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Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community

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Abstract

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Within the United States, the relatively new covenant marriage statutes of Louisiana, Arizona, and Arkansas provide a form of two-tiered marriage and divorce law. But there is even an earlier, and potentially more fulsome, example in New York's get statutes. New York's laws derive from civil statutes that deal with specific problems raised by the intersection of civil law and Jewish law in marriage and divorce situations. New York's laws implicitly acknowledge that there are multiple understandings of the marital relationship already present among members of society. These examples from within the United States lay the groundwork for a heartier discussion of the proper role of the state and other groups with respect to marriage and divorce law.

As part of that discussion, the Article contends that the United States should look outward, to the practices of other countries. Several other nations – including India, Kenya, South Africa, and others – have ensconced multiple understandings of marriage in their own civil law. That is, the state has (to varying degrees) ceded control and authority of marriage to other tribunals - or it has reified more than one understanding of marriage in its civil law. Such multiple understandings are generally predicated upon religious grounds. These other

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I. INTRODUCTION

For many years now, American marriage and divorce law matters have fallen under the unitary jurisdiction of the several States.¹ Not only has the civil authority obtained and retained full jurisdictional control, but the civil authority has also dictated that parties wishing to be married or divorced must do so under a unitary set of principles reified in state law.²

Recently, multi-tiered regimes have arisen in American law despite these tendencies toward unitary principles. The most notable of these is the “covenant marriage movement,” which has found legislative success in three states to date.³ This limited legislative success has been far surpassed by voluminous commentary and reflection upon the notion of “covenant marriage laws.”⁴ One of the points of contention by critics of these

¹ See *Elk Grove Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 12 (2004) (“Long ago we observed that ‘the whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States.’”) (citing *In re Burrus*, 136 U.S. 586, 593-594 (1890)).

² Cf. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479 (2001) (discussing the tendency at American law to create unitary systems under which all marriages must fall).

³ Arizona: ARIZ. REV. STAT. ANN. §§ 25-901-906 (2006). Arkansas: ARK. CODE ANN. § 9-11-801 to § 9-11-811 (2006). Louisiana: LA. REV. STAT. ANN. § 9:272 (2005). See also *infra* Section II.A.

⁴ See, e.g., Joel A. Nichols, *Louisiana’s Covenant Marriage Statute: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?* 47 EMORY L.J. 929 (1998). See also COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE (John Witte, Jr. & Eliza Ellison eds., 2005) [hereinafter COMPARATIVE PERSPECTIVE] (using covenant marriage laws as a springboard for a series of chapters considering covenantal and contractual notions of marriage, especially within religious traditions); Daniel W. Olivas, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to be Ignored*, 71 TENN. L. REV. 769 (2004) (contending that Tennessee should not adopt a “covenant marriage law” like that of Louisiana because it would be both ineffective and inefficient); Peter Hay, *The American “Covenant Marriage” in the Conflict of Laws*, 64 LA. L. REV. 43 (2003) (exploring the extent to which the limitations inherent in a covenant marriage are likely to be given effect in non-covenant states and internationally); Steven L. Nock et al., *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. 169 (2003) (undertaking statistical analysis of couples

covenant marriage laws is that they create “two-tiered system[s] of marriage,”⁵ by allowing couples to choose whether to enter “a contract marriage, with minimal formalities of formation and attendant rights to no-fault divorce ... [or] a covenant marriage, with more stringent formation and dissolution rules.”⁶

A different kind of multi-tiered regime⁷ pre-dated the covenant marriage model, though. While the nation’s first covenant marriage law came into effect in Louisiana in 1997, New York has recognized more than one model of marriage since 1983.⁸ It was in that year that New York passed the first *get* statute, seeking to alleviate the harshness of civil divorce upon Jewish women.⁹ While New York’s *get* laws are of a substantially different nature than the more recent covenant marriages laws, both sets of reforms move away from strictly unitary models and recognize greater pluralism in marriage and divorce law. This is a salutary move, for the

entering covenant marriages during its first five years in Louisiana); Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?* 25 U. Ark. Little Rock L. Rev. 261 (2003) (discussing the introduction and rationale for covenant marriage laws, especially in Arkansas); Jeanne Louise Carrere, “It’s Déjà Vu All Over Again”; *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701 (1998) (contending that Louisiana’s covenant marriage law will not likely assist in lowering divorce rates, but will likely increase the litigiousness of divorce and increase the likelihood of spousal abuse); Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998) (discussing and defending the origins and provisions of Louisiana’s covenant marriage law).

⁵ Nichols, *supra* note 4, at 929. See also Katherine Shaw Spaht, *Marriage: Why a Second Tier Called Covenant Marriage?*, 12 REGENT U. L. REV. 1 (1999). An example of such criticism may be found in Brummer, *supra* note 4, at 293 (By sanctioning covenant marriage, the state has in effect established two distinct categories of marriage, which may lead to the false impression that couples who enter one form are somehow ‘more married,’ and thus entitled to greater protection than those who enter into traditional marriage.”).

⁶ John Witte, Jr. & Joel A. Nichols, *Introduction*, in *COMPARATIVE PERSPECTIVE*, *supra* note 4, at 1.

⁷ As discussed below, this Article uses the terminology of “multi-tiered” in at least two ways: (1) to refer to systems that either have more than one possibility of marriage and divorce in their civil law; and (2) alternatively, to describe systems whereby jurisdiction over marriage and divorce matters is shared between different authorities. Either way, such systems are multi-tiered because they inherently recognize and explicitly reify the fact that there is more than one possible understanding of marriage.

⁸ The 1983 law (as amended substantially in 1984) may be found at N.Y. DOM. REL. LAW § 253 (McKinney 1999). The 1992 *get* act may be found at Amendments (Section 236B(5)(h) and 236B(6)(d)) to N.Y. DOM. REL. LAW § 236B (McKinney 1999).

⁹ See *infra* section III.B.

American tendencies toward uniform jurisdiction and uniform application of a single set of laws are neither historically mandated nor uniformly accepted by the international community.¹⁰

Instead of unitary notions of jurisdiction and uniform application of a single law, the promise of a multi-tiered system holds substantial promise. At least two reasons present themselves as rationales for the changes to date in American law (evidenced by Louisiana and New York). The first is the “sad and serious crisis of marriage in civil society,”¹¹ evidenced by a wealth and welter of somber statistics about increasing divorce rates and the attendant effects on children and adult well-being.¹² This was the driving force behind the covenant marriage laws, especially in Louisiana.¹³ The second is that there is more than one conception of marriage and divorce law in a plural society.¹⁴ This rationale was part of the impetus for the New York *get* statutes.¹⁵

These two rationales can readily be expounded upon to suggest further pluralism in marriage and divorce law. First, the statistics of increasing divorce rates and the attendant consequences of divorce can be expanded to encompass a host of ongoing debates about the proper and best way to “revitalize” the institution of marriage.¹⁶ Solutions range from the “abolition of marriage” (at least insofar as the civil state has any say in it)¹⁷ to increasing federalization of the definition of marriage¹⁸ to all manner

¹⁰ See *infra* Section II and IV, respectively.

¹¹ Jean Bethke Elshstain, *Marriage in Civil Society*, 7 FAMILY AFFAIRS 1-5 (Spring 1996).

¹² See, e.g., Cynthia DeSimone, *Covenant Marriage Legislation*, 52 CATH. U. L. REV. 391, 403-05 (2002-03) (citing a multitude of several statistics and sources); James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 877, 909-911 (2000) (same). But see Robert T. Michael, *An Economic Perspective on Sex, Marriage, and the Family in the Contemporary United States*, in FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE 94-119 (Steven M. Tipton & John Witte, Jr., eds., 2005) (offering a more benign interpretation of statistics that purport to show a decline in the family).

¹³ See generally Nichols, *supra* note 4.

¹⁴ See Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540 (2004). See also AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS* (2001).

¹⁵ See IRVING A. BREITOWITZ, *BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY* 179-85 (1993).

¹⁶ See ALAN J. HAWKINS, LYNN D. WARDLE, & DAVID ORGON COOLIDGE, *REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY* (2002).

¹⁷ See, e.g., MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (Anita Bernstein ed., 2005); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006); Daniel A. Crane, *A “Judeo-Christian”*

of things in between.

Second, the confession that there is more than conception of the definition of marriage quite naturally expands to the recognition that we are a tremendously pluralistic society¹⁹ – especially with regard to religion.²⁰ We honor the best of our traditions when we recognize and reify our pluralistic nature²¹ – especially when we are careful to balance that pluralism with protections for women and children, with procedures to foster fairness, with policies that advance shared societal values of non-discrimination, free exercise, parental control, and the like.²²

This Article proposes to take these twin rationales – the admitted changes in the cultural definition of marriage and divorce, and the pluralistic nature of our multi-cultural society – to further the conversation once again. Rather than retaining our unitary and singular notions of marriage and divorce law, perhaps we should take seriously the possibility of multi-tiered marriage. Perhaps we should allow for the possibility that marriage and divorce might have more than one form at law.²³ And perhaps if we open the discussion to more than one understanding of marriage, we should acknowledge the thoughtful contributions and reflections by religious individuals and groups regarding marriage and divorce law.²⁴ This Article posits that those religious groups have an

Argument for Privatizing Marriage, 27 CARDOZO L. REV. 1221 (2006).

¹⁸ See e.g., Defense of Marriage Act, 28 U.S.C. §1738C (2000).

¹⁹ See SHACHAR, *supra* note 14, at 17-41 (discussing “the perils of multicultural accommodation,” and especially discussing the work of Will Kymlicka, Charles Taylor, and Iris Young).

²⁰ See Estin, *supra* note 14, at 555-56.

²¹ Cf. Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. REV. 1693, 1734-50 (2005) (detailing the religiously plural nature of early Georgia).

²² See Estin, *supra* note 14, at 556-58. See also Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992) (“One of law’s most basic duties is to protect citizens against harms done them by other citizens. This means protecting people from physical harm, as the law of spouse and child abuse attempts to do, and from non-physical harms, especially economic wrongs and psychological injuries.”).

²³ Cf. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1784 (2005) (“[P]erhaps the state should similarly leave to individuals the choice of structure for their personal lives, even while it continues to offer its assistance when it is helpful in matters such as registration and default rules.”)

²⁴ See, e.g., JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT* (1997) (discussing the history of Christian understandings of marriage); Nichols, *supra* note 4, at 979-88 (discussing Christian, Jewish, and Muslim religious structures and tribunals for addressing marriage

appropriate role to play in assisting the state to define the metes and bounds of the marital relationship.

Thus, this Article proffers the concept of promoting multi-tiered marriage in our multi-cultural and pluralistic society. It is unclear what form this multi-tiered marriage might take, and a variety of possibilities suggest themselves as alternatives.²⁵ It is possible that American law will continue on its path of viewing marriage through a strict contractarian lens, such that reforms arise as a matter of enforcing the married parties' agreement.²⁶ It is also possible that some variation on the state laws of New York, Louisiana, and others might be a better alternative, wherein multiple (and maybe even competing) models of marriage are available to couples through the civil law itself.²⁷ Or there may be other possibilities that are better for the American situation. More critical than the precise form, though, is that the broader conversation include the possibility of the state ceding some of its jurisdictional control and hegemony. A number of religious communities are competent and capable of adjudicating the marital rites and rights of their respective adherents, and this may well be better alternative than our current least common denominator notion of marriage law.²⁸

To advance the conversation down this path, this Article begins by looking backward, and then turns inward, and finally turns outward. Thus, Section II describes the historical precedent for shared or competing jurisdiction, evidenced through the history of Western marriage law. Section III details the modern American precedent for recognizing that citizens may have varying conceptions of marriage, evidenced primarily in

and divorce issues).

²⁵ See SHACHAR, *supra* note 14, at 88-113 (discussing a variety of "shared jurisdictional" models).

²⁶ See, e.g., Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 460, 474-75 (1998) (noting that current "marital law does not fit all marriages" and proposing to use the mechanism of contract law to allow couples to choose alternate forums, including religious forums, for jurisdiction of marital disputes). See also MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 35-42 (1993) (discussing how our society has shifted in its view of marriage from "status" to "contract").

²⁷ I fully recognize that the notion of amalgamating civil and religious law presents a host of Establishment Clause concerns. For present purposes, I assume that any such objections could be adequately addressed and overcome – although I admit that might not necessarily be the case in a fuller analysis.

²⁸ See Witte & Nichols, *supra* note 6, at 25.

the laws of Louisiana and New York. Section IV delineates comparative precedents for multi-tiered marriages, evidenced in the laws of various countries in the international community (especially India, Kenya, and South Africa). Finally, Section V draws these somewhat disparate strands together once again by elucidating their commonalities – namely their admission that there is more than one conception of marriage and divorce law. It also elucidates the potential promise of multi-tiered marriage – that plural religious communities will be able to retain and further their own understandings of the goods and goals of marriage while the state will simultaneously be able to protect the most important rights of its citizens.

II. A SELECTIVE HISTORY OF MARRIAGE AND DIVORCE LAW JURISDICTION

The common lore of American law is that jurisdiction of marriage and divorce “has always been regulated by the civil authorities” – and primarily the various state civil authorities.²⁹ While technically true, this broad claim elides the fact that the English common law “as received” in the various American colonies (and then states) reveals a more complex history and understanding of jurisdiction over both marital formation and dissolution.³⁰ Before turning directly to the history of marriage and divorce law in America that led to its current jurisdictional status, though, it is useful to retrace a selective history of such jurisdiction in Western society.

Although unable to be pinned to a singular point in time, the Roman Catholic Church gradually assumed jurisdiction over matters of marriage and divorce law for believers.³¹ And as the Catholic Church

²⁹ See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 2d ed. 31 (1988).

³⁰ See GEORGE ELIOT HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS*, 3 vols. (1904). See also WITTE, *FROM SACRAMENT TO CONTRACT*, *supra* note 24 (describing dual system of ecclesiastical structures and civil structures for marriage and divorce law in Europe prior to and during the Reformation); RODERICK PHILLIPS, *PUTTING ASUNDER* (1988) (tracing the historical roots of divorce in Western society through modern times).

³¹ See generally WITTE, *FROM SACRAMENT TO CONTRACT*, *supra* note 24, at 16-41 (Chap. 1, describing “Marriage as Sacrament in the Roman Catholic Tradition”); PHILLIPS, *supra* note 30. See generally CHARLES J. REID, JR., *POWER OVER THE BODY, EQUALITY IN THE FAMILY* (2004) (discussing the rise of “rights” within medieval canon law).

As Max Rheinstein has stated, the initial evolution of any external jurisdiction (whether civil or ecclesiastical) over marriage and divorce was initially an innovation, for

obtained increasing political strength and sway after the Papal Revolution in the thirteenth century, so too it increasingly began to claim sole jurisdiction over such matters. To be fair, the Catholic Church was not beginning from scratch, but relied upon a system of ecclesiastical courts and a cadre of developing canon law.³² The Catholic Church believed marriage to be a sacrament – rather than merely a civil contract – and thought it naturally followed (especially when bolstered by claims from scripture) that marriage must be indissoluble. To be fair, this indissolubility was ameliorated by (1) impediments restricting the entry into marriage; (2) the possibility of annulment; and (3) the possibility of separation *a mensa et thoro* (from bed and board) on proof of adultery, desertion, or cruelty. But these factors did not (and could not) mask the fact that absolute divorce remained unavailable at canon law.

The Protestant Reformation in the 16th century ushered in changes in marriage and divorce law just as it ushered in changes in so many other areas of life. Most importantly for present purposes is that the reformers reconceived marriage as a social or civil estate more than a spiritual estate.³³ At the same time, they placed jurisdiction of marriage and divorce in civic hands rather than clerical hands³⁴ – partly as a default consequence of not having ecclesiastical courts of their own readily at hand, and partly as a natural consequence of their theology.³⁵ But the Protestant Reformation on the Continent – including its shifting of jurisdiction to civil courts – did not follow the same path in England, the

matters of marriage “had largely been outside the sphere of law.” MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* 17 (1972).

³² See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 226-30 (1983) (describing the development and operations of the medieval canon law of marriage).

³³ See WITTE, *FROM SACRAMENT TO CONTRACT*, *supra* note 24, at 42-126

³⁴ See, e.g., JOHN WITTE, JR. *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* 232-52 (2002) (discussing the “new civil law of marriage” in Lutheran theology and practice).

³⁵ See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 185 (2003) (“Luther’s strong view of the ‘worldly character of marriage led him to advocate not only the exclusive competence of secular political authorities to legislate the conditions of marriage but also the exclusive jurisdiction of secular courts to adjudicate marital causes. Other Lutheran reformers, including Melanchthon, advocated a less extreme position, leaving to Protestant ecclesiastical tribunals, called consistories, the adjudication of marital causes.”).

prime progenitor of American common law.

In England, the Protestant Reformation led to a break between the Church of England and Rome – but there was not an accompanying break in doctrine regarding marriage and divorce.³⁶ The result of the English Reformation thus continued to be union of church and state – including the retention of ecclesiastical courts, which exercised jurisdiction over matters of marriage and divorce until the 1850's. And in England – as in at canon law – there was no judicial right to absolute divorce (although relief could possibly be gained from Parliament).³⁷ When the Puritans briefly took control of England in the mid 17th century they introduced the notion of civil marriage – but this was as short-lived as Cromwellian regime itself.³⁸ Eventually, reform came to England in the mid-nineteenth century, with passage of legislation in 1835/36 that allowed marriages to be contracted under the supervision of a civil authority rather than only by ecclesiastical authorities,³⁹ and then, finally, in 1857 by the famous Matrimonial Causes Act.⁴⁰ That Act first allowed for absolute divorce (rather than only annulment or separation from bed and board), addressed matters of child custody, and shifted jurisdiction over issues of marriage and divorce law to the civil courts rather than the church courts. (While the ecclesiastical courts were allowed to retain an internal body of canon law for voluntary use by its members, they no longer had any binding legal authority compared to the civil courts.) This basic separation between civil and ecclesiastical courts has remained to this day in England, although churches continue to enjoy special rights regarding marital formation even after the state removed ecclesiastical control over

³⁶ As John Witte has described, Anglican thought moved toward conceiving of marriage as a “commonwealth” more than a “sacrament.” See WITTE, FROM SACRAMENT TO CONTRACT, *supra* note 24, at 130-80. But for jurisdictional purposes, this rather attenuated difference did not have a great deal of practical effect. See, e.g., *id.* at 164 (“[M]arriage litigation in sixteenth and seventeenth-century England continued to look much as it had during the Middle Ages.”) (quoting R.H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 69-70 (1992)).

³⁷ See LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987 183-210 (1990); PHILLIPS, *supra* note 30, at 227-41.

³⁸ See GEORGE ELIOT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS, 3 vols., I: 408-35 (1907).

³⁹ 6, 7 William IV c. 85 (1836).

⁴⁰ 20 & 21 Vict. C. 85. See also WITTE, FROM SACRAMENT TO CONTRACT, *supra* note 24, at 202-04; STONE, *supra* note 37, at 368-422; MARY ANN SHANLEY, FEMINISM, MARRIAGE AND THE LAW IN VICTORIAN ENGLAND, 1850-1895 (1989).

dissolution issues.⁴¹

An interesting parallel set of jurisdictional developments transpired in Jewish law at roughly the same period of time. As set forth more fully below,⁴² Jewish law views marriage simultaneously as a private contract between two parties (with some degree of community involvement also) and also a covenant.⁴³ Over time, Jewish law has produced a well-developed law regarding marriage and divorce and has sought to regulate the same by its own religious courts. When Jews were living in predominantly Muslim territories in the middle ages, the Turkish authorities granted them a measure of autonomy over internal family law matters.⁴⁴ This system involved the grant of semi-autonomy over certain legal matters by the governing civil authority (the Ottoman Empire) to certain religious communities – known as “millets.”⁴⁵ While this semi-autonomy was granted both the Christians and to Jews (both groups deemed “dhimmi” under the governing Islamic law), most literature has focused on the role of the Jewish communities in regulating their own internal affairs, especially with regard to family law.⁴⁶ The millet system allowed for Jewish law to retain jurisdiction and effective control over marriage and divorce between Jews – and allowed Jewish scholars, rabbis, and courts to continue to shape and re-cast their conceptions of marriage and reify those into law without interference from the civil state. This early recognition of Jewish-specific understandings of personal law is a healthy reminder that there is more than one reasonable understanding of

⁴¹ See Carolyn Hamilton, *England and Wales*, in *FAMILY LAW IN EUROPE*, 2d ed. (Carolyn Hamilton & Alison Perry, eds.) 95, 103, 113-14 (2002) (describing entrance into marriage via either civil or ecclesiastical means; also ascribing divorce jurisdiction solely to civil courts) (citing primarily to Marriage Act of 1949 and Matrimonial Causes Act of 1973).

⁴² See *infra* Section III.B.

⁴³ See David Novak, *Jewish Marriage: Nature, Covenant, and Contract*, in *COMPARATIVE PERSPECTIVE*, *supra* note 4, at 26; Michael J. Broyde, *The Covenant-Contract Dialectic in Jewish Marriage and Divorce Law*, in *COMPARATIVE PERSPECTIVE*, *supra* note 4, at 53.

⁴⁴ See JACOB KATZ, *TRADITION AND CRISIS: JEWISH SOCIETY AT THE END OF THE MIDDLE AGES* (1961); see also H.A.R. GIBB & HAROLD BOWEN, *ISLAMIC SOCIETY AND THE WEST: A STUDY OF THE IMPACT OF WESTERN CIVILIZATION ON MOSLEM CULTURE IN THE NEAR EAST*, vol. 1, pt. II, 212.

⁴⁵ CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE 12-13 (1982) (“Rather than a uniformly adopted system, it may be more accurately described as a series of *ad hoc* arrangements made over the years, which gave each of the major religious communities a degree of legal autonomy and authority with the acquiescence of the Ottoman state.”).

⁴⁶ See David Novak, *Jewish Marriage and Civil Law: A Two-Way Street?*, 68 *GEO. WASH L. REV.* 1059, 1068-69 (2000).

how law should govern individuals and communities respecting marriage and divorce.

In the early days of the American republic, the colonists carried marriage and divorce laws with them from their origins.⁴⁷ This meant that in colonies (such as those in the north) settled by Puritans – heirs of the Calvinist traditions – civil authorities addressed matters of marriage and divorce for early on; it was only after some time that the Puritans allowed any ministers to conduct weddings.⁴⁸ But in Virginia, exactly the opposite was true: A religious marriage ceremony, according to the rites of the Church of England, was prescribed by law up until the time of the Revolution.⁴⁹

There were similar disparities among the colonies respective divorce. In New York, for example, divorce was within the power of the civil courts, due to the Reformation heritage.⁵⁰ But in the Southern colonies with their stronger Anglican heritage, divorce was disallowed. This derived both from the conception of marriage as an indissoluble union, and also from the fact that there were no ecclesiastical courts at all in the new land. (There was a substantial possibility of appealing to the legislature for a divorce even if courts could not or would not grant divorces; this mirrored the practice of Parliamentary divorce in England.)⁵¹

After the Revolution, regions on the frontier that had formerly been under Spanish control gradually came onto the American scene (including the Louisiana territory, Florida, Texas, New Mexico, California). Before become associated with the United States, these territories had been under the formal jurisdiction of Catholic bishops. Residents of those territories were thus subject to Catholic canon law of marriage– including the notion

⁴⁷ GEORGE ELIOT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS (1907), II: 366 (“It is an established principle of jurisprudence that colonists settle in an uninhabited land take with them all the laws of the mother-country which are suited to their new circumstances.”).

⁴⁸ *Id.* at II: 138.

⁴⁹ *Id.* at II: 228.

⁵⁰ *Id.* at II: 376.

⁵¹ See, e.g., *id.* at II: 349, III: 31. See also NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 49 (2000) (“Not long after 1800, almost every state legislature entertained petitions for divorce and a dozen states stipulated grounds for divorce suits to be brought in the courts. The legislative petition method faded as judicial divorce spread almost everywhere and most states expanded the statutory grounds.”) (citation omitted).

of indissoluble marriage, but some relief via annulment. To be sure, the law on the books and the law in action were not always in harmony given the realities of daily life and existence in sparsely populated lands, often far away from priests, bishops, and ecclesiastical courts.⁵² When these territories came under control of the United States, marriage and divorce law was quickly shifted to the civil authorities.

Collectively, this very short overview highlights the notion that jurisdictional authority over matters of marriage and divorce has rested – at various times and places – with civil authorities, religious authorities, or both. And the lines have not always been clear and uniform. This counsels us to tread cautiously in modern times when we presume that all marriage and divorce must be singular and solely under the jurisdiction of the state alone. Further, the historical precedent gives us reason *not* to be surprised by more recent developments and changes in state laws.

III. DOMESTIC MOVEMENT TOWARD MULTI-TIERED MARRIAGE

One seminal reason that civil and various religious authorities shared (and sometimes competed for) jurisdiction over marriage and divorce matters is because there was not only one understanding of marriage. This should be unsurprising as an historical matter, since current debates about same-sex marriage are also premised upon fundamentally competing notions of the goods and goals of marriage.

It is one thing to acknowledge that there are varying understandings of marriage (as contract, as sacrament, as spiritual estate, as civil union, and others); it is quite another to embody more than one understanding in the law. Somewhat surprisingly (given the paucity of commentary on the issue), there are already several ways that matters of marriage and divorce are “tiered” – or governed differently depending who is seeking governance. For example, one could adduce the examples of the new “domestic partnership” or “civil union” arrangements as indicative of a recognition of more than one legally cognizable level of commitment between two individuals.⁵³

Another variant of these multi-tiered jurisdictional schemes are the

⁵² See generally Hans W. Baade, *The Form of Marriage in Spanish North America*, 61 CORNELL L. REV. 1 (1975).

⁵³ See Case, *supra* note 23, at 1773-77 (surveying various state law examples, including California, New Jersey, Vermont, Connecticut, and others). See also William C. Duncan, *Survey of Interstate Recognition of Quasi-Marital Statutes*, 3 AVE MARIA L. REV. 617 (2005).

regulation of family law issues by various tribal courts of American Indian tribes. While “enormous uncertainties exist as to the contours of a tribe’s civil jurisdiction,” the tribal court’s civil jurisdiction “may be at its strongest” in the realm of family law (which tribes have traditionally enjoyed a sovereign role).⁵⁴ This is especially true with regard to child custody determinations,⁵⁵ but there are also cases that indicate that jurisdiction over divorce or marital separation issues may lie with the tribal court.⁵⁶ That the civil state shares (and cedes?) jurisdiction – albeit with another “sovereign” entity – in tribal courts underscores that there are already different systems of marriage and divorce depending who is involved.⁵⁷

But still other, and bolder, examples of pluralism within the civil law itself also come to mind. The “covenant marriage” laws of Arizona, Arkansas, and Louisiana⁵⁸ ensconce more than one conception of marriage and divorce law within a single state. And while these laws are often hailed as the nation’s first two-tiered laws, there is a strong argument that New York laid the groundwork some fourteen years before Louisiana through passage of New York’s statutes regulating Jewish divorce.⁵⁹ Accordingly, it is fruitful to discuss both the more recent “covenant marriage laws” of Arizona, Arkansas, and Louisiana – and then to compare that with a detailed discussion of the New York experience.

⁵⁴ Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 594-95 (2000).

⁵⁵ See, e.g., *Fisher v. District Ct.*, 424 U.S. 382 (1976) (holding that a tribe had exclusive jurisdiction to determine custody of an Indian child in a dispute between the child’s Indian mother and her Indian foster mother). See also Barbara Ann Atwood, *Changing Definitions of Tribal Power Over Children*, 83 MINN. L. REV. 927 (1999); Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989).

⁵⁶ See, e.g., *Eberhard v. Eberhard*, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Ct. App. 1997) (exercising divorce and custody jurisdiction over dispute between tribal member and non-Indian).

⁵⁷ A survey of Indian family law jurisdiction is beyond the scope of this Article, but it would likely yield conclusions that bolster the descriptive and normative analysis herein.

⁵⁸ Arizona: ARIZ. REV. STAT. ANN. §§ 25-901-906 (2006). Arkansas: ARK. CODE ANN. § 9-11-801 to § 9-11-811 (2006). Louisiana: LA. REV. STAT. ANN. § 9:272 (2005).

⁵⁹ See, e.g., Broyde, *supra* note 43, at 67 (“One could claim that New York state not only had the first covenant marriage law, but the first two such laws – the 1983 Jewish divorce law and the 1992 Jewish divorce law, each with a different approach to Jewish marriage.”).

A. Covenant Marriage Laws (Louisiana, Arkansas, and Arizona)

Covenant marriage laws have three key features: (1) mandatory premarital counseling that stresses the seriousness of marriage and its attendant lifelong commitment; (2) the premarital signing of a legal document (a Declaration of Intent) requiring couples to make “all reasonable efforts to preserve the marriage, including marriage counseling” in the event of difficulties; and (3) the provision of limited grounds for divorce.⁶⁰ These laws provide state-sanctioned, alternate, voluntary forms of marriage from the typical easy-entry and no-fault divorce regimes. The end result of such laws is that couples entering covenant marriages have heightened entrance requirements and more limited possibilities for exit.⁶¹ The theory behind this movement that premarital counseling, combined with an advance commitment to heightened efforts to make the marriage “work” even in the face of difficulty and the knowledge that covenant marriages are more difficult to exit, will lead to stronger marriages. And strengthening the institution of marriage in this way will help “lessen the problem of divorce.”⁶²

The nation’s first such covenant marriage law was passed in Louisiana in 1997.⁶³ Similar ideas had previously been floated in popular and academic literature,⁶⁴ and had been introduced in a handful of state legislatures,⁶⁵ but had found insufficient traction. In Louisiana, newly-elected State Representative Tony Perkins worked with LSU Law Professor Katherine Shaw Spaht to draft and introduce a covenant marriage law to “strengthen the family” by turning a “culture of divorce” into a “culture of marriage.”⁶⁶ After a series of committee hearings and a

⁶⁰ See Katherine Shaw Spaht, *The Modern American Covenant Marriage Movement: Its Origins and Its Future*, in *COMPARATIVE PERSPECTIVE*, *supra* note 4, at 239-40, 244-47.

⁶¹ Cf. WITTE, *FROM SACRAMENT TO CONTRACT*, *supra* note 24, at 217-28 (advocating that there must be a level of comparability in marital formation and dissolution rules).

⁶² Spaht, *Modern American Covenant Marriage*, *supra* note 60, at 243.

⁶³ LA. REV. STAT. ANN. § 9:272 (2005). For a history of the passage of the law, see Spaht, *Modern American Covenant Marriage*, *supra* note 60, at 240-43; Nichols, *supra* note 4, at 943-46.

⁶⁴ See Christopher Wolfe, *The Marriage of Your Choice*, *FIRST THINGS* 37-41 (Feb. 1995); Amitai Etzioni, *How to Make Marriage Matter*, *TIME*, Sept. 6, 1993, at 76.

⁶⁵ See Nichols, *supra* note 4, at 943-44 (citing to Florida, Georgia, Mississippi, Indiana, Illinois, and Washington).

⁶⁶ Audio tape of Tony Perkins, Louisiana State Representative (and sponsor of Louisiana’s Covenant Marriage Law), Hearings before Senate Committee on Judiciary A

few amendments, the legislature passed the act and Louisiana Governor Mike Foster signed it into law in mid-1997.⁶⁷

Louisiana's Covenant Marriage Law introduced a fundamental change in traditional marriage law in the state, for it provided couples a choice as to whether to take the regular marriage option or the "covenant marriage" alternative. A covenant marriage is defined as pertaining to one man and one woman who agree with the proposition that "the marriage between them is a lifelong relationship," and that marriage vows may be broken only under extreme circumstances.⁶⁸ The covenant marriage law used the previously existing law of marriage and divorce as a sort of default minimum system for marriages: couples must explicitly choose to make their marriage (and thus potential divorce) conform to the covenant marriage standards.

There are both heightened entrance and exit requirements for couples entering covenant marriages. The heightened entrance requirements include premarital counseling and submission of a Declaration of Intent. First, the couple must jointly attend premarital counseling by a "priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a marriage counselor."⁶⁹ This counseling must include a discussion of the nature of marriage as understood by the Covenant Marriage Law, a discussion of the legal recourse(s) available to the parties should marital difficulties arise, and a discussion of the obligation to seek marital counseling prior to seeking legal recourse in the event of marital difficulties.⁷⁰ The counselor must also provide the couple with a copy of the informational pamphlet by the attorney general's office detailing the rights and responsibilities in covenant marriages.⁷¹

(June 10, 1997) (on file with author).

⁶⁷ See Spaht, *Modern American Covenant Marriage*, *supra* note 60, at 240-43.

⁶⁸ The statutory definition provides:

A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.

LA. REV. STAT. ANN. 9 § 272(A) (2004).

⁶⁹ *Id.* at § 273(A)(2)(a).

⁷⁰ LA. REV. STAT. ANN. 9 § 273(A)(2)(a) (2004).

⁷¹ *Id.* at § 273(A)(2)(b).

Following the counseling – but before the marriage ceremony – the parties must sign a Declaration of Intent.⁷² This document contains the content of the parties’ covenant, including their commitment to one another, states their understanding of the nature of marriage (as “a covenant between a man and a woman who agree to live together as husband and wife for so long as they both shall live”), affirms that premarital counseling has occurred, and reiterates that the two parties understand the legal implications of entering into this kind of union.⁷³ Consonant with that understanding, the parties commit themselves to seek counseling during marriage if difficulties should arise.⁷⁴

Accompanying the higher threshold of entrance to a covenant marriage, it is correspondingly difficult to exit a covenant marriage. In “regular” marriages in Louisiana couples may divorce for adultery, conviction of a felony, or living separate and apart for six months (180

⁷² Newlyweds are not the only persons who can obtain the state of covenant marriage; the law also has potential retroactive effect. Couples who are already married may elect to enter voluntarily into a covenant marriage – thus “upgrading” the status of their previously “regular” marriage. The married couple must jointly execute a letter of intent to designate their marriage a covenant marriage and to subject themselves to the laws pertaining thereto. *Id.* at § 309(A)(1).

⁷³ The statute provides that the recitation must include the following attestation in full:

A COVENANT MARRIAGE

We do 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. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives.

Id. at § 273(A)(1). This last clause purportedly operates as a choice of law clause, binding the parties to Louisiana law. See Katherine Shaw Spaht & Symeon C. Symeonides, *Covenant Marriage and the Law of Conflict of Laws*, 32 CREIGHTON L. REV. 1085 (1999). *But see* Hay, *supra* note 4.

⁷⁴ LA. REV. STAT. ANN. 9 § 273(A)(1) (2004). See also Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 614 (2005) (discussing the obligation of the parties to seek resolution while still married, unless there has been physical or sexual abuse).

days).⁷⁵ In covenant marriages, though, couples no longer have the option of unilateral divorce after a 180 days' separate; instead, they must wait at least two years.⁷⁶ Other alternatives are available to parties in covenant marriages who have undergone the required marital counseling but have not lived apart for two years without reconciliation, such that divorce is obtainable upon proof of: (1) adultery of the other spouse; (2) the other spouse's commission of a felony and subsequent sentencing to "death or imprisonment at hard labor;" (3) abandonment of the matrimonial domicile for a period of one year (with a refusal to return) by the other spouse; (4) physical or sexual abuse directed toward the spouse seeking the divorce or a child of one of the spouses; (5) the two year separation; and (6) separation for at least one year from the date of a judgment for separation from bed and board.⁷⁷

Non-guilty spouses in covenant marriages may also benefit from a legal alternative other than divorce: separation from bed and board for egregious cases (including habitual intemperance of the spouse),⁷⁸ although counseling is still required before such a separation may be granted.⁷⁹ Separation from bed and board does not "dissolve the bond of matrimony," since the separated spouses may not marry again in the interim.⁸⁰

Less than one year after Louisiana's passage of its covenant marriage law, Arizona became the second state to adopt a covenant marriage law.⁸¹ And in 2001 Arkansas joined these two by passing its own covenant marriage law.⁸² "All three statutes contain the familiar three components of mandatory premarital counseling, a legally binding agreement to take reasonable steps to preserve the marriage, and

⁷⁵ LA. CIV. CODE ANN. arts 102, 103 § 1 (2004).

⁷⁶ LA. REV. STAT. ANN. 9 § 307(A)(5) (2004).

⁷⁷ LA. REV. STAT. ANN. at § 307(A). Note that § 307(A)(6)(b) (concerning divorce when a minor child is involved) has another variable. The period of separation after judgment of separation from bed and board increases to one year and six months if a minor child is involved, unless the basis of the judgment of separation from bed and board was for abuse of the child or the spouse seeking the divorce. In the latter instance, a divorce may be granted if the spouses have been living apart without reconciliation for only one year. *Id.* at § 307(A)(6)(b).

⁷⁸ *Id.* at § 307(B).

⁷⁹ *Id.* Counseling is not required if the other spouse is abusive. *Id.* at §307(D) (as added by 2004 La. Acts. No. 490).

⁸⁰ *Id.* at § 309(A)(1).

⁸¹ ARIZ. REV. STAT. ANN. §§ 25-901-906 (2006).

⁸² ARK. CODE ANN. § 9-11-801 to § 9-11-811 (2006). See also Brummer, *supra* note 4.

restrictive grounds for divorce.”⁸³ Arizona allows for greater permissibility in grounds for divorce under its covenant marriage law, notably including that the state can grant a divorce in a covenant marriage upon proof of mutual consent by both husband and wife.⁸⁴ The grounds for divorce in Arkansas much more closely track those in Louisiana.⁸⁵ Aside from these two additional states that have joined Louisiana, attempts to secure covenant marriage laws have failed in several states, although they continue to be introduced on a regular basis.⁸⁶

While the efficacy of covenant marriage laws can be (and indeed is) debated, the very advent of such laws is notable for their re-introduction of more than one model of marriage in the law. More precisely, these covenant marriage laws enact two-tiered systems for marriage and divorce law. This shift away from a unitary legal model of marriage and divorce law is a salutary move. Indeed, it represents a virtual sea-change at modern American law by promulgating multiple, co-existing models of marriage within a single state at the one time.⁸⁷ But the commentary to date is relatively silent on this fundamental shift. And just as the literature focuses on the virtues or vices of the “covenant marriage” option – rather than on the fact that there *is* an option – the literature also overlooks the fact that a multiple-tiered system of marriage in New York that pre-dated the Louisiana scheme by almost fifteen years.

⁸³ Spaht, *Modern American Covenant Marriage Movement*, *supra* note 60, at 247.

⁸⁴ ARIZ. REV. STAT. ANN. §§ 13-3601 (2006).

⁸⁵ See Spaht, *Modern American Covenant Marriage Movement*, *supra* note 60, at 248-49.

⁸⁶ See, e.g., Cal. S.B. 1228 (2006); Ind. H.B. 1210 (2006) and Ind. S.B. 19 (2006); Ky. H.B. 242 (2006); Miss. H.B. 467 (2006); N.C. H.B. 1664 (2005).

⁸⁷ Of course, the long ensconced notion that substantive family law is fundamentally a matter of state (as opposed federal) concern already introduces the possibility of multiple, co-existing models of marriage within the United States – which leads to the very examples herein of Louisiana, New York, and the like. These inter-state differences already lead to quite interesting and difficult situations regarding conflicts of law. See, e.g., Peter Hay, *The American ‘Covenant Marriage’ in the Conflict of Laws*, in COMPARATIVE PERSPECTIVE, *supra* note 4, at 294.

B. New York's *Get* Statutes

New York's *get* statutes⁸⁸ have generated wide discussion in legal literature, but the discussion has been limited to constitutional analysis (with most commentators believing the New York statutes to be unconstitutional).⁸⁹ What has not been discussed in the literature is the fundamental change in family law wrought by the *get* statutes.⁹⁰ And what becomes apparent upon closer investigation is that the *get* statutes introduce major change in American family law by acknowledging that there may be more than one jurisdictional claim upon a married couple and that there may be more than only the singular conception of marriage typically promulgated by the state. (It is this latter principle that forms a key insight picked up by the covenant marriage statutes, discussed above.)

1. *Jewish law of marriage and divorce.*

Although not explicitly mentioned anywhere in the *get* statutes, Jewish law undergirds the rationale of the *get* statutes and provides their entire *raison d'être*.⁹¹ Thus, a general understanding of the principles of

⁸⁸ N.Y. Dom Rel. Law §§ 236B, 253 (McKinney 1999).

⁸⁹ "There is no express reference to Jews in the statute in an attempt to avoid the appearance of violating the constitutional separation of church and state, but nevertheless it is highly questionable whether the statute is constitutional." ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* 547 (1988). For other examples of the voluminous literature, see, e.g., BREITOWITZ, *supra* note 15, at 179-203; Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 810-39 (1998); Ilene H. Barshay, *The Implications of the Constitution's Religion Clauses on New York Family Law*, 40 HOW. L.J. 205 (1996); Patti A. Scott, Comment, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117 (1996); Jodi M. Solovy, Comment, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493 (1996); Paul Finkelman, *New York's Get Laws: A Constitutional Analysis*, 27 COLUMBIA J. OF LAW AND SOC. PROBLEMS 55 (1993); Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312 (1992).

⁹⁰ Cf. Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. REV. 703 (1995) (looking at the practical effects of the *get* statutes and their effect on and acceptance by Jewish communities, but failing to address the fundamental changes in family law ushered in by the *get* statutes).

⁹¹ "Although the statute [§ 253] is phrased in ostensibly neutral language, its avowed purpose is to curb what has been described as the withholding of Jewish religious

Jewish law on marriage and divorce is a necessary framework for understanding the *get* statutes.

According to *halacha*,⁹² a marriage may be terminated in only two ways: through the death of a spouse or by the granting of a *get*.⁹³ The first method seems clear enough on its face, but was particularly troublesome in earlier times -- when methods of communication and investigation were much more primitive -- when one spouse (usually the husband) was traveling and failed to return. A ready example comes from times of warfare, when the husband would go off to battle and fail to return for a long period of time; the wife and Jewish law had to find a way to address the tension between waiting indefinitely for a husband to return who may be deceased and obtaining a divorce and remarrying with the possibility remaining that the missing husband may yet return. Jewish law developed a series of detailed regulations governing such cases.⁹⁴

The second method of terminating a marriage is a divorce.⁹⁵ Under Jewish law, the regulations regarding the giving and receiving of a *get* govern divorces.⁹⁶ A *get* is a formal written document signifying and stating the husband's desire to divorce.⁹⁷ As elaborated by the Talmud,

divorces, despite the entry of civil divorce judgments, by spouses acting out of vindictiveness or applying economic sanction. See Governor's Memorandum of Approval, McKinney's 1983 Session Laws of New York, pp. 2818, 2819. The statute seeks to provide a remedy for the 'tragically unfair' situation presented where a Jewish husband refuses to sign religious documents needed for a religious divorce." Alan D. Scheinkman, *Practice Commentaries, 1999 Main Volume*, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, N.Y. DOM. REL. LAW § 253, C253:1.

⁹² "Halacha is the entire corpus of Jewish law." BREITOWITZ, *supra* note 15, at 3 n.5. See also *id.* at Appendix D.

⁹³ See M. MIELZINER, THE JEWISH LAW OF MARRIAGE AND DIVORCE IN ANCIENT AND MODERN TIMES, AND ITS RELATION TO THE LAW OF THE STATE 108 (1884, repr. 1987).

⁹⁴ See discussion and sources in *id.* at 108-114.

⁹⁵ See generally RACHEL BIALE, WOMEN AND JEWISH LAW: THE ESSENTIAL TEXTS, THEIR HISTORY, AND THEIR RELEVANCE FOR TODAY 70-101 (1984).

⁹⁶ The following discussion applies most strictly to Orthodox and Conservative Judaism, as Reform Judaism did away with the *get* requirement in 1869. See J. David Bleich, *Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement*, 16 CONN. L. REV. 201, 232 n. 96 (1984). Many Reform rabbis encourage the use of the *get*, though, because it may avoid complications for the parties later. See sources cited in Breitowitz, *supra* note 89, at 315 n.5 and 270 n. 256.

⁹⁷ Jewish law founds the origin of the *get* is mentioned in the Torah: "A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his

the *get* has clear gender implications in Jewish divorces. It is the sole role of the husband to give (or withhold) a *get*; the role of the wife is limited to receiving the *get*. Further, a husband may give a *get* and divorce his wife even against her will, “but a husband divorces only from his own free will.”⁹⁸ The power of the husband in marital relationships was furthered by the development in Jewish law of the husband’s right to divorce his wife on almost any grounds at all, no matter how frivolous. Conversely, a wife’s right to sue for divorce is much more limited,⁹⁹ but nonetheless turns upon the husband’s willingness to issue a *get* to finalize the divorce.¹⁰⁰ (The issuance of a *get* is a private act, with no need for judicial involvement – but a rabbi or rabbinical tribunal is “invariably” present to ensure adherence to procedural formalities.¹⁰¹)

Because the issuance of the *get* is the sole right of the husband, a difficult situation develops when a recalcitrant husband refuses -- for whatever reason -- to issue a *get* to his wife. Without a *get*, a Jewish woman cannot remarry according to Jewish law and she becomes an *agunah*, “a chained woman.”¹⁰² If the woman remarries without a proper Jewish divorce, she is not only not married to the putative second husband, but she is never allowed to marry that man because “he is her guilty, adulterous partner.”¹⁰³ Also of great significance at Jewish law is that any children born to an *agunah* who remarries without receiving a *get* are considered bastards, *mamzerim*. These children are “illegitimate” religiously (though not necessarily civilly) and carry that status with them throughout their life. The children are effectively excluded from

house . . .” Deut. 24:1 (JPS translation).

⁹⁸ IRWIN H. HAUT, *DIVORCE IN JEWISH LAW AND LIFE* 18 (1983) (quoting BABYLONIAN TALMUD, *YEVAMOT*, 112b).

⁹⁹ See MICHAEL J. BROYDE, *MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW* 15-27 (2001) (summarizing historical rights and reasons to divorce at Jewish law).

¹⁰⁰ See HAUT, *supra* note 98, at 18-25. Jewish law places only two extreme exceptions on a husband’s right to divorce according to the Torah: when a man rapes an unmarried woman and when a newly married groom falsely accuses his bride of having had sexual relations with a stranger after a certain marital status has already been obtained. In the former case, the man must marry the woman if she consents – and then may not divorce her. In the latter case, the false accuser is enjoined from ever divorcing his wife. See *id.* at 18-19.

¹⁰¹ BREITOWITZ, *supra* note 15, at 6.

¹⁰² See BROYDE, *supra* note 99, at 15 (“Jewish law defines an *agunah* as a woman who wants to be divorced, is entitled to a *get*, but is not receiving one.”).

¹⁰³ DORFF & ROSETT, *supra* note 89, at 524.

organized Judaism, as they are not even allowed to marry into Judaism for ten generations.¹⁰⁴ Unlike women, men are not nearly as affected by the failure to give a *get*. A man who remarries without a Jewish divorce has not committed adultery, but has only violated a rabbinic decree mandating monogamy; he is nonetheless considered married to his second wife and his children are legitimate.¹⁰⁵

Jewish law has made several efforts to protect the interests of women, who lack power in divorce cases because of the husband's sole right to issue the *get*. These include standardizing the *get* process to include a host of formal and technical rules which should, in part, prevent a husband from too hastily issuing a *get*.¹⁰⁶ Another protection for the wife comes at the front end of marriage rather than the back end. When a couple marries, they must sign a *ketubah* ("writing") that denotes certain obligations -- of money and provision for the physical needs of the wife -- that a husband must undertake in the event of a divorce.¹⁰⁷

But these methods do not address the situation of a recalcitrant husband who refuses to issue a *get*, though. To partially combat this problem, Jewish law developed a legal fiction that in certain circumstances a properly convened Jewish court acting within its jurisdiction may compel the husband to issue the *get*.¹⁰⁸ Although a *get* must be issued by the free will of the husband, the legal fiction is that the husband intends to act in accordance with Jewish law and duress may thus be used to compel him to do what his true disposition wishes to do.¹⁰⁹ Traditionally, the range of various social pressures exerted on the recalcitrant husband to encourage the issuance of a *get* spanned from public declarations in the synagogue to social excommunication and banishment from the community. These pressures met moderate success when Jewish

¹⁰⁴ See ADRIENNE BAKER, *THE JEWISH WOMAN IN CONTEMPORARY SOCIETY* 57 (1993); DORFF & ROSETT, *supra* note 89, at 524.

¹⁰⁵ See DORFF & ROSETT, *supra* note 89, at 524-25 ("A man is guilty of adultery in Jewish law only if he has intercourse with a woman who is married to someone else.").

¹⁰⁶ See HAUT, *supra* note 98, at 27-41.

¹⁰⁷ See MIELZINER, *supra* note 93, at 85-89.

¹⁰⁸ It is important that this be a properly convened Jewish court (*Beth Din*) acting within its own jurisdiction, for duress upon a husband by a secular court is *never* proper and may never comport with Jewish law regarding a freely given *get*. See HAUT, *supra* note 98, at 24. For further commentary on the important restriction that issuance of a *get* must not be invalidly compelled, see BREITOWITZ, *supra* note 15, at 20-40 (discussing the *get meusah*: a bill of divorce granted under compulsion or duress).

¹⁰⁹ See generally HAUT, *supra* note 98, at 23-25.

communities were “fairly independent entities with virtually complete control over their internal affairs.”¹¹⁰ But in an age of increasing technology and mobility and decreasing isolation for most Jewish communities, these methods rarely effect the desired result. When coupled with the fact that the circumstances when duress are proper are quite limited, this legal fiction results in only moderate protection for women.

2. *Effect of dual systems of marriage and divorce.*

Important to the above discussion is that Jewish law does not recognize the validity of civil divorce.¹¹¹ This means that an observant Jew must obtain a Jewish religious divorce before he or she remarries. Until relatively recent times, any conflict between Jewish law and civil law on marriage and divorce was minimal since many civil states delegated authority over these aspects of family law to the religious authorities in some fashion.¹¹² But in recent times, the Jewish law problems regarding the voluntary giving of a *get* and the *agunah* problem have become exacerbated due to a dual law of marriage and divorce.

The exclusive shift to exclusive civil court jurisdiction of divorce law “raised the spectre, horrid indeed from the point of view of Jewish law, that a Jewish couple could be deemed to be divorced by the laws of the state or country in which they lived, and yet remain married in the eyes of Jewish law, unless a *get* was given and accepted.”¹¹³ In America, the exclusive civil court jurisdiction over divorce resulted in a dual law of marriage and divorce, with the civil authorities (the states) maintaining full jurisdiction over marriage and divorce and Jewish law resisting

¹¹⁰ Michael S. Berger & Deborah E. Lipstadt, *Women in Judaism from the Perspective of Human Rights*, in HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL PERSPECTIVES 77, 101 (Michael J. Broyde & John Witte, Jr. eds., 1998). The range of social pressures exerted on recalcitrant husbands includes a certain level of permissible corporal punishment in some instances: “force is applied to [the recalcitrant husband] until he says, ‘I consent.’” *Bava Batra*, 47b-48a, in DORFF & ROSETT, *supra* note 89, at 527-28.

¹¹¹ See DORFF & ROSETT, *supra* note 89, at 520 (noting the limitation on the principle of *dina demalkhuta dina* (the law of the land is the law) to exclude coverage of divorces executed in non-Jewish courts); BREITOWITZ, *supra* note 15, at 8 (“[J]ust as a civil divorce has no validity in the eyes of religious law, a religious divorce is not recognized civilly.”).

¹¹² See *supra* notes 42-46 and accompanying text. See also BREITOWITZ, *supra* note 15, at 164-72 and sources cited therein.

¹¹³ HAUT, *supra* note 98, at 59.

surrendering its jurisdiction over the same. The result for Jewish couples is an obligation to abide by the regulations of both civil and religious authorities.¹¹⁴

In marital formation, the dual law of marriage is not a great obstacle, as most states permit marriage by either secular or religious officials. Most rabbis, empowered by the state to effectuate a civil marriage and by the religious tradition to effectuate a religious marriage, will not perform a religious ceremony without meeting the requirements of the civil marriage, and vice versa. There can never be a Jewish marriage without a civil marriage, and a civil marriage not in accord with Jewish law may nonetheless be later brought under the aegis of Jewish law, and so there are no serious jurisdictional conflicts in regard to marriage.¹¹⁵

Marital dissolution, however, presents serious jurisdictional difficulties. While the *agunah* problem is difficult enough within the Jewish tradition, it becomes even more extreme and exaggerated when civil authorities govern divorce – for if a man refuses to give a *get* to his wife, he nonetheless may obtain a civil divorce by meeting the proper civil requirements. Because Jewish law does not recognize the validity of civil divorces, the couple would thus remain religiously married even after obtaining a civil divorce. Only by complying with the strictures of Jewish law regarding the *get* procedure may a couple be divorced religiously. This anomaly allows either party to remarry according to civil law, even though to do so for the woman would mean that she was committing adultery and all children from the second union would be bastards. The consequences for the man are not nearly so dire, for even though his actions would be frowned upon by Jewish law, he would not be committing adultery nor would any offspring be illegitimate.¹¹⁶ This disparity alone decreases the incentive for a man to issue a *get* to his wife, or else to condition issuance of the *get* upon certain conditions regarding

¹¹⁴ See BROYDE, *supra* note 99, at 29-32. Broyde states that “[n]ever before the twentieth century has the Jewish community been subject to a system of compulsory civil marriage and divorce law, and this requirement has had a major impact on both the contours of the agunah problem and the contours of the solutions to it.” *Id.* at 30. While I have been unable to discover support for such a strong statement (and such late development) of the duality, there is no doubt that the problem of the dual systems has become exaggerated after the advent of no-fault divorce.

¹¹⁵ See DORFF & ROSETT, *supra* note 89, at 524.

¹¹⁶ See BROYDE, *supra* note 99, at 29-31.

custody or property distribution. In effect, then, “[t]he importance of the *get* to Jewish women has made it an ideal tool for blackmail.”¹¹⁷

Examples abound of abuses of the inequitable bargaining position of husband and wife due to the sole power of the man to issue the *get* and thus effectuate a religious divorce. For example, one recalcitrant husband agreed to issue a *get* only after receiving \$15,000 and a promise that his former wife would not press assault charges against him after he broke her leg.¹¹⁸ Other examples include a woman who mortgaged her house for \$120,000 to pay the amount demanded by her husband for issuance of a *get*, a woman who was forced to drop charges against her husband for sexually abusing their daughter so that she might obtain a *get*, and the increasing demands of a recalcitrant husband who asked for \$100,000 (which he received), then \$1 million, and then his wife’s father’s pension -- in addition to demanding full custody of the children.¹¹⁹

The sordid tales of recalcitrant husbands with excessive demands in return for issuing a *get*, when combined with the number of recalcitrant husbands who simply refuse to issue a *get* under any conditions, has made the time ripe for reform. Many rabbis, who attribute the rise in *agunot* to recently changed conditions (both in the precedence of civil law over religious law and the ineffectiveness of religious societal sanction), are ready to search for new solutions to the problem of the *agunot*.¹²⁰ Prospects for reform have come both from within the religious law and from outside of it.

In 1954, the Conservative scholar Saul Lieberman sought to add a new clause to the *ketubot*, the marriage contract.¹²¹ This new clause effectively was to act as an arbitration agreement between the parties; the *Beth Din* was named as the arbitrator if the parties desired to dissolve the

¹¹⁷ Shauna van Praagh, Book Review of *Religion and Culture in Canadian Family Law*, by John Tibor Syrtash, 38 MCGILL L.J. 233, 143 (1993).

¹¹⁸ See Peter Hellman, *Playing Hard to Get*, in WOMEN IN CHAINS: A SOURCEBOOK ON THE AGUNAH 15, 16-17 (Jack Nusan Porter ed., 1995).

¹¹⁹ See Irwin Cotler, *Jewish NGOs and Religious Human Rights: A Case Study*, in HUMAN RIGHTS IN JUDAISM, *supra* note 110, at 165, 264.; Zornberg, *supra* note 90, at 718-20.

¹²⁰ See Berger & Lipstadt, *supra* note 110, at 104 (“[T]he fact that a large number of *agunot* have appeared only recently is evidence that the existing system is sufficiently viable. What these Orthodox leaders bemoan is the changing conditions that have rendered traditional methods of coping with this problem essentially useless.”).

¹²¹ See SHLOMO RISKIN, WOMEN AND JEWISH DIVORCE: THE REBELLIOUS WIFE, THE AGUNAH AND THE RIGHT OF WOMEN TO INITIATE DIVORCE IN JEWISH LAW, A HALAKHIC SOLUTION 137 (1989). See also HAUT, *supra* note 98, at 63-65; Breitowitz, *supra* note 89, at 361-70.

marriage in the future.¹²² The hope was that this clause would be halachically and civilly enforceable as an arbitration agreement as well as a religious agreement between the parties to submit to the authority of the *Beth Din*. Orthodox rabbis reacted negatively to this Conservative proposal on halachic grounds, for they asserted that the agreement to pay an indeterminate sum of money is impermissible in Jewish law. Further, they contended that the *ketubah* itself, as an integral part of the Jewish marriage ceremony, is not a civil document but a religious document, which is by its nature excluded from civil judicial review.¹²³

The arguments about the civil enforceability of the Lieberman clause were put to the test in a 1983 New York case, *Avitzur v. Avitzur*.¹²⁴ In a 4-3 decision, New York's highest court held that the Lieberman clause was enforceable as an arbitration clause which could be enforced "solely on the application of neutral principles of contract law."¹²⁵ Although the *ketubah* was a document used as part of a religious ceremony, the clause in question could be culled from the document and enforced according to secular principles without excessive entanglement between religion and the state.¹²⁶ The result of *Avitzur* is that the parties may be forced (by a civil court) to respond to summons of the religious court; the case does *not* address the later question of a wife may later go back to civil court to compel her husband's compliance with an order by a *beth din* that has required the husband to issue a *get*.¹²⁷

Building on the holding of *Avitzur* (and thus building in part on the

¹²² "We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision." Quoted in RISKIN, *supra* note 121, at 137.

¹²³ See *id.* A possible solution to this constitutional difficulty is for the couple to sign a standard civil pre-nuptial agreement in addition to the religious *ketubah*. See Berger & Lipstadt, *supra* note 110, at 106; Nichols, *supra* note 4, at 986-87; Esther Rosenfeld, *Jewish Divorce Law*, 1 U.C. DAVIS J. INT'L L. & POL'Y 135, 150 (1995). See also Michelle Greenberg-Kobring, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J. L. & SOC. PROBS. 359 (1999) (proposing to use prenuptials to address agunah problems, and discussing their validity both at civil and religious law).

¹²⁴ 58 N.Y.2d 108, 446 N.E.2d 136, *cert. denied*, 464 U.S. 817 (1983). *But see* Victor v. Victor, 866 P.2d 899 (Ariz. App. Div. 1 1993)(refusing to give civil validity to a similar clause in the *ketubah*, which was viewed as only a religious document). See also *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct.), *appeal denied*, 555 N.E. 2d 376 (Ill. 1990)(construing a standard Orthodox *ketubah* as an implied contract to give a *get*).

¹²⁵ *Id.* at 114.

¹²⁶ For a fuller discussion of *Avitzur*, see BREITOWITZ, *supra* note 15, at 96-106.

¹²⁷ See *id.* at 101.

presence of the Lieberman clause in Conservative *ketubahs*), Jewish rabbis and scholars turned to the civil authorities in New York to provide assistance in the troublesome realm of recalcitrant husbands and *agunot*.¹²⁸ The efforts culminated in the passage of the first *get* statute in 1983. Legislation had first been introduced in 1981, but was withdrawn because of possible constitutional concerns.¹²⁹ By 1983, substantially similar legislation was re-introduced and passed both legislative houses by wide margins, and enjoyed the signature of the new Governor, Mario Cuomo.¹³⁰

3. *The introduction of get statutes.*

The 1983 law, as amended in 1984,¹³¹ is codified as New York Domestic Relations Law § 253 (“Removal of Barriers to Remarriage”).¹³² Although facially neutral, the statute is clearly drafted so as to apply only to Jewish divorces. The law refrains from using the term “*get*,” opting instead for the legally neutral phrase “barrier to remarriage.” This phrase has a technical meaning in the statute: “‘barrier to remarriage’ includes, without limitation, any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party’s commission or withholding of any voluntary act.”¹³³ The gist of the statute, applicable only to persons who were married in a religious ceremony, is that a “barrier to remarriage” (a *get*) must be removed, if within the couple’s power to do so, before the state will grant a civil divorce.¹³⁴

¹²⁸ Several other attempts at reducing the problem of *agunot* have been made *within* religious law. See, e.g., *id.* at 41-75 (Chap. 2, “The Halachic Response”). Analysis of these responses, including their halachic validity, is beyond the scope of this Article.

¹²⁹ See Breitowitz, *supra* note 89, at 376 n.276. See also Zornberg, *supra* note 90, at 729.

¹³⁰ The Senate passed the 1983 bill by a margin of 58 to zero. The Assembly passed the bill by a margin of 136 to 7. See Legislative Bill Jacket, [1983] N.Y. Laws ch. 979 (reporting results of the vote on N.Y.S. 6647, N.Y.A. 6423, 206th Sess. (1983)). Quoted in Zornberg, *supra* note 90, at 729 n. 132. A number of groups raised constitutional objections (which were plainly unheeded) to the final legislation. See *id.* at 729-30.

¹³¹ See 1984 N.Y. Laws, ch. 945, § 1. For explanation of the amendments, see Zornberg, *supra* note 90, at 732 n. 138.

¹³² N.Y. DOM. REL. LAW § 253 (McKinney 1999).

¹³³ N.Y. DOM. REL. LAW § 253(6) (McKinney 1999).

¹³⁴ N.Y. DOM. REL. LAW § 253(1). New York, like other states, recognizes religious

A more detailed analysis of the statute reveals a number of nuances and gaps, however. The statute requires two things of a party initiating an action for civil divorce or annulment: (1) an allegation in the complaint that the party has taken or will take, to the best of his or her knowledge, all steps "solely within his or her power" to remove all barriers to remarriage prior to entry of a civil judgment; and (2) the filing of an affidavit prior to judgment that the party has indeed removed all barriers to remarriage.¹³⁵ To protect against the filing of false affidavits, the statute provides for criminal liability for the intentional filing of a false affidavit.¹³⁶ Further, the statute provides that the clergyman (or rabbi) who officiated the wedding ceremony may counter the plaintiff's affidavit with an affidavit stating that barriers to the defendant's remarriage still exist. If the clergyman so attests, the court is not authorized to enter a judgment of civil divorce or annulment.¹³⁷ Presumably, the clergyman will inform the court when the barriers have been removed and the court may proceed with the civil action at that time.

The statute was limited in its scope, however, such that not all *agunot* were covered. For example, if the woman initiated the civil divorce proceeding, the statute did not aid her because it did not force the defendant to remove all barriers to remarriage.¹³⁸ Further, the statute did not grant the civil court the power to compel the removal of the barriers to remarriage; it only gave the power to refuse to grant a civil divorce. Thus a husband could refuse to issue a *get* and simply forgo obtaining a civil divorce and leave his wife stranded. Moreover, because the law only affects weddings that were "religious" weddings and insists that divorces

marriages by according civil validity to a marriage ceremony performed by a duly authorized "clergyman or minister," which includes rabbis. See N.Y. DOM. REL. LAW §§ 11(1), (7) (McKinney 1999).

¹³⁵ See N.Y. DOM. REL. LAW §§ 253(2) and (3), respectively. Alternately, the plaintiff may allege that the defendant was waived in writing any such requirements. See *id.*

¹³⁶ See N.Y. DOM. REL. LAW § 253(8). Of course, it is unlikely that New York prosecutors would expend time and resources to prosecute plaintiffs who had filed false affidavits in domestic divorce cases. See Scheinkman, *supra* note 91, at C253:7. But see Kalika v. Stern, 911 F.Supp. 594 (E.D.N.Y. 1995) (husband had been tried and acquitted of making a false statement; there was a good faith dispute as to whether a *get* was required under the circumstances).

¹³⁷ See N.Y. DOM. REL. LAW § 253(7).

¹³⁸ This is different in the case of a "conversion divorce," which is a separation decree that is changed to a divorce action. In such a case, both parties must attest to the removal of all barriers to remarriage. See N.Y. DOM. REL. LAW § 253(4).

conform to the strictures of the officiating clergyman, it did not account for any change in religious belief between the wedding and break-up of the marriage.¹³⁹

To fix one of these loopholes, in 1993 the New York State Legislature enacted additional legislation that attempted to cover situations where an aggrieved wife filed for divorce as a plaintiff. This resulted in a more extensive law allowing the civil court to take a party's inability to remarry into account when considering equitable distribution of property.¹⁴⁰ This 1992 "get statute" applies both to plaintiffs and defendants, regardless of whether the parties were married in a religious ceremony. While a similar bill had laid dormant since 1984, it appears that impetus for its resurrection and passage lay in a well-popularized case involving the daughter of Rabbi Sholom Klass, publisher of The Jewish Press. The case, *Schwartz v. Schwartz*, involved the wife suing for divorce against a recalcitrant husband. Because the husband did not counterclaim (which would have rendered him a plaintiff and consequently rendered the 1983 law applicable), the 1983 law did not apply and the court could not refuse the civil divorce because of an outstanding barrier to remarriage. However, the judge in the case held that the husband's refusal to issue a *get* could be taken into account by the court in determining the equitable distribution of marital assets.¹⁴¹ The 1992 amendments accomplish the same results by means of statute rather than only common law.

The result of *Schwartz* and the 1992 *get* statutory additions is that a court may take a husband's refusal to issue a *get* into account when distributing the assets of the couple.¹⁴² This is critical for an *agunah*, whose prospects at financial security through remarriage are seriously impaired. And while the 1992 amendments provide the court with no

¹³⁹ For further analysis, see Breitowitz, *supra* note 89, at 375-80; Scheinkman, *supra* note 91.

¹⁴⁰ See N.Y. DOM. REL. LAW §§ 236B(5)(h), (6)(d) (McKinney 1999).

¹⁴¹ *Schwartz v. Schwartz*, 153 Misc.2d 789, 583 N.Y.S.2d 716 (Sup. Ct. Kings County 1992). The judge found authorization for his decision in the "catch-all" provision of the equitable distribution statute, which empowered the court to consider "any other factor which the court shall expressly find to be just and proper." See N.Y. DOM. REL. LAW § 236B(5)(d)(13).

¹⁴² Any "barrier to remarriage" (such as a refusal to issue a *get*) is not to be considered in isolation regarding distribution, but is simply one of a set of factors to which the court must look. See N.Y. DOM. REL. LAW § 236B(5)(d) (listing 13 factors a court shall consider in determining the equitable distribution of property) and § 236B(6)(a) (listing 11 factors a court shall consider in determining the amount and duration of maintenance).

further power over the decision of recalcitrant husbands not to issue *gets*, the amendments do provide the husband with powerful financial incentive to issue a *get* so that a court will not take his refusal into account when distributing marital assets.

Although the halachic validity of the *get* statutes, particularly the 1992 amendments, is much debated in Jewish circles,¹⁴³ these arguments bear little relevance for present purposes. For regardless of the ultimate acceptance and use of the *get* statutes among Jews, their very existence proves that the state of New York has actively sought to provide state sanction and assistance to fulfilling the religious requirements of marriage and divorce. That the state may not have achieved its objective in the most effective manner for Jews is irrelevant in light of the fact that such a strong effort has been made at all.

4. *New York's Laws as Precursors to Covenant Marriage Statutes.*

New York's *get* statutes reintroduce a radical element into American family law: an acknowledgment that there is more than one jurisdictional model and method of marriage and divorce. If the most salient characteristic of covenant marriage laws is their recognition of a greater pluralism in family law,¹⁴⁴ then New York's laws were not only first in this regard,¹⁴⁵ but in fact go farther than covenant marriage laws.

Functionally, New York's *get* statutes affect a greater number of persons than the covenant marriage laws. Although reliable estimates are hard to find for either situation, sheer numbers seem to indicate a far greater impact in New York than in Louisiana. In Louisiana, researchers estimated that about 2% of new marriages were covenant marriages as of 2003.¹⁴⁶ In New York, there is a substantial Orthodox and Conservative Jewish population that may be affected by the *get* statutes – such at estimates are that there are potentially thousands of *agunot* at any given

¹⁴³ Compare, e.g., Chaim Dovid Zwiebel, *Tragedy Compounded: The Aguna Problem and New York's Controversial New "Get Law,"* in WOMEN IN CHAINS, *supra* note 118, at 141, with Marvin E. Jacob, *The Agunah Problem and the So-Called New York State Get Law: A Legal and Halachic Analysis,* in WOMEN IN CHAINS, *supra* note 118, at 159.

¹⁴⁴ See Nichols, *supra* note 4, at 988-94.

¹⁴⁵ See Broyde, *supra* note 43, at 67.

¹⁴⁶ See Nock et al., *supra* note 4, at 170 (finding that about 2% of Louisiana couples enter covenant marriages).

time.¹⁴⁷

Structurally, New York's *get* statutes outpace covenant marriage laws in the level of deference accorded to religious entities and point the way to a new era of increased pluralism, if not an outright return to a millet system of family law. A more fulsome millet system in the realm of family law would allow religious systems to function as semi-autonomous entities with the state acting as the over-arching sovereign that that intervenes only when basic minimum guidelines were not met. While this type of more formalized millet system is still a couple of steps removed from the current status of family law, New York and Louisiana have taken clear steps in this direction.

IV. INTERNATIONAL MODELS

In opening the national conversation about the role and boundaries of the civil authority with respect to marriage and divorce law, it is also prudent to consider contemporary international models for comparison. While there is much discussion and debate in the academy about the "proper" role of international law for constitutional decision-making,¹⁴⁸ it is much less controversial to look to other legal systems as illustrative (if not normative). Once we allow ourselves to look at other developed nations and their laws respecting marriage and divorce, the notion of multiple layers of marriage law and "multi-tiered" systems seems much more plausible and workable – for several other countries already recognize varying types of marriages and accord different groups at least limited jurisdiction over parts of family law.

In the following section, this Article outlines some – though certainly not all – of the variant models of family law jurisdiction in other legal

¹⁴⁷ See Greenawalt, *supra* note 89, at 822 ("Given the large number of Orthodox and Conservative Jews that live within [New York], the statutes have a practical importance that far exceeds New York's status as one among fifty states."). Estimates are particularly difficult, and range from as low as 50 to as many as 150,000. The low estimate comes from a strict reading of the term "*agunah*" and probably excludes many women who are unable to remarry for lack of a *get*. The high estimate is probably a typographical error, intended initially to read 15,000. See Breitowitz, *supra* note 89, at 316 n. 6.

¹⁴⁸ See, e.g., Roger Paul Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1 (2005); *id.*, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005) See also Sarah H. Cleveland, *Our International Constitution*, 31 YALE INT'L L.J. 1 (2006).

systems. This comparative approach is not intended to be comprehensive, but it nonetheless casts a wide enough net to observe that there are several other exemplars worldwide that already advocate shared jurisdiction in marriage and divorce law in more profound ways than the current American practice. A number of these countries have retained systems from pre-colonial times and melded those with common law regimes. But others have adopted pluralistic models intentionally as a method of dealing with the host of internally diverse cultures.

A. India

Marriage and divorce law in India operates primarily through the civil apparatus, but purports to apply “religious” law much of the time. Indian law has specifically enacted various “religious” laws – Hindu,¹⁴⁹ Muslim,¹⁵⁰ Christian,¹⁵¹ and Parsi¹⁵² – that are intended to apply to adherents of those faiths. Additionally, there is a residual category in Indian for marriages of between members of variant faiths, or for citizens who simply choose secular law for themselves.¹⁵³ Under all of the various systems of law, civil courts retain jurisdiction to resolve disputes.¹⁵⁴ This

¹⁴⁹ The Hindu Code includes the Hindu Marriage Act of 1955, the Hindu Succession Act of 1956, and Hindu Minority and Guardianship Act of 1956, and the Hindu Adoption and Maintenance Act of 1956. See Robert D. Baird, *Traditional Values, Governmental Values, and Religious Conflict in Contemporary India*, 1998 B.Y.U. L. REV. 337, 345 (referring to these as the “Hindu Code Bill”).

¹⁵⁰ See Muslim Personal Law (Shariat) Application Act (1937); Dissolution of Muslim Marriages Act (1939); and Muslim Women (Protection of Rights on Divorce) Act (1986).

¹⁵¹ See Indian Christian Marriage Act (1872); Indian Divorce Act (1869).

¹⁵² See Parsi Marriage and Divorce Act (1936).

¹⁵³ See Special Marriage Act (1954).

Additionally, there is some thought that members of the Jewish faith constitute a separate category. But Jewish personal law is not codified like other religious law is, and is Jewish law is primarily governed by contract and customary law. See Paras Diwan, *Family Law in THE INDIAN LEGAL SYSTEM* 639-41 (Joseph Minatur ed., 1978) [hereinafter Diwan, LEGAL]; M. A. QURESHI, *MARRIAGE AND MATRIMONIAL REMEDIES: A UNIFORM CIVIL CODE FOR INDIA* 4 (1978).

¹⁵⁴ Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 109 (2000). Family law matters fall under the original jurisdiction of the Family Courts, which were established in 1984. See Family Courts Act, 1984 explanation (establishing “Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.”). Appeals from Family Courts are taken to the High court

leads, at times, to some difficulties about how to interpret changes within various systems of law and whether such changes should (and must) come from the civil court systems itself or from within the various religious communities to whom the law applies.¹⁵⁵ Further, because customary religious law is permitted to supplement (though not to contradict) statutory law,¹⁵⁶ divorce may occur at times without judicial intervention at all. This is especially true of Muslim divorces,¹⁵⁷ but also holds for Hindu divorces as well.¹⁵⁸

Religious affiliation is the prime determinant in choosing the governing law for marriage and divorce issues. But, as discussed below, religious *belief* is not the prime governing factor for choice of personal law. Rather, it is membership in a particular “religious” community by birth – or entrance into that community by conversion – that is decisive.¹⁵⁹ So long as the individual does not denounce the religion outright and take up another, generally that person will be ruled by the personal law of the community to which she belongs.¹⁶⁰ And because the personal laws are national in scope in India (rather than varying state by state, as is the case in the United States),¹⁶¹ the choice of law determination is the prime jurisdictional decision.

The practice of having multiple contiguous systems of personal laws originates with British colonial rule. In the late 18th century the British authorities established a general territorial law, with a common law type system of courts, but retained “enclaves of personal law.”¹⁶² For example, the Bengal regulation of 1772 provided that with regard to

of each state. Family Courts Act § 19(1).

¹⁵⁵ The Shah Bano case, discussed *infra* notes 225-229 and accompanying text, is a good example of this.

¹⁵⁶ See PARAS DIWAN, FAMILY LAW: LAW OF MARRIAGE AND DIVORCE IN INDIA 4 (1983) [hereinafter DIWAN, FAMILY LAW]; Diwan, LEGAL, *supra* note 153, at 634-35.

¹⁵⁷ DIWAN, FAMILY LAW, *supra* note 156, at 159. The only codified portion of Muslim divorce law in India concerns petitions of divorce brought by the wife.

¹⁵⁸ DIWAN, FAMILY LAW, *supra* note 156, at 163-65 (Some of the customary grounds for divorce include renunciation, abandonment, repudiation, immorality, unchastity, adultery, conversion, and mutual consent.).

¹⁵⁹ See DIWAN, FAMILY LAW, *supra* note 156 at 3, 164.

¹⁶⁰ *Id.*

¹⁶¹ Diwan, LEGAL, *supra* note 153, at 634.

¹⁶² Galanter & Krishnan, *supra* note 154, at 106. See also Louise Harmon & Eileen Kaufman, *Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservation for Women on Rural Panchayats*, 19 BERKELEY WOMEN'S L.J. 32, 43 (2004).

“inheritance, marriage, caste, and other religious usages, or institutions” the courts should apply “the laws of the Koran with respect to the Mahometans, and those of the Shaster with respect to the Hindus.”¹⁶³ This policy of retaining separate systems of personal law continued with few exceptions up until Indian independence. The shaping of the bodies of law was largely left to the religious groups themselves, with a few exceptions to regulate practices outside the norm by British standards (such as against child marriage, against immolation of widows (Sati), permitting remarriage of widows, and the like).¹⁶⁴ But these bodies of “religious” law were not administered by religious authorities and courts, but rather by the civil authorities: Common law judges ruled on matters of Hindu and Muslim law, although the courts had the assistance of native law officers to advise on the nuances of the religious laws.¹⁶⁵ Beginning in 1860, though, the religious advisors were abolished and the judges took exclusive control in applying the personal law. This in turn began to render the “religious” personal laws less distinctly religious and instead more reflective of the views and interpretations of the common law judges themselves – such that one commentator has described the development of new bodies of “Anglo-Hindu” and “Anglo-Muslim” law.¹⁶⁶

Various reforms were undertaken within the 20th century to conform Indian personal law to more modern standards and understandings of human rights. Many of these reforms originated from *within* the various religious communities themselves – and were thereafter reified in law by the governing legislative authority.¹⁶⁷ A prime example of this modernization is the reform and unification of Hindu law in the mid-1950’s, leading to adoption of what is now known as the Hindu

¹⁶³ Bengal Regulation of 1772. Galanter and Krishnan note that the language was amended by 1793 to read “Mohamadan Laws” and “Hindu Laws.” Galanter & Krishnan, *supra* note 154, at 106 n.23 (citing to Regulation IV of 1793, sec. 15.).

¹⁶⁴ Harmon & Kaufman, *supra* note 162, at 44. Laws permitting widow remarriage and civil marriage were available as an alternative to Hindu law, but few chose to opt out of the personal law system. *Id.*; see also Marc Galanter, *Remarks on Family Law and Social Change in India in CHINESE FAMILY LAW AND SOCIAL CHANGE IN HISTORICAL AND COMPARATIVE PERSPECTIVE* 492, 494 (David C. Buxbaum ed., 1978).

¹⁶⁵ Galanter & Krishnan, *supra* note 154, at 106.

¹⁶⁶ *Id.* at 106-07. See also Martha C. Nussbaum, *International Human Rights Law in Practice: India: Implementing Sex Equality Through Law*, 2 CHI. J. INT’L L. 35, 40-47 (2001) (discussing the possibility for reform within bodies of religious law in India).

¹⁶⁷ See, e.g., Nussbaum, *supra* note 166, at 41-47 (discussing various reforms within Hindu, Christian, and Muslim personal law).

Code.¹⁶⁸ The changes included (among others) the abolition of polygamy, the availability of divorce, and a more equitable distribution of property rights between genders.¹⁶⁹ While this provided unification of Hindu law, it also rendered the law applicable to “Hindus” more of a modern civil law rather than traditional religious Hindu law.¹⁷⁰

Just prior to this reform of Hindu Law, India’s new constitution had come into force in 1950. Therein, there was (and still is) a hortatory provision directing the state to “endeavor to secure for the citizens a uniform civil code throughout the territory of India.”¹⁷¹ This provision “appears to envision the dissolution of the personal law system in favor of a Uniform Civil [personal] Code,”¹⁷² but there has been very little movement to date in this direction. In part, this lack of movement toward a unified personal law system lies in the fact that a uniform code would necessarily mean that abolition of the various personal laws set forth below; this would especially anger the minority Muslim community because it would alter the unique characteristics of that religious group.¹⁷³ The wisdom of unification is much debated both within academic literature¹⁷⁴ as well as within politics.¹⁷⁵ However, there is also strong

¹⁶⁸ See MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH*, ch 3 (2000); see also Galanter & Krishnan, *supra* note 154, at 107-08; Galanter, *supra* note 164, *passim*.

¹⁶⁹ See Baird, *supra* note 149, at 345.

¹⁷⁰ See, e.g., Baird, *supra* note 149, at 345 (“[The Hindu Code] bills provide uniformity in family matters to legally classed ‘Hindus’; they also modernize the Hindu Code, not on the basis of sacred texts, but on the basis of rationality, modernity, social needs, and even world opinion.”).

¹⁷¹ India Const. art. 44. “Uniform civil code for the citizens. – The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.”

¹⁷² Galanter & Krishnan, *supra* note 154, at 107.

¹⁷³ See, e.g., Galanter, *supra* note 164, at 494; Nussbaum, *supra* note 166, at 43-47; Baird, *supra* note 149, at 344-46.

¹⁷⁴ See, e.g., Nussbaum, *supra* note 166, at 46 (“The [current] system of personal laws has many severe problems.”); Ruma Pal, *Religious Minorities and the Law in RELIGION AND PERSONAL LAW IN SECULAR INDIA* 24, 32-33 (Gerald James Larson ed., 2001), (“While laws may be derived from religion, they do not form part of it, and the need for a uniform civil code cannot be overstated.”); Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women’s Rights in India*, 23 *BERKELEY J. INT’L L.* 201, 209 (2005) (“India’s framework of separate personal laws for various religious communities is ... a good example of how a multiculturalist approach to law and governance in India has resulted in undermining women’s rights.”).

¹⁷⁵ For example, the Hindu-nationalist Bharatiya Janata Party (BJP) has used calls for a

opposition to a uniform code because the minority religious groups fear the new law would only represent the traditions of the majority Hindu population.¹⁷⁶ In any event, the current legal structure in place continues to hold five distinct categories of personal law: Hindu, Muslim, Christian, Parsi, and a residual category of secular law.¹⁷⁷

Hinduism. The personal law applicable to Hindus is easily the most widely-applied, for over 82% of India's population of 1.08 billion self-identifies as Hindu (if Sikhs are included).¹⁷⁸ The Hindu Code applies to all such persons, as it is the governing law for any person who is Hindu, Buddhist, Jaina, or Sikh by religion.¹⁷⁹ Hindu law also explicitly applies to "any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion."¹⁸⁰ By default, then, Hindu law applies to all Indians who are not Muslim, Christian, Parsi, or Jew – demonstrating that the term "Hindu" has largely lost its religious connotation for purposes of modern Indian Hindu

UCC (or for a reform of Muslim personal law) as part of its platform in recent national elections, in order to make the laws fit the "constitutional guarantees of equality and dignity of women." See The Times of India, "BJP favours reforms in Muslim laws" June 29, 2005, <http://timesofindia.indiatimes.com/articleshow/1154979.cms>; Galanter & Krishnan, *supra* note 154, at 110-11. But there is a strong resistance to the current unification of personal law, for fear that the resulting legislative enactment would simply be . See, e.g., *id.*; Nussbaum, *supra* note 166, at 46 ("In this day of growing Hindu fundamentalism, Uniform Code really does mean Hindu Code, and the resistance of the Muslim minority to losing its legal system is comprehensible.").

¹⁷⁶ Galanter & Krishnan, *supra* note 154, at 110.

¹⁷⁷ As noted below, "Hindu law" technically applies as a default (or residual) category for all those who do not fall under a different personal law and do not choose to subject themselves to the Special Marriage Act. Further, discussion of the applicable personal laws below is necessarily abbreviated and typically omits discussion of separation, maintenance, child custody, and others, in order to focus more directly on laws of marriage and absolute divorce.

¹⁷⁸ All population numbers and religious percentages are from the CIA World Factbook, www.cia.gov/cia/publications/factbook/geos/in.html.

¹⁷⁹ Hindu Marriage Act § 2 (1955). The following are considered Hindu, Buddhist, Jaina, or Sikh by religion: (a) any child both of whose parents are Hindu, Buddhist, Jaina, or Sikh by religion, (b) any child who has one Hindu, Buddhist, Jaina, or Sikh parent and was brought up as a member of that community, or (c) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina, or Sikh religion. Hindu Marriage Act, 1955.

¹⁸⁰ Hindu Marriage Act § 2(c) (1955). See also DIWAN, FAMILY LAW, *supra* note 156, at 5; JASPAL SINGH, LAW OF MARRIAGE AND DIVORCE IN INDIA 3-6 (1983); Diwan, LEGAL, *supra* note 153, at 636-37.

personal law.¹⁸¹

The Hindu Marriage Act (1955) governs marriages. Polygamy is expressly disallowed, as it is rendered a penal offense punishable by jail time.¹⁸² Marriage between a Hindu and a non-Hindu is not permitted under this Act, but this prohibition is not as harsh as first appears for two reasons. First, since "Hindu" under the Act includes "any person who is Hindu, Buddhist, Jaina, or Sikh by religion,"¹⁸³ then any of those two individuals could marry under the Hindu Marriage Act. Second, a Hindu and non-Hindu could marry under the secular Special Marriage Act.¹⁸⁴ Also, the Hindu Marriage Act attempted to abolish child marriage by establishing the legal age marriage at 21 years for males and 18 years for females.¹⁸⁵ Even so, child marriage is considered neither void nor voidable (that is, the resulting marriage is still valid), but penalties such as jail time or a fine may attach to persons who marry underage.¹⁸⁶ Couples seeking to enter a valid Hindu marriage may do so by either: (1) choosing to perform the Shastric rite and ceremonies recognized by Hindu law; or (2) performing customary formalities which prevail in the caste, community, or tribe to which one (or both) parties belong.¹⁸⁷ Once validly entered through one of those two methods, there is no national requirement for the Hindu marriage to be registered with the civil authorities.¹⁸⁸

¹⁸¹ Diwan, *LEGAL*, *supra* note 153, at 636-37. There is also the issue of the Special Marriage Act, whereby individuals can proceed under secular civil law in some circumstances. *See infra* notes 258-273 and accompanying text.

¹⁸² Hindu Marriage Act § 5(i) (1955). *See also* DIWAN, *FAMILY LAW*, *supra* note 156, at 56 (stating that prior to 1955 Hindu men were permitted to have an unlimited number of wives); QURESHI, *supra* note 153, at 50.

¹⁸³ Hindu Marriage Act § 2 (1955).

¹⁸⁴ *See infra* notes 258-259.

¹⁸⁵ Hindu Marriage Act § 5(iii). The Child Marriage Restraint Act of 1929 first introduced age provisions, setting minimum ages at 18 for males and 15 for females. By Amendment in 1978, the ages were set to their present state. *See* DIWAN, *FAMILY LAW*, *supra* note 156, at 56-57.

¹⁸⁶ DIWAN, *FAMILY LAW*, *supra* note 156, at 57. *See also* PARAS DIWAN, *LAW OF MARRIAGE AND DIVORCE* 126-27 (4th ed. 2002).

¹⁸⁷ Hindu Marriage Act § 7 (1955). *See also* DIWAN, *FAMILY LAW*, *supra* note 156, at 64 (noting that the customary ceremonies be both ancient and obligatory, and need only prevail on the side of one of the adherents (and not necessarily both)); B. P. BERI, *LAW OF MARRIAGE AND DIVORCE IN INDIA*, 2D ED. 23 (1989).

¹⁸⁸ Hindu Marriage Act § 8 (1955). *See also* DIWAN, *FAMILY LAW*, *supra* note 156, at 66 (stating that even where state governments have made registration compulsory, failure to

Prior to the 1955, Hindu law rendered marriage indissoluble, leaving no possibility for divorce.¹⁸⁹ The Act introduced the seminal change of the availability of judicial divorce¹⁹⁰ – which, when coupled with the alteration of male-only inheritance rules, the changing of the age of capacity for marriage, and, especially, the abolition of polygamy, left Indian Hindu personal law in a quite different form from its previous condition as truly religious law.¹⁹¹ In its present form (as amended in 1976), the Act provides for judicial decree of divorce based on either fault grounds or mutual consent.¹⁹² Under the fault theory of divorce, either husband or wife may sue for divorce based on adultery, cruelty, desertion for a period of not less than two years, conversion away from Hinduism, unsound mind/mental disorder, leprosy, venereal disease in a communicable form, renunciation of the world, or not heard of as alive for seven years.¹⁹³ Either party may also seek a decree of divorce on the ground that there has been no resumption of cohabitation for one year or more after a decree for judicial separation or no restitution of conjugal rights for one year or more after a decree for restitution of conjugal rights.¹⁹⁴ There are also some limited special grounds upon which only a wife may seek divorce.¹⁹⁵

register does not effect the validity of the marriage but only subjects the person to a nominal fine.)

¹⁸⁹ See Galanter & Krishnan, *supra* note 154, at 108; Nussbaum, *supra* note 166, at 43.

¹⁹⁰ Hindu Marriage Act, § 13 (1955). Prior to passage of the Hindu Marriage Act there were certain areas of India that had customary rules regarding divorce within the Hindu religion, but the Hindu Marriage Act was the first national legislation regulating and permitting divorce for Hindus in India generally. See Sampak P. Garg, *Law and Religion: The Divorce Systems of India*, 6 TULSA J. COMP. & INT'L L. 1, 16 & n. 173 (1998).

¹⁹¹ See Galanter & Krishnan, *supra* note 154, at 108 (“Very few rules remained with a specifically religious foundation.”); Nussbaum, *supra* note 166, at 43.

¹⁹² Hindu Marriage Act §§ 13, 13B (1955) (amended 1976); see also Garg, *supra* note 190, at 16.

¹⁹³ Hindu Marriage Act § 13(1)(i)-(vii) (1955); see also Garg, *supra* note 190, at 16-18.

¹⁹⁴ Hindu Marriage Act § 13(1A)(i)-(ii) (1955).

¹⁹⁵ These include: include: if a previous spouse of the husband was alive at the time of a marriage conducted before the commencement of the Hindu Marriage Act; the husband has been guilty of rape, sodomy, or bestiality, since the solemnization of the marriage; there has been no cohabitation for one year after an order of maintenance is passed under the Hindu Maintenance and Adoptions Act or the Criminal Procedure Code; or, if the marriage was solemnized before the wife attained the age of fifteen years, and she repudiated the marriage before attaining the age of eighteen years. Hindu Marriage Act § 13(2)(1)-(iv) (1955).

The couple may also agree to divorce and seek a judicial decree based upon mutual consent. They must allege that “they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.”¹⁹⁶ In such cases, a court must act between six and eighteen months after the petition is filed, presumably to give the couple a chance to reconcile and withdraw the petition.¹⁹⁷

Finally, the Hindu Marriage Act provides an additional time restriction on judicial divorce – namely that couples may not seek a judicial decree of divorce within one year of marriage.¹⁹⁸ The law provides exception by permitting a petition within the first year of marriage if the case is “one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent.”¹⁹⁹

Islam. Muslims make up the largest minority group in India, about 13.4%.²⁰⁰ In personal law matters, there are three main addressing specific areas of law: the Muslim Personal Law (Shariat) Application Act (1937), the Dissolution of Muslim Marriages Act (1939), and the Muslim Women (Protection of Rights on Divorce) Act (1986). By their terms, these laws are the “rule of decision” in all cases “where the parties are Muslim.”²⁰¹ Unlike Hindu law in India, much of Islamic law (*Shari’ah*)²⁰² in India

¹⁹⁶ Hindu Marriage Act § 13B(1) (1955); *see also* Garg, *supra* note 190, at 18.

¹⁹⁷ Hindu Marriage Act § 13B(2) (1955); *see also* Garg, *supra* note 190, at 18.

¹⁹⁸ Hindu Marriage Act § 14(1) (1955).

¹⁹⁹ Hindu Marriage Act § 14(1) (1955).

²⁰⁰ CIA World Factbook.

²⁰¹ Muslim Personal Law (Shariat) Application Act § 2 (1937). The full text of the applicability provision reads as follows:

Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religion endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

Id.

²⁰² The phrase “Islamic law” has a host of meanings, which are beyond the scope of the discussion herein. For a more detailed discussion of Islamic law respecting marriage and divorce matters generally (and not simply confined to the Indian context), *see* DAWOUD

remains uncodified, and instead proceeds from case law and precedent.²⁰³ The definition of who is a Muslim in India for purposes of the personal law derives from such case law: Muslims are those who are born to Muslim parents, or those who convert to Islam (either by profession of faith or by a formal conversion ceremony).²⁰⁴

Marriage under the Muslim law is "a contract which has for its object procreation and legalizing of children."²⁰⁵ The marriage is generally accomplished by a proposal and acceptance made at the same meeting.²⁰⁶ Polygamy is still permitted under the Muslim personal law in India, with the husband allowed to take up to four wives at a time.²⁰⁷ (This presents a potential problem at times within India, for no other religious law allows polygamy any longer and men may be attracted to Islam simply to be able to practice polygamy.)²⁰⁸ However, Islam itself

SUDQI EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* (1996); DAWOUD S. EL ALAMI, *THE MARRIAGE CONTRACT IN ISLAMIC LAW IN THE SHARI'AH AND PERSONAL STATUS LAWS OF EGYPT AND MOROCCO* (1992); JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* (1990); Nichols, *supra* note 4, at 982-83.

²⁰³ See Garg, *supra* note 190, at 3.

²⁰⁴ See DIWAN, *FAMILY LAW*, *supra* note 156, at 7-9, and cases cited therein. Under Indian law, if a child is born to one Hindu parent and one Muslim parent, the personal law of that child will be determined according to which faith the child is "brought up." *Id.* at 8.

²⁰⁵ BERI, *supra* note 187, at 41 citation omitted).

²⁰⁶ See *id.* at 42. See also Nichols, *supra* note 4, at 982 and sources cited therein.

²⁰⁷ See Nussbaum, *supra* note 166, at 44 (stating that polygamy is a legal option for Muslim men, but is exercised in only about five percent of marriages). See also QURESHI, *supra* note 153, at 51-55.

²⁰⁸ Indian courts have tended to hold that if one spouse changes religion, then the marriage is still ruled by the personal law under which the couple was originally married. "[N]o spouse can, on converting to another religion, impose his new religion and new law on the other spouse." DIWAN, *FAMILY LAW*, *supra* note 156, at 24-25. More directly on point, In the Supreme Court case of *Lily Thomas v. Union of India*, decided May 5, 2000, the court considered the question of whether a second marriage entered into by a convert to Islam would be valid where the individual merely converted with a view to enter into a second marriage. Justice S Sagir Ahmad wrote in paragraph 33, "So long as that [Hindu] marriage subsists, another marriage cannot be performed, not even under any other personal law, and on such marriage being performed, the person would be liable to be prosecuted for the offence under § 494 IPC." And, in paragraph 61, Justice R. P. Sethi wrote, "The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void on that ground also and attract the provisions of § 494 IPC." *Lily Thomas V. Union of India & ORS and other Appeals*, 2 LRI 623 (Sup. Ct. of India, May 5, 2000).

limits the practice of polygamy so that a man may only marry more than once if he can treat all his wives with equity, otherwise, he may only take one wife.²⁰⁹ Muslim men are allowed to marry non-Muslim women, but Muslim women may only marry within their faith under Muslim personal law.²¹⁰

Muslim divorce in India can be divided into three categories: judicial divorce, divorce by mutual agreement, and non-judicial unilateral divorce.²¹¹ Muslim marriages may also be dissolved as the result of apostasy from Islam. If the husband converts away from Islam, the marriage is automatically dissolved, but if the wife converts away, she must still sue for divorce from her husband because of the Dissolution of Muslim Marriages Act.²¹²

Judicial divorce, governed by the Dissolution of Muslim Marriages Act, requires recourse to the civil courts and is available only to females.²¹³ Before passage of the Act, a Muslim wife in India had virtually no right of divorce.²¹⁴ With the change in the law, there are now several enumerated grounds upon which Muslim women may seek a judicial decree of divorce, including: unknown whereabouts of the husband; the husband's failure to provide maintenance; imprisonment of the husband; the husband's failure to perform, without reasonable cause, his marital obligations; impotence, insanity, or severe disease of the husband; underage marriage

²⁰⁹ See Qur'an 4:3; see also Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari'a in a Modern World*, 19 AM. U. INT'L L. REV. 485, 520 (2004).

²¹⁰ See NASIR, *supra* note 202, at 27-28.

²¹¹ See Diwan, *LEGAL*, *supra* note 153, at 655; Garg, *supra* note 190, at 7. Further, because marriage is a contract under Islamic law, only *valid* marriage contracts may end in divorce. If the marriage contract was not valid for one of a number of reasons, the parties must separate either on their own or by court order (effectively annulling the marriage). See NASIR, *supra* note 202, at 70, 95-96; Nichols, *supra* note 4, at 982 (listing possible reasons a marriage might be invalidly formed).

²¹² See Dissolution of Muslim Marriages Act § 4 (1939) ("The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage...."); Diwan, *LEGAL*, *supra* note 153, at 657; NASIR (3D ED.), *supra* note 202, at 134.

²¹³ See Dissolution of Muslim Marriages Act.

²¹⁴ See Nussbaum, *supra* note 166, at 43; JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 76 (2nd ed. 2001) ("The real purpose of the *Dissolution of Muslim Marriages Act*, like that of comparable Egyptian legislation, was to introduce reforms that would improve that status of women and grant them some judicial relief by establishing additional grounds for divorce, most of which were not recognized by Hanafi law, the official law followed by the courts of the subcontinent...").

cruelty;²¹⁵ or other grounds recognized under Muslim law.²¹⁶ One notable outcome is that by civilly instituting these methods of divorce for women, the government in India has somewhat circumvented the choice of the religious adherents regarding what “Islamic law” means for them.²¹⁷

Although not codified, parties in a Muslim marriage may also divorce by mutual consent.²¹⁸ “Roughly speaking, [divorce by mutual agreement] is known as *khul’* where the aversion is on the side of the wife, and *mubara’a* where this is mutual.”²¹⁹ This kind of mutual agreement rises to legal status through a form of offer and acceptance, usually through the wife paying the husband the amount of her dower.²²⁰ In India, the court need not be involved in this type of divorce if amicably undertaken by the parties.

The third kind of divorce is non-judicial, unilateral divorce – which is a right reserved for husbands under Muslim personal law. This repudiation of the marriage by the husband is called *talaq* (“repudiation”).²²¹ *Talaq* comes in several forms, but all that is required is that the husband be of majority age and sane, and that he speak words that indicate an intention to divorce.²²² There are approved forms of *talaq* which give the husband a period of time during which he may withdraw his repudiation, and the customary form which requires only that the husband say, “I divorce thee,” three times and is immediately effective – without involvement of any civil authority.²²³ The husband may generally delegate his unilateral right of divorce to any other third party,

²¹⁵ Cruelty is defined in some detail in the law, including lack of equitable treatment of multiple wives, physical mistreatment, immorality of the husband, interference in the wife’s property rights, or disruption in the wife’s religious observance. Dissolution of Muslim Marriages Act § 2(viii)(a)-(f) (1939).

²¹⁶ Dissolution of Muslim Marriages Act § 2(i)-(ix) (1939).

²¹⁷ See Nussbaum, *supra* note 166, at 43 (noting that the state effectively instituted the *Maliki* school of interpretation rather than the *Hanafi* school). Prior to the passage of the 1939 law, many Muslim women were converting to other religions in order to obtain the right to divorce. *Id.* Thus, more leeway for women to divorce was introduced in the Muslim law itself, and Muslim women were simultaneously disallowed to divorce solely for reasons of their own conversion.

²¹⁸ See DIWAN, LAW OF MARRIAGE AND DIVORCE (4TH ED.), *supra* note 186, at 587-92.

²¹⁹ EL ALAMI & HINCHCLIFFE, *supra* note 202, at 27. See also NASIR, *supra* note 202, at 78-81.

²²⁰ See EL ALAMI & HINCHCLIFFE, *supra* note 202, at 27-28; ESPOSITO, *supra* note 214, at 32.

²²¹ See Garg, *supra* note 190, at 7; Nichols, *supra* note 4, at 983-84..

²²² See ESPOSITO, *supra* note 214, at 29; Garg, *supra* note 190, at 8-9.

²²³ See ESPOSITO, *supra* note 214, at 30-31; Garg, *supra* note 190, at 8.

including the wife.²²⁴

Finally, India has addressed one other aspect of Muslim marriage in the Muslim Women (Protection of Rights on Divorce) Act, 1986. This law was passed by the legislature in response to the famous *Shah Bano* case.²²⁵ The case arose after sixty-four-year-old Shah Bano was divorced by her husband of forty-three years (who happened to be a prosperous lawyer) through his invocation of triple *talaq*.²²⁶ Under traditional Islamic law, women divorced this way were not entitled to maintenance, but only the return of the dowry from the outset of marriage. This had led to regular and severe underfunding of Muslim women, and so women had pursued additional maintenance under section 25 of the Indian Criminal Code, which requires men “of adequate means” to provide for their ex-wives.²²⁷ Shah Bano sued her ex-husband for maintenance – as many other women had successfully done before her – and she won an award of maintenance in the lower court. On appeal the Supreme Court affirmed and awarded her even more maintenance, in an opinion that criticized Islamic practices. Thus, the justices not only applied the Criminal Code over the personal laws, but stated that the finding was consistent with the *Quran*.²²⁸ This opinion set off a storm of protest within the Muslim community – because they took it as a sign that the Muslim Personal Law was being weakened by judicial re-interpretation. Muslim leaders therefore lobbied the legislature and secured passage of the Muslim Women (Protection of Rights on Divorce) Act in 1986.²²⁹ The Act effectuates a legislative reversal of *Shah Bano*, by depriving all Muslim women (but no others) of the right to seek maintenance after Muslim divorce under the criminal code, and putting the responsibility for maintenance on the wife’s family.

²²⁴ See EL ALAMI & HINCHCLIFFE, *supra* note 202, at 25.

²²⁵ Mohammed Ahmed Khan v. Shah Bano Begum & Others, 72 AIR SC 945 (1985).

²²⁶ Commentary abounds regarding the *Shah Bano* case and its aftermath. See, e.g., GERALD JAMES LARSON, INDIA’S AGONY OVER RELIGION 256-61 (1995); SHACHAR, *supra* note 14, at 81-83; ESPOSITO, *supra* note 214, at 114-16; Nussbaum, *supra* note 166, at 44-45; Galanter & Krishnan, *supra* note 154, at 111-14; Pal, *supra* note 174, at 31-32; Harmon & Kaufman, *supra* note 162, at 49-50.

²²⁷ See Nussbaum, *supra* note 166, at 44.

²²⁸ Shah Bano, 72 AIR SC 945, 946-47 (stating, among other things, that the “fatal point in Islam is the degradation of woman”).

²²⁹ Muslim Women (Protection of Rights on Divorce) Act (1986).

Christianity. Christians constitute a smaller minority (2.3%) of the Indian population.²³⁰ The laws governing Christian marriage and divorce are relatively antiquated, even when compared to the other religions, as the laws have not been substantially updated since the late 19th century.

The Indian Christian Marriage Act (1872) – which expressly applies to “persons professing the Christian religion”²³¹ – provides for monogamous marriages between two Christians (or between one Christian and one non-Christian).²³² The engaged couple must be the age of capacity: 21 for males and 18 for females.²³³ Marriage is treated primarily as a contract between the parties, with attendant formalities required.²³⁴ Once the officiant has solemnized the marriage, it must be registered with the civil authorities to be binding.²³⁵

The law governing Indian Christian divorce has given commentators more pause than the marriage law.²³⁶ But it has just recently been amended (2001) to implement a number of modernizing changes.²³⁷ Prior to amendment, the law governing Christian marriage (the Indian Divorce Act (1869)) permitted divorce only in cases of “hard fault.”²³⁸ Men were allowed to institute divorce proceedings only for adultery, and women were allowed institute proceedings only for adultery coupled with some other flaw.²³⁹ Under the newer amendments,

²³⁰ CIA World Factbook.

²³¹ Indian Christian Marriage Act, preamble (1872).

²³² Indian Christian Marriage Act §§ 4, 60(2) (1872); WILLIAM E. PINTO, LAW OF MARRIAGE AND MATRIMONIAL RELIEFS FOR CHRISTIANS IN INDIA 33-35 (1991); DIWAN, FAMILY LAW, *supra* note 156, at 35.

²³³ Indian Christian Marriage Act § 60(1) (1872).

²³⁴ *See* Indian Christian Marriage Act § 4 (1872); PINTO, *supra* note 232, at 34-35. But the sacramental aspect of Christian marital teaching is also recognized, for the Act also permits the clergy to administer the ceremony under solemn procedures, and then renders the marriage indissoluble except in cases of hard fault. *See id.*

²³⁵ *See, e.g.*, Indian Christian Marriage Act §§ 27ff. (1872); Diwan, LEGAL, *supra* note 153, at 646.

²³⁶ *See, e.g.*, Nussbaum, *supra* note 166, at 41-43.

²³⁷ *See* The Indian Divorce (Amendment) Act, 2001 (*reprinted in* DIWAN, LAW OF MARRIAGE AND DIVORCE, 4TH ED. at 1116).

²³⁸ *See* Indian Divorce Act (1869).

²³⁹ *See* Indian Divorce Act § 10 (1869) (allowing for a woman to petition for divorce alleging adultery coupled with: incest; bigamy; marriage with another woman; rape, sodomy, or bestiality; cruelty; or desertion). *See also* PINTO, *supra* note 232, at 133. Further, women could also petition for divorce if the “husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a

Christian marriages may be dissolved either unilaterally (for fault) or by mutual consent. Either the man or woman is now permitted to petition the court for dissolution on grounds of adultery, conversion by the spouse to another religion, insanity, desertion, cruelty, or other reasons.²⁴⁰ Additionally, women may petition for divorce if the husband has been guilty of rape, sodomy, or bestiality.²⁴¹ Or, importantly, the parties may jointly petition the court for a divorce if they have been living separate and apart for at least two years and “have mutually agreed that the marriage should be dissolved.”²⁴² Rather awkwardly, the revised Indian Divorce Act requires the parties to wait at least six months (but not longer than 18 months) after the submission of the mutual request for dissolution and then petition the court *again*; at that point, the court may pass a decree dissolving the marriage.²⁴³

Parsi (Zoroastrianism). Parsis (also known as members of the Zoroastrian faith) initially migrated to India in the 8th century because of persecution in their native Persia.²⁴⁴ They were initially governed by custom, which incorporated much of the local Hindu law and customs.²⁴⁵ In 1865 the first Parsi Marriage and Divorce Bill was passed, and it was subsequently modernized and replaced by the Parsi Marriage and Divorce Act of 1936.²⁴⁶ (Even so, custom continues to govern some minor matrimonial matters, including form of the ceremony.)²⁴⁷ Modern Indian Parsi personal law applies to all who are “Parsi Zoroastrians”²⁴⁸ – which typically include individuals who descended from Zoroastrian parents and profess the Zoroastrian faith.²⁴⁹

form of marriage with another woman.” Indian Divorce Act § 10 (1869)

²⁴⁰ The Indian Divorce (Amendment) Act § 10(1)(i)-(x)(2001).

²⁴¹ The Indian Divorce (Amendment) Act § 10(2) (2001).

²⁴² The Indian Divorce (Amendment) Act § 10A(1) (2001).

²⁴³ The Indian Divorce (Amendment) Act § 10A(2) (2001). *See also* Nussbaum, *supra* note 166, at 42-43.

²⁴⁴ *See* BERI, *supra* note 187, at 48.

²⁴⁵ *Id.* at 48-49.

²⁴⁶ *Id.* at 49.

²⁴⁷ *See* DIWAN, FAMILY LAW, *supra* note 156, at 5.

²⁴⁸ Parsi Marriage and Divorce Act § 2 (7) (1936).

²⁴⁹ *See* DIWAN, FAMILY LAW, *supra* note 156, at 9. Diwan notes that conversion into the Parsi faith is “against the usage and customs of the Parsis of India.” *Id.*

Under the Parsi Marriage and Divorce Act, Parsi marriage is required to be only between two Parsis, and must be monogamous.²⁵⁰ Like other faiths in India, the minimum age of marriage is twenty-one years for males and eighteen years for females.²⁵¹ Marriage is a contract, but it must be solemnized by a priest with the *ashirvad* ceremony in the presence of two additional witnesses.²⁵² The officiating priest must then submit a registration form to the civil authorities for the marriage to be considered valid.²⁵³

Fault-based divorce for Parsi marriages is statutorily permitted equally to the husband and wife.²⁵⁴ There are a host of permissible grounds on which a disaffected spouse may allege fault and thereby petition for divorce, including adultery, insanity, desertion, conversion by the other spouse to another religion, pre-existing pregnancy, and others.²⁵⁵ If the fault-based ground for divorce is adultery, then the Act specifies that “the person with whom the adultery is alleged to have been committed” shall be made a co-defendant (along with the allegedly adulterous spouse). If the husband is the plaintiff in such cases, the court has the option of ordering this third party to pay all or any part of the costs of the divorce proceeding.²⁵⁶

The Act also allows for divorce based on mutual consent of both parties. In such cases, the parties must allege that they have lived separately for at least one year, that they are not able to live together, and that they mutually agree that the marriage should be dissolved.²⁵⁷

Civil Marriage and Divorce. Beginning in 1872, India established a procedure for non-religious, civil marriage for anyone who declared they were not a professing Christian, Jew, Parsi, Hindu, Muslim, or Jain. In 1954, the Special Marriage Act was modernized to eliminate the need for any such foreswearing, and parties of any religion may be married under

²⁵⁰ Parsi Marriage and Divorce Act § 4 (1936).

²⁵¹ Parsi Marriage and Divorce Act § 3(c) (1936).

²⁵² Parsi Marriage and Divorce Act § 3(b) (1936); DIWAN, FAMILY LAW, *supra* note 156, at 34.

²⁵³ Parsi Marriage and Divorce Act § 6 (1936).

²⁵⁴ Parsi Marriage and Divorce Act § 32 (1936) (“Any married person may sue for divorce...”).

²⁵⁵ Parsi Marriage and Divorce Act §32(a)-(j) (1936);

²⁵⁶ Parsi Marriage and Divorce Act § 33 (1936).

²⁵⁷ Parsi Marriage and Divorce Act § 32B(1) (1936).

the Act.²⁵⁸ This is especially advantageous for two Indians of different faiths who wish to marry, in the event that neither of the applicable personal laws would allow marriage otherwise (e.g., a Hindu and a Muslim).²⁵⁹ Because civil marriage under the Act is effectively a civil contract,²⁶⁰ the parties must choose to so enter the marriage and must attend to minimum formalities – including publication of banns,²⁶¹ some form of solemnization before three witnesses and a Marriage Officer,²⁶² recitation of a binding declaration in the presence of those parties,²⁶³ and registration.²⁶⁴

One notable feature of the civil marriage statute is that it provides a method for already-married parties to change the applicable law to that of the Special Marriage Act.²⁶⁵ To do so, parties must jointly petition the relevant civil Marriage Officer, who will post a notice (akin to banns) for 30 days.²⁶⁶ If there are no objections – and the if the parties otherwise would have met the requirements for civil marriage – then the Marriage Officer registers the marriage and the parties thereafter operate under the structure and strictures of the Special Marriage Act rather than the previously applicable “religious” personal law.²⁶⁷

Parties married under the Special Marriage Act may seek a judicial divorce either unilaterally or by mutual consent. Unilaterally, either husband or wife may petition for divorce on a number of fault grounds, including adultery, desertion for two or more years, long term imprisonment of the spouse, cruelty, insanity, or other reasons.²⁶⁸ By later

²⁵⁸ Special Marriage Act (1954); QURESHI, *supra* note 153, at 4. There are some minimum requirements for parties to be eligible to enter a civil marriage, including that the parties must be of sound mind, capable of giving consent, be of minimum age (21 for males and 18 for females), not be within degrees of prohibited relation, and not have another living spouse. Special Marriage Act § 4(a)-(d) (1954); BERI, *supra* note 187, at 60-62. A lack of valid consent or bigamous marriage would render a civil marriage null and void. Special Marriage Act § 24 (1954)

²⁵⁹ Diwan, LEGAL, *supra* note 156, at 644; QURESHI, *supra* note 153, at 4.

²⁶⁰ DIWAN, FAMILY LAW, *supra* note 156, at 35.

²⁶¹ Special Marriage Act §§ 5-10, 14 (1954).

²⁶² Special Marriage Act § 11 (1954).

²⁶³ Special Marriage Act § 12 (1954). The parties must declare the following: “I, (A), take thee (B), to be my lawful wedded wife/husband.” *Id.*

²⁶⁴ Special Marriage Act § 13 (1954).

²⁶⁵ Special Marriage Act §§ 15-18 (1954).

²⁶⁶ Special Marriage Act § 16 (1954).

²⁶⁷ Special Marriage Act §§ 17-18 (1954).

²⁶⁸ Special Marriage Act § 27(1)(a)-(h) (1954).

amendment, there are now a few additional grounds available only to a complaining wife – such as rape, sodomy, or bestiality, or the non-cohabitation within one year after the wife has been awarded maintenance.²⁶⁹ Further, either husband or wife may individually petition for divorce under the theory that the marriage has broken down if there has been no resumption of cohabitation or restitution of conjugal rights one year after an order for the resumption or restitution.²⁷⁰

There is also provision under the Special Marriage Act for couples jointly to petition the court for divorce by mutual consent.²⁷¹ The attestations and applicable waiting period before the court will act upon the petition mirror those in the amended Indian Divorce Act (applicable to Christian Marriages).²⁷² There is also a requirement, akin to that in Hindu Marriage Law, that a court will not grant a divorce before the completion of one year of marriage so that the couple may have a chance to reconcile.²⁷³

B. Kenya

Another example that may be adduced – albeit in a more cursory fashion – is Kenya, another former British colony. Kenya's former colonial status is significant (as it was for India) because it has led to the admixture of pre-existing customary laws with Western-style statutes and common law introduced by the British. The combination of these two factors, coupled with the religious diversity of the nation of Kenya both now and in colonial times, has produced a multi-tiered system of personal law.

There are four basic systems of statutory marriage in Kenya: Civil Marriage,²⁷⁴ African Christian Marriage,²⁷⁵ Muslim Law,²⁷⁶ and Hindu Law.²⁷⁷ Further, customary marriages are expressly recognized, although

²⁶⁹ Special Marriage Act § 27(1A)(i)-(ii) (1976).

²⁷⁰ Special Marriage Act § 27(2)(i)-(ii) (1970); Diwan, *LEGAL*, *supra* note 153, at 655.

²⁷¹ Special Marriage Act § 28 (1954).

²⁷² *Cf. supra* note 243 and accompanying text.

²⁷³ Special Marriage Act § 29.

²⁷⁴ Marriage Ordinance, Laws of Kenya, CAP 150 (1960).

²⁷⁵ African Christian Marriage and Divorce Ordinance, Laws of Kenya, CAP 151 (1962).

²⁷⁶ Mohammedan Marriage, Divorce and Succession Ordinance, Laws of Kenya, CAP 156 (1962).

²⁷⁷ Hindu Marriage and Divorce Ordinance, Laws of Kenya CAP 157 (1962).

they are not codified.²⁷⁸

Jurisdiction over entrance into marriage varies according to the form of marriage entered. By way of example, Christian marriage may be celebrated either by a licensed minister or by a civil official – either of whom must then register the marriage with the proper state registry. But Muslim marriages fall exclusively to the province of general (uncodified) Islamic law, although Islamic marriages must be registered with the proper authority. And there is no particular form of marriage nor registration requirement at all for customary marriages.

Jurisdiction over divorce is not much cleaner. For those forms of marriage that are subject to the Matrimonial Causes Act (Civil, African Christian, and Hindu), the civil “High Court” is authorized to address these matters.²⁷⁹ For Muslim marriages, jurisdiction lies first religious tribunals with recourse also available in civil courts (which are supposed to apply Islamic law).²⁸⁰ And for customary marriages, there is also a mixture of

²⁷⁸ See Marriage Ordinance § 37 (“[N]othing in this Ordinance contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”). See also EUGENE COTRAN, *RESTATEMENT OF AFRICAN LAW: KENYA, VOL. 1 (THE LAW OF MARRIAGE AND DIVORCE)* 1 (1968). The most thorough recent rendering of the various Kenyan marriage laws lists six categories by adding a separate category for “Cohabitation” (or common law marriage). See Catherine A. Hardee, *Balancing Act: The Rights of Women and Cultural Minorities in Kenyan Marital Law*, 79 N.Y.U. L. REV. 712, 719-29 (2004). For more on Kenya, see Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Process*, 14 ST. THOMAS L. REV. 459 (2002); VICKY W. MUCAI-KATTAMBO ET AL., *LAW AND THE STATUS OF WOMEN IN KENYA* 5 (1995), available at <http://www.ielrc.org/content/a9501.pdf>; Mumbi Mathangani, *Women’s Rights in Kenya: A Review of Government Policy*, 8 HARV. HUM. RTS. J. 179, 183 (1995).

²⁷⁹ Matrimonial Causes Ordinance, Laws of Kenya, CAP 152 § 8 (1962). For grounds of separation, see Subordinate Courts (Separation and Maintenance Ordinance), Laws of Kenya, CAP 153 (1962).

²⁸⁰ Section 66 of the Kenyan Constitution provides for the establishment of Kadhi Courts (Islamic courts). Section 5 of the Kadhi Courts Act provides that “[a] Kadhi’s court shall have an exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal statute, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion...” The Mohammedan Marriage, Divorce and Succession Ordinance § 3(2) also grants jurisdiction over Muslim marriages to the Supreme Court. (“The Supreme Court and every judge thereof shall ... have jurisdiction to hear and determine all matrimonial causes and suits arising out of Mohammedan marriages...”). See also Ahmed Issack Hassan, *Working Document for the Constitution of Kenya Review Commission on the Kadhi’s Courts, Chief Kadhi and Kadhis*,

availability of tribal authority and civil authority.²⁸¹

While a full detailing of the provisions of the various forms of marriage is not necessary here,²⁸² a summary of the salient features of the various personal laws is still quite instructive.

Civil Marriage/Divorce and Christianity. Marriage under Kenya's Marriage Ordinance is "open to all persons irrespective of race or religion."²⁸³ Civil marriage is monogamous, and entrants must meet certain requirements such as capacity and non-affinity.²⁸⁴ Further, there are other procedures such as banns, a proper ceremony (with two witnesses and an officiant, held at the proper time of day with proper vows), and registration.²⁸⁵ Somewhat curiously, civil marriages may occur either in the registrar's office or in a church, and may be officiated either by a civil official or a minister.²⁸⁶ Couples married under the general civil marriage statute may divorce only for fault reasons, enumerated under the Matrimonial Causes Act. These include adultery, desertion, cruelty, insanity, or rape/sodomy/bestiality.²⁸⁷

African Christian Marriage is very closely related to civil marriage. It is only available to couples where at least one party is an African and a Christian; non-Christian couples must use some other religious law, customary law, or avail themselves of the regular civil marriage procedures.²⁸⁸ There is a separate governing statute regulating African Christian marriage, but effect of the statute is simply to relax a number of required formalities (such as longer registration periods, easier preliminary notice requirements, and the like).²⁸⁹ And there is no separate statute for

available at <http://www.kenyaconstitution.org/docs/07d046.htm> (last visited Oct. 14, 2005).

²⁸¹ See *infra* notes 307-309 and accompanying text.

²⁸² For a more fulsome explanation of the various forms of personal law in Kenya, see Hardee, *supra* note 278, at 719-29.

²⁸³ COTRAN, *supra* note 278, at 1.

²⁸⁴ Marriage Ordinance, § 11.

²⁸⁵ Marriage Ordinance, §§ 3-18, 29, 32-34.

²⁸⁶ Marriage Ordinance, §§ 3-7.

²⁸⁷ Matrimonial Causes Ordinance, Laws of Kenya, CAP 152 Part I (1962). For grounds of separation and jurisdiction therein, see Subordinate Courts (Separation and Maintenance Ordinance), Laws of Kenya, CAP 153 (1962).

²⁸⁸ African Christian Marriage and Divorce Ordinance § 3(1).

²⁸⁹ African Christian Marriage and Divorce Ordinance. See also Hardee, *supra* note 278, at 723-24 and sources cited therein.

divorce; the Matrimonial Causes Act still governs.²⁹⁰

There are two other distinguishing features of African Christian Marriage. First, it explicitly provides for the conversion of customary marriages into Christian marriages.²⁹¹ This is a unique feature of African Christian marriage, as no other marriages can be “converted” under statutory law.²⁹² Second, the Ordinance provides additional protection for widows by forbidding the practice of widow inheritance (wherein a widow automatically becomes the wife of her deceased husband’s brother) and mandating that the widow become the guardian of the children of the marriage so long as she remains a Christian.²⁹³

Islam. Marriage and divorce law for Kenyan Muslims is codified, but exhibits a great amount of deference to Islamic law generally.²⁹⁴ The Muslim Ordinance states that Muslim marriages are valid if contracted in accordance with Islamic law, and further states that questions of validity and divorce shall be governed by Islamic law. The Ordinance does *not* define the nature of that law, except to state that the burden of proof is on the party alleging that a practice is in accordance with Islamic law.²⁹⁵ This allows room for polygamy, non-judicial divorce, and other grounds of dissolution as defined by Islamic law generally.²⁹⁶ The Muslim Ordinance does require reporting by the parties to a Registrar of Mohammedan Marriages and Divorces.²⁹⁷ Jurisdiction in Muslim divorce cases lies both with Islamic courts (Kadhis courts) and civil courts – although the civil court is bound to apply Islamic law in relevant cases.²⁹⁸

Hinduism. Marriage and divorce for Hindus bears many similarities to African Christian Marriage and the civil Marriage Ordinance. The prime governing law is the Hindu Marriage and Divorce

²⁹⁰ COTRAN, *supra* note 278, at 2-4.

²⁹¹ African Christian Marriage and Divorce Ordinance § 9.

²⁹² *See* Hardee, *supra* note 278, at 724.

²⁹³ African Christian Marriage and Divorce Ordinance § 13; *see also* Hardee, *supra* note 278, at 724.

²⁹⁴ Mohammedan Marriage, Divorce and Succession Ordinance, Laws of Kenya, CAP. 156 (1962).

²⁹⁵ Mohammedan Marriage, Divorce and Succession Ordinance §§ 2-3.

²⁹⁶ *See infra* notes 211-224 and accompanying text (discussing Islamic law of divorce).

²⁹⁷ Mohammedan Marriage, Divorce and Succession Ordinance § 9.

²⁹⁸ *See supra* note 280.

Ordinance,²⁹⁹ which is “largely based on the Hindu Marriage Act of India.”³⁰⁰ The Ordinance expressly provides that marriages under that Ordinance may only be between two Hindus³⁰¹ – thereby requiring marriages to be monogamous (and consequently disallowing the traditional Hindu practice of polygamy).³⁰² The Hindu Ordinance allows for some variation and allowance to custom regarding marriage formation, and similarly provides regulation regarding entrance to marriage (capacity, registration, and the like).³⁰³

Divorce under the Hindu Ordinance is effectively limited to judicial divorce for cause.³⁰⁴ Like African Christian Marriage, it operates under the Matrimonial Causes Ordinance (and also the Subordinate Courts (Separation and Maintenance) Ordinance provided there is no conflict with the Hindu Ordinance.³⁰⁵ The Hindu Ordinance adds three additional fault grounds for divorce: religious conversion by the spouse; the spouse’s entering a religious order; or judicial separation for two or more years.³⁰⁶

Customary Law. Outside of the statutory systems of marriage and divorce described immediately above, Kenya’s laws expressly provide for recognition of traditional, customary (or tribal) marriages.³⁰⁷ The laws regarding customary marriage and divorce vary from tribe to tribe, with jurisdiction generally exercised by the Elders of community. Customary marriage is potentially polygamous, depending the custom of any particular tribe.³⁰⁸ Of further interest is that when customary marriages break down, divorce matters are typically first heard by the tribal Elders. If the dispute rises to the level of the civil judicial system, the civil courts

²⁹⁹ Hindu Marriage and Divorce Ordinance, Laws of Kenya, CAP 157 (1962).

³⁰⁰ COTRAN, *supra* note 278, at 5.

³⁰¹ Hindu Marriage and Divorce Ordinance § 2.

³⁰² Hindu Marriage and Divorce Ordinance §§ 3(a), 7(3).

³⁰³ Hindu Marriage and Divorce Ordinance §§ 3, 5, 6.

³⁰⁴ Hindu Marriage and Divorce Ordinance § 10.

³⁰⁵ Hindu Marriage and Divorce Ordinance §§ 9, 7(5).

³⁰⁶ Hindu Marriage and Divorce Ordinance § 10(1).

³⁰⁷ See Marriage Ordinance § 37 (“[N]othing in this Ordinance contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”). See also Mohammedan Marriage, Divorce, and Succession Ordinance § 6 (stating that a preexisting customary marriage is a bar to entering a Muslim marriage).

³⁰⁸ See Hardee, *supra* note 278, at 727-28. See also Juma, *supra* note 278, at 469, 477-85 (describing the evolution of customary African law).

are directed to apply the customary law of the parties.³⁰⁹ Because of the reliance on custom as the driving force, there is no system for registration of marriage, for reporting of marriage or divorces, or for handing down decisions of local tribunals regarding personal law matters.

C. South Africa

While current personal law in India and Kenya mainly continues pre-existing structures alongside, there is still some movement and tendency in both countries toward unifying the law. That is not the case in South Africa – which is, instead, explicitly attempting to establish multi-tiered personal laws and jurisdictional structures to protect religious and minority rights.

South Africa's history is part of the driving force behind the institutional recognition of multi-tiered personal laws. A former colony of the Dutch (1652) and then the British (1795), South Africa united in 1910 – and began the policy of separation that characterized it for most of the twentieth century.³¹⁰ The exclusion of black South Africans (and others) from the political process under the system of apartheid has left an indelible and lasting impact on the current nation. The first multi-racial election was held in 1994, when Nelson Mandela was elected President. The current Constitution was ratified in 1996. That Constitution, and subsequent law-making, have consciously taken South Africa's history into account and have tried to ensure minority rights and equality, in part by preserving customary and religious practices of all systems. This has laid the groundwork for a multi-tiered personal law system.

Under apartheid, there was a two-fold system of courts with jurisdiction over personal law matters, as black South Africans were subjected to a separate (and inferior) court system.³¹¹ During the 1990's, tribal divorce courts were conclusively abolished and jurisdiction over

³⁰⁹ See Hardee, *supra* note 278, at 727-28. Hardee also discusses a category of "Cohabitation" (or common law marriages), which are beyond the scope of our discussion here. See *id.* at 728-29.

³¹⁰ For a general and complete history of South Africa, see LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 31-32 (3rd ed. 2001); FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, SOUTH AFRICA: A COUNTRY STUDY 1-86 (Rita M. Byrnes, ed., 3rd ed. 1997) [hereinafter "Byrnes"]; RODNEY DAVENPORT & CHRISTOPHER SAUNDERS, SOUTH AFRICA: A MODERN HISTORY (5th ed. 2000).

³¹¹ See T. W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 139-50 (2004).

divorce matters was transferred to the newly-formed family courts.³¹² Appeals from the family courts are to the High courts, and appeals from the High courts are to the Supreme Court of Appeal.³¹³ Today, customary tribal courts do not have power to issue binding decisions in marital disputes, although they retain mediation authority.³¹⁴

While there was duality in personal law under apartheid, it was carried forward in a way that continued to subjugate the black South African populace and continued to relegate them to second-class status. With the advent of the new Constitution and subsequent laws, there is a recognition not just of alternative systems of marriages, but an intentional legal movement to accord equal status to those different personal law regimes. The two currently statutorily recognized forms of marriage and divorce law are civil (Christian) marriage and customary marriage. But there is also increasing discussion of passing legislation regarding Muslim marriages as well, and maybe others (such as Hinduism).³¹⁵

Civil/Christian Marriage. The laws relevant to civil and Christian marriage are the Marriage Act (1961)³¹⁶ and the Divorce Act (1979).³¹⁷ Civil marriage in South Africa is similar to marriage in the United States.³¹⁸ Under the Divorce Act, couples may petition for divorce in a

³¹² Magistrates Courts Amendment Act of 1993, Act No. 120 of 1993. *See also South Africa; Divorce Fever Hits City Court*, Africa News, Nov. 17, 2003 (stating that family courts are less expensive and quicker than the previous system). If there is no family court in the area, jurisdiction lies with the High court. Divorce Act No. 70 of 1979; Customary Marriages Act No. 120 of 1998 § 1(i).

³¹³ *See* http://www.capecourt.gov.za/afr/pubs/public_info/C/32303/E. (Appeals dealing with Constitutional matters would proceed from the High Court to the Constitutional Court which is the final say on all Constitutional matters. The Supreme Court of Appeal is the highest court for non-Constitutional matters.)

³¹⁴ *See* BENNETT, *supra* note 311, at 143 (explaining that traditional rulers also retained jurisdiction over claims for return of lobolo and actions for damages for adultery if customary law is applicable).

³¹⁵ As discussed below, there is also a recognition in the civil law that Jewish law has special problems operating under the state system because of the potential non-issuance of a *get*. Therefore, the Divorce Act of 1979 was amended in 1996 to add a requirement that religious divorce must be granted before civil divorce may be granted. Divorce Act No. 70 (1979) § 5A.

³¹⁶ Act No. 25 of 1961.

³¹⁷ Act No. 70 of 1979.

³¹⁸ *See* David L. Chambers, *Civilizing the Natives: Marriage in Post-Apartheid South Africa*, DAEDALUS 101, 103 (Fall 2000).

High Court or a family court.³¹⁹ The only available grounds for divorce are (1) irretrievable breakdown of the marriage and (2) the mental illness or the continuous unconsciousness of a party to the marriage.³²⁰ Irretrievable breakdown grounds may be founded upon adultery, separation for one year or more, or imprisonment of the defendant – all evidence that the “marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between [the couple].”³²¹

Under the old South African government, there was a very clear preference in the law for the civil/Christian form of marriage over customary marriages. Civil/Christian marriage was the form practiced by white South Africans.³²² If a couple married by civil or Christian rites – that is, if they married in one of the established churches³²³ or a civil registry office – the common law applied to their marriage.³²⁴ Black South Africans retained a choice to marry either under civil law or their customary law, but civil/Christian marriages were considered superior to customary marriages.³²⁵ For example, if the couple chose to combine civil/Christian ceremonies with traditional ceremonies, the marriage would be governed by common law because the law presumed dominance of the civil/Christian marriage over the customary elements.³²⁶ This distinction matters less after the 1998 passage of the Recognition of Customary Marriages Act, but there is still a presumption in the law that the civil or Christian ceremony is the default, with common law then governing such matters.³²⁷

³¹⁹ Divorce Act § 1.

³²⁰ Divorce Act §§ 3-5.

³²¹ Divorce Act § 4.

³²² See Chambers, *supra* note 318, at 103.

³²³ Cf. BENNETT, *supra* note 311, at 57 n. 176 (stating that marriages celebrated in independent African churches had no legal effect).

³²⁴ See *id.* at 57.

³²⁵ See *id.* at 60; Chambers, *supra* note 318, at 103.

³²⁶ See BENNETT, *supra* note 311, at 58. Further, until recently a spouse in a customary marriage could marry in a civil/Christian ceremony and nullify any previously existing customary union, and in suits by dependants for damages from the death of a breadwinner, the claim would fail because the union went unrecognized. See *id.* at 190-91.

³²⁷ The Recognition of Customary Marriages Act (1998) produced a more uniform code of marriage law with almost no possibility of conflict because “the consequences will be the same whether the unions were celebrated by customary or civil/Christian rites.” *Id.* at

Customary Marriage. In the early 20th century, South Africa recognized customary marriages after the passage of the Native Administration Act (1927). As mentioned above, though, customary marriages were still given inferior status at law. During the colonial period through this time, five salient features typically distinguished customary unions from the otherwise prevailing civil model of marriage: (1) customary marriages permitted polygamy;³²⁸ (2) the validity of the customary union depended upon lobolo;³²⁹ (3) the relationship in a customary union was between two families, rather than two individuals; (4) the customary union was achieved gradually over time, rather than through a single ceremony; and (5) the customary marriage was a private affair that needed no intervention by civil or religious authorities.³³⁰

In 1996, the Bill of Rights in the new Constitution granted Parliament the right to pass legislation “recognizing marriages concluded under any tradition, or a system of religious, personal or family law.”³³¹ It

70. However there are some times, as when a husband wants to take a second wife, when there must be a decision whether the civil/Christian marriage should be given precedence or the customary marriage should. Therefore, if a couple performed both civil/Christian and customary rites, the civil/Christian form of marriage will still prevail. This hints at the former prejudice against customary marriages, but it also gives wives greater protections by favoring monogamous unions. *Id.* at 236-38.

³²⁸ The potentially polygamous nature of customary marriage was a major reason for its inferior treatment by those in power. See Johan D. van der Vyver, *State Sponsored Proselytization: A South African Experience*, 14 EMORY INT’L L. REV. 779, 832 (2000).

³²⁹ Lobolo is the practice wherein the groom and his family enter into highly stylized negotiations with the parents of the bride and agree on an amount of bridewealth; the groom then pays the lobolo to the bride’s parents. (The Recognition of Customary Marriages Act § 1(iv) (1998) defines lobolo as “the property in cash or in kind, whether known as lobolo, bohali, xuma, lumalo, thaka, ikhazi, magadi, emabheka or by any other name, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.”) See Chambers, *supra* note 318, at 103; BENNETT, *supra* note 311, at 236-42.

³³⁰ See BENNETT, *supra* note 311, at 188.

³³¹ South African Const. § 15(3)(a)(i); BENNETT, *supra* note 311, at 192. Section 15 of the Constitution, 1996, states, in full:

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that: a. those observances follow rules made by the appropriate public authorities; b. they are conducted on an equitable basis; and c. attendance at them is free and voluntary.



further gave the government a duty to eradicate laws discriminating against customary marriages in order to encourage religious and cultural diversity. To this end the South African Law Commission's Special Project Committee on Customary Law³³² began to investigate reform of customary law, with the goals of implementing the Bill of Rights and promoting African legal heritage.³³³ The Committee submitted its Report on Customary Marriages, and Parliament agreed to nearly all of its recommendations culminating in passage of the Recognition of Customary Marriages Act (RCMA) in 1998.³³⁴

The main purposes of the RCMA are to give full recognition to existing customary marriages and to stipulate requirements for future customary marriages.³³⁵ Further, the RCMA intentionally moves beyond past discrimination in favor of civil/Christian marriages by according full legal status to customary marriages. In the words of Deputy Justice Minister Cheryl Gillwald at the inception of the RCMA on November 15, 2000: The Act "brings to an end the tyranny of dictatorial recognition of

(3) a. This section does not prevent legislation recognizing: i. marriages concluded under any tradition, or a system of religious, personal or family law; or ii. Systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

South African Const. § 15 (1996).

³³² The South African Law Commission is an advisory body which conducts research in order to bring South African Law in line with the Constitution. "Because of the lengthy, orderly, and democratic process that the [South African Law Commission] goes through with regard to law reform, the South African Government gives strong deference to their legislative recommendations." Andrew P. Kult, *Intestate Succession in South Africa: The "Westernization" of Customary Law Practices Within a Modern Constitutional Framework*, 11 IND. INT'L & COMP. L. REV. 697, 712-714 (2001).

³³³ See BENNETT, *supra* note 311, at 193.

³³⁴ Recognition of Customary Marriages Act (1998). See also BENNETT, *supra* note 311, at 194; Kult, *supra* note 332, at 717-718.

³³⁵ See Kult, *supra* note 332, at 718; BENNETT, *supra* note 311, at 194. The preamble to the RCMA reads, "To make provision for the recognition of customary marriages; to specify the requirements for a valid customary marriage; to regulate the registration of customary marriages; to provide for the equal status and capacity of spouses in customary marriages; to regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages; to regulate the dissolution of customary marriages; to provide for the making of regulations; to repeal certain provisions of certain laws; and to provide for matters connected therewith." Recognition of Customary Marriages Act, preamble (1998).

civil and other Eurocentric faith-based marriages at the expense of marriages concluded in accordance with customary law.”³³⁶

The RCMA defines “customary marriage” as “a marriage concluded in accordance with customary law.”³³⁷ And customary law is defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.”³³⁸ There are two statutory requirements for a customary marriage to be valid: (1) Both prospective spouses must be at least eighteen years old and must consent to be married to each other under customary law, and (2) “the marriage must be negotiated and entered into or celebrated in accordance with customary law.”³³⁹ Because there is no single definition of customary law applicable to all black South Africans,³⁴⁰ the openness of the RCMA’s definition of customary marriage provides for a wide variation in practices in custom. Even so, there are a few common characteristics of customary marriage formation. For example, usually a couple is considered married by their customary or tribal community group only after the completion of a lengthy process; there is not a once-in-time ceremony as in civil or Christian marriages. The customary process usually includes payment of all or part of lobolo (a bride price), performance of some kind of (widely varying) ceremonies, and, for some groups, a period of cohabitation or birth of a child.³⁴¹ Under the RCMA, lobolo has effectively become a contractual accessory to marriage, with its payment typically signifying that a union is a customary form of marriage.³⁴² Many South Africans are still strongly attached to the practice, as it stands as a “symbol that the wife is valued, as a mark of the bond between families, as compensation to the bride’s parents for the cost and effort to raise her, and, today, as a symbol of continuity with African traditions.”³⁴³

³³⁶ Keynote address by the Deputy Minister of Justice and Constitutional developments, Ms. Cheryl Gillwald, MP, at the Launch of the Recognition of Customary Marriages Act No. 120 of 1998, November 15, 2000.

³³⁷ Recognition of Customary Marriages Act § 1(iii); Kult, *supra* note 332, at 718.

³³⁸ Recognition of Customary Marriages Act § 1(ii); Kult, *supra* note 332, at 718.

³³⁹ Recognition of Customary Marriages Act § 3(1).

³⁴⁰ See Chuma Himonga, *Transforming Customary Law of Marriage in South Africa and the Challenges of Its Implementation with Specific Reference to Matrimonial Property*, 32 INT’L J. LEGAL INFO. 260, 264 (2004).

³⁴¹ See Chambers, *supra* note 318, at 103-104.

³⁴² See BENNETT, *supra* note 311, at 236.

³⁴³ See *id.* at 235; Chambers, *supra* note 318, at 104.

One of the main purposes of the RCMA was to set up a system of registration for customary marriages and divorces.³⁴⁴ It imposes a duty on the spouses to ensure their marriage is registered, but failure to register does not affect the validity of the marriage.³⁴⁵ The RCMA did alter the customary law including the addition of age and consent requirements and the grant to spouses equal status and capacity,³⁴⁶ but it did not abolish polygamy.³⁴⁷ A husband who wishes to enter an additional customary marriage must simply apply to the court to “approve a written contract which will regulate the future matrimonial property system of his marriages.”³⁴⁸ This is supposed to ensure the fair treatment of the first wife/wives and will vary according to the property system that governs the marriage.³⁴⁹

One very big change in the RCMA is the process and grounds for divorce. Whereas dissolution of marriage under customary law was traditionally handled by the families or the local community, the RCMA codified the grounds for divorce – which are essentially the same as civil/Christian divorce and governed by the Divorce Act (1979).³⁵⁰ Thus, the codification of customary marriage law has had the dual effect of legitimizing the status of customary marriage (by according it equal status with civil/Christian marriage) but also altering it (by requiring that marriage registration and all of divorce proceed through civil channels).

Muslim Marriage. Just as customary marriages were initially disfavored (and not recognized legally) in South Africa because of their potentially polygamous nature, so too were Muslim and Hindu marriages disfavored. But while the RCMA has given customary marriages full

³⁴⁴ Kult, *supra* note 332, at 718.

³⁴⁵ Recognition of Customary Marriages Act § 4 (1), (9).

³⁴⁶ Recognition of Customary Marriages Act § 6; BENNETT, *supra* note 311, at 199; Himonga, *supra* note 340, at 264.

³⁴⁷ Recognition of Customary Marriages Act § 2(3)-(4) (stating that all existing polygamous marriages were recognized as marriages at the commencement of the Act, and that all future polygamous marriages will be recognized as marriages if they comply with the provisions of the Act).

³⁴⁸ Recognition of Customary Marriages Act § 7(6).

³⁴⁹ All pre-existing marriages will continue to be ruled by the property system of customary law, and marriages entered into after the commencement of the Act are in community of property unless the spouses opt out with an ante-nuptial contract.

Recognition of Customary Marriages Act § 7(1)-(2).

³⁵⁰ Recognition of Customary Marriages Act § 8. *See also* BENNETT, *supra* note 311, at 266.

recognition, Muslim and Hindu marriages have still not been obtained statutory status.³⁵¹ As it did with customary marriage, the South African Law Commission has been in the process of investigating Islamic Marriage. Since 1999, the Commission has published several documents related to Islamic marriages,³⁵² culminating in a July 2003 Report and attached draft bill on Muslim marriages.³⁵³ To date, this proposal has not been passed into law.

The Report and draft bill do not propose to eliminate polygamy entirely,³⁵⁴ but a spouse in a Muslim marriage may not subsequently marry under any other law during the subsistence of the Muslim marriage.³⁵⁵ Unlike the other forms of marriage in South Africa, Muslim marriage would automatically be out of community of property.³⁵⁶ Like the requirement for entering a subsequent customary marriage, if the husband wishes to marry again, he must apply to the court for a contract for the future regulation of matrimonial property in his marriages.³⁵⁷ The court "must grant approval if it is satisfied that the husband is able to maintain equality between his spouses as is prescribed by the Holy Qur'an."³⁵⁸ Polygamy without permission of the court is punishable by a fine of up to R20,000.³⁵⁹

The draft bill also makes some changes to the husband's rights to irrevocable *talaq*. The divorce must be registered in the magisterial district closest to the wife's residence in the presence of the wife and two witnesses within thirty days of pronouncement.³⁶⁰ Further, a spouse must then institute legal proceeding within fourteen days of registration for a decree confirming dissolution of marriage by *Talaq*.³⁶¹ This registration and divorce procedure is a substantial deviation from the traditional form

³⁵¹ Van der Vyver, , *supra* note 328, at 837; Rashida Manjoo, *Legislative Recognition of Muslim Marriages in South Africa*, 32 INT'L J. LEGAL INFO. 271, 273 (2004).

³⁵² Manjoo, *supra* note 351, at 274. These documents include an Issue Paper (May 2000), a Discussion Paper (Dec. 2001), a Bill (Oct. 2002), and an amended draft Bill (July 2003).

³⁵³ See South African Law Reform Commission, Project 59, *Islamic Marriages and Related Matters Report*, July 2003 (hereinafter Report).

³⁵⁴ Draft Bill § 8(6).

³⁵⁵ Draft Bill § 5(2).

³⁵⁶ Draft Bill § 8(1).

³⁵⁷ Draft Bill § 8(6).

³⁵⁸ Draft Bill § 8(6)(a).

³⁵⁹ Draft Bill § 8(11).

³⁶⁰ Draft Bill § 9(3)(a).

³⁶¹ Draft Bill § 9(3)(f).

of *talaq* divorce, for the traditional form was strictly a private matter and the draft bill purports to put jurisdiction in the hand of the civil authority. Specifically, the draft bill provides that Muslim divorce will be under the same jurisdiction as other systems of marriage – the jurisdiction of the High Courts or family courts with appeals to the Supreme Court of Appeals.³⁶² However, the court will be assisted in an advisory capacity by two Muslim assessors who have specialized knowledge of Islamic law.³⁶³ Appeals must be submitted to two Muslim institutions for written comment on questions of law within sixty days, and the Supreme Court of Appeals will give due regard to the written comments.³⁶⁴ Thus, the result will be that the civil court system will be applying Islamic law – albeit with deference to the interpretation of religious authorities. Finally, if the parties have a civil marriage and want to dissolve it, the court will not grant the civil divorce until it is satisfied that the accompanying Muslim marriage has been dissolved.³⁶⁵

D. Other Exemplars

As the above examples demonstrate, there are multiple possible conceptions of the proper jurisdictional relationship between civil and religious authorities regarding marriage and divorce law. And India, Kenya, and South Africa certainly do not exhaust the reservoir of possible comparative examples. Nor do they exhaust the possible number of options for structuring such relationship.³⁶⁶

For example, one could look to Israel for a variation on governance of personal law matters. Israel's personal law is administered primarily by religious tribunals – in direct descent from the *millet* system of the Ottoman Empire.³⁶⁷ Thus, rabbinical courts govern marriage and divorce law for all Jews, and other “religious courts” govern personal law for adherents of other faiths.³⁶⁸ But a limited number of religious groups are

³⁶² Draft Bill § 15(1) and (3)

³⁶³ Draft Bill § 15(1)(b) and (2).

³⁶⁴ Draft Bill § 15(4)-(5).

³⁶⁵ Draft Bill § 16(1).

³⁶⁶ See, e.g., SHACHAR, *supra* note 14 at 88-113 (discussing a variety of models of possible “shared jurisdiction”).

³⁶⁷ Galanter & Krishnan, *supra* note 154, at 121. See also notes 44-47 and accompanying text.

³⁶⁸ See *id.* at 122; Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of*

recognized, and there is not a residual category of secular civil law in some areas (marriage, for example), and this presents potential hardships for those outside the recognized religious groups.³⁶⁹ Israel maintains some control over the religious tribunals by requiring a right to appeal – both within and without the respective religious legal systems. But the secular civil courts do not have authority to reverse an error in applying religious law; rather their appellate jurisdiction is limited to other matters such as jurisdictional issues, procedural rules, natural law principles, and precedent.³⁷⁰ This presents challenges for this system of law, as does the additional notion that all Jews are under the same rabbinical court system which is controlled by the Orthodox movement.³⁷¹ While this has led some commentators to suggest that the religious court system “as it currently exists in Israel may actually hinder, rather than aid, religious autonomy,”³⁷² Israel’s approach provides another alternative for thinking intentionally about religious rights and minority rights in personal law matters.

Or Egypt could alternately be adduced as a structural possibility, for it permits the laws of Islam, Christianity, or Judaism to govern marriage and divorce law over adherents of those faiths.³⁷³

Or, closer to home, we could learn from the ongoing discussions and debates within our northern neighbor, Canada, regarding religious pluralism. In Canada, the model has not been direct co-opting and

Recognition Under English and U.S. Jurisprudence, 18 *LOY. L.A. INT’L & COMP. L.J.* 311, 328 (1996).

³⁶⁹ See Ruth Lapidoth, *Freedom of Religion and Conscience in Israel*, 47 *CATH. U. L. REV.* 441, 462-64 (1998). Cf. S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Law Affects Human rights and the Potential for Violence*, 19 *MICH. J. INT’L L.* 109, 139 (1997) (discussing the possibility for divorce in civil courts for members of unrecognized religious communities, even though such persons cannot be married in civil courts).

³⁷⁰ See Reed, *supra* note 368, at 499-500.

³⁷¹ See generally Galanter & Krishnan, *supra* note 154, at 122-27. See also Lapidoth, *supra* note 369, at 463-64; Strong, *supra* note 369, at 156, 158.

³⁷² Reed, *supra* note 368, at 501.

³⁷³ See EL ALAMI, *supra* note 202, at 6 (“[In Egypt,] [t]he issues of marriage and divorce have remained regulated by religious principles and are therefore subject to the rulings of the *Shari’ah*. Christian and Jewish rulings are likewise applied to similar issues amongst those groups respectively.”). See also ESPOSITO, *supra* note 214, at 49-61 (describing reforms in Muslim law of marriage and divorce in Egypt); ENID HILL, *MAHKAMA! STUDIES IN THE EGYPTIAN LEGAL SYSTEM, COURTS & CRIMES, LAW & SOCIETY* 72- 101 (1979) (discussing nuances of divorce – especially under Islamic law – in Egypt).

enforcement of religious law by the state itself, but rather a reliance on firm notions of contract such that individuals could “opt” into an arbitral board of their choosing to resolve disputes – including a religious arbitral board with binding authority.³⁷⁴

Legislators in Ontario passed the Arbitration Act of 1991 to provide an alternative to settling disputes within the court system.³⁷⁵ The Act allowed the parties to choose the law under which the arbitration would be conducted.³⁷⁶ According to the Attorney General’s interpretation of the situation, the original intent of the drafters was that this choice of law provision would allow the parties to choose from any of the provincial laws; however, the plain language of the statute was accepted, and that intent of the drafters was ignored.³⁷⁷ This meant that in practice, Christians, Jews, Muslims, and people of other faith traditions could arbitrate their disputes according to the principles of their faith.³⁷⁸ In addition, the Act required Ontario courts to “uphold arbitrators’ decisions if both sides enter the process voluntarily and if results are fair, equitable, and do not violate Canadian law.”³⁷⁹

The system enacted by the Arbitration Act of 1991 functioned

³⁷⁴ Without venturing too far afield, it seems that the Canadian model probably comes the closest to what might be constitutional, permissible, and most in line with American notions of the common structure of the marital relationship. If marriage is primarily seen as a contract at American law, there is a cogent argument to be made that parties ought to be free to use the formalities of contract law to enter into both heightened contractual requirements and an alternative adjudicator of any future disputes. Judicial review could then be had of arbitral decisions, as such decisions are currently reviewed (with great deference).

³⁷⁵ Arbitration Act, S.O., ch. 17 (1991) (Can.). Private arbitration was also legal prior to 1992 in the previous Arbitration Act, and “family matters have been arbitrated based on religious teachings for many years in Jewish, Muslim, and Christian Settings.” Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, 4 (2004), available at

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>.

³⁷⁶ Arbitration Act, S.O., ch. 17, 32(1) (1991) (Can.) (“In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties....”)

³⁷⁷ See Boyd, *supra* note 375 at 12; Marie Egan Provins, *Constructing an Islamic Institute of Civil Justice that Encourages Women’s Rights*, 27 LOY. L.A. INT’L & COMP. L. REV. 515, 520 (2005).

³⁷⁸ See Provins, *supra* note 377, at 520.

³⁷⁹ Arbitration Act, S.O., ch. 17, 34, 46 (1991) (Can.); Carol Lowes, *Islamic Board Gets Green Light*, CHRISTIANITY TODAY, March 2004 at 22, available at <http://www.christianitytoday.com/ct/2004/003/17.22.html>.

without problem until the fall of 2003 when Syed Mumtaz Ali announced that the Islamic Institute of Civil Justice (IICJ) had been established "to ensure that Islamic principles of family and inheritance law could be used to resolve disputes within the Muslim community in Canada."³⁸⁰ Mumtaz Ali's statements to the media about the IICJ created public concern that Ontario had granted special rights to Sharia Courts to settle disputes between Muslims. Although religious arbitrations had been in practice for years, the IICJ and the publicity surrounding its establishment brought new attention, and citizens and citizens' groups brought their concerns to the Ontarian government which authorized the Attorney General, Marion Boyd to investigate the current system of arbitration.³⁸¹ That investigation eventually led to a 2004 report endorsing the continued use of arbitration as an alternative dispute resolution mechanism in family law with certain recommendations for improvement.³⁸²

The report was not received with great favor, and in spite of the attorney general's endorsement, Ontario recently passed an amendment to the Arbitration Act that put an end to arbitration of family law matters under religious principles. In September 2005, Premier Dalton McGuinty made a surprise announcement during a phone interview that "[t]here will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."³⁸³ This position came to fruition with the passage of Bill 27 on February 23, 2006, which amended the Arbitration Act of 1991. The bill amended section 32 of the Arbitration Act so that instead of allowing disputes to be decided under "the rules of law designated by the parties," the amended act states that "[i]n a family

³⁸⁰ See Boyd, *supra* note 375, at 3.

³⁸¹ See *id.* at 3-6.

³⁸² See Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion: Executive Summary* (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf>; Provins at 524. Boyd's recommendations generally called for more government involvement to oversee and evaluate arbitration, education and training for arbitrators, education for the public about the arbitration process, and the requirement that the parties to arbitrations obtain independent legal advice. See generally Boyd, *Executive Summary*; Provins, *supra* note 377, at 524-25.

³⁸³ See Prithi Yelaga and Robert Benzie, *McGuinty: No Sharia Law*, TORONTO STAR, September 12, 2005 at A1. Quebec has taken the same position about Muslim law. While Ontario was still debating its use, lawmakers in Quebec "unanimously rejected use of Islamic tribunals in its legal system." Les Perreux, *Quebec Rejects Islamic Law*, CANADIAN PRESS, May 27, 2005 at A8.

arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied.”³⁸⁴ This effectively cut off not only the rights of Muslims to settle disputes in family matters under Islamic law, but eliminated the rights of other religious traditions as well, including the rabbinic courts present and practicing in Ontario since 1889.³⁸⁵

As these and other comparative examples show, there are a wide range of possible approaches to multi-tiered marriage. Many of these are already being practiced elsewhere. That is not to say that there is necessarily a ready panacea in some other country that can be easily adapted to the American experience. But it would be provincial and parochial – and possibly even foolhardy – to fail to look for other sources of wisdom besides our own at a moment of crisis (and opportunity) in marriage and divorce law.

V. CONCLUSION

In the midst of a national debate about the meaning and definition of marriage, we would be well-served to acknowledge that our multiplicity of citizens is unlikely to agree on a singular answer. This leads to two at least possible conclusions – either (1) rule by majoritarian voice or (2) allow for variation in understandings of marriage and divorce. In recent times, the first option has been the dominant theme at American law. But there are signs – in Louisiana, New York, and elsewhere – that we may be willing to consider recognizing our pluralism and reifying that into law. There are historical antecedents for recognizing different models of marriage and divorce jurisdiction. There are also strong examples from comparative international law that can serve as guides (as well as warnings, if need be).

Moving toward multi-tiered marriage need not mean – indeed, *should* not mean – that we must abandon protections for women and

³⁸⁴ Family Statute Law Amendment Act, S.O. c.1, 32 (2006) (Can.), *available at* <http://www.ontla.on.ca/Library/bills/382/27382.htm>. In addition, the explanatory note to the amendment states that “[t]he term ‘family arbitration’ is applied only to processes conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction. Other third-party decision-making processes in family matters are not family arbitrations and have no legal effect. *Id.*

³⁸⁵ See Ron Csillag, *Jewish Groups Say New Bill Targets Beit Dins*, CANADIAN JEWISH NEWS, at 5.

children that we have assiduously worked to implement. Nor should it mean that the state must sanction actions and behavior that will undermine core values of equality. But it is unnecessary for the state to retain sole jurisdictional control over a unitary, least common denominator system of marriage and divorce law. If capable and competent parties desire to enter more binding unions under the auspices of their religious traditions, they should be free to do so. If religious communities desire to draw upon their own theological and legal resources to aid in governing their adherents, they should be able to do so. We may well be seeing the bellwethers of multi-tiered marriage in current state laws. We may be well seeing a rediscovery of some of our own history of shared or complementary jurisdiction over family law. And we may well be seeing alternate ways to implement multi-tiered marriage through the examples of other nations in the international community.