The Practice of Religious Law: Pastoral Care and the Resolution of Family Conflicts: Case Studies of Islam and Judaism in North America

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THE PRACTICE OF RELIGIOUS LAW: PASTORAL CARE AND THE RESOLUTION OF FAMILY CONFLICTS
CASE STUDIES OF ISLAM AND JUDAISM IN NORTH AMERICA

Natalie A. Ghosn

A DISSERTATION
Submitted to the Faculty
of the University of Miami
in partial fulfillment of the requirements for
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THE PRACTICE OF RELIGIOUS LAW: PASTORAL CARE AND THE RESOLUTION OF FAMILY CONFLICTS
CASE STUDIES OF ISLAM AND JUDAISM IN NORTH AMERICA

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Despite the long-term secularization of North American societies, there remain people, native and immigrant, who are committed to the centrality of religion in their lives. Some members of religious communities, as a result, turn inward for help in resolving conflicts they face in everyday life, particularly in matters concerning domestic affairs like courtship, marriage, divorce, childrearing challenges, estate planning, and the like. The practice of seeking a religious form of conflict resolution is not uncommon among Jewish and Muslim communities in North America. American and Canadian law are pluralist by nature in that they permit and partially valorize such conflict resolution.

This dissertation seeks to examine the methods by which Jewish and Muslim religious leaders engage domestic conflict matters through a religious lens and in a religious setting. The dissertation examines the ways in which religious leaders consider a variety of topics related to law, dispute resolution, the family and gender. The choice of law, of jurisdiction, and of venue that participants in this form of alternative dispute resolution (ADR) have made are central to the analysis here. The motivations inclining individuals to seek the guidance of religious leaders as opposed to bringing their concerns to secular therapists, social workers, psychologists, and professional arbitrators or courts,
are examined in this dissertation. Accessibility to religious leaders with regard to cost, mobility and the integration of newly arrived immigrants, the spiritual element of all crises, a sense of solidarity and obligation with a religious community, the status religious leaders hold in particular communities and the perceived knowledge and expertise held by religious leaders all play a role in both the choices and outcomes illuminated in this inquiry.

Finally, the dissertation concludes that rather than constituting a roadblock to minority and immigrant integration into the North American “mainstream,” these clerical fora and processes actually facilitate integration, a fact of which most participants and practitioners are aware.
With special thanks & dedication to Raphina Ghosn, my mom.
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Chapter 1: Introduction

Although there are growing populations of immigrants as well as an intensification of religiosity in certain communities, secularism is on the rise in Western nations.\(^1\) While there has been some accommodation of religious values in secular law and society, for many religiously observant individuals this form of accommodation does not go far enough. Today, there is tension between religious freedom and the laws of equality as laws are evolving to incorporate a variety of forms of equality, not previously recognized. These changing values can, at times, clash with the religious beliefs of certain communities.\(^2\) Challenges to the integration of newly arrived religious minority immigrants exist and religious leaders are in a unique position to facilitate a form of integration that satisfies religious and cultural requirements of individuals as well as the expectations of mainstream secular society. An examination of the relationship between secular and religious practices of clergy members in our present society is the focus of this work. As the recent trend in North America is toward increasing secularism there are shifting societal values and evolving laws that accommodate this reality. In recent decades, there is an “ever-widening gap between traditional values and societal law and policy in the United States.”\(^3\) Religious communities, while shrinking, have turned inward for resolution of conflicts its members face in their everyday lives.\(^4\) Many “religiously observant Americans view the secularization of American laws and policies as repugnant to their own beliefs and principles, and have become further entrenched in

their traditional beliefs.” People of faith are thus more comfortable organizing many aspects of their lives in the private sphere. This is particularly true for matters concerning family life.

During the 1920s, disputes concerning culture, religion and tradition were prevalent. Eventually, the term “culture wars” developed to describe these disputes. The term refers to a “conflict between those values considered traditional or conservative and those considered progressive or liberal.” Today, there is still a tension that exists between traditional values and the continuous secularization of law and general society and this has caused many members of religious communities to “become even more invested and devoted to their respective faiths as sources of all-encompassing personal values.” As explained above, there has been a gradual withdrawal from secular society, particularly with regard to family law (like marriage laws) by religiously observant individuals.

The practice of seeking a religious form of conflict resolution is not uncommon among Jewish and Muslim communities in Canada and the United States. This process often occurs through the mediation and pastoral care of religious leaders. This dissertation seeks to examine the method by which Jewish and Muslim religious leaders engage secular matters through a religious lens and in a religious setting. This pastoral care is akin to religious arbitration which has developed “into just one more expression of the choice-of-law and choice-of-forum provisions typical in many kinds of contracts.”

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5 Broyde, 10.
6 Broyde, 30.
7 Broyde, 32.
8 Broyde, 82.
Pastoral care is now addressing a wide-variety of subject-matter beyond the scope of matters of faith.

The manner by which religious leaders think about a variety of topics related to law, dispute resolution, the family and gender will be examined in this study. While this project does not conduct a large-scale statistical study, it does produce data derived from in-depth ethnographic style interviews of ninety-three religious leaders, fairly evenly distributed between Orthodox Judaism, Conservative Judaism, Reform Judaism and Sunni Islam. How the religious leaders interviewed work, and how they interact with issues that are not particularly religious in nature, i.e., not strictly matters of faith, is examined and analyzed in this project. Why individuals seek the guidance of religious leaders for secular crises they are facing as opposed to simply taking a concern they are having to a secular institution like a therapist, a social worker, a psychologist, arbitration or courts, etc. is a focal point of this work. Overall, this work finds that a combination of factors address this inquiry. Accessibility to religious leaders with regard to cost, mobility and the integration of newly arrived immigrants, the spiritual element of all crises, a sense of solidarity and obligation with a religious community, the status religious leaders hold in society and the perceived knowledge and expertise held by religious leaders all play a role.

This study addresses a number of questions. It asks, from the perspective of religious leaders, do religiously affiliated individuals feel obligated to pursue a religious resolution to family law conflicts they are facing, how effective is pastoral care as a form of alternative dispute resolution, what shape and form does the community-based, non-state sanctioned, practice of religious law take in North America, and what are the gender
implications of the community-based, non-state sanctioned, practice of religious law in North America?

These questions will be examined in the context of the practice of Islamic and Judaic family law that takes place at the community level through the dispute resolution of Rabbis or Imams in a religious setting and as governed by the applicable religious doctrine, Shari‘a or Halakhah. The findings in this dissertation are driven by first-hand research in the form of interviews of religious leaders conducted in both Canada and the United States.

Following this introductory chapter, chapter two focuses on the theoretical and conceptual frameworks used to conduct the research and interviews that form the basis of this work’s findings. It explores the various methodological tools used as well as the various academic approaches taken. In addition, a description of the interviews chosen for this project is also provided.

Chapter three provides the reader with a guide to the pertinent and frequently used project terms that often generate multiple meanings. For example, what is meant by religious law, Shari‘a and Halakhah, are defined and explained as pertinent to this project. Divided into three main categories of law, domestic law, international law and religious law chapter four outlines the various national legal provisions of Canada and the United States of America, the applicable international law by way of treaties and conventions, as well as the relevant religious provisions in both Islamic law and Judaic law that govern matters of family law within the scope of this work. The interaction between the mediation of family law in the private religious sphere and the role the state has in family law is explored in the interviews. The function or basic purpose of family
law is “to support fundamental social institutions, like marriage and parenthood, and to steer people into participating in them.”

Chapter five asks, from the perspective of religious leaders, do religiously affiliated individuals feel obligated to pursue a religious resolution to the family law conflicts they are facing? This question is important in determining the reach or obligation an individual may actually feel towards an informal dispute resolution process. This question is again examined with regard to each of the four denominations studied, Sunni Islam, Orthodox Judaism, Conservative Judaism and Reform Judaism. Chapter six asks, how effective is pastoral care as a form of alternative dispute resolution? This question is examined by quasi-objective indicators as well as from the insider point-of-view of the religious leaders themselves. Chapter seven examines, the Islamic and Judaic tradition, through engagement of a question central to this study: What shape and form does the community-based, non-state sanctioned, practice of religious law take in North America? This question is addressed with regard to four religious denominations studied.

Chapter eight addresses a question which assists in explaining the effects of religious pastoral care on gender. What are the gender implications of the community-based, non-state sanctioned, practice of religious law in Islam and Judaism? The chapter explains the gender implications of the community-based, non-state sanctioned practice of religious law in North America and in each of the four denominations studied. The results both reflect and contradict commonplace understandings. Chapter nine offers concluding thoughts about the form of alternative dispute resolution which developed

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through pastoral care in religious communities as well as perspectives on the role religious leaders play in the integration of religious communities.

Michael J. Broyde in *Sharia Tribunals, Rabbinical Courts, and Christian Panels* examines the interaction between secular law and private religious arbitration. He argues that a secular legal framework should be used to “facilitate, enforce – and also regulate” religious arbitration.10 This study argues that such a framework is already developing to govern the pastoral care of religious leaders; however, it is emerging in an informal and unregulated manner. Given the breadth of issues that come before religious leaders and the vast expertise in a variety of fields and techniques that could prove useful in such instances, this work argues that a regulated and professional network outside of the clergy would be beneficial to religious leaders if available in a more concrete manner. Religious leaders should have access to non-spiritual training that will assist them in delivering pastoral care which is in tune with secular society.

Some individuals do not desire their secular disputes to be resolved by a secular court and some individuals do not want their non-faith-based crisis addressed by secular sources, as in the case of a therapist. It is the position, based on the findings of this study, that a strategy of integration be pursued between religious and secular institutions. Instead of religious leaders referring congregants in crisis to outside sources, religious leaders should have access to resources to address a wide variety of subjects. Developing a system of broader education that includes training for religious leaders in social work, counseling and other relevant fields that is cohesive with secular standards would create a system that would be beneficial for society in addressing crises of congregants that are of a secular and/or faith-based nature. While there is some training in these areas available

10 Broyde, 163.
in certain denominations and certain faiths that have formal training, it is not uniform across traditions and the depth of training can range from extensive to none at all. The interviews in this study highlight this reality and nearly every religious leader felt as though the care they could offer fell short in one regard or another. Developing insight not only in matters of faith, but also in relevant secular matters will be optimal. This has been the strategy of religious arbiters, many of whom have knowledge in both religious and secular law. Sensitivity to both religious and secular norms will be essential in the effective operation of such a system. It is clear that religious leaders who resolve disputes “ultimately serve a role in shaping the community, no differently than judges in any society.” This study concludes that this access to a broader system of education for religious leaders would be a positive contribution to society.

11 Broyde, 163.
12 Broyde, 166.
Chapter 2: Theoretical Framework

2.1 Interdisciplinary Approach to Academic Inquiry

John C. Roberts, Chief Justice of the U.S. Supreme Court has argued that “Interdisciplinary research…can be one of the most productive and inspiring of human pursuits – one that provides a format for conversations and connections that lead to new knowledge.”

This study seeks to exemplify this objective through the use of interdisciplinary methodology. Interdisciplinary research can be defined as “a mode of research by teams or individuals that integrates information, data, techniques, tools, perspectives, concepts, and/or theories from two or more disciplines or bodies of specialized knowledge to advance fundamental understanding or to solve problems whose solutions are beyond the scope of a single discipline or area of research practice”.

In addition, “interdisciplinary legal research will draw substantially on the methodologies and knowledge of other academic disciplines, rather than being grounded solely in textual research of primary and secondary legal sources.” Despite the assertion that law is an independent and separate field whose research is set apart from other academic disciplines, this dissertation takes an interdisciplinary approach to research and employs qualitative ethnographic approaches in its methodology. This project seeks to draw on knowledge of a variety of academic fields including international law, comparative law, religious studies, international relations, gender studies, social anthropology and history with special attention to law, anthropology and religion.

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14 Owen and Noblet, 5.
15 Owen and Noblet, 6.
Ziyun Liu states that the “realization of interdisciplinary research on international legal theory and the study of international law is inevitable.”\textsuperscript{16} Despite the criticism that interdisciplinary research will be “not understandable” or will have a “lack of meaning of guidance to social practice,”\textsuperscript{17} interdisciplinary research has found a foothold in comparative legal analysis that has shown the utility academic inquiry across a variety of fields can generate. This move towards interdisciplinary research has also been fostered by international relations scholars looking for insight in their puzzles.

2.2. Methodology

This dissertation will focus on the gender impact of the non-state sanctioned community-based practice of religious law. It will examine the “hierarchical power implications” of masculinity and femininity within the context of the practice of religious law. The traditional understanding of gender hierarchy consists not simply of differences between masculinities and femininities, but with a patriarchal structure.\textsuperscript{18} “If sex is biological, [as Ann Tickner and Laura Sjoberg argue] and “gender” is social, “gender hierarchies” are socially constructed hierarchies based on gendered expectations of individuals, states, and other actors in global politics.”\textsuperscript{19} This hierarchy is relevant to the topics of this dissertation and will be examined here. It can be argued that the historical feminisms in Islam and Judaism reflect the patriarchal society in which they were developed.

\textsuperscript{17} Liu, 501.
\textsuperscript{18} Tickner, J. Ann., and Laura Sjoberg. Feminism and International Relations Conversations about the Past, Present and Future. Taylor and Francis, 2013, 4.
\textsuperscript{19} Tickner and Sjoberg, 4
According to Ann Tickner and Laura Sjoberg, in order to “transcend structural constraints and effect emancipatory social change” in research efforts, researchers need a method that:

1. Compels critical self-reflection over their own assumptions, language and embeddedness in a particular historical and ideological context;
2. Guides them toward inclusivity and opens them to input and ideas from (potentially) all members of society;
3. Allows them to identify and remedy actual or potential forms of oppression and exclusion in society and in their own practice;
4. Enables the recurrent evaluation of their practices and ideas.\(^{20}\)

International law scholars “are used to conducting detailed analysis” that produces “theoretical analysis with a fine filter based on factors, such as events, procedure, text, practice and specific arrangement mechanisms.”\(^{21}\) On the other hand, international relations scholars show that “descriptive work based on different theoretical visions can acquire better research results…since different research perspectives [within the field of IR] can lead researchers to mainly concern [themselves with] the factors that require specific attention, the relationships that need to be explored, and to provide them with different channels that can help clarify complicated facts.”\(^{22}\) All these attributes are incorporated in the methodology of this dissertation.

This research takes a bottom-up approach that starts at the level of the individual in order to draw larger conclusions about religious leadership in Jewish and Muslim communities in North America. Intensive interviews are the primary method of data collection for this study. These interviews were conducted first-hand with a selection of Rabbis and Imams in Canada and the United States. Directed, as opposed to open-ended questions, proved most useful and provided the best way to rule out side-tracked

\(^{20}\) Tickner and Sjoberg, 25-26
\(^{21}\) Liu, 514.
\(^{22}\) Liu, 514.
responses to the actual inquiry. Interviews were conducted after Institutional Review Board approval was obtained.

Methods rooted in the field of Anthropology have been employed for this project and significant emphasis on ethnographic style interviewing was used. Ethnographic exerts appear in the text. Data collected during the interview process are deciphered, graphed and included as figures in this project. The ‘ethnographers toolkit’ described by Iris, Plattner and Berman consists of research design, qualitative methods, direct observation, interview skills and data recording and retrieval, are all employed in this project. Interviews were recorded by freehand notes as well as by electronic tape-recording of the entirety of the interviews conducted. Qualitative interviewing has been used not only to produce the ethnography portions of this project but also to collect quantitative data points. The use of qualitative tools is consistent with the comparative method.

The subjects that were interviewed for this project are exclusively religious leaders with authenticated credentials, be it through formal religious schooling or community acknowledgement of the religious leader’s role. As Penn W. Handwerker explains in The Construct Validity of Cultures, “under ordinary field conditions and for nearly all ethnographic goals, everyone constitutes a cultural expert in what she or he knows, feels, and does.” Hence, for purposes of this project, Rabbis are considered to be the experts.

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on matters of religion and law in the Jewish faith and that status is accredited to Imams in the Islamic Faith.

The primary focus of this project has been ethnographic interviewing. While this project did not conduct a large-scale statistical study, a brief survey concluded each interview in an attempt to gather a sampling of data representative of the faiths under study. The graphed images, displayed as figures throughout this work, map the percentage from responses of 22 Orthodox Rabbis, 22 Conservative Rabbis, 23 Reform Rabbis and 26 Sunni Imams to the particular inquiry. This method could be described as a sample survey which is “a study in which information is gathered from a fraction of the population chosen to represent the whole.”27 This survey data was collected orally during the interview process and resulted in a number of quantitative graphs being generated which are shown throughout chapters five through eight of this work.

As a practice theorist, I take the overall goal of this project as seeking to explore how religious leaders understand their reality and their place in society and how they process and understand culture in a practical and applied manner. The interaction between the spiritual and secular realms, the role of pastoral care, relationships between religious and secular law, are subjects that were explored in the interviews.

As James P. Spradley explains in The Ethnographic Interview, culture “refers to the acquired knowledge that people use to interpret experience and generate social behavior” and “each culture provides people with a way of seeing the world.”28 Culture is explored in an attempt to decipher understanding to the following inquires: What shape and form does the community-based, non-state sanctioned, practice of religious law take in North

28 Spradley.
America and what are its gender implications?; How effective is pastoral care as a form of alternative dispute resolution?; From the perspectives of religious leaders, do religiously affiliated individuals feel obligated to pursue a religious resolution to family law conflicts they are facing? How religious leaders see the world is at the very essence of this project.

2.3 Case Selection

The two faith traditions chosen for this study are Islam and Judaism. Both Islam and Judaism are law-based faith traditions that, in their traditional form, “expect their adherents to order their lives and resolve their conflicts in accordance with their respective religious norms.”29 Both Judaism and Islam are traditions with legal systems based upon God’s revealed will.30

The region studied here is North America, in particular, Canada and the United States. Based on the similar patterns of development and recent immigration, these nations are well-suited for comparison. The comparative case method will be used to contrast the same and similar factors of analysis in both of the faith traditions studied. The comparative method is “research that uses comparable data from at least two societies.”31 The comparative method asks questions about “empirically defined, historically concrete, large-scale social entities and processes.”32 While only two nations, one region, two faith traditions and four religious denominations are studied in this project, the methods that will be employed will form a model for further research on

29 Broyde, 135.
30 Broyde, 138.
31 Ragin, 4.
32 Ragin, 4.
religious communities in other nation-states. This study serves as a first step to larger projects.

Due to constraints of accessibility in accessing Shi’a religious leadership on a wide-scale basis, the Shi’a denomination of Islam is not included in this study. Only leadership in the Sunni tradition were interviewed. There is significant cultural and ethnic diversity in the religious leadership interviewed. It was beyond the scope of this study to examine, in depth, how these distinctions affect understandings and interpretations of law. These cultural nuances are topics for future study. The three primary denominations of Judaism in North America are included in this study, Orthodox, Conservative and Reform. These “denominations are mainly distinguished from one another on the basis of their philosophical approaches to Jewish tradition, and their degree of fidelity to an interpretation of traditional Jewish law, or halacha.”

Reform Judaism is the largest denomination of American Jews, constituting thirty-five percent of self-identifying Jews. The movement “emphasizes the primacy of the Jewish ethical tradition over the obligations of Jewish law.” Conservative Judaism is often considered a middle-ground of religious observance and adherence to Jewish law between Reform Judaism and Orthodox Judaism. For Conservative Jews, religious law is obligatory. However, there are large distinctions in the interpretation of Jewish law in this denomination. A gender-equalitarian approach to Jewish law is the main distinction

34 The Jewish Denominations.
35 The Jewish Denominations.
36 The Jewish Denominations.
37 The Jewish Denominations.
38 The Jewish Denominations.
between Conservative Judaism and Orthodox Judaism. Orthodoxy Judaism is defined by a traditional understanding and adherence to Jewish law as “interpreted by rabbinic authorities over the centuries.” Only ten percent of American Jewry self-identifies as Orthodox. In terms of demographics of the populations examined for this study, Jews make up roughly 2% of the total population in North America, based on national censuses and large-scale surveys of individuals who self-identify as Jewish. The United States is estimated to have 5,690,000 Jews and Canada is estimated to have 350,000 Jews.

There are approximately 1,053,945 Muslims living in Canada. This represents 3.87% of the total Canadian population. The rapid immigration of refugees from Syria is likely to have increased this number; however, official data about demographic changes has not yet been released. Islam continues to be the fastest growing non-Christian religion in Canada.

According to Pew Research Center there are about 3.45 million Muslims living in the United States. Muslims are a rapidly growing population in the United States as a consequence of higher fertility rates and continuing immigration of Muslims to the United States. While conversion rates are higher in Islam than other faiths this has not

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39 Interview on November 1, 2017.
40 The Jewish Denominations.
41 The Jewish Denominations.
42 Liu.
43 Liu.
47 Besheer.
contributed significantly to the growing Muslim population in the USA.\textsuperscript{48} There are nearly as many Americans leaving Islam or no longer identifying with that faith as those that are converting to Islam.\textsuperscript{49} In this regard, the numbers roughly even out.\textsuperscript{50} Three-quarters of U.S. Muslims are immigrants or the children of immigrants.\textsuperscript{51} This reality is important in understanding the significance of religious resolutions to family conflicts in American Muslim communities. This theme of immigration and integration will be examined in this study.

\textsuperscript{48} Besheer.
\textsuperscript{49} Besheer.
\textsuperscript{50} Besheer.
Chapter 3: Definitions

Let us begin by defining terms central to the analysis here, specifically: religious law, religious courts, Shari'a, Halakhah, gender rights and gender equality, alternative dispute resolution, and community-based law.

3.1. Religious Law

There are many different understandings and interpretations of religious law. There, however, are certain features that remain consistent in most understandings, despite variations from one religious tradition to another. Religious law is understood as God-given law by adherents to the faith tradition. According to Elena Paraschiv in *The Role of Specific Religious Law Within a Predominantly Secular Legal Order*, a violation by adherents of religious law is a direct violation of God and God’s law itself. While religious law may be interpreted as a religious instrument, “it is not [Paraschiv further argued] subject to adaptation to changing opinions or practices among those who are bound by it.”

Francois Dessemontet, in *Emerging Issues in International Arbitration* argued that religious law can be defined in negative terms. Religious law, in this view, is not the law of the land. Some emphasize that “religious law stresses *inter alia* communal values and a submission to authority within hierarchical structures: religious law may have a multifaceted character in developing democratic process principles derived from

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54 De Blois, 192.
55 I.e. Religious law is something because it is not something else. It is not the national or state law, it is another kind of law.
religious law, and the focus of the content of the law is on equality and individual autonomy.”57

According to Adam Shinar and Anna Su, the term religious law refers to “law which bears upon interpersonal conduct and connotes moral obligations on the part of the believer” as they consider religious law to be a “source or tool of interpretation and not the subject of it”.58 More broadly, “religious law may encompass a wide range of doctrines and teachings, usually grounded in religious texts, which are concerned with interpersonal interactions, moral obligations, and specific religious duties.”59 Religious law can be seen, interpreted and applied like any other body of law. From its adherents’ point of view, there would be no incompatibility between the application of religious law and religious freedom.60 Michael Helfand explains that, “seeing religious law as more like law than religion can help protect the institutional infrastructure that makes religious freedom possible.”61 There remains one important distinction between the interpreting religious law and any other legal code. This has to do with the finality of judgments that are reached through an interpretation of religious law. While judgments of secular courts are considered binding, they are also often open to appeal for reinterpretation. In contrast, from the perspective of the religious leaders, “those rules and norms, as interpreted and handed down by the recognized authorities of the community, are experienced as carrying legal and binding effects” which are final in nature.62

57 De Blois, 191-192.
59 Shinar, 76.
61 Helfand, 161.
62 Shinar, 76.
An important dichotomy to consider when defining religious law is that the term “can be used to describe both the rules found in sacred texts and also the more practical rules developed by religious groups themselves.” Religious groups are regulated not only by the laws of states in which they live but also by “their own internal laws, rules and procedures.” As a result, religious groups adhere to both the divinely inspired rules contained in sacred texts as well as more practical rules that developed from the practice of religious groups.

### 3.2 Religious Courts

Usually considered in formal terms, courts are institutions where the administration of law takes place. Religious courts, by contrast, are courts that have jurisdiction in spiritual and religious matters. These courts are often sanctioned by the state in which they operate. As suggested by Marie Ashe and Anissa Helie, religious courts enforce religious law and these courts are “tolerated or endorsed by civil governance.”

In contrast to state courts where justice is typically administered by a Judge designated through the formal mechanisms of the state legal apparatus, in religious courts, the ‘Judge’ is the ruling authority on matters of religion. In the case of Judaism, this is often a Rabbi, and in Islam an Imam or Sheikh. Religious courts do not administer the law of the land. Instead, they invoke the legal tenets of a particular religious tradition in order to issue a ruling. In religious courts, “sacred text would be directly justiciable in

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64 Sandberg, 170.
65 Sandberg, 170.
court”. In the proceedings, “parties would cite specific provisions of … [religious] text when making their arguments and judges would rely on such provisions in deciding cases and justifying their decisions”.68

Arbitration is a form of alternative dispute resolution defined as a “method of dispute resolution involving one or more neutral third party who is usually agreed to by the disputing parties and whose decision is binding.”69 The research here focuses not on the formal court mechanisms defined, but upon the adjudication of religious law that takes place outside of the formal state-sanctioned legal sphere through arbitration, mediation, and counseling.

3.3 Shari‘a

The meaning of the term Shari‘a is contested, partly because the term itself is only mentioned once in the Qur’an.70 Sharia has been defined as the “umbrella of rules, regulations, values and normative frameworks, covering all aspects and spheres of life for Muslims, as developed over time.”71 In this connotation “not all Sharia is legally enforceable in a court of law; some remains in the moral/ethical domain, and our human understandings of its requirements and our actions in relation to these are to be judged in the hereafter.”72

In some interpretations, Shari‘a has been associated with the term “Islamic law”. As Rex Adhar and Nicholas Aroney explain, the “phrase ‘Islamic law’ is often used interchangeably with the Shari‘a, and while this usage has its critics, others defend the

68 Huxley, 89.
69 Broyde, 5.
72 Ali, 23.
equation.”73 “Islamic religious law [Abbas Amanat and Frank Griffel argue] is at best only an approximate translation of the term Shari’a.”74 For other observers, however, the word Shari’a might refer to “the law that God has ordained through revelation.”75 Under this interpretation of law, “Shari’a is understood as divine law and practiced in a realm that connects religion and law.”76 The Oxford Dictionary of Islam defines Shari’a as “God’s eternal and immutable will for humanity, as expressed in the Quran and Muhammad’s example (Sunnah), considered binding for all believers; ideal Islamic Law.”77 The practice of Shari’a is “understood as the application of norms and values rather than a legal system which operates outside constitutional and state law.”78

This body of law is said to be divinely ordained. This is significant for its application and administration today. As Mohammad Kamali explains, “Shari’a bears testimony to the recognition of divine revelation as the most authoritative influence and source, over and above that of rationality and man-made legislation.”79 This interpretation of Islamic jurisprudence reflects a “stability and continuity of values,” informed as it is by the direct word of God investing into it a divine nature.80

Religious Law, Irene Oh has contended, “is not the same as the religion of Islam.”81 In fact, the law itself, while connected to the body in which it operates, whether that be a tribunal, a religious court, or even a nation-state, is separate from the religious

73 Adhar and Aroney, 3.
75 Amanat and Griffel, 4.
76 Amanat and Griffel, 4.
80 Kamali, xix.
practice of Islam. Religious law exists independently of these agencies which may, or may not, utilize its tenets. Oh emphasizes that the “problem is the … monolithic view that incorrectly equates religious law (Shari’a) with religion and religious government.”

According to this view, “where religious law can be free, just, and reasonable through open discourse, religious jurisprudence will be more effective than secular jurisprudence in a society consisting of religious and faithful citizens.”

The term Shari’a has often been translated as meaning ‘the way’ or ‘the path leading to the source’. In this sense, Shari’a “outlines a global conception of creation, existence, death, and the way of life it entails, stemming from a normative reading and an understanding of scriptural sources.” Shari’a tells Muslims how to be Muslims. Hence, the “practice of ‘Shari’a law’ can then be better understood as the application of norms and values rather than a legal system which operates outside state law.”

Shari’a embodies legal rules and principles that can be applied to the everyday lives of Muslims.

An important concept for understanding the various understandings of the term Shari’a is fiqh. Fiqh is the “science or method of deducing” the opinions of Islamic scholars and jurists, and means “comprehension or understanding.” It is the process of developing jurisprudence. The scientific aspect of fiqh comes from the ability to interpret these scholars’ opinions within the context, time period and locality from which the opinion originates. Fiqh is also concerned with the sources of Islamic law and determining the manner by which the rules of Shari’a are derived. “Usul al-Fiqh is

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82 Oh, 105.
83 Oh, 105.
84 Oh, 105.
86 Bano
87 Ahdar and Aroney, 3-4.
88 Ahdar and Aroney, 3.
concerned with the sources of Islamic law, [Kamali argued] their order or priority, and the methods by which legal rules may be deduced from the source material of the Shari’a.”

There are two kinds of sources, informing Shari’a: revealed and non-revealed. The Qur’an and the Sunnah, represent the first two sources and the Qur’an is the most authoritative. They “provide two basic evidences and indications from which detailed rules may be derived, the latter provides the methodology and procedural guidelines to ensure correct utilization of the source evidence.” The Qur’an is the most relevant source for locating “the foundation of a particular norm of law” and is considered, although written by men, to be the “most authentic record of the word of God.”

The Sunnah consists of the “practices of the Prophet” and is the second primary source of Islamic law. From a legal perspective, the sunnah could be understood as meaning “the law, the way.” The sunnah contains the words, the actions, inaction and silences of the Prophet Muhammad, known as the hadith. There is a specific methodology used in determining the legal soundness, the credibility and the authenticity of any given hadith. The first is the “soundness of its isnad (chain of narration).” This primarily includes an examination of the “identity and reliability of the narrators in the narration chain, mode of narration, strength of the narration chain (i.e., does it have a missing link, an unreliable link in the chain, etc.) and the existence of different chains of

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89 Kamali, 1.
90 Kamali, 1.
91 Kamali, 1.
93 Hassan, 66.
95 A-Hibri, 43.
96 Al-Hibri, 47.
narration for the same hadith.” The second is the “soundness of its matn (its substance or content)”.

Here, the main factor to consider is whether the content of the hadith is “consistence with the Qur’an, or even with other equally more reliable hadiths.”

Ijma is the third source of Islamic law and is defined as “a consensus among those who are learned in the law.” The rationale behind Ijma is that consensus would not be reached in err and could be trusted based on the principle of the “Prophetic statement that ‘my ummuh (community of believers) would never agree upon an error.’”

The fourth and final source of Islamic law is Ijtihad which can be described as “independent interpretation of law by one who is learned to solve a situation that is new or for which there is no precedent or authoritative pronouncement in other sources of fiqh.” The difference between ijtihad and the other sources of Islamic Law “lies in the fact that ijtihad is a continuous process of development whereas divine revelation and the prophetic legislation discontinued after the demise of the Prophet.” The term Qiyas refers to the process of reasoning by analogy. According to this practice, “jurists reason by analogy in order to extend a ruling from one situation to another that is similar in some respects, but for which neither a clear nass (definitive text) exists in the Qur’an nor is it addressed by the hadith.” In the hierarchy of the application of this source to a particular problem of Islamic law, it would only be invoked after it is firstly determined that the other three sources of Islamic law, the Qur’an, the Sunnah and Ijma, in order of

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97 Al-Hibri, 48.
98 Al-Hibri, 48.
99 Al-Hibri, 48.
100 Hassan, 67.
101 Al-Hibri, 77.
102 Hassan, 67.
103 Kamali, 468.
104 Al-Hibri, 79.
105 Al-Hibri, 79.
hierarchy, could not be applied. The practical utilization of these sources will be examined in chapters five through eight of this dissertation. For a proper appreciation of the interview results offered in this study, the term Shari’a will be understood as Islamic law.

3.4 Halakhah

Jewish law, known as Halakhah shares some important similarities with Shari’a. As a verb Halakhah means “to walk” or “to go” and “walking is parallel to observing.”\textsuperscript{106} Halakhah is also thought of as being divinely inspired.\textsuperscript{107} Jewish law and Islamic law also share the “the idea that God revealed to men binding principles and norms which cannot be changed by any human authority, are superior to any human law, and constitute a complete and universal system of law.”\textsuperscript{108} Both Halakhah and Shari’a “promise to help men…to live a righteous life.”\textsuperscript{109} Halakhah denotes a “norm” and “procedure.”\textsuperscript{110}

There are some important differences between Islamic law and Jewish law. In Jewish law the word of God is found in the Torah. There is a distinction to be made “between the law given by God to Moses and to Noah.”\textsuperscript{111} Only the second, earlier, set of laws applies to all of mankind. The laws given to Moses apply only to the Jewish people. These laws give members of the Jewish faith the resources to follow the word of God including “moral imperatives, ritual commands, and civil laws.”\textsuperscript{112}

A historical process of rabbinic interpretation codified in literature called midrash was “utilized by rabbis to ‘unpack’ all of the implications of the written text, to introduce

\begin{itemize}
  \item \textsuperscript{106} Urbach, Ephraim E. \textit{The Halakhah Its Sources and Development}. Modan Ltd., 1996, 2.
  \item \textsuperscript{107} Huxley, 54.
  \item \textsuperscript{108} Huxley, 54.
  \item \textsuperscript{109} Huxley, 54.
  \item \textsuperscript{110} Spero, Shubert. \textit{Morality, Halakha, and the Jewish Tradition}. KTAV Publishing House, 1983, 166.
  \item \textsuperscript{111} Spero, 166.
  \item \textsuperscript{112} Spero, 166.
\end{itemize}
oral traditions, to resolve disagreements, and to arrive at definitive rulings.”\textsuperscript{113} Eventually the “corpus of final and accepted rulings in all questions of Jewish law came to known as Halakhah.”\textsuperscript{114}

In a manner similar to Shari’a the corpus of Jewish law is derived from a number of sources, three of which inform Halakhah. The Torah are the laws instituted by Rabbis and long-standing custom.\textsuperscript{115} The term mitzvah is commonly used to refer to a good deed. A distinction later developed to differentiate between "mitzvot d’oratia (an Aramaic word meaning "from the Torah") [and] mitzvot d’rabbanan (Aramaic for "from the rabbis)."\textsuperscript{116} Minhag is the term used for "a mitzvah that arises from custom."\textsuperscript{117} All of these sources of Halakhah are binding although their application varies.\textsuperscript{118}

The goal of Halakhah goes beyond dispute resolution. While one of its main objectives is justice, like other systems of religious law, Halakhah also has “specifically religious objectives, whether in terms of salvation or eschatology.”\textsuperscript{119} More broadly, Halakhah is designed as a system which has “moral rules in both their positive and negative forms” which “are meant to be observed in real life and ought to be presented in the form of clear guidelines for behavior.”\textsuperscript{120} Just as we will equate the term Shari’a with Islamic law, for purposes of this study, we will equate the term Halakhah with Jewish law.

\textsuperscript{113} Spero, 166.
\textsuperscript{114} Spero, 166.
\textsuperscript{116} Rich.
\textsuperscript{117} Rich.
\textsuperscript{118} Rich.
\textsuperscript{119} Huxley, 40.
\textsuperscript{120} Spero, 166.
3.5 Gender Rights and Gender Equality

The terms gender rights and gender equality invoke a variety of different meanings and connotations depending on the audience and the context. These understandings are important for this study given the multicultural nature of North America. Having a number of distinct cultural societies co-existing in North America raises questions about the adherence of gender equality norms and values that have developed in mainstream North American society.

Feminist critics of multiculturalism agree that in cases of conflict, guarantees of gender equality must take precedence over claims rooted in culture and religion. While it has sometimes been argued that it might be best if cultures wedded to the patriarchal oppression of women within their midst were to become extinct, most theorists argue that the primacy of equality should be established by encouraging communities to identify ways in which their discriminatory practices can be integrated with gender equality norms.\(^{121}\)

Variations are amplified when we discuss gender equality and gender rights in relation to religious practices. In addition, the concept of equality can generate multiple understandings, particularly with regard to matters of family law.

Civil law’s concerns for gender equality and for protecting vulnerable parties are salient reasons to be cautious about new forms of legal pluralism. Any system of “multi-tiered marriage” that does not attend adequately to the equal protection and equal citizenship of women as well as men conflicts with the commitments of the U.S. family law system and constitutional principles.\(^{122}\)


People’s experiences inform their understandings of the term gender equality and understandings of gender are often thought to be socially constructed. According to Maxime Molyneux and Shahra Razavi, the “requirements of equality are rarely transparent and sorting them out is not just a matter of the depth of one’s commitment or the clarity of one’s thought.”\textsuperscript{123} Apart from ones experiences or the knowledge one may have collected locally or one’s experience in making political judgments, “we often reach contrasting conclusions depending on our location in the hierarchies of power.”\textsuperscript{124}

The term gender equality can have meanings beyond the simple equation of all things being equal between men and women. It can be argued that “equality means desegregation: no separate spheres for men and women.”\textsuperscript{125} Yet, this meaning is often problematic. Thinking of equality as a form of desegregation causes a particular set of difficulties for adherents of the Jewish and Islamic faiths, as, for some, segregation is a pertinent and mandatory reality for followers in these faiths. This is also true in the secular sphere.

There is often a compelling egalitarian case for segregation, as when people suggest that, in the context of current general relations, girls will get more equal attention from their teachers and a more equal opportunity to advance their education if they are taught in single-sex schools; or that in a context of racist attacks, ethnic minority groups will enjoy more equal security when they are able to concentrate in the same neighborhood rather than being dispersed throughout a wider community.\textsuperscript{126}

\textsuperscript{124} Molyneux and Razavi, 131.
\textsuperscript{125} Molyneux and Razavi, 131.
\textsuperscript{126} Molyneux and Razavi, 131.
The concept of equality developed within the framework of liberalism in North America.\textsuperscript{127} Under this framework, women’s equality is achieved when “whatever rights society enshrines within its laws” apply equally to both men and women.\textsuperscript{128} This was a limited framework for understanding equality that did not consider the historical and biological differences between men and women.\textsuperscript{129} The lived reality of men’s and women’s lives is different. This understanding of equality is difficult to reconcile with the way many of the religious leaders interviewed for this project understand equality in faith. For them, equality in faith does not mean equal in all things; rather, it is a more holistic form of equality which takes account of the differences between men and women.

Another understanding of the term “gender equality” is presented by Joanna L. Grossman and Linda C. McClain who explain that “one common understanding of gender equality is gender neutrality or equal treatment (for example, treating cases alike).”\textsuperscript{130} While this definition appears clear, there are still a number of hurdles to enacting it in practice. One obstacle is a failure to account for past discriminations that would not be taken into consideration. When “gender-neutral laws replace a gendered legal regime, such gendered laws leave their traces.”\textsuperscript{131} In these instances, substantive equality would not be realized due to structural obstacles.\textsuperscript{132}

The term “rights” has been even more challenging to define than the term gender “equality”. The “relationship between women and rights has never been easy to

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\begin{itemize}
  \item \textsuperscript{127} Phillips, Anne. \textit{Feminism and Equality}. B. Blackwell, 1987, 7.
  \item \textsuperscript{128} Phillips, 7.
  \item \textsuperscript{129} Phillips, 7.
  \item \textsuperscript{131} Grossman and McClain, 2.
  \item \textsuperscript{132} Grossman and McClain, 2.
\end{itemize}
define.” Yet, rights themselves, or the framing of a particular concern in terms of rights, remains one of the most important mechanisms through which individuals attempt to gain equality. One definition of rights describes them as “the medium by which people stand up for themselves and demand recognition and respect.” This level of assertiveness in framing rights in the equality framework has received historical backlash. “Concerns that rights are the wrong approach to justice and equality have often come from political theorists (historically male) and others who stood to lose status, power and property if women’s rights took a hold.” These sentiments are still widespread in some religious communities, although the phenomenon is not exclusive to religious communities.

Part of what has caused the contestation over the term “rights”, particularly with regard to women seeking rights, has been the community backlash. As Deborah L. Rhode and Carol Sanger explain, over the “last several hundred years it has been argued that women don’t want rights, don’t need rights (or don’t need them anymore), aren’t temperamentally suited for rights – as well as those who have attempted to exercise them – have been subject to ridicule and to intellectual, reputational and sometimes even physical attack.” More subtle approaches to understanding and methods for achieving equality have now taken hold and these approaches take a wider variety of forms acknowledging that there are multiple understandings of equality. In the context of Judaism and Islam, we see that some of these historic pressures are still present.

134 Rhode and Sanger, xi.
135 Rhode and Sanger, xi.
136 Rhode and Sanger, xi.
137 Rhode and Sanger, xi.
While the concept of rights has been problematic, overall, it is well-agreed upon that the concept is still a useful tool in achieving gender equality.\(^{138}\) One of the reasons there has been so much resistance to using rights to achieve gender equality is not from lack of appropriateness; rather, because the rights framework has been operating within a limited institutional framework.\(^{139}\) While there has been a widespread commitment to gender equality in many countries there has not always been a practical realization of those commitments. Grossman and McClain argue that the “constitutional, statutory, and common law of many countries…international law and human rights instruments” all have a commitment to gender equality, yet, there remains a “stark gap between formal commitments to the equal rights and responsibilities of men and women and against discrimination and subordination based on sex and the gendered realities of women’s lives.”\(^{140}\) To engage the topic of persistent gender inequality that still exists in certain factions of society Grossman and McClain use the language of equal citizenship to describe “society’s goals of equal status for all members of society and its ideals of inclusion, membership, belonging.”\(^{141}\) Although rights may not deliver a full resolution to every perceived injustice, they still “serve a mediating function and offer ‘a new place from which to negotiate power, domination, and hierarchy with new tools.’”\(^{142}\)

The strategy of obtaining equality often occurs within a rights-based framework. For example, “the early twentieth-century women’s movement was founded on the idea of equality, a goal typically formulated and achieved through legal rights.”\(^{143}\) Framing an

\(^{138}\) Rhode and Sanger, xi.
\(^{139}\) Rhode and Sanger, xi.
\(^{140}\) McClain and Grossman, 1.
\(^{141}\) McClain and Grossman, 1.
\(^{142}\) Rhode and Sanger, xi-xvi.
\(^{143}\) Rhode and Sanger, xx.
issue in terms of rights means that it can ‘be brought under the umbrella of trade union debates, parliamentary consideration, media reportage, and so on. Claims of an infringement of rights thus become accessible under this framework.

For purposes of this study, a more flexible and less rigid definition of rights is most useful. This definition will mirror Rhodes, and therefore rights will include the “arguments and critiques, legal strategies and political efforts necessary to establish categories and regimes of gender rights.” Hence, equality is considered, with its various understandings and meanings, to be the framework through which rights operate.

3.6 Alternative Dispute Resolution

The terms alternative dispute resolution (ADR) and Arbitration frequently appear when discussing conflict resolution and religion. This is owed to the fact that in a number of Western countries special faith-based arbitration panels exist that sometimes resolve conflicts using religious law. For example, Jewish arbitration is a well-developed system in the United States. While these panels are not the focus here, it is difficult to separate their impact from the community-based practice of law which is examined here. It can be argued that the community-based practice of law is, in fact, a form of alternative dispute resolution albeit not one that is officially sanctioned by the state. For our purposes alternative dispute resolution can take two forms, mediation and arbitration.

Arbitration is “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

144 Rhode and Sanger, xx.
145 Rhode and Sanger, xx.
146 Rhode and Sanger, xvi.
147 Broyde, 14.
In arbitration, each party agrees for any controversy or claim arising out of a contract to be settled under arbitration rules. One or three arbiters may be used and facts and information surrounding the claims of all parties are heard by the arbiter.

The arbitrators then dictate a solution, including awards to be made to one party or the other. In agreeing to arbitration, the parties to this dispute agree that they will faithfully observe the arbitrator's rules, and to abide and perform any award rendered by the arbitrators. A court having jurisdiction may have judgment entered on the award in an arbitrated dispute.

In mediation, a neutral assists the parties to the dispute in reaching a settlement. The mediator does not have the authority to make a binding decision or award.

Mediation is a “method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”

Family mediation, for its part includes a voluntary process for participants, flexibility, confidentiality, and facilitation by a neutral or impartial third party.

Islamic mediation most typically occurs in the area of family disputes. In many instances, a “couple will name an older family member or some other individual to mediate their dispute.” This function often falls to Imams in the North American context as many couples immigrate to Canada and the USA without elder family members. Islam encourages the processes of mediation and arbitration in resolving disputes.

148 Broyde, 88.
150 Heinke.
151 Broyde, 87.
152 Molyneux and Razavi, 31.
153 Broyde, 20.
154 Broyde, 20.
If you fear a breach between them, appoint [two] arbitrators, one from his family, and the other one from hers; if they wish for peace God will cause their reconciliation.155

3.7 Community-Based Law

Community-based law is not a term that has an agreed-upon or formal legal definition. As a starting point, according to “20 USCS § 7801(6), the term “community-based organization” means “a public or private nonprofit organization of demonstrated effectiveness that--

(A) is representative of a community or significant segments of a community; and

(B) provides educational or related services to individuals in the community.”156

Community-based law is often practiced by community organizations. In cases of the application of Islamic and Judaic religious law at a community level this process often takes place inside a mosque or synagogue. It consists of individuals seeking resolution to a dispute through the application of expert knowledge and the applicable religious law, in a non-formal setting. Individuals that seek this sort of community-based law for dispute resolution often feel personally bound by the decisions, despite lacking binding force in the national legal system. Community-based law constitutes a form of alternative dispute resolution, However, it is not a form of arbitration. Where arbitration has standard rules of procedure, community-based law occurs informally through the pastoral care of religious leaders who give opinions and advice to congregants on issues generally thought to be in the purview of secular law.

Chapter 4: Applicable Laws

Today, “many Americans sense that they are living through a period of intense conflict between religious freedom and equality law. On the one hand people see that a widening variety of individuals require protection from discrimination if they are to enjoy full and equal citizenship and, on the other hand, Americans share a basic and long-standing commitment to religious freedom, including of those who dissent from aspects of egalitarianism.”

4.1 Domestic Law

The liberal democracies of Canada and the USA focus on the premise that individuals should be free to practice their religion and the government should refrain from establishing any official religion. Historically, religion and religious legal provisions have incorporated themselves into the state's legal apparatus. This project takes as its focus the informal application of religious laws and values through the counsel, pastoral care and adjudication of religious leaders in the private sphere. In this private sphere, considerations arise with regard to the tension that exists between a person's right to be treated equally under the law and her or his right to practice their religion freely and unimpeded by the state.

The domestic national laws of the United States and Canada all, in some way, embody laws that protect an individual's right to be treated equally under the law as well as an individual's right to practice their faith freely without interference by the state. However, at times, these two sets of provisions, which are designed to create a more free and egalitarian society, are in conflict. These provisions often come into tension with one

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157 Tebbe, 1.
another, and it is this tension that my interviews will explore. Here we sketch the provisions that will be relevant to the discussions that follow.

4.1.1 Canada

Equality Under the Law: Section 15 of the Canadian Charter provides:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Section 15 does not preclude “any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

Religious Freedom: Freedom of religion in Canada is a constitutionally protected right, allowing believers the freedom to assemble and worship without limitation or interference. The "Fundamental Freedoms" section of the Canadian Charter of Rights and Freedoms states:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Canadians are therefore free to have their own beliefs and opinions, are free to practice religion or refrain from doing so, and are free to establish media organizations.

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160 Legislative Services Branch.
with or without religious content. Canadian religious institutions generally benefit from charitable organization status, which allows supporters to benefit from tax credits or deductions for their financial contributions.\textsuperscript{161}

4.1.2 USA

Equality Under the Law: The Fourteenth Amendment (Amendment XIV) to the United States Constitution was adopted on July 9, 1868, as one of the Reconstruction Amendments. Contained therein is the Equal Protection Clause which requires each state to provide equal protection under the law to all people within its jurisdiction. The Equal Protection Clause of the Fourteenth Amendment states: “Nor shall any state ... deny to any person the equal protection of the laws”\textsuperscript{162} Equality of all religions was a firmly held principle among the founding fathers.\textsuperscript{163}

Madison captured the prevailing sentiment: A just Government…will be best supported by protecting every Citizen in the enjoyment of his religion, with the same equal hand which protects his person and property; by neither invading the equal rights of any sect, nor suffering any sect to invade those of another. John Adams concurred: “[A]ll men of all religions consistent with morals and property [must] enjoy equal liberty,…security of property…and an equal chance for honors and power. Baptist leader Issac Backus wrote similarly that religious liberty requires that “each person and each [religious] society are equally protected from being injured from others, all enjoying equal liberty to attend the worship which they believe is right.

Religious Freedom: In the United States, freedom of religion is a constitutionally guaranteed right provided in the religion clauses of the First Amendment. From the

\textsuperscript{161} Legislative Services Branch.
\textsuperscript{162} LII Staff. “14th Amendment.” Legal Information Institute, Legal Information Institute, 17 May 2018, www.law.cornell.edu/constitution/amendmentxiv.
perspective of the founding fathers, the free exercise of religion and freedom of conscience were two closely related concepts.\textsuperscript{164}

Liberty of conscience was the right to be left alone to choose, to entertain, and to change one’s religious beliefs – without state coercion or control and without benefits or burdens imposed by the state. Free exercise of religion was the right to act publicly on the choices of conscience once made – up to the limits of encroaching on the rights of others, disturbing the public peace, or otherwise violating criminal laws.\textsuperscript{165}

The First Amendment prohibits the federal government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof".\textsuperscript{166} This provision was later expanded to state and local governments.\textsuperscript{167} Essentially, the free exercise clause of the First Amendment “protects the rights of individuals to practice the religion of their choice, free from government intervention.”\textsuperscript{168} The Establishment Clause “prohibits government from establishing a religion.”\textsuperscript{169}

4.2 International Law

Akin to the provisions under domestic national law, there are also provisions that protect an individual's right to be treated equally under the law as well as an individual's right to practice his or her faith freely in international law. The pertinent provisions are outlined below.

Equality Under the Law: Article 14, Section 1 of the International Covenant on International and Political Rights states that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his right and

\begin{itemize}
  \item \textsuperscript{164} Witte and Nicholas, 45.
  \item \textsuperscript{165} Witte and Nicholas, 45.
  \item \textsuperscript{167} Broyde, 84.
  \item \textsuperscript{168} Broyde, 84.
  \item \textsuperscript{169} Broyde, 84.
\end{itemize}
obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a
competent, independent and impartial tribunal established by law”.

Religious Freedom: Article 18 of the Universal Declaration of Human Rights
states that "Everyone has the right to freedom of thought, conscience and religion; this
right includes freedom to change his religion or belief, and freedom, either alone or in
community with others and in public or private, to manifest his religion or belief in
teaching, practice, worship and observance."  

4.3 Religious Law

As outlined above, there are a number of legal provisions in national law that
protects religious freedoms. Still, there are many religiously observant individuals who
will simultaneously adhere to another set of legal provisions based on their personal
religion. When discussing Muslim personal status law, it is important to note that there
are several variances among the major schools of Islam. I will elaborate, when relevant,
to the discussing in this project. The "growth of different legal schools, and a spectrum of
legal doctrines even within these schools, illustrates the possible breadth of legal opinions
among thinkers working with essentially the same methods and sources." Despite this
diversity, common themes can be identified.

As with the differing perspectives in the schools of Islam, Judaism also has
several different denominations; such as Orthodox, Conservative and Reform that have
their own interpretations of classic Jewish personal status laws. These interpretations
yield some significant differences in the responses to the interview questions in this

170 "International Covenant on Civil and Political Rights." OHCHR,
study. Examination of these nuances is not generally relevant here, however, they will be elaborated upon as appropriate. Instead, the focus of this section will be on the main tenets and principles of Jewish and Muslim marriage and divorce laws that will be relevant to the interview discussions and conclusions that follow.

4.3.1 Islamic Law

A. Marriage

According to Islamic law, marriage serves a dual purpose. On the one hand it is a legal contract similar to one that may be found in the secular legal sphere, while, on the other hand it is the "fulfillment of a moral imperative to marry as an essential part of leading a good Muslim life." With regard to the legal foundations of marriage in Islam, all four major schools of the Sunni denomination (Maliki, Hanbali, Hanafi and Shafi) all “agreed that a contract is required for a juridically sound marriage, as is a dowry (mahr) for the bride, and that a Muslim woman needs a guardian (wali) to enter into marriage”. However, the scope of the guardian’s authority remains an area of distinction among the schools.

Marriage laws in Islam are based upon three primary tenets. The first is lawful sexual intercourse. The second is social hierarchy and the preservation of that system. The third concerns the proper distribution of wealth. Laws concerning marriage are based upon these goals.

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173 Tucker, 41.
174 Esposito, 193.
175 Esposito, 193.
177 Yamani, 51.
The document that embodies the Islamic marriage is called a *nikah*. One of the primary purposes of the document is to legalize sexual intercourse, as sex outside of marriage in Islam is considered illicit.178 Once the *nikah* is complete, signed by the husband, wife, governing authority (usually an Imam) and two Muslim witnesses, a "married couple may look at all parts of each other's bodies and they may engage in sexual intercourse."179 At this stage of the contract the man and the woman have equal rights in legal terms, having now effected a contract entered into by two consenting adults "enabling them to engage in sexual activity with each other."180

Consent by both the man and the woman, if they are both of legal age to consent, is required for a valid marriage contract.181 This consent can either be silent or oral depending on the presence or absence of virginity in the bride.182 Silent consent would be valid under the following conditions, if "the guardian consults her and she remains silent or smiles, this constitutes consent, because the Prophet (upon him be peace and blessings) said, 'The virgin is consulted in [what pertains] to herself; if she remained silent, this was her consent…and consent is likely the cause because she is embarrassed to demonstrate desire by replying."183 Consent “may simply be an absence of refusal on the woman’s part.”184

In the case of minor brides, the issue of consent is entirely different. Consent need not be obtained in the case of minors. All the "legal schools agreed that a girl's father had the

178 Tucker, 41.
179 Tucker, 41.
180 Tucker, 42.
182 Tucker, 42.
183 Tucker, 42.
184 Siddiqui, 53.
right to marry her to whomever he chose without consulting her; the father enjoyed similar rights to marry off his minor sons.\textsuperscript{185} Once the girl reaches the age of maturity she can reject a contract that was entered into on her behalf when she was a minor.\textsuperscript{186} This principle is called \textit{khiyar al-bulugh}.\textsuperscript{187} The minor in Islam simply did not have the legal capacity to offer their own consent. Consent obtained through coercion is invalid.\textsuperscript{188}

The Islamic legal text regarding consent was written in the 11\textsuperscript{th} century by a Hanafi jurist.\textsuperscript{189} It was part of the work \textit{al-Mukhtasar}, translated as “The Abridgement”.\textsuperscript{190} It was a concise legal manual that outlined the jurisprudence, in this instance, of the Hanafi school.\textsuperscript{191} The text reads as follows:

The marriage of a free (\textit{hurra}), adult (\textit{baligha}), sane (\textit{'aqila}) woman is/should be contracted with her consent (\textit{rida'ha}), whether or not the guardian (\textit{wali}) contracts her marriage.\textsuperscript{192}

After consent, the second major component of a valid Islamic marriage is \textit{mahr}.\textsuperscript{193} \textit{Mahr} is a dower paid by the groom to the bride. The dower “varies from place to place and from one social class to another.”\textsuperscript{194} \textit{The Oxford Dictionary of Islam} defines \textit{mahr} as:

Dowry paid by a husband to his wife. Becomes the property of the wife to spend, save, or invest as she pleases, although in some countries it is often taken by the bride’s family. Can be either money or property. May be paid all at once or split into two payments, one upon marriage and the other at a time stipulated in the marriage contract, such as

\begin{footnotesize}
\begin{enumerate}
\item Tucker, 43.
\item Siddiqui, 52.
\item Siddiqui, 52.
\item Siddiqui, 52.
\item Adler, Rachael, and Ayesha S Chaudhry. “Guardianship of Women in Islamic and Jewish Legal Texts.” \textit{Islamic and Jewish Legal Reasoning: Encountering Our Legal Other}, Oneworld Publications, 2016, 29.
\item Adler and Chaudhry, 29.
\item Adler and Chaudhry, 29.
\item Adler and Chaudhry, 30.
\item Broyle, 56.
\item Moghissi, Haideh, and Halleh Ghorashi, editors. \textit{Muslim Diaspora in the West: Negotiating Gender, Home and Belonging}. Ashgate, 2010, 61.
\end{enumerate}
\end{footnotesize}
upon the death of the husband or divorce. Required in order for the marriage contract and the marriage itself to be valid.\textsuperscript{195}

The "Qur'an enjoins believers to 'give the women the dowries as a gift spontaneous' (4:4) and as one not to be returned: 'And if you desire to exchange a wife in place of another, and you have given to one a hundred-weight, take of it nothing' (4:24)."\textsuperscript{196} Mahr was intended to be a guarantee of financial stability for a period of time for the woman following divorce should the marriage dissolve.

While the marriage contract should specify the amount of the dower, it was not necessarily invalid if it did not specify an exact amount in advance.\textsuperscript{197} In cases where a specific amount was not included in the marriage contract, the groom would be required to pay a "proper" dower, which was essentially a legally determined amount.\textsuperscript{198} The determination of a proper mahr usually took into consideration whether or not it was an amount the bride was willing to accept.\textsuperscript{199} According to the male jurists of the time, it also often took into consideration particular attributes of the bride which were considered to hold higher value.\textsuperscript{200} Men also had corresponding attributes that made them more suitable as grooms and increased their marriageable value. For women, age, beauty, virginity, and intelligence were all considered virtues; whereas, for men, piety, health and occupation were the primary considerations of a groom's suitability.\textsuperscript{201} Under all circumstances, regardless of the wealth of the groom, a dower was required for a valid marriage contract. In its absence, a marriage could be invalidated.

\textsuperscript{195} Esposito, 187.
\textsuperscript{196} Tucker, 46.
\textsuperscript{197} Tucker, 46.
\textsuperscript{198} Tucker, 46.
\textsuperscript{199} Tucker, 48.
\textsuperscript{200} Tucker, 48.
\textsuperscript{201} Tucker, 49.
A proper dower is derived from the background and qualities of the bride. Historically, a Maliki jurist called for consideration of her religion (whether Muslim or not), her beauty (both physical and spiritual), her wealth, the region where she lived, and her sisters dower and/or that of other women of her paternal line. Al-Marghinani, a Hanafi, agreed that all these factors were relevant and added her age, her intelligence, the times in which she lived (whether a time of tranquility or of troubles), her virginity or absence of same. The jurists did not attempt to weigh these factors or attach absolute values to them with the exception of the factor of virginity. Instead, the values were considered fluid and could be examined and weighted on a case-by-case basis.

The dower must be readily accessible by the bride and not held at some inaccessible or distant location. It must also be paid at the time of marriage or in a timely and specified fashion and not “in some distant future or contingent upon a future event or unknown date such as the death of the husband.” Under ordinary circumstances, the bride collects her *mahr* at the time of the marriage contract.

After consent, *mahr*, and the valid and signed execution of the marriage contract, Islamic marriage requires the consummation of the marriage. At this point a plethora of marital duties proscribed for under Islamic law come into effect. These duties are largely separated into the "twin doctrines of nafaqa (maintenance) and nushuz (disobedience)." The doctrine of *nafaqa* required the husband to provide maintenance to his wife, irrespective of her religion. This maintenance usually included food,

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202 Tucker, 48.
203 Tucker, 48.
204 Tucker, 46-47.
205 Tucker, 47.
206 Tucker, 50.
207 Tucker, 50-51.
clothing and other necessities. There are specific recommendations as to the types of food, the types of clothing as well as the types of accommodations.\textsuperscript{208} An inability to provide this required maintenance, under certain circumstances, could be grounds for divorce.\textsuperscript{209}

While \textit{nafaqa} established a wife's material claims against a husband, its counterpart, \textit{nushuz} laid out the wife's obligation to pay reparations to her husband if she failed to live up to her marital obligations. An interesting point of contestation in \textit{nushuz} arises when determining whether a wife's marital obligation or a wife's obligation to God takes precedence in an instance of conflict. For example, jurists tackled the tricky issue of the parameters of a husband's rights to wifely obedience versus his wife's religious and broader familial duties. A woman should not leave home to visit or travel without her husband's permission, but “what if she wished to go on pilgrimage?”\textsuperscript{210}

In Sunni law there was also a generally understood requirement of two witnesses for a valid Islamic marriage.\textsuperscript{211} Two male witnesses or one male witness and two female witnesses are required.\textsuperscript{212} All the witnesses must have legal capacity, meaning, they must be “sane, free and adult.”\textsuperscript{213} Ultimately, both the man and the woman in an Islamic marriage had very specific, \textit{albeit} gendered, roles to play and obligations to fulfill within the marriage. When these obligations were not met, the recourse to divorce, although not encouraged, was permissible for Muslim couples.

\textsuperscript{208} Tucker, 51. 
\textsuperscript{209} Tucker, 52. 
\textsuperscript{210} Tucker, 53. 
\textsuperscript{211} Yamani, 52. 
\textsuperscript{212} Yamani, 52. 
\textsuperscript{213} Yamani, 52.
B. Divorce

While lawful in Islam, divorce is highly discouraged.214 The circumstances under which divorce was permissible were limited by jurists although not always followed in practice. Ronak Husni and Daniel L. Newman explain, on "no other legal grounds than the Prophet's words alone, a great number of Islamic jurists have concluded that divorce should be regarded as an illicit act."215

Among all the things that God has made lawful, none is more abhorrent to Him than divorce.216

Marriage, as an institution was highly desirable, it was understood that inevitably recourse to divorce may be necessary for some couples in certain circumstances. Someone who is married already possesses half of his faith.217 Thus, the idea of "till death do us part" that exists in the Catholic tradition is absent in Islam.218 A number of passages in the Qur'an support this point elaborating on the fact that divorce may be necessary although it is not encouraged. In fact, reconciliation in the face of conflict was highly encouraged.

Men are enjoined, insofar as their wives are concerned, to "retain them honorably or set them free honorably" (2:231), but cautioned against taking overly hasty decisions to divorce their wives: "if you are averse to them, it is possible you may be averse to a thing and God set in it much good" (4:19)219

215 Husni and Newman, 73.
216 Husni and Newman, 73.
217 Husni and Newman, 73.
218 Tucker, 84.
219 Tucker, 84.
And if you fear a breach between the two, bring forth an arbiter from his people and from her people an arbiter, if they desire to set things right; God will compose their difficulties (4:35)²²⁰

As with the process of divorce in other traditions, there are some aspects of the Muslim divorce law that breed controversy. The dower was one such case as it often involved the transfer of a significant portion of property. A significant problem associated with dower was determining whether or not the marriage was consummated as a finding that the marriage had not been consummated would result in only a partial dispensation of the dower. Only half the dower needs to be paid in a unconsummated marriage.²²¹ If it was found that the marriage had been consummated, Islamic law determined that the dower was then due in full provided there were no other mitigating circumstances.²²²

Another area of contention in Muslim divorce law is the perceived inequality of rights between the man and the woman over the divorce process. Some equate this inequality to issues of interpretation of Islamic law.²²³ Still others assert that the rules that developed giving men far more control over the divorce process reflect the true spirit of the *Qur'an* and the *hadith*.²²⁴ In Islamic divorce, men could initiate divorce with relative ease, whereas women "could initiate divorce only on limited grounds and generally under the auspices of the court."²²⁵

²²⁰ Tucker, 84.
²²¹ Tucker, 47-48.
²²² Tucker, 47.
²²³ Tucker, 86.
²²⁴ Tucker, 86.
²²⁵ Tucker, 86.
In general, men hold the power over initiation of divorce in Islam of which there are three main types: *talaq*, *tafriq* and *khul*. As the most common type, *talaq* is often referred to as the standard "man's divorce" consisting of the man speaking the specified formula of divorce which would end his marriage.\(^{226}\) This iteration required the husband to say *talaq* three times. Whether this could be done all at once in a single occurrence or in three separate instances was a difference of legality between the schools. *Talaq* does not require recourse to a court yet it can result in an irrevocable and final divorce at which point the husband no longer had the option to take his wife back. Under this form of divorce, the wife could not protest the divorce or advocate her point of view. Still, since Islam discourages divorce, it allows a man to return to his wife twice if he reconsiders his decision up until the time *talaq* is pronounced a third time, at which point it was thought there was no longer any possibility of reconciliation and the divorce becomes irrevocable.\(^{227}\)

*Divorce must be pronounced twice and then (a woman) must be retained in honor or released in kindness.*

The above verse is based on the fact that after the spouses get divorced and fail to reunite twice, the marriage has no chance of being restored. However, this does not preclude the possibility that the couple may subsequently get back together again. Indeed, with the passing of time, the parties may change and destiny may bring the couple back together again in order to live a peaceful and harmonious life based on mutual devotion, which is a precondition in Islamic law for reconciliation, as indicated in the verse previously quoted: 'If they consider that they are able to observe the limits of Allah'.\(^{228}\)

\(^{226}\) Esposito, 193 and Tucker, 86.
\(^{227}\) Husni and Newman, 69.
\(^{228}\) Husni and Newman, 70.
After divorce (of any kind), a statutory period known as 'idda commenced and the divorce was only finalized once this 'waiting period' was complete. During this waiting period, there was again no recourse to the courts available for the wife and once the waiting period was over the divorce became automatically finalized. In addition, there was "only limited obligations imposed on the husband for payment of any dower he owed and temporary support of his wife while she waited on the divorce to be finalized." During this waiting period, the wife could not remarry. A wife's freedom of movement is also significantly curtailed during this waiting period.

The only way a husband could remarry a wife after a talaq divorce would be if his former wife remarried another man and then divorced. At this point, she would be eligible to return to her original husband. This provision is intended to discourage men from divorcing a wife. Some controversial legal loopholes developed from this practice such as the wife engaging in so-called one or two night marriages so she could be eligible to return to the original husband. The different schools of thought differed on whether these types of marriages were valid to fulfill this requirement under the law.

There were several reasons why 'idda was seen as an essential aspect of the Islamic divorce process. Ideally, after the first two pronouncements of divorce the wife would go through her waiting period, a period of reflection whereby the husband had a chance to rethink his invocation of divorce and attempt reconciliation. The duration of the waiting period in Islam was logical in nature and provided an opportunity for

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229 Tucker, 86
230 Tucker, 86.
231 Tucker, 86-97.
232 Tucker, 100.
233 Husni and Newman, 71.
234 Husni and Newman, 71.
reconciliation, it also ensured that there would be no inaccuracies in determinations of paternity. As explained by Jonathan E. Brockopp et al., the "waiting period is defined in the Qur'an as three menstrual cycles and is established for the purposes of ensuring that a divorced woman is not with child, and that if she is pregnant, the paternity of that child is known and mother and child are properly cared for".235

A second type of Islamic divorce is known as tafriq. Tafriq is akin to annulment in western law, and was typically invoked by a wife who made a plea to a judge to annul her marriage based on one of several grounds.236 Tafriq could also be invoked by a man, though it was fairly uncommon since a man could simply invoke talaq as a method of divorce. If a man sought to elaborate on a deficiency in his wife he may choose this method of divorce as it would allow a court record of the defect to be built. For example, according to the scholar Al-Shafi’, and his followers, “a husband could seek an annulment of the marriage if his wife suffered from leprosy, scrofula, insanity, or physical defects of her genitalia which prevented intercourse.”237

The grounds for annulment have varied between the schools but one marital defect was agreed upon by all of the traditions: the condition of impotence of the man.238 This was the most commonly invoked reason for the issuance of a tafriq divorce. Tafriq was the preferred method of divorce for women because it “preserved all her rights to post-divorce property settlements.”239 Another ground for invoking this type of divorce would be if the explicit provisions of the marriage contract were violated. For example, if

236 Tucker, 95
237 Tucker, 95.
238 Tucker, 92.
239 Tucker, 95.
the contract contained a provision that prohibited the husband from taking a second wife and then he proceeded to take a second wife anyway the marriage could be annulled.240

Unlike husbands could with *talaq*, *tafriq* required recourse to the courts according to the interpretation that women were not capable of ending their marriage without consulting a third-party. *Tafriq* was a court procedure asking for an annulment "whereby a wife, her family or, according to some schools, a husband could request that a defective marriage be annulled."241

A third type of Islamic divorce is *khul*. As with *tafriq*, *khul* was also typically invoked by women. *Khul* often had more stern consequences for the woman. In this type of divorce, the wife pays the husband to release her from their marriage. "The basic meaning of *khul* upon which most jurists agreed is that of a divorce desired by the wife in return for compensation paid to her husband."242 Contestation arises in this form of divorce as there are no solidified rules concerning how much compensation would be required by the wife, whether or not the husband must actively participate in this form of divorce nor what role the courts or judges are to play in this form of divorce.243

Islam encouraged kindness towards women in the divorce process, especially if it is determined that it was the man that harmed the woman. If that is the case then it "is incumbent upon him to provide maintenance, as shown in the following verse: ‘There shall be for divorced women provision honourable - an obligation on the god-fearing’."244

240 Husni and Newman, 67.
241 Tucker, 92.
242 Tucker, 95.
243 Tucker, 95.
244 Husni and Newman, 77.
4.3.2 Judaic Law

A. Marriage

Jewish marriage is a public contractual transaction which involves both a bride and groom, and which God also "has a heavy stake as much as the participants." Marriage is a second rite in Judaism. It follows the first rite, that of betrothal. In modern times it is not unusual for these two rites to occur simultaneously. As Brockopp et al. explain, in "contemporary Judaism the rite of betrothal and that of marriage take place on the same occasion, the whole rite under the marriage canopy or huppah."n246

Jewish marriage includes aspects of contract law whereby a critical document, called a ketubah is prepared which specifies settlement provisions in the case of divorce. Jewish weddings are “sealed with a ketubah, a marriage contract, ensuring protection for the woman in case of mistreatment, neglect, or refusal of rights, such as the right to adequate sustenance and the right to be sexually satisfied by her husband.”n247 This document places an obligation of care of the wife on the husband and it "takes effect when witnessed."n248 It also solidifies "the husband's commitment to support the wife even at the cost of the shirt on his back."n249 This is an absolute prerequisite to a valid Jewish marriage which cannot take place unless these guarantees are in place.

The Jewish marriage contract (ketubah) is a legal contract and contains many similar provisions that one would find in a secular marriage contract.250 There are provisions for responsibilities and obligations of the husband and wife in the marriage as well as

245 Brockopp, 68.
246 Brockopp, 67.
248 Brockopp, 67.
249 Brockopp, 67.
250 Brockopp, 67.
provisions for contract enforcement. The contract provisions can vary from marriage to marriage. Some contracts could include a provision requiring a husband to issue a Jewish bill of divorce (*get*) in the case of a dissolution of the marriage whereas others may include no such provision.\(^{251}\) Traditional factors can affect the transfer funds that are required for a valid *ketubah*. A virgin at marriage being allowed two hundred zuz, a widow or divorcee, one hundred."\(^{252}\) Today, the transfer of funds in a *ketubah* is usually a cash gift from the groom to the bride that is to be paid in the case of death or divorce as a form of life insurance or divorce settlement to the wife.\(^{253}\) Because a future payment is called for, marriages are not stalled or delayed on account of the groom not presently having cash funds to transfer to his bride.\(^{254}\) In a Jewish marriage, as men have held considerable control over a woman's future, a point that will be discussed in more detail below in the section on Jewish divorce, much of the Jewish marriage contract focuses on the protection of women in the case of divorce.

B. Divorce

There are those who would contend that there is an inherent inequality that exists in Jewish marriage laws, particularly with regard to divorce. The Abrahamic religions are “deeply rooted in gender hierarchy, reserving public power to men and sacralising the patriarchal family…and under the doctrine of…monotheisms women have been excluded from public power and subjected to male domination within the family or in their sexual

\(^{251}\) Broyde, 51.

\(^{252}\) Brockopp, 67.


\(^{254}\) Maurice.
According to John D. Rayner, “traditional Jewish marriage law is predicated on a fundamental disparity between men and women that has been mitigated in the course of the ages.”

Traditional Jewish Law proscribes that a divorce can only be effected by the willing giving of a get, or bill of divorce written in a prescribed ritual manner, by the husband to the wife. Because the get must be give willingly, and because except in the rarest and most exceptional circumstance Jewish law does not provide for the judicial dissolution of marriage, husbands can and sometimes do use their refusal to grant a get as leverage in divorce proceedings. Without the get, the wife will continue to be considered religiously married, and will not be able to marry anyone else under Rabbinic law, and any romantic relationships she subsequently has with other men will be considered adulterous, with serious religio-legal and communal implications for both herself and any future children she may have. A woman whose husband refuses to grant her a get after the practical dissolution of the marital relationship is called an agunah, a “chained woman.” She remains metaphorically chained to her husband in a dead marriage, unable to move on with her life within the framework of Jewish religious observance.

Jewish law places fewer bars and consequences on a man marrying or having a sexual relationship with more than one woman than on a woman marrying or having a sexual relationship with more than one man, husbands have an upper hand in religious divorce proceedings.

Egalitarian norms have evolved overtime and been incorporated into American family law. Jewish family law, however, has not made comparable strives and control over the

257 Broyde, 248-249.
Jewish divorce process remains the sole prerogative of men today.\textsuperscript{259} As Gail Labovitz argued "there is no need to sugar-coat the fundamental fact that Jewish heterosexual marriage is based on an embedded inequity between the male and female partners."\textsuperscript{260}

For her part, Wendy Kennett has asserted that divorce may be an even greater problem in some Jewish communities than in Muslim ones.\textsuperscript{261} Husbands are the only ones who can grant a divorce according to Jewish law, and “if a man refuses to grant his wife a divorce, it is difficult for her to move on from the relationship: she is a “chained” wife – an \textit{agunah}.\textsuperscript{262}

Jewish divorce requires the severance of the Jewish marriage contract. Some matters of conflict that could arise in a divorce proceeding, whether religious or secular, are already stipulated beforehand in the \textit{ketubah}.\textsuperscript{263} Alimony for at least a one year period is specified in the \textit{ketubah}. The reason a longer period of time is not stipulated is because it is assumed that the divorcee will remarry after that period of time.\textsuperscript{264} Adherence to the terms of the \textit{ketubah} contract is most common in Orthodox and Conservative Judaism. This provision of alimony was intentional and it was thought that it would discourage men from divorcing their wives, something discouraged in the Jewish tradition. Brockopp \textit{et al.} have suggested that the purpose of the \textit{ketubah} is "to protect a woman from divorce

\begin{itemize}
  \item \textsuperscript{259} Joffe, 179.
  \item \textsuperscript{262} Kennett, 204.
  \item \textsuperscript{263} Broyde, 51.
  \item \textsuperscript{264} Brockopp, 67.
\end{itemize}
on a man's whim by making divorce costly and to provide for a woman during such time as she is not married to a man.^^265 This is considered to be to the woman's advantage.

The provisions in the ketubah are not absolute and are in no way guaranteed. A woman could lose her marriage settlement entirely if it were found that she violated her obligations in the marriage. These obligations were not limited to sexual obligations and could encompass a variety of other obligations required in the marriage. In the case that the wife is found to have violated her obligations in marriage she could lose her right to a marriage settlement entirely making it far easier for a husband to divorce her.^^266 The most obvious example of an act that would terminate the wife's right to a marriage settlement is infidelity.^^267 One of the basic messages of the Torah is that God's justice is perfect and proportionate. As such, a finding that a wife was not entitled to a marriage settlement because she was found to have broken one of God's marital obligations would be entirely acceptable to the faithful.^^268 "Scripture provides the main probative evidence …when God judges, he will match the act of merit with an appropriate reward and the sin with an appropriate punishment."^^269

One of the most heavily researched areas of Jewish divorce is the Get which is akin to a divorce decree or Jewish bill of divorce.^^270 What has made it a focal point of both research and controversy, however, has been the inherent gender imbalance associated with its distribution.^^271 Just as the Jewish offer of marriage was stipulated for by the man, the man also holds the decision-making power to release his wife from their marital

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265 Brockopp, 73.
266 Brockopp, 73.
267 Brockopp, 74.
268 Brockopp, 85.
269 Brockopp, 85.
270 Broyde, 51.
271 Kennett, 204.
obligation. The exception to this would be if the husband predeceases his wife. In that case, his death terminates the marriage automatically.

In certain cases the disproportionate amount of power in the divorce process between the husband and the wife can lead to unintended consequences that can oftentimes be dire for the woman. For example, the "most notable of the resulting problems is the phenomenon of agunot/mesuravot get, women whose husband either cannot or will not divorce them and may withhold a get in order to extract money, child custody and/or a more favorable divorce settlement, or simply out of spite and a desire to exert control over their (ex) wives." The refusal to issue a Get has significant and serious consequences for women. A woman who is not divorced correctly in Jewish law suffers numerous negative consequences. The most salient of these consequences is the fact that, according to Jewish law, an improperly divorced woman will be viewed as an adulteress if she engages in any subsequent relationship. This status will not end with her. It will be passed down to any subsequent children she may bear for generations to come. Even if the woman is civilly divorced and civilly remarries, without an accompanying religious divorce, her future children could be viewed as mamzerim or "Jewish children who cannot marry Jews." Her remarriage would also not be considered religiously legitimate and her acts within her subsequent marriage would continue to be viewed as

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272 Kennett, 204.
273 Labovitz, 92.
274 Labovitz, 92.
275 Kennett, 204.
276 Labovitz, 92.
277 Labowitz, 92.
278 Labowitz, 92.
adulterous.279 While the wife can technically withhold the acceptance of the get document from the husband as well, the resulting consequences are not the same. According to Jewish law, men are not penalized for adultery.280

Where the woman does hold some semblance of power or control over her divorce is in the delivery of the get document.281 The delivery specified in the document should accommodate the woman's individual preferences.282 The reasoning behind this is that the "document must conform to the law (or it yields no effect and leaves her sanctified to that particular man), she has to make sure it is validly prepared as to its critical points. That is why she dictates the conditions of the writ's delivery. While she cannot initiate the procedure - Scripture has accorded her no role in the transaction but the passive one of receiving the document - her will governs where and how the writ will be handed over to her."283 In some instances the wife may choose to take on an active role and be present in severing the marriage bond upon receipt of the get and in other cases, she may choose to appoint an agent or third party to receive the document on her behalf.

Another procedural requirement is that the wife must know she is receiving the get or the writ of her divorce in order for its delivery to be considered valid. As such, presenting a woman with a writ of divorce without her being aware that this is the document she is receiving will invalidate it. For example, if the husband puts the get into her hand while she is sleeping, then she wakes up, reads it, and sees that it is her writ of divorce, it is not

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279 Labowitz, 92.
280 Labowitz, 92.
281 Brockopp, 117.
282 Brockopp, 117.
283 Brockopp, 117.
a valid delivery - until he says to her '[h]ere is your writ of divorce.'\textsuperscript{284} Even in this circumstance, the wife's active participation is required to receive the document validly.

\textsuperscript{284} Brockopp, 117.
Chapter 5: Religious Obligation and Legal Issues

5.1 From the perspective of religious leaders, do religiously affiliated individuals feel obligated to pursue a religious resolution to family law conflicts?

This study asked 93 religious leaders (26 Sunni Muslim, 23 Reform Jew, 22 Conservative Jew, 22 Orthodox Jew) to comment on this topic. Many were taken aback by the implication that anything at all would be ‘required’ or ‘obligatory’ in matters of faith. On a more practical level some religious leaders felt it was necessary to make the distinction between the type of crisis an individual was facing, meaning, was it a crisis of faith or not? Others, however, insisted that every crisis was a crisis of faith or at least had an element of spirituality within it. Others simply felt that religion and tradition had insight to provide on a wide variety of life crisis and as such should be consulted, or at least, be a starting point when an individual is facing a crisis in their life, regardless of the nature of the crisis, familial or not. To get to the intricacies of this inquiry a number of questions were posed to religious leaders.

This concept of obligation or belief that an individual is required by their faith to pursue a religious resolution to a crisis he or she is facing is essential to understanding the role the informal practice of dispute resolution plays vis-à-vis the larger secular legal system. For an individual who adheres to this religious premise, there may be no recourse to the secular legal system to resolve a crisis they are facing. Instead, they impose upon themselves the obligation to follow a religious ruling or even a more informal form of religious advice given by their religious leader. There is vast variation in the concept of “obligation” and whether or not a religious resolution is required. These variances lay between faiths and among denominations. They will be elaborated upon in more detail below.
5.1.1 Islam

As mentioned previously, due to the constraints in accessing the Shia community, all the Imams interviewed for this project are associated with the Sunni Tradition of Islam. The only distinction was that some Imams pointed out that they did not necessarily believe in the Sunni-Shia split in Islam and that there was only one Islam but if required to self-categorize, they would associate themselves with the Sunni branch.

*Shari'a* has sometimes been described simply as Islamic Law. However, for others, it does not hold a concrete legal meaning. I asked religious leaders, “If you had to sum up in a few sentences what *Shari'a* is, how would you explain its meaning? For some Imams, *Shari'a*, and religion more generally, are not viewed as a set of codified laws, or in practical terms, a set of do’s a don’ts; rather, *Shari'a* is part of the divine revelation which contains many canons and values, as well as human experience, to which Muslims can subscribe – *Shari'a* then becomes a combination of these two. It acts as a guide or pathway by which Muslims can govern their lives. The level of flexibility imagined by *Shari'a* varied from Imam to Imam. At one end of the spectrum, it was an unbending set of codified rules and on the other it was a guide that encouraged or discouraged a number of actions and choices for Muslims. In one interpretation, Muslims have the ability to renegotiate and reinterpret what the will of God is and what scripture means, leaving *Shari'a* as both a growing and evolving body of knowledge.

Interviewer: So if you had to sum up in just a few sentences what *Shari'a* is how would you explain its meaning?

Interviewee (Sunni Imam): *Shari'a* actually means law. So when people ask us do you believe in *Shari'a* or not and the simple answer is, depending on how the person defines this word *Shari'a* and *Shari'a* means law then I ask the person the question, do you believe in law and order or not? Obviously we all believe there
should be law and order in societies so that's basically what Shari'a is. And what is interesting is 90% of the Shari'a law is very similar to the Judaic-Christian law. Even the Jews, they have something called the Halakhah - in Israel they practice that. It's basically 90% identical, 90% identical. It's the same law. And when it comes to Shari'a the only thing people focus on is just the, like the, the penal laws - when it comes to someone - when it comes to murder, the death penalty, when it comes to someone lobbing those punishments. People focus on that when Shari'a actually means Islam. It means a complete way of life. And what people don't understand is that some of the laws of Shari'a are actually more lenient than the laws we have in other societies. For example, here, in our legal system when a person commits murder there are only two laws: either the person will get life imprisonment or he will get the death penalty. And in about 32 states such a person will get the death penalty. Where in Shari'a if a person commits this act now the family of the victim, we have three choices, either they can ask for the law of justice which is 'eye for an eye' or, which is the death penalty or number two...which is the murderer has to pay a certain amount of money to the family of the victim and they can be forgiven or the third thing is to forgive the person completely and such an act is recommended - forgiveness. So this is what Shari'a is but people forget about everything and just only focus on the death penalty and the death penalty is something that exists even in this society as well. And when people compare, for example, Shari'a with Western law, I tell the people, when we talk about West, which West are we talking about? Because every country has different laws. When it comes to the Old Testament and our Constitution, according to some people, they believe it is based on Judaic-Christian principles so if that is the case, the Constitution and the Bible has laws that are a lot more strict than the Shari'a, right. When it comes to death penalty it comes in over 15 places in the Old Testament where a person should be put to death. But when you look at the whole picture and you look at the reason why these laws are so harsh...so the innocent people can live in peace then things will make more sense, right. Going back to your question, Shari'a linguistically means law, right and a law, we believe in law, yes we believe there should be law and order in society. We don't believe there should be chaos.285

Here we see attempts to normalize Shari'a by drawing comparisons and similarities to secular society and this Imam remains defensive of accusations against Shari'a.

285 Interview on December 19, 2017.
Interviewer: If you had to sum up in just a few sentences what *Shari’a* is, how would you explain its meaning?

Interviewee (Sunni Imam 2): *Shari’a* is a - the path of life because it does mean, linguistically speaking, a path of water, and again, it is a path of life because water is a symbol of life.\(^{286}\)

I asked religious leaders, “Do you believe that Muslims have an obligation to resolve their conflicts through the teachings of religious text and the tenets of religious law?” For most Imams, this is indeed a requirement. When a Muslim is facing a crisis in life, he or she should turn to their faith for guidance as it is believed that the Islamic tradition has a wealth of advice that can provide guidance in times of crisis. This was the general feeling among the Muslim Clerics. However, a minority of Imams, who also conceded the wisdom of the faith, felt it necessary to make the distinction between the types of crisis an individual was facing and emphasized that the individual should pursue whatever resource was available to them that could best deal with the crisis.

Interviewer: Do you believe that Muslims have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law? So as a Muslim person who is facing a crisis in their life what is their obligation? Are they first required to turn to their religion or can they look elsewhere to solve that crisis?

Interviewee (Sunni Imam): I guess it’s almost the same thing. People can search for help regardless, if they find it in the tradition that’s good, if they find it elsewhere then that is also permissible. Islam is very flexible when it comes to that.\(^{287}\)

In general, the Imams acknowledged that the Islamic faith had a wealth of wisdom to offer on any given number of crises but the faith did not have exclusive jurisdiction over crisis management. Adherents of the Islamic faith were free to seek

\(^{286}\) Interview on February 9, 2018.

\(^{287}\) Interview on February 9, 2018.
whatever resources were available to them, whether religious or secular, and best-suited to dealing with a particular crisis.

**Figure 1:** Do you believe that Muslims/Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?

I asked religious leaders, “How do you think that religious law and civil law of the state are connected, or do they operate separately?” Although, several Imams acknowledged that there is a distinction between the civil law of the state and religious law, many aspects of the two overlap because, in their view, they share the ultimate aim of helping and protecting people. As such, in many instances, the Imams did not see the two bodies of law as in conflict. However, where distinctions exist, it was understood that a Muslim should not take any action to contradict an Islamic law but at the same time should not follow an Islamic law which went against a secular law. For example, although same-sex marriage is permitted in secular law, an Imam would not be required
to take affirmative action to officiate over a same-sex marriage ceremony as that ceremony would contravene the proscriptions of Islamic law. Many Imams also saw significant overlap between secular and religious law.

Interviewer: How do you think that religious law and civil law of the state are connected? Are they something that are connected or do they operate separately?

Interviewee (Sunni Imam): You know, the law, obviously, there are certain things that overlap and there are certain things that don't and in my opinion, I really think that the courts here - there are a few things that overlap, for example, in Islam we don't issue divorce right away we say hold on hold on hold on, you know, or issue the divorce, ok, you cannot kick her out of the house, we are going to give you three months. God gave her three months, three months cycle...whatever you do don't kick them out of your home. But in this case of divorce, God said it's her home now so she must stay there for the time and that time allowance is to kiss and make-up. The court does the same thing, the court will not issue a divorce right away. They give them, at least, 6 months to go and work it out. As a matter of fact, I was amazed when my son died and I was doing his, I was executing his, you know, whatever estate he had, monetary etc. I found that, my God, the form I had to fill out and the things that they require are so similar to the Islamic way - I told the guy, man, this is so similar to Islam how we do things. He said, where do you think this came from? This country was Christian. So what he was alluding to was, you know, religious-based. So there are certain things that overlap, other things that don't.288

While the state legal system is continuously adapting to the increasing secularization of general society, this interview showed that there are still congruencies to be found between Islam and the Judeo-Christian roots of the American legal system.

5.1.2 Judaism

There are three primary denominations of Judaism - Orthodox, Conservative and Reform. It is key to understand the differences between these denominations because the denominations themselves often govern the scope of the actual responses. Approaches to

288 Interview on March 18, 2018.
pastoral care, legal interpretation and the general role of both secular and religious law in each denomination varied significantly. The figures shown will account for these denominational differences from which larger conclusions about the overall status of the faith can be ascertained.

The variety of meanings attached to the term *Halakhah* and the role that *Halakhah* plays in the everyday lives of Jewish people is significant and differences in the understandings of the meaning of *Halakhah* formed along denominational lines. There was variation within denominations, in particular, within Reform Judaism. Reform Judaism in Canada was much more structured and responses tended to mirror the responses given by Conservative Rabbis in the United States. Overall, Reform Judaism in Canada was more conservative than Reform Judaism in the United States with regard to perspectives on law and its place in the daily lives of Jewish people. Below are the perspectives on the common meaning and role *Halakhah* holds in each of the major denominations of Judaism. I asked religious leaders, “If you had to sum up in a few sentences what *Halakhah* is, how would you explain its meaning?”

As explained in the Orthodox tradition.

Interviewer: If you had to sum up in just a few sentences what *Halakhah* is, how would you explain its meaning?

Interviewee (Orthodox Rabbi): *Halakhah* is observance of Jewish law. It's the system which instructs the individual how to live their religious lives and in Judaism religious life is really all-encompassing, it's both how you treat your fellow human beings, your relationship with your community with your country or your society as well as your relationship with God and how you observe rituals. So *Halakhah* is the guiding system that helps you figure out what you are supposed to do.289

289 Interview on November 15, 2017.
As explained in the Conservative Movement.

Interviewer: If you had to sum up in a few sentences what Halakhah is how would you explain its meaning?

Interviewee (Conservative Rabbi): Oh my gosh, you're asking, all the questions you are asking could be like 10 hour conversations or two year courses so Halakhah is the term that is usually translated as Jewish law. The root for Halakhah comes from the Hebrew term 'to walk' so in some way it's the way Jews walk in the world, it's our path, it's our path to God. The traditional way of understanding Halakhah is that that is the will of God, the way to walk in the world according to God's will. Now what becomes very complicated depending on which Jewish person you ask, is depending on the religious orientation of the Jewish person you ask, is the nature of Halakhah as a legal system as a human legal system versus understanding Halakhah as divine revelation. So, since you are asking me, and I am a Conservative Rabbi, and I take a historical and critical approach to Jewish texts and tradition, I would say that Halakhah is unfolding human legal process of trying to interpret Torah both the written Torah and the oral traditions and the oral Torah over time using legal principles and hermeneutical techniques that have been passed down throughout the generations to try to determine normative behavior.290

As explained in the Reform Movement.

Interviewer: If you had to sum up in a few sentences what Halakhah or Jewish law is, how would you explain its meaning?

Interviewee (Reform Rabbi): In the reform world Halakhah is a guiding principle but not a legal standard so we use rabbinic teaching historically to help us think about how we want to live and not define how we live so we use the Halakhah as one more source of guidance but not as any particular path to kind of value and it's a body of work that is ongoing - some of our tradition believes that it was all given at Mount Sinai and it just unfolds over the generations, more of it becomes revealed, or uncovered I should say because it was all revealed at Sinai. Some of us, that's the more traditional world, and those of us in the liberal world believe that it's a legal, that it's rabbinic understandings that have come out of historical contexts and interpretation of texts that are all human created and therefore are time-bound and culture-bound.

290 Interview on November 1, 2017.
and defiantly need to be adjusted and changed as culture changes.291

I asked religious leaders, “Do you believe that Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?” Again, this question yielded a number of distinct responses from the various denominations in Judaism as shown previously in figure 1. Almost all religious leaders expressed the view that even when such an obligation was not required there was some value in consulting religious texts and tradition as there was applicable value and insight to be found there. Still, there was often a distinction to be made for many religious leaders. In general, the conclusion was when the issue facing an individual touched on matters of faith, religion should, of course, be consulted. For Rabbis adhering to this perspective, the answer to this question depended on the type of issue in question. For Rabbis in the Reform movement, the most-common response emphasized that there are no requirements or obligations in the Jewish faith that are obligatory and it was a matter of individual choice as to the role and extent that religion would play in an individual’s life. For others, emphasis was placed on ensuring that any action an individual took did not contradict any religious requirement or obligation. In the Orthodox tradition, matters concerning family life were often considered to be within the purview of religious law.

Interviewer: Do you believe that Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law? So when a Jewish person is facing a crisis in their life are they required to first turn to their faith to try to solve that crisis or can they go elsewhere?

Interviewee (Orthodox Rabbi): When facing a crises for anything in their life they should be going to whatever is going to do the best job without conflicting with any religious tenet. So that often requires puzzling things over, getting some advice from people,

291 Interview on October 27, 2017.
even people you don't necessarily go to for the counseling. There are issues that are best resolved, because they have very little formal connection with a particular religious precept - so they are best resolved by going to a professional who may have no understanding whatsoever of Jewish law. There are other things, especially things that have to do with the family, and child-rearing and the like which most certainly should be going through - should be seen through the lens of Jewish teaching, of Jewish law, and Jewish thought.292

I asked religious leaders, “How do you think that religious law and civil law of the state are connected, or do they operate separately?” There was one consistent response to this question from Jewish religious leadership which was that the law of the land is the law.

‘Dina d’malchuta dina’

According to Jewish law there is a requirement for the Jewish people to abide by the laws of the land in which they are living. However, this requirement was not universal. While adherence to restraining laws is mandatory, adherence to affirmative laws is only required insofar as they do not go against a firm Jewish law. This was an issue for many Orthodox clergy who had difficulty reconciling same-sex marriage laws with religious law. While lawful in the society they were living in, they are not consequentially required to officiate at same-sex marriages, for example. For many Rabbis, the principle went a step further, reaching the conclusion that many of the values characteristic of our modern ‘secular’ legal system, were also Jewish values that can be discerned from various Jewish texts, traditions and teachings. Some responses, the minority, emphasized the separation of religious institutions and the state as a value to be upheld.

292 Interview on August 5, 2018.
Interviewer: How do you think that religious law and civil law of the state are connected? Do you think they are something that are connected and inter-related to each other or do you think that they operate separately?

Interviewee (Reform Rabbi): No, they live in separate realms, they sometimes intersect but they're often - you might have a Jewish religious text that's 1800 years old and it might not have any relevance, or any obvious relevance, in a contemporary situation.

Interviewer: How do you think that religious law and civil law of the state are connected? Are they something that are connected in your mind or do they operate separately?293

Interviewee (Orthodox Rabbi): For me, it's mostly a semantic issue because the Talmud itself going back to I think around the 4th century maintains that the law of the land is binding. It's not binding when it's contradictory to religious law. So as a matter of Jewish law I have to uphold and follow civil law. That said, the two are very different and have very different goals. Western law does not proscribe behavior it [prohibits] behavior, but it never proscribes behavior. Religious law is prescriptive, it aims at creating a better person. Western law doesn't do that and cannot do that by virtue of certain constitutional issues, essentially the Establishment Clause, and where we are today that means any kind of moral issue can be pushed by the state because it is a matter of conscience and that is then interpreted by the court as being covered by the Establishment Clause. So the two occupy very different realms. Civil law tries to keep society stable and prohibiting criminal behavior by creating penalties for criminal behavior but religious law aims at producing a better or holier person.294

I asked religious leaders, “Do you ever suggest that couples should seek recourse to their issue in the state court system or are conflicts often resolved in the community?”

Although the Rabbis acknowledged that this was an infrequent occurrence, there were some instances where a Rabbi felt as though the matter that came before him or her was a matter that could not be resolved in a religious setting and as such a couple would have no choice but to go to a secular court. Overall, most Rabbis have suggested that couples

293 Interview on May 4, 2018.
294 Interview on August 5, 2018.
should seek recourse to the civil law system, *albeit* infrequently. This was most often the case in matters of divorce. Much more common than a recommendation to seek assistance through the secular legal system was a recommendation or referral to a counselor or mental health specialist. Many Rabbis kept information for these sort of external referrals handy for such instances.

**Figure 1: Do you ever suggest that couples should seek recourse to their issue in the civil law system?**

![Graph of Direction to State Law](image)

In conclusion, the general population is seeing a rise in secularism. Still, there are some areas of the law where Judeo-Christian principles persist. Religious leadership is often able to employ these congruencies between the secular legal system and religious law in the advice and opinions they give as part of their pastoral care.

While there appear to be consistent attributes in the meanings of *Shari’a* and *Halakhah*; such as, a path, a guide, religious law, there are denominational differences in Judaism that play a significant role in determining the priority *Halakhah* has in an individual’s everyday life. The findings of this study suggest that denominational differences play a significant role in determining whether or not a religious leader felt that members of their faith were obligated to resolve their conflicts through the teachings
of religious texts and the tenets of religious law. In Orthodox Judaism, in particular, crises concerning family life were viewed as obligatory subjects for religious resolution.
Chapter 6: Alternative Dispute Resolution

6.1 How effective is pastoral care as a form of alternative dispute resolution?

The process of an individual seeking pastoral care with an objective of resolving a family conflict or crisis is a matter that addresses choice of law and choice of forum doctrines. Choice of law involves choosing what “body of substantive law to apply to a dispute.” Choice of forum involves determining which venue and location a dispute will be adjudicated in. When congregants approach religious leaders with the expectation that they will resolve a conflict they are participating in an advisory, voluntary commitment to religious law as the choice of law and the religious institution as the choice of venue. Even “American religious communities are fundamentally volunataristic, and the Constitution is understood as denying all coercive authority to religion. This does not prevent religion from claiming universal jurisdiction, however, only from enforcing it. They are permitted no tools other than persuasion to change others’ offending behaviors and beliefs.”

6.1.1 Islam

I asked religious leaders, “Have you ever considered secular law when giving advice? If so, please describe.” In the responses to Muslim religious leaders to this question there was often a stark split. Some respondents felt as though they were being accused of engaging in the unauthorized practice of law. In these cases, of course, the answer was always no. For others, it seemed obvious that a consideration of secular law would be

296 Glannon, 132.
relevant in their day-to-day pastoral care. This would require them, as religious leaders, to have some knowledge of secular laws that would be useful in ensuring their actions complied with the legal requirements of the state.

Interviewer: Have you ever considered secular law when giving advice or do you ever use secular values when giving advice?

Interviewee (Sunni Imam): I'm not sure I fully understand the question. Can you reframe it?

Interviewer: So when you are giving advice in your capacity as spiritual leader, have you ever been influenced or ever had in the back of your mind something that you know from society around you - so, let's say for example animal rights or something that is trending in the society around you, has that ever influenced the advice you give in your religious capacity?

Interviewee (Sunni Imam): Ya, of course. I have to live in the real world so. We live in what we live in so sometimes there are particulars of religious guidance but oftentimes it is more common for the religious guidance to be more general than specific. So when it's general there is plenty of room to incorporate what's considered the reality of what the people may be facing. When it comes to secular law, definitely we take those things into consideration, you know, because you have to. People need to understand the laws related to abuse, children, or violence and domestic violence. They need to understand laws that relate to workplace policies, sexual harassment, all of these kind of things so that defiantly - when there is a need for secular law to be considered we try to do our best to consider it and then culture is culture, it comes up where it needs to come up.298

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298 Interview on March 17, 2018.
I asked religious leaders, “Do you ever use secular values in advising your parishioners? If so, please describe.” Many Imams explained that they did not use secular values in the advice they gave or that they did not see much of a difference between secular and Islamic values and as such they didn’t feel like there needed to be a distinction made when giving advice. I then asked religious leaders, “Do you feel that your parishioners often follow your advice or ruling?” For the most part, Muslim religious leaders answered affirmatively to this question. Many Imams felt that the only reason congregants were coming to them in the first place was because those individuals trusted their advice and, as such, would often heed that advice.

In some cases, such as with well-known and highly respected Sheikhs in Canada, the Imam may even ask parishioners who are coming to seek advice if they are willing to accept the advice of the faith once they receive it. In these instances it is incumbent upon the couple themselves to voluntarily accept the jurisdiction of the religious authority. Of course, once accepted this became a moral obligation to adhere to as opposed to a legally
binding obligation as we would understand it in terms of secular law. For faithfully observant individuals, a moral or religious obligation carries the same weight as a binding decision dispensed by a court in the secular realm.

Interviewer: So, I had asked you, do you feel that people take your advice? Do they listen to you when you speak?

Interviewee (Sunni Imam): Ya, ya, I think so. If you Google, you'll find a lot of reviews I did.299

I asked religious leaders, “Do your parishioners, that have sought your advice, ever/often end up in a secular court for the same matter?” On the Islam side of this question, only in limited and isolated cases was the answer a yes. In certain instances, individuals came to the Imam and simply did not find that the advice they were given was satisfactory so they explained that they were going to proceed to a court to address the matter. In other instances, the matter simply could not be dealt with without a court. For example, in cases where a civil divorce was required.

This study made inquiries about the deference of religious leadership to the state legal apparatus. I asked religious leaders, “Do you ever suggest that couples should seek recourse to their issue in the state court system or are conflicts often attempted to be resolved in the community?” Most Imams said they don’t suggest this action but whether or not this happens simply depends on the sentiments of the couple. In certain instances, religious leaders cited the lack of enforcement power in the religious realm as justification to defer a matter to the state court system.

Interviewer: Have you ever felt like and does this often happen to you where you've offered some sort of counseling to a couple and then they've just ended up in the secular or the provincial court for the exact same issue. Does that happen or do most people - are most people able to resolve their issues within the community?

299 Interview on December 21, 2017.
Interviewee (Sunni Imam): We are working with the secular system - you have to understand, I don't know how you get the answer from others but - you live in Canada, for instance, the secular system, you live with the law. We have a provision in our Islamic law, even we were to do Islamic law we have something called custom. You have to go with the custom. If the custom does not contradict the major principles of justice and fairness to both the man and woman it's fine, we use it as a source of legislation so the courts are the way to go because they have the authority to enforce law. We don't have that authority, that's why...we have to go with the court. So basically, we encourage them to go with the court.\textsuperscript{300}

Most religious leaders had a more straightforward response and suggested that in their faith there was a religious obligation to adhere to the laws of the land in which they were living. Others simply felt that it was a moral obligation owed to the society in which they lived to adhere to the secular law. However, the response above suggests something different. That Imam suggests that interaction with the secular law was a matter of necessity. Since religious authorities do not have enforcement power, in some cases, there is no choice but to interact with the secular legal system.

This study then inquired about the use of secular resources in crisis management and conflict resolution. I asked religious leaders, “Why do you think individuals seek the guidance of a spiritual leader instead of simply taking their concerns to therapists, arbitration or courts in the secular realm?” The primary emphasis in the Muslim community was accessibility; not just in terms of the free cost, which was mentioned, but also in terms of the gendered reality that many Muslim women do not have fluid and easy access to the public sphere. Sometimes approaching an Imam at a local mosque is the easiest way to get an intervention into a crisis they are facing. This step garners respect in the community. There was among my interviewees an Imam who emphasized that Islam

\textsuperscript{300} Interview on December 21, 2017.
Interviewer: Why do you that individuals might seek the guidance of a spiritual leader like yourself instead of simply taking a crisis or a concern they are facing to a therapist, or to arbitration or to a court or to some other body in the secular realm? Why would they come to a spiritual leader?

Interviewee (Sunni Imam): Two reasons, the first reason is that if somebody is a Muslim they want to believe that religion can solve all of their problems and that's, you know, one of the historical fallacies that lead to a weakness of faith when someone believes that a spiritual guidance is going to solve any problem and there are various factors. There are personal psychology, personal state of mind, there is social factors - there are so many things that influence people's lifestyles and decisions and the successes and failures and struggles and good points they have so sure, as an Imam, I'm going to entertain anybody to show them that there is a spiritual path but to make it clear to them it would require a holistic assessment if you begin on that spiritual path and you don't find that it is solving it you should probably, my advice always is, you should go to somebody who is in a professional field related to - when it comes to counseling, professional growth, personal issues, psychological or relationship-based or whatever it is - it could be somebody who understands the science of the heart and spiritual commitment is a science, and there is no question about that but maybe people's heart is in the right place but their mind is not able to commit to that for psychological reasons or the environment they live in or their upbringing or whatever it may be - so for example, this nonsense where people clearly should get divorced and they go through this never-ending process of the Imam trying to console them and tell them that divorce is a terrible thing and that one should never do this, that we should maintain this, and then what they end up doing is living in misery but, so, I'm one of those rare Imams who, if I see that clearly there are irreconcilable differences, they just don't like each other or have done something terrible or one doesn't really
like the other one then I just advise them, you should go handle your business in the court. And then there is this strange perception that, in Islam, a woman cannot go to the court and get divorced, which is false. If it was an Islamic court of Shari'a she can go to the Judge and give evidence and explain her case and there is various ways that she would get a divorce and that has happened since the Prophetic time. So it's just some cultural problems we have.\footnote{Interview on November 4, 2017.}

The process of pastoral care given by religious leaders often addresses disputes but differs significantly from the formal dispute resolution processes like arbitration. I asked religious leaders, “What benefits or shortcomings do you see between the conflict resolution you offer to couples in the mosque and the more formal process of religious arbitration?” The informal process of dispute resolution that parishioners can seek through their Imams was viewed in a very positive light by these Imams. A number of reasons were given, including, but not limited to, lower costs and having disputes processed more quickly and rapidly than in other forms of dispute resolution.

Interviewer: The process you can offer to a couple, you know, it's something informal, it's in your office, it's inside the Islamic center, there is no binding final decision that, you give advice, you listen, you oftentimes know the couple versus a more formal process, a couple has an issue, they go to court, to arbitration, maybe they apply some religious principles in the arbitration or in the court but there is a final decision, it's more confrontational. What do you think is beneficial about your process over the more formal process or where do you think your process falls short? How does this process help couples over those in the formal sector?

Interviewee (Sunni Imam): We are not legal counselors, you know, we are not legal counselors, we are just a religious leader. So all we can give is advice and advice is not binding whereas when they go to arbitration and the arbiter decides everything, and they pay for it, then they are bound. So therefore, it's not that we are falling short on something, it is because the law is there and the law gives you permission - but when it comes to the legal
binding the law says you have to go to the court of law. We are not a part of law, we don't have that power.

Interviewer: And do you think that what you can offer to a couple, this more informal advice, do you think it is beneficial for the couples?

Interviewee (Sunni Imam): Ninety percent of the time, yes. Ninety percent of the time yes. Three or four months ago there was a situation where, not only the husband and the wife, but two families would end up, you know, in the big mess and myself and another Imam, we jumped into it and things got - everything is back to normal. And it was just simple pieces of advice, simple pieces of advice because they were too young, two young people and nothing was there in their life but emotions, no experience, they were not at a certain age so all to give them is experience, share with them that love, that concern, you know, that care for a few hours...and they came to their mind and everything was back to normal. So ninety percent of the time it works. Sometimes, it doesn't work too.302

Interviewer: So the type of dispute resolution you can offer - something very informal, it's usually in your office, you know the couple ahead of time, you don't give them a decision, you just give them advice - they can take it or they can leave it - do you think that this process has some specific benefit to couples that maybe they wouldn't get in an arbitration or a court or something more formal or do you think that it falls short in some way? What do you think is beneficial about your process?

Interviewee (Sunni Imam 2): I think it is the first one, it is beneficial because it allows them to think outside the context of court, right. For example, if something were to happen, you go to a lawyer and the lawyer is just waiting for the day you go looking because, you know what, thank-you very much I think you should go for divorce because that is how he makes his money or she makes her money, right. You come to an Imam there are hundreds of benefits because I don't benefit whether you divorce or not divorce. I mean it's all about how can I help you - because sometimes, unfortunately, something that is such a big problem and all the husband has to do is shut up for a few minutes and listen to the wife, that's all. If the husband just does that, that's more than enough to solve all the problems in the marriage. Unfortunately, It's so sad, it seems like such a major problem and all the husband has to do is keep quiet and just hear the wife once in awhile, you know. In arbitration, generally speaking, especially

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302 Interview on March 20, 2018.
when it comes to law and divorce, that doesn't really happen unfortunately. There is a lot of other contexts and other things - there is time constraints, they don't have time to give the couples an hour and a half, you know - half an hour, if not, come back another time, half an hour. Can't solve it, thank-you very much, you know what now you have to get a divorce it has nothing to do with me. That is how arbitration works. But when it comes to us I have all the time in the world. I will sit with you for a whole month straight, once a week, twice a week to help you solve the marriage problem. I do think it is a benefit, a major benefit I think.  

6.1.2 Judaism

I asked religious leaders, “Have you ever considered secular law when giving advice? If so, please describe.” None of the Rabbis said they would counsel on secular law in a traditional sense of law practice, however, most said they would consider it in one way or another. On a very basic level, if a congregant asks for advice or approval on a matter that violates secular law, the Rabbis would advise them not to proceed for that reason. For example, a situation where a Jewish man asked to marry a woman while she was still married civilly to another man. Or a situation which involved accepting a donation to the Synagogue in a way that went against proper financial disclosures. The Rabbis often quoted the following principal or verse – “The law of the land is the law” - *dina de-malkhuta dina.*

However, they all made clear that they would not sanction an act that contravenes the civil law of the state. In contrast, just because something was permitted in secular law, for example, same-sex marriage, they would likewise not be required to participate in a law they didn’t agree with or that went against their faith. By way of another example, the use of marijuana. I asked religious leaders, “Do you ever use secular values

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303 Interview on December 19, 2017.
in advising your parishioners? If so, please describe.” According to the Rabbis, there was significant overlap between secular values and Jewish values. Some Rabbis didn’t even necessarily see a clear distinction at all while others saw only a slight distinction between secular values and religious values. Some Rabbis also acknowledged that a secular value was more relevant when it had some sort of connection or congruency with a religious value. In these cases, those sorts of values, such as, a prohibition on abuse of a spouse, were more useful when the Rabbi was giving advice. Other values that were seen not to be as closely affiliated with religious traditions; such as, whether or not one should favor a free market, tended to find less of a place in the pastoral counseling of Rabbis and when the values did find their way into a conversation no particular point of view would be encouraged or discouraged.

Interviewer: And have you ever considered secular law when giving advice or have you ever used secular values when giving advice?

Interviewee (Reform Rabbi): Sure, all the time.

Interviewer: What would be an example of that?

Interviewee (Reform Rabbi): You know when we think of like classic liberal values, 19th century liberalism or enlightenment values of reason, those are secular values, those are not religious values and I use them all the time.304

Interviewer: And have you ever considered secular law or have you ever used secular values when giving advice as a Rabbi?

Interviewee (Orthodox Rabbi 2): Well, I taught in a non-Jewish law school for 15 years so I certainly had to ponder it quite a bit. Are their values coming in from non-Jewish society that I use, I do when I think, when I can make the case in my own mind that they really are Torah values, Jewish values but there is a particularly good way of

304 Interview on May 4, 2018.
phrasing it or an elegant way of explaining it that I have taken from Western society. Jewish tradition maintains that Torah, whatever that means, is something that is endemic to the Jewish people – that they were given the Torah and God did not expect anybody else to practice it. But, wisdom can be found among all peoples of the world so I am certainly open to the idea of drawing from that wisdom and I tend to do more than a fair amount, that's putting it lightly, of secular reading. That all becomes part of who I am, part of what I convey.  

I asked religious leaders, “Do you feel that your parishioners often follow your advice/ruling?” After a short chuckle by many Rabbis upon hearing this question, most acknowledged that yes, they do believe their congregants listen to them especially when they voluntarily sought them out. However, almost all Rabbis interviewed had some sort of interaction with individuals who had come to see them only to prove to their spouse that they were correct in front of that third party or only to have a Rabbi validate their actions. Some did not return when a Rabbi’s advice was contrary to the result the individual was looking for. Of course, these were the exceptions. Adherence to the advice of the Rabbi also tended to vary in degree from one denomination to another.

Interviewer: And do you feel that you have been effective in the advice that you have given? Do you feel that your parishioners heed your advice? Do they follow the guidance that you try to give them?

Interviewee (Orthodox Rabbi): I think it is very situational, some people do sometimes, and other people don't sometimes. But, I think people perceive my teaching and the advice I give to be measured, I don't think people think of me as an extremist, and so that probably - in that sense I think people would probably think it's fairly reasonable.

Interviewer: And do you feel that you have been effective in the advice that you have given? Do you feel that your parishioners often follow the advice that you give them?

305 Interview on August 5, 2018.
Interviewee (Orthodox Rabi): I have no idea why they should, but yes they do.306

I asked religious leaders, “Do your parishioners, that have sought your advice, ever or often end up in a secular court for the same matter?” Some of the Rabbis explained that they were not aware as to whether couples they had seen ended up in secular courts with the same problem they had come to see their Rabbi about. For those who were it was usually in a case of divorce or issues that the Rabbi could not resolve, even if he or she wanted to. For example, a religious divorce of a legally registered marriage would also need an accompanying civil divorce. With saddened hearts, many of the Rabbis also acknowledged that by the time many couples end up coming into their offices with a marital conflict, one or both of the spouses had already made up their mind that divorce was the only solution and the congregant may be simply looking for validation or religious adjudication of that decision.

I then asked religious leaders, “Do you ever suggest that couples should seek recourse to their issue in the state court system or are conflicts often attempted to be resolved in the community?” Among Jewish religious leadership, responses to this question were split. For those who do refer couples elsewhere, most said they would refer couples to a licensed marriage counselor or a psychologist but not to a secular court or other confrontational system. In the few instances where a Rabbi suggested that a couple should take its issue to a secular court, this has almost always been for family law cases. In particular, with divorce cases where many Rabbis required proof of a civil divorce before issuing a get or Jewish divorce decree.

Interviewer: And your parishioners that have come to seek your advice - have you ever had a situation where they have ever, or

306 Interview on August 5, 2018.
often ended up in a secular court for the exact same matter they came to speak to you about? Or have you, yourself, ever simply suggested to them - you know this is sort of beyond the capacity of what I can do as a Rabbi, you need to go to a secular court to deal with the issue that you are facing. Have you ever had any situations like that?

Interviewee (Orthodox Rabbi): Absolutely, especially the second question. Sure, especially when you are dealing with monetary matters there are people who are unwilling to submit to the Jewish court at which point there is a procedure for letting people go to secular courts. It happens everyday.307

I asked religious leaders, “Why do you think individuals seek the guidance of a spiritual leader instead of simply taking their concerns to therapists, arbitration or courts in the secular realm?” As with their Muslim colleagues, there was a strong emphasis on accessibility to religious leaders versus accessibility to secular alternatives when facing a crisis. There were certainly more Rabbis who emphasized the fact that sessions with them were free and that they felt this was a strong motivation for individuals to seek their guidance on a given crisis. However, they also acknowledged that they were often only a first step and did not necessarily have all the tools necessary to deal with a wide variety of crises, especially those which fell outside of the spiritual realm. Many Rabbis had developed sophisticated referral networks, particularly with specialized mental health counselors to whom they could refer their parishioners. There were some Rabbis who acknowledged that they felt spiritual guidance was and should be the first step when an individual was faced with a crisis in their life and that observant Jews should turn first to their Rabbis who have ample knowledge to provide on a wide variety of issues. In the Orthodox tradition, there was strong sentiment that this was a spiritual obligation. While in the Reform tradition, no such obligation was believed to exist. Still, many of the

307 Interview on August 5, 2018.
Rabbis acknowledged that turning to faith and a spiritual leader would be useful if an individual chose to do so.

Interviewer: Why do you think that individuals might seek the guidance of a spiritual leader, so someone like yourself, like a Rabbi, instead of simply taking a concern they are having to a therapist, to arbitration or to a court or to some other part of the secular realm – what is it that motivates a Jewish person when they are facing a crisis in their life to come and speak to their Rabbi?

Interviewee (Orthodox Rabbi): So there are different answers to that depending on the type of question...Many of my colleagues don't do the type of intervention that you really require a long-term therapist for. Most Rabbis don't even do arbitration. I happen to have a certificate of arbitration so I did arbitration kind of on the side but the questions that come to an Orthodox Rabbi are one of two kinds. One is that Judaism, traditional Judaism, is a legal system and it is a very very far-reaching legal system and in that sense it is much more, it's much closer to Shari'a law than it is to Canon law. There are far more things covered, much more inclusive. Orthodox Jews are used to the idea that there is a Halakhahic, Halakhah is Jewish law, Halakhahic approach or semi-Halachahic approach to lots and lots of questions. So many questions will come to Rabbis simply because he has the knowledge about what Jewish law and/or...Jewish tradition have to say about particular problems. The second has to do with this belief that people who have spent their lives or part of their lives immersed the study of Torah have, in some areas, a leg up on other people. That the study of Torah itself is used to use, to use Steven Hawkins illustrious phrase, studying the mind of God, as it were and therefore have a little bit keener insight into some, into some problems. Compounded with the fact that a lot of Rabbis do have a lot of experience with problems because they've heard the stories again and again and again and they learn from their mistakes and can give practical advice.308

I asked religious leaders, “What benefits or shortcomings do you see between the conflict resolution you offer to couples in the synagogue and the more formal process of religious arbitration?” Most Rabbis found their process beneficial because it is a more

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308 Interview on August 5, 2018.
open and fluid process. Individuals do not feel as defensive since the process is less confrontational in the opportunity it gives couples to resolve their conflicts. It is non-binding so there is less pressure and people are not afraid that what they say will be used against them which allows more flexibility to the couple and often more truths between them and to themselves. In addition, the Rabbis felt that knowing the couple provided a particular insight that could be used to assist in the resolution of the conflict or conflicts a couple is facing. However, many Rabbis acknowledged that the process can fall short for these same reasons as there is no system in place to hold parties accountable to the agreed upon solutions.

In conclusion, forms of conflict resolution; such as, mediation through pastoral care serve a useful societal function. This form of care fills a void for religiously observant individuals who may not take the steps to address a crisis they are facing in the secular realm. Aside from being a more accessible system for individuals in terms of costs it also provides an avenue for crisis management that is more approachable for some individuals. Familiarity with religious leaders, the swift resolution of disputes and the ability to have both spiritual and secular concerns addressed in a single locale all play a factor. From the perspective of the religious leaders interviewed, the pastoral care and the advice and opinions they give are heeded by their congregants in most cases. Religious leaders often viewed themselves, not as replacements but as supplements to the resources available to their congregants in secular society.

Contrary to my initial hypothesis, that religious leadership would find that the tenets of their faith provided an all-encompassing system for crisis management, many of the religious leaders interviewed made the concession that oftentimes knowledge from
sources outside the faith are useful in addressing a crisis. At the same time, they also acknowledged that their religious traditions had a role to play in crisis management even for a crisis that was not of a spiritual nature. Consideration of secular laws was often taken by religious leaders.
Chapter 7: Community-Based Practice of Religious Law

7.1 What shape and form does the community-based, non-state sanctioned, practice of religious law take in North America?

When discussing community-based family law we look at the process of families, and more specifically, couples, taking an issue that would traditionally be thought of in the realm of family law in the formal and secular legal sector outside that sector for resolution. Unlike, for example, marital counseling, oftentimes couples who seek guidance on a family law conflict they are experiencing through a religious avenue expect some sort of finality or resolution. However, according to a significant number of religious leaders throughout North America this is not necessarily always the result. Instead, this form of pastoral care unfolds more as a social worker or therapy counseling session as opposed to a formal process of adjudication. As part of the investigation to answer this question, what shape and form does the community-based, non-state sanctioned, practice of religious law take in North America, I asked Muslim and Jewish religious leaders across North America a series of questions about the interaction of state law and aspects of religious practice.

7.1.1 Islam

I asked religious leaders, “When you officiate a wedding do you typically have the state marriage license signed at the same time as the religious ceremony?” – “Do you require a civil marriage license for the couples you are marrying?” Nearly every religious leader with whom I spoke acknowledged that in their communities nearly all religious marriages are also legally registered with the state. For most leaders, this was a requirement. For some it was stricter than others. Some leaders required the marriage license to be signed prior to the religious ceremony, for others in conjunction with a
Many religious leaders acknowledged that in certain very specific cases they would overlook their firm belief as to the validity of a marriage license if the couple could show a warranted reason for not wanting to have one. For most imams, this reason would have to be genuine and not a malicious attempt to avoid the protections the other spouse would get through a legally registered marriage or an attempt to circumvent the law against polygamy by taking a second wife, in the case of the husbands. For example, one Imam spoke about a young couple under the age of 25 that wanted to delay
registering their marriage with the state so they could remain on their parent’s health insurance until the age of 25. Another spoke about an older couple where a widow did not want to lose the death benefits of a prior spouse by registering a new marriage. For those Imams these reasons were considered valid enough to proceed with a religious marriage ceremony without an accompanying legal registration with the state.

Interviewer: When you officiate a wedding - when a couple comes to you and asks you to help them get married, do you sign the state marriage license at the same time as the religious ceremony, and is it something you require? Do you require a marriage license for the couples you are marrying?

Interviewee (Sunni Imam): In some extent yes and in some extent not, ok. There is Islamic marriage by itself and there is Islamic marriage and state marriage so it depends. If somebody wants to do it by license then we do it by license, if they not you understand by license and they are what you call girlfriend and boyfriend in this society so then we give them - we will conduct the marriage, you understand and we let them know that this is not anything to do or to substitute legality but they are not concerned about the legality - most of the people come from overseas and want to do something here.309

As with most research, there is often an outlier. One Imam from the South Eastern United States explained to me that the only law he was concerned with was God’s law. For this Imam, if a couple is married before the eyes of God that was satisfactory for him and a state marriage license was not needed. This Imam, quoted above, emphasized that he often conducts marriages for couples coming from overseas and that, for many of them, in the countries they come from an Islamic Marriage was all that was needed for a marriage to be recognized by the State. The legality of a civil marriage license was not on the minds of some couples and for all intents and purposes they considered themselves legally married upon completion of an Islamic marriage ceremony – even one conducted

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309 Interview on November 2, 2017.
in the United States. This is an instance where a religious leader was uniquely placed to facilitate the integration of newly arrived immigrants to general society by explaining the requirement and necessity of civil marriage licenses accompanying religious ceremonies.

**Figure 5: In your community, do you find that most religious marriages are also legally registered with the state?**

I then asked, “Can you tell me about the location and space you use to discuss a matter of family law? When someone comes knocking at your door asking for assistance where does the discussion with them take place?” Attempts to resolve a family law conflict within a religious community is very different from attempts to resolve that same conflict in the state legal apparatus. Community attempts are often informal; they do not carry legally binding force in the way they would when approached from a secular standpoint and agreements are not binding. Attempts are often conducted by a religious leader who knows the couple and is well-known by the couple experiencing a conflict. The process unfolds as a form of mediation in many senses. I asked Islamic religious
leaders across the USA in what location they actually spoke to couples that were facing a crisis. Almost all leaders had some sort of office usually inside a mosque but sometimes also in an Islamic community center where they could meet couples. They were also open to more creative options. In the case where an Imam was meeting only with the female partner of a couple, due to religious norms of appropriate interaction between members of opposite sexes they would often meet in a public space to avoid any future accusations of impropriety. This could be in the prayer area of a mosque, at a coffee shop, at the home of the couple, or in an office with a clear window so passersby could view their interaction. In the minds of many, this raises many issues of privacy and the ease with which women can reach their religious leaders. However, this research finds that these locational restrictions did not in any way deter women from seeking the guidance of their spiritual leaders in times of family crisis.

This research found that there were more women than men who took the first approach to mediation with a religious leader about a family law conflict. There were a variety of explanations provided to account for this observation. Many of them focused on what could be described as an inherent insight of the female gender. The leaders explained that they felt many women were more attuned to problems in their marriage and thus were the first ones to try to address an issue. Others explained that women were more invested in their marriages. Still others pointed out that women had less fear of speaking to a third-party about a marital problem and that they felt that many men feared talking about a problem with a third-party because that very act would provide acknowledgment of the existence of an issue in the home that the man, the ‘head of the
household’ was unable to address. Our modern Imams were also available to meet couples using electronic platforms; such as, Skype, for example.

Interviewer: Can you tell me about the space and location you use to discuss a matter of family law? So when someone comes in to see you, they are having a particular issue concerning the family where do you talk to them? Where does the discussion take place?

Interviewee (Sunni Imam): I usually have a few offices where I meet couples, one is at the mosque, one is at another organization I work for which is Imam's Services - so they have a space as well and in some cases they prefer to meet at a coffee shop - maybe at their particular home or location. So usually it's in the offices but there are some cases where they are more comfortable for me to go where they are so I may attend at a coffee shop or someone's home.310

In a study which interviewed women in Canada who sought the advice an Imam, a number of reasons were given by the women as to why Imams were often their first approach when facing a crisis. That study found that according “to religious counselors and women interviewed, trust in the ‘father-figure’ authority of a disinterested person, as well as confidentiality, geographical proximity, and the fact that the assistance is free are the main factors that motivated the women to seek the help of religious counselors. The issue of trust is of great importance and may distinguish the religious process from the legal one.”311

I then asked religious leaders, “When a couple is considering divorce and has had a marital breakdown, what recommendations for reconciliation, if any, do you typically suggest to them and how do you rely on or how much do you rely on religious texts in your decision making process or in the advice you deliver?” While many of my

310 Interview on November 30, 2017.
assumptions about this research proved true, my assumption going into this particular inquiry was that an Imam would utilize religious texts and directly quote them with jurisprudential passages when interacting with a couple facing a family law issue, such as, a marital breakdown, for example. On the contrary, this research found that, while religious texts play a very central role to religious leaders, one hundred percent of them stated that they do not have a particular text that they turn to when giving advice. For all of them, each case was different and deserved to be examined on a case-by-case basis. This is in stark contrast to the way enforcement of law operates in the secular realm. In a common law legal system, precedents are often followed and a standard set of rules are applied to cases. The process that is unfolding here suggests more of a counseling or social work function.

Interviewer: When a couple is considering divorce, what sort of recommendations for reconciliation, if any, do you typically suggest to them? So do you have a particular text or part of the tradition you turn to or a particular story you turn to or is it on a case-by-case basis?

Interviewee (Sunni Imam): I do case-by-case, and again just to make it clear, I'm a spiritual counselor so I do my spiritual aspect of it and I also try to do, I do a lot of strategy and things, I'm a consultant, a religious consultant in many way, so I got, I like thinking about things and putting things together so for example, she'll write down the top five things bothering her and he'll write down, talk about strategy, how to fully fix these issues and stuff and it all goes case-by-case but of course when you see things which are alarming, which are out of the ordinary, then of course you have to push them to go to someone professional because sometimes the deterioration is meant to help comes to play depression and anxiety stress and everything else and I'm not in field to proscribe any of these medications or to even diagnose that but you can see signs like, you know what, this is not in my zone so let's...what we start doing now is creating a database of mental health counselors/professionals from the Muslim community, either locally or nationally and get them connected, make sure that they do get connected because once a person
comes to you you have a sense of responsibility so what you do is make sure you are following up by, as I said here, making sure they are doing ok, did you make the phone call, are you guys talking now, is everything ok and of course you would see them every few days and just try to gauge it from there.

But ya, it's all case-by-case really typically, it's really case-by-case. When it gets too dirty and the police get involved and the courts get involved and they come to me then it's like, you know, we can pray for you and invite you to think and to be patient as you do what you're doing - you're going through a process now so it's not saying just to kind of God now just be cool minded, anchors against fire which isn't productive. I know a couple that they lost over $300,000.00 in assets fighting with each other through lawyers and stuff and again you know what look, if it's getting this bad just dissolve it, don't, don't create an atmosphere of hate in the eyes of your children, don't create a drama in front of your children, you're adults and do respectfully because at the end the day it scars everyone and I've learned one thing form doing marriage counseling for I don't know how many years now but um no one wins, no one wins in this, everyone loses so there is going to be some scars.  

It was clear from the interview, as a whole, that many Imams felt that the hard and fast application of religious law simply wasn’t suitable for application in the context they found themselves in. It was also clear that many Imams did not view themselves as Judges; rather, more as counselors. They felt that they owed a more general duty of spiritual care and guidance to their parishioners. Instead of admonishment or punishment for an Islamically prohibited act occurring, guidance on how to overcome these deficiencies was often given.

7.1.2 Judaism

On the Judaic side of the question about civil marriage licenses, in almost every case, Rabbis conducted religious marriage ceremonies with an accompanying civil marriage license. Where the answer was no, it was in very rare cases, where, for example,  

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312 Interview on January 10, 2018.
a Reform Rabbi chose to marry a same-sex couple prior to the time in which these marriages were permitted by the state.

Interviewer: When you officiate a wedding do you typically have the state marriage license signed at the same time as the religious ceremony and is this something you require? Do you require a civil marriage license for the couples you are marrying?

Interviewee (Orthodox Rabbi): I'm licensed by the province of Ontario. The answer to your question is, I don't know. I'm licensed by the province of Ontario and therefore that means that every marriage that I do has to have a civil marriage license. On occasion, what I can do is I can phone up the clergy hotline for the province of Ontario when a couple has either asked that I not issue a license and then I have to get permission from the government which is what I do. I will not perform a marriage without a civil license unless I have clear-cut authorization from the province. If I go out of town, like when I go to New York I will not do a wedding unless it has been licensed because I know it's against the law there.

I obey the laws of the land but in Jewish religion if huppa and khudkushi is not performed it's not considered to be a marriage. You know there is religiously the religious procedure for getting married has to occur in order for the marriage to be considered significant.313

It was clear in the interviews that Jewish religious leadership felt bound by the secular laws of the state they were residing in. In terms of where Jewish leadership held meetings that could be described as counseling sessions, these meetings often took place in a private space with a heavy focus on comfort - there was usually a mention of a couch in the office. Occasionally, meetings would occur in public spaces like coffee houses, but it would be where people couldn't hear the conversation so an element of privacy was still preserved.

Interviewer: Can you tell us about the location and space you used when you were at your Chicago Rabbinate to discuss a matter a family law? So when someone comes in to see you, they

313 Interview on December 6, 2017.
are facing a particular issue concerning the family where does this discussion take place?

Interviewee (Orthodox Rabbi): A lot of times it is a place in a backroom. My office itself is too small to sit down with a couple but they come to a backroom and sit down with a couch. And I remember many meetings there. A very private back room. Now, occasionally, I would meet with a couple in a public space where we have many other people around there but you know a little bit of privacy I mean just people didn't hear our conversation and when I would meet only with a woman and sometimes only with a man but definitely only a woman, I would make sure it's in public space so it might be in a coffee shop or something, it would not be one-on-one in a private space.314

For many of the male Rabbis, similar to the Imams, if meeting only with a woman they would almost always meet with them in a public space or, at the very least, in a space where third parties could view their interaction at any time; such as, in an office with the door open or with a clear window. With regard to the use of religious texts, most of the Rabbis explained that they don’t have a set procedure for addressing situations of family crisis and they examined these issues on a case-by-case basis as the needs of each couple are different even if many of the marital problems couples face are universal. There were also numerous Rabbis who had sophisticated referral networks set up to psychologists, social workers and marriage counselors. These were often individuals who have professional training as well as specific knowledge of the traditions and cultural roots of the couple. Sometimes the Rabbis simply had a professional person they turned to in these instances as opposed to a religious text that they tried to counsel from. Again, we see that pastoral care revolves around a counseling function rather than a strict adherence to religious law.

Interviewer: In an instance where you have had a couple come to you where they have had some sort of marital breakdown and

314 Interview on November 17, 2017.
might be considering a divorce, what sort of recommendations for reconciliation, if any do you typically suggest to them? So do you have a particular part of the tradition or the texts that you would turn to in that situation or is it sort of on a case-by-case?

Interviewee (Orthodox Rabbi): Case-by-case, but still the key recommendation would be to get them into counseling with the right people. It may take some rabbinic arm-twisting to get a reluctant spouse to agree to it. Men, in particular, often have to be dragged into a counseling situation and sometimes you have to work on issues of responsibility, guilt, who knows what but the chief goal is to get them in the hands of competent professionals.315

In conclusion, a number of points should be taken from this discussion on the community-based practice of law. First, there is significant recognition of and adherence to secular law by religious authorities. Most religious leaders interviewed acknowledged a dual responsibility in both the religious and secular realms. This is apparent from the discussion on the registration of marriage licenses where nearly all religious leaders felt obligated to have religious marriage ceremonies legally registered. Most of the religious leaders interviewed did not find incompatibility between their religious laws and obligations and the secular legal system. In fact, most found it incumbent upon themselves to encourage congregants to follow secular laws so long as they were not incompatible with a specific religious requirement or obligation.

Entering this inquiry the assumption was made that men were favored in religious settings. While this remains true in certain instances, this reality did not preclude the participation of women in seeking the opinions of their religious leaders. On the contrary, most religious leaders interviewed explained that they saw a high prevalence of women as opposed to men, seeking their opinion and advice on conflictual matters related to the family. This was true despite the added barriers some women faced in speaking to male

315 Interview on August 5, 2018.
religious leaders vis-à-vis the maintenance of privacy in public space. These inquiries also found that matters that could be considered essentially legal in nature; such as, a proposed dissolution of marriage were not approached in a juridical manner by the religious leaders interviewed. Meaning, the religious leaders did not apply a rigid and standard set of laws to the applicable scenario; rather, the religious leaders were more flexible and examined a given situation on a case-by-case basis using a similar approach as a therapist or counselor.
Chapter 8: Gender Implications

8.1 What are the gender implications of the community-based, non-state sanctioned practice of religious law in North America?

Gender is an important consideration when looking at essentially legal issues being resolved outside of the formal legal sector. This is especially true when dealing with family issues as “power imbalances are considered by some to be inherent in family mediation given the gendered nature of family life and the gendered consequences of conflict.”\textsuperscript{316} For example, there is often a gender imbalance in income earning and childrearing responsibilities between women and men.

When examining aspects of religious law, it is a widespread expectation that religious authorities are likely to be patriarchal. As such, gender has often been a consideration where notions of religious values and norms are present. In fact, “one of the most common arguments offered in opposition to secular enforcement of religious arbitration awards is the claim that religious norms and values very often include commitments that clash severely with contemporary liberal notions of gender equality…”\textsuperscript{317} I posed a number of questions to Islamic religious leaders to enforce this issue. I first asked a series of questions governing the main rules and religious requirements of Islamic marriage, divorce, and child custody. I then proceeded to get to more contentious points, I asked, “What would you consider is a point of controversy in your religious tradition concerning a matter of family law”? The religious leaders were forthcoming with their answers as though they were already prepared for the sort of questions I posed about gender. Nearly all of them acknowledged some controversial issue concerning a gender disparity in their responses. This is not surprising given that

\textsuperscript{316} Bano, 35.
\textsuperscript{317} Broyde 212.
past research has found that “women experience gender-based discrimination in religious and other informal processes.” However, most Muslim religious leaders interviewed sought to correct this perception by immediately blaming the influence of cultural practices on the faith and they considered that culture should be an aside and not a primary influencing factor in determinations of faith. For these leaders, Islam stood apart from culture and should not be influenced by it. The discussion on *mahr* below is an example of the effect of culture on religious practice.

One suggestion for overcoming the potential patriarchal nature of gender interpretations is for religious practices, like marriage ceremonies to be recognized by civil law. According to this concept, gender rights fare better when there is public access and open acknowledgement of religious practices than when they occur behind closed doors. According to John Eekelaar, marriage “has long been viewed as a prime location of gender inequality…and in many jurisdictions, gender equality is more likely to be promoted if unions which the parties and their communities see as marriages are also accepted as marriages by the civil law than if they are not.” Today, most religious marriage ceremonies are recognized by civil law.

8.1.1 Islam

One point of controversy concerning family law was the concept of *mahr*, the gift from the groom to the bride in conjunction with a marriage. I asked the religious leaders, “What is a point of controversy in your religious tradition concerning a matter of family law?” Imams pointed to a number of instances where a well-suited couple was unable to marry because the groom could not secure the *mahr* being requested by the family of the

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318 Saris, 255.
bride. Many Imams explained that the bride’s family often calculated the amount of *mahr* based on cultural interpretations (for example, what amount the bride’s sister received as *mahr* for her wedding) that had no grounding in religious law but that cultural norms had become so prevalent that they fully intertwined with religious requirements wholeheartedly. In case of *mahr*, the imams explained that the true purpose of the *mahr* was either simply as a gift from the groom to the bride or, in some interpretations, a financial security in the case of divorce, so any amount, or in-kind representation that satisfied this requirement would be satisfactory from a religious standpoint. Under the interpretation of many Imams, a non-monetary *mahr* like a trip to *Hajj* or a promise to teach a portion of the *Qur’an* to the wife would satisfy this requirement.

Interviewer: What would you say is a point of controversy in your religious tradition concerning a matter of family law? So, either from within the Muslim community, or from outside the Muslim community, what have people looking in found controversial?

Interviewee (Sunni Imam): Well, two things come to my mind right off the top of my head. One is what I mentioned earlier, that over here a Judge, like if a wife petitions for a divorce and the husband refuses to accept, the Judge can unilaterally issue the divorce and it's going to be binding. Whereas in Islam, basically, the husband has to accept the divorce or, if he doesn't then the wife has to provide reasonable grounds like physical abuse, or verbal abuse or you know irreconcilable differences in order for her to obtain the annulment. This can be worked around though, there is a work-around for that that I usually recommend to couples and that is to sign a prenuptial agreement where the husband delegates directly the right to his wife to divorce, that she can also initiate the divorce and, and what do you call it, she can also divorce just like the husband can anytime granted without issue. That's the one way to work around it so that way the wife doesn't have to go through the headache of going through a three scholar committee and all that or you can make it conditional that in case there is physical abuse or irreconcilable differences or verbal abuse etc. etc. then the wife has the right to divorce the husband. So, if this is agreed upon prenuptially, and this is something I recommend to couples, then you know, the wife can
just go to the court and get her divorce and that's it, that will be an Islamic divorce as well, she does not have to worry about the husband accepting it or not.\(^{320}\)

This work-around preemptively grants the wife full rights to divorce, without showing fault. It stands in contrast to the standard rules for Islamic divorce and is made possible through the existence of the secular legal system which can enforce these sorts of prenuptial agreements. I then made inquiries about the controversy the Muslim community has faced over concerns of gender equality.

Interviewer: What is a point of controversy in your religious tradition concerning a matter of family law? So what controversy has the Muslim community, in your experience gotten from people looking in at your community from the outside? Is there anything that stands out to you?

Interviewee (Sunni Imam 2): There are several. Let me start with one. There are people who would absolutely like to honor the spirit of Shari'a and Islamic Family Law and they want their religious documents, mainly Nikkah Contract to be recognized, whatever the religious framework brought men and women together and whatever their religious framework that they build this marriage upon - there are people who would like to honor that religious framework - religious law and when they go through official divorce, I think there is a way in which Jewish community, very similar negotiates this - there is a way I would say, not a court, but there must be Islamic jurisprudence given a role in mitigating, mediating and arbitrating some of these religious practices, this is an incredible controversy because the whole creating Shari'a business stems, in New Jersey, I believe in Illinois there has been divorces - the court basically recognized and/or seek the expert opinion of the religious jurists, Islamic jurists and this is one controversy.

Secondly, of course Islam's, one of the most controversial issues within the religion, in general, especially when it comes to family law, is polygamy. Polygamy is uh, is something that I believe was necessary back in the day - that were social, economic, cultural and political reasons why polygamy was practiced but I believe in the modern rule - most of the ethical moral teachings behind the polygamy laws is no longer applicable. I can give examples, and

\(^{320}\) Interview on January 8, 2018.
therefore, this is one of few things I believe with the evolvement and progress of humanity polygamy should be complete outlawed. This is very controversial for an Imam to say - there are people who send me death treats because I say this publically and it's very controversial when some of the people stick with the tradition and would like to implement polygamy into societies, especially, like I said, where it is illegal. I think the Mormons and the Muslims go through similar controversial dilemmas over here.

Interviewer: And this work-around, is it considered Islamically valid to include terms like that in the prenuptial agreement?
Interviewee (Imam): Ya, ya ya, of course. There is a basis to it.321

The importance of supplementing or “working around” established rules of Islamic law through the use of a prenuptial agreement is emphasized. In this sense, religious leadership in North America has found a way to adapt existing laws in a more gender equitable manner.

Another issue that often raises gender concerns, in terms of discrimination against the woman, is the matter of interfaith marriage. I asked the religious leaders, “Are interfaith marriages allowed in your religious tradition?” Tunisia has acknowledged that the traditional rules concerning interfaith marriage in Islam simply do not apply to modern-day contexts.322 However, this is a minority position and the majority of Muslim communities do not acknowledge this position. In current context, “modern Muslim legislation permits men to marry non-Muslim women; Muslim women marrying non-Muslim men is illegal.”323 One hundred percent of the Imams interviewed for this research held the traditional position that a Muslim woman cannot, under any circumstances, marry a non-Muslim man. However, a Muslim man can marry other faithful women who believe in a singular God; the so-called “people of the book”, who

321 Interview on November 13, 2017.
stem from the other Abrahamic traditions, Judaism and Christianity. From the secular point of view, this stance exhumes concepts of patriarchy. What was the rationale behind this? In Islam there was a guarantee that Jewish and Christian women would not be precluded from continuing to practice their individual faiths by the Muslim men they were married to because these traditions preceded Islam and were recognized as valid faith traditions in Islam. There was no such similar guarantee for Muslim women married to non-Muslim men to whom they could be subservient. The fear was that the earlier faiths would not recognize the legitimacy of the Muslim Prophet.

Interviewer: Are interfaith marriages allowed in your religious tradition?

Interviewee (Sunni Imam): Oh, Yes! From the Sunni Islamic point-of-view a man can get married to a Jewish woman, a Christian woman or a Muslim woman. From this aspect, interfaith marriages are allowed. But if a woman wants to marry outside of the religion of Islam then it's not encouraged by the religion. Or if a man wants to marry someone who is not considered a believer, meaning that they are not a Jew, Christian or a Muslim, then in that case, you know, it is looked down upon if a man chooses to marry, for example, a Buddhist or Hindu or an Athiest.

Interviewer: And what is the traditional rationale behind that?

Interviewee (Sunni Imam): The rationale is that generally the man is considered, the husband is considered, what we would say the Amir of the home or the role model or the one that leads, and the one that you know encourages upbringing and things like that. So, if the husband has that role and that responsibility then he has to have the right faith, he has to have the right values and that will passed on to the rest of the family, including the wife. Vice-versa, the rationale is that if the wife chooses to marry a man that is not a Muslim then that role of the husband, who may be a Christian or may be an Atheist, those values and those teachings as leader of the home will be passed on to the wife and the children which then will be turning away from the values of the religion and one of the objectives of the religion of Islam is that we want to
maintain our values and maintain the teachings of the Qur'an even after marriage.\textsuperscript{324}

Still, it is not unheard of today, or necessarily uncommon today to find Muslim women married to non-Muslim men. I asked the leaders, “In the case that an impermissible form of marriage had already occurred in which a Muslim woman had already married a non-Muslim man, what would be the status of that marriage in Islam?” And moreover, “what would be the status of the children of those marriages in Islam?” While the Imams contended that they certainly would not encourage a marriage of this sort, it was not their place nor their role to place judgment on those couples. They would be welcomed into the mosque just as any other Islamic rule-breaker would be. For example, while drinking was prohibited in Islam, many Muslims drink and the mosque does not turn these individuals away. In similar terms, they would have no right to turn away an interfaith couple where a Muslim woman married a non-Muslim man. They also explained that they would not take actions to breakup this type of marriage once it had already been consummated. Several imams explained, “of all the things God has made permissible, divorce is the most disliked.”

They Imams further explained that the sins of the parents do not descend the children in a way that they may in other Abrahamic faiths. For example, according to Jewish law, an improperly divorced woman will be viewed as an adulteress if she engages in any subsequent relationship.\textsuperscript{325} This status will not end with her, in fact it will be passed down to any subsequent children she may bear for generations to come.\textsuperscript{326} In Islam,

\textsuperscript{324} Interview on November 30, 2017.
\textsuperscript{325} Labowitz, 92.
\textsuperscript{326} Labowitz, 92.
children are born innocent and are wholly welcomed into the Muslim community. When they reach adulthood, it is up to them to choose the path they want to follow.

Interviewer: In the instance that an impermissible form of marriage has already happened whereby a Muslim woman has married a non-Muslim man, what is the status of those children? Are they still governed by religious law? What is their role in the mosque? Are they still considered Muslim? What is status of the children of those marriages?

Interviewee (Sunni Imam): Well, you know that the Quran says that we were all born Muslims [irrespective of the religion or lack of religion of either of the parents] and the parents changed us to be something else. So the children, until they reach the age of discernment, and make a decision, are Muslim. Now, even if you say you are seven or eight years old, and let's say the Mom was a Hindu and you say you are Hindu, you really don't know what you are saying.327

Concerning the matter of same-sex marriage, I asked the religious leaders, “Is same-sex marriage permitted in your faith?” All Imams interviewed were in unanimous agreement that according to religious doctrine same-sex marriage was not permitted in Islam. However, where a same-sex marriage had occurred, neither religious leaders nor any living being had any authority or right to shun or disavow a homosexual from the faith or interaction in the community. A few Imams also explained that having a close relationship with a member of the same sex was not forbidden in Islam and it was something that was encouraged. However, a sexual relationship of this nature is prohibited. From the perspective of the leaders interviewed, this was a matter left to God to determine the righteousness of these individuals on their judgment day. In conjunction with this response, the Imams explained what the purpose of marriage in Islam was. They agreed that there was a biological purpose of procreation but also a purpose of wholeness and companionship. They often quoted the following verse:

327 Interview on January 12, 2018.
And among his signs in this, that he created for you mates from among yourselves, that ye may dwell in tranquility with them, and he has put love and mercy between your hearts, verily in that are signs for those who reflect.\(^{328}\)

The prohibition on same-sex marriage is a firmly settled matter in Islam. In fact, prohibited sexual acts can be met with severe punishment.

Interviewer: And what about the status of same-sex marriage in Islam? What is the purpose of marriage, more generally, in Islam and how does Islam view same-sex marriage?

Interviewee (Sunni Imam): So the purpose of marriage is to build a family and to build a community. You can't have a community without a marriage. Right now, based on statistics, each marriage will need 2.8 children for the human race to survive based on death and dying predictions and algorithms...The family is so that we can build a Muslim community, a healthy safe community and a healthy society...

When we talk about same-sex marriages...all humans are the creation of Allah and we have no right to not respect them. A marriage, though, according to my understanding, requires a pair of a male and a female and so I do have LGBTQ+ persons that do counseling with me. Last year I did counseling of three transgendered persons. Last Saturday night, I was with a Muslim woman, my wife and I, who is a member of my congregation and her son is gay and we were talking about that and he is Allah's creation and he cannot be - The Prophet, peace be upon him, said, if you take anything away from a marginalized group that he will testify against you on the day of judgment - this is an authentic hadith. So we cannot take dignity away from LGBTQ+ people...we can say that according to the Qur'an, marriage is reserved for a male and a female. We can say that no sex outside of marriage is halal in Islam. These are things we can say. So when I get asked discretionary questions, people will say what about gay marriage? And I will say to them, it's not about gay marriage, it's about the sex outside of marriage is prohibited in Islam and marriage can only occur between a man a woman.\(^{329}\)


\(^{329}\) Interview on January 12, 2018.
I then approached the issue of interfaith marriage in Islam. I asked religious leaders, “Do you ever have couples of an interfaith marriage approach you for assistance in a conflict they are experiencing? Has the fact that the couple is interfaith provided any additional challenges to their marriage?” Some Imams concluded that marital problems are universal and as such whether or not a couple experiences a greater prevalence of conflict in their marriage would not be as a result of their interfaith status. However, there were still a far greater number of Imams that believed that interfaith couples, in their own experience, experience a greater prevalence of conflict in their marriage. It is for this reason that many Imams have taken on varying degrees of involvement in performing interfaith marriages.

While all Imams acknowledged that, according to Islamic law, interfaith marriages are permissible under certain circumstances, mainly between a Muslim man and a Jewish or Christian woman, many Imams still refused to perform interfaith
marriages because of the added difficulties they have seen those couples face. This may be a result of cultural differences that exist in the present Western context, that did not exist when the Islamic legal provisions were created and which mainly referred to the interfaith marriage of persons of the same or similar Middle Eastern culture as opposed to a wide variety of different cultures inter-marrying in a Western context like the one found in a multicultural North America. In this Western context, it is not uncommon for marriages between Muslims to occur with the partners holding very different cultures. Many Imams acknowledged the reality that couples that desire to marry will do so regardless of an Imam’s willingness to perform their marriage ceremony. So, while Imams may discourage the marriage they may still perform the ceremony with certain conditions such as, premarital counseling that would allow the couples to pre-determine and agree to a path when faced with the particular crises of interfaith marriage.

To the despair of many Imams, however, it has been their experience that even when these additional precautions are taken, marriage remains a difficult endeavor for interfaith couples and it is the interfaith nature of the union that adds significant pressure to the marriage, particularly when children enter the equation. Religious leaders found that many of the difficulties an interfaith couple faces begin with the onset of childrearing duties. While certain aspects of the marriage may have seemed straightforward when it was just the husband and the wife, with the onset of childrearing responsibilities couples became nostalgic about the traditions they were raised in themselves as a child, and arguments and conflicts ensue over a variety of topics that were previously deemed settled. Areas of contention include, what religious tradition to raise the children in, what religious institutions to allow the children to attend and what holidays the family will
celebrate (i.e. whether or not there can be a Christmas Tree in the home has been a classic point of conflict for many interfaith couples, not only in Islam but also in Judaism). Other issues were more distinct matters of faith, such as, what religious ceremonies and rites of passage the children should participate in. The tension that exists between the Islamic legal and religious principles on interfaith marriage and the lived reality of many Imams in counseling interfaith couples remains profound in this multicultural mosaic or melting pot of North America.

Interviewer: Have you ever had a couple in an interfaith marriage approach you for assistance in a conflict they are experiencing and has the fact that they have been interfaith provided any additional challenges?

Interviewee (Sunni Imam): Ok, so after they have got married they approached me?

Interviewer: Yes, they have already gotten married, there is one Muslim partner and one non-Muslim partner...

Interviewee (Sunni Imam): Yes, I have had a few cases where there is an interfaith marriage and they have had some conflicts and they are seeking help and guidance so, the interfaith perspective exposes the couple to different cultures, different habits, different perspectives - so what I try to do in these type of situations is have each partner recognize and respect the different perspectives and come to some form of compromise - come to some form of goodness and agreement whereby despite the view of the cultures and perspectives they are able to solidify their own understanding of how they are going to deal with the specific issue. So the interfaith marriages - they expose the partners to new dimensions and new perspectives and that sometimes creates a conflict and they need to maneuver and they need to navigate those different perspectives and come towards a good understanding and an agreement so that they can move forward in a positive way despite the different perspectives, or opinions, or cultures.330

330 Interview on November 30, 2018.
I then turned to the topic of dowry for marriage. I asked the religious leaders, “What kinds of marital gifts or dower have you seen? Have you seen any other type of property exchanged in conjunction with a marriage?” In most cases, the Imams gave a straightforward response to this question. Property exchanged in conjunction with a marriage was often used to satisfy the Islamic legal and procedural requirement of *mahr* or, in the most simplistic form, a gift from the groom to the bride. The vast majority of the time, Imams simply saw a strictly monetary gift given from the husband to the wife. However, the amount of monetary exchange varied to a wide degree from a few dollars to hundreds of thousands of dollars depending on a number of factors, the primary one being the means and capability of the groom. At times, especially in the South Asian culture, gifts of gold jewelry were often customary and this tradition has spread to many couples in the South Asian Diaspora in North America. In rare cases, gifts that did not have a definitive monetary value were also given by the groom and accepted by the bride to satisfy the *mahr* requirement. For example, a promise to take the wife on the sacred pilgrimage of *Hajj* or a promise to teach the wife a portion of the *Qur’an*. At times, some Imams found these gifts as problematic, as the intention of *mahr* was to provide a financial safety net for the wife in case of a divorce, as the gift could not be revoked or retrieved by the husband. Still, others accepted these gifts, but sometimes with conditions, that the gifts not be delayed too far into the future and that the gifts be fulfilled within a set period of time. In current day context, although not legally required under Islamic law, it was not uncommon for the wife to also provide gifts to the husband in a number of monetary and non-monetary forms. In the North American context this was often in the form of a wedding ring.
Interviewer: You mentioned earlier that one of the main requirements for an Islamic marriage was a dowry or the *mahr*, what kinds of marital gifts or property have you seen exchanged in conjunction with a marriage to satisfy this requirement? Has this always been monetary or have you seen other things?

Interviewee (Sunni Imam): I've seen money, I've seen gold...I've seen symbolic things, like a copy of *Qur’an*, for example. I've seen, you know, another type of dowry which is the wife, the bride, requesting a trip to Mecca, for example, for *Hajj*, so, I've seen all kinds of dowries.\(^{331}\)

I then addressed the issue of accessibility of congregants to religious leaders. I asked the religious leaders, “Who is typically present in the room when a discussion concerning a matter of family crisis is occurring?” There are a number of different issues that could fall in the category of a family crisis. The most common are “the breakdown of formally and informally recognized intimate relationships, disputes about money, property, and children, intergenerational and parent(s)-child conflict, and domestic violence.”\(^ {332}\)

Universally, Imams insisted that the couple be the only people present in the room during a counseling session or mediation that may be addressing these sensitive topics.

Interviewer: And who is typically present in the room when the discussion is occurring? Is it just you and the couple or are there other people there?

Interviewee (Sunni Imam): If it is a couple-related matter then I actually tell them that there should be no one else there and that it should only be the couple. But there are some other situations where it requires other family members, for example, in a joint home where there are some issues surrounding in-laws, etc. and it's a bigger problem. So in those situations, I may ask in one of the sessions a certain family member to be present but in most cases it's just the couple.

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\(^{331}\) Interview on January 6, 2018.

Interviewer: Has the couple themselves ever wanted to bring someone else with them?

Interviewee (Sunni Imam): Yes, there have been some cases where, usually it's a parent, they want the parent to be there. So I initially decline that. I tell them no it's a matter between you two so let's only have you two present. If during the counseling sessions I feel there is a need for parents or someone, a family member, friends, to be involved and they are comfortable with that then I would be open to that. But, again, I prefer that they - that it is only the couple.333

Attempts to resolve a family law conflict in a religious community is very different from attempts to resolve that same conflict in the state legal system. Community attempts are often informal, they do not carry a legally binding decision in a way the state system does, and the attempts are often conducted by a religious leader who knows the couple and is well-known by the couple experiencing a conflict. As such, the process unfolds as a form of mediation in many senses. I inquired with Islamic religious leaders about where they actually spoke to couples that were facing a crisis. I asked the religious leaders, “When someone comes in to see you about a particular issue concerning the family, where does this discussion take place?” Almost all leaders had some sort of office usually inside a mosque but sometimes also in an Islamic community center where they could meet couples. However, they were also open to more creative options. In the case where an Imam was meeting only with the female partner, due to religious norms of appropriate interaction between opposite genders they would often meet in a more public setting to avoid any future accusations of impropriety. This could be in the prayer area of a mosque, at a coffee shop, at the home of the couple, or in an office with a clear window so passersby could view their interaction. In the minds of many this raises issues of privacy and the ease with which women can reach their religious leaders. However, it

333 Interview on November 30, 2018.
was found that these locational restrictions did not in any way deter women from seeking the guidance of their spiritual leader in times of family crises and this research actually found that there were more women than men who took the first approach to mediation with a religious leader about a family law conflict. Of course, given our day and age, our modern Imams were also available to meet couples using electronic platforms; such as, Skype, for example.

Interviewer: Can you tell me about the location and space you use to discuss a matter of family law? So when someone comes in to see you about a particular issue concerning the family where does the discussion take place?

Interviewee (Sunni Imam): In the office and it needs to have both parties present and if not, then if it's a girl then she has to have somebody else with her.334

I asked the Imams about their own personal experience in a pastoral role in their communities and their attempts to resolve family conflicts. I asked them, “In your experience, have you found that there are more men or more women who take the first approach to mediation with you”? While some did not notice a particular pattern, an overwhelming majority acknowledged that there were more women who came knocking at their door seeking guidance. I followed-up, why do you think this may be the case? A variety of reasons were given. Some said women embody the spiritual realm more wholeheartedly and thus were more likely to seek the guidance of a spiritual leader in times of family crises; others suggested that women were more invested in their marriages and more quick to acknowledge when a problem existed that needed external help to resolve. Others claimed that cultural influences of patriarchy and the role of the man in the home – a role that embodied the man always being right – prevented men

334 Interview on November 4, 2017.
from acknowledging when a marital problem may exist. This may lend the perspective of women’s empowerment to take a crisis in their marriage into their own hands. Most of the religious leaders interviewed found that this action taken by women to approach a religious leader concerning a matter crisis in their family life came from a position of empowerment as opposed to one of disempowerment. Other imams acknowledged that women sometimes came to them from a place of disempowerment instead of one of empowerment. Lack of financial independence may lead women to seek the only free resource they had ready access to, the spiritual leader at the mosque. At times, other women felt as though they needed another man who was in a position of authority to even be able to speak to their husband about a given marital issue.

Interviewer: In your experience have you found that there are more men or more women who take the first approach to a mediation with you? So in the instance that a couple is experiencing a problem oftentimes one half of that couple comes to the Imam first and then the Imam meets with the couple after. You know, in that first instance who is it that is knocking at your door? Is it the wife or is it the husband?

Interviewee (Sunny Imam): I haven't done the numbers. My gut is telling me it's probably the wife making the inquiry first, but I do have a great number of husbands that would do that. And sometimes they will do it by - husbands tend to wait longer...I know I am generalizing here - but it's a situation where it is not their first resort in many cases so a lot need to get to a certain place where they say ok I've got to do this now that kind of thing whereas a wife sees that things are going in a certain direction - not that she's quick to come but they tend to come more regularly than the husbands. So of late that tends to maybe be trending in another direction. But, I say, in general the wife tends to come more often than the husband does.

Interviewer: And why do you think that that might be? Why do you think that the wife is coming in to discuss the marital problems before her spouse?
Interviewee (Sunni Imam): You know I think there are varying situations. Maybe sometimes there is a situation where the husband is just a little disconnected from the issue in the sense that, he didn't think it was as bad as it was, from his perspective it was not as bad or what have you, I've heard that more than once or quite frankly I think that sometimes there are situations where - not that the wife is making a bigger deal out of things but they have a kind of understanding, an understanding where she still saw the need to come in and involve the Imam in certain things, and I think that has sometimes been annoying to the husband as well so I think that there are a lot of dynamics here at play. One of the things that happens, more often than not, whether it is from the husband initiating or the wife initiating many of them do not take that first step and, like the Qur'an says, bring someone from your side, bring someone from their side and you all sit down and see if you can work through a solution. If that happens, that is the exception, not the rule, that's the exception. In many cases, that step is many times stepped over.335

Interviewer: I'm going to give you a quote from the UK, and then I'm going to ask you a question about it. In the case of the United Kingdom's Mediation Councils, council proponents have argued that women constitute the overwhelming majority of individuals approaching Shari'a councils and this fact is regularly identified by council proponents as indicating the necessity and adequacy of the services that councils provide for women. So in your experience have you found that there are more men or more women who take the first approach to resolving a conflict with you or to having a mediation with you or seeking advice with you?

Interviewee (Sunni Imam 2): It's usually more woman than men.

Interviewer: And why do you think that that is?

Interviewee (Sunni Imam 2): Because most religious women - they feel that religion tries to protect women. Most religious women they believe that Islamic law in many cases - they will be in favor of them, they will not be in anyway negatively affected by that tradition. Secondly, I don't know if I'm being sexist, it's basically my own bias. When it comes to conflict and issues, seeking help, in general I saw this, in my student counseling as well, women are more courageous, more open for asking questions seeking help. It takes a lot more for men to accept that they need help and they need to seek help. There is something in

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335 Interview on January 23, 2018.
the men's psyche I think prevents them until it gets really really worse. For women I think there is some feminine wisdom where before it gets incredibly out of control where they are intuitively more inclined to receive or seek help.\footnote{336 Interview on November 13, 2017.}

Interviewer: In your experience have you found that there are more men or more women who take the first approach to mediation with you? I think you said earlier that usually when someone comes alone, it's usually the man but in that first instance before you meet with the couple together, is it usually the man who comes to sort of complain or seek advice on the relationship first or is it usually the woman?

Interviewee (Sunni Imam 3): It is usually the women, nine out of ten times.

Interviewer: And why do you think that that might be the case?

Interviewee (Sunni Imam 3): I think women are much more empathetic and are much more concerned about relationships as opposed to men who will often neglect them or take them for granted. Likewise, men don't like talking about their emotions, they don't like to talk about their problems, they are more solution-focused and they will only get another party involved if there is a need to do so and they can't solve it themselves and usually they feel, let me try to do it myself and give it my best shot before I seek help from the outside. Those are some of the distinctions that I found.\footnote{337 Interview on April 9, 2018.}

As can be seen, the role of the religious leader here is not one that is particularly religious. Instead, religious leaders take on a role similar to that of a counsellor or social worker. In the following passages, we see again, that the pastoral care the religious leader provides is not Islamic in nature and has a wisdom and applicability outside the religious sphere.

I then asked the religious leaders, “When a couple has an issue do they often come to see you alone or does the husband or wife ever bring additional family members along?” In almost all cases the Imams insisted on seeing the couples together and outside the
presence of additional family members. Many Imams pointed to the fact that in a number of instances some of the challenges a newly married couple faces has been exasperated by in-laws who oftentimes live in the same household as newlyweds, especially in the South Asian Diaspora, or are otherwise substantially involved in the lives of newlyweds. Couples have the opportunity to be more honest and forthcoming in addressing the issues they have when they are isolated from extended family members. The Imams acknowledged that when this reality exists the best hope for a couple is to give them the opportunity to express their feelings in a safe, private environment with no reprisal.

Moghissi and Ghorashi compiled a series of academic essays culminating in the work, *Muslim Diaspora in the West* which examines a number of the unique challenges facing Muslim women in negotiating gender in Western nations. The work explains that dominant discourses concerning Islam and Culture have been negative by nature.\(^{338}\) This perpetuation of the belief that Muslims are “the other” and something to be feared has halted meaningful dialogue and integration of Muslim women in secular society. They call this exclusionary rhetoric essentialism.\(^{339}\) Under its tenets, Muslim migrants are “considered to deviate from Western norms” creating a construction of an “us versus them” dichotomy.\(^{340}\) The relationship between religion and society, in general, is also framed in these terms. The “importance of religion in Western societies and its relations to the state has changed over the past decade, yet this relationship is anything but simple and clear-cut as it is often presented within the constructed dichotomies of ‘the secular self’ and the ‘religious other’”.\(^{341}\) Thus, Muslim women must continuously combat this

\(^{338}\) Moghissi and Ghorashi, 210.
^{341}\) Moghissi and Ghorashi, 210.
dominant negative discourse of Islamization and Culturalization and assert their ability to determine the own gender needs in their own communities.\textsuperscript{342} Changing the rhetoric to one that is positive will be an essential step in achieving the agency Muslim women in diaspora communities need to return to public spaces on gender discourses.\textsuperscript{343}

One of the more difficult questions posed in this study, because it had the potential to alienate the interviewee as it could be perceived as an accusation or an insult of faith, was about gender discrepancies in faith. I asked the religious leaders, “Some people have made the claim that in your faith men are superior to women in matters of legality. Do you think there is a reasonable foundation for this belief?” Many Imams were able to interpret this question as one inspired by a widespread misunderstanding in and of the faith. The question inquired on a number of gender-sensitive issues related to Islam and the family, in particular Imams were asked to comment on the unequal distribution of assets between male and female children of a deceased, the role and weight of male versus female witnesses, as well as the disproportionate weight the male partner held over the Islamic divorce process and husband’s ability to unilaterally divorce wives, a power that was not similarly allocated to the female partner. Most Imams were able to easily explain and justify these perceived inequalities as mere differences of faith as opposed to an understanding of men as superior to women. This was the majority approach by Muslim religious leadership and the responses reflected this reality. Religious leaders working in the twenty-first century are well-prepared for discussions about gender. Some Imams acknowledged that differences exist with regard to the rights men and women have when it comes to an Islamic divorce. However, they point to the

\textsuperscript{342} Moghissi and Ghorashi, 214.
\textsuperscript{343} Moghissi and Ghorashi, 214.
fact that in a patriarchal society, where women’s voices often go unheard, this system was designed to allow women access to a third-party arbiter to which she could plead her case. With regard to the role and weight of witnesses where two women equal the weight of one man, Imams often pointed to the fact that women have greater household, childrearing, and family duties in the home and thus their availability to participate in aspects of the public sphere is limited. They asserted that these rules were designed to alleviate some of the burden an individual woman may carry to bear witness. Regarding the matter of inheritance, the Imams universally pointed out the preponderant responsibility male family members hold towards women in their family, be that their wife, their mother, their sisters or their daughters and that, in reality, women hold a superiority in this area because they are not financially responsible to any others. The religious leaders explained, that in Islam everything a husband earns he must share with his wife and it belongs to him and his wife, whereas, everything a woman earns is hers alone, and she is under no obligation to share her earnings with anyone else. A minority of Imams acknowledged the history of patriarchal male interpretations of the text as resulting in male-dominated approaches to faith. A few Imams blamed the negative and “inaccurate” influence of culture on religion, which appeared to be the fallback response to any perceived issue of faith throughout the interviews as a whole. Overall, as the results in Figure 7 show the majority of Imams took the position that the belief that the superiority of men over woman was a part of the faith was a misunderstanding despite the fact that, in practice, many of the inequities materialize in a very real and consequential way for women.

Interviewer: Some critics of Islam have made the claim that in your faith men are superior to women in matters of legality and
they would point out things like the ability and ease with which men can initiate a divorce versus a woman or the role of male witnesses versus female witnesses or they will talk about inheritance rules and other topics - do you think there is a reasonable foundation for that belief or do you think that these are things that have been misunderstood?

Interviewee (Sunni Imam): I think that, I think that they - first of all, I believe that Allah is just, I believe that Allah is just, so I start with that premise to say that to say that the same there is a missed, some sort of inequity there - but, see I will also argue that, that justice in Islam does not always mean equal, it doesn't necessarily mean equal but working for a common benefit where no one is harmed and aggrieved, I think that that's the point of, the resolution of certain consequences. So I think if you are looking at a pure thing of apples to apples, like you get three and I get three that that makes us equal and we have equality and so on from that perspective, sure...something is not right with that, but from a functional standpoint in terms of the responsibility of the husband, of the male or even the brother in terms of inheritance and his responsibility to his family and so on in that traditional role I think it really is impossible for it to be an equitable deal, so to speak. So it is always the apples to apples way, not necessarily, no. Does that mean that it is unjust, I bargain that it is not. I believe that Allah is just, I believe that Allah is just and I believe that, you know, the issue again becomes a human, a human condition that if, if I'm a corrupt leader it doesn't matter if I am, if everything is supposed to be equal, I'll find a way to make it not equal - if I am corrupt. But if I am just, and even though something seems to favor - I will work to make sure that everybody is ok out of that scenario and that's what Islam requires us to do. So, I understand the position of the opponents of Islam, who are critical of Islam, and I'm not saying that, Islam functionally, meaning how Islam is lived out by people shouldn't be criticized, it should be criticized, we are not above criticism, I'm not for certain, I'm not, I'm very critical of us, I'm more critical than I really allow others to be...but to blatantly say that, I would think, to me, demonstrates their lack of understanding about Islam in many respects.  

Here we are presented with a different perspective of equality in Islam. In the perspective of this Imam, equality does not mean equal in the sense of one equals one; rather, equality encompasses gender differences and means justice. The unique roles and

responsibilities of a husband and a wife in a harmonious marital home is taken into account in determining equality. Functional harmony is the goal of this Imam’s perspective on gender equality in Islam. This remains in line with the Islamic principal of social harmony. *Qadis* are individuals who interpret and apply Islamic law in more formal settings. It is a firmly entrenched principal of *Qadis* to “preserve social harmony by reaching a negotiated solution to a dispute.”

The *Qur’an* does not specifically proscribe the superiority of men over women. However, custom, tradition and cultural development play a factor in this reality materializing in practicality.

There are in the Quran some verses which can be interpreted as defining the position of women and men in terms of difference or subordination, but only in relation to certain very particular matters not as a general statement. Moreover, these parts of the Quran have also been interpreted by some modernist authors in such a way as to eliminate any idea of superiority of men over women.

Figure 7: It is sometimes said that in your faith men are superior to women in matters of legality – do you think there is a reasonable foundation for that belief?

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345 Broyde.
347 Krivenko, 58.
I asked religious leaders, “Do you think there are any gender concerns that arise from the practice of religious law?” Most Imams, with few exceptions, were consistent with regard to this question. There are concerns, yes, but there shouldn’t be. Rather, it was cultural influences that brought a mixture of patriarchal understandings of society into the practice of religious law that needed particular attention. Given that many mosques and Islamic communities in the United States today are not pluralistic in nature but rather fall along cultural lines (e.g. a predominately African American mosque, or a predominately Syrian and Arab mosque, a predominately South Asian mosque), then I think we do need be concerned with the role culture in playing in religion.

**Interviewer:** Do you think there are any gender concerns that arise from the practice of religious law?

**Interviewee (Sunni Imam):** What do you mean?

**Interviewer:** Is there anything that creates a gender imbalance or discriminates over one gender over the other that comes from people applying religious law?

**Interviewee (Sunni Imam):** I'm sure, I'm sure there must be several examples. If I was a *Qadi*, if I am adjudicating marriage and divorce as a full-time job I would have more examples but, for example, permissible for polygamy puts a lot of women in very difficult situations. If you are a first wife, second wife, or third wife, depending on what's going on I can totally see how men can get away with it and women can be totally in difficult situation. Secondly, there are some Islamic law practices that doesn't allow woman to share her money and her income with her husband. Because Islamic family law is designed in a context where men work and women stay home and raise the children - so any money that woman has, traditionally woman is allowed to keep it to herself. But if two couple are working, both husband and wife are working, for a woman to say I am not going to contribute to family expenses, you are religiously obligated to take care of all the bills, I am going to keep the money to myself then I see a lot of men being in an incredibly difficult situation.348

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348 Interview on November 13, 2018.
Gender concerns in the Islamic faith are not the exclusive purview of women. In this particular instance, the lived modern reality of many couples, where both the husband and wife earn a consistent income has resulted in a gender inequity that disadvantages the male partner. As traditional foundations that Islamic societies were based upon evolve so too must the interpretation of traditional Islamic jurisprudence to account for the present reality.

8.1.2 Judaism

For all of the denominations of Judaism studied, there was an echoing of controversy surrounding how other denominations differed in their approach to matrilineal lineage. I asked religious leaders, “What is a point of controversy in your religious tradition concerning a matter of family law?” This issue of how denominations determined who was considered a Jew and who was not has become one of the most mediated and contested topics in Jewish communities, in particular, in instances where Jewish individuals from different denominations sought to marry each other and one denomination did not consider the partner from the other denomination to actually be Jewish. Other topics that were mentioned as being controversial were female Rabbis, same-sex marriage, interfaith marriages and the preponderant power of the male spouse over the divorce process.

Interviewer: What would you say is a point of controversy in your religious tradition concerning a matter of family law? So, either coming from other branches of Judaism or outside the Jewish community, what have people looking in found controversial?

Interviewee (Conservative Rabbi): Probably what the biggest thing is what people call the agunot or aguna which literally is a chained woman. In a circumstance - because a get is given only from a man to a woman it can happen in other parts of Judaism, particularly in the ultra-orthodox world. It is, unfortunately, not so
uncommon that a couple will be, for all intents and purposes, divorced - they don't live together in the way of a husband and a wife in a loving a relationship, in any of those ways, but they are - so they are not really married in any emotional sense of the word but the husband refuses to give a get to the wife. Technically, in the ancient religion of Judaism the husband can remarry because it's not actually technically prohibited for a husband to have more than one wife, but it is technically prohibited for a wife to have more than one husband so what happens if the husband wants to torture the person who is for all intents and purposes his ex-wife? He won't give a get and she is then unable to move-on into future relationships or marry someone else or anything like that nor is she really married.

Interviewer: What would you say is a point of controversy in your own tradition? So either from people looking in from outside the Reform Movement from other branches of Judaism or from outside Judaism - what have people looking in found controversial, if anything?

Interviewee (Reform Rabbi): I think looking to the Reform movement from outside other Jewish tradition, honestly, I think patrilineal decent is still that hot-button issue. I think it effects, in the United States, it effects a lot of people and no one really is dealing with that in any meaningful way. The Reform movement - basically, you know, the reform - modern Orthodoxy will make any sort of funny person or realistic person will say Modern Orthodoxy is younger than Reform Judaism because Reform Judaism starts in the 19th Century and Modern Orthodoxy is a response, as it were, to Reform Judaism. Before that there was Judaism, Ashkenazi Judaism, Sephardi Judaism but there was not like different denominations, it is really a response to the enlightenment in the 19th century. So the reason why I am sharing that with you is because the Reform Movement sometimes makes a decision and it impacts the greater Jewish world. So patrilineal descent is one of those decisions that was made in the Reform Movement that greatly affected the Jewish world especially here in the United States because, Suburban America, Reform Congregation, Conservative Congregation right near each other, kids in those congregations all going to public school together, kids fall in love, heteronormative marriage, so likes let's, the guy and the girl whatever they fall in love, the Reform Movement comes out with patrilineal descent as sort of a pillar of the movement if you will and they go the Conservative Rabbi to officiate at the wedding, the Conservative Rabbi has to say “no” if one of the people is Jewish by patrilineal decent. But
that person, that child has been raised as a Jew their whole entire life. That's a real issue, for the first time in their life they are being told that they are not Jewish. Well the Reform Movement wants to say we are big tent and open and all of that but it actually, and it has welcomed a lot of people, and I'm painting a picture that I think is a little bit more - it doesn't always exist - it happened this way but it is one of those things, as far as I know, the Reform Movement in the United States and the liberal movement in England are the only two sort of Reform Movements that accept patrilineal decent. Canadian Reform doesn't, Israeli Reform doesn't, Australian Reform doesn't, British Reform doesn't but British liberal does so even amongst like-minded progressive Jews it created, sort of, a rift - and, again I might be painting a picture that is more dramatically than other Reform colleagues might speak about but I think it's a challenging thing. I'm also not saying it is right or wrong I'm saying that I think looking in that is a challenge from within the Jewish world.- who is a Jew.349

I then turned to the matter of interfaith marriage. I asked religious leaders, “Are interfaith marriages allowed in your religious tradition?” While there was a lot of symmetry and cohesiveness in the responses to this question given by Islamic leadership, from Jewish religious leadership, which mainly fell along denominational lines. The issue of interfaith marriages was also one of the highly mediated topics in the Jewish community and this is also an issue of current prominence given that interfaith marriages are occurring on a wide-scale basis in some Jewish communities today. The isolationist reality of Jewish communities in the past made the matter of inter-marriage essentially a non-issue. Today, “Jews and others no longer live in intimate communities that foster traditional associational patterns. Furthermore, the plausibility structures that formerly supported these patterns and provided religious warrants that justified in-marriage no longer have the power they once did among most Jews.”350

349 Interview on November 28, 2018.
350 Jacob and Zemer, 19.
Whether or not an individual was considered Jewish had numerous consequences, especially in the area of family relations, for that individual’s place in Jewish communities as it was oftentimes a determining factor on the eligibility of one individual to marry another individual in the Jewish faith. In the Orthodox and Conservative movements interfaith marriages were not permitted. In the Reform movement, interfaith marriages were technically permissible, however, there was more latitude given to the individual Rabbis to determine whether they would perform an interfaith marriage. There was significant variation in the extent to which, even within the same congregation, one Rabbi would perform an interfaith marriage while another colleague would not. Either way, there was no criticism or perceived disownment towards the Rabbis that chose not to perform interfaith marriages and when there was criticism it often came from the other denominations of Judaism.

**Figure 8: Are interfaith marriages allowed in your religious tradition?**

Interviewer: Are interfaith marriages allowed in your religious tradition?
Interviewee (Reform Rabbi): Ya, allowed. It has been something where I have evolved over the years. For the entirety of my career, full-time, I would not officiate at a marriage between a Jew and a non-Jew. Mind you I would officiate at the marriage of two gay or two lesbian Jews, but they had to both be Jewish. I just wouldn't officiate at a marriage between a Jew and a Christian or a Jew and a Muslim or a Jew and a Hindu or a Jew and Buddhist. Since I've retired I've gotten much looser about that, and I don't worry about that. But that was easily the most difficult part of my active Rabbinate. So, in other words, the entirety of the years from 1970 to 2010 when I retired, that entire 40 years it was always a point of tension because there were people who wanted me to officiate and were very upset with me because I would not officiate. There were jobs I didn't get, there were jobs I wouldn't even be considered for because I would not officiate. So that's, you know there is a distinction between officiating and not officiating and permitting or dealing with people. So, for example, I always dealt with people who were inter-married. My own brother, who I always loved very much, converted to Christianity when he was very young and my son married a Catholic. I did not officiate at the weddings but I still love them and I still relate to them.\footnote{Interview on July 31, 2018.}

I asked religious leaders, “Are children of interfaith marriages still governed by religious law?” Again, this question varied vastly from the internal perspectives in Islam and, again, within Judaism, between denominations. Within Judaism, the answer to this question came down to how each denomination viewed patrilineal versus matrilineal lineage. As a preliminary matter, whether or not religious law applied to an individual would first depend on whether or not that individual was considered Jewish. In the Orthodox and Conservative movements, Jewish identity and lineage was passed through the mother only. Irrespective of the heritage of the father, if the mother was Jewish the children were automatically Jewish. This rule developed as a matter of practicality as maternity was easier to determine definitively than paternity. However, in the Reform Movement the rule has evolved to accommodate the growing rates of interfaith marriages.
between individuals that did not fit the strict matrilineal lineage rules but wished to remain a part of the Jewish community. In this movement Jewish lineage could be passed on either by a Jewish mother or a Jewish father with a few extra proscriptions; such as, an understanding and reality that the children of the marriage be raised in a Jewish household. What exactly is meant by a Jewish household, however, has resulted in a number of varying interpretations. A prerequisite, however, is that the child in question not be simultaneously raised in any other faith than Judaism.

In the Reform Movement specifically, individuals are not governed by religious law *per se*; rather, they have the choice of whether or not they wish to turn to religious law to inform, address or solve a crisis they are facing, which is in stark contrast to the religiously observant members of the Orthodox movement whose everyday actions and decisions are informed and governed by the tenets of religious law.

Interviewer: In the case that an interfaith marriage has already happened, how does the Reform Movement view the children of those marriages? Are those children still considered Jewish? Are they still welcomed in the Synagogue? What is their status, are they still governed by religious law? How do they relate to the Jewish faith?

Interviewee (Reform Rabbi): You have to deal with American Reform because outside the United States, things differ and in Canada they even differ from city to city. Some cities, I think Toronto, has been very rigid about never accepting the children of inter-marriage...Toronto has been very strict about allowing Rabbis to inter-marry but in Montreal, it was a requirement of the Montreal Synagogue that the Rabbis in Montreal officiated inter-marriages, so you know there was that difference between Montreal and Toronto. In general, Jews are people in the Reform Movement who say they are Jews. And, so, we don't go around checking all of their credentials. And if the mother is Jewish, according to all branches of Judaism the child is Jewish. But I would say, if the people are raising their child as a Christian and just because the mother is Jewish doesn't mean the child is Jewish. So - it is - that's what I mean when I say it's all your own
Judaism. It's much more because we believe in personal freedom we also allow for a tremendous variation.\textsuperscript{352}

In addition to denominational variation, there is also geographic variation within the same denomination that can lead to mediation of this question of who is permitted to marry whom when determining who is and is not considered Jewish. There were also a number of denominational differences with regard to same-sex marriage in Judaism. I asked religious leaders, “Is same-sex marriage permitted in your religious tradition?” According to the Orthodox tradition, same-sex marriage was biblically and legally prohibited by the Jewish faith. In very recent years, the Conservative movement has made some efforts to reassess the issue of same-sex marriage within the legally proscribed limits of Jewish Law. This issue is now an open matter in the Conservative movement and remains in flux. In the Reform Movement, we again see great variation within the movement itself. It comes down to an individual Rabbi to decide whether or not he or she will participate in or officiate at a same-sex marriage ceremony. For most Reform Rabbis, same-sex marriage was permitted with an understanding that the purpose of marriage, in Judaism, went beyond the biological necessity of procreation to something more spiritual that included a concept of wholeness or completeness between partners. These Rabbis would officiate over same-sex marriage ceremonies; however, many Rabbis insisted that both the partners be Jewish.

Interviewer: And what is the status of same-sex marriage in your religious tradition?

Interviewee (Reform Rabbi): In Reform Judaism, and this has been true for about 25 years, allows Rabbis to officiate at same-sex marriages and also homosexuals, both lesbian and gay to be Rabbis. Those are the two issues with same-sex and Reform Judaism has been the most out front Jewish denomination in

\textsuperscript{352} Interview on July 31, 2018.
terms of those issues. Reconstructionist Judaism and Conservative Judaism have followed after Reform Judaism in both those regards but it took time.\textsuperscript{353}

I asked religious leaders, “Do you ever have couples of interfaith marriages approach you for assistance in a conflict they are experiencing? Has the fact that the couple is interfaith provided any additional challenges to their marriage?” The answer was almost unanimously “absolutely, yes” to this question with the exception of some Orthodox congregations where interfaith marriages were extremely rare. However, whether the couple seeking the advice of the Rabbi was experiencing a type of marital conflict that varied from the type of marital conflict non-interfaith couples face was difficult to determine. On the one hand, I encountered the resounding notion that marital problems are universal in nature and many couples face variations of the same sort of difficulties. On the other hand, the overwhelming majority of religious leadership in the Jewish community across all denominations exhibited an apprehension to interfaith marriage precisely because they felt that interfaith families faced many additional challenges compared to two-partner Jewish marriages and that these specific problems were directly related to the maintenance of a Jewish household, Jewish lineage and Jewish peoplehood - which were all central values of the broader global Jewish community and tradition as a whole. This was the prevailing opinion irrespective of denominations. However, in terms of technicality, the majority position from the Orthodox and Conservative movements was that interfaith marriage was not permitted in Judaism and most of the Rabbis interviewed in this study would not officiate at an interfaith marriage ceremony. By contrast, in the Reform Movement the prevailing opinion was that interfaith marriages were permitted however the sentiment remained

\textsuperscript{353} Interview on July 31, 2018.
that these couples faced additional challenges to their marital life and had higher rates of conflict in their marriages. Whether or not a Reform Rabbi would officiate at an interfaith marriage was an individual and personal decision left up to the individual Rabbi.

While all denominations realized the reality of interfaith marriage, certain movements focused on conversion more concretely, in particular, when children were involved who were not considered Jewish, meaning, they had a Jewish father (Jewish seed) but not a Jewish mother, so, while technically not considered Jewish in the Orthodox and Conservative Movements, conversion was seen as a way to alleviate some of the additional difficulties interfaith couples face. In terms of the particular problems these couples face, many arose with the arrival of children to the marriage. While some couples faced tranquility prior to the birth of children in the marriage, many Rabbis noticed that with the onset of childrearing, couple's opinions on issues that were previously thought to be settled changed or evolved and they often found themselves longing to rear children in the same manner in which they themselves had been raised. An appreciation of and recognition of the importance of tradition often came to the forefront when children were born and many familial conflicts arose around times of holidays. Rabbis that commented on this particular dynamic pointed to the difficulty and incompatibility in raising children when there are attempts, in a single household to adhere to two separate religious communities, for example, by celebrating Christmas and attending Church on Sundays to celebrating Hanukah and attending Synagogue on Saturdays. This type of childrearing was totally unaccepted and discouraged by Jewish religious leadership. Another common difficulty that was raised was the issue of whether or not the children should attend a religious day school, in this case, Jewish day school
versus secular school. While this particular issue was also one that arose frequently in non-interfaith Jewish couples, the extent of the conflict varied with far more detrimental fallout to the interfaith couple than the non-interfaith couple.

Interviewer: Have you ever had a couple of an interfaith marriage, so one Jewish partner and one non-Jewish partner, approach you for assistance in a conflict they are experiencing and has the fact that the couple is interfaith provided any additional challenges for them?

Interviewee (Reform Rabbi): Ya sure, I mean, I've had loads of those, and, I, when somebody comes in for counseling then my focus is entirely, totally, on trying to help them to work out the problem. I'm not going to put my religious stuff on them, you know. So I would never remotely say to them the reason you are having problems is because you inter-married and you shouldn't have done that. That would be awful. I wouldn't be able to look at myself in the mirror if I said that. I don't know how many dozens and dozens and dozens of times I've had that situation. But, absolutely.354

Another topic in Jewish tradition that often raises concerns is gender segregation within the faith. In terms of the pastoral care this study examines, the physical access of female congregants to male religious leadership in times of crisis is at issue. I asked the Rabbis, “Who is typically present in the room when a discussion about a family crisis is occurring? Typically, the only people present in the room when the Rabbi was addressing a family conflict were the Rabbi and the couple experiencing a conflict or seeking the guidance of the Rabbi on a particular issue. There were a few Rabbis from the Orthodox denomination who would not meet alone with a woman under any circumstances. Others would, but with their own wife or female secretary present to witness that no improprieties occurred. It was very uncommon for the couple to bring additional family members or others to their session with the Rabbi.

354 Interview on July 31, 2018.
Interviewer: Who is typically present in a room when a discussion is occurring? Is it just you and the couple or is there anyone else there?

Interviewee (Conservative Rabbi): No, it would be me and the couple. I mean, occasionally, the couple might have an issue which involves somebody's parents so they would come in as well. But, generally speaking, it's the couple and me.355

I asked religious leaders, “When someone comes in to see you about a particular issue concerning the family where does this discussion take place?” The majority of Rabbis would see individuals seeking advice or guidance in their office, and for pulpit Rabbis, their offices were primarily located in their Synagogues. Some Rabbis also had home offices where they would meet with individuals or would, in certain circumstances when it was found necessary, at the home of the couple. A “necessary” situation would be one where the couple did not feel comfortable with the possibility of being seen by other community members seeking the assistance of a Rabbi, or the privacy of the home was needed for some other reason. Another favorite venue for the Rabbis was public coffee houses where just enough privacy was maintained for a conversation to occur. It should be noted that many Rabbi's offices had a clear window so that the interaction could be seen but not heard so an element of privacy was maintained.

Interviewer: When someone comes in to see you about a particular issue concerning the family where does the discussion take place:

Interviewee (Conservative Rabbi): I have a study/office so we would meet in that - there - set up very much the way somebody else might look at a counseling setting. Rarely, in my experience, would that take place in a room that is also used for prayer. We don't believe in a place of prayer needs to have any particular symbols - so, in theory, a room could have multiple uses but generally speaking this kind of counseling or conversation would

355 Interview on November 24, 2017.
take place in an office where there is some privacy and close the
door and have a conversation.356

The vast majority of Rabbis indicated that it was normally women who took the
first approach to a mediation with them. I asked the Rabbis why they thought this may be
the case and a variety of responses were given that were strikingly similar to the
responses given by the Imams to this same inquiry. Some Rabbis indicated that women
embody the spiritual realm more wholeheartedly and thus were more likely to seek the
guidance of a spiritual leader in times of family crises; others suggested that women were
more invested in their marriages and quicker to acknowledge when a problem existed that
needed external help to resolve. Some rabbis claimed that cultural influences of
patriarchy and the role of the man in the home – a role that embodied the man always
being right – prevented men from acknowledging when a marital problem may exist.

Interviewer: In your experience, have you found that there are
more men or more women who take a first approach to a
mediation with you? So, normally when a couple has a problem
they don't always come together in the first instance. It is either
the husband or the wife that comes knocking at the door and then
the Rabbi usually says - well I need to see you both together. In
that first instance, who is it that is taking that approach, who is
knocking at the door? Is it the woman or the man?

Interviewee (Reform Rabbi): I think it is probably - I think it is
very close, but, maybe usually the woman.
Interviewer: And why do you think that may be the case?
Interviewee (Reform Rabbi): I don't know. This is my answer to
that question, ok - I think women talk about things, on the whole,
more easily - so they will come and talk to me more easily or they
will kind of seek out various ways to try to navigate a situation
and the Rabbi is one on the list so I think that's the woman
answer. I've been told by other Rabbis and other clergy that men
come see me more often than other places so when I give that
answer I say very very close and I'm told that in the world of
religion women are rising up to positions of leadership and that
you can't find men anywhere...I do not find that to be the case in

356 Interview on November 24, 2017.
my Synagogue and I don't know what it is - it's not like I'm some macho guy so all the macho men come to talk to me but I do think for some reason the men out there find me to be someone reasonable to talk to. So, they can kind of trust me as a man so to speak.357

I then turned to the issue of male-superiority in the Jewish faith. I asked religious leaders, “Some people have made the claim that in your faith men are superior to women in matters of legality. Do you think there is a reasonable foundation for this belief?” There were a number of responses given and significant differences in the perspectives presented. There was, however, some alignment among the denominations with regard to responses. The Reform and Conservative Rabbis, for the most part, acknowledged there were gender disparities that existed in the Jewish tradition that needed amending, however, their reasoning for these acknowledged disparities was different. Some Reform Rabbis acknowledged a strict gender bias and as such they have amended a number of aspects of the tradition to encompass a more inclusive and equal form of Judaism. In the Conservative movement the acknowledged gender disparities in the faith were mainly accounted to biased or inaccurate interpretations of law, thus, reforms that were made in the Conservative denomination were made within the realm of and with full account of Jewish law. New and valid legal interpretations that were accepted by the community were made for any changes occurring within that movement. One notable and relevant change in both the Reform and Conservative movements came with the acceptance and continuing ordination of female Rabbis. In the Orthodox movement the answers were more varied. For the most part, however, there was a prevailing opinion that what is sometimes perceived as a disparity of gender equality in parts of the law and tradition were simply misunderstood - the differences reflected the inherent differences that exist.

357 Interview on March 26, 2018.
between men and women. I pushed a little further on this inquiry with the Orthodox Rabbis and asked specifically about some of the predominant gender concerns concerning the Jewish community. I asked about the predominant power men have over the divorce process, the certain rights to prayer that men have that women do not have, and the prohibition on female Rabbis.

Again, the majority of Rabbis in the Orthodox denomination emphasized the inherent differences between male and female as accounting for the perceived differences in their rights, duties and obligations in the faith. For example, women were exempt from time-bound obligations and the tradition found it necessary to bind men to these sorts of obligations; such as, putting on *tefilian* during the morning prayer. This was because women, through the menstrual cycle already had a deep connection to time that men did not, so greater emphasis was placed on them fulfilling a spiritual duty that would connect them to time. Few chose to comment on the divorce process although some acknowledged the apparent difficulties there and explained ways certain communities have chosen to deal with the ‘Get Issue’; such as, pre-proscribing the issuance of a *Get* in the *Ketubah* contract in the case of a civil divorce.

Interviewer: Some people have made the claim when they talk about Judaism - in your faith men are superior to women in matters of legality and they raise different issues, they would bring up rights to prayer, or the role of witnesses, the *get* - the whole process of the man's control over the divorce process and so on. So I want to ask you, in your opinion do you think there is a reasonable foundation for that belief that men are superior to women in matters of legality or do you think that this is something that has been misunderstood in the tradition?

Interviewee (Reform Rabbi): There is no question that the Jewish legal tradition is a male-biased tradition and men are the full citizens in my opinion.358

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358 Interview on March 26, 2018.
I then asked religious leaders, “Do you think there are any gender concerns that arise from the practice of religious law?” The responses to this question were fairly evenly split. When taken at its bare minimum, Rabbis who thought of themselves in the role of a Judge or adjudicator of legal precepts, felt as though the laws would be applied in a gender neutral manner. There were also Rabbis who were comfortable knowing how they would act in this capacity but could not account for how others would act and as such felt there were risks involved in the application of law by clergy that could be detrimental to women. Lastly, there were some Rabbis who simply did not feel as though clergy members were qualified to act in greater legal capacities, with regard to matters traditionally thought of in the realm of family law like divorce or child custody.

Interviewer: Obviously there is some recognition of religious law in the state system today. For example, if you officiate at a wedding and you sign the marriage license - you notarize that marriage license the state will recognize that - they will recognize your religious authority in that area. Do you think if we were to implement religious law and have it recognized more wholeheartedly in that state system, so, for example, control of divorce decrees and child custody and these other matters - do you think that there are any gender concerns that could arise from that practice of religious law? What are your thoughts on that?

Interviewee (Reform Rabbi): I think there are all kinds of concerns that would arise and I think that it would be a disaster and I wish the law would change so that clergy were not officiates through a civil law system. I believe in a total separation of church and state. And I think this message that a member of a church or synagogue is acting as a representative of the state, I wish that that did not exist. I wish that religious marriage and civil marriage were two totally separate entities.359

In conclusion, this chapter provides a number of insights concerning the gender implications of pastoral care and mediation through religious leadership. What is

359 Interview on March 26, 2018.
interesting is how little the counseling function employed by religious leadership is actually enforced by religious precepts. In general, there are very few religious leaders who are citing doctrine when interacting with congregants facing a crisis related to family life.

Matrilineality is a controversial gender-related topic in Judaism and the process of ascribing Jewish identity through the father as well as the mother is a major source of denominational tension. Some have described this as “unfair” to Jewish fathers who are in an interfaith marriage with non-Jewish mothers. The issue of interfaith marriage seems, on the other hand, to have a larger effect on women in Islam where there is a blanket prohibition on interfaith marriage for women only. The marriage laws in both faith traditions tend to favor men over women. In Islam, men are the only ones who have recourse to a unilateral divorce. Similarly, in Judaism men hold a preponderance of power in the issuance of the get. The financial burden of marital gifts falls on the man in both Islam and Judaism; however, in both traditions these dowry provisions were specifically designed to provide financial security to the woman in the case of divorce.

Access to religious leadership appears to be roughly equal for both men and women. Although, there were added barriers to women’s access to male religious leadership in terms of privacy constraints, this did not act as a deterrent. There were still more women than men who took the first approach to mediation with religious leadership.

One topic that remained contested was whether or not religious leaders felt as though there was a reasonable foundation for the belief that men, in the faith, are superior to women in matters of legality. Whatever the opinion of religious leaders, most were able to admit that gender discrepancies exist in their faith traditions but also offer an
explanation, usually historical, for this fact. There is little doubt that, in view of contemporary perspectives on gender, this was a source of discomfort to most clergy.
Chapter 9: Conclusion

A number of points emerge from this study. The general population is increasingly secular. But large swaths of the population, particularly, but not exclusively, among immigrants are not. There are some areas of the law where Judeo-Christian principles persist. Religious leadership is often able to employ the congruencies between secular and religious law in the advice and opinions they give as part of their pastoral care. What is interesting is how little the counseling function employed by religious leadership is actually enforced by religious precepts. In general, there are very few religious leaders who are citing doctrine when interacting with congregants facing a crisis related to family life.

Forms of conflict resolution serve a useful social function. Mediation through pastoral care is one such example. This form of care fills a void for religiously observant individuals who may not take steps to address a crisis they are facing in the secular realm. Pastoral care is a system of greater accessibility for individuals. It also provides an avenue for crisis management that is more approachable for some individuals. Familiarity with religious leaders, the swift resolution of disputes, no financial costs and the ability to have both spiritual and secular concerns addressed in a single locale all play a factor. From the perspective of the religious leaders interviewed, the advice and opinions they give through pastoral care are heeded by their congregants in most cases.

Contrary to my initial hypothesis, that religious leadership would find that the tenets of their faith provided an all-encompassing system for crisis management, many of the religious leaders interviewed made the concession that oftentimes knowledge from sources outside the faith are useful in addressing a crisis. At the same time, they also
acknowledged that their religious tradition had a role to play in crisis management even for crises that were not of a spiritual nature. Consideration of secular law was often taken, even as dispositive, by religious leaders. There is significant recognition of secular law by religious authorities. Most religious leaders interviewed acknowledged a dual responsibility in both the religious and secular realms. This is apparent from the discussion on the registration of marriage licenses where nearly all religious leaders felt obligated to have religious marriage ceremonies legally registered.

Most of the religious leaders interviewed did not find incompatibility between religious law and obligations and the secular legal system. In fact, most found it incumbent upon themselves to encourage congregants to follow secular laws so long as they were not incompatible with a specific religious obligation. Where an incompatibility did exist, religious leaders felt obligated to the religious understanding and found themselves bound to follow it as long as it was not considered illegal under secular law. One issue where this arose was with regard to same-sex marriage. While same-sex marriage is permitted under most secular law it is considered prohibited by many in religious leadership. Most religious leaders interpret this incompatibility in favor of religious dominance and as such, do not feel compelled to take any affirmative steps to conduct a same-sex marriage ceremony.

Entering this inquiry, the assumption was made that men were favored in religious settings. While this remains true in certain instances, this study did find that this reality did not preclude the participation of women in seeking the opinions of their religious leaders. On the contrary, most religious leaders interviewed explained that they saw a high prevalence of women, as opposed to men, seeking their opinion and advice on
conflictual matters related to the family. It was often the woman who sought out the assistance of a religious leader in the first instance. This was true despite the added privacy barriers women may face in speaking to male religious leaders in private spaces.

This study also found that matters that could be considered legal in nature, such as, a proposed dissolution of marriage, were not approached in a juridical manner by the religious leaders interviewed. Meaning, the religious leaders did not apply a rigid set of laws to the applicable scenario; rather, the religious leaders were more flexible and examined a given situation on a case-by-case basis using a similar approach to that of a therapist or counselor. It is interesting how little the counseling function employed by religious leadership is actually enforced by religious precepts. In general, there are very few clergymen who are citing doctrine when interacting with congregants facing a crisis related to family life. Still, many of the opinions of religious leaders hold significant weight for individuals who subject themselves to religious jurisdiction. Fear of unfavorable rumor, a sense of moral obligation, fear of community reprisal or disownment, and exclusion from participation in a congregation all play a role in solidifying enforcement of a religious leader’s opinion. In this manner, pastoral care works as a form of norm enforcement as there is an awareness on the part of the people who seek pastoral care through clerics that these norms will be enforced through a variety of sanctions.

One topic that remained contested was whether or not religious leadership felt as though there was a reasonable foundation for the belief that men, in their faith, are superior to women in matters of legality. Whatever opinion the religious leaders held, most were able to admit that gender discrepancies exist in their faith traditions while also
offering an explanation, usually historical, for this reality. Historic gender discrepancies have been addressed through secular law as society’s understanding of gender roles has evolved. However, with the use of religious alternative dispute resolution or even private resolution of family crisis through the pastoral care of religious leaders there is no guarantee that this evolution has affected religious precepts and interpretations of religious law. This is a matter of concern.

There appear to be consistent attributes in the meanings of Shari’a and Halakhah; such as, a path, a guide, religious law but, there are denominational differences in Judaism that play a significant role in determining the weight of Halakhah in the everyday lives of members of the Jewish faith. The findings of this study suggest that denominational differences play a significant role in determining whether or not a religious leader felt that members of their faith were obligated to resolve their conflicts through the teaching of religious texts and the tenets of religious law. In Orthodox Judaism, in particular, crises concerning family life were viewed as obligatory subjects for religious resolution.

From the perspective of the religious leaders interviewed, individuals that seek the guidance of their Imam or Rabbi on any given issue, particularly those concerning matters of the family, almost always heed and follow this advice without seeking recourse elsewhere. In essence, these congregants are voluntarily subscribing to religious law as their choice of law and religious institutions as their choice of forum to address family crisis.

The subject-matter of alternative dispute resolution mechanisms is vast and includes, but is not limited to, family law disputes and general civil and commercial law
disputes. Mediation is the method often employed for family law disputes. There are a variety of topics addressed by family mediation, such as: marriage, separation, divorce, parenting schedules, child support, alimony, property division, elder care, family budgeting, distribution of inherited property, family business succession and other family matters. These are exactly the same category topics that are often presented by congregants to their religious leaders. The religious leaders interviewed for this study focused significantly on marriage, divorce, and the well-being of children of the marriage in the pastoral care they gave.

Muslim and Jewish religious leaders remain compliant with and deferential to state law. With few exceptions, Muslim and Jewish religious leaders comply with state requirements vis-a-vis civil marriage licenses while they act as representatives of the state. Nearly all religious marriages remained legally registered with the respective states. The majority of religious leaders interviewed also acknowledged that they have considered secular law when giving advice.

Creating a system of broader education for those in pastoral care roles and incorporating this more formally with secular norms will assist in avoiding any of the potential ills informal forms of mediation can have on women or other disempowered members of society. Since clergy address a number of secular issues in their religious capacity, broader education in such areas as family law requirements, domestic abuse procedures, addiction therapy, fair housing rules, counseling techniques and so on and so forth would prove invaluable. The type of pastoral care the religious leaders interviewed engaged in reflected norms of social work in many instances. Developing methods of

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pastoral care through secular frameworks would give value-oriented societies the access to techniques proven to be useful in addressing a crisis they may be facing. In these instances, religiously devout individuals would have access to spiritual counseling and advice that complied with and had insight from secular frameworks. This sort of system would also ensure that religiously devout individuals who turn to religious authorities in times of crisis have access to the best possible and most holistic sources available to address their concern. It was made clear in the interviews that very often religious leaders were approached with matters that went far beyond a spiritual crisis.

It has been suggested that “religious isolationism within secular societies…correlates to a number of serious communal ills within religious communities.”361 One of the primary themes of this study has been an exploration of how gender is affected by the process of religious forms of resolving family conflicts. Traditional interpretations of religious law are not in compliance with the present-day understandings of gender dichotomy in greater society. Thus, disempowerment of marginalized groups in society; in particular, women is a potential communal ill of isolated religious communities. This issue has been explored in the literature on religious arbitration.

Feminist criticisms of religious group autonomy within secular societies maintain that, by giving faith communities limited powers of self-government through the legal enforcement of religious arbitration, that state entrenches traditional power structures and puts vulnerable parties at greater disadvantages within their communities. This is especially true in connection with secular recognition of religious dispute resolution. By legally enabling internal problem-solving through communal channels, many abuses and problems within religious groups are kept in-house. Victims of domestic violence, sexual abuse, predatory

361 Broyde, 234.
lending, unfair business and real estate practices, poor education, and religious coercion to conform to communal norms can be effectively pressured to keep their complaints within the community, where oftentimes they will not be effectively addressed. Indeed, in some isolationist communities, members may not even understand or be aware of alternative options.362

Developing a system of broader education for those engaging in pastoral care will assist in avoiding some of the challenges described above. Religious leaders often act as a buffer between the less integrated members of religious communities and newly arrived immigrants to their religious communities and broader society. In a certain sense, religious leaders teach these members of their congregation how to live by their religious obligations as well as the norms and values of the greater society they are living in. Having a thoroughly developed system to give religious leaders the tools they need to address a wider range of the crisis that come before them without the need to refer congregants elsewhere, as congregants may not feel comfortable or have the ability to access those outside resources that are suggested, would be useful and provide a societal value. Although not specifically mentioned in the interviews, one could infer, especially with regard to the growing number of Muslim immigrants in the United States, that there may be both cultural as well as language barriers that preclude true accessibility to sources outside the religious community for many congregants facing a crisis.

The techniques and methods of religious leaders have significant insight that secular society can benefit from. It was clear from the findings of this study that religious leaders engaging in a form of dispute resolution through pastoral care have developed their own set of techniques that can successfully navigate a wide-variety of both religious and inherently secular crises. Similar to the process of religious arbitration that employs

362 Broyde, 234.
secular legal procedure and norms to address a matter with the use of religious law and other religious legal precepts, this form of dispute resolution through pastoral care – a type of mediation with a religious leader as mediator – can also usefully invoke secular rules and procedures of counseling to address a crisis that may or may not be of a religious nature.

Integration of newly arrived immigrants into broader society has been a cornerstone of the so-called “melting pot” of US immigration policy. However, there have been a number of challenges to the integration of newly arrived immigrants including religious minorities despite the fact that cultural pluralism has remained a goal.363 This is particularly true in the Muslim community.

Unfortunately, cultural pluralism is under siege in some quarters. The rise in hate violence directed at law-abiding Arab Americans, Pakistani Americans, and American Muslims, and those of Sikh descent following the September 11th tragedy demonstrates that things can go terribly wrong in some neighborhoods. Misguided individuals act in an emboldened manner against Americans who do not fit a particular, European-descent, image.364

With time, most religious minorities are able to integrate into broader society significantly. There are, however, exceptions such as, certain groups which discourage widespread integration in broader society, like the ultra-orthodox Hassidic Jewish community. Since most of the Muslim community has more recently arrived in the United States than most of the Jewish community these challenges of integration and concerns over isolationism of religious minorities is more pertinent among the Muslim-American population today.

364 Hing, 878.
The results of this study indicate that religious leaders have an integral role to play in the integration process of newly arrived immigrants as some of the first points of entry for these individuals, who are religious minorities, are religious institutions. Religious leaders, through their pastoral care and other activities, play a mediatory role between the preservation of religion and culture on the one hand and integration into broader society, on the other. This is important when discussing gender as women are often associated “with a communal essence” which “can have negative consequences for women.” The idea that women embody the authentic persona of religious and cultural communities creates a number of issues in the integration process as there are often significant efforts for cultural preservation when newly arrived immigrants enter countries like the United States or Canada. This is also one of the reasons why individuals may seek to resolve their conflicts in a religious forum as opposed to a mainstream secular one. The religious forum meets their needs of cultural understanding and preservation that secular resources do not. According to Martha Minow,

Largely secular democracies in particular are struggling to maintain gender equality while respecting religious freedom, as recent immigrants to European and North American communities bring religious traditions that differ from the ones dominant in their host countries – and the encounter with the host country leads some of the immigrants’ children to seek more religious orthodoxy and some to seek less.

Religious leaders are in a unique position and are essentially able to teach newly arrived immigrants how to navigate the secular society they are living in while still adhering to their religious principles and obligations. It is the position of this study that

365 Joffe, xv.
most religious leaders successfully facilitate the integration of newly arrived religious minority immigrants and do not act a barrier to integration efforts. In particular, religious leaders are well equipped to address some of the unique particularities of newly arrived immigrants that provide challenges to integration in general. For example, issues of communication between English and non-English speakers can often be bridged by religious leaders. The same holds true for culturally appropriate social interaction. Many of the Muslim religious leaders interviewed in this study were themselves immigrants or first generation Americans or Canadians.

Finally, this study takes the position that clerics themselves understand their unique position in society and often embrace this role through the consideration of secular laws and secular values in the pastoral care they give. Clergy are able to educate their congregants, through their advice, of the way things are done in the society they are living in as the clerics are more attuned, than the many newly arrived immigrants, to state and country convention. The practice of religious leaders helps to integrate congregants as opposed to isolate them.

As a final note, what was clear from the interviews was that the type of pastoral care studied here provides a valuable function in society. Developing a system of broader education that incorporates secular norms while retaining religious values will be both beneficial for congregants interacting with their religious leaders as well as for the integration of immigrants and religious minorities into general society.
Bibliography


Appendix A: Interview Questions

Background Questions
1. What is your name?
2. Which synagogue/mosque do you belong to?
3. How long have you been a Rabbi/Imam?
4. What is your position at your Mosque/Synagogue?
5. How long have you been with this institution?
7. Take me back through the history of your career and what brought you to this institution?
8. Why do you think individuals seek the guidance of a spiritual leader instead of simply taking their concerns to therapists, arbitration or courts in the secular realm?

General Questions about Family Law
9. If you have to sum up in a few sentences what *Sharia/Halakha* is, how would you explain its meaning?
10. Do you believe that Muslims/Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?
11. What are the main rules and religious requirements governing Jewish/Islamic marriage?
12. What are the main rules and religious requirements governing Jewish/Islamic divorce?
13. What are the main rules and religious requirements governing matters of child custody in the Judaic/Islamic tradition?
14. What is a point of controversy in your religious tradition concerning a matter of family law?
15. Are interfaith marriages allowed in your religious tradition?
16. Are children of interfaith marriages still governed by religious law? What is their status in the community and the tradition as a whole?
17. Is same-sex marriage permitted in your religious tradition?

Specific Questions about Family Law in Host Congregation
18. Do you ever have couples of mixed-faith marriages approach you for assistance in a conflict they are experiencing? Has this provided any additional challenges?
19. When you officiate a wedding do you typically have the state marriage license signed at the same time as the religious ceremony? Do you require a civil marriage license for the couples you are marrying?
20. What kinds of marital gifts or dower have you seen? Have you seen any other types of property exchange in conjunction with marriage?
21. Can you tell me about the location and space you use to discuss a matter of family law? When someone comes in to see you about a particular issue concerning the family where does this discussion take place?
22. Who is typically present in the room when such a discussion is occurring?
23. Do you find more young couples or old couples coming to you for help resolving a family law conflict?
24. When a couple is considering divorce, what sort of recommendations for reconciliation, if any, do you typically suggest to them?
25. What about for other types of family law matters besides divorce?
26. How is divorce perceived in your community? Is it shunned? Is it understood?
27. How do you rely or how much do you rely on religious texts in your decision making process or in the advice you deliver?
28. In your community do you find that most religious marriages are also legally registered with the state?
29. How do you think that religious law and civil law of the state are connected, or do they operate separately?
30. Have you ever considered secular law when giving advice? Do you ever use secular values in advising your parishioners? If so, please describe.
31. Do you feel that your parishioners often follow your advice/ruling?
32. Do your parishioners, that have sought your advice, ever/often end up in a secular court for the same matter?
33. Do you ever suggest that couples should seek recourse to their issue in the state court system or are conflicts often resolved in the community?

Questions about Gender

34. In the case of the United Kingdom’s Mediation Councils, council-proponents have argued that “women constitute the overwhelming majority of individuals approaching sharia councils, and this fact is regularly identified by council-proponents as indicating the necessity and adequacy of services that councils provide for women.” In your experience, have you found that there are more men or more women who take the first approach to mediation with you?367
35. When a couple has an issue do they often come to see you alone or does the husband or wife ever bring additional family members along?
36. It is sometimes said that in your faith men are superior to women in matters of legality. Do you think there is a reasonable foundation for that belief?
37. Do you think there are any gender concerns that arise from the practice of religious law?

Concluding Questions

38. What benefits or shortcomings do you see between the conflict resolution you offer to couples in the mosque/synagogue versus the more formal system of religious arbitration?
39. What have you learned from mediating conflicts between couples that approach you for guidance/resolution?
40. Do you have any other comments or perspectives you would like to share on the topics we discussed today?

Yes/No Survey Questions

1. Do you believe that Muslims/Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?
2. Are interfaith marriages allowed in your religious tradition?
3. In your community do you find that most religious marriages are also legally registered with the state?
4. Have you ever considered secular law when giving advice?
5. Do you ever suggest that couples should seek recourse to their issue in the civil law system?
6. It is sometimes said that in your faith men are superior to women in matters of legality. Do you think there is a reasonable foundation for that belief?
7. Do you require a civil marriage license for the couples you are conducting a religious marriage ceremony for?
8. Is same-sex marriage permitted in your religious tradition?
Orthodox Judaism
Do you believe that Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?

Yes 41
No 59

Orthodox Judaism
Are inter-faith marriages allowed in your religious tradition?

Yes 95
No 5
Orthodox Judaism
In your community do you find that most religious marriages are also legally registered with the state?

- Yes: 100
- No: 0

Orthodox Judaism
Have you ever considered secular when giving advice?

- Yes: 91
- No: 9
Orthodox Judaism
Do you ever suggest that couples should seek recourse to their issue in the civil law system?

Yes: 90
No: 10

Orthodox Judaism
It is sometimes said that in your faith men are superior to women in matters of legality: do you think there is a reasonable foundation for that belief?

Yes: 62
No: 38
Orthodox Judaism
Do you require a civil marriage license for the couples you are conducting a religious marriage ceremony for?

- Yes: 10
- No: 90

Orthodox Judaism
Is same-sex marriage permitted in your religious tradition?

- Yes: 5
- No: 95
Conservative Judaism

Do you believe that Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?

Yes 27
No 73

Conservative Judaism

Are inter-faith marriages allowed in your religious tradition?

Yes 0
No 100
Conservative Judaism
In your community do you find that most religious marriages are also legally registered with the state?

- Yes: 100
- No: 0

Conservative Judaism
Have you ever considered secular law when giving advice?

- Yes: 82
- No: 18
Conservative Judaism
Do you ever suggest that couples should seek recourse to their issue in the civil law system?

- Yes: 10
- No: 90

Conservative Judaism
It is sometimes said that in your faith men are superior to women in matters of legality: do you think there is a reasonable foundation for that belief?

- Yes: 23
- No: 77
Conservative Judaism
Do you require a civil marriage license for the couples you are conducting a religious marriage ceremony for?

- Yes: 5
- No: 95

Conservative Judaism
Is same-sex marriage permitted in your religious tradition?

- Yes: 86
- No: 14
Reform Judaism
Do you believe that Jews have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?

- Yes: 83
- No: 17

Reform Judaism
Are inter-faith marriages allowed in your religious tradition?

- Yes: 70
- No: 30
Reform Judaism
In your community do you find that most religious marriages are also legally registered with the state?

- Yes: 0
- No: 100

Reform Judaism
Have you ever considered secular law when giving advice?

- Yes: 9
- No: 91
Reform Judaism
Do you ever suggest that couples should seek recourse to their issue in the civil law system?

- Yes: 17
- No: 83

Reform Judaism
It is sometimes said that in your faith men are superior to women in matters of legality: do you think there is a reasonable foundation for that belief?

- Yes: 24
- No: 76
Reform Judaism
Do you require a civil marriage license for the couples you are conducting a religious marriage ceremony for?

Yes: 87
No: 13

Reform Judaism
Is same-sex marriage permitted in your religious tradition?

Yes: 91
No: 9
Sunni Islam
Do you believe that Muslims have an obligation to resolve their conflicts through the teachings of religious texts and the tenets of religious law?

- Yes: 88
- No: 12

Sunni Islam
In your community do you find that most religious marriages are also legally registered with the state?

- Yes: 96
- No: 4
Sunni Islam
Have you ever considered secular law when giving advice?

Yes: 4
No: 96

Sunni Islam
Do you ever suggest that couples should seek recourse to their issue in the civil law system?

Yes: 4
No: 96
Sunni Islam
It is sometimes said that in your faith men are superior to women in matters of legality: do you think there is a reasonable foundation for that belief?

Yes 54
No 46

Sunni Islam
Do you require a civil marriage license for the couples you are conducting a religious marriage ceremony for?

Yes 84
No 16
Sunni Islam
Is same-sex marriage permitted in your religious tradition?

0

100

Yes
No
Appendix C: Sample Islamic Marriage Contract

Marriage Certificate

In the Name of God, The Beneficent, The Merciful

And among His Signs in this, that He created for you, mates, from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect. (Qur’an 30:21)

THIS IS TO CERTIFY:

That in the City [city name], State of [state name], I, [imam’s name], Imam of [mosque/Islamic Center], by virtue of the power vested in me on [day, month, year] A.D.

UNITE IN MARRIAGE

Mr. [groom’s name], born on [day, month, year], of [country] citizenship, of [groom’s street address, city, state & zip], daughter of [full names of bride’s parents]

According to the teaching of the Holy Qur’an.

MAHR

The immediate mahr of [immediate mahr] amount is due upon the signing of this contract, and the deferred mahr of [deferred mahr] amount is due upon demand, death or divorce.

In addition to the following vows, we also agree to all clauses specified in Attachment A (Attachment A should include the stipulations and language as agreed upon by the couple based upon legal advice.)

WE VOW

棹 That we fully understand the terms of this agreement.
棹 That this contract is based upon mutual consent and agreement.
棹 That we are of marriageable age according to U.S. law
棹 That we are free to marry, are not married in any way to another person in any place, have not been promised to marry anyone, are

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not involved in a divorce, and any past divorces are valid in the place in which we plan to reside

IN THE EVENT EITHER OF US WISHES TO CONCLUDE THIS MARRIAGE, WE VOW:

- That the husband will delegate his right to divorce repeatedly under Islamic law to his wife, creating a similar right for each spouse to divorce the other repeatedly.
- That we will file for a civil divorce in the United States.
- That upon the divorce being finalized, the civil divorce will automatically conclude the religious marriage, and any other form in which it may exist within a foreign jurisdiction.
- That the mahr is separately owned by the wife, and any remaining mahr will be due to the wife when the civil divorce is finalized.368

Appendix D: Sample Judaic Marriage Contract

Ketubah Text
Traditional Orthodox
English

On the _ day of the week, the _ day of the month of ___ in the year 57___, according to the manner in which we count (dates) here in the community of __________, the bridegroom, __________, said to this virgin, __________: "Be my wife according to the laws and traditions of Moses and Israel. I will work, honor, feed, and support you in the custom of Jewish men, who work, honor, feed, and support their wives faithfully. I will give you the settlement (mohar) of virgins, two hundred silver zuzim, which is due you according to Torah law, as well as your food, clothing, necessities of life, and conjugal needs, according to the universal custom." Miss ______ agreed and became his wife. This dowry that she brought from her father's house, whether in silver, gold, jewelry, clothing, home furnishings, or bedding, Mr.__________, our bridegroom, __________ accepts as being worth one hundred silver pieces (zekukim). Our bridegroom, Mr. ______ agreed, and of his own accord, added an additional one hundred silver pieces (zekukim) paralleling the above.

The entire amount is then two hundred silver pieces (zekukim).

Mr. __________, our bridegroom made this declaration: "The obligation of this marriage contract, this dowry, and this additional amount, I accept upon myself and my heirs after me. It can be paid from the entire best part of the properties and possessions that I own under all the heavens, whether I own (this property) already, or will own it in the future. (It includes) both mortgageable property and non-mortgageable property. All of it shall be mortgaged and bound as security to pay this marriage contract, this dowry, and this additional amount. (It can be taken) from me, even from the shirt on my back, during my lifetime, and after my lifetime, from this day and forever."
The obligation of this marriage contract, this dowry, and this additional amount was accepted by Mr. __________, our bridegroom, according to all the strictest usage of all marriage contracts and additional amounts that are customary for daughters of Israel, according to the ordinances of our sages, of blessed memory. (It shall) not be a mere speculation or a sample document.

We have made a kinyan from Mr.__________, our bridegroom, to Miss ________, this virgin, regarding everything written and stated above, with an article that is fit for such a kinyan.
And everything is valid and confirmed.

Bride ________________ Groom ________________
Witness ________________ Witness ________________
Rabbi ________________

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Appendix E: Sample Jewish Divorce Decree

English Translation of Text of the Get

On the _______ day of the week, the _______ day of the month of _______ in the year _______ after creation of the world, according to the calendric calculations that we count here, in the city ________, which is situated on the_________ river, and situated near springs of water, I, ________ the son of ________, who today am present in the city ________, which is situated on the_________ river, and situated near springs of water, willingly consent, being under no duress, to release, discharge, and divorce you [to be] on your own, you, my wife ________, daughter of ________, who are today in the city of ________, which is situated on the_________ river, and situated near springs of water, who has hitherto been my wife. And now I do release, discharge, and divorce you [to be] on your own, so that you are permitted and have authority over yourself to go and marry any man you desire. No person may
object against you from this day onward, and you are permitted to every man. This shall be for you from me a bill of dismissal, a letter of release, and a document of absolution, in accordance with the law of Moses and Israel.

______ the son of ________ — witness
______ the son of ________ — witness

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