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Western democracies in recent years have witnessed dramatic (and often highly-charged) debates regarding Islamic law, women and the limits of pluralism in a liberal polity. Perhaps the most relevant of these for the issue of family law pluralism was the Shari’a arbitration controversy of Ontario, Canada of 2004-2005 (the “Shari’a Arbitration controversy”). Although Jewish, Christian and Isma’ili Muslim (a relatively small sect of Shi’a Muslims who follow the Agha Khan) residents of Ontario had long made use of private arbitration for the resolution of intra-communal family disputes, when a group of Sunni Muslims announced their intent to establish a mechanism to allow orthodox Muslims to arbitrate their family law disputes in accordance with their understanding of Islamic law, a transatlantic controversy erupted that was resolved only when Ontario took the drastic step of prohibiting the arbitration of all family law disputes in which the arbitrator purported to apply non-Canadian law.¹ Great Britain, too, experienced its own

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¹ Numerous academic articles in response to the Shari’a Arbitration controversy have been published. See, e.g., Jean-Francois Gaudreault-DesBiens, “The Limits of Private Justice? The Problems of the State Recognition of Arbitral Awards in Family and
moment of Islamic law anxiety when the Archbishop of Canterbury suggested that British commitments to pluralism might require the English legal system to recognize certain aspect of Islamic law. That controversy was subsequently heightened when it was revealed that British Muslims had already set up judicial councils that engaged in legally

2. See, e.g., John F. Burns, “Top Anglicans Rally to Besieged Archbishop,” New York Times, February 12, 2008 (discussing the controversy that erupted in Britain as a result of archbishop Rowan Williams’ comments that recognizing certain elements of Islamic law would be consistent with British law). A copy of the speech is available online at http://www.archbishopofcanterbury.org/1575.
binding arbitration of family law disputes pursuant to British law permitting binding arbitration. ³

Given the general anxiety surrounding Islamic law in western democracies, the fact that fear of Islamic law should be a substantial stumbling block to increasing legal pluralism in the domain of family law is ironic, given the pluralistic nature of Islamic law’s regulation of the family, as will be shown in greater detail in this chapter. At the same time, however, legal recognition of family law pluralism, from the perspective of a liberal political order, is not without its genuine risks: the rules of Islamic family law, as well as the rules and traditions of other sub-communities within a liberal polity, are not substantively equivalent to the generally applicable rules of civil law. Any system of family law pluralism within a liberal polity, therefore, must establish institutional mechanisms to ensure that legal pluralism does not become a tool to deprive individuals of their rights as citizens. ⁴


This chapter will attempt to explain how the Islamic religious and legal commitments of “orthodox” Muslims can reinforce and promote Islamic conceptions of the family within the general legal background provided by a liberal system of family law. Indeed, this chapter will make the perhaps surprising case that for orthodox Muslims a liberal family law – at least in the context of a religiously heterogeneous polity – represents the preferred means for the recognition of family law pluralism in contrast to other arguments in support of family law pluralism that would give greater power directly to religious bodies in the administration of family law. Orthodox Muslims have their

5. Throughout this paper, I will be referring to “orthodox” Muslims. This should not be taken to refer to any specific group of Muslims living in any contemporary society. Rather, it is a theoretical category intended to capture individuals who affirm the truth of the historically accepted theological doctrines of Sunni Islam and grant at least prima facie authority to historically accepted Sunni ethical and legal doctrines. See Mohammad H. Fadel, “The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law,” *Canadian Journal of Law and Jurisprudence* 21:1 (January 2008): 5-69 (discussing the assumptions made when talking about religious commitments of hypothetical Muslims).

own profound disagreements on the nature of marriage and its legal and religious consequences, a fact that gives them strong Islamic reasons to support family law pluralism. Orthodox Islam also has a well-established historical commitment to the recognition of non-Islamic conceptions of marriages, a fact which also contributes to Muslim comfort with family law pluralism. At the same time liberal family law, because of its commitments to autonomy, contemplates the legitimate use of private ordering within the family, at least within certain limits. The space liberalism creates for private ordering within the family is sufficient for robust manifestations of Islamic family life that are also consistent with the minimum requirements of liberalism. Accordingly, there is no need, from an Islamic perspective at least, for a system of family law pluralism beyond that already implicit within liberalism itself.

In exploring the interaction of Islamic religious and legal conceptions of the family with liberal family law, this chapter accepts as normative a version of liberal family law that derives from Rawls’ conception of political liberalism, focusing in particular on Rawls’ remarks on the family in The Idea of Public Reason Revisited, rather than on other versions of family law that might adopt a more comprehensive form of

7. See, e.g., McClain at  (explaining the persistence of private ordering in family law which on occasion can act to subvert liberal commitments to egalitarian norms of marriage).
liberalism. This chapter will argue that despite orthodox Muslims’ religiously-grounded understanding of marriage, a politically liberal family law along the lines espoused by Rawls, because of its neutrality with respect to metaphysical conceptions of the family, and its commitment to provide a qualified form of autonomy for the family, is entitled to the support of orthodox Muslims, even if it would exclude as impermissible certain norms of the family that orthodox Muslims would deem morally permissible or even just.

The chapter is organized as follows. It begins with a brief account of the role of the family in political liberalism and the limits political liberalism places on both the public regulation of the family and the family’s internal autonomy within those limits (Part 1). To determine whether Islamic conceptions of the family can satisfy political liberalism’s limitations on the family’s autonomy, I will turn to a general description of how orthodox Islam understands the relationship between the legal and the moral, and the role of individual conscience in that relationship, on the one hand, and why the difference between objective law and subjective moral obligation generates pluralism in Islam, a fact that in the context of family law generates competing legal doctrines of the family, 8.

relatively broad contractual freedom within the marriage contract, and competing religious visions of the family. Not all manifestations of Islamic conceptions of the family will be consistent with the requirements of political liberalism, however, and for that reason it is appropriate that any system of legal pluralism that permits Muslim citizens to use Islamic law to adjudicate their family law disputes be conducted pursuant to institutional arrangements that can confirm that the results of such adjudication are in conformity with the minimum requirements of a liberal legal order (Parts 2 and 3). I will then give examples of some of the salient historical differences in Muslim understandings of family law and their relationship to Islamic religious conceptions of marriage (Part 4) before turning to why, from an Islamic perspective, a politically liberal family law could very well be attractive to orthodox Muslims, and whether the use of Islamic law to conduct family law arbitration, from the perspective of political liberalism, could be consistent with political liberalism’s approach to regulating the family (Part 5). The chapter will then conclude (Part 6) with cases from New York involving family law arbitration in the context of Orthodox Jewish law to demonstrate that, as a practical matter, courts in a liberal jurisdiction have the institutional capacity to give effect to the autonomy of non-liberal citizens as evidenced by their desire to abide by their own family laws, while successfully walling off those aspects of family law that are mandatory from the intrusion of non-liberal norms. This suggests that courts in liberal jurisdictions could
do the same in the case of Muslim family law arbitrations, despite the contrary outcome in Ontario.  

9.

1. Family Law Pluralism and Political Liberalism

One of the central objections to the legal recognition of Islamic family law arbitrations raised at the time of the Shari’a Arbitration controversy in Ontario was that Islamic law would conflict with Canadian commitments to gender equality within the family. The meaning of equality within the family, however, remains deeply contested, even among liberals. And, even religions that are commonly viewed as endorsing a patriarchal family structure, of course, have their own conceptions of gender equality: Islam, for example, teaches the equal moral worth of men and women. And, the New Testament states that men and women are “all one in Christ Jesus.”

9. Daniel Cere, “Liberalism, Marriage & Religion,” [this volume] (suggesting that Canadian family law has, in recent years, taken a decided turn toward comprehensive rather than political liberalism).


11. Quran, Āl ‘Imrân, 3:195 (“And so their Lord answered their prayers, saying ‘I suffer not the loss of the deeds of any of you, whether male or female; you are of one another’”)
Equality, therefore, can mean radically different things, especially in connection with its application to particular disputes. Numerous plausible (though incompatible) theories could be advanced regarding the family that are, broadly speaking, consistent with some theory of liberal equality. For example, one could take the view that gender

and Al-Nisâ’, 4:124 (“Whosoever does a righteous deed, whether male or female, and is a believer, they shall enter Paradise.”). Even the most extreme views among Muslims supporting the subordination of wives to their husbands hold that in so doing, the wife is in the first instance honoring God. Al-Mubarkfuri, Tuḥfat al-Ahwadhi, Kitāb al-Ridâ’, bab Ma ja’ fi Haqq al-Zawj, Hadith no. 1157 (commenting on a statement attributed to the Prophet Muhammad in which he is said to have declared that “[a]ny woman who dies, and her husband is pleased with her, enters Paradise.” Al-Mubarkfuri comments that this is on account of her having honored “the claims of God and man.”). As a general rule, Islamic doctrines accord great authority to statements of the Prophet Muhammad, but only after attempting to authenticate them and grading them into one of three (or four) classes: sound, (fair), weak or forged. For purposes of this paper, I am agnostic with respect to the proper categorization of various statements attributed to the Prophet Muhammad, and include these statements only to the extent that Muslim authors have previously cited them. The historical accuracy of such statements, particularly the ones I cite in this chapter regarding marriage, however, is regularly contested by orthodox Muslims themselves.

equality in marriage should be viewed as a matter of distributive justice, in which case equality means that men and women should receive an equal share of the benefits of married life. One (potential) drawback of such a conception, however, is that it would not exclude marriages organized around a gendered division of labor, if such a marriage resulted in fact in an equal (or relatively equal) sharing of the burdens and benefits of marriage. Another option would be to consider marriage as an egalitarian liberal community that “resists individual accounting” of desert. Such a conception, however, would preclude traditional homemakers from receiving any tangible rewards for non-market services they perform in the household.

Some feminists, however, argue that marriage should be treated in a manner analogous to a partnership in which case equality would require valuing the individual contributions of each spouse to the family, including the non-monetary contributions historically provided by traditional homemaker.

13. Empirical evidence in fact suggests that traditional marriages are more likely to produce this result than most two-wage earner couples. Amy L. Wax, “Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?” Virginia Law Review 84 (May 1998): 509-672, 519 (“The data on marital use of time, for example, indicate that men and women in traditional marriages, in which the division of labor is sharp, work similar hours and enjoy roughly similar amounts of leisure time. . . . In contrast, the dual-earner couple presents a more convincing story of marital inequality.”)

by wives in the form of child-rearing and housework. On the other hand, if “care work” is monetized, it might encourage women to continue to specialize in household rather than market production. This would have the (unintentional?) effect of reinforcing the gendered-division of labor that many feminists have traditionally sought to eliminate. Not only are there numerous conceptions of what equality means in a heterosexual marriage from a liberal perspective, each theory produces its own winners and losers.


16. Philomila Tsoukala, “Gary Becker, Legal Feminism, and the Costs of Moralizing Care,” *Columbia Journal of Gender and Law* 16 (2007): 357-428, 421-422, 425 (discussing theoretical and empirical evidence suggesting that the more the law protects the interests of traditional homemakers at divorce, the more popular the traditional homemaker role becomes).

17. Starnes, “Mothers, Myths, and the Law of Divorce,” 204 (noting that “abandonment of gender-determinative roles . . . has long been the goal of many feminists.”)

18. Tsoukala, “Gary Becker, Legal Feminism, and the Costs of Moralizing Care,” 422 (calling on feminists to pay greater attention to how their proposed family law reforms will create winners and losers among women).
Political liberalism does not attempt to determine which of these liberal (or non-liberal) conceptions of equality is correct. It instead regulates the family from the perspective of what is required “to reproduce political society over time” in a manner consistent with its ideal of treating all citizens as “free and equal.”

Because the family is part of political society’s basic structure, labor inside the family is “socially necessary labor.” On Rawls’ account, however, the family is an association, and therefore “the principles of justice – including principles of distributive justice – [do not] apply directly to the internal life of the family.” They are relevant only in a negative sense, meaning that the basic rights of women as citizens place limits on permissible forms of family organization.


20. Ibid., 788.

21. John Rawls, Political Liberalism, expanded ed. (New York; Chichester, West Sussex: Columbia University Press, 2005), 40-43 (describing “association” as a kind of voluntary ordering within political society that, because of its voluntary nature, is entitled, among other things, to offer different terms to different persons in the association).


23. Ibid., 789-790.

24. Ibid., 789.
must not be so severe, however, as to constrain “a free and flourishing internal life [of the
association].”

Rawls’ analysis of the family effectively places it in a median position between
public institutions (to which the principles of justice apply directly) and associations (to
which the principles of justice require only a right of exit): on the one hand, the family,
because of its essential role in the reproduction of political society over time, is part of
the basic structure; on the other hand, it is a voluntary association and thus the principles
of justice do not apply to it in the same way that the principles of justice constrain a
wholly-public institution, such as the legislature or courts. Rawls’ analysis of the family
within political liberalism has important implications for equality within a system of
family law that is politically liberal: it tolerates the continued existence of inequality
within the family, but on the condition that such inequality “is fully voluntary.”
Religiously justified hierarchies of the family, therefore, are consistent with the principles
of justice provided the background conditions of political justice are met. The only

25. Ibid., 790.
26. Ibid., 792 (stating that a liberal conception of justice “may have to allow for some
traditional gendered division of labor within families.”)
27. Ibid. Rawls explains that an action is only “voluntary” if it is both rational from the
perspective of the actor and “all the surrounding conditions are also fair.” Ibid. n. 68.
28. Ibid. (“a liberal conception of justice may have to allow for some traditional gendered
division of labor within families – assume, say, that this division is based on religion –
gender-based inequality that must be abolished as a matter of the principles of justice is that which is involuntary. 29 Religiously justified satisfies the voluntariness requirement because adherence to religion in a politically liberal regime is, by definition, voluntary. While Rawls appears to be indifferent to whether the burdens of labor in the family (what Rawls refers to as “reproductive labor” 30) should be shared equally in fact between men and women, or whether it is enough for women to be fairly compensated for taking on a disproportionate share of such labor, he insists that justice requires that one of these two possibilities be satisfied. 31

Family law, therefore, plays a secondary role for Rawls in guaranteeing gender equality because women enjoy all the basic rights of citizens, and also have access to the provided it is fully voluntary and does not result from or lead to injustice. To say that this division of labor is in this case fully voluntary means that it is adopted by people on the basis of their religion, which from a political point of view is voluntary, and not because various other forms of discrimination elsewhere in the social system make it rational and less costly for husband and wife to follow a gendered division of labor in the family.”)

29. Ibid. (stating that political liberalism strives to eliminate the gendered division of labor only to the point where involuntary gendered division of labor is “reduced to zero”).

30. Ibid., 788.

31. Ibid., 792-793.
material means necessary to allow them to make effective use of their liberties and opportunities. In such circumstances any residual gender-based inequality can be assumed to be voluntary. From a Rawlsian perspective, therefore, as long as women are being fairly compensated for any additional work they take on with respect to reproductive labor (measured against a hypothetical baseline of reproductive labor that reflects a gender-neutral division of labor), and the background political conditions are otherwise just, political liberalism has nothing to say about the internal organization of the family, even one explicitly endorsing a gendered division of labor.

2. The Relationship of Islamic Law to Islamic Ethics

Despite the oft-repeated claim that Islamic law is a “religious” law, Islamic law in fact regularly distinguishes between the moral or ethical consequences of human actions

32. Rawls, Political Liberalism, 469-471.

33. One might object to this conception of the family on the grounds that it does not sufficiently take into account the effect upon children of growing up in a family organized around principles of gender hierarchy. Presumably, Rawls’ reply would be that children too are exposed to the principles of justice through mandatory public education, and therefore, a family organized around principles of gender hierarchy would not be free to insulate their children from the egalitarian norms of public reason. Rawls, Political Liberalism, 199-200.
and their legal consequences. As a general matter, Islamic ethics is scripturalist in orientation: it claims to derive its moral judgments from an examination of Islamic revelatory sources that are believed, in principle, to provide morally conclusive knowledge. The goal of Islamic ethical inquiry is to classify all human acts into one of five ethical categories: forbidden, obligatory, indifferent, disfavored, or supererogatory. Because these categories represent God’s judgment of human acts, they are primarily theological categories and are not necessarily rules of law. Muslim theologians refer

34. To take one such example, the Hanafi school of Islamic law provides that a mother has a religious obligation (diyânatan) to nurse her infant child, but that such an obligation cannot be enforced by a court (qadâ’an). 2 ‘Umar b. Ibrahim Ibn Nujaym, Al-Nahr al-Fa’iq Sharh Kanz al-Daqa’iq (Beirut: Dar al-Kutub al-‘Ilmiyya, 2002), 518-519.
35. The three revelatory sources are the Qur’an, Islam’s holy book; the sunna – the normative statements and practices of the Prophet Muhammad; and consensus.
36. For a more detailed description of the relationship of Islamic ethics to Islamic law, see Fadel, “The True, the Good and the Reasonable,” 19-29.
37. Ibid., 27.
38. Ibid., 22-23, 64; Bernard G. Weiss, The Spirit of Islamic Law (Athens and London: University of Georgia Press, 1998), 20 (stating that the rules of obligation are not necessarily rules of law to be enforced by temporal authorities, but are rather about the “duties that human beings have toward God and with sanctions that belong to the world to come”).

to these categories as “the rules of obligation” because they apply to the conduct of a morally responsible person and represent ethical judgments regarding the conduct of such a person.\textsuperscript{39}

Revelation, however, only yields conclusive answers for a limited set of moral questions, thus giving rise to the need for good faith interpretation of revelation.\textsuperscript{40} Interpretation is an equivocal enterprise and as a consequence Islamic ethics, despite its scripturalist commitments, recognizes that Muslims acting in good faith will have different views of the contents of God’s commands.\textsuperscript{41} In the absence of a temporal authority that can conclusively resolve these ethical and theological disputes, individual Muslims satisfy their moral obligations to God by adhering to that rule which they in good faith believe best represents the divine will as evidenced by Islamic revelatory sources.\textsuperscript{42} Finally, ethical conduct requires that a human being direct his actions for the purpose of pleasing God rather than self-interest.\textsuperscript{43} Islamic ethics, therefore, consists of a

\textsuperscript{39} Fadel, “The True, the Good and the Reasonable,” 68.

\textsuperscript{40} Ibid., 41.

\textsuperscript{41} Ibid., 41-43.

\textsuperscript{42} Ibid., 42-43.

\textsuperscript{43} This principle is set forth in a statement attributed to the Prophet Muhammad in which he is alleged to have said, “Actions [are judged] solely by intentions, and each individual shall only receive what he intends. Therefore, whoever immigrated [to Medina] for the sake of God and His prophet, then his immigration was for the sake of
combination of theoretical knowledge regarding the status of one’s action in the eyes of God, conformity of one’s conduct to that theoretical judgment, and the intention by an individual to perform the act in question for the sake of God. For example, the valid discharge of the obligation to pray the five-times daily prescribed Islamic prayers requires (i) knowledge that to do so is obligatory, (ii) knowledge of the manner by which the prayer is to be performed, (iii) performance of the prescribed ritual acts in accordance with the rules for ritual prayer, and (iv) an intention to perform the prayer solely for the sake of God. While all ritual acts require a religious intention, secular acts – such as entering into contracts, including a contract for marriage – are valid without the requirement of a religious intention.\(^{44}\)

Islamic law, in contrast to Islamic ethics, is concerned solely with determining the secular consequences of human conduct within a system of temporal justice which, while

\[\text{God and His messenger. As for the one who immigrated for the sake of a worldly gain or to marry a woman, then his immigration was for that [and not God].” “Hadith Number One: Actions are but by Intentions,” Ibn Rajab’s Commentary on Imam Nawawi’s Forty Hadith, trans. Mohammed Fadel, http://www.sunnah.org/ibadaat/alamal_bilniyyat.htm.}\]

[How about citing to “The complete forty hadith,” Abdassamad Clarke?]

To be sure, acting for self-interested reasons is not necessarily sinful; it is simply not religiously meritorious.

certainly related to the ethical norms of Islamic revelation, is never wholly determined by it. Moreover, Islamic law, as a secular system of justice, does not attempt to determine the subjective states of human actors, even though in the absence of such data it is impossible to know the true moral status of any act. Because of rule indeterminacy and fact indeterminacy, the judgments of courts, viewed from a moral perspective, can only produce valid (zâhir) judgments rather than morally true (bâtin) judgments. While a judge’s verdict is sufficient to terminate the dispute that gave rise to the litigation in the secular world, it is not enough to discharge the conscience of the prevailing litigant.

45. A more accurate conception of the relationship of Islamic ethics to Islamic law is that the latter exists within certain boundaries established by the former. Fadel, “The Good, the True and the Reasonable,” 23-29, 48-49.


47. “Rule indeterminacy” arises from the impossibility of knowing whether the judge has applied the “correct” rule of law to the case (correct in the sense of corresponding with God’s rule for the case). See the discussion regarding the dispute within Islamic ethics as to whether a “correct” rule exists for every case in Fadel, “The Good, the True and the Reasonable,” 40-43.

48. “Fact indeterminacy” refers to the risk that the evidence provided by the litigants to the court may not correspond to the actual facts of the case.
unless she acted in good faith. Good faith means two things: first, that the successful litigant did not deceive the court as to the facts of the case; 49 and second, that the successful litigant did not advance a rule of law which he or she subjectively rejects. 50 If these conditions are met, however, then the judge’s ruling grants the prevailing party a moral as well as a legal entitlement to that which had been previously in dispute, and categorically moots the prior moral controversy with respect to that particular case. 51

But legal rules cannot be viewed as entirely separate from a Muslim’s moral obligations. For example, an invalid contract of sale may result in a defective transfer of title, with the result that the recipient of the property is deemed to be holding the object of


50. An example would be where a defendant asserts the validity of his marriage to a woman despite the fact that it was contracted without the approval of the wife’s father, who was alive and present, in reliance on a Hanafi rule recognizing the validity of such marriages, even though the defendant is a Maliki and subjectively believes that a marriage in such circumstances is invalid in the absence of the father’s consent. Fadel, “Adjudication in the Maliki Madhhab,” 115 n. 223.

51. Ibid., 116.
the sale not as an owner, but rather as a trustee with corresponding moral and legal obligations to return the item to its true owner without making any use of it for himself.  

Or, in the case of family law, “if a man and a woman enter into a marriage in a manner that does not conform to the basic requirements of a marriage contract, the couple may not be considered to be truly married, and sexual intercourse between them will be illicit.” Moreover, legal rules do not derive exclusively from jurists’ interpretations of revelation: state officials may promulgate legally binding rules under a doctrine known as siyāṣa sharʿīyya on the condition that such rules do not contradict Islamic norms, i.e. do not command an act that would be religiously forbidden or prohibit an act that would be religiously obligatory.  

Two sets of regulations, therefore, are relevant to the ethical decisions of an orthodox Muslim: his subjective perception of his religious obligations and the legal

52. Weiss, Spirit of Islamic Law, 21; 2 Ahmad b. Muhammad b. Ahmad al-Dardir, al-Sharh al-Saghir, ed. Mustafa Kamal Wasfi (Cairo: Dar al-Ma‘arif, 1986), 110 (“[It, i.e. the object of an invalid sale] must be returned to its seller so long as it has not changed from its original condition and the purchaser is not permitted to use it [in any respect] so long as it is in its original condition.”)  

53. Weiss, Spirit of Islamic Law, 21.  

54. Fadel, “The True, the Good and the Reasonable,” 58 n. 234.
system’s objective regulation of his conduct. Where a discrepancy exists between the two sets of norms, an individual Muslim faces the moral problem of determining whether he will abide by the legal rule in question or his own moral opinion. If the rule in question is a mandatory rule of law, i.e. either commanding an act or an omission, Muslim jurists are of the view that a Muslim can, in good faith, comply with a legal rule that he rejects as unjust provided that compliance with that rule does not entail disobedience to God. In other words, mere moral disagreement with the inherent rightness of a legal rule does not excuse compliance – only a true conflict between fidelity to the rule of law and fidelity to God could excuse compliance with a mandatory law. A Muslim’s obedience in such a context does not imply his or her moral

55. The problems arising out of the duality of ethical/legal regulation which an orthodox Muslim faces would exist even if this Muslim lived in a perfectionist Islamic state. See Johansen, “Truth and Validity of the Qadi’s Judgment.” See also Haider Ala Hamoudi, “Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience,” Berkeley Journal of Middle Eastern and Islamic Law 1:1 (2008) (discussing the “hybridity” of the modern Muslim legal subject as the product of dual commitments to following Islamic law and state law).

56. Fadel, “The True, the Good and the Reasonable,” 58, n. 234.

57. For this reason, a government agent that unlawfully killed another could not raise as a defense that he was merely acting on the instructions of his superior on the theory that he
agreement with the command in question or that it is just, only that he or she can comply with it without committing a sin.

The distinction between the moral and the legal in the context of permissive rules creates for observant Muslims what can only be described as a moral quandary: he or she may be objectively entitled under prevailing law to press a certain claim, or raise a certain defense, but unless he or she subjectively assents, as a moral matter, to that right or defense, she is not religiously entitled to avail himself or herself of that particular rule because to do so would be to act in a manner that one subjectively understands to be unjust.\textsuperscript{58} As shall be further discussed below, this moral problem is especially pressing in the case of certain rules of family law pertaining to the right of a Muslim woman to remarry and that relate to the distribution of marital property upon termination of a marriage.

3. The Scope of Islamic Family Law and its Relationship to Islamic Ethics\textsuperscript{59}

has a moral duty to resist an immoral command. [Citation to Sarakhsi (al-Mabsut), Ibn Qudama (al-Mughni), Ibn ‘Abd al-Salam (Qawa‘id al-Ahkam)]

58. Malikis, for example, routinely cite the example of the Hanafi principle giving neighbors a legal right of first refusal in the event of a sale of land as a rule for which it would be immoral for a Maliki to act on, given their belief that a legal right of first refusal only accrues to partners in land, not neighbors.

59. For purposes of this chapter, references to Islamic law do not refer to any system of positive law enacted or given effect by a state. Instead, they are to the doctrines of
To understand the dynamics of Islamic family law and the interaction of ethical and legal claims in the life of an orthodox Muslim, one must keep in mind that Islamic family law operates principally at two different levels. First, Islamic law regulates sexual intimacy and the lawful reproduction of children, where the most important rule is that sexual intimacy (including intimate contact not involving intercourse) is illicit in the absence of a valid marriage; it in fact constitutes a mortal sin and in certain cases, a

Islamic family law set forth in pre-19th century legal treatises by Muslim jurists. Although many of these rules are no longer politically salient because they have been replaced or modified by positive legislation in states that have incorporated Islamic family law as part of their legal system, these rules’ authority is independent of any state command, and therefore, they remain highly relevant to orthodox Muslims’ understandings of their rights and obligations, especially in liberal jurisdictions where there is no state-established system of Islamic law adjudication.

Only children conceived pursuant to a recognized marriage contract are considered legitimate. The legal validity of marriage contracts is generally a matter of strict liability: even good-faith mistakes can result in the contract being defective, in which case the parties are generally required to separate, at least until a valid contract is concluded. The Islamic law of divorce also regulates sexual intimacy by rendering illicit intercourse constitutes the crime of zinā which, according to traditional doctrines of Islamic law, is the subject of a mandatory penalty (one of the so-called hudûd (sing. hadd) penalties). The penalty set forth in the Quran for adultery is 100 lashes. Al-Nur, 24:2. Muslim jurists, however, limited this punishment to illicit intercourse between persons who were legally virgins (bikr), i.e. had not experienced marital intercourse. The punishment for individuals who had the experience of marital intercourse (muhsan) was stoning to death which, although not mentioned in the Quran, was believed to have been practiced by the Prophet Muhammad. Children born outside of a lawful relationship are lawful descendants of the mother but can never be lawful descendants of the father, even where the biological father admits paternity or subsequently marries the mother. Daniel Pollack, Moshe Bleich, Charles J. Reid, Jr., and Mohammad H. Fadel, “Classical Religious Perspectives of Adoption Law,” Notre Dame Law Review 79 (February 2004): 693-753, 734-735. 2 al-Dardir, al-Sharh al-Saghir, 384 (stating that the general rule is that invalid marriages must be annulled) [should be “al-Dardir” throughout; need to keep volume number because his treatise consists of 4 vols.]; 2 [make sure to preserve the volume number because his treatise consists of 4 vols.]; 2
sexual intimacy between the former spouses illicit, immoral, and potentially subject to criminal sanction. But divorce does not affect the relationship of the parent to the child; a legitimate child remains permanently part of each parent’s kin group even after dissolution of the marriage.

Second, Islamic law introduces a broad new set of economic relationships, primarily within the nuclear family, but also within the extended family. A valid marriage contract creates new economic relationships within the family requiring, for example, periodic transfers of property from the husband to his wife; from the father to any minor children; and from adult children to their parents, if the parents become indigent. Such transfers are mandated both during the lifetimes of the individuals and thereafter. Ibn Nujaym, Al-Nahr al-Fa’iq Sharh Kanz al-Daqa’iq, 252 (stating that it is obligatory to annul an invalid marriage contract). Children born of an invalid marriage, however, are nevertheless deemed to be legitimate. Ibid., 254. Other incidents of a lawful marriage, e.g. the right to inherit, are present until the marriage is annulled. Ahmad al-Dardir, al-Sharh al-Saghir, 388.

64. David S. Powers, “From Almohadism to Malikism: the Case of al-Haskuri, the Mocking Jurist, ca. 712-716/1312-1316,” in Law, Society and Culture in the Maghrib, 1300-1500 (Cambridge University Press: Cambridge, 2009) 53-94 (describing case of jurist who knowingly remarried his former wife in violation of laws of re-marriage who narrowly escaped application of the stoning penalty on a legal technicality but was subjected to a penalty of lashing and exile).
concerned (in the form of mandatory maintenance obligations), and after death (in the form of a mandatory scheme of inheritance). Maintenance obligations between parents and legitimate children are mandatory by virtue of the relationship itself. 65 A husband’s obligation to support the wife is contingent upon the continued existence of the marriage. Once the marriage is dissolved by divorce or death, any ongoing maintenance obligation terminates after a limited time. 66

While universal agreement exists with respect to certain aspects of family law, e.g. the impermissibility of sexual intimacy in the absence of a valid marriage contract, not all Islamic ethical or legal rules regulating family life enjoy such universal recognition. In particular, because the background rule governing property relations is more permissive than that involving sexual intimacy, there is substantially wider scope within Islamic ethics and law for the organization of a household’s economic relations than would be contemplated for the organization of sexual relations. 67 The next section

66. This will generally be approximately three months if the woman, at the time of the divorce, is not pregnant. If she is pregnant, she has a right to maintenance from her husband until she delivers the fetus. A widow is generally entitled to maintenance from the estate of her deceased husband for a little more than four months.
67. While the default moral presumption regarding the use of the external things of this world – including trade in such things – is indifference, i.e., one can engage in such activities without the risk of sin, the default presumption regarding sexual intimacy is that
will discuss the practical consequences of intra-Muslim differences of opinion regarding both the ethical and legal rules governing family life and how such differences, as a historical matter, helped sustain an Islamic version of family law pluralism.

4. Islamic Commitments and Family Law Pluralism

Pluralism of family regulation in societies governed by Islamic law has four principle causes. The first cause is intra-Islamic pluralism that arises by virtue of the role of human interpretation in the law-finding process and the impossibility of resolving the resulting differences of opinion. The second cause is the fact that Islamic family law is a mix of mandatory and permissive rules, resulting in potential departures of Islamic marriage contracts from the default terms of Islamic law (and at times in a manner that appears to subvert the religiously normative “ideals” of marriage). The third cause is the non-judicial religious/moral regulation of the family and the fourth is the willingness of Islamic law to give partial recognition to non-Islamic systems of family law.

a. Intra-Islamic Legal Pluralism and Islamic Family Law

of prohibition. Marriage functions therefore to make licit something (sexual intimacy) that is otherwise prohibited. 7 Muhammad b. ‘Abd al-Wahid, known as Ibn al-Humam, Sharh Fath al-Qadir (Cairo: Maktabat wa Matba’at Mustafa al-Babi al-Halabi, 1970), 8 (discussing the different moral presumptions governing sexual exchange and exchange of property).

68. Ibid., 39–45 (discussing the ethical and epistemological premises that gave rise to a system of intra-Muslim normative pluralism).
As a result of the relationships between and among Islamic ethical theory, moral epistemology, and law, four distinct systems of substantive law (commonly referred to as “schools of law”) arose among Sunni Muslims: the Ḥanafī, the Mālikī, the Shāfi‘ī, and the Ḥanbalī. While each system of law was considered equally “orthodox” from an ethical perspective, they nevertheless often had material differences in their substantive legal doctrines, including their approaches to the regulation of the family. To illustrate the range of substantive disagreement consider a few salient differences between the Hanafī and Maliki schools. ⁶⁹

While both the Hanafī and the Maliki schools of law recognize the right of an adult woman to marry without the consent of her father (or her father’s male relatives in the absence of the father), ⁷⁰ the Hanafīs give the father (or the father’s male relatives) the right to annul a daughter’s marriage if it was contracted without his consent and if the

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⁶⁹ Historically, both the Hanafī and the Maliki schools of law have been closely associated with dynasties in the Islamic world. In the modern era, Hanafī doctrines largely prevail in the field of family law in much of the Arab world with the exception of North Africa, where Maliki influence on modern family law codes is greater. For a discussion of some of the differences between the Malikis, the Hanafis, and modern Arab family law codes, see Lama Abu-Odeh, “Modernizing Muslim Family Law: The Case of Egypt,” *Vanderbilt Journal of Transnational Law* 37 (October 2004): 1043-1146.

bridegroom was not the wife’s social equal (kaf’). While the Malikis also recognize the
document of social equality (kafā’a) in marriage, they restrict it to religion and freedom,
and, accordingly, the father (or the father’s male relatives) does not have the right to
annul the marriage of his adult daughter contracted without his consent (or even in
defiance of his will) on the grounds that her husband is not her social equal.
Significantly, the relatively greater independence Maliki law gives women to contract
their own marriages results in a correspondingly weaker claim to maintenance against
their extended kin group relative to the Hanafi rule. While the Hanafi law of
maintenance obliges the father or the father’s male kin to maintain even adult unmarried
or divorced daughters (or daughters whose husbands fail to provide for them), the Maliki

71. Farhat J. Ziadeh, “Equality (Kafū’a) in the Muslim Law of Marriage,” American
Journal of Comparative Law 6 (1957): 503-517, 510. Early Hanafi jurists (eighth and
ninth centuries of the Common Era) had an elaborate doctrine of social equality that
generally privileged Arabs over non-Arabs. For later Hanafi jurists such as Ibn ‘Abidin
(nineteenth century), however, Arabs had ceased to exist as a social group, with the
exception of individuals with well-known lines of descent from ancient Arabian tribes
with the ironic result that the relatively greater egalitarianism of the ancient Arabs was
replaced with the relatively greater social hierarchies of the non-Arabs. 3  Muhammad
Amin Ibn ‘Abidin, Hashiyat Radd al-Muhtar (Cairo: Mustafa al-Babi, 1966), 84-91. For
Malikis, on other hand, all free male Muslims are the social equals of all Muslim females
without regard to descent, wealth, or other social hierarchies.
law of maintenance does not recognize intra-familial maintenance obligations other than those between a parent and a child.  

Another important difference between the two schools of law pertains to the law of spousal maintenance. While both agree that it is the husband’s duty to support the wife, the Hanafis understand the maintenance obligation to be more akin to a gift rather than a contractual undertaking. Accordingly, the failure of a husband to honor this obligation does not give rise to an enforceable claim for money on the part of the wife.  

Only after the wife complains to the judge and the judge reduces the maintenance obligation to a sum certain (whether payable as a lump sum, monthly, or yearly), or the wife enters into a specific contractual agreement with her husband regarding the amount of her maintenance, does the wife have an enforceable claim against the husband.  

Moreover, repeated failures of a husband to meet his maintenance obligation do not give rise to a right of divorce; instead, the wife may borrow money on the credit of the husband in order to satisfy her needs, or the judge may imprison the recalcitrant husband.  

72. Ahmad al-Dardir, *al-Sharh al-Saghir*, 750-751; Ibn Nujaym, *Al-Nahr al-Fa’iq Sharh Kanz al-Daqa’iq*, 510 (stating that if the husband is incapable or unwilling to support her, the wife’s brother must do so if he is solvent).  

73. Ibn Nujaym, *Al-Nahr al-Fa’iq Sharh Kanz al-Daqa’iq*, 512 (unpaid maintenance is not enforceable by a judge because it is in the nature of a gift, not a debt).  

74. Ibid.  

75. Ibid., 510.
husband as he would imprison any other recalcitrant debtor in order to induce him to perform his financial obligations. For the Malikis, however, the maintenance obligation is a debt owed by the husband to the wife that she is free to enforce at any time. In addition, the Malikis deem a husband’s failure to maintain his wife a fundamental breach of the marriage contract, giving her a right to divorce as a result.

The Hanafis and the Malikis also differ on the law governing consensual divorce (khul’). Both schools agree that if the husband is at fault, i.e. the wife is not in a state of disobedience (nushûz) to the husband, then it is prohibited for the husband to receive any consideration from his wife in exchange for divorce. The Hanafis, however, characterize this prohibition as only a religious and not a legal obligation. Thus, if an innocent wife agrees to pay her husband consideration in exchange for a divorce, that

76. Muhammad b. ‘Ali al-Haddad, al-Jawhara al-Nayyira, 246 (stating that a judge may imprison a husband who refuses to maintain his wife).
77. Ahmad al-Dardir, al-Sharh al-Saghir, 754 (the wife may always collect unpaid maintenance because it is in consideration for her being sexually available to her husband).
78. Ibid., 745-746.
agreement is legally binding and she has no right to seek repayment of that amount.  

The Malikis, however, treat this prohibition as creating both a religious and legal obligation. Therefore, they grant a divorced woman a cause of action for the recovery of any sum wrongfully paid to her ex-husband if she can prove that she had been entitled to a divorce from her husband (because, for example, he had been abusing her). Indeed, even a cuckolded husband is not permitted by the Malikis to harass his wife into accepting a separation by *khul*'.  

The contrasting positions of the Hanafis and Malikis on this issue reflect in turn a deeper disagreement on judicial divorce: the Hanafis only grant a judicial divorce on extremely limited grounds while the Malikis permit the judge to divorce a wife whenever she proves harm. 

Finally, the Hanafis and Malikis have substantially different understandings of the financial consequences of a wife’s disobedience. For the Hanafis, the wife loses her right to maintenance simply by virtue of her disobedience and it is not restored until she

80. 3 ‘Ala’ al-Din Abu Bakr b. Mas’ud al-Kasani, *Bada‘i’ al-Sana‘i’ fi Tartib al-Shara‘i’* (Beirut: Dar al-Katub al-Ilmiyyah), 150 (stating that the wife has no legal right to the return of the consideration).

81. The husband’s return of property unlawfully received from his wife in exchange for the divorce does not vitiate the divorce’s effectiveness. 2 al-Dadir, *al-Sharh al-Saghir*, 530.

submits again to her husband’s authority. For the Malikis, however, a husband’s maintenance obligation persists until the husband exhausts all legal avenues to secure the submission of the rebellious wife to his authority.

The schools’ abstract and general agreements on certain fundamental points should not obscure the often profound differences regarding how to give concrete effect to such principles within a general system of rights and remedies. Moreover, while it may be the case that none of the historical schools of Islamic law provide grounds for a liberal conception of marriage (such as a partnership of equals), some are more consistent with a politically liberal family law than others. As the preceding examples indicate, Maliki rules appear substantially more favorable to women, both from the perspective of distributive justice and protecting a woman’s right to exit an undesirable marriage. Accordingly, the default rules of Maliki family law may provide greater doctrinal

84. 2 al-Dardir, *al-Sharh al-Saghir*, 740.
85. Lama Abu-Odeh, for example, observed recently that despite the differences among the historical schools, they “tend to pull toward a particular position” in certain basic questions regarding the family. For example, they generally endorse a family structure which is both gendered and hierarchical and which accrues “to the benefit of the husband . . . but with a strong underlying element of transactional reciprocity of obligations . . . in which husbands provide money, in the form of maintenance, and women provide conjugal society in return.” Abu-Odeh, “Modernizing Muslim Family Law,” 1070, 1073.
resources for fashioning Islamic marriage contracts that satisfy the minimum substantive requirements of political liberalism relative to the default rules of Hanafi family law.

b. The Contractual Nature of Islamic Family Law

Islamic marriage law permits tailor-made agreements (if drafted using the proper contractual formula) that may deviate, within specific bounds, from the legally provided terms of the marriage contract. Parties are not free, however, to include terms that are “repugnant” to the Islamic conception of marriage, i.e. terms that purport to alter the fundamental terms of the Islamic marriage contract. If such a term is sufficiently “repugnant,” it could render the contract void in its entirety. An example of such a repugnant term, from the Sunni perspective, is a marriage contracted for a specific period of time (mut’a). The Maliki school also considers “repugnant” an agreement to marry on condition that the parties will keep the marriage a secret\textsuperscript{86} or, an agreement that the husband will not spend the night with the wife, or, will visit her only during certain specified times (e.g. the day time).\textsuperscript{87} Other terms, although not repugnant to the marriage contract, may not be judicially enforceable (at least by specific performance), such as a promise by a husband to refrain from marrying another woman, or from causing her to settle in another town. The non-enforceability of such a term does not, however, vitiate

\textsuperscript{86} 2 al-Dardir, \textit{al-Sharh al-Saghir}, 382-383 (secret marriages are a legal nullity unless the parties have cohabitated for a “lengthy time”).

\textsuperscript{87} Ibid., 384.
the validity of the marriage,\textsuperscript{88} nor does it imply that the husband is morally free to ignore it.\textsuperscript{89} The enforceability of other terms, e.g. a marriage on the condition that the wife possess a unilateral right to divorce at any time, is controversial: Malikis do not recognize it, but the Hanafis do.\textsuperscript{90}

Even if a contractual term is not enforceable through specific performance, its breach may give rise to monetary damages. The Hanafis, for example, hold that if a woman agrees to a reduction in her dowry in consideration of the groom’s promise to perform or to refrain from an act that is beneficial to her or another and is otherwise lawful (e.g. a husband’s promise not to take another wife), and the husband then subsequently breaches that promise, she is entitled to receive compensation from her husband. Damages in this case are calculated based on the difference between the dowry

\textsuperscript{88} Such conditions are viewed as legally unenforceable promises which ought to be kept as a matter of morality. To describe such conditions as void, therefore, despite such language in the secondary literature, is an error. See, e.g., Abu-Odeh, “Modernizing Muslim Family Law,” 1070-1071 and n. 106-107.

\textsuperscript{89} Abu al-Walid Muhammad b. Ahmad Ibn Rushd (the Grandfather), 4\textit{ al-Bayan wa-l-Tahsil} (Beirut: Dar al-Gharb al-Islami, 1984), 377 (explaining that husband is morally but not legally bound to fulfill promise to his wife not to prevent her from attending the mosque).

she would have ordinarily received \textit{(mahr al-mithl)}\footnote{The term \textit{mahr al-mithl} means the “dowry of [her] peers,” where the bride’s peers are taken to be her agnatic female relatives, e.g. her sisters.} but for the husband’s promise, and the dowry she actually received pursuant to the contract.\footnote{Ibn Nujaym, \textit{Al-Nahr al-Fa’iq Sharh Kanz al-Daqa’iq}, 245-246. See also Lucy Carroll Stout, “Muslim Marriage Contracts in South Asia: Possibilities and Limitations,” in Harvard Law School, Islamic Legal Studies Program: Conference on the Islamic Marriage Contract, January 1999 (unpublished manuscript on file with the author, discussing principles of Hanafi law on breach of marriage contracts).}

More important than the availability of damages, however, is the ability of parties to transform what would otherwise be a non-enforceable term into one that is enforceable by including an express remedy for breach. For example, a contractual clause granting the wife a unilateral right to divorce in the event that her husband marries a second wife is enforceable, even if a general promise by the husband not to take a second wife is not. Because Islamic law views such a provision as an oath or a conditional divorce, the right to divorce becomes available to the wife simply by virtue of the occurrence of the specified contingency without regard to whether the wife offered a financial concession to the husband in exchange for the term in question. The conditional structure of this device allows for its use to protect (particularly) the wife from all sorts of contingencies for which the law does not provide a remedy, e.g. a prolonged absence of the husband from the marital home. Accordingly, even the Hanafi school, which is the most
restrictive in terms of allowing judicial divorces to women, provides women greater access to divorce as a matter of the spouses’ contract than the school’s default rules would otherwise permit.

As a matter of both social and legal history, we know that Islamic marriage contracts that departed from the legally-provided default rules were unexceptional. Indeed, examples of standard form marriage contracts with terms that depart from legally provided default rules appear as early as the late tenth/early eleventh centuries of the Common Era. One such model from Andalusia includes provisions such as providing the wife the option of divorce in the event her husband took a second wife, left the marital home beyond a contractually defined period of time, or demanded that the wife leave her home town for another. 93 We also know that such provisions were enforced in courts. 94

Likewise, we also know that in the urban centers of fourteenth-and fifteenth-century Mamluk Egypt and Syria, monetization of the marriage contract had become sufficiently widespread as to undermine the “patriarchal ideal of conjugal harmony . . . [pursuant to which] a household should constitute one indivisible economic unit . . .


Islamic law, far from condemning these contractual innovations, gave them legitimacy through the development of new contractual clauses that came to be inserted routinely in the marriage contracts of this period even though some religious authorities condemned such clauses as contrary to normative Islamic conceptions of the family.


96. Two new clauses were particularly important in these developments. The first transformed the husband’s maintenance obligation from one payable in kind – food, clothing, and shelter – to one payable only in cash at regular intervals. The second transformed the husband’s obligation to pay a dowry from an obligation payable only upon a fixed schedule or upon death or divorce to an obligation payable at the demand of the wife. This latter clause makes its first appearance in marriage contracts of the thirteenth century. Ibid., 52-53, 56.

97. Ibid., 57 (quoting Ibn Qayyim al-Jawziyya, a famous Syrian jurist from the fourteenth century as complaining that “[i]f a husband scolds his wife for her housekeeping, or prevents her from stepping out or leaving his house, or does not let her go wherever she wishes, the wife then demands her marriage gift. The husband is sent to prison, while she goes wherever she wants.”) A legal treatise from the period stated, for example, that although it is customary for a wife not to seek collection of the unpaid portion of her dowry until death or divorce, “the text of standard marriage contracts does specifically
Islamic law, therefore, apart from the pluralism provided by the formal system of legal pluralism also furthered a system of family law pluralism by promoting the use of non-standard contractual terms that replaced the law’s default terms, with the result that Islamic family law is best understood as a mixed system of mandatory public rules and contractual private rules.

c. Religious Regulation of the Family in Islam

allow the wife to demand the marriage gift [dowry] ‘whenever she wants.’ A qādī [an Islamic law judge] presented with such a contract must enforce the payment of the remaining marriage gift [dowry] at the wife’s request, and send the husband to jail if he refuses.” Ibid.

98. Reform of the pre-Islamic Arabian family was an express goal of numerous verses of the Quran, both at a moral level and at a legal level. See, e.g., Quran, al-Takwîr, 81:8-9 (condemning the pre-Islamic Arabian practice of female infanticide); al-Nisâ’, 4:19 (prohibiting the pre-Islamic practice of “inheriting” women for remarriage, prohibiting men from harassing women in order to extort property from them, and admonishing to live with women in kindness); al-Baqara, 2:229 (calling on men to live with their wives in kindness or to divorce them in a spirit of generosity); al-Baqara, 2:233 (“The mothers shall nurse their children for two years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall suffer an injury on account of her child, nor [shall the] father on account of his child [suffer an injury] . . . . If they
At the same time that Islamic legal principles of contract operate to provide
parties with significant opportunities to depart from the default terms of Islamic law, so
too religion and religious rhetoric impact the regulation of Muslims’ marital life,
especially in light of strains of religious rhetoric that values an ethic of female sacrifice\(^99\) – sometimes to the point of self-abnegation\(^100\) – over individual rights. Different religious

\begin{itemize}
  \item Mutually agree to wean the child and after they consult with one another, there is no blame on them. If ye decide on a foster-mother for your offspring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear Allah and know that Allah sees well what ye do.”
\end{itemize}

\(^99\) Abu Hamid Muhammad b. Muhammad al-Ghazali, *The Proper Conduct of Marriage in Islam*, trans. Muhtar Holland (Al-Baz Publishing, 1998), 61 (attributing to the Prophet Muhammad the statement that a woman who endures a bad husband will receive heavenly reward); and Ahmad b. Muhammad Ibn Hajar al-Haytami, *al-Ifsah ‘an Ahadith al-Nikah* (Baghdad: al-Maktaba al-‘Alamiyya, 1988), 87 n.3 (attributing to the Prophet Muhammad the statement that a woman, even if her husband is oppressive, should not disobey him) and 93 (attributing to the Prophet Muhammad the statement that a woman who demands a divorce from her husband without just cause will be deprived from even the “scent of Paradise.”) For an example of a modern manifestation of this ethic among Turkish Muslims in Thrace, Greece, see Robin Wilson [her contribution to this book].

\(^100\) The expectation that a wife should completely subordinate her individual desires to the service of her husband was expressed from time to time by medieval Muslim (male)
writers on marriage. For example, the well known medieval Muslim theologian, jurist and philosopher al-Ghazali described the virtuous wife in the following terms:

She should stay inside her house, and stick to her spinning wheel. She should not go up too often to the roof and look around. She should talk little with the neighbors, and visit them only when it is really necessary to do so. She should look after the interests of her spouse in his absence and in his presence, seeking to please him in all that she does. She must be loyal to him in respect of herself and of her property. She should not go out of her house without his permission. When she does go out with his permission, she should be disguised in shabby attire, keeping to out-of-the-way places far from the main streets and markets. She should be careful not to disclose her identity to her husband’s friends; indeed, she should avoid recognition by anyone who thinks he knows her, or whom she recognizes. Her only concern should be to keep things right and to manage her household.

conceptions of marriage may account for the different approaches taken by the Malikis and the Hanafis. While both the Hanafis and the Malikis treat marriage as a contract that is supererogatory, the Hanafis give marriage greater devotional weight than do the Malikis. One later Hanafi author, for example, states that aside from faith in God, marriage is the only religious obligation that began with Adam and Eve, persists for the entirety of human history, and continues into the afterlife. This kind of religious rhetoric surrounding marriage is largely absent from Maliki sources, who are simply content to state that all things being equal, marriage is a religiously meritorious act on account of the secular benefits it provides.

This does not mean, however, that religious ideals do not inform Maliki family law. For example, Malik, the eponymous founder of the Maliki school, is reported to have discouraged the use of contractual stipulations in marriage contracts, reportedly on

101. Hina Azam argues that the different legal approaches taken by the Hanafis and the Malikis reflect a deeper disagreement on the nature of human sexuality and ownership of the body, with the Hanafis adopting a “theocentric” view of the body and sexuality while the Malikis took a more “proprietary” view of the body and sexuality. Hina Azam, “Identifying the Victim: God vs. the Woman in Islamic Rape Law,” lecture delivered at the 2008 Annual Meeting of the Middle East Studies Association (unpublished manuscript on file with the author).


the theory that their inclusion is inconsistent with the relationship of trust that is at the heart of marriage.\textsuperscript{104} Religious conceptions of marriage manifest themselves even in strictly legal matters. Islamic law treats marriage contracts differently from commercial ones. To illustrate, in commercial contracts the norms of arm’s length bargaining permit each party to seek its maximum advantage (mushâḥḥa or mukâyasa), but marriage contracts are construed according to the principal of mutual generosity (musâmaḥa or mukârama) pursuant to which the norms of magnanimity and sharing prevail over individual welfare-maximizing interpretations of the contract.\textsuperscript{105} For that reason, for

\textsuperscript{104} 9 Abu al-Walid Muhammad b. Ahmad Ibn Rushd (the Grandfather), \textit{al-Bayan wa-l-tahsil} (Beirut: Dar al-Gharb al-Islami, 1984), 311-312. According to Ibn Rushd the Grandfather (12\textsuperscript{th} century), however, Malik disliked such conditions not for religious reasons as such, but because they are bad deals for women: in most instances a woman will never have an opportunity to exercise her contingent rights, yet she agrees in advance to a reduced dowry in consideration for these additional stipulations.

\textsuperscript{105} Ibid., 263 (explaining that a prospective bride’s guardian need only disclose to the prospective groom facts regarding his charge that would legally permit the groom to annul the marriage, but not other facts, e.g. the fact that the prospective bride had committed fornication, even if knowledge of such facts would have led the groom to withdraw the offer of marriage or reduce the dowry, because marriage is governed by a norm of generosity and because the dowry is not a commercial consideration but a gift to the bride).
example, the Malikis do not permit a husband to annul his marriage in the event that certain contractual representations, e.g. actual virginity, were breached, even if such representations were explicitly demanded by the husband. On the other hand, this interpretive principle also meant that a woman’s economic contribution to the household is easily recharacterized as a gift to the husband rather than as a loan that the husband must repay. In short, tension exists between the values of Islamic law as a legal system and traditionalist Islamic religious discourse: the former protects and vindicates the individual rights of the parties to the marriage contract (even rights that go beyond those proscribed by law) while the latter promotes an ethic of sacrifice, trust, love and female subordination to their husbands.

To the extent individual Muslims internalize the traditional religious discourse regarding marriage, the prospect that they will use the rights afforded to them under Islamic law to opt out of the default terms of Islamic law would seem, necessarily, to be


107. Maliki law required a wife to swear an oath that she intended to treat her contributions to the household as a debt payable in the future in order for her to receive compensation for such contributions in the future. Ibid., 193; see also Ibn Rushd, al-Bayan wa-l-tahsil, 345-346. Moreover, a wife’s failure to timely claim amounts that her husband owes her would result in a dismissal of her claim. Al-Hadiqa al-Mustaqilla al-Nadra fi al-Fatawa al-Sadira ‘an ‘ulama’ al-Hadra 24b (unpublished manuscript on file with the author).
POLITICAL LIBERALISM, ISLAMIC FAMILY LAW AND FAMILY LAW PLURALISM: LESSONS FROM NEW YORK ON FAMILY LAW ARBITRATION, in Marriage and Divorce in a Multi-Cultural Context: Reconsidering the Boundaries of Civil Law and Religion (Ed. Joel A. Nichols) (Cambridge University Press, forthcoming 2010)

diminished, and to that extent, giving effect to family law arbitrations that reflected such a discourse would be inconsistent with political liberalism. Traditional religious discourse, however, does not exercise a monopoly over Islamic religious conceptions of marriage and gender relations. Islamic discourse on gender and the family over the last one hundred and fifty years, however, has generally stressed egalitarian religious

108. Even among conservative groups that are typically labeled “Islamist,” important shifts in the religious discourse toward a more egalitarian understanding of marriage and gender relations have taken place. See Gudrun Krämer, “Justice in Modern Islamic Thought,” in Shari’a: Islamic Law in the Contemporary Context, ed. Abbas Amanat and Frank Griffel (Stanford: Stanford University Press, 2007), 20-37 at 33 (noting that while Islamist thinkers all use gender-based rights-schemes in their normative conception of the family, they also affirm a partnership-type model for family life which “is . . . far removed from traditional role models according to which husband and wife (or wives) lead largely separate lives that do not require or even allow for a sense of shared interest and responsibility”). Indeed, the translator of al-Ghazali’s The Proper Conduct of Marriage in Islam described the difficulties he had in finding an Islamic publishing house willing to publish the entire translation, presumably because they found some of Ghazali’s statements regarding women’s role in marriage to be an obsolete relic of the middle ages, if not an outright embarrassment. Supra note 100, ix.
themes at the expense of the traditionalist doctrines described above. To the extent contemporary Muslims internalize this discourse, however, one would expect that they would be more willing to take advantage of the contractual structure of Islamic law to opt out of its default terms in favor of a more egalitarian marriage contract that could in principle be consistent with the requirements of political liberalism.

In short, religious beliefs, at least in the contemporary context, operate as a wild card in determining the behavior of individual Muslims: some religious Muslims may be traditionalist in their views of marriage, while other religious Muslims may adopt a much more egalitarian view of the family with others in between. The prevalence of divergent subjective religious beliefs among Muslim citizens further exacerbates the problem of

family law pluralism within the Muslim community because it reinforces the gap between the norms of an objective legal system (whether or not nominally Islamic) and the subjective moral norms of individual Muslims.

d. Marriages of Non-Muslims and Islamic Family Law

Another important historical cause of family law pluralism in Islamic law was its willingness to afford limited recognition to marriages conducted under non-Islamic law pursuant to the principle that non-Muslims enjoyed autonomy over their religious affairs. 110 Islamic law did not view its recognition of non-Islamic systems of family law as an endorsement of the specific moral conceptions underlying non-Islamic marriages; rather, it was viewed as a function of the political agreement between the Islamic state and the particular group of non-Muslims permanently residing in an Islamic state (dhimmîs). Islamic law was therefore willing to tolerate marriages that it would condemn as incestuous provided that the marriage at issue was believed to be permissible according to the parties’ own religion. 111 Non-Muslims, according to the Hanafis (but

110. The Hanafi principle was expressed in the rule that “they are to be left alone in matters that pertain to their religion (yutrakûn wa ma yadinûn).”

not the Malikis) could avail themselves of Islamic family law, but only if both parties agreed to submit their dispute to an Islamic court.\textsuperscript{112}

While Islamic law took a strong hands-off position with respect to the standards that governed the formation and dissolution of non-Muslim marriages, Muslim jurists did not feel such restraint with respect to those aspects of Islamic family law regulating intra-household transfers of wealth. Accordingly, a non-Muslim husband was subject to the same legal duty to maintain his wife as was a Muslim husband. If that husband breached or could not fulfill those duties, the extended family took on those maintenance obligations to the same extent a Muslim family would have done so in similar circumstances.\textsuperscript{113} Similarly, while Islamic law gave non-Muslim parents the right to raise their own children (including teaching them their non-Islamic religion),\textsuperscript{114} they could not take actions that would endanger the secular well-being of their children (such as agreeing to send them to enemy territory where they could be enslaved).\textsuperscript{115} Thus, to the extent that a family law dispute appeared to implicate a norm that Muslims believed

\textsuperscript{112} Ibn Nujaym, \textit{Aal-Nahr al-Fja’iq Ssharh Kkanz al-Ddaqa’iq}, 285 (stating that Muslim court – with respect to issues of validity of marriage or divorce – intervenes in marriage of non-Muslims only if both parties agreed to submit their claim to the court).

\textsuperscript{113} Hanafi citation; 2 al-Dardir at ???

\textsuperscript{114} Pollack et al., “Classical Religious Perspectives of Adoption Law,” 746-747.

was nonreligious, sectarian identity did not shield non-Muslims from the jurisdiction of an Islamic court.  

e. Conclusion

Islam, as a religious and a legal system, systematically contributes both to the social fact of family law pluralism (in the sense of sustaining numerous ways in which families can live) and a normative system of family law pluralism by legally recognizing the existence of different legal rules that can apply to issues of family as well as allowing individuals to create their own “rules” by including express contractual terms in their marriage contracts that depart from legally-provided default rules. As a matter of religious doctrine, traditional Islamic religious teachings endorse a hierarchical relationship with a strong emphasis on female subordination and sacrifice. The rules of Islamic law, which permitted women to insert provisions into the marriage contract that strengthened their positions with respect to their husbands, and which emphasize a rights’-based approach to marriage, mitigated this ethic to a certain extent. Notably, even the Hanafi school which, relative to the Maliki school, produced legal doctrine that substantially increased the vulnerability of married women to abuse at the hands of their husbands, recognized the legal validity of these contractual provisions. In the modern period, however, even traditional Islamic religious rhetoric has itself taken a turn toward egalitarianism, even if it has not embraced gender-blindness as a norm within the family.

Islamic religious and legal tradition thus gives broad support to a robust system of family law pluralism. The dynamic aspect of religious understandings of marriage and gender, as well as the support Islamic law gives to individualized marriage contracts, also support the notion that orthodox Muslims have at their disposal sufficient Islamic resources to generate both religious and legal norms of family law that are consistent with politically liberal limits on family law pluralism. In the next section, I will discuss why orthodox Muslims could very well find a politically liberal system of family law to be normatively attractive, even though it would foreclose some kinds of legitimately Islamic families.

5. The Attractiveness of a Politically Liberal Family Law to Muslims

Because of Islamic law’s distinction between a legitimate rule of law and moral truth, an orthodox Muslim’s decision as to whether she can comply in good faith with non-Islamic norms will entail two judgments: first, whether the conduct demanded of her would require her to act in a manner that is sinful, and second, whether she is required to endorse a doctrine that she believes to be false. This Islamic reticence to endorse

117 See note 56, supra.

118. Andrew F. March, “Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies,” American Political Science Review 101:2 (May 2007): 235-252, 251 (stating that for Muslims, “the rhetoric employed by a state . . . is crucial – are Muslims being asked to profess something contrary to Islam or even to endure quietly the glorification of a contrary truth?”)
false metaphysical reasoning suggests that political liberalism’s agnosticism with respect
to the truth of various non-political metaphysical doctrines makes it more palatable to
orthodox Muslims than, for example, a “Christian” or “Jewish” or a “Judeo-Christian”
state (or a state based on a comprehensive secular philosophy for that matter), despite the
many shared practical norms that Judaism or Christianity have with Islam, but some of
whose metaphysical foundations Muslims find objectionable. Because political
liberalism only requires Muslims to endorse non-Islamic conceptions on political rather
than metaphysical grounds, nothing more is at stake from the perspective of an orthodox
Muslim than the political recognition of non-Muslim marriages, something not
generically different from pre-modern Islamic law’s recognition of non-Islamic marriages
on political but not moral grounds. Political liberalism’s refusal to endorse any
specific metaphysical foundation for the family, therefore, has the potential of solving
many Islamic objections to features of contemporary family in the United States and
Canada.

A few examples may clarify why orthodox Muslims could find the metaphysical
neutrality of a politically liberal family law attractive. Consider the historical prohibition

law’s recognition of non-Muslim marriages is not equivalent to moral endorsement of
those marriages).
on polygamy in common law jurisdictions. 120 Numerous reasons have been advanced to justify the historical ban on polygamy in common law jurisdictions, some of which could be viewed as implicitly racist. 121 Some common law courts asserted that polygamy is socially dangerous as evidenced by its draconian punishment in common law, 122 is politically incompatible with democracy, 123 and is contrary to the norm of “Christendom.” 124 Given the strong historical connection between the teachings of

120. The anti-polygamy provisions of the common law took an especially extreme form in South Africa, whose legal system refuses to recognize the validity of any marriage which is “potentially polygamous” even if the marriage is in fact monogamous. Rashida Manjoo, “Legislative Recognition of Muslim Marriages in South Africa,” International Journal of Legal Information 32 (Summer 2004): 271-282, 276

121. Reynolds v. United States, 98 U.S. 145, 164 (1878) (describing polygamy as a practice that is “odious among the northern and western nations of Europe,” and which is “almost exclusively a feature of the life of Asiatic and of African people”).

122. Ibid., 165 (stating that English law, and later the laws of her American colonies, including Virginia, punished bigamy and polygamy with death).

123. Ibid., 165-166 (quoting an expert for the proposition that polygamy leads to “stationary despotism,” whereas monogamy prevents it).

124. Hyde v. Hyde and Woodmansee, L.R. 1 P&D 130, 133 (HL) (1866) (stating that “marriage, as understood in Christendom, may for this purpose be defined as the voluntary union of life of one man and one woman, to the exclusion of all others.”)
Christianity and the common law’s regulation of the family,\textsuperscript{125} it ought not to be a surprise that Muslims may consider the prohibition of polygamy to be a reflection more of religious policy than the views of a neutral lawmaker. Orthodox Muslims could hardly be expected to endorse in good faith a ban on polygamy based on the historical grounds articulated by these common law courts because to do so would require them to abandon their belief that the Quran is an inerrant source of moral truth.\textsuperscript{126} On the other hand, Muslims could endorse legal regulation or even prohibition of polygamy if the justification for such a ban was morally “neutral,” \textit{i.e.} it did not condemn polygamy as morally odious or inherently degrading to women, but instead justified the regulation or prohibition of polygamy on the grounds that it unjustifiably injured the interests of children, that the \textit{ex ante} availability of polygamy inefficiently raised barriers to

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\textsuperscript{125} Reynolds, 98 US at 165 (stating that “ecclesiastical [courts] were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage”); see also Nichols, “Multi-Tiered Marriage,” 142-147 (discussing influence of Roman Catholic and Anglican Churches in the substance of American family law).
\end{flushleft}

\begin{flushleft}
\textsuperscript{126} According to orthodox interpreters, the Quran expressly allows a qualified form of polygamy. Quran, \textit{Al-Nisā’}, 4:3 (“So marry women as you please, two, three or four, but if you fear that you will not be just [among them] then [marry only] one.”)
\end{flushleft}
marriage, or that it prevented women in polygamous marriages from enjoying equal
rights as a citizen.127

Another problematic example from the perspective of an orthodox Muslim would
be the definition of marriage included in “covenant marriage” legislation appearing in
certain U.S. jurisdictions. In the State of Louisiana, for example, a couple who desires to
choose covenant marriage must “solemnly declare that marriage is a covenant between a
man and a woman who agree to live together as husband and wife for so long as they
both may live.”128 This conception of marriage, to the ears of an orthodox Muslim,

127. See Mohammad H. Fadel, “Public Reason as a Strategy for Principled
Reconciliation: The Case of Islamic Law and International Human Rights Law,” Chicago
Journal of International Law 8 (Summer 2007): 1-20. See also Rawls, “The Idea of
Public Reason Revisited,” 779 (stating that the prohibition of polygamy must be justified
solely in terms of women’s rights as citizens and not in terms of the value of monogamy
as such). The fact that such arguments are consistent with public reason does not mean
that in fact they are persuasive. For an argument that a liberal political order can tolerate
polygamy, see Andrew F. March, Is There a Right to Polygamy? Marriage, Equality and
Subsidizing Families in Liberal Public Justification, Journal of Moral Philosophy
(forthcoming) (arguing that common liberal justifications for the prohibition of polygamy
fail).

covenant marriage, see Nichols, “Multi-Tiered Marriage,” 147-152.
smacks of a legislative endorsement of a peculiarly Christian ideal of marriage as a lifelong commitment between one man and one woman.\textsuperscript{129} On the other hand, if the justification of covenant marriage were more along the lines suggested by Professors Robert and Elizabeth Scott – a means to allow couples to opt out of the no-fault regime in

\footnotesize

\textsuperscript{129} Muslims since the middle ages have identified the conception of marriage as a lifelong relationship as a specifically Christian conception of marriage to be distinguished from that of Sunni Islam, which characterized the relationship as one of indefinite duration. See, e.g., 2 Abu Ishaq al-Shatibi, \textit{al-Muwafaqat fi Usul al-Shari’a} (Cairo: al-Maktaba al-Tijariyya al-Kubra, 1975), 389 (stating that permanence, even if it is one of the legal goals of marriage, is not, in contrast to the Christian conception of marriage, a necessary element of a lawful marriage in Islam, and rejecting the requirement of permanence in marriage as an unreasonable restraint (\textit{tadyiq}).) See also ibid., 398-399 (distinguishing the validity of a marriage where there is a subjective intent that the marriage will be temporary – which is legally irrelevant – from the invalidity of a marriage that is explicitly limited to a contractual term). For a compelling historical account of the relationship between Christian metaphysical conceptions of the relationship of the Church to Jesus Christ and the historical origins of the legal doctrine of marriage indissolubility in the Latin middle ages, see D.L. D’Avray, \textit{Medieval Marriage: Symbolism and Society} (Oxford: Oxford University Press, 2005).
order to encourage greater marital specific investments by prospective spouses – than no theological norms from an Islamic perspective would be implicated.\textsuperscript{130}

The implicit norm of marital permanence that still infuses much of current family law does not simply amount to an expressive injury to Muslims that can be dismissed as lacking practical consequence;\textsuperscript{131} the historical ideal of marital permanence, despite its clear sectarian roots in Christian theology, and despite lip-service to the ideal of the “clean-break” following the adoption of no-fault divorce, continues to have a profound impact on the law of spousal support as evidenced by the continued salience of “need” in fashioning spousal support awards.\textsuperscript{132}

\begin{thebibliography}{99}
\bibitem{131} Indeed, in cases involving religious sentiment, sometimes expressive injury \textit{simpliciter} is the greatest injury imaginable. See, for example, Martha C. Nussbaum, “India: Implementing Sex Equality Through Law,” \textit{Chicago Journal of International Law} 2 (Spring 2001): 35-58, 44-45 (describing tone in opinion of \textit{Shah Bano} case as “contemptuous” of Islam, with the result that large segments of the Indian Muslim community abandoned previous openness to greater gender egalitarianism).
\end{thebibliography}
Need-based spousal support awards broadly conflicts with Islamic conceptions of maintenance obligations in numerous respects. The most significant area of conflict is its gender blind approach to the law of spousal support. In Islamic law, the wife never has an obligation to support her husband, and if she does support him, she generally has the right to treat such support as a debt for which she can demand repayment when her

§ 15.2(4) (requiring Canadian courts, in fashioning a spousal support order, to take into account the “needs . . . of each spouse”); Uniform Marriage and Divorce Act § 308, 9A U.L.A. (West 2008) (permitting court to grant an order for maintenance to either spouse based on the spouse’s need); Cal. Fam. Code § 4320(d) (West 2008) (requiring court, when fashioning support order, to take into account “[t]he needs of each party based on the standard of living established during the marriage”); 750 Ill. Comp. Stat. 5/504(a) (West 2008) (permitting court to take into account spouse’s need in fashioning spousal support order). The sectarian roots of marital permanence as an ideal receives further circumstantial support in the historical split between European and Middle Eastern Jewry’s approaches to family law. See Michael J. Broyde’s chapter in this collection, “Some Thoughts on New York State Regulation of Jewish Marriage: Covenant, Contract or Statute?” pp. xx-xx (describing the repudiation by European Jewry of a contractual conception of marriage in favor of a covenantal form beginning around 1000 C.E. in contrast to Middle Eastern Jewry who continued to adhere to a contractual understanding of marriage).
husband has the means to repay. 133 She could of course agree to forego her current right to maintenance in favor of supporting herself from her own property, or to forgive accrued maintenance debts, 134 but she cannot prospectively waive her right to maintenance from her husband because such a condition, from the perspective of Islamic law, would be repugnant to an essential term of the marriage contract – the husband’s duty to provide support. 135 In jurisdictions such as the United States and Canada, however, a Muslim wife can find herself saddled with her equitable share of the marital household’s debts at divorce, 136 and also with a prospective obligation to provide financial support to her ex-husband in circumstances where she is better prepared for life post-divorce than her husband. 137

The contradictory outcomes provided by the default law of a jurisdiction applying an equitable distribution or a community property scheme, on the one hand, and the default rules of property distribution under Islamic family law, on the other, generally

133. See al-Mawwaq, al-Taj wa al-Iklil li-Mukhtasar Khalil.
134. 2 Ahmad b. Muhammad al-Sawi, Bulghat al-Salik (on the margin of al-Dardir, al-Sharh al-Saghir), 385-386.
135. Ibid., 386.
136. See, e.g., the American Law Institute’s Principles of the Law of Family Dissolution § 4.09(1) (2002) (providing that marital debts, as well as marital assets, should generally be divided equally between the spouses).
137. See supra n. 132.
create an opportunity for strategic forum shopping on the part of both Muslim spouses. This kind of post hoc strategic behavior, relative to a Muslim couple’s reasonable ex ante expectations as to their respective economic rights and obligations by virtue of their marriage under Islamic law (pursuant to which the husband never has a claim to his wife’s assets or earnings), is most acute in circumstances where the wife is saddled with household liabilities, prospective support obligations, or both. It is also present, however, when the Muslim wife is the beneficiary of the jurisdiction’s default laws, particularly with respect to a claim for prospective support on the basis of need (in terms of receiving an enhanced portion of the marital economic pie relative to the rules of Islamic law).

The basic norm of gender blindness with respect to distribution of the economic burdens and benefits of the marriage derives from the liberal conception of marriage as a community based on sharing. 138 Such a norm of spousal sharing in a marriage that is intact is consistent with Islamic law and Islamic religious teaching. But, upon dissolution of the marriage, Islamic law does not apply the norms of liberality that govern the economic relationships of spouses in an intact marriage to their rights upon the marriage’s dissolution. Instead, Islamic law assumes that the divorcing parties maintain separate “accounts” for the property of each, and at dissolution, it is the task of the court to determine precisely the “contents” of each spouse’s account, without a right of redistribution of those assets as between the spouses.

138. See Frantz and Dagan, “Properties of Marriage.”
A clear example of how Islamic law applies a norm of sharing to intact marriages while simultaneously maintaining an exclusive recognition of individual property rights upon the dissolution of marriage is its treatment of the bride’s dowry (mahr or ṣadāq) and her trousseau (jihāz or shuwār). The former is a gift from the husband to the wife at the time the parties agree to marry, while the latter is a gift from the bride’s parents to the bride at the time of her marriage. Both are legally the bride’s property. Nevertheless, so long as the marriage remains intact, Islamic law recognized that her individual ownership right to both the dowry and the trousseau are qualified. For example, a bride was obligated by operation of custom to bring to the husband’s home (the marital home) a trousseau commensurate with the size of the bridal gift she received from her husband. The logic of this rule derived from the notion that, so long as the marriage was intact, the groom has the right to the use the bride’s trousseau, even though it is nominally her exclusive property. Only upon the dissolution of the marriage, therefore, does the wife receive unfettered control of her dowry and trousseau.

The mere fact that Islamic law has its own conception of what distributive justice requires upon the dissolution of a marriage does not explain, however, why orthodox Muslims should object to the application of a different norm, such as equitable

139. Rapoport, supra n. 96, pp. 14-15 (discussing differences between the marriage gift, the dowry and the wife’s individual ownership rights over each).
140. Ahmad al-Dardir, al-Sharh al-Saghir, 458; Citation to Hanafi text.
141. Ahmad al-Dardir, al-Sharh al-Saghir, 735.
distribution or community property, given that Islamic law, as a general matter, does not have an objection to positive legislation so long as it does not *command* disobedience to God.\(^{142}\) The answer is that while compliance with the command to redistribute assets from one spouse to another would not be morally problematic as applied to the spouse from whom assets are being redistributed, the recipient spouse may not be morally entitled, based on her subjective Islamic conception of justice, to bring that claim. Recall that as a matter of Islamic ethics, a party is not morally entitled (even if, from an objective perspective, he may be legally entitled) to claim something on grounds which he believes to be unjust. Accordingly, orthodox Muslim spouses upon divorce will recognize that there are potential conflicts between the default laws of the liberal jurisdiction in which they live governing the distribution of marital assets upon dissolution of her marriage, and their private Islamic conceptions of what constitutes a just distribution. They will individually need to consider whether these material differences are consistent with their Islamic conceptions of justice.

This gives rise to three possible responses from the perspective of the recipient spouse: (1) **No-Conflict**: The recipient spouse believes in good faith that the jurisdiction’s default norms are consistent with Islamic norms of justice and thus can present his or her legal claims consistent with his or her subjective Islamic ethical commitments; (2) **Conflict with Opt-Out**: The recipient spouse believes that the jurisdiction’s default rules are inconsistent with his or her Islamic conception of justice and thus he or she does not make a claim to his or her full “legal” entitlement, resulting in

\(^{142}\) See text at note 54, supra.
such a Muslim spouse opting into an Islamic distributive scheme, even though it makes
him or her economically worse off than he or she would have been under the
jurisdiction’s rules; and (3) **Strategic Opt-In**: The recipient spouse believes that the
jurisdiction’s default rules are inconsistent with his or her Islamic conception of justice,
but because the jurisdiction’s default laws would make him or her better off, he or she
chooses to apply the jurisdiction’s rules in contradiction to his or her own conception of
what justice requires out of self-interest.

These last two cases illustrate that because of the potential conflict between a
jurisdiction’s default norms and those of Islamic law, orthodox Muslims have an
important ethical stake in the debate on family law pluralism. Orthodox Muslims,
however, need only endorse a form of family law pluralism that allows them to opt out of
a jurisdiction’s generally applicable norms and to pre-commit to an Islamic conception of
distributive justice to avoid the moral hazard that arises from the existence of conflicting
norms and a means to pre-commit to some sort of Islamic adjudication mechanism to
assure that Muslim women have an unchallengeable right to remarry. A more general
delegation of powers to religious authorities (even if they could be conclusively
identified) would be both unnecessary and undesirable, both from an Islamic perspective
(because such authorities could impose their own subjective understandings of Islamic
norms on the parties), and from a politically liberal perspective (because it would make
citizens’ rights contingent on their religious community). Historical experience in the
Muslim world, moreover, also suggests that in cases where Muslims find themselves as a
minority, and Muslims are governed by Islamic family law, the integrity of Islamic
family becomes fused with questions of the minority’s Islamic identity, with the result that the Muslim community finds it harder to make effective reforms in Islamic law relative to Muslims living in Muslim-majority countries.

Binding arbitration agreements executed in advance of marital breakdown are perhaps the most and maybe even the only effective means of giving orthodox Muslims who worry about the possibility of strategic behavior at a marriage’s dissolution the means to solve this problem. Binding arbitration agreements also have the potential to solve the particular problems facing Muslim women who obtain a civil divorce, but are unable to procure an Islamic divorce from their husbands. In this case, an orthodox Muslim woman might not understand herself to be eligible for remarriage, especially if her Muslim husband openly denies having divorced her Islamically. Even if she believes she is Islamically divorced, she may find that some non-trivial proportion of her religious community does not recognize her divorce as valid, therefore creating a substantial obstacle to her ability to remarry. Unlike Jewish law, however, Islamic law (except for the Hanafis) provides a remedy for women whose husbands refuse to divorce them: a judicial divorce. Because an Islamic court is theologically empowered to resolve morally controversial cases, a judgment from an Islamic court that she is divorced would establish conclusively her legal and moral entitlements against any within the Muslim community who deny that she is divorced. In the absence of the establishment of Islamic courts in liberal jurisdictions, only arbitration conducted pursuant to Islamic law can fulfill the important function of generating moral closure. Indeed, from a purely religious perspective, it is perhaps more important that the law assure specific performance of a
Muslim couples’ obligation to arbitrate their dispute, even if the jurisdiction is unwilling to respect the results of the arbitration: without the ability to compel parties’ appearance, the arbitration could not proceed in an efficient manner, if at all, in the face of a spiteful husband, for example, who refused to cooperate voluntarily. 143

Contemporary family law in jurisdictions such as Canada and the United States in large part already provides such a structure that would enable orthodox Muslims to opt out of conflicting family law provisions, 144 including affording them the right to arbitrate

143. See, e.g., 4 Ahmad al-Dardir, al-Sharh al-Saghir, 199 (stating that it is not permissible for an arbitrator to rule against an absent party).

144. See, e.g., ALI Principles of the Law of Family Dissolution § 7.04 (permitting parties, by pre-marital agreement, to opt out of default state law principles governing distribution of marital property provided that certain procedural requirements are met); Ibid., § 7.09(2) (permitting parties to a separation agreement to alter state-provided rule for disposition of marital assets subject to certain limitations); Uniform Premarital Agreement Act § 6 (2001) (providing for the enforcement of premarital agreements subject to certain requirements); Canadian Divorce Act § 9(2) (1968) (encouraging parties to “negotiate[e] . . . the matters that may be the subject of a support order”); Family Law Act, R.S.O. 1990, c. F.3, § 2(10) (2006) (making provisions of Ontario Family Law Act subject to parties’ agreement “unless this Act provides otherwise”) and § 52(1) (permitting parties in a marriage to regulate, by their contract, “their respective rights and obligations under the marriage or on separation,” including matters such as
their family law disputes (with the exception of Ontario). Given the flexibility of Islamic family both in terms of legal doctrine and its recognition of parties’ right to depart from the default terms of the marriage contract (not to mention the reality of dynamic interpretations of religious interpretations of marriage), one cannot assume that orthodox Muslims would not contract Islamic marriages and regulate the legal incidents of their dissolution (using binding arbitration) in a manner that would inevitably violate the limits of a politically liberal regime’s mandatory law. In other words, state enforcement of binding family law arbitration agreements (subject to the state’s right to confirm that such arbitration agreements were validly entered into and that the results of such arbitrations do not violate public policy) should be sufficient to meet orthodox division of property and support obligations); and Carol Rogerson, “Case Comment: Miglin v. Miglin 2003 SCC 24 ‘They Are Agreements Nonetheless,’” Canadian Journal of Family Law 20 (2003): 197-228 (discussing decision of Canadian Supreme Court to uphold terms of spousal support agreement against a subsequent challenge under the Divorce Act on the grounds that it is important to protect the autonomy of the parties, especially with respect to controversial matters such as spousal support).

145. But see Bakht, “Were Muslim Barbarians Really Knocking on the Gates of Ontario?” 80-81 (suggesting that arbitration of family law disputes pursuant to religious norms is still permitted in Ontario despite the Family Law Amendment Act of 2005 that purported to prohibit such arbitrations).
Muslims’ religious commitments with respect to family law within a politically liberal polity.

This does not mean that orthodox Muslims might not have legitimate complaints regarding certain details of the actual rules in particular jurisdictions (rather than the rules of an idealized politically liberal family law). For example, given the role the state has assigned to intact couples for the distribution of various public benefits, the state may be justified in refusing to recognize polygamous unions for these distributive purposes.¹⁴⁶

This would not, however, at least in circumstances where there has been a broad deregulation of consensual sexual relations between adults,¹⁴⁷ justify the continued

¹⁴⁶ Mary Anne Case, “Marriage Licenses,” Minnesota Law Review 89 (June 2005): 1758-1797, 1783 (arguing that an important function of marriage in contemporary United States is to structure relationships between the couple and third parties, something that could not be easily replicated with a polygamous relationship).

¹⁴⁷ Ibid., 1765 (“While [marriage] once bound couples together indissolubly for life in a heavily regulated status relationship, virtually all of whose terms were mandatory and imposed by the state, marriage now licenses in a new way – a married couple is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, . . . to publicize their relationship or be discreet about it.”) See also ibid., 1769 (“Today . . . every constitutionally recognized aspect of liberty [in the United States] legal marriage formerly monopolized (sex,
criminalization of polygamy, much less criminalization of persons who celebrate a polygamous marriage. Similarly, Muslims can legitimately criticize the continued cohabitation, reproduction, parenting, etc.) seems, as a matter of constitutional right, no longer within the state’s or marriage’s monopoly control.”)

148. Polygamy is prohibited by statute in both the United States and Canada. See, e.g., N.Y. Penal Law § 255.15 (2008) (criminalizing bigamy and classifying it as a class E felony); R.S.C. 1985, c. C-46, § 290 (criminalizing bigamy). Canada also punishes any person who “celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a [polygamous] relationship.” R.S.C. 1985, c. C-46, § 293(1). Aiding and abetting liability might apply to reach a similar result in U.S. jurisdictions, at least according to some nineteenth century cases. See, e.g., Boggus v. State, 34 Ga. 275 (1866). Other features of Canadian law, however, are quite permissive with respect to polygamous unions. The Family Law Act, for example, recognizes the validity of polygamous marriages if they were contracted in a jurisdiction that recognizes polygamous marriages. R.S.O. 1990 c. F3, § 1(2). Likewise, the Family Law Act’s definition of “spouse” can result in a person having numerous spouses for support purposes. See Marion Boyd, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion (December 2004), 24, available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf (describing hypothetical where one man ends up having three spouses for purposes of Family Law Act).
incorporation of need in spousal support determinations, despite its theoretical
inconsistency with no-fault divorce, as a tacit endorsement of a sectarian view of
marriage as a life-long commitment.\textsuperscript{149}

As the outcome of the Shari’a Arbitration controversy in Ontario, as well as the
continued controversy regarding Islamic family law arbitration in the United Kingdom,\textsuperscript{150}
reveal, the recognition of Islamic family law arbitration remains extremely contentious.
The next section will use the example of New York, and how its courts have monitored
family law arbitrations conducted pursuant to orthodox Jewish law, to demonstrate the
practical ability of courts in a liberal jurisdiction to ensure that the results of religious
arbitrations are consistent with public policy and individuals’ rights as citizens. The
success of New York in this regard ought to dispel much of the reasonable (though not

\textsuperscript{149}. Recognizing the anomalous nature of need-based spousal support orders, the
American Law Institute in its proposed \textit{Principles of the Law of Family Dissolution} has
expressly stated that it seeks to substitute “\textit{compensation for loss} rather than \textit{relief of
need}” as the justification for post-divorce spousal support orders. Unlike need,
“\textit{compensation for loss}” is broadly consistent with Islamic conceptions of distributive
justice and for that reason their adoption as law in the United States would result in a law
of spousal support that would be both more consistent with public reason and Islamic
law.

\textsuperscript{150}. See \url{www.onelawforall.org.uk} (last visited June 2, 2009) (campaigning to prohibit
the use of Islamic law in family law arbitrations).
irrational) concern that family law arbitration conducted pursuant to Islamic law could systematically deprive individuals of their rights.


I have argued that arbitration of family law disputes is conceptually consistent with the structure of a politically liberal family law. Because liberal family law must allow parties the right to opt out of at least some provisions of law out of respect for the parties’ autonomy,^{151} it is difficult to understand why arbitration of disputes within family law that are governed by permissive rather than mandatory law (e.g. division of marital assets and post-divorce support agreements), should be forbidden as a normative manner. If, on the other hand, there are practical reasons (e.g. the fear that the judicial system is incapable of ensuring that arbitrations are conducted in accordance with mandatory law, or that individuals who would make use of family law arbitration are ignorant of their rights), then these are defects in the background conditions of justice which should be, from a Rawlsian perspective, addressed directly as such, rather than be used to restrict an otherwise permissible liberty.

\[\text{151. The recent decision of the Canadian Supreme Court in} \ Bruker v. Marcovitz, [2007] 3. S.C.R. 607, 2007 SCC 54, \text{gives support to the notion that religiously motivated contracts, to the extent that they are valid contracts, are equally amenable to enforcement under Canadian law as a contract entered into with a secular motive.}\]
As a practical matter, arbitration also appears to be the most promising institutional tool for reconciling liberal and non-liberal conceptions of the family.\textsuperscript{152} From a liberal perspective the permission to use arbitration to resolve family law disputes can only be tolerated if it is not used to shield parties from the reach of family law’s mandatory elements.\textsuperscript{153} But adherence to liberal principles of autonomy themselves would seem to require a reviewing court to enforce an arbitrator’s decision in permissive

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\textsuperscript{152} The procedures governing the enforceability of an arbitrator’s orders provide a practical mechanism for creating a dialogue between the mandatory norms of a liberal regime and the internal norms of a non-liberal community. See Patrick Macklem, “Militant Democracy, Legal Pluralism and the Paradox of Self-Determination,” \textit{International Journal of Constitutional Law} 4 (July 2006): 488-516, 512-13 (arguing for the need to initiate a “jurisprudential dialogue between [liberal] and Islamic legal orders, where the individual tenets of one system are tested against those of the other” rather than dismissing a commitment to the values of Islamic law as indicative of the wholesale rejection of democratic values).
\textsuperscript{153} Gaudreault-DesBiens, “Limits of Private Justice,” 18 (expressing fear that arbitration agreements could be used to prevent “any sort of judicial review of arbitral processes or appeal of arbitral awards.”)
\end{quote}
areas of family law to the same extent a reviewing court would enforced a private
agreement between those parties covering the same issues.154

This is the path family law arbitration has taken in numerous decisions of New
York courts involving disputes between Jewish couples who had submitted or agreed to
submit some or all of their family law disputes to Jewish religious courts for resolution.
The New York case law is clear that, as a threshold matter, a court is to determine
whether the dispute is amenable to arbitration, i.e. that the dispute does not involve some
matter of mandatory public law.155 Because matters such as division of marital assets
and post-divorce spousal support are not, as a general matter, subject to public policy
restraints, they are presumptively amenable to arbitration156 (provided the procedural

154. This is consistent with the the Supreme Court of Canada’s reasoning in Miglin v.
Miglin, 1 S.C.R. 303, 2003 SCC 24 (2003), which upheld a spousal support agreement
against a challenge that it was inconsistent with the terms of the Divorce Act on the
grounds that vindicating the spouses’ autonomy as reflected in their agreement takes
precedence over the Divorce Act’s provisions regarding spousal support.

few substantive limitations on the decision of an arbitrator, it is important to identify
which issues are not amenable to arbitration on the grounds of public policy).

156. Hirsch v. Hirsch, 37 N.Y.2d 312 (N.Y. 1975) (upholding agreement to arbitrate
spousal support claims against argument that to do so violates public policy); Hampton v.
requirements for a valid arbitration are met\textsuperscript{157}, and an arbitrator’s decision in these matters must be enforced.\textsuperscript{158} Decisions regarding child custody are not amenable to arbitration, because that would violate mandatory public policy, which in this case requires the court to determine that the custody arrangements are in the best interests of the child.\textsuperscript{159} New York courts also specifically enforce the obligation to arbitrate the dispute, even if the arbitration agreement provides for religious norms to govern the ordering wife to present her claim for an upward adjustment in child support to arbitration); \textit{Lieberman v. Lieberman}, 566 N.Y.S.2d 490 (N.Y. Sup. Ct. 1991) (upholding arbitrator’s decision regarding division of divorcing couple’s marital assets).

\textsuperscript{157} \textit{Stein v. Stein}, 707 N.Y.S.2d 754, 759 (N.Y. Sup. Ct. 1999) (declining to confirm arbitrator’s order where there was no evidence that procedural requirements of arbitration statute were satisfied); \textit{Golding v. Golding}, 176 A.D.2d 20 (N.Y. App. Div. 1992) (refusing to enforce an arbitrator’s award where court found that wife was compelled to participate as a result of the husband’s threat to refuse to grant her a Jewish divorce).

\textsuperscript{158} Note 156, supra.

\textsuperscript{159} \textit{Glauber}, 192 A.D.2d at 97-98. New York courts, moreover, follow a principle of severance in the event that an arbitrator’s decision included both permissible objects of arbitration and non-permissible objects of arbitration. \textit{Lieberman}, 566 N.Y.S.2d 490 (upholding decision of rabbinical tribunal granting a religious divorce, dividing marital assets, and awarding child support, but vacating order for joint parental custody).
arbitration. More controversially, perhaps, they have refused to find that an agreement to arbitrate could be set aside on the grounds of duress where a woman was subjected to the threat of “shame, scorn, ridicule and public ostracism” by the members of her religious community if she did not agree to participate in the arbitration. In short, the jurisprudence of New York courts with respect to family law arbitration is to enforce agreements to arbitrate and to enforce the results of such proceedings to the same extent that the court would enforce the parties’ own private agreements.

The approach of New York (policing arbitral results on a case-by-case basis for conformity with public policy and only striking down those elements of an order that actually violate public policy), is consistent with Rawls’ conception of a politically liberal family law: This approach understands that the function of public law in the context of the family is to ensure that the internal governance of the family does not deprive any of its members of their fundamental rights as citizens, but so long as that condition is satisfied, a family enjoys autonomy. Its approach contrasts with the categorical approach taken by Ontario, which simply states that an arbitrator’s decision, if it is based on non-Canadian law, violates public policy simpliciter, without need to


Ontario law in this regard mimics the suggestion of Professor Gaudreault-DesBiens, who argues against a policy of legal recognition of arbitrators’ awards in the context of family law while at the same time allowing believers to continue to submit their disputes to arbitrations. Although he cites many reasons why he believes that legal recognition of arbitral decisions in the family law context is misguided and perhaps even dangerous, Professor Gaudreault-DesBiens’ primary argument is that because family law affects the status of the person, it raises “the potential application of constitutional values such as dignity and equality, over which the State may still legitimately insist upon retaining some normative monopoly.” Even though he recognizes that recognition of faith-based arbitration – whether based on Islam or another religion – will not inevitably result in “outcomes that undermine the dignity or the equality of the individuals involved,” he nevertheless concludes that non-recognition is 


164. Ibid., 21 (recognition of faith-based arbitration in family law disputes could lead minority group to demand “the creation of separate institutions exercising some form of *imperium* over a segment of the population.”)

165. Ibid., 20.

166. Ibid.
the best policy choice because it minimizes the risk that “fundamental constitutional values could be undermined.”

Gaudreault-DesBiens’ approach can best be described as a comprehensive liberal approach in which the boundaries of mandatory law – here the Canadian Charter of Rights – are applied to matters of family governance directly, rather than in the indirect fashion which Rawls endorsed. To the extent that Gaudreault-DesBiens justifies this approach on a controversial normative conception of equality, however, he is advocating the use of state power to impose a comprehensive rather than a political doctrine, and thus on Rawlsian terms his proposal is unreasonable. To the extent that his objections are prudential, it is not clear why those prudential concerns should not be addressed.

167. Ibid., 22.

168. Rawls, Political Liberalism, 37 (stating that society cannot remain united on a version of liberalism without “the sanction[] of state power,” something he refers to as “the fact of oppression”). See also, contribution by Cere to this book, arguing that recent developments in Canadian family law augur a turn toward comprehensive liberalism in family law.

169. That is, based on the empirical conditions, whether they are particular defects in the Canadian legal system which makes it implausible for Canadian courts to regulate arbitrations in the manner undertaken by New York courts or whether there are unique sociological circumstances involving the Canadian Muslim community which render its
7. Conclusion

Muslims have a keen interest in preserving and even enhancing a pluralistic system of family law. Some of these reasons have to do with their interest in maintaining a political system (and a family law) that is neutral with respect to religious as well as secular comprehensive doctrines. Some kinds of family law pluralism, such as that implicit in the marriage covenant statutes, appear to endorse a sectarian religious understanding of marriage rather than foster a family law pluralism that is consistent with a metaphysically neutral family law. At the same time, a politically liberal family law along the lines Rawls describes is sufficiently respectful of family autonomy to permit orthodox Muslims to structure their family life within some (but not all) Islamic members particularly vulnerable to the involuntary loss of their rights in the context of arbitration.

170. Indeed, a former attorney general of Ontario, Marion Boyd, suggested a reform of the Arbitration Act that would preserve the right of religious arbitration while including greater procedural protections to insure that the results of arbitrations would be consistent with Canadian law. See Boyd, note 150, supra.

171. McLean (noting that some groups advocating for greater family law pluralism do so to promote a “true” understanding of marriage rather than to promote family law pluralism as a good in itself).
conceptions of the family. The current regime of family law in the United States and Canada is broadly consistent with Rawls’ conception that principles of justice apply to the family indirectly. Accordingly, within the bounds required by these principles, orthodox Muslims should have adequate resources to adjust their doctrines in a manner that is both faithful to their own ethical commitments but also respects the public values of a liberal democracy.

For these reasons, orthodox Muslims’ interests in family law pluralism are better served through marginal reforms to the current family law regime (such as decriminalization of polygamy and replacement of spousal need with compensation for loss as a basis for post-divorce spousal awards) that render it closer to the Rawlsian ideal of neutrality in contrast to proposals that would award religious institutions greater jurisdiction over family life. Even if the state were to cede such jurisdiction equally to all religious groups, and thus ameliorate Muslims’ concerns about the state endorsing a sectarian conception of marriage, orthodox Muslims in a liberal state would still worry about the state ceding power over family law to a Muslim religious institution. Because orthodox Islam is inherently pluralistic, the state would inevitably have to privilege one group of Muslims and their interpretation of Islam over another, with the result that some otherwise permissible conceptions of family life (both from the perspective of political liberalism and Islam) could be arbitrarily excluded. Accordingly, arbitration of family law disputes, at least for Muslims, is an ideal institution. Because arbitration is essentially contractual and therefore from a political point of view voluntary, it respects the autonomy of individual Muslims, both as religious believers (against the views of
other believers) and as citizens (by allowing them to opt out of general default rules); it does not, as its critics often assume, amount to a kind of delegation of state power to an imagined Muslim collectivity.

The most substantial fear in applying the New York model of state supervision of religiously-motivated family law arbitration which was developed in the context of the Jewish community to Muslim communities may be that U.S. courts lack sufficient capacity regarding Islamic law to perform this task effectively. As evidenced by the U.S. cases discussed by McClain, American courts have reached wildly diverging interpretations of the meaning of the *mahr* (a sum paid or payable from the husband to the wife and which is included in the Islamic marriage contract). More sinisterly, there is the risk that anti-Islam bias could infect even judicial interpretations of Islamic law in a fashion that exacerbates rather than reduces Muslim alienation from public law.

172. Different interpretations of the *mahr* reflects in part the strategic behavior of parties once they are involved in litigation, but it is also a reflection of parties’ conflation of cultural norms, Islamic law norms, and even legal confusion resulting from the fusion of Islamic and common law conceptions of divorce.

Arbitration, however, reduces both of these problems. To the extent that disputes arising out of Muslim marriages are resolved through arbitration rather than civil court proceedings, civil courts will avoid thorny issues arising out of the interpretation of Islamic law. Questions that currently bedevil civil courts, such as the “true” meaning of *mahr*, whether *mahr* is a religious or legal obligation, or whether a woman who initiates divorce is entitled to retain her *mahr*, would simply be moot in a proceeding for the enforcement of an arbitral award.

While Muslim communities in the United States and Canada have much work to do if they wish to transform the pre-modern Islamic legal tradition into a workable body of rules that satisfies the requirements of political liberalism, some of the structural features of Islamic family law will be especially helpful in this regard. The first is the contractual nature of the marital relationship. Orthodox Muslim communities could prepare standard pre-marital agreements, for example, that are drafted to conform to both the requirements of the local jurisdiction and Islamic law. The second is more doctrinal: building on the notion that a woman is generally not obligated to contribute to the economic welfare of the household, Islamic law could take the view that contributions by the wife to the household remain debts unless the husband proves that she intended them to be gifts.\(^{174}\) This change, even though doctrinally marginal (essentially consisting of

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174. In the Maliki school, for example, a wife is obligated to provide some housework, e.g. sweeping the floor, cooking, and making the bed, on the theory that she does this primarily for herself, but she is not obligated to perform any that is part of a recognized
only a shift in the burden of proof), would substantially enhance a traditional wife’s economic position within the family while also respecting Islamic law’s policy of treating intra-household transfers within an intact marriage being undertaken in a spirit of liberality rather than expectation of profit.

At the same time, we should not underestimate the possibility that large numbers of Muslims – even religiously committed Muslims – will accept the default norms of applicable family law as consistent with their religious values. Given the relative flexibility of liberal family law, as well as Islamic family law’s general willingness to respect parties’ agreements and its respect for intra-Muslim pluralism, it should not be surprising that even orthodox Muslims might not feel the need for substantial changes to the present family law regime. Viewed in this light, incidents such as the Shari’a Arbitration controversy overstate the tension between Islamic family law and that of a liberal regime. With hindsight, they may very well appear to have been little more than tempests in the proverbial teapot. While I do not want to minimize the risk that bad-faith, profession, e.g. baking or sewing. Even this obligation, however, is a matter of custom, and therefore can be varied by contract. More generally, it would not be conceptually difficult to conclude that most housework, if performed by the wife, deserves to be compensated. By agreeing to permit such obligations to accumulate without requiring the wife to demand prompt payment, such a rule would allow traditional Muslim wives to be compensated for their in-kind contributions to the household at the time the marriage is dissolved, whether by death or divorce.
religious fanaticism and deeply-held anti-Muslim sentiments (or some combination thereof) will not come together again in the future to produce an even more noxious brew than what was served in Ontario during the Shari’a Arbitration controversy, the example of New York shows quite clearly that liberal jurisdictions have sufficient resources to manage the interaction between religious and public norms. Hopefully, this lesson will be remembered the next time the issue of Islamic family law becomes a political football in a liberal jurisdiction.