

Taking Your Religion to Court: Exploring the Conflict Between the  
Capacity of the Individual to Fully Function Within the Family and the  
Capacity of the Religious Group to Define Itself.

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## Introduction

Societies are premised on the values that the members of those societies deem to be fundamental. In the United States, many of the values considered fundamental, or, as Justice Benjamin Cardozo wrote, “implicit in the concept of ordered liberty,” are enshrined in the Constitution and are considered to be rights enforceable as against the state.<sup>1</sup> One of these rights is the freedom of religion.<sup>2</sup> Alexis de Tocqueville, the Frenchman who famously traveled the young American nation, remarked that “[i]n the United States the influence of religion is not confined to the manners, but it extends to the intelligence of the people.”<sup>3</sup> In light of the special place religion occupies in American life, a conflict has arisen in the law centering on whether “accommodation” or “deference” should be given to religious understandings, agreements, or judgments – particularly in the family law context.<sup>4</sup>

Professor Ayelet Shachar describes the question as whether “cultural,” or religious, groups should have the option to maintain “their *nomos*: the normative universe in which law and cultural narrative are inseparably related.”<sup>5</sup> Shachar sympathizes with the multicultural age in which we live while pointing out “the ironic fact that individuals inside [a minority religious] group can be injured by the very reforms that are designed to promote their status as group members in the accommodating, multicultural state.”<sup>6</sup> Shachar thus highlights a tension in the modern liberal democracy’s attempt to accommodate a minority religious group: the democracy’s sensitive accommodation of the group can work against a group member that is herself a minority within the group.

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<sup>1</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>2</sup> See U.S. CONST. AMEND. 1 (stating, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

<sup>3</sup> Alexis de Tocqueville, *Democracy in America*, Chapter XVII (1840).

<sup>4</sup> See Ayelet Shachar, *Multicultural Jurisdictions 2* (Cambridge 2001); Robin Fretwell Wilson, THE OVERLOOKED COSTS OF RELIGIOUS DEFERENCE 64 Wash. & Lee L. Rev. 1363 (2007).

<sup>5</sup> Ayelet Shachar, *Multicultural Jurisdictions 2* (Cambridge 2001).

<sup>6</sup> *Id.* at 3.

Such a group member can be seen as poor, not only in economic terms but also in the non-economic terms described by scholars such as the political economist Amartya Sen who speaks of a “capability handicap.”<sup>7</sup> This deficit is not perfectly correlated with income. That is, individuals of higher and lower income can experience this “capability handicap,” which manifests itself as a lack of capacity to function in the family as one sees fit, such as deciding which educational or job opportunities to pursue or deciding how to spend one’s leisure time.<sup>8</sup> Sen also describes the “capability handicap” in terms of those who have “no opportunity of political participation” in society.<sup>9</sup> Sen describes “capability,” in terms of “the capability to achieve functionings (i.e. all the alternative combinations of functionings a person can choose to have)” and to make choices.<sup>10</sup> In addition to the capacity to achieve “functionings,” those things necessary to promote “well-being,” Sen notes that [c]hoosing may itself be a valuable part of living, and a life of genuine choice with serious options may be seen to be – for that reason – richer.”<sup>11</sup>

Sen notes that gender inequality is “particularly relevant” in capability analysis and that “in the context of intrahousehold divisions, it is not easy to split up the total household income into the incomes going respectively to different members of the family.”<sup>12</sup> Sen explains, “Inequality inside the household is one of resource-use and of the transformation of the used resources into capability to function, and neither class of information is well captured by any devised notion of ‘income distribution’ within the family.”<sup>13</sup> So even a woman who seems to be

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<sup>7</sup> Amartya Sen, *Development As Freedom* 89-94 (Oxford 1999).

<sup>8</sup> Amartya Sen, *Inequality Reexamined* 109, 113 (Harvard 1992).

<sup>9</sup> Amartya Sen, *Development As Freedom* 89-94 (Oxford 1999).

<sup>10</sup> Amartya Sen, *Inequality Reexamined* 40-41 (Harvard 1992).

<sup>11</sup> Amartya Sen, *Inequality Reexamined* 39, 41 (Harvard 1992) (noting that “This is not to say that every additional choice makes a person’s well-being go up, nor that the *obligation* to choose necessarily adds to one’s freedom”).

<sup>12</sup> *Id.* at 122.

<sup>13</sup> *Id.* at 122-23.

well provided for in a marriage may lack the capability to function and to make decisions for herself.

In light of the tension between the individual's rights to equal treatment and to the protections of the civil law and the group's right to determine its rules of life, Professor Shachar concludes that it is possible for civil courts to recognize decisions of religious groups only if there is "an institutional design which equips [vulnerable group members] to dismantle the power hierarchies that put them at risk in the first place."<sup>14</sup> Shachar speaks of these "vulnerable group members" both as "individual[s]" and as "traditionally subordinated categories of members."<sup>15</sup> Thus the capability of the individual woman to assert her civil rights within the context of a religious group is viewed in the context of her ability to band together with other similarly situated women and bring about the "transformative accommodation" that Shachar outlines, and that will be addressed *infra*. Shachar points out that "accommodation" could include the religious group having "exemption from certain laws" or allowing the religious group "some degree of autonomous jurisdiction over the group's members."<sup>16</sup> In short, "accommodation ... aims to provide identity groups with the option to maintain their unique cultural and legal understanding of the world, or their *nomos*."<sup>17</sup>

Providing "accommodation," or deference, to religious groups can be seen as a way of empowering them with the liberty to determine for themselves what sort of group identity, or "*nomos*" they want to have. Without this ability to determine its own course, the group could be impoverished in a similar way to the individual who is incapable of political or family choice. The religious group, to be truly empowered, must be able to define itself and set its own

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<sup>14</sup> Ayelet Shachar, *Multicultural Jurisdictions* 15 (Cambridge 2001).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 17.

<sup>17</sup> *Id.*

boundaries. The Supreme Court, while stopping short of articulating “group rights,” has long held that individuals within religious groups have the right to promote their religious views without undue government interference or coercion.<sup>18</sup> The Court has noted that some religious beliefs are not “merely a matter of personal preference, but one of deep religious conviction, shared by an organized group...”<sup>19</sup>

The Archbishop of Canterbury, Dr. Rowan Williams, recently echoed Shachar’s call for some form of religious accommodation while recognizing that “there remains a great deal of uncertainty about what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes.”<sup>20</sup> Dr. Williams cited as examples of religious accommodation actions the British government has already taken to provide Muslim and Jewish communities greater leeway in determining questions of family law and commercial transactions law and actions to provide for the religious consciences of Roman Catholic adoption agencies that may, otherwise unlawfully, discriminate against same-sex couples wishing to adopt.<sup>21</sup>

### The Anchored Woman Seeking a *Get*

A civil court’s decision to accommodate, or defer to, a religious decision is especially problematic, and susceptible to exploiting and impoverishing women, in the family law context. Women can become trapped in unequal relationships, which can both lead to and exacerbate a

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<sup>18</sup> See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 300 (1940) (Holding that requiring members of the Jehovah’s Witnesses to acquire a permit before soliciting door-to-door amounted to a violation of the Fourteenth Amendment’s guarantee to due process of law).

<sup>19</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Holding in violation of the First and Fourteenth Amendments state law that required all children, including Amish children, to attend a public or private school).

<sup>20</sup> Rowan Williams, Archbishop’s Lecture – Civil and Religious Law in England: a Religious Perspective (Feb. 7, 2008) (unpublished manuscript, on file with author), available at <http://www.archbishopofcanterbury.org/1575> (last visited April 9, 2008).

<sup>21</sup> *Id.*

woman's low economic means or lack of authority in a marital relationship, thus causing a capability handicap. An example of such a capability handicap is the "agunah" situation in the Jewish Orthodox context.<sup>22</sup> Shachar explains:

According to Jewish law a husband can "anchor" his wife in a religious marriage – even if the relationship has been formally terminated by state law – by refusing to consent to the religious divorce decree (the *get*). Such an "anchored" woman (or *agunah*) cannot "acquire herself" or become free to marry another man within the Jewish faith, as long as her husband refuses the *get*.<sup>23</sup>

This power held by the husband is clearly one-sided and is in stark contrast to the no-fault divorce option available under the civil law in most jurisdictions in the United States. Today the civil law protects the individual's right to determine when to leave a marriage; the law buttresses the individual's capability to make this life decision herself. As Professor Ann Laquer Estin has pointed out, "After a century of social and legal change, access to divorce today has come to be seen as a civil right."<sup>24</sup> With no-fault divorce, one party can initiate divorce proceedings, and ultimately obtain a divorce, without the consent of the other party so long as the statutory minimum time of living separate and apart is met.

In marriages where the classic husband-as-primary-breadwinner scenario obtains, an observant Jewish woman seeking a divorce is faced not only with the prospect of not being able to remarry until her first husband grants the *get*. She may also be involuntarily forced into a workforce that she has not otherwise planned to enter because of her understanding and arrangement with her husband as economic provider. A woman in this situation would be

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<sup>22</sup> See Ayelet Shachar, *Multicultural Jurisdictions* 57 (Cambridge 2001).

<sup>23</sup> *Id.* at 57-58

<sup>24</sup> Ann Laquer Estin, EMBRACING TRADITION: PLURALISM IN AMERICAN FAMILY LAW, 63 *Md. L. Rev.* 540, 569 (2004) (citing *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (describing divorce as "the adjustment of a fundamental human relationship" and holding that mandatory filing fees violate due process rights of those who cannot afford to pay)).

especially vulnerable to demands or concessions imposed by the “anchoring” man as she seeks religious permission to exit a failed marriage and begin a new marriage that also conforms with her religious sensibilities.

The problem for a religiously observant woman in this context is not as easily solved as it may be for a non-observant woman similarly situated. Shachar notes:

While she can remarry under secular or civil law before a judge even without obtaining the *get* (since in the eyes of state law the first marriage has already been legally terminated), “she must then abandon her convictions and, to some extent, abandon traditional Judaism.” ... “[A]ny children produced by [the union of an “anchored” woman and another man] are considered “illegitimate” and hence inadmissible as members [of the Jewish faith].”<sup>25</sup>

Thus the woman is trapped in an economically, politically, and religiously impoverished situation. The woman is likely without the economic providence of the husband she is seeking to divorce while she is simultaneously unable to remarry within her religious tradition and receive the economic support of a new husband. Similarly, because of her religious convictions, she is left politically powerless; she is unable to obtain the *get* that she needs to be able to remarry because the *get* is contingent on her husband’s consent. In conflict with the woman’s desire to receive a religious divorce is the religious group’s desire to define itself and determine its own rules for how religious divorces will be granted, rules that dictate the husband as the one who must approve the religious divorce before such divorce can be had.

The New York *Get* Statute seeks to reconcile this conflict by requiring the suing or counter-claiming husband to file an affidavit stating that he has “taken all steps solely within [his] power to remove all barriers to the [wife’s] remarriage” before the court will grant the

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<sup>25</sup> Ayelet Shachar, *Multicultural Jurisdictions* 58-59 (Cambridge 2001).

couple a civil divorce.<sup>26</sup> The statute's requirement that the husband be suing or counter-claiming means that the statute does not go as far as to require all Jewish husbands in divorce proceedings to grant their wives the *get*. The statute reaches only those husbands who are also seeking a divorce by requiring that, before a civil divorce is granted, those husbands must first "remove all barriers to the [wife's] remarriage."<sup>27</sup> The statute thus prevents a husband from securing a civil divorce from his wife while simultaneously refusing her a religious divorce. The statute accommodates the religious conscience of a husband who wants to remain married to his wife, and the religious conscience of a Jewish community that wants to adhere to the understanding of divorce being the sole prerogative of the husband, by not requiring such a husband to do anything.

In accommodating the religious group's understanding of divorce, the statute may offer no relief for the wife in the case of *agunah* who seeks a divorce from a husband who does not also want a divorce.<sup>28</sup> In such a case, the wife may stay "anchored" in the religious marriage at the husband's discretion even though she has obtained a civil divorce. Thus the conflict is brought into sharp relief between individual religious rights, and the empowerment that goes along with those rights, and the right of the religious group to be fully capable of defining itself and setting its own rules. The husband is exercising his right to follow the religion of his choosing, and to follow the religious rules as set out by the group.

Because American courts are loathe to upset a religious group's determination of its own faith and doctrine,<sup>29</sup> it is difficult, if not impossible, for an American court to side with one party

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<sup>26</sup> N.Y. DOM. REL. LAW § 253 (McKinney 2008).

<sup>27</sup> *Id.*

<sup>28</sup> Jeremy Glicksman, ALMOST BUT NOT QUITE: THE FAILURE OF NEW YORK'S *GET* STATUTE 44 Fam. Ct. Rev. No. 2 300, 305 (2006).

<sup>29</sup> See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (citing *Maryland & Virginia Eldership of Churches v. Church of God at Sharpsburg*, 396 U.S. 367, 368 (1979) (Brennan, J., concurring) (holding that court cannot resolve intrachurch property disputes on basis of religious doctrine).



over another in a religious dispute by making a judgment on which party's interpretation of the religious doctrine is the correct interpretation. However, courts can use "neutral principles of law," such as neutral principles of contract law, to rule in favor of a party.<sup>30</sup> For a court to analyze a religious agreement under neutral principles of contract law means that the court will treat the religious agreement as a secular agreement for purposes of enforcement. The requisite elements to enforce a secular contract must be present for the court to enforce the religious agreement. These elements include a basic meeting of the minds of the parties, an offer, an acceptance, and consideration.<sup>31</sup> A court can strike down an otherwise enforceable agreement on void-for-vagueness or unconscionability grounds.<sup>32</sup>

Absent an antenuptial agreement that a court can review using neutral principles, a court is faced with the difficult decision of determining which party's religious understanding should be given effect. *Aflalo v. Aflalo*<sup>33</sup> is an example of a case in which a woman desires a religious divorce, or *get*, and is perhaps economically dependent on her husband. The wife sought to have the court compel the husband to grant her a *get*.<sup>34</sup> The husband refused, arguing that it was his religious wish, and right, to seek reconciliation with his wife through the Jewish tribunal, the Beth Din.<sup>35</sup> The court agreed with the husband, holding his First Amendment religious interest paramount.<sup>36</sup> The court opined:

It may seem "unfair" that Henry may ultimately refuse to provide a "get." But the unfairness comes from Sondra's own sincerely-held religious beliefs. When she entered into the [Jewish marital contract] she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if Henry does

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<sup>30</sup> See, e.g., *Odatalla v. Odatalla*, 810 A.2d 93, 95-96 (N.J. Super. Ch. 2002) (citing *Jones v. Wolf*, 443 U.S. 595 (1979)).

<sup>31</sup> *Id.* at 97.

<sup>32</sup> *Id.*

<sup>33</sup> 685 A.2d 523 (N.J. Super. Ch. 1996).

<sup>34</sup> *Id.* at 525

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 530.

not provide her with a “get” she must remain an “agunah.” That was Sondra's choice and one which can hardly be remedied by this court. This court has no authority – were it willing – to choose for these parties which aspects of their religion may be embraced and which must be rejected.<sup>37</sup>

The court refused to follow other New Jersey trial courts that had compelled husbands to grant *gets* in certain situations, holding that those cases were either involving different facts or were wrongly decided.<sup>38</sup>

The only ray of light for similarly situated women was the court’s recognition that a husband’s refusal to grant a *get* in order to improve his financial position in a divorce settlement would amount to “extortion,” indicating that the court would frown upon such a manipulation of the *get*.<sup>39</sup> But this concession by the court can be cold comfort in light of the court’s refusal to give meaningful effect to the wife’s religious wish to obtain a divorce and either to continue as a practicing Orthodox Jew herself, or to allow her children the opportunity to choose to be practicing Orthodox Jews. If a woman is unable to obtain a *get*, her children by a subsequent man will be considered “mamzerim,” or illegitimate, and unable to marry other Jews with similar beliefs.<sup>40</sup> The woman in this situation, who may often rely on her current husband or a subsequent husband for economic support, is incapable of effectuating the religious divorce. She is thus impoverished in her capacity to make economic or religious choices on behalf of herself or her future offspring.

The court’s reasoning not only favors the husband’s right to refuse the *get*, it implicitly favors the religious group’s right to determine its own destiny, to set the parameters of its religious doctrine and practice. While the husband may be seen as manipulating his power over

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<sup>37</sup> Id. at 531.

<sup>38</sup> Id. at 527-30.

<sup>39</sup> *Aflalo v. Aflalo*, 685 A.2d 523, 525 (N.J. Super. Ch. 1996) (citing *Burns v. Burns*, 538 A.2d 438 (N.J. Ch. Div. 1987)).

<sup>40</sup> Id. at 527 (citing Himelstein, *The Jewish Primer* 161 (1990)).

the woman by keeping her anchored in a religious marriage she wishes to leave, it is the religious group's doctrine that has given the husband this power. As discussed *infra*, the Canadian case of *Marcovitz v. Bruker* recently used neutral principles of contract law to rule in favor of a woman seeking to enforce an antenuptial agreement that provided the couple would seek religious arbitration in view of obtaining a *get*.<sup>41</sup> Absent a similar antenuptial agreement, a court is hard-pressed to overrule religious doctrine that teaches a husband's granting of a *get* is his sole prerogative.

### Enforcing the *Mahr* Agreement under Contract Law

Women married in the Islamic tradition, especially those women who are economically disadvantaged, may find themselves similarly vulnerable and without the capacity to make important life decisions. Sharia law provides for a *mahr*, sometimes called a *sadaq*, "a gift which the bridegroom has to give the bride when the contract of marriage is made and which becomes property of the wife."<sup>42</sup> The *mahr* is a type of dowry, intended to provide for the financial well-being of the wife after the marriage has ended. Professor Robin Wilson points out the problem that "some religious authorities preclude payment of the *mahr* to a wife if she initiates the divorce."<sup>43</sup> In this way, the very instrument intended to provide financial security to the woman operates as a lock and chain to keep the woman in a marriage that may be harmful to her. The woman is forced to stay married not only because of the husband's likely economic support role but also because the woman's "severance pay" cannot be collected if she is the one who determines that the marriage should end. So the wife's right to a civil divorce may be

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<sup>41</sup> See *Marcovitz v. Bruker*, 2007 CarswellQue 11548 (discussed on p. 15 of this paper).

<sup>42</sup> O. Spies, Hadana, in *Encyclopedia of Islam* n. 86 (P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel & W.P. Heinrichs eds., 2007).

<sup>43</sup> Robin Fretwell Wilson, *THE OVERLOOKED COSTS OF RELIGIOUS DEFERENCE* 64 Wash. & Lee L. Rev. 1363, 1379 (2007).

severely curtailed if she lacks the capacity to function financially post-marriage. A woman may not be fully capable of choosing civil divorce if she fears that her economic support, the *mahr*, is unavailable to her due to her initiating the civil divorce proceedings.

*In re Marriage of Dajani*<sup>44</sup> is a case where the wife, as the party who initiated the divorce proceedings, was denied the *mahr*. The trial court refused to enforce the antenuptial agreement that provided for the *mahr*, siding with the husband's Islamic law expert who testified that a wife who initiates the divorce proceedings forfeits her claim to the *mahr*.<sup>45</sup> The wife appealed. The appellate court upheld the trial court's decision not on the basis of the Islamic law expert's testimony but rather on the basis of judicial precedent that taught that marital agreements, whether religious or not, should be held invalid if those agreements encourage divorce.<sup>46</sup> The *Dajani* court held unenforceable the *mahr* agreement at issue, which would have paid \$1,700, as an agreement impermissibly encouraging "profiteering by divorce."<sup>47</sup> Despite the court's stated rationale for its decision, the precedent the court set militates against the capability of individual women to make for themselves what amounts to a very difficult intrafamilial choice – i.e., whether to seek a divorce. The court here buttresses the religious group's right to set its own rules, provided that barring enforcement of the *mahr* due to the woman's initiation of divorce proceedings is a set group rule. It may not be. Aspects of the group, e.g., other Islamic experts, may side with the individual woman, and thus the capability of those group members to determine group rules is somewhat undermined.

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<sup>44</sup> 251 Cal. Repr. 871 (Ct. App. 1988).

<sup>45</sup> Id. at 872

<sup>46</sup> Id.

<sup>47</sup> Id. at 872-73 (citing *In re Marriage of Noghrey*, 169 Cal. App. 3d 326, 331 (1985)).

A more recent case, *In re Marriage of Bellio*,<sup>48</sup> held enforceable a secular prenuptial agreement forcing the husband to pay the wife \$100,000, rejecting *Dajani*'s teaching that "[a] dowry worth only \$1,700, payable upon dissolution, is [sufficient] to seriously jeopardize a viable marriage."<sup>49</sup> The *Bellio* court found the \$100,000 appropriate because it was intended to put the wife in the position she would have been in had she not entered into the marriage.<sup>50</sup> The \$100,000 can be seen as the amount needed to make the wife whole for her services to the marriage, and can be seen to represent the amount the wife would have had if she had married someone else or if she had pursued a lucrative career instead of marrying Mr. Bellio.

Some courts have seemed more willing to enforce *mahr* or *sadaq* agreements even when the wife is the one initiating the divorce. In *Akileh v. Elchahal*,<sup>51</sup> the court, reviewing the wife's appeal, held the *sadaq* agreement enforceable even though the husband testified that he thought a *sadaq* agreement was unenforceable if the wife initiated the divorce.<sup>52</sup> The court used neutral principles of contract law to determine whether there was a "meeting of the minds" between husband and wife at the time the antenuptial *sadaq* agreement was entered into and whether "consideration" for the contract was given.<sup>53</sup> The court found in the wife's favor, for validity of the *sadaq* agreement, on both questions (whether the requisite "meeting of the minds" and "consideration" were present) noting that the wife upheld her end of the contract by entering into the marriage.<sup>54</sup> The only evidence the husband used to show at trial that his wife should forfeit the *sadaq* if she initiated the divorce was the husband's understanding that his sister had to

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<sup>48</sup> 129 Cal. Repr. 2d 556 (Ct. App. 2003).

<sup>49</sup> Id. at 559.

<sup>50</sup> Id.

<sup>51</sup> 666 So. 2d 246 (Fla. App. 2d Dist. 1996).

<sup>52</sup> Id. at 249.

<sup>53</sup> Id. at 248.

<sup>54</sup> Id.

forfeit her *sadaq* when she initiated divorce proceedings against her husband.<sup>55</sup> The trial court below had found for the husband, holding that his understanding of *sadaq* forfeiture amounted to an absence of “meeting of the minds” between him and his wife,<sup>56</sup> a requisite for a valid contract. The appellate court, ruling for the wife, rejected the trial court’s holding that the husband’s understanding that the wife would forfeit the *sadaq* if she initiated the divorce proceedings amounted to an absence of a meeting of the minds.<sup>57</sup>

The husband seems to have used his religious understanding, that the wife forfeits the *sadaq* if she initiates the divorce, to make a neutral principles argument that a valid contract did not exist due to an absence of a meeting of the minds. The husband argued that if the wife at the time of the agreement did not also share his understanding of the forfeiture rule, then there was no meeting of the minds to give rise to a valid contract. But it is the forfeiture rule itself that the court implicitly rejects, thus siding with the individual woman over the religious group’s – or at least the husband’s – doctrinal understanding of when the *sadaq* is forfeited. The court does not say so, but the court here clearly gives effect to the wife’s understanding of how a religious agreement should be enforced over the husband’s understanding and over some group understanding with which the husband had prior experience. Because the wife presented the court with an agreement that she argued was legally enforceable, the court was able to rest its formal decision for the wife on neutral principles of contract law grounds.

In *Odatalla v. Odatalla*,<sup>58</sup> the wife initiated the divorce but still won enforcement of the antenuptial agreement. The husband in *Odatalla* did not raise the argument that a wife initiating divorce should be barred from receiving the *mahr*. Rather, the husband’s two arguments were

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 666 So. 2d 246, 248-49 (Fla. App. 2d Dist. 1996).

<sup>58</sup> 810 A.2d 93 (N.J. Super Ct. Ch. Div. 2002).

that the antenuptial *mahr* agreement should not be enforced either because it would run afoul of the First Amendment's establishment and free exercise of religion clauses, or because it was invalid as a contract.<sup>59</sup> The husband's First Amendment argument was that a civil court's enforcement of the religious *mahr* agreement would amount to improper entanglement of state with religion. The court rejected the husband's First Amendment argument, noting that, consistent with the Supreme Court's jurisprudence, the *mahr* agreement could be evaluated under "'neutral principles of law'" – more specifically, the neutral principle of contract law, and thus a civil court's enforcement of the religious *mahr* agreement would not amount to improper entanglement of state and religion.<sup>60</sup> The court upheld the *mahr* agreement as a valid contract and ordered the husband to pay the \$10,000 as provided in the *mahr* agreement.<sup>61</sup>

These cases show that a court is better able to enhance the capability of a woman to make her own intrafamilial decisions if the woman presents the court with a neutral principles of law basis on which to rest its decision. This basis often takes the form of an antenuptial agreement. Thus a woman in a religious group is well advised to enter into a valid agreement that outlines her rights within the group in the event of a divorce. These rights could include whether the husband and wife will seek religious arbitration in view of securing a religious divorce, a *get* situation, or whether and when the woman will receive *mahr* payment.

### Canadian Examples

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<sup>59</sup> Id. at 95.

<sup>60</sup> Id. at 97.

<sup>61</sup> Id. at 97-98. *See also Aziz v. Aziz*, 488 N.Y.S. 2d 123 (N.Y. Sup. 1985) (enforcing *mahr* agreement as valid contract where husband initiated the divorce proceedings).

In *Kaddoura v. Hammoud*,<sup>62</sup> a Canadian court refused to enforce a *mahr* agreement. Rather than analyzing the antenuptial agreement under neutral principles of civil contract law as did the American courts, *supra*, the court noted that an Islamic law expert “said that only an Islamic religious authority could resolve such a dispute” and held that determining the parties rights and obligations under the *mahr* agreement “would necessarily lead the Court into the ‘religious thicket,’ a place that the courts cannot safely and should not go.”<sup>63</sup> The wife was left with no recourse in the civil courts to force her husband to pay her the \$30,000 he agreed to, in writing in the antenuptial agreement, even though the court was “satisfied that [the husband] understood clearly how much the Mahr was and that it was written into the marriage certificate which he signed.”<sup>64</sup> The *Kaddoura* court likened the antenuptial *mahr* agreement to the Christian marital obligation “to love, honour, and cherish” and held that both types of obligations “go well beyond the basic legal commitment to marriage required by our civil law, and are essentially matters of chosen religion and morality.”<sup>65</sup>

*Kaddoura* stands in contrast to a recent ruling from the Supreme Court of Canada, *Marcovitz v. Bruker*,<sup>66</sup> that held, “It is true that a party cannot be compelled to execute a moral duty, but there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones.”<sup>67</sup> *Marcovitz* involved an agreement entered into by a Jewish couple at their divorce that provided the parties would “appear before the Rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious Get, immediately upon a Decree Nisi of Divorce being granted.”<sup>68</sup> After the

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<sup>62</sup> 168 D.L.R. (4th) 503 (Ont. Gen. Div. 1998).

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> 2007 CarswellQue 11548.

<sup>67</sup> Id.

<sup>68</sup> Id.



ex-husband's refusal to comply with the agreement and grant the *get* for nine years, the ex-wife sued for breach of the agreement "claiming damages in the amount of \$500,000 for her inability to remarry and for being prevented from having children who would be considered 'legitimate' under Jewish law."<sup>69</sup> In ruling in favor of the ex-wife and the agreement, the court noted:

The refusal of a husband to provide a *get*, therefore, arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs.<sup>70</sup>

The highest court in Canada thus resolves in the wife's favor the tension between the wife's individual rights – the right to practice the religion of her choice while having her valid contracts enforced under the civil law – and the religious group's right to vest in the husband the sole prerogative of granting the *get*. The Supreme Court of Canada, as American courts must, uses neutral principles of law to analyze the rights of the individual versus the rights of the religious group. The Canadian high court uses these neutral principles to enhance the capability of the individual to fully function within the family at the expense of the capability of the group to define itself, to set its own doctrinal rules. The lesson here is that women in religious groups should be made aware of their full civil rights so that they can choose to enter into valid agreements, which civil courts would be obliged to enforce, in order to plan for the contingency of not being married to their husbands.

### Religious Arbitration in the United States

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<sup>69</sup> Id.

<sup>70</sup> Id.

Arbitration is generally “[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”<sup>71</sup> American courts have long recognized the First Amendment religious rights of Jewish couples to seek resolutions of family issues before a religious arbitral court, or Beth Din.<sup>72</sup> As seen in *Aflalo v. Aflalo*, *supra*,<sup>73</sup> American courts are willing to give effect to the religious rights of individuals who wish to have a religious tribunal arbitrate their familial dispute.

In addition to civil courts using religious freedom grounds to recognize the rights of individuals to choose religious arbitration, courts often use neutral principles of law to analyze agreements to seek religious arbitration. This use of neutral principles to analyze agreements to arbitrate is analogous to courts using neutral principles to analyze the enforceability of *mahr* agreements. Unlike agreements of Jewish couples to seek arbitration from a Beth Din, the accommodation of Islamic law by deferring to an Islamic tribunal is a new phenomenon in American jurisprudence.

A case where a civil court has agreed to defer to an Islamic tribunal is *Jabri v. Qaddura*.<sup>74</sup> There, the wife filed for divorce, seeking custody of the couple’s children and the enforcement of an Islamic marriage certificate, which was signed by the husband and wife prior to the marriage and provided for a “dowry” of one half of the value of the marital house and \$40,000.<sup>75</sup> The husband counterclaimed, seeking custody of the children and non-enforcement of the Islamic marriage certificate, arguing that the certificate was fraudulently induced by the wife. The trial court entered partial summary judgment for the husband, holding unenforceable

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<sup>71</sup> BLACK’S LAW DICTIONARY 41 (2d pocket ed. 2001).

<sup>72</sup> *See, e.g., Friedman v. Friedman* 824 N.Y.S. 2d 357 (2006) (Because husband and wife validly agreed to seek religious arbitration, husband could not challenge aspects of the arbitral decision solely on the basis of the agreement to arbitrate.)

<sup>73</sup> 685 A.2d 523 (N.J. Super. Ch. 1996); See p. 8 of this paper.

<sup>74</sup> 108 S.W.3d 404 (Tex. App. 2003).

<sup>75</sup> *Jabri v. Qaddura*, 108 S.W.3d 404, 406-407 (Tex. App. 2003).

and invalid under Texas law the “purported Islamic Dowry agreement.”<sup>76</sup> The trial court based its non-enforcement of the dowry agreement not on the husband’s fraud argument but on the basis that the agreement was generally unenforceable and invalid as a premarital agreement under Texas law, because Texas law did not provide for such an agreement.<sup>77</sup> The trial court did not see a way, under Texas law, of enforcing the religious agreement that the wife stood to benefit from substantially.

Subsequent to the trial court’s partial summary judgment ruling, the parties entered into an arbitration agreement, agreeing to remove the litigation from the civil court system and to submit the litigation to the “Texas Islamic Court,” a panel of imams sitting as religious arbitrators and applying Sharia law to the dispute.<sup>78</sup> The wife then moved, in the trial court, to compel arbitration pursuant to the recently signed arbitration agreement.<sup>79</sup> The trial court denied the wife’s motion to compel arbitration, determining that the parties disagreed regarding the scope of the arbitration agreement and that therefore the arbitration agreement was invalid.<sup>80</sup>

The wife appealed.

On appeal, the appellate court held that the arbitration agreement was valid and enforceable and “cover[ed] all disputes between the parties that arose prior to the date the parties signed the Arbitration Agreement, including all matters that were the subject of the partial summary judgment previously granted by the trial court,” including the issue of whether the dowry agreement was enforceable.<sup>81</sup> Here, as with the *get* agreement in *Marcovitz* and the *mahr* agreement cases, a civil court uses neutral principles of law to rule for the woman.

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<sup>76</sup> Id. at 407.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id. at 409.

<sup>80</sup> Id.

<sup>81</sup> Id. at 413-14.

The *Jabri* case never reached the Texas Islamic Court for arbitration due to the parties' agreeing to a settlement; however, the *Jabri* case illustrates an American court's willingness to defer to the judgment of a religious tribunal, under the rationale of giving effect to a valid private agreement of the parties to litigate their claims before the religious tribunal. This is a significant development in American jurisprudence. The case implies that, unlike the Muslim tribunals referenced by Professor Wilson, some Muslim tribunals may be willing to enforce the traditional rights of the *mahr* even when the wife initiates the divorce. Although we do not know how the Texas Islamic Court would have ruled on the question of whether the dowry agreement was enforceable, the settlement in the *Jabri* case seems to imply that at least the parties foresaw some chance of the religious tribunal, either fully or partially, enforcing the wife's dowry rights. That the parties were willing to agree on a monetary settlement without going to the religious tribunal indicates that the parties thought the religious tribunal might enforce some monetary *mahr* or dowry rights of the wife. This implication of the *Jabri* case serves to indicate that at least not all Islamic tribunals would refuse to enforce the *mahr* rights of a wife who initiates divorce proceedings against her husband. And, in any event, if a woman believes that religious arbitration will work in her favor, she is wise to enter into a civilly enforceable agreement that provides for the religious arbitration. But a conflict between individual and group rights could certainly arise if the religious arbitrator sides not with the wife but with the husband – and perhaps the group's determination that the wife should forfeit the *mahr* under certain circumstances. A similar conflict has been faced recently in Canada.

#### Accommodating Religious Arbitration in Canada

In addition to the United Kingdom's experience with accommodating aspects of Islamic, or Sharia, law, as mentioned *supra*,<sup>82</sup> Canada has experience with accommodation of Islamic law in the family law context. Prior to 2006, members of the Muslim community proposed using Ontario's Arbitration Act<sup>83</sup> to allow practicing Muslim couples to submit their family law disputes to religious arbitrators who would apply Islamic legal principles to the disputes,<sup>84</sup> much as the *Jabri* court did in Texas. Natasha Bakht, an Ontario lawyer, warns that "it is ... feasible that under the [2004 version of the] *Arbitration Act* a regressive interpretation of Sharia will be used to seriously undermine the rights of women. ... As the Act currently stands, *any* conservative, fundamentalist or extreme right wing standard can be used to resolve family law matters in Ontario."<sup>85</sup> Bakht notes, "With no legal aid or mandatory legal representation, there are serious concerns as to whether women will be truly free in their choice to arbitrate."<sup>86</sup> Bakht points out that battered women would likely lack the capacity to negotiate an agreement that is "fair to [their] interests,"<sup>87</sup> that immigrant women would be more likely to accept a religious arbitration without looking into their rights under Canadian law,<sup>88</sup> and that indeed all women would be susceptible to the fact that "private ordering tends to replicate social inequities ... [such that] the oppression women experience in society generally will be duplicated in arbitrated agreements and awards."<sup>89</sup> Bakht points out the tension in a Canadian legal scheme that allows private arbitration of family law matters under religious criteria that differ from Canadian law

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<sup>82</sup> See p. 4 of this paper.

<sup>83</sup> *Arbitration Act*, S.O. 1991, c. 17

<sup>84</sup> Natasha Bakht, Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women 1 *Muslim World J. Hum. Rts.* 1 (2004).

<sup>85</sup> Natasha Bakht, Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its Impact on Women 1 *Muslim World J. Hum. Rts.* 1, 18 (2004) (emphasis in original).

<sup>86</sup> *Id.* at 19.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 20.

<sup>89</sup> *Id.*

while promising that all Canadians, including women, are “equal before and under the law and [have] the right to the equal protection and equal benefit of the law without discrimination.”<sup>90</sup>

In light of the proposal by members of the Muslim community to allow Muslim couples to use the Arbitration Act to seek religious arbitration of family law matters, and observations such as those of Bakht, the Ontario government appointed former Ontario Attorney General Ms. Marion Boyd in 2004 to review the implications of Muslim couples using the Arbitration Act to adjudicate their family disputes.<sup>91</sup> Boyd’s report set forth a middle-ground approach, suggesting that Muslim couples should be allowed to seek religious arbitration in the family law context so long as procedural protections are in place.<sup>92</sup> Boyd noted:

The Review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Therefore the Review supports the continued use of arbitration to resolve family law matters. However, that use should be subject to the safeguards recommended below.<sup>93</sup>

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The recommended safeguards, or procedural protections, required that, for a religious arbitration agreement to be enforceable, the agreement must first meet the requirements that any other domestic contract would have to meet to be generally enforceable.<sup>94</sup> Other procedural protections required the parties to put the agreement in writing and for both parties to sign the agreement, having first been advised by counsel or affirmatively waived their right to be advised by counsel.<sup>95</sup> The procedural protections permitted a court to review a religious arbitral award and to set that award aside if, among other reasons, the court found the award unconscionable or

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<sup>90</sup> Id. at 20 (quoting *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 at s. 15(1)).

<sup>91</sup> Id. at 24.

<sup>92</sup> Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* 133-42 (Report to Ontario Attorney General and Minister Responsible for Women’s Issues December 2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf> (last visited on April 8, 2008).

<sup>93</sup> Id. at 133.

<sup>94</sup> Id.

<sup>95</sup> Id. at 137.

found that “a party did not receive a statement of principles of faith-based arbitration.”<sup>96</sup> This “statement of principles” was to be developed by the religious arbitrators and “[explain] the parties’ rights and obligations and available processes under the particular form of religious law.”<sup>97</sup>

In light of Boyd’s forty-six recommended safeguards, and a general public sentiment that there should be one law of the land with respect to arbitration of family law disputes, “[t]he Ontario legislature ... passed the Family Statute Law Amendment Act, 2005, which mandates that all family law arbitrations in Ontario are to be conducted only in accordance with Canadian law.”<sup>98</sup> As the Minister for Health Promotion, Hon. Jim Watson, argued from the floor of the Ontarian legislature, the thrust of the Act was to ensure that arbitral “resolutions based on other laws and principles, including religious principles -- shariah, Christianity, Judaism etc. -- would have no legal effect and would only amount to advice.”<sup>99</sup> The Ontarian legislator for the Huron-Bruce district, Mrs. Carol Mitchell, noted from a letter she received that Ontarians felt that while “multiculturalism and religious tolerance” were important values, they did not believe those values should “translate into the establishment of separate legal systems for individuals of different faiths.”<sup>100</sup> So the Ontario family law arbitration law now provides, “family arbitration ... is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction” – not with the private law of any religious group.<sup>101</sup>

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<sup>96</sup> Id. at 134.

<sup>97</sup> Id. at 136.

<sup>98</sup> Press Release, Ministry of the Attorney General of Ontario, Family Law Arbitrations To Be Based On Canadian Law Only (Feb. 15, 2006) (on file with author), *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/news/2006/20060215-famend.asp> (last visited April 9, 2008).

<sup>99</sup> Debates (Hansard) of the Ontario Legislature at 1640, *available at* [http://www.ontla.on.ca/web/house-proceedings/hansard\\_search.jsp?searchString=family+statute+law+amendment+act&go=Search&locale=en](http://www.ontla.on.ca/web/house-proceedings/hansard_search.jsp?searchString=family+statute+law+amendment+act&go=Search&locale=en) (last visited April 9, 2008).

<sup>100</sup> Id. at 1650.

<sup>101</sup> Family Statute Law Amendment Act, 2006, amend. to Arbitration Act, 1991 s. 1(b) (Ontario).

Admittedly, this law leaves the religious group less able to identify itself, and leaves the members of that group without the capacity to use the civil law to enforce certain agreements made under the aegis of the religious group to which they ascribe. The people of Ontario, through their government, chose not to allow religious groups to use the civil court system to enforce their private family law agreements. Although religious arbitrations can still occur, they now have no legal effect, leaving the group less able to identify itself and thus, in some sense, impoverished. However, Ontario describes its law in irreligious terms: the law is designed to promote uniformity, neutrality, and equality in the law and is designed to protect more vulnerable individuals. Ontario's approach can be seen as extreme in that it provides no legal deference whatsoever to religious groups' family law rules. However, Ontario's approach is sound in that, in choosing between a religious group and those group members who are more vulnerable, the approach focuses on the vulnerable and seeks to protect them through the duly enacted laws of the land – laws that all Ontarians enjoy.

#### Shachar's "Transformative Accommodation" Approach

Ontario's Family Statute Law Amendment Act stands in contrast to Professor Shachar's "transformative accommodation" approach.<sup>102</sup> Shachar audaciously posits that transformative accommodation "takes the two different locuses of authority – the *nomoi* group and the state – and, instead of viewing their conflict of interests as a problem, considers it as an occasion for encouraging each entity to become more responsive to *all* its constituents."<sup>103</sup> This approach harkens to Marion Boyd's proposal, which the Ontario government ultimately rejected, that sought to accommodate religious arbitrations in family law by recommending procedural

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<sup>102</sup> See Ayelet Shachar, *Multicultural Jurisdictions* 117 (Cambridge 2001).

<sup>103</sup> Id.



protections to ensure that vulnerable, less powerful parties would not be taken advantage of.

Shachar describes transformative accommodation as a “separation-of-power” model and outlines its “three core principles:” “the ‘sub-matter’ allocation of authority, the ‘no monopoly’ rule, and the establishment of clearly delineated choice options.”<sup>104</sup>

The “sub-matter” allocation of authority assumes that a “contested social [arena],” such as the family law context, is sub-divided into component parts.<sup>105</sup> Neither the *nomos* nor the state should have complete control over all the parts; rather, the *nomos* and state share a “context-sensitive allocation of jurisdiction.”<sup>106</sup> The “no monopoly” rule is a follow-on concept to the “sub-matter” allocation of authority concept<sup>107</sup> The “no monopoly” rule provides that no single authoritative entity should have complete power over a social arena, i.e., the family law arena.<sup>108</sup> Shachar argues, “If carefully designed and implemented, transformative accommodation can thus create incentives for both state and group to serve their citizenry better.”<sup>109</sup>

The rub seems to be in Shachar’s third principle where individuals “have clear options which allow them to choose between the jurisdiction of the state and the *nomoi* group.”<sup>110</sup> Shachar asserts that individuals can decline “jurisdictional authority at predefined ‘reversal’ points,” and, “[a]s a last resort ... ‘[o]pt out’ of a jurisdiction [altogether] if the jurisdiction power-holders fail to effectively respond to constituent needs.”<sup>111</sup> Shachar explains, “Once an agreed-upon reversal condition has been breached, the individual is automatically entitled to the protection of the competing jurisdictional authority (either group or state). Clearly delineated and

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<sup>104</sup> Id. at 118-119.

<sup>105</sup> Id. at 119.

<sup>106</sup> Id.

<sup>107</sup> Id. at 120.

<sup>108</sup> Id. at 120-21.

<sup>109</sup> Id. at 122.

<sup>110</sup> Id.

<sup>111</sup> Id.

selective ‘entrance,’ ‘exit,’ and ‘re-entry’ options are thus a crucial component in improving the situation of traditionally vulnerable group members.”<sup>112</sup>

It is not certain that the vulnerable group members, i.e., the non-“power-holders,” will be able to simply “opt out” of the group’s jurisdiction when the group fails to adequately protect them. As Bakht has observed, these individuals may not have the capacity to choose whether opt-in, as it were, in the first instance because they may not have access to legal counsel or access to information regarding their full civil rights.<sup>113</sup> Without the capacity to opt-in, it is highly doubtful individuals will have the capacity to likewise opt-out. Marion Boyd’s forty-six procedural recommendations also militate against the notion that vulnerable group members will be able to reject group determination of their situation. Is a Boyd-style approach worthwhile if the state has to look over the shoulder of the group with such scrutiny in every case? Amartya Sen’s gender inequality analysis also calls into question the capacity of women to freely choose whether the group will arbitrate their intrafamily disputes.<sup>114</sup>

### Conclusion

The middle-ground approaches taken in Marion Boyd’s recommendations to the Ontario government, and in Shachar’s “transformative accommodation,” appropriately seek to strike a balance when resolving the conflict between the capability of the individual to make intrafamilial decisions for herself and the capability of the group to define its own rules and practices. In the United States, religious liberty is certainly a touchstone, given the First Amendment and the pervasive nature of religion in American society. The state must respect the religious freedoms of individuals, and the groups they comprise, by refraining from determining religious doctrine.

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<sup>112</sup> Id. at 124.

<sup>113</sup> See *supra*, n. 79.

<sup>114</sup> See *supra*, n. 12.

This principle is clear from Supreme Court jurisprudence, and is seen in the *get* cases that do not involve contractual agreements where the courts are loathe to make a determination as to which party should win under religious rules. But the state will use neutral principles of law – including contract law – to enforce agreements that parties enter into that are valid under the principles of contract. The state will also use these neutral principles to determine whether an arbitral agreement or determination should be enforced by the civil courts.

It would be preferable for American jurisdictions to first attempt a Boyd-style or Shachar-style system of allowing religious arbitrations of certain family law disputes as long as substantial procedural safeguards are in place to protect all individuals' civil rights, and to protect especially vulnerable individuals who do not have the capacity to make fully independent decisions. In addition, antenuptial agreements that outline the parties' rights and obligations in the event of marital separation or divorce are highly desirable as a way to enhance the capacity of individuals to fully function – provided these agreements are fairly drawn up with both parties' interests in mind. These agreements could serve to protect vulnerable group members, especially if family members or lawyers are involved in the negotiating and drafting of these antenuptial agreements with the best interests of the individuals in mind. Ultimately, when a group member's rights are in tension with the rights of the group, the state should err on the side of the likely vulnerable individual – even if this means an Ontario-style rejection of private religious arbitration. Perhaps the jurisdictions of the United States will be more successful at striking a balance in enhancing the capability of both the vulnerable individual and the group.