?" *Boston College Law Review* 48 [2007]:781); whether a public school's refusal to recognize a proposed Bible study club requiring members to sign a statement of faith violates students' free exercise of religion — or whether the contrary decision would violate the Establishment Clause (see Truth v. Kent School District, No. 04–35786, available online at http://www.ninthcircuitopinions.com/2008/04/25/truth-v-kent-school-district/).

8. See other chapters in this volume. See also Ayelet Shachar and Ran Hirschl,

"Constitutional Transformation, Gender Equality, and Religious/National Conflict in Israel: Tentative Progress through the Obstacle Course," in *The Gender of Constitutional Jurisprudence*, ed. Beverly Baines and Ruth Rubio-Marin (Cambridge: Cambridge University Press, 2005): 205–29.

9. "Seeking Common Ground: Quebecers Speak Out: Consultation Document," Commission de Consultation sur les Practiques D'Accommodement Reliées Aux Differences Culturelles, accessed June 27, 2011, http://www.accommodements.qc.ca/documentation/document-consultation-en.pdf.

10. For information on developments in the United States, see "Resources by Tradition," The Pluralism Project at Harvard University, accessed June 27, 2011, http://www.pluralism.org/resources/tradition/index.php.

11. Samuel P. Huntington, "The Clash of Civilizations?" *Foreign Affairs* 72 (1993): 22–49. For critiques, see generally Paul Berman, *Terror and Liberalism* (New York: W.W. Norton & Co., 2003), and Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York: W.W. Norton & Co., 2006).

12. "Compromise" carries these two basic definitions: "settlement of differences reached by arbitration or by consent reached by mutual concessions" and "a concession to something derogatory or prejudicial." *Merriam-Webster's Collegiate Dictionary*, 11th ed. (Springfield, MA: Merriam-Webster, Inc., 2008): 256.

13. See Milton Ridvas Konvitz, *The Legacy of Horace M. Kallen* (Madison, NJ: Fairleigh Dickinson University Press, 1987), discussing debates in the United States in the early twentieth century; Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* (Ithaca, NY: Cornell University Press, 2007), on the same; and Maria Rosa Menocal, *The Ornament of the World: How Muslims, Jews, and Christians Created a Culture of Tolerance in Medieval Spain* (Boston: Little, Brown, and Company, 2002), exploring a moderate form of pluralist tolerance in intergroup relations in fourteenth-century Spain.

14. Pluralism here means "a conviction that various religious, ethnic, racial, and political groups should be allowed to thrive in a single society." *American Heritage New Dictionary of Cultural Literacy*, 3rd ed. (Boston: Houghton Mifflin, 2005), http://dictionary.reference.com/browse/pluralism. A system arranging a hierarchy, subordinating one group to another in terms of freedoms, status, and resources, is not pluralist.

15. I follow in the path set by others, notably, Carol Weisbrod (*Emblems of Pluralism: Cultural Differences and the State* [Princeton, NJ: Princeton University Press, 2002]: 7, 29, 49), offering an account of the relations between individuals, groups, and the state, with emphasis on the cultural resonances of those relationships, and comparing a state-centered hierarchical model, illustrated by

American legal treatment of Mormon and a horizontal state-subgroup model, in which groups are accorded more recognition and autonomy.

16. See N.Y. Dom. Rel. Law § 253 (McKinney 1999) (requiring a party married by clergy seeking a divorce to verify that no barriers to remarriage exist by the time the final court judgment is entered); N.Y. Dom. Rel. Law § 236b (McKinney 1999) (directing divorce courts to consider actions by one spouse created a barrier to remarriage by the other spouse when setting spousal maintenance [alimony] and property division maintenance ["equitable distribution"]). The legislature also gives divorce courts discretion to consider the effect of a barrier to remarriage in making equitable distribution of property. Idem § 253.

17. Laureve Blackstone, "Note: Courting Islam: Practical Alternatives to a Muslim Family Court in Ontario," *Brooklyn Journal of International Law* 31 (2005): 207, 228.

18. Robert M. Cover, "The Supreme Court, 1982 Term — Forward: *Nomos* and Narrative," *Harvard Law Review* 97 (1983): 4, 11.

19. Tanina Rostain, "Permissible Accommodations of Religion: Reconsidering the New York Get Statute," *Yale Law Journal* 96 (1987): 1147, 1149. Yet, even in the absence of a statute like New York's, a New Jersey court approved a judicial directive telling a husband to deliver a *get* in order to permit completion of the secular divorce process. *Minkin v. Minkin*, 434 A.2d 665, 668 (N.J. Super Ct. Ch. 1981). A similar judicial approach recently emerged in Canada.

20. *Sieger v. Sieger*, No. 6975/98, 2005 N.Y. Misc. LEXIS 1808, at *61 (N.Y. Sup. Ct. June 29, 2005) (concluding that the Establishment Clause precluded the Court from inquiring into the propriety of the husband's pursuit of a ruling from a religious court regarding the wife's refusal to accept the husband's notice of divorce).

21. See idem at 1166–67 (noting that "[c]ivil divorce impeded some women's ability to marry within Judaism").

22. T. Rostain, "Permissible Accommodations of Religion," 1166–68.

23. Marcovitz v. Bruker, 2007 SCC 54.

24. Idem, 33, 36 (noting that the obligation was unenforceable because it was religious in nature).

25. Idem, 47, 51, 60–63.

26. Idem, 63. The court also cited analogous protections for Jewish women from husbands who refuse to provide a religious divorce in the European Commission of Human Rights, France, the United Kingdom, Australia, Israel, and New York. Idem, 73, 83–89.

27. CBC News, "Global Groups Unite."

28. See Asia Pacific News Service, "Canada to Allow Islamic Courts," *Asian Pacific Post,* May 19, 2004, http://www.asianpacificpost.com/porta12/40288191 0674ebab010674f4c17b13b3.do.htm; Mona Eltahawy, "Ontario Must Say 'No' to Islamic Law," *Christian Science Monitor*, February 2, 2005, http://www.csmonitor. com/2005/0202/p09s01-coop.html; Faisal Kutty, "In Praise of Marion Boyd's Report: Ontario Report Affirms Right to Use Islamic Principles in Arbitration," *Catholic New Times,* January 30, 2005, accessed June 27, 2011, http://goliath.ecnext .com/coms2/gi_0199–3694320/In-praise-of-Marian-Boyd.html#abstract.

29. Lee Carter, "Protests over Canada Sharia Move," *BBC News*, September 8, 2005, accessed June 27, 2011, http://news.bbc.co.uk/2/hi/americas/4215182.stm.

30. Jehan Aslam, "Judicial Oversight of Islamic Family Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship," *NYU Journal of International Law and Politics* 38 (2006): 841, 842–43.

31. See CBC News, "Global Groups Unite" (quoting Tarek Fatah of the Canadian Muslim Congress); see also Shauna Van Praagh, "Bringing the Charter Home," *McGill Law Journal* 38 (1993): 233 (reviewing John Tibor Syrtash, *Religion and Culture in Canadian Family Law* [Toronto: Butterworth-Heinemann, 1992]).

32. See Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) (noting that multicultural accommodation can in some cases nullify an individual's citizenship rights); Judith Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts," *University of Chicago Law Review* 56 (1989): 671 (examining the differences in sovereignty between states and Indian tribes and their relationship to the federal courts); Martha Minow, "About Women, About Culture: About Them, About Us," *Daedalus* 129 (2000): 125 (reflecting on why women's issues predominantly arise as clashes of cultural conflict).

33. Arbitration Act, 1991 S.O., ch. 17 (Can.), available at http://www.canlii.org /on/laws/sta/1991c.17/20080215/whole.html.

34. Hence, the Ontario Bet Din, which managed Jewish arbitrations, explicitly adopted a rule to abide by Canadian law in case of a conflict with Jewish law, while at least some of the advocates of Islamic arbitration called for shielding the arbitrated disputes from Canadian law. Conversation with Professor Ayelet Shachar (Dec. 20, 2007); see also Ayelet Shachar, "Entangled: State, Religion, and the Family" (unpublished article, on file with *Connecticut Law Review*).

35. Note this comment on a blog by Saffiyah:

> What will this mean for Canadian Muslims? Very little. It would have been complicated to try and develop these religious tribunals for Muslims in Ontario,

> precisely because the supporting structures are underdeveloped and our imams do not have adequate training to be able to carry out their duties in a manner that stands up to public scrutiny. But mediation will continue despite the legal prohibition on religious tribunals. So if a couple wants to resolve a conflict and chooses to go to their imam to do so? They can go right ahead. The process will be unsupervised and informal, and one wonders whether this will not set the stage for greater rights violations than might be suffered within the context of the religious tribunal itself.

Posting of Thoughts, Rants and Passions of a Young Muslim Woman Seeking Soulful Enlightenment in Cyberspace to "Law Prohibits Religious Arbitration in Ontario," http://www.safiyyah.ca/wordpress/?cat=20 (Feb. 17, 2006, 4:41 EST). In mediation, the parties design their own agreement with the help of a neutral third-party; in arbitration, the third party resolves the dispute between the couple, but only within the range of options that the parties could elect themselves; hence, neither criminal sanctions nor a divorce can be issued by arbitration. Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women," *National Association of Women and the Law Working and Research Papers* (March 2005): 7–8, http://www.nawl.ca/ns/en/documents/Pub_ReligArb05_en.rtf. Nothing by law would prevent arbitration of disputes over child support, custody, access to children, and religious education of children (Ibid. 11)

36. This would have required more explicit authorization for judicial review of arbitrated agreements; absent agreement by the parties to provide for judicial review, the Arbitration Act had limited bases for juridical review. Arbitration Act, 1991 S.O., ch. 17 (Can.), § 45(1), § 46(1).

37. See, for example, Susan M. Okin, "Is Multiculturalism Bad for Women?" in *Is Multiculturalism Bad for Women?* ed. Susan Moller Okin et al. (Princeton, NJ: Princeton University Press, 1999): 9–24.

38. Convergence is "the process of coming together or the state of having come together toward a common point." See *The American Heritage Medical Dictionary* (Boston: Houghton Mifflin, 2007), accessed June 27, 2011, http://medical-dictionary.thefreedictionary.com/convergence.

39. Compare with Ayelet Shachar, "The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority," *Harvard Civil Rights–Civil Liberties Law Review* 35 (2000): 385, 399–400, 405–6 (explaining that women should not have to choose between their rights as citizens and their group identities, and offering jurisdiction as the key to achieving both of these goals).

40. See Theodore M. Benditt, "Compromising Interests and Principles," in

Compromise in Ethics, Law, and Politics, ed. J. Roland Pennock and John William Chapman (New York: New York University Press, 1979): 26, 31–36.

41. See Summers v. Tice, 199 P.2d 1, 2–3, 5 (1948) (finding defendants to be jointly liable); Page Keeton, "Products Liability — Some Observations About Allocation of Risks," *Michigan Law Review* 64 (1966): 1329, 1330–31, 1334, 1339 (examining the shifting and allocation of losses in products liability cases); David L. Sunding and David Zilberman, "Allocating Product Liability in a Multimarket Setting," *International Review of Law and Economics* 18 (1998): 1–3 (considering the efficiency of various liability rules); see also David M. Dudzinski, "Tobacco Litigation: Statistics Permitted for Proof of Causation and Damages in Class Action," *Journal of Law, Medicine & Ethics* 31 (2003): 161–63 (allowing statistical proof and extrapolation to find proof of causation).

42. President Bill Clinton and others in the 1990s advanced the position that abortion should be "legal, safe, and rare." The Lancet, "Making Abortion Safe, Legal, and Rare," *Lancet* 370 (2003): 291. For the view that governments can use racial categories but only if narrowly tailored to serve a compelling governmental interest, see Parents Involved in Community Schools v. Seattle School District No. 1., 127 S. Ct. 2738, 2789, 2797 (2007) (J. Kennedy, concurring in part and concurring in the judgment). Thanks to Adrian Vermeuele for this point.

43. Robert Mnookin, "Dealing with the Devil" (presentation at a Harvard Law School Faculty Workshop, July 2007).

44. Similar issues arise for the prosecutor of international courts who may be invited to negotiate with human rights abusers who offer to halt their abuse in exchange for delaying or avoiding prosecution, though here protection of the roles of the court and prosecutor may add to the reasons not to negotiate.

45. Working out a way to acknowledge and respect two principles is itself not a compromise unless refusal to accommodate rises to the level of a principle that itself should not be sacrificed. Sadly, such refusals often seem the price of not only adhering to principle, but being seen to do so. Even being seen talking with an opponent in some quarters can be viewed as a compromise either because withholding the approval implied by the conversation is part of expected condemnation or because the conversation may make compromise too tempting. Candidates for national political office, thus, argue over whether meeting with dictators or heads of rogue states would be too compromising — either because the sheer act of meeting grants too much approval or due to fear that a substantive compromise of principle could be the only outcome of such a meeting.

46. Cf. Gabriella Blum, *Islands of Agreement: Managing Enduring Armed Rivalries* (Cambridge, MA: Harvard University Press, 2007) (identifying and

forging agreements on narrow issues can provide a predicate for stability even if the larger conflict is not resolved).

47. See Rhonda Parkinson, "The Meech Lake Accord," November 2006, accessed June 27, 2011, http://www.rhondaparkinson.com/meech-lake-accord.htm (describing failed constitutional amendments to address relationship between Québec and rest of Canada).

48. See Nondiscrimination in City Contracts Chapters 12B and 12C of the San Francisco Administrative Code, http://www.sfgov.org/site/sfhumanrights_index.asp?id=4584 (last visited Mar. 31, 2008) ("The Human Rights Commission enforces San Francisco's Nondiscrimination in Contracts Laws. These laws include provisions prohibiting discrimination in employee benefits and public accommodations based on marital and domestic partner status and in most cases require that City contractors provide domestic partner benefits equal to those offered to spouses of their employees."). See Minow, "Should Religious Groups Ever Be Exempt from Civil Rights Laws?"

49. William J. Levada, "The San Francisco Solution," *First Things: The Journal of Religion, Culture, and Public Life* (1997): 17–19, accessed June 27, 2011, http://www.firstthings.com/article.php3?id_article=3724.

50. Ibid.

51. Ibid. That statement continued:

> But I reject the notion that it discriminates against homosexual, or unmarried heterosexual, domestic partners if they do not receive the same benefits society has provided to married employees to help maintain their families. If it is a question of benefits, why should not blood relatives, or an elderly person or a child who lives in the same household, enjoy these same benefits? Under the city's new ordinance, however, blood relatives are excluded from the benefits that the city's new ordinance extends to domestic partners.
>
> Historically social legislation providing spousal benefits for married persons has recognized the role that women traditionally exercised as wives and mothers, and the important function they contribute to the future of society by their unpaid work in the home raising their families. Even with today's changes in the workplace, to seek to equate domestic partnership with the institution of marriage and family runs contrary to Catholic teaching, indeed to the beliefs of most religious and cultural traditions, and as recent polls have shown, to the basic convictions of the great majority of Americans.

52. Ibid.

53. See ibid. (discussing the city's regulations).

54. Ibid.

55. "Overview," San Francisco Human Rights Commission, accessed March 31, 2008, http://www.sfgov.org/site/sfhumanrights_page.asp?id=5921 (describing the Equal Benefits Ordinance, also known as the City's Nondiscrimination in Contracts Ordinances [Chapters 12B and 12C of the San Francisco Administrative Code]).

56. Levada, "The San Francisco Solution."

57. Ibid.

58. See ibid. (discussing the agreement reached with San Francisco to allow the archdiocese to comply with the new ordinance).

59. See ibid. (examining the "mutually acceptable solution" reached by the city and the archdiocese).

60. Let us distinguish those who seek space for private freedom and those who seek to impose their own views on everyone else. A free society should offer not untrammeled but more latitude of the first kind than the second. See Carol Weisbrod, "Family, Church and State: An Essay on Constitutionalism and Religious Authority," *Journal of Family Law* 26 (1988): 741, reprinted in *Kindred Matters*, ed. D. Meyers et al. (Ithaca, NY: Cornell University Press, 1993.

61. See Christopher D. Belelieu, "Note: The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam through a European Legal Prism in Light of the *Sahin* Judgment," *Columbia Journal of European Law* 12 (2006): 573, 606 (citing Sahin v. Turkey, 44 Eur. Ct. H.R. 5, ¶ 47 [2005]).

62. Ibid., 577.

63. Ibid., 581 (quoting Nicole Pope and Hugh Pope, *Turkey Unveiled: A History of Modern Turkey* [Woodstock, NY: Overlook Press, 2004]: 317).

64. Ibid.

65. See ibid., 582 (describing Prime Minister Erdogan's efforts to maintain a secular-religious balance).

66. Ibid., 607–8 (citing Sahin v. Turkey, No. 44774/98, ¶¶ 78, 98–99, 108, 113–114, 117–21 (Eur. Ct. H.R. Nov. 10, 2005).

67. *Sahin*, App. No. 44774/98, ¶¶ 55–59, 61.

68. Belelieu, "The Headscarf as the Symbolic Enemy," 589–92, 607–10 (citing *Sahin*, App. No. 44774/98, ¶¶ 78, 98–99, 108, 113–14, 117–22, discussing the court's reliance on Turkey's case law, and noting the concept of "the margin of appreciation" used by the court to allow latitude for member states in their decision making and adherence to the Convention on Human Rights).

69. Pierre Atlas, "Secularism vs Democracy in Turkey," *RealClear Politics*, June

15, 2008, accessed June 27, 2011, http://www.realclearpolitics.com/articles/2008/06/secularism_vs_democracy_in_tur.html.

70. Jonathan Head, "Quiet End to Turkey's College Headscarf Ban," *BBC News*, Dec. 31, 2010, http://www.bbc.co.uk/news/world-europe-11880622.

71. Marvine Howe, *Turkey Today: A Nation Divided over Islam's Revival* (Boulder, CO: Westview Press, 2000): 248.

72. Belelieu, "The Headscarf as the Symbolic Enemy," 583.

73. Grenville Byford, "Fighting the Veil: Turkey Is Bitterly Divided over Government Efforts to Ease Its Headscarf Ban. What Will the Courts Do Now?" *Newsweek*, February 4, 2008, accessed June 27, 2011, http://www.newsweek.com/id/107941; Noah Feldman, "Veiled Democracy?" *New York Times*, February 8, 2008, accessed June 27, 2011, www.nytimes.com/2008/02/08/opinion/08feldman.html; Gareth Jenkins, "Turkey's Constitutional Changes: Much Ado about Nothing?" *Eurasia Daily Monitor* 5 (February 11, 2008), accessed June 27, 2011, http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=33371.

74. Pierre Tristan, "Leila Sahin and Turkey's Battle over the Islamic Head Scarf: How Political Islam Is Challenging the World's Most Secular Muslim Democracy," About.com: Middle East Issues, accessed April 26, 2008, http://middleeast.about.com/od/turkey/a/me080210.htm.

75. See Carolyn Fluehr-Lobban, "Cultural Relativism and Universal Human Rights," *Anthro Notes* 20 (1998), accessed June 27, 2011, http://anthropology.si.edu/outreach/anthnote/Winter98/anthnote.html (explaining the use of the harm principle in making a distinction between universal human rights and cultural relativism).

76. Abdullahi An-Na'im, "Promises We Should All Keep in Common Cause," in *Is Multiculturalism Bad for Women?* ed. Susan Moller Okin et al., (Princeton, NJ: Princeton University Press, 1999): 59.

77. Martha C. Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999): 49.

78. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995); Michael Walzer, "The Communitarian Critique of Liberalism," in *New Communitarian Thinking: Persons, Virtues, Institutions, and Communities*, ed. Amitai Etzioni (Charlottesville: University Press of Virginia, 1995): 52.

79. "Our Name," Colorful Penguin, accessed May 12, 2008, http://www.colorfulpenguin.com/our_name.html (discussing Gary Larson and penguin drawing); "Movie Review: Happy Feet," NY Movie Reviews, accessed May 12,

2008, http://nymoviereviews.com/?page_id=116 (discussing Gary Larson and penguin drawing).

80. See generally Wisconsin v. Yoder, 406 U.S. 205 (1972).

81. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); see Resnik, "Dependent Sovereigns," 672–75 ("[A]ccording to the Court, if federal courts were to imply power to 'intervene' in tribal decisions, the courts would undermine the authority of a group whose powers have already been limited"); see also Martha Minow, "About Women, About Culture: About Them, About Us," in *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies*, ed. Richard Shweder et al. (New York: Russell Sage Foundation, 2002): 252–67.

82. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51–52, 72 (1978).

83. Idem.

84. See Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, NY: Cornell University Press,1990): 110–12 ("[T]he social-relations approach assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood"); Martha Minow and Mary Lyndon Shanley, "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law," *Hypatia* 11 (1996): 4–6 suggesting a view of family law that takes into account the deeply involved relationships of interdependency and mutual responsibility in families); Jennifer Nedelsky, "Reconceiving Rights as Relationships," *Review of Constitutional Studies* 1 (1993): 1–19 (arguing for an understanding of rights as relationships).

85. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993): 134 (describing political liberalism as an overlapping consensus of reasonable comprehensive doctrines wherein the reasonable doctrine endorses a single political conception, but each from its own point of view); see also Cass R. Sunstein, "Commentary: Incompletely Theorized Agreements," *Harvard Law Review* 108 (1995): 1733 (identifying possibilities for convergence on specific resolutions of certain problems even in the absence of greater theoretical disagreement).

86. See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (finding an Ohio Pilot Project Scholarship Program that provided tuition aid allowing low-income students to elect private religious schools did not violate the Establishment Clause); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (affirming the central holding of *Roe v. Wade* but permitting states to require written informed consent from the woman twenty-four hours before the abortion); see generally Martha Minow, "The Government Can't, May, or Must Fund Religious Schools: Three

Riddles of Constitutional Change for Laurence Tribe," *Tulsa Law Review* 42 (2008): 101–27.

87. Miller v. California, 413 U.S. 15 (1973).

88. See generally Olivier Roy, *Secularism Confronts Islam*, trans. George Holoch (New York: Columbia University Press, 2007) (discussing the tensions between secularism and private religious beliefs).

89. See generally Shachar, *Multicultural Jurisdictions*.

90. See generally Weisbrod, "Family, Church, and State"; Weisbrod, *Emblems of Pluralism* (particularly the chapter "Practical Polyphony"). There is still a further alternative of private space for separate practices that is nonetheless still conditioned upon compliance with fundamental protections that the secular state or human rights norms establish for everyone.

91. Weisbrod, *Emblems of Pluralism*, 61–63, 68.

92. Ibid., 166, 175–77.

93. See generally Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000).

94. Robert Cover argued that the nation-state will periodically seek to destroy normative subcommunities from jealousy or desire for overall control, even while acknowledging that the subcommunities may at times take steps that should — from an outside perspective — be stopped. Cover, "The Supreme Court, 1982 Term," 6–11, 68.

95. "The Search for Signs of Intelligent Life in the Universe," directed by John Bailey (1991, Los Angeles, CA, Orion Classics) (performed by Tomlin and written by Jane Wagner).

96. See Richard Henry, "Adlai Stevenson," accessed March 31, 2008, http://www.uua.org/uuhs/duub/articles/adlaistevenson.html.