FINDING A VOICE OF CHALLENGE: THE STATE RESPONDS TO RELIGIOUS WOMEN AND THEIR COMMUNITIES

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I. INTRODUCTION

Feminist legal studies have long given serious attention to the problem of gender identity and its relationship to legal regimes and practices that affect women. From intersectional discourse to queer studies, feminists have attempted to give voice to the ways in which political and social communities create and define gender, and marginalize, erase, subordinate, and occasionally protect or celebrate women, sometimes with the heavy hand of the law. Intersectional studies of gender and sexual orientation,[1] gender and race,[2] and gender and disability or aging[3] have been part

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[1] *See, e.g.*, Ann Ferguson, *Patriarchy, Sexual Identity and the Sexual Revolution: Heterosexual Ideology As a Coercive Force*, *in* FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN 416–23 (Anne Murphy & Susan Gamer eds., 2d ed. 1984) (arguing that while the institution of heterosexuality is coercive, it is not sufficient in itself to perpetrate male dominance); BEVERLY W. HARRISON, MAKING THE CONNECTIONS: ESSAYS IN FEMINIST SOCIAL ETHICS 135–51 (1985) (describing the relationship between homophobia and misogyny and how each is at the core of the "ideology of control" in a male-dominated, patriarchal society). *See generally* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN (Anne Murphy & Susan Gamer eds., 2d ed. 1984) (describing deprivation of a political existence for lesbians through their inclusion in the male homosexual paradigm).

[2] *See generally* Siobhan Mullally, *Gender Equality, Citizenship Status, and the Politics of Belonging*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 192, 192–204 (Martha A. Fineman ed., 2011) (discussing how women's identi-

of this conversation.

By comparison, less attention has been paid in American feminist legal literature to the dilemma of women who are also religious and part of faith communities, whose identities, rights, and respect may be called into question by both their religious and political communities. Although she is not necessarily alone in her critique, Megan O'Dowd has attacked secular gender feminism as a possible source of this silence.[4] In her critique, O'Dowd argues that secular feminists tend to explain women's social struggles as stemming from their religious affiliations, stigmatize religious women as victims of their religious cultures, and purport to resolve these women's problems "by eradicating the significance of religion from women's lives."[5] In their refusal to support religious women on their own terms, O'Dowd argues, secular feminists have forced religious women to choose between religion and equality.[6] Moreover, she argues, secular feminist essentialists have imposed their Western norms on non-Western religious women, thereby denying these women's agency. As a result, secular feminist essentialists have alienated such women, badly needed for their gifts and perspectives, from the feminist movement.[7]

By contrast to the relative lack of interest in religious women among American legal feminists, there has been an outpouring of multiculturalism studies led by Canadian legal scholars,[8] American philosophers, and

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ties as "outsiders" influence state exclusionary policies).

[3] *See* Isabel Karpin & Roxanne Mykitiuk, *Feminist Legal Theory as Embodied Justice*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 115, 125–29 (Martha A. Fineman ed., 2011).

[4] Megan O'Dowd, *Secular Gender Essentialism: A Modern Feminist Dilemma*, 3 CRITICAL LEGAL STUD. J. 104 (2010). *See also* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1402 (2003) (arguing that the Enlightenment compromise that has treated religion as private is "natural, irrational, incontestable, and imposed"). *See generally* Cheryl B. Preston, *Women in Traditional Religions: Refusing to Let Patriarchy (or Feminism) Separate Us from the Source of Our Liberation*, 22 MISS. C.L. REV. 185 (2003) (providing another critique of feminists' approach to religious women).

[5] O'Dowd, *supra* note 4, at 104.

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1992); Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 390–92 (2000) [hereinafter Shachar, *The Puzzle*] (discussing the work of Charles Taylor and Will Kymlicka); Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Gover-*

political scientists,[9] who have explored in great depth how the self-determination claims of religious or aboriginal communities should be resolved when they come into conflict with the state's interests. Some of them, most notably Canadian legal scholar Ayelet Shachar, have particularly focused on the human rights of women within those communities. In this Article, I would like to add a few of my own reflections on how the state might respond to religious women with commitments to multiple communities—faith communities, political communities, and perhaps the American feminist community itself—each demanding loyalties and behaviors in tension with or even at odds with the demands of their other communities. Specifically, I want to think about whether, particularly in the U.S. context, the state has any legitimate interest in noticing and responding to these commitments. I will suggest that we should rethink the usual forms of state response to problematical actions tied to individual identity, which are to regulate or even prohibit behavior that the state believes are inimical to democratic values.

To grasp the difficulty of responding to these conflicts effectively, it is important to look at recurring difficulties that seem to evade a just result when all of the conflicting interests are fairly considered, so we can think more deeply about when states have a proper interest and when they should appropriately intervene. In Western cultures, it is important to look at the tough cases, since others raising these conflicts are usually ignored by the state or resolved by women quietly bearing their burdens. I will start with two that have received extensive consideration in the legal literature, and one that has not: Muslim headscarf bans, the Jewish *agunah*, and the emerging Christian Domestic Discipline movement.

A. MUSLIM HEADSCARF BANS

In early 2011, the French Parliament extended its ban on wearing *burqas* to all public places, enforced primarily by a fine, which resulted in

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nance in Diverse Societies, 50 MCGILL L.J. 49, 55–56 (2005) [hereinafter Shachar, *Religion*] (discussing the work of "first wave" multicultural theorists).

[9] *See, e.g.*, Shachar, *The Puzzle*, *supra* note 8, at 399–405 (identifying proponents of a "reuniversalized citizenship" approach, including Susan Okin (at Stanford until her death), Amy Gutmann (University of Pennsylvania), Martha Nussbaum (Chicago), Brian Barry (at Columbia until his death), Ian Shapiro (Yale), and Stephen Macedo (Princeton)); *id.* at 390 (discussing the work of Iris Young); TAYLOR, *supra* note 8, at 3–5 (arguing that multicultural groups' demands are not necessarily illiberal in the introduction by Amy Gutmann).

April arrests of civilly disobedient Muslim women protesting the law.[10] Among the most important justifications the French gave for the law was that the *burqa* contradicts the French principles of gender equality—the government called it a "new form of enslavement that the republic cannot accept on its soil."[11] France also claimed that the *burqa* poses a security threat to the nation.[12] In the past, however, regulation of the headscarf or other religious head coverings had been justified on the French principle of *laïcité*, meaning that the public space in France should be secular.[13]

The European Court of Human Rights, which has not as of this writing had the opportunity to take up any human rights challenges to the French law, has viewed a similar ban on the headscarf in public universities in Turkey sympathetically under European Court standards.[14] In Tur-

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[10] The French ban, violation of which is punishable by a $215 fine or special citizenship classes, includes *burqas*, which are defined as full body coverings with a mesh opening around the eyes, as well as *niqabs*, full-face veils that leave only openings for the eyes. These definitions do not appear to be used universally. The ban apparently does not cover the *hijab*, a head covering that covers the hair and neck but not the face (although *hijab* is also used as a generic term for all of these garments), or the *chador*, a full-body covering that does not obscure the face. More ominously, those who force women to wear a veil can be punished with up to a year in prison, and a $43,000 fine, or twice that if the veiled person is a minor. I will use the terms headscarf and *hijab* somewhat interchangeably to refer generally to any head-coverings, whether face-obscuring or not, worn by Muslim women in accordance with Islamic law. I will generally use the term *burqa* as a placeholder for both the *burqa* and the *niqab*. *See* Camille Rustici, *France Burqa Ban Takes Effect; Two Women Detained*, HUFFINGTON POST (Apr. 11, 2011, 9:57 AM), http://www.huffingtonpost.com/2011/04/11/france-burqa-ban-takes-ef_n_847366.html; Antoine Lerougetel, *France Enforces Burqa Ban*, WORLD SOCIALIST WEB SITE (Apr. 18, 2011), http://www.wsws.org/articles/2011/apr2011/burq-a18.shtml; Susan Manfull, *France Prepares to Ban the Burqa As Construction of Nation's Biggest Mosque Is Lauded*, THE MODERN TROBADORS (Mar. 13, 2011, 1:01 AM), http://moderntroubadours.blogspot.com/2011/03/france-prepares-to-ban-burqa-as.html.

[11] *See* Said Ahmed-Zaid, *Forbidding the Veil Is Just As Oppressive*, IDAHOSTATESMAN.COM (May 21, 2011), http://www.idahostatesman.com/2011/05/21/1657156/forbidding-the-veil-is-just-as.html; *France's Burqa Ban in Effect Next Month*, CNN (Mar. 4, 2011), http://articles.cnn.com/2011-03-04/world/france.burqa.ban_1_buraq-ban-full-face-veil?_s=PM:WORLD (quoting Ahmed-Zaid).

[12] *See France's Burqa Ban in Effect Next Month*, *supra* note 11.

[13] *See, e.g.*, Peter Cumper & Tom Lewis, *"Taking Religion Seriously"? Human Rights and Hijab in Europe—Some Problems of Adjudication*, 24 J.L. & RELIGION 599, 603 (2008–2009); Britton D. Davis, *Lifting the Veil: France's New Crusade*, 34 B.C. INT'L & COMP. L. REV. 117, 121–22 (2011) ("[*Laïcité* is a] 'collective, public identity' of the French people, the cornerstone of a national personality, defining what it means to 'be French.'").

[14] *See* Cumper & Lewis, *supra* note 13, at 602–03; Susan Perry, *The French Burqa Law*, DEBATING HUMAN RIGHTS (Apr. 5, 2011), http://debatinghumanrights.org/?p=204 (discussing

key, unlike France, the expressed reason for the headscarf ban has been that visible markers of Islamic identity threaten the fragile peace that Ataturk's secularization of Turkish government and society has supposedly brokered in Turkey.[15]

One woman objecting to the French ban explained why she was willing to be civilly disobedient: "I wear a full face veil because it is a submission to God . . . [,] I wear the veil like the women of the Prophet Mohammed did, to dress the same way as them."[16] Saida Kada, founder of French Muslim Women in Action, suggests, "A woman dons the veil . . . because it is one of the steps taken in the construction of one's spiritual relationships. . . . 'The discovery of Islam is marked by a series of steps that successively fashion your identity by leading you to find an equilibrium in yourself, in God, and with others.'"[17] Convert Alma Levy further explains, "In order to pray, you have to cover your head. Quickly, I found it impossible to put on the veil when I prayed and to take it off when I went outside. Undressing in order to go out seemed incongruous to me: the headscarf was part of myself."[18]

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the European Court of Human Rights' ruling on the validity of the Turkish law in *Arslan v. Turkey*, which set limitations on *burqa* bans); Mullally, *supra* note 2, at 198–99 (describing the European Court of Human Rights case upholding of the Turkish headscarf ban against medical student Leyla Sahin).

In Canada, Citizen and Immigration Minister Jason Kenney issued a regulation in December requiring Muslim women applying for citizenship to take off their *niqabs* before the citizenship judge. *See* Barbara Kay, *New Niqab Law Puts Canadian Values First*, NAT'L POST (Dec. 12, 2011 , 12:44 PM), http://fullcomment.nationalpost.com/2011/12/12/barbara-kay-new-niqab-law-puts-canadian-values-first/. Quebec has tabled a 2010 proposal to require both federal employees and their clients to show their face if required by security, communication or identification needs. *Id.*; *see also Bill N° 94: An Act to Establish Guidelines Governing Accommodation Requests Within the Administration and Certain Institutions*, NAT'T ASSEMBY QUE. (Nov. 4, 2010), http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html.

[15] *See* Valorie K. Vojdik, *Politics of the Headscarf in Turkey: Masculinities, Feminism and the Construction of Collective Identities*, 33 HARV. J.L. & GENDER 661, 677–79 (2010) (discussing conflict between Ataturk and Islamist parties over the headscarf). *See also* Mullaly, *supra* note 2, at 198–99 (describing the dissenting judgment in the *Sahin* case, which argued that religious observance should not be conflated with extremism).

[16] Dale Hurd, *Muslim Women Protest French Burqa Ban*, THE CHRISTIAN BROADCASTING NETWORK (Apr. 12, 2011), http://www.cbn.com/cbnnews/world/2011/April/Muslim-Women-Protest-French-Burqa-Ban/.

[17] JOAN W. SCOTT, THE POLITICS OF THE VEIL 143 (2007) (quoting SAÏDA KADA, ONE VEILED, THE OTHER NOT).

[18] *Id.* at 143.

Such a comprehensive headscarf ban has not been passed in the United States, but some states have issued headscarf bans in limited circumstances. In some places, Muslim school children have been required by school regulations to change out of various forms of Islamic dress.[19] Perhaps most visibly, the Department of Justice sued an Oklahoma school district that demanded that eleven-year-old Nashala Hearn take off her headscarf or go home.[20] President Barack Obama referenced Nashala's case in June 2009 when he argued in a speech that Western countries should not impose their views on proper dress on Muslim women.[21] Other cases have surfaced as well. For example, a Muslim woman in Orange County was required to remove her *hijab* in order to be booked into the county jail and attend her court hearing.[22] Elsewhere, a female police officer was refused the right to wear her *hijab* as part of her uniform.[23]

Moreover, private U.S. companies have been taken to task for headscarf bans or religious harassment arising out of an employee's donning of a headscarf. As perhaps the most prominent examples, a current and a potential employee whose headscarves allegedly did not fit in with the com-

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[19] *See, e.g.*, Aminah B. McCloud, *American Muslim Women and U.S. Society*, 12 J.L. & RELIGION 51, 56–57 (1995–1996) (noting that teachers ridicule girls who wear the headscarf, and that these girls are required to take off their clothing for gym class).

[20] *See, e.g.*, Hera Hashmi, *Too Much to Bare? A Comparative Analysis of the Headscarf in France, Turkey, and the United States*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 409, 441 (2010); *U.S. to Defend Muslim Girl Wearing Scarf in School*, CNN (Mar. 30, 2004), http://articles.cnn.com/2004-03-30/justice/us.school.headscarves_1_dress-code-head-scarf-muslim-head-scarves?_s=PM:LAW; *U.S. Opposes Oklahoma Headscarf Ban*, BBC NEWS (Mar. 31, 2004), http://news.bbc.co.uk/2/hi/americas/3585377.stm.

[21] *See* Jesse Lee, *Nashala's Story*, THE WHITE HOUSE (June 4, 2009, 3:20 PM), http://www.whitehouse.gov/blog/Nashalas-Story/. *See also* Howard LaFranchi, *In Battle of the Burqa, Obama and Sarkozy Differ*, THE CHRISTIAN SCIENCE MONITOR (June 23, 2009), http://www.csmonitor.com/USA/Foreign-Policy/2009/0623/p02s20-usfp.html ("[Obama called on Western countries] 'to avoid dictating what clothes a Muslim women [sic] should wear,' saying that such action constituted 'hostility' towards religion clothed in the 'pretense of liberalism.'").

[22] *See* Hashmi, *supra* note 20, at 442 (discussing Khatib v. County of Orange, 639 F.3d 898 (9th Cir. 2011)). At the district court level, *Khatib* denied the Religious Land Use and Institutionalized Persons Act and Free Exercise complaints of a prisoner forced to remove her headscarf, but the Ninth Circuit reversed on the question of whether the correctional institution was covered by the statute and remanded for further proceedings. An Orthodox Jewish woman similarly lost her lawsuit to prevent law enforcement officials from removing her headscarf for the mandatory booking photo. *Zargary v. City of New York*, 607 F. Supp. 2d 609 (S.D.N.Y. 2009), *aff'd*, 412 Fed. Appx. 339 (2d Cir. 2011).

[23] Hashmi, *supra* note 20, at 432 (discussing Webb v. City of Philadelphia, 562 F.3d 256, 258 (3d Cir. 2008)).

pany image have charged the Walt Disney Company and Abercrombie and Fitch with employment discrimination.[24] Other companies, ranging from medical groups to private prison companies, have also been sued for refusing to allow their employees to wear *hijabs*.[25]

B. THE *AGUNAH*

S.A., a sixty-one-year-old Orthodox Jewish woman, filed for divorce after thirty-seven years of marriage to her eighty-year-old husband, an ordained rabbi, whose violent behavior included a threat to carve letters into her stomach.[26] S.A. had supported her husband's volunteer religious and civil rights work for twenty-seven years of their marriage, but he contested her request to change the equitable distribution of the property due to his refusal to give her a *get*, a Jewish divorce.[27] Even though she had summoned him in front of two *beth dins*, he failed to appear, and a contempt citation—or *seruv*—was issued against him.[28] S.A's husband insisted that he would not come unless his preconditions were met.[29] Because she could not obtain a *get*, the couple's rabbi noted that she was an *agunah*: a "chained woman" who was married yet had none of the religious rights or benefits of marriage.[30] In addition to being unable to remarry, she "[could not] relate to married couples, nor [could] she freely interact with single

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[24] *See* Hashmi, *supra* note 20, at 444; Steven Greenhouse, *Muslims Report Rising Discrimination at Work*, N.Y. TIMES (Sept. 23, 2010), http://www.nytimes.com/2010/09/24/business/24muslim.html?pagewanted=all; *Muslim Employee Sues US Disneyland over Headscarf Ban*, BREITBART (Aug. 19, 2010, 1:07 AM), http://www.breitbart.com/article.php?id=CNG.5e4d052d8a65c3e244b3cae1bab6a2bb.291&show_article=1; Sarah Pierce, *Discrimination Suits by Muslim Employees Mount*, LEGAFI (Sept. 15, 2010), http://www.legafi.com/lawsuits/news/536-discrimination-suits-by-muslim-employees-mount-. *See also* McCloud, *supra* note 19, at 53 (noting that J.C. Penney fired a girl who refused to take off her headscarf, and that Quality Inn fired a woman for refusing to take off her scarf, although they rehired her after getting pressured to do so). My seminar student, Bryan Pierce, made me aware of the *Abercrombie* and *Disney* cases.

[25] *See, e.g.*, Equal Emp't Opportunity Comm'n v. Geo Group, Inc., 616 F.3d 265 (3d Cir. 2010) (upholding "no headgear" religious accommodation); McCloud, *supra* note 19, at 53 (describing Pinkerton guard sent home because she wanted to wear a headscarf with her job).

[26] S.A. v. K.F., 2009 N.Y. Misc. LEXIS 169 at *1, *7 (N.Y. App. Div. Jan. 28, 2009).

[27] *Id.* at *3, 9–11.

[28] *Id.* at *9.

[29] *Id.* at *10.

[30] *Id.* at *15.

men."[31] She would be unable to go to "single's [sic] events or date . . . . '[A] woman who does not receive a Get is considered almost as if she's in mortal danger of her life because she has no ability to act in a normal fashion.'"[32] In addition, while S.A. was past childbearing years, when an *agunah* remarries without a *get* and has children, those children are condemned with the title *mamzerim* and are in many ways pariahs in the Orthodox community.[33]

One *agunah* explained her own anguish at the way in which her husband used the *get* to control her: "He was obsessed with me . . . . It was, 'If I can't have you, nobody can.' People don't know what to do with us. It's a type of slavery. We're at their mercy."[34] Another, whose lawyer husband withheld a *get* for seven years, said, "I can go to sleep every night peacefully now [that I have a *get*.] I feel a sense of relief you can't imagine."[35] Of the fate of *mamzerim*, one Orthodox woman explained: "If my daughter decided to have a child who would be a *mamzer*, she would get beaten by me with a leather whip on her behind. This seems to me the worst possible thing that could ever be. . . . They're like a child who is born to a father who is a drug addict or a mother who is a whore. It is the same thing."[36]

In response to the question why Orthodox women would not simply exit the Orthodox community rather than face such a difficult fate, one

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[31] *Id.* at *33.

[32] *Id.* at *33–34.

[33] *Id.* at *11. *See also Orthodox Jewish Women 'Get' Divorce Support*, WASH. EXAMINER (Feb. 23, 2007, 4:00 AM), http://washingtonexaminer.com/orthodox-jewish-women-039get039-divorce-support (noting that *mamzerim* cannot be Orthodox Jews); Alan C. Lazerow, *Give and "Get"? Applying the Restatement of Contracts to Determine the Enforceability of "Get Settlement" Contracts*, 39 U. BALT. L. REV. 103, 105–06 (2009) (describing the status of *mamzerim*). Lazerow notes that this issue may affect as many as 15,000 Jewish women. *Id.* at 107.

[34] *See* Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 370 (1999). *See also Orthodox Jewish Women 'Get' Divorce Support*, *supra* note 33, at 1 (quoting agunah Cynthia Ohana) ("This is a hostage situation. We are being held for ransom."); Lazerow, *supra* note 33, at 108–10 (describing psychologist Abraham Maslow's view that *agunot* are deprived of "love needs," resulting in lack of self-esteem, achievement, and self-respect, and additional mental health problems).

[35] Greenberg-Kobrin, *supra* note 34, at 370.

[36] Susan Weiss, Ctr. for Women's Justice, Remarks at the Conference of the Hadassah-Brandeis Institute and the Jewish Orthodox Feminist Alliance: Choosing Limits, Limiting Choices: Women's Status and Religious Life, Agunot and the Powers that Be 11–12 (Mar. 13–14, 2005).

website reminds:

> It is important to remember that most women who find themselves to be agunot would face overwhelming ostracism and isolation if they chose [to] remarry. First, an Orthodox Jewish man with whom they would share customs and religious views would not marry them without a get. Any children born without having the get are prohibited from marrying any other Orthodox Jews. For many of these women, their entire family is Orthodox. Were they to ignore religious strictures, their parents, siblings, aunts, uncles, cousins, and friends might shun them.[37]

C. CHRISTIAN DOMESTIC DISCIPLINE

In the emerging Christian Domestic Discipline ("CDD") movement, spouses are committed to the view that the husband is the head of the household, and that he should use physical punishment to discipline his wife and reinforce his dominant role, as defined by an oral agreement that the husband and wife work out with each other.[38] Such discipline includes "maintenance spanking" and "punishment spanking."[39] Maintenance spankings serve to "punish small infractions over a period of time, remind the submissive to behave, reinforce roles in the relationship, remind the submissive of harsher consequences should they misbehave, and allow the feelings of dominance and submissiveness in the relationship."[40] By contrast, "punishment spankings" are "usually severe and cause a substantial amount of pain."[41] One practitioner of CDD describes her experience in this way:

> During the pain and shame of a disciplinary spanking—when we're wailing over the knee of our partner—even those (like me) who invite or agree to such a system will find themselves regretting the decision. But

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[37] *Agunahs—Life Without a Jewish Divorce*, SQUIDOO, http://www.squidoo.com/jewish-divorce-child-custody-and-agunot (last visited Jan. 2, 2012).

[38] *See, e.g.*, *Domestic Discipline*, JEHOVAHS-WITNESS.NET, http://www.jehovahswitness.net/jw/friends/78823/1/Domestic-Discipline (last visited Jan. 2, 2012) (describing premises of CDD); *Introduction to DD: Basic History and Concepts*, CHRISTIANDOMESTICDISCIPLINE.COM, http://www.christiandomesticdiscipline.com/introdd.html (last visited Jan. 2, 2012). *See also* TAKEN IN HAND, http://takeninhand.com/taken.in.hand.in.a.nutshell (last visited June 22, 2011) (describing the purpose of CDD).

[39] *Introduction to DD: Basic History and Concepts*, *supra* note 38.

[40] *Id.* My student Emily Johnson made me aware of this movement.

[41] *Id.*

> afterward, when the burning pain ebbs to a dull throb and the punisher explains in loving tones why it was necessary, the submissive partner remembers why they wanted it this way in the first place. For they know that ultimately no one could ever come as close as their dominant mate to making them feel loved, protected, nurtured and excited.
>
> And for the dominant partner the rewards are there as well—even if they regret having to be the heavy during their mates [sic] period of over-the-knee distress. But even before the tears have faded they know that their errant partner didn't just earn that spanking—he or she needed that spanking.[42]

While I am unaware of any state prosecutions of husbands for exercising CDD, this possibility has been debated in law school exercises and a police blog.[43] In situations where such discipline results in physical harm to the woman in "no-drop" states where women may not control dismissals of abuse prosecutions, or in cases where a wife tries unsuccessfully to revoke consent to a particular instance of discipline, such a scenario could occur. From the lack of reported cases, it appears that the states have taken a hands-off approach to CDD situations if they even know about them.[44]

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[42] Vicki Blue, *A Spanking Good Lifestyle—Chapter One: Why Domestic Discipline?*, CHRISTIAN DD GROUP, http://www.christiandd.com/freestories/vickiblue/dd1.html (last visited Feb. 9, 2012).

[43] *See, e.g.*, *Criminal Case Study 1*, NAT'L JUDICIAL EDUC. PROGRAM, http://njep-ipsacourse.org/S5//S5-3.php (last visited Dec. 30, 2011) (describing domestic abuse case study involving practitioner of CDD); *Christian Domestic Discipline Marriages*, POLICESPECIALS.COM, http://www.policespecials.com/forum/index.php?/topic/116635-christian-domestic-discipline-mriaes/page__p__1994988__hl__%2Bchristian+%2Bdomestic+%2Bdiscipline+%2Bmarriages__fromsearch__1#entry1994988 (last visited Dec. 30, 2011) (discussion of whether police should follow up on third party report of CDD).

[44] A fourth provocative case involves government intervention into the FLDS (fundamentalist Mormon) communities in Texas, Utah, and elsewhere. Paul A. Anthony, *Texas Child Advocates Believe System Failed After FLDS Raid*, SAN ANGELO STANDARD-TIMES (Mar. 27, 2009), http://www.sltrib.com/news/ci_12013868. In April 2008, the Texas Department of Child Protective Services removed 468 youth from a Texas compound of the FLDS, including 29 women thought to be children. *Id.*; Brent Hunsaker, *Women, Children and Pregnant Teens Removed from Texas FLDS Compound*, ABC 4 NEWS (Apr. 5, 2008, 2:33 PM), http://www.abc4.com/news/local/story/women-children-and-pregnant-teens-removedfrom/6_oPVGfc3ECHV08KrDOIwQ.cspx. The key charge against the sect was that its leaders were forcing female children into plural marriages. Anthony, *supra*. I ultimately decided not to include this case in the main discussion because of the ambiguity about whether these "adult" women were much past the age of eighteen, and autonomy discussions raise somewhat different considerations when they involve children, or those not much past the age of childhood. Moreover, the FLDS community has traditionally been so insular that questions about the capacity of these women to meaningfully con-

I would like to pursue the question of what the state response should be to these kinds of cases by first drilling down a bit into what it means to have an identity in which female and religious are equally critical modifiers. Muslim feminists who have pushed back against feminist pressure to take off the headscarf[45] have argued that the headscarf is constitutive, at least in part, of their identities. Similarly, testimonies of CDD women who tell their stories often claim that they have tried other unsatisfactory relationships with their spouses or other men; they claim that they have found meaning and identity through CDD relationships.[46]

After considering how religious conduct is integral to a woman's identity, I will think about whether the state has any interest in being involved in identity conflicts that a woman may experience as a result of her commitments to her various communities. This inquiry will not comprehensively cover all of the potential conflicts among women's communities that arise. Ayelet Shachar, among others, has pointed out that there are more than two actors in most conflicts involving religious women: there is the woman herself; there is her religious community; and there are other religious communities interacting with her and her community and sometimes watching how the state responds to ensure that they are equally treated.[47] Finally, there is the state itself, a multi-jurisdictional entity that may intervene at many levels using various types of procedure, from criminal and civil court to social services.[48]

I will consider, but reject, the view that the state should turn a blind eye to the conflicts of identity that religious women experience because it

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sent to anything are much more difficult to assess than in the other cases. My seminar student Melanie Cook made me aware of many of these issues facing FLDS women.

[45] *See, e.g.*, Vojdik, *supra* note 15, at 662 (noting that feminist scholars in the United States have argued that veiling represents subordination of women).

[46] *See, e.g.*, DeAnna, *DeAnna's Testimony: CDD Is Not Domestic Violence*, CHRISTIANDOMESTICDISCIPLINE.COM, http://www.christiandomesticdiscipline.com/ deannas-testimony.html (last visited Jan. 2, 2012) (describing how DeAnna, the author, previously in an abusive marriage, married a Christian man and became cruel to him until she discovered CDD) ("[CDD created a relationship of] loving submission, rather than fearful submission. I want to submit to him, and he is truly becoming a 'servant leader.'").

[47] *See* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 27 (2001) [hereinafter SHACHAR, MULTICULTURAL JURISDICTIONS] (identifying conflicts of individual vs. individual; individual vs. state; identity group vs. identity group; identity group v. state; non-member vs. identity group; and individual group member vs. identity group).

[48] *See id.*

is a matter of their choice. However, I will also reject the argument that the state should intervene coercively in most situations because women cannot make autonomous decisions. Traditionally, freedom of religion cases have concentrated on the need for, or impropriety of, coercive state intervention—for example, state attempts to restrain, prohibit, or punish the expression of one's religion through daily rituals, dress, or practices such as food limitations or proselytization. In my view, though, if the state has a legitimate interest in how a woman's religious identity works out in practical behaviors—and I think it does—that interest may be furthered in most cases in other ways besides regulation or criminalization. There will be situations where the state must intervene coercively, but they should be limited to those cases where the need to intervene is truly compelling.

For other cases, states have at their disposal many other ways to influence religious women and their communities toward gender equality. Examples of such ways include education (for example, teaching religious women that their expression of identity is harmful to themselves or others), symbolic non-acquiescence (communicating to the women and others that the state rejects such expression as inconsistent with the state's values), non-coercive dispute resolution, and providing incentives or disincentives to women to forego damaging forms of identity expressions. Primarily, I hope to underscore that the state should be more cognizant of the (relatively) non-coercive methods at its disposal to deal with gender inequality in religious communities, so that it resorts to more coercive methods only when there is an extremely high state interest that can only be served by regulation. In essence, I suggest that state lawmakers should voluntarily impose a form of strict scrutiny on their own decision-making *vis-à-vis* religious communities and select the least restrictive alternative virtually all of the time.

II. RELIGIOUS CONDUCT AS IDENTITY: COMMUNICATION, COMMUNITY, POLITICS, AND THEOLOGY

A religious woman's identity is complex; it plays many roles in her life and it may be difficult to separate a woman's understanding of herself as a religious person, a woman, a citizen, and even a feminist. First, as many headscarf wearers note, acts of religious identification have interpersonal dimensions. Some of those dimensions may involve traditional

"communication," that is, one person attempting to start a dialogue with or relay a message to another.[49] Other dimensions may involve more complex interpersonal interaction than simply "messaging": for example, religious conduct, including dress, may play an integral part in the creation of community among adherents and the demarcation of its boundaries.[50] Religious conduct can also serve political roles[51] and create community with the divine in the understanding of many religious believers.[52] For these reasons, the Supreme Court's current understanding of how religious conduct functions, most strikingly in the belief-action distinction that continues to bedevil religious freedom cases, is really troublesome.[53]

A. RELIGIOUS CONDUCT IS A FORM OF INTERPERSONAL COMMUNICATION

Most often, particularly among Western-raised feminists, the interpersonal dimension of religious conduct is described primarily as expressive—a woman chooses to wear certain articles of clothing or engage in certain behaviors to communicate to an external world what she wants others to know about her life history, commitments, passions, and understanding of herself.[54] Or, as Hannah Arendt might have said, a religious woman engages in certain speech and action to show herself, to express her distinctiveness from anyone who has ever lived, and thereby manifest her capacity for freedom and equality with others.[55]

However, describing a woman's religious behavior as mere self-expression can often be simplistic or misleading in a number of ways. First, many religious behaviors are not always, or even primarily, intended to be communicative. For example, consider the use of clothing. A religious woman may initially decide to wear a headscarf or a cross out of some thoughtful intention to send a particular message about her faith tradition and her place in it. Yet over time, such clothing or jewelry can be-

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[49] *See infra* Part II.A.

[50] *See infra* Part II.B.

[51] *See infra* Part II.C.

[52] *See infra* Part II.D.

[53] *See infra* Part II.E.

[54] *See, e.g.*, SCOTT, *supra* note 17, at 138–39 (noting that opponents of the headscarf law in France made a demand for social recognition and a desire for agency and individual autonomy).

[55] *See* HANNAH ARENDT, THE HUMAN CONDITION 175–78 (1958).

come as much habit as chosen attire, selected because of the comfort of repetition or availability, or because the woman senses it to be a part of her body, rather than because she wants to make a particular statement about her faith. Nevertheless, a woman who dons religious apparel out of habit may still occasionally recognize that she is making a religious statement through her mode of dress.

Second, many religious expressive actions can be aimed primarily at the self. For example, a woman may wear a cross that is not visible to others as a communication to her self—a reminder of who she is or wants to be, what she wants to stand for, and how she wants to conduct her life. The message that the religious object sends to the woman, which reinforces her self-understanding or challenges her to the life symbolized by the religious object, may never reach another audience.

Third, one might argue that some religious dress is intended to avoid communication, attracting attention to the self, or communicating an idea about the self. Certainly, the exhortation to modest dress in some religions can be characterized as a demand that women choose one message about themselves over another.[56] For example, modest dress may be emphasized so that women will not communicate reductionist self-descriptions signaling that they are only sexual objects; modest dress may remind everyone that women are whole persons, not body parts.[57] Such restrictions may also serve as a message about property and boundary markers, permitting some (for example, one's husband) to see parts of a woman's body, while others cannot.[58] However, another way to read some modesty regulations is to interpret them as calls for women to blend in, not be noticed, submit to God so far as to be invisible, or more positively, to direct public attention onto others, not the self.[59]

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[56] *See* SCOTT, *supra* note 17, at 152–62, 172–73 (noting the French feminist outcry against the Muslim woman's refusal to be sexually available and free to make sexual choices as an "object of desire" and abandonment of critique of patriarchal objectification of women and emphasis on their sexuality).

[57] *See id.*

[58] *See, e.g.*, Vojdik, *supra* note 15, at 664–65 (noting how masculinities construct gender through regulation of women's bodies, including headcoverings); SCOTT, *supra* note 17, at 57–58 (discussing how French conquerors were fascinated by Algerian veils and saw harems as representing an imprisonment of Arab women and their inaccessibility to the French as sexual partners).

[59] *See* Hashmi, *supra* note 20, at 415 (explaining various reasons for why a woman may wear a *hihab*).

It is also overly simplistic to talk about religious behavior as expressive in the "I am making a statement" sense. Communication of any kind, including through religious symbols or behaviors, transcends simple messages consciously chosen by the speaker and becomes a part of a dynamic and interdependent relationship between speaker and hearers.[60] However, this relationship does not always produce a clear and consistent message embraced by both speaker and hearer. In framing the non-endorsement test to adjudicate Establishment Clause cases, Justice O'Connor famously acknowledged that there may be a disjuncture between the speaker's expressive intentions and what O'Connor dubbed the "objective" message that a reasonable, well-informed observer of the symbolic expression might read from it.[61]

Justice O'Connor's definition, while helpful, does not acknowledge the possibly shifting, ambivalent, and varied intentions that might be carried in a speaker's religious expression, including the speaker's subconscious or barely understood motivations, or intentions that might shape such expression. Nor does it fully acknowledge the multiplicity of meanings received by or attributed to the expression, even by a single recipient of that message, given the recipient's personal history and the circumstances of the expression. Yet, at least, the O'Connor formulation acknowledges the possible mismatch between the message a speaker intends to convey about her identity, her values, and her loyalties, and the message received by those experiencing that expression. This point is clearly illustrated by the recent *burqa* controversy in France, where French secular women read a much different message from the *burqa* than those who put it on.[62]

Religious clothing and other behaviors can similarly create an expressive relationship even in momentary encounters. If I pass a nun in a habit or a Jewish man wearing a *tefillin* or *kippah* on the street, my glance, comprehension, acknowledgement, or withdrawal from him or her will af-

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[60] *Id.*

[61] *See* Lynch v. Donnelly, 465 U.S. 668, 690–91 (1984) (O'Connor, J., concurring) ("[T]he meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community[.]"); County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989) (describing the objective observer).

[62] *See* SCOTT, *supra* note 17, at 172–73 (describing French feminist abandonment of critique of objectification of women in favor of headscarf ban to protect women's rights and the republican project).

fect more than just my own experience and perspective. My reaction may also change the experience of the religious person I encounter. If I see a nun or *burqa*-wearer and avert my eyes, stare with disapproval, smile in sisterhood, or respond otherwise, she will notice and her life will be affected, if only briefly.

Such expressions play an important role in the shaping of one's identity, since identity is a complex brew that evolves over one's lifetime. Both the person whose identity is being formed and those around her have a hand in shaping individual identity, and what they throw into the mix contributes to a lengthy recipe of influences, each tossing in more as time goes on to perfect the result. Although each life may have integrity, the complexities involved in self-definition suggest that a person's identity evolves throughout his or her entire lifetime.

However, it is unlikely that observers can keep the complex and shifting identity of the other in mind all the time, even if both individuals have had a long and very close relationship. The human urge to categorize the "Other," to create a reliable and predictable form for her identity, is very strong.[63] If I read the same message from another person's behavior dozens of times, those sense-impressions may eventually harden into a construction of the Other in my mind that I will continue using to understand her. My own responses and behaviors will settle into similarly predictable patterns that bleach out much of the nuance of her expression, and ignore the subtle changes in the Other's identity that emerge over time.

We can see why this dynamic becomes problematic in relation to religious women's rights and dignity. For example, once an Orthodox Jewish or Christian woman becomes the archetype religious woman in my mind, and once I have attached my own expectations to that archetype, it is very difficult to avoid essentializing. A *hijab*-wearing woman will provoke a similar evaluation and likely a similar response from me, no matter who and what else she is, one that gets in the way of what she actually intends to communicate and my ability to respond in a way that makes for neighborly relations between us.

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[63] *See* EMMANUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY 198 (Alphonso Lingis trans., Duquesne Univ. Press 1969) (describing the subject's attempt to totalize the Other).

B. RELIGIOUS CONDUCT CONSTITUTES COMMUNITY

Religious rituals and behaviors also serve the social purpose of constituting communities, often in ways that enrich and deepen human experience, which in turn help to shape both individual and communal identities. Participants in communal religious rituals report a range of interpersonal experiences when they are acting in community, from a transcendence of self into a higher reality of wholeness and fulfillment, to an experience of emotional and intellectual intimacy with other members of the religious community.[64] Whether an individual kneels or *davens* in prayer, sings traditional liturgies, or recites creeds or histories, each of these experiences draws the individual beyond immediate worries and demands of the material world to a broader and more profound experience of the human condition, including a connection with the past.

Even less ritualistic religious community experiences can be a rich source of identity formation and development. Religious women who serve a supper after services, supervise youth group activities, run a soup kitchen, or write letters to members of Congress on behalf of social causes, may sense that, precisely because they are communal, these experiences are critical to their own self-constitution. Such women may find their sense of self enriched by working together silently to put a meal on the table, by sharing their value commitments with like-minded persons in their community, by expressing compassion or cheering or inspiring or listening to those they want to serve.

Similarly, religious communities can serve a critical function for the believer, challenging her about who she wants to be and offering her values by which she can frame her life-story and exemplars of womanhood (both ancient and archetypal, and contemporary and local). They can call her to account when she does not act as a person of integrity, betraying the life-story she has created and pledged to the community or to God. Conversely, in critiquing community expectations from her own vantage point, the religious woman can be shaping her community at the same time that it is shaping her identity.

Another social purpose served by religious identity expression is to demarcate both who is in the community and who is not. In one sense, this is another form of interpersonal expression—by wearing a *hijab*, cross, or

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[64] *See* Hashmi, *supra* note 20, at 415.

tallit, the believer is signaling his or her willingness to affiliate with others.[65] Again, there is a plethora of possible affiliating messages one can send in this way. By such dress, a woman might be evangelizing—calling others outside the community to join a community where they too can be set apart to do God's will or to be in the community. She might be simply testifying—here is who we are, what we stand for, and what you can expect from us. For example, a pair of nuns in habits handing out food on a street corner will send a different message about themselves, their community, and what passersby might expect from them than if they were dressed in business suits or jeans and a t-shirt.

But there can be a dark side when women in these communities define their boundaries through various forms of identity expression. This is especially evident when religious, social, or political communities police these expressions. In Israel, controversy has erupted over a new form of *kashrut* (kosher) inspection—*haredi* (ultra-conservative) women now inspect clothing shops to make sure that ultra-orthodox clothing is properly modest.[66] One news report, referring to a photo, noted that women sporting wigs, long sleeves, long skirts, and sensible shoes would not be considered properly dressed under *haredi* norms because they "lack hats worn over their wigs, their stockings are too sheer, white shoes are not permitted, many of the blouses [in the displayed photo] would be considered too modern, and they all lack a covering—either a shawl, or a jacket or a sweater—over their blouses."[67] While the Jewish state is not enforcing these regulations, some members of the *haredi* community are doing their part, as stores that refuse to comply with the inspection standards have been burned and non-compliant women have had bleach sprayed on their clothing.[68] *Haredi* men are similarly confined to the dress of their ancestors from eighteenth and nineteenth century Europe—dark suits, white

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[65] *Id.*

[66] *See Haredim Launch New Kosher Supervision . . . for Clothing Stores*, FAILEDMESSIAH.COM (Jan. 31, 2011, 2:44 AM), http://failedmessiah.typepad.com/failed_messiahcom/2011/01/haredim-launch-new-kosher-supervision-for-clothing-stores-234.html (describing push to get *hardi* women to comply with clothing ban); Neta Sela, *Kosher Haredi Dress: Nix Everything Tight or Red*, YNETNEWS.COM (Jan. 2, 2007, 3:43 PM), http://www.ynetnews.com/articles/0,7340,L-3347515,00.html (describing posters of "White List" clothing stores deemed to comply with these standards).

[67] *Haredim Launch New Kosher Supervision . . . for Clothing Stores*, *supra* note 66.

[68] *See* Sela, *supra* note 66.

shirts, beards with curling sidelocks, and black, full-brimmed hats.[69]

As the clothing inspection movement may suggest, these clothing standards perhaps go beyond regulation of behavior, as they also attempt to define who legitimately belongs in the community in a very visible way. Creating a visible system for identifying trustworthy insiders and untrustworthy outsiders has some positive aspects: it efficiently defines and protects the community in certain ways. Distinctive religious dress can serve to protect the boundaries of the community by signaling to insiders those people who are trustworthy, and share the same social expectations for behavior and other values as the viewer. Moreover, as I have suggested, by adopting the forms of religious expression demanded by such sub-communities, adherents receive a constant reminder of the values and actions which they have pledged to uphold, with such expressions serving as an occasion for reflection on values and self-discipline in behavior.

But there is a negative corollary associated with this attempt to define a community by defining its members' identities. Such dress can remind community members that outsiders not wearing the appropriate identifiers cannot be trusted and should be encountered in very limited and different ways. Similarly, religious dress and behavioral regulations may be a way of creating hierarchies of worth through the delineation of community boundaries—we insiders who dress and act appropriately are better, more pious, less sinful, and more worthy of care or respect than those outsiders who do not. As the inspection movement suggests, there may even be concentric circles within the insider group of those who are more inside and thus better than others, as well as circles delineating those who are more outside and less worthy.

The larger community may also suffer from this attempt to demarcate community boundaries. Distinctive religious behavior, such as the dress of the *haredi* community, can also aid in isolating communities by limiting the amount of intercourse and interdependence the community will have with outsiders who might benefit those in the community. Those within the community can easily avoid non-members simply by identifying them at a glance rather than engaging in any kind of extended human encounter that would permit a fairer judgment on whether the outsider is trustworthy and a valuable conversation partner. Furthermore, outsiders can easily ca-

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[69] Lisa Katz, *Ultra-Orthodox Judaism: Haredi Jews*, ABOUT.COM, http://judaism.about.com/od/denominationsofjudaism/a/haredi.htm (lasted visited Jan. 2, 2012).

tegorize insiders by dress or other religious expression as "those people," who are either unwilling or unworthy of further engagement.

Beyond the interpersonal rejection of the Other, the easy identification of members of a religious community by outward expressions of identity, such as dress, may also result in exclusion, stigmatization, and discrimination against social minority outsider groups. As we have seen in the Taliban in Afghanistan and places throughout the world, when it is easy to detect minorities because they are marked by physical manifestations, such as clothing, enforcers can more easily punish noncompliance with majority norms.[70] The Supreme Court's suspect class criterion of visibility recognizes the fact that identifying people as part of despised groups and refusing them access to the tangible social benefits offered to others is easier when there is a visible sign of group status,[71] whether those identifying markers are skin color, clothing, or behavior such as keeping kosher or midday prayer. To identify someone as "Other" based on dress, for example, permits the other to be cabined into a stereotype and treated as a diminished person who is not worthy of the same respect or care as those inside one's community.

C. RELIGIOUS CONDUCT CREATES POLITICAL IDENTITY

Like other symbolic actions from sit-down strikes to street protests, religious identification through clothing or ritual behavior can serve a political purpose. Such expression, particularly because it summons humans in a holistic way that often engages heart, mind, spirit, and body, can mobilize and energize a group of others with common commitments and perspectives to combine their power and energies toward a common goal. Similarly, religious conduct can also serve as an act of personal defiance against the prevailing power structure. A possible example is the Falun Gong, which has morphed from a "traditional Chinese spiritual discipline. . . . which consists of spiritual, religious, and moral teachings for daily

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[70] *See, e.g., Report on the Taliban's War Against Women*, U.S. DEP'T OF STATE (Nov. 17, 2001), http://www.state.gov/g/drl/rls/6185.htm (describing violent enforcement of burqa requirements on women in Afghanistan).

[71] *See* Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 765 ("[Such visible distinctions] are most conducive to creating the awareness of inequality . . . . visible differences are always capable of providing extremely robust platforms for inequality[.]").

life, meditation, and exercise, based upon the principles of truthfulness, compassion, and tolerance" to an expression of political dissent against the persecution tactics of the Chinese government.[72]

The headscarf has seemingly served these political purposes in European and Turkish debates: Valorie Vojdik argues that young, urban women have chosen the headscarf to challenge both secular elites who understand the headscarf as a symbol of oppression by men, and Islamist understandings that the veil protects modesty and the woman's place at home.[73] At the same time, many such women are rebelling against Western feminists' attempts to define a valid form of feminism that excludes their faith.[74] They also challenge a Western social system that has distorted the role of sexuality in ways that confine and endanger the feminine gender in public life,[75] as evidenced by rampant eating disorders, excessive cosmetic surgery, immodest clothing, and the sexualization of young children in pageants and photography. Joan Scott suggests that Muslim girls who wore the veil after the school ban had three main reasons: to identify themselves as immigrant women; as a compromise with their families so they could have access to public life; and for some protection against French public environments that endangered or discriminated against them as Muslims.[76] As this very complex example indicates, religious behaviors can be powerful politics—from within the family to within the nation.

D. RELIGIOUS CONDUCT CREATES THEOLOGICAL COMMUNITY

Finally, religious conduct has a strictly theological dimension. Many secular legal thinkers describe minority religious rights cases as posing difficult choices for the believer about which set of conflicting rules

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[72] *See* H.R. Res. 605, 111th Cong. (2010) (describing Falun Gong and recognizing persecution of Falun Gong adherents). The United Nations has also condemned persecution of the Falun Gong. *2010 UN Report Highlights Falun Gong Persecution in China*, STATUS OF CHINESE PEOPLE (Oct. 17, 2010), http://chinaview.wordpress.com/2010/10/17/2010-un-report-highlights-falun-gong-persecution-in-china/.

[73] *See* Vojdik, *supra* note 15, at 664–65.

[74] *See, e.g.*, SCOTT, *supra* note 17, at 85 (quoting Kada's view that emancipation and Westernization are mixed up in the French view).

[75] *See id.* at 154–55 (noting that for Muslims, the veil recognizes the threat of sexuality for society and politics, and that "open" systems permit voyeurism and exhibitionism).

[76] *Id.* at 137.

(God's or the state's) to obey, using a legalistic model of religious experience.[77] By contrast, many religiously committed individuals, from the Western monotheistic traditions at least, are more likely to understand these conflicts in interpersonal terms.

It is difficult for a secularist to understand the strength and pervasiveness of religious women's relationships with God. Perhaps one might attempt a weak analogy: asking a Muslim woman to disobey a *Qur'anic* injunction is like asking a mother to reject her child, or a man to denounce his son. But for many believers, the relationship with the divine transcends relationships with even the most intimate others, including the inner relationship with one's self. For them, the primary relationship of existence is their relationship with God, and through their daily conduct, they enter into a community with a distinct Other.

Religious people may describe this communion, this gathering together of the self and the divine, in quite different ways. For some, their religious conduct forms an ongoing conversation with a divine Other. That conversation may take the form of a demand from Allah, Jahweh, or Jesus, and a response such as submission or obedience.[78] For some, it might be described as the call of a moral voice to the individual conscience about what the faithful person is called to do.[79] But that moment of community

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[77] A somewhat ironic recitation of this view can be found in Michael Stokes Paulsen, *God is Great, Garvey is Good, Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597 (1997) (reviewing Garvey's book, *What Are Freedoms For?*). He suggests that Garvey's position is "[i]n short, the religion clauses are God-fearing clauses. The law thinks that God exists and that He makes demands (rules, duties, prohibitions) on men, and that this reality requires the state to yield." *Id.* at 1611.

[78] *See* John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849, 862 (1993) (describing Vatican II's focus on submission of mind and will to the authority of the church). *See also* United States v. Macintosh, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting) ("[I]n the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by any of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."); Roshan Danesh, *Internationalism and Divine Law: A Bahá'í Perspective*, 19 J.L. & RELIGION 209, 214 (2003–2004) ("[The Bahá'í religion] exhorts individuals to fulfill their duties to obey and recognize God, show love and fellowship to the entire human race, and avoid any acts that might cause sadness to the hearts and souls of others[.]").

[79] *See, e.g.*, Robert J. Muise, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771, 774 (1996) ("[The conscience [is] a voice that is] 'present at the heart of the person, enjoin[ing] him at the appropriate moment to do good and to avoid evil,'. . . . [the messenger of God who] speaks to us behind a veil [and teaches us.])

may also be experienced as a loving response to a first loving outreach by God, or the generous care for an Other who is calling out in His need.[80] Indeed, that community of the individual and the divine has also been described by religious believers as a sense of losing oneself in the divine, or of being one with the Other, such that one's actions are neither distinctly chosen nor one's experience separable from the rest of creation.[81] In light of the testimonies over the centuries describing these relationships in richer and more complex detail, I will forego any further feeble attempts to describe them.[82]

The point is that as a person forms a community with the divine, religious conduct loses its character as a choice one makes in the same way one chooses bagels over bread in the grocery store, or even whether to cheat on a spouse with a co-worker. For some Muslim women who wear the *hijab*, to ask them to take it off is to ask them to reject or betray a relationship with Allah, a relationship that may be of the essence of a religious woman's sense of personhood, of meaning. For some Jewish women, to marry outside the faith is to turn their backs on the most important source of their being. And, presumably, for Christian women involved in domestic discipline, this religious practice is experienced as finding oneself in the submission to the divine through the hand of the partner.

E. ONE MORE TIME ON THE BELIEF-ACTION DISTINCTION

This brief excursion into the roles that religious conduct expressing

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(alteration in original) (quoting Catechism of the Catholic Church para. 1777 (U.S. Catholic Conference, Inc. trans., 1994)); Romans 2:15 (describing God's law as written on human hearts).

[80] Muise, *supra* note 79, at 771; Marie A. Failinger, *"No More Deaths": On Conscience, Civil Disobedience and a New Role for Truth Commissions*, 75 U.M.K.C. L. REV. 401, 424 (2006) (describing Luther's view of conscience).

[81] *See, e.g.*, Annette Reed, *St Teresa of Avila—October 15th. "Christ Has No Body Now but Yours,"* PAXTONVIC'S BLOG (Oct. 13, 2009), http://paxtonvic.wordpress.com/2009/10/13/st-teresa-of-avila-october-15th-christ-has-no-body-now-but-yours/ ("[St. Theresa has an] ever growing sense of oneness with God [and being] overwhelmed with divine love[.]").

[82] *See generally* REYNOLD A. NICHOLSON, THE MYSTICS OF ISLAM (1914), *available at* http://www.sacred-texts.com/isl/moi/moi.htm (providing an introduction into the inner life of Muslims from all backgrounds and classes); THE SCHOCKEN BOOK OF JEWISH MYSTICAL TESTIMONIES (Louis Jacob ed., 1997) (providing a comprehensive background to the Jewish personal experience with God); Augustin Poulain, *Mystical Theology*, *in* THE CATHOLIC ENCYCLOPEDIA (2011), *available at* http://www.newadvent.org/cathen/14621a.htm (discussing historical and modern mystics).

identity plays once more highlights the oft-remarked troublesome nature of the belief-action distinction introduced by the Supreme Court in *Reynolds v. United States*[83] and reinforced in *Employment Division v. Smith.*[84] The Court's belief-action distinction suggests that religious experience internal to the individual is absolutely protected, while any external manifestation of that experience, whether in speech or other human actions, is subject to prohibition, including through criminal sanctions. Taken literally, of course, the belief-action distinction says really nothing about rights at all: in a world without the technology to probe human minds, beliefs are necessarily absolutely protected because there is virtually no way for the state to know for certain what one believes unless he or she engages in actions.

The language of "religiously motivated conduct"[85] used by courts and commentators suggests that the conduct itself can be isolated as having no meaning—no expressive qualities of its own—and that the purpose for the conduct happens, in this case, to be religious, whereas in other cases the driving force behind the conduct might be secular. Yet, we can illustrate the fallacy of that assumption even without looking at religious conduct. Almost anything we do for functional reasons—eating, sleeping, working, or making love—we inflect with our own sense of identity and purpose. Were that not so, there would not be any high-end restaurants (or ethnic restaurants, or restaurants of any kind) or racks of sleepwear and bedclothes in various shades and shapes. Not to mention any need for the multitude of business uniforms or the outpouring of literature on love published throughout the centuries.

Where religious behavior is concerned, the self-expressive and identity-forming nature of many such mundane functional acts comes into high relief. This must be particularly true for religions such as Judaism and Islam, which stress behavior in accordance with commandments or in submission to the will of God as one of the most important pillars of faith.[86]

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[83] 98 U.S. 145, 163 (1878).

[84] 494 U.S. 872, 878–79 (1990), *invalidated in part by* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488; Frederick M. Gedicks, *The Rise and Fall of the Religion Clauses*, 6 B.Y.U. J. PUB. L. 499, 502–05 (1992) (describing the introduction in *Reynolds,* apparent demise, and resurrection of the belief-action distinction in *Smith*).

[85] *E.g.*, Emp't Div. v. Smith, 494 U.S. 872, 875 (1990).

[86] *See* Stephen J. Werber, *A Jewish Law Perspective with a Comparative Study of Other Abrahamic Traditions*, 30 SETON HALL L. REV. 1114, 1156 (2000) (describing Judaism and Islam

To give an example, a Jew who does not place milk and meat products together at his table or a Muslim who will not pick up a piece of bread that has touched pork may not be communicating anything to another person, since that other will often not know the context from which such behavior flows. But to suggest that such acts are not equally high forms of devotion as protected prayer, as a communication with the God who has covenanted with the Jew or has commanded submission from the Muslim, is to not understand or acknowledge how this act is different in kind than the acts of those who will not put milk with meat, or pork with bread, because they dislike the taste.

That is not to say that secular activity may never serve expressive functions important to one individual's identity. Otherwise, one would not know what to make of Minnesota Vikings fans who paint their bodies purple, put horns on their heads, and stand in the freezing snow half-naked to cheer their team. It is only to say that behavior commanded or encouraged by a religion is more likely to be critical to a religious person's identity, whereas so-called secular behavior is somewhat less likely to be so.

Such an understanding gives the lie to the idea that there is a clear distinction between religious expression, which generally is protected, along with speech, at the highest level in U.S. constitutional jurisprudence,[87] and religiously motivated conduct, which is currently protected at a lower level, with some minor exceptions.[88] Justice Scalia, a fan of the belief-action distinction, would likely retort that it is necessary for many reasons—including to cabin judicial activism—to have a clear dividing line between protected and unprotected conduct.[89] Indeed, there may be practical reasons that the courts must limit the protection for religious actions, but it should not be under the pretense that there is a clear line between belief and action, or between communicative and non-

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as giving "law based upon divine and immutable revelation" and noting that "[b]oth systems govern all aspects of behavior . . . .").

[87] *See, e.g.*, *Emp't Div.*, 494 U.S. at 876–77.

[88] *E.g.*, *id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

[89] *See id.* at 879, 887–88 (1990) (arguing, after favorably citing the belief-action distinction in *Reynolds*, that the centrality test is unworkable because it would require impermissible judicial inquiry into the "centrality of particular beliefs or practices to a faith" and that if the compelling state interest test is applicable at all, "it must be applied across the board").

communicative religious behavior. Until *Smith*, the Supreme Court dealt with the need for limits not by parsing the expressive nature of the conduct, but by requiring the state to prove that regulation or prohibition of that conduct was necessary to serve a compelling interest.[90] Focusing on the necessity of state intervention rather than whether the religious conduct communicates avoids trivializing or distorting the real nature of religious conduct.

III. DOES THE STATE HAVE AN INTEREST IN RESPONDING TO RELIGIOUS CONDUCT THAT CONSTITUTES IDENTITY BUT VIOLATES SOCIAL NORMS?

When most constitutional scholars discuss whether the state should be involved with citizens' choices, they assume that state interest and state regulation go hand in hand—if there is an interest, there is the power to regulate; if there is not, the state is disabled from doing anything meaningful to prevent certain behavior. I would take a somewhat different approach, suggesting that the state has good reason to notice all religious conduct, including conduct that is primarily intended to create community with the divine, but that does not mean the state has reason to regulate, prohibit, or otherwise interfere with religious conduct. Rather, the state's response to the religious conduct can and should be tailored to the nature of the religious conduct. In this section, I will discuss whether or not the state should intervene at all, and if so, what kinds of intervention are appropriate in the cases we are considering.

A. WHETHER THE STATE SHOULD TAKE A HANDS-OFF OR PATERNALISTIC APPROACH TO RELIGIOUS WOMEN'S CONDUCT: THE TROPE OF CHOICE

A common secular response to the problem of the *agunah* is to say, "How foolish is she? Why does she not just move on with her life and ignore what her rabbi and the people in her community think? Why does she not just leave Orthodox society and marry somebody who is not Orthodox?" Similarly, many secularists, including feminists, might see the *burqa*-wearing Muslim or the housewife in a CDD marriage, and wonder why they do not just choose to leave such a seemingly dignity-destroying situa-

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[90] *Id.* at 894 (O'Connor, J., concurring).

tion.

As Western law and Western feminism consider cases involving religious women engaged in what they consider non-feminist or dignity-damaging behavior, both theoretical systems assume that such conduct can be intellectually cabined and resolved through the framework of choice. Some feminists believe the law should treat these religious women as capable of making autonomous decisions whether to comply with the demands of their religious communities or cultures, even if their choices might conflict with core values of democratic states.[91] These feminists similarly believe that religious women should be permitted to live with the choices they have made, however subordinating and harmful they may seem from most feminists' perspective.[92] From this perspective, the French and Turkish laws[93] (and possibly the more modest U.S. government bans on headscarves in certain circumstances) might be denounced as coercive, precluding the woman's choice to wear religious covering. Under this framework, a state should refuse to intervene in the *get* rules of the Orthodox Jewish faith or to prosecute CDD because it should respect the woman's decision whether to commit to and live by the religious values of her choice.

Other feminists believe the state should *not* allow women to make certain choices that harm them, though the harms they see and the reasons for intervention may vary.[94] Those feminists who support *burqa* bans often focus less on the tangible harm suffered by the *burqa*-wearer (unless she is a child) and more on the harm to women's progress generally and to social commitments to secularism such as *laïcité*.[95] In the case of a *get*, the harm is largely borne by the individual woman, but it is social or interpersonal in nature—outside of Israel, although the woman cannot remarry in her faith community, she is at least theoretically free to abandon her com-

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[91] *See, e.g.*, Yola Hamzo Ventresca, *Religious Dress in Schools: Balancing Religious Accommodation, Family Autonomy, Free Choice and Equality*, 17 EDUC. & L.J. 245, 253 (2007) (quoting Lady Hale in the Begum headscarf case) ("[Achieving girls' full potential] includes [allowing them to] grow[] up to play whatever part they choose in the society in which they are living . . . . Like it or not[,] this is a society committed in principle and in law, to equal freedom for men and women to choose how they will lead their lives within the law[.]").

[92] *See id.*

[93] *See supra* notes 10–15 and accompanying text (discussing French and Turkish laws).

[94] *See* SCOTT, *supra* note 17, at 15.

[95] *Id.*

munity if she determines that its constraints are too burdensome for her.[96] In the CDD cases, there may be significant physical harm to the woman if the beatings become severe. Additionally, there is arguably psychological harm when a woman is in a subordinating relationship in which her husband is not only entitled but also encouraged to use shaming and physical violence to respond to seemingly trivial transgressions.[97]

Feminists who support the headscarf ban seem to fall back on either utilitarian or paternalistic arguments.[98] Playing the utilitarian card, they may argue that a woman cannot consent to wearing the *burqa* because that action, even if valuable to the religious woman, is outweighed by the social harm that other women suffer because the *burqa* reinforces the social validity of male domination. Playing the paternalism card, they may argue that *burqa*-wearing women clearly do not know what is good for them, and that the state should override their preferences. They may argue that a woman's consent to these practices suggests a lack of real choice—perhaps she suffers from outside pressures that cannot be resisted, but certainly her "choice" to follow her religious beliefs cannot possibly further her autonomy and growth. Others might argue that women's choices to wear the headscarf, not remarry because of lack of a *get*, or consent to domestic discipline, result from their laboring under false consciousness or even psychological disability that precludes autonomous (and therefore valid) consent.[99]

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[96] *See, e.g.*, Norma B. Joseph, Concordia University, Remarks at the Conference of the Hadassah-Brandeis Institute and the Jewish Orthodox Feminist Alliance: Choosing Limits, Limiting Choices: Women's Status and Religious Life, Agunot and the Powers that Be 25 (Mar. 13–14, 2005) (transcript available at http://www.brandeis.edu/hpi/pubs/agunot_powers_that_be-edited.doc).

[97] The following is an example of such a seemingly trivial transgression. In one fictional CDD story, the narrator wife describes how her husband justifiably paddled her for her failure to clean out the cat box because she had agreed to take care of the cat as a condition of bringing it into the home. Chula, *The Cat Box*, CHRISTIAN DD GROUP, http://www.christiandd.com /freestories/chula/catboxfirst.html (last visited Jan. 2, 2012).

[98] *Compare* SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 66 (describing Okin's views that women who remain loyal to religious cultures are victims of socialization, lacking in self-esteem) *with* Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L.J. 417, 426–28 (1996–1997) (arguing that the understanding of the self as socially constructed in relationship to others, especially in a culture of patriarchy, undermines traditional understandings of women's autonomy, but that the vision of women as victims is problematical).

[99] *See* Yehiel S. Kaplan, *The Power of Interpretation: Religious Scholars Elevate the Status of Female Guardian in Jewish Law*, 14 CARDOZO J.L. & GENDER 519, 530 (2008) (arguing that feminists accuse women who adhere to patriarchal religious traditions as having "false con-

However, it is not very helpful to think about these problems of intersecting community norms in terms of a simplistic version of choice—that a religious woman can decide to walk out of a religious community and into a Western secular community. Although philosophers have talked about the experience of living in overlapping communities,[100] most women's lives are more likely to resemble a stream fed by many tributaries, where even the source of the currents may be hard to identify. With the exception of a very few enclaves that have managed to create completely separate economic and social communities, such as the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS"),[101] most religious women in Western societies are moving between these communities for their work, their children's schooling, shopping, and other activities on a daily basis.[102]

Thus, rather than experiencing life as two hard spheres (religious and secular) that sometimes overlap and cause problems, a religious woman may have the sense of being tossed about by external demands not easily cabined, whose sources are not easily identifiable, except perhaps when a crisis comes to a head. For example, who is causing the pain of the *agunah*? Is it her husband, who is willing to hijack her life because of greed, a need for control, or simply vindictiveness? Is it her rabbi or religious community, who will not release her chains because of an ancient tradition? Is it her God? Is it a secular society that will not come to her aid against the community that is willing to shun her? Is it her unwillingness to take a healthy path? If Shachar is right that the stakes for many a minority religious community's sense of stability are especially high where

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sciousness").

[100] *See, e.g.*, Rhoda E. Howard-Hassman, *Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights?*, 24 MICH. J. INT'L L. 227, 236 (2002) (suggesting that modern women's commitments and identities are overlapping).

[101] *E.g.*, Hunsaker, *supra* note 44 ("[The El Dorado compound is a] fenced-in town, complete with utility services[.]").

[102] Admittedly, the level of isolation of some religious communities living in geographical enclaves, such as the Kiryas Joel Satmars, may call into question how porous these religious women's social boundaries really are. *See* Nomi M. Stolzenberg, Board of Education of Kiryas Joel Village School District v. Grumet*: A Religious Group's Quest for Its Own Public School, in* LAW AND RELIGION: CASES IN CONTEXT 203, 207 (Leslie C. Griffin ed., 2010) (describing formation of Satmar Jewish enclave in Monroe Township).

women's conduct is concerned,[103] we might expect the pressures to be especially intense.

In such a circumstance, where a religious woman's rights or dignity might be in jeopardy through the heavy hand of her religious or other communities, the depiction of the problem as whether the woman should choose to leave one community for the other is not adequate. Borrowing this image of two sharply different spheres in which she lives, some have argued that, so long as religious communities are inclusive of entrants and permit free exit by those who object to their practices, they should be able to engage in at least some practices offensive in a liberal democratic society, such as gender discrimination or hierarchical organization.[104] According to the choice model, absent some significant interference with women's abilities to make independent choices, such as evidence of physical coercion or misrepresentation, the government has no business intervening in any way.[105]

However, Shachar and others have pushed back, noting that realistically there may not be a "free entrance" or "free exit" for women in many religious communities in the same way that individuals can decide to join a bowling league or a bridge club, or to quit them if they do not like how the rules are interpreted.[106] Most religious women were born into religious communities rather than having affiliated with them after careful study of the alternatives. Though in Western societies, religious women may be exposed to a lot of competing influences that give them continuing opportunities for reevaluation of their commitments, it is difficult for anyone to completely undo or redo religious or secular beliefs that have framed the way he or she has grown up. Even lapsed religious people may retain commitments to certain values that were formed in them at early ages, such as social justice or selfless service, or they see the world through a

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[103] *See* discussion of women's religious identity, *supra* notes 46–51 and accompanying text.

[104] *E.g.*, Dwight G. Newman, *Exit, Voice and "Exile": Rights to Exit and Rights to Eject*, 57 U. TORONTO L.J. 43, 43–44 (2007) (quoting Chandran Kukathas', Joseph Raz's, and Susan Moller Okin's views about the relationship between exit rights and "oppressive" group practices).

[105] *See* SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 68–70 (summarizing the arguments of Chandran Kukathas).

[106] *See id.* at 41 ("[Exit strategy is a] cruel choice of penalties, either accept all group practices . . . or leave . . . ."). *See also* Johanna Bond, *Pluralism in Ghana: The Perils and Promise of Parallel Law*, 10 OR. REV. INT'L L. 391, 400 (2008) (arguing that Shachar's transformative accommodation approach does not adequately account for the difficulty of exit).

lens originally shaped by their religious upbringing.

On the exit end, to give up a religious community is not just to avoid the harm of certain practices that women may deem violative of the equality principle or otherwise odious to feminist values. It is also to give up the warp and woof of these women's lives—friendships, possibly relationships with spouses, children, parents, and siblings who are committed to the community, particularly in communities that use shunning to exclude dissenters. It is to wipe out of these women's lives the daily practices and rituals that may have become an important part of their self-identity and given their lives a sense of meaning and direction. The anguish of the *agunot*, who are not even expelled from their communities, but only placed to one side within them, tells this story. This is not even to count the loss of tangible benefits from support with childrearing, finances, livelihood, home, and physical environment that a woman exiting a closed religious community may be giving up.

Having to choose between important relationships that sustain her and gender equality may be difficult for any woman, even when the religious community is relatively integrated into a secular society, such as in mainline Christian denominations. Though women certainly do abandon their religious communities, responding to a religious woman's objection to gendered treatment by saying that she should simply quit her religious community if it does not meet her expectations for equality is somewhat like telling an American that she should go live in another nation if she does not like how the government here works.

In addition, it is not always clear that exiting necessarily improves the situation of religious women, even from a rights and dignity perspective. Most feminist and many multicultural discussions start with the presumption that religious communities provide few rights for women, and that they are generally less beneficial places for women compared with the many rights and opportunities that secular Western societies afford. But in reality, the package of rights that a religious community has to offer a woman may be quite competitive with the package of rights that a Western secular community is prepared to offer her. For example, the Church of Jesus Christ of the Latter-Day Saints ("LDS") has a "Church Welfare Plan," which provides material assistance to families who cannot meet their needs despite their best efforts.[107] An LDS woman might decide that

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[107] *See, e.g.*, *Welfare Services Fact Sheet—2010*, THE CHURCH OF JESUS CHRIST OF

these economic rights, unrecognized and unevenly funded in most American jurisdictions, are much more important to her than formal gender equality rights that she might or might not be able to exercise in secular society. Similarly, while Western feminists may be appalled at rights granted to husbands in orthodox Muslim communities, such as the right to discipline wives,[108] economically, a woman's marriage contract and authentic Islamic law may provide her more real-world economic protection than Western marriage and divorce law currently does.[109] A woman who exits her community may acquire precious Western rights, but lose equally valuable or more important religious community rights.

Perhaps most importantly, unless a woman has come to the conclusion that her religious community is entirely theologically corrupt, leaving her religion can be tantamount to rejecting God in her eyes. As I have suggested, this is no small thing for a religious woman. Also, she may have more reasons to stay in the community beyond her own sense that she will abandon God: the woman also may feel a call to her co-religionists not to abandon them, but to stay and fight against the injustice. Many religious communities are not ideologically as monolithic as secularists paint them to be. As Shachar and others point out, many religious communities are themselves sites of debate and dissent about what a particular religious tradition says about gender justice.[110]

LATTER-DAY SAINTS, http://www.providentliving.org/pdf/2010_WELFactSheet_English.pdf (last visited Jan. 3, 2012) (describing employment assistance and other services offered by the Church Welfare Plan and the process for provision of assistance to needy members of the church through storage centers, thrift stores, and employment resource centers).

[108] *See, e.g.*, Mohammad H. Fadel, *Public Reason As a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 CHI. J. INT'L L. 1, 9 (2007) (describing nominal legal right of husband to discipline wife and limitations on that right, including wife's cause of action for injuries caused by husband and evidentiary presumption in favor of wife's version of the events, and arguing that because of moral disapproval of such discipline, legal prohibition of this practice would not raise difficulties for a practicing Muslim).

[109] *See* Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSAT'L L. 1043, 1061–67 (2004) (noting that under traditional *Taqlid* jurisprudence, a woman's marriage contract provides her with property rights). Generally women must receive their dowry from their husbands upon marriage, earn maintenance money upon assuming their spousal duties, and be supported during a divorce initiated by their husbands. *Id. See also* Azizah Y. al-Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 J.L. & RELIGION 37, 46–55 (2000–2001) (describing women's rights in the original Islamic understanding).

[110] *See* SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 124–25; al-Hibri, *supra* note 109, at 38–39 (describing Muslim women's reexamination of accretions to original Is-

Faithful religious women may be the only credible dissenters who can effectively convince a religious community that it has lost its way from the true path on gender or other justice issues. Indeed, Shachar suggests that a religious community may give in to gender justice demands if a sufficient number of its women threaten to walk away unless the community changes its ways, since religious leaders know how important these women are to the continued life of the community.[111] Conversely, a secular attack from the outside is not likely to have the same credibility because religious leaders will (correctly) point out that the secularists do not share the same understanding of reality, informed by a particular faith tradition, much less the same values as the religious community. Thus, religious women may feel called, even by God, to serve as dissenters within their community, and a secular state that largely agrees with their position should not be encouraging them to exit and give up the prophetic edge they can offer.

These complications suggest that both the pure autonomy approach, which suggests that women can make their own choices and should be left alone to manage them, and the paternalistic approach, which suggests that religious women's choices are evidence of flawed autonomy, are not very helpful approaches. We might ask whether the state should respect women's autonomy by providing exemptions to religious communities for conduct that would otherwise be regulated by the government, such as spousal abuse. Conversely, we might consider whether it is intermeddling to be involved with religious community decisions in cases where regulation is inappropriate.

B. WHETHER TO REGULATE AT ALL: SOME RECURRING CONCERNS

The decision to exempt religious behavior comes with some practical concerns that the state cannot completely ignore. Three concerns that have been consistently expressed in church-state exemption cases are anxiety about fraudulent claims, concerns about social resentment, and the difficult problem of equal treatment for all citizens, regardless of their religious or secular commitments.

In the constitutional background, there is the ever-present concern

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lamic jurisprudential views of women).

[111] SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 124–25.

that someone will fraudulently claim to be engaging in religious expressive conduct that is not "objectively readable" as a message by the average passerby; the thought seems to be that conduct that "acts like" oral expression is less likely to be ambiguous and the subject of fraud.[112] The question is whether this risk is more significant than the risk to a believer that his or her conduct, expressive of his very self, will be prohibited or otherwise stifled. While charlatans abound, it has always seemed more likely to me that the number of cases in which religiously important expressive conduct will be repressed by the state will vastly exceed the number of free-riders who think to use the Free Exercise Clause as a cloak to get special privileges.[113]

However, a more significant worry is that onlookers who are neither charlatans nor people of the exempted religious belief will believe that others are getting a special advantage that they are not, and therefore resent the government's accommodation of expressive religious conduct. In *Sherbert v. Verner*'s heyday, the Supreme Court resolved this potential for resentment by making at least occasional subtle inquiries into the sincerity of the religious belief, its centrality to the religion, and evidence that the believer was willing to "sacrifice" for his belief.[114] For example, one might conclude from the Court's discussion in *Sherbert* that most people would not expect a charlatan or free-rider to give up a good job and take unemployment benefits unless he or she was truly acting out of religious belief,[115] although popular mythology about "lazy welfare recipients" might belie that assumption. In *Wisconsin v. Yoder*, the Court's lengthy discussion of the obvious sincerity of the Amish and the centrality of their

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[112] *See, e.g.*, David Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 276–83 (1995) (noting that review of a free exercise claimant's sincerity is necessary to prevent fraud by those who wish to avoid the law for non-religious reasons); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (discussing the unlikelihood of fraud or deceit claims).

[113] *But see* Steinberg, *supra* note 112, at 276–86 (discussing criticisms of sincerity review).

[114] *Id.* at 277 n.182 (quoting Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 988 (1986)) (arguing that the compelled exemption option has necessitated a sincerity inquiry).

[115] *Sherbert*, 374 U.S. at 407 (discussing the unlikelihood of fraudulent claims for exemption from work statute). Of course, there may be some easily identified situations where fraud and free-riding may be commonly expected, for example, exemption from taxes and from military service.

views on education to their way of life[116] seemed to signal to its audience that they should not resent this particular accommodation that most folks would not want anyway. On the other hand, the Court was less willing to grant accommodations to believers who refused to go to war or pay their taxes,[117] perhaps because their audience would perceive unfairness in exempting these believers from a heavy burden of citizenship.

The Court has often dealt with the possibility of resentment for religious accommodations through the rubric of harm to state interests. In *Smith*, for example, the Court considered the claim that there would be harm to the state's interest in uniform enforcement of drug laws because other groups besides Native worshipers might claim a religious exemption (the fraud concern).[118] However, the state could just as well have argued that such an exemption might engender resentment from non-religious folks for whom drug use was personally important, resulting in more scofflaws. By contrast, Justice Blackmun essentially argued that granting this exemption would not result in fraud because most people would be unlikely to find the use of peyote pleasurable;[119] presumably, he might also have argued that pleasure-seeking drug users would not analogize their drug abuse and the peyote experience, and therefore not be resentful of different treatment.

In moral and constitutional terms, however, this question is posed as one of equal treatment for all citizens. There has been a plethora of writing that suggests it is impossible to justify granting citizens with religious motivations an accommodation from state law for the same behavior that citizens with secular motivations must refrain from (or engage in).[120]

Described as a moral issue of equal treatment rather than a psycho-

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[116] Wisconsin v. Yoder, 406 U.S. 205, 209–13, 215–19 (1972) (discussing the uniqueness of the centrality of Amish views on education to their way of life).

[117] *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971) (denying exemption for conscientious objector to an "unjust war"); United States v. Lee, 455 U.S. 252 (1982) (denying Amish exemption from payment of Social Security taxes).

[118] *See* Emp't Div. v. Smith, 494 U.S. 872, 878–80 (1990) (describing history of requiring compliance with neutral, generally applicable laws); *id.* at 904 (O'Connor, J, concurring) (concluding that the state's interest in uniform drug employment was compelling).

[119] *See, e.g., id.* at 916 (Blackmun, J., dissenting) (noting that peyote is bitter and "simply not a popular drug" and unrelated to the trafficking in other drugs).

[120] Christopher Eisgruber and Lawrence Sager have been among those well-known academics beating this drum. *See, e.g.*, Christopher Eisgruber & Lawrence Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 449 (1994).

logical concern about citizen resentment, this problem is not quite so easy to gain philosophical repose on. Religious conduct may have a number of dimensions that so-called secular conduct does not, making them difficult to compare. On the other hand, neither secular nor other religious citizens will have access to the meaning of religious conduct engaged in by a believer, and therefore, the believer's experience and understanding of what is happening when she engages in religious conduct will seem often nonsensical or unbelievable to the secular (or other religious) person.[121]

I do not propose to try to resolve this difficult debate here. Others have done a good job laying out the arguments on either side. I would only note that a strict scrutiny-like refocusing of the key constitutional question on the state's interest seems like a more practical way of testing the necessity for state regulation than a debate about whether there is a violation of equal dignity either to grant or not to grant an exemption to believers. If the harm to the state's interest is actually great and actually provable—a case which Justice Blackmun was skeptical about in *Smith*[122]—there is little reason to conclude that the harm to the religious minority seeking accommodation should trump the harm to the larger community's interest. But, if the onus is on the state to prove its interest and how the accommodation will cause harm, both believers and non-believers may benefit from a more searching review and a more careful crafting of laws that will potentially enlarge the freedoms of both.[123]

Finally, in terms of a concern for citizen alienation if the state grants an exemption, a believer is more likely to be comfortable making a decision about whether she should civilly disobey because of her religious

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[121] For me, for example, that includes the descriptions given by women involved in CDD of their experience of fulfillment.

[122] *Emp't Div.*, 494 U.S. at 908 n.2 (Blackmun, J., dissenting) (noting that compelling interests must be more than abstract or symbolic, and that the state had neither enforced its interest in uniform drug laws nor raised that as an argument in defending its statute).

[123] I acknowledge that one important reason not to shift attention back to state justification of its laws is to protect legislative prerogative and process, since "state interests" are not always so easy to define with legislation that is the product of amendments and compromise. However, as Justice Marshall reminds us, the state should not have a problem giving a reason for its actions if there is one, and at a minimum, we might adopt Justice Stevens' view of the rational basis inquiry, which is to consider either the state's actual reason or (if we cannot identify it) a reason that would have motivated an impartial lawmaker considering the benefits of legislation that transcended the harm to the injured class. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

commitments if she knows that the state law forbidding her conduct is not ill-willed, indifferent, or oblivious to her plight. Conversely, a well-thought-out and well-crafted religious accommodation is less likely to cause non-believer resentment, either because the non-believer comes to understand and be compassionate about her counterpart's situation, or because the exemption provides a fair balance of rights and responsibilities for both believers and non-believers.

C. TO NOTICE WHAT THE STATE CANNOT REGULATE: SOME PRACTICAL CONCERNS

Even if constitutional and human rights jurisprudence should recognize a broader space for religious action than the belief-action distinction and its conceptual relatives, we must concede that the state may still have an interest in noticing and responding to, even regulating or prohibiting, religious conduct critical to the identity of a believer. But just as exempting religious communities from generally applicable laws poses some concerns, the state's choice to pay attention to more private conduct than it can regulate is not without its potential concerns, including a concern for state overreaching.

Some might object to the state paying more attention to religious conduct even while regulating it less, arguing that government bodies should not involve themselves with private expression or association at all unless they are prepared to regulate in some way. There are good arguments to be made about why a state should be blind or indifferent to religious (or similar expressive) conduct if it is not significantly harmful enough to require regulation.

From a practical perspective, state bodies such as the legislature may be more willing to intermeddle with the affairs of religious communities if they can stop short of regulation. If they do not have to pass a regulatory law to weigh in on some issue, they do not have to consider in the same depth the potential consequences to that community and how their actions might be perceived by other communities, both majority and minority. It is one thing to pass a resolution denouncing behavior—for example, the House's resolutions apologizing for slavery passed in 2008[124]—and still

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[124] *See House Resolution Apologizes for Slavery*, UNITED PRESS INT'L, INC. (July 29, 2008, 7:44 PM), http://www.upi.com/Top_News/2008/07/29/House-resolution-apologizes-for-slavery/

another to take responsibility for legislating specifics that will make that disapproval more than symbolic and harm real constituents in tangible ways.

There is also an important argument that the state should be blind to religious activity unless there is some compelling need for interaction, such as in childhood education. Whenever the state notices anything, some would argue, it has difficulty resisting the urge to regulate it. Moreover, there is a very real argument that any state notice of religious conduct is likely to result in either endorsement or disapproval under the Establishment Clause because any state notice has to be communicated in some way, and communication always contains some evaluation. Under the non-endorsement rationale, the costs of such recognition are significant: outsiders whose religions are not recognized or disparaged in some way may become disaffected with the political system or may feel disrespected by the government.[125] Insiders of approved religions may feel empowered to use their newfound recognition to gain special advantages for themselves, or to suppress outsider religions publicly or privately through harassment or abuse.[126] Those who are not strongly associated with either outsider or insider religions may feel pressured to join favored groups in order to receive the government's symbolic approval or its benefits, and to avoid disfavored groups that may have offered a rich opportunity for them to seek meaning, friendships, and direction for their lives.

D. A MIDDLE WAY: NEITHER EXEMPTING NOR OVER-REGULATING

I want to argue that although the state should recognize more religious activity as identity-forming conduct that comes within the ambit of religious freedom guarantees, the state may also respond more often than the strict scrutiny regime might suggest. However, its response should more frequently be milder than regulation though stronger than complete exemption from state concern. Rather, the state should use its non-regulatory powers—for example, symbolic non-acquiescence—more often

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UPI-84171217375080/ (noting also the Senate apologies to Native Americans and Hawaiians, and legislation apologizing for the Japanese internment during World War II).

[125] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (O'Connor, J., concurring) (1984) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community.").

[126] *Id.*

to project social norms like gender justice, rather than criminalizing or regulating religious behavior.

A "bottom line" for any state regime regulating or criminalizing religious behavior must be the ability to identify with accuracy and precision when religious conduct will so endanger vital state interests that the state cannot afford to give any leeway to the religious believer or her community.[127] The strict scrutiny test has traditionally embodied this bottom line approach to the problem of fundamental rights that threaten critical state values or interests.[128] In its first query, on the state's compelling interests, the test recognizes that there are some interests that the state must consider bottom line concerns critical to protecting human rights and democracy, which cannot be sacrificed even if there is some plausibly superior interest from the perspective of religious (or other) communities.[129] Perhaps the most obvious and potentially provable is the endangerment of human life, though one can propose similar compelling state interests such as protection against the despoiling of the environment or the protection of the state itself.[130]

The perennial problem for the courts is to identify when the legislature or executive has overstepped its prerogative, either in presenting as compelling an interest that is at best substantial, or more frequently, in suggesting that a certain form of regulation is actually necessary to

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[127] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 556 (1997) (O'Connor, J., concurring) (noting Madison's view) ("[T]he State could interfere in a believer's religious exercise only if the State would otherwise 'be manifestly endangered.'"). It goes without saying that this argument is not the current rule that the Supreme Court utilizes for Free Exercise Claims. *See* Emp't Div. v. Smith, 494 U.S. 872, 879–84 (1990) (holding that neutral, generally applicable laws are not held to this heightened scrutiny standard).

[128] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

[129] *See, e.g.*, U.S. v. Lee, 455 U.S. 252, 258–59 (1982) (holding that protection of the Social Security system was an overriding state interest that would trump even sincere religious objections).

[130] *See, e.g.*, Thunderhorse v. Pierce, 418 F. Supp. 2d 875, 895 (E.D. Tex. 2006), *aff'd*, 232 Fed. Appx. 425 (5th Cir. 2007) *and* 364 Fed. Appx. 141 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 896 (2011) (holding that in the prison setting, inmate segregation policies designed to protect inmates from danger may override religious freedom); Crow v. Gullet, 541 F. Supp. 785, 792 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (recognizing compelling environmental interest in state completion of construction projects that overrides Native American religious freedom burdens).

achieve that interest.[131] The second part of this analysis really asks three questions. First, is the state's vital interest really at stake? Second, will the proposed regulation protect the state's vital interest to a significant degree (the causation question)? Third, are there any regulations that will achieve at least as much protection for the state's vital interest with less sacrifice of human liberty or putative human rights (the least restrictive alternative question)?

But that is not to say that the state has to review all of its possible reactions to religious expression under a strict scrutiny protocol. The state may acknowledge and act on the reality that religious expression, including religious conduct, can cause harm that may be largely symbolic and emotional, showing disrespect, intolerance or bigotry for others. We might look at the declarations of the Aryan nation for such an example:

> The group states that God's creation of Adam marked "the placing of the White Race upon this earth. Not all races descend from Adam. Adam is the father of the White Race only["] . . . Folding in anti-Semitism, the group goes on to explain that non-Aryans are not merely inferior but must be destroyed: . . . . "We believe that there are literal children of Satan in the world today. These children are the descendants of Cain, who was a result of Eve's original sin, her physical seduction by Satan. We believe that the Canaanite Jew is the natural enemy of our Aryan (White) Race."[132]

We should also acknowledge that religious conduct may also result in other tangible costs, such as economic loss to the state or taxpayers (for example, where a tax exemption is offered to some, so that the tax burden must be shifted to others or absorbed) or inconvenience to the individual (for example, where an employee is granted an accommodation for religious holidays and his co-workers have to work around it).

In cases where constitutional tradition does not (or should not) permit regulation or prohibition under a strict scrutiny regime, but the state is

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[131] *See Emp't Div.* v. Smith, 494 U.S. 872, 893 (1990) (O'Connor, J., dissenting) ("[The previous Free Exercise rule required] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."). Perhaps the most well-known example of a government's failure to do both is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.* 508 U.S. 520, 546 (1993) (holding that the city's proffered interests were not compelling, nor were its means necessary or narrowly tailored to meet its ends).

[132] *See Aryan Nations/Church of Jesus Christ Christian*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/ext_us/aryan_nations.asp?xpicked=3&item=an (last visited Jan. 3, 2012).

convinced that religious expression is causing symbolic or emotional harm to vulnerable minority groups, the state is not forced simply to keep silent. Rather, the state has many alternative paths to affect religiously harmful behavior without regulation.

1. Expressive Conduct: Meeting Speech with Speech

For religious conduct that is largely expressive, one alternative for the state is to engage that expression with its own. An oft-overlooked power in secular democracies is the power to denounce expression, whether formally through a legislative resolution or executive proclamation, or informally through a press conference or the opening of a public debate about the expression. In criminal law terms, if religious expression is harmful but does not rise to the threshold at which regulation is necessary for compelling reasons, the state may even have a duty of nonacquiescence—of signaling to the polity that the values of this religious minority are not its own, and that it does not accept particular behavior as appropriate for a conscientious citizen.[133]

I do not suggest that this kind of response is without risk—it may be tempting for politicians to overuse denunciation as a means to vilify a minority, especially in times where public anxiety is high and scapegoats are sought. The French headscarf controversy is a clear example of how state denunciation of minority practices can go awry. Long before the French decided to ban the *burqa* in public places, public figures and local governments were denouncing the headscarf as a threat to *laïcité* and to the full equality of women.[134] They were joined by a large majority of the French public who likewise detested the headscarf.[135] The one place where the French moved from denunciation to prohibition was in the public schools, where the headscarf was banned for students.[136]

The threat to actual French state values seems, to the outsider, diffuse and somewhat minimal: it is estimated that only two thousand of France's five million Muslims wear the full-body *burqa* or *niqab* that was ultimate-

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[133] See Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING 95, 101–05 (1970), for a discussion of symbolic nonacquiescence.

[134] SCOTT, *supra* note 17, at 14–16.

[135] A Pew Global Attitudes Project poll found French approval of the ban at more than four to one, while two of three Americans oppose it. Ahmed-Zaid, *supra* note 11.

[136] *See* SCOTT, *supra* note 17, at 1–2.

ly banned.[137] In the Netherlands, which considered outlawing the *burqa*, only an estimated fifty to one hundred women out of approximately one million Muslims wore it.[138] It is difficult not to write off the French denunciation as mere hysteria or unspoken fear of Islamic radicals, not true concern about serious harm actually proven to be linked to the *burqa* and *niqab*.

But in any case, it seems clear that French public denunciation of the headscarf was still less restrictive of religious freedom than the complete ban of the *burqa* and *niqab* in public space that France passed in 2011.[139] Though official denunciation no doubt contributed to further social unrest between non-Muslim and Muslim French citizens and immigrants, at least Muslim women religiously committed to these forms of dress could carry out their daily activities, such as working and shopping, albeit in the face of threats of public humiliation or verbal attack. Similarly, though the limited ban on headscarves and other ostentatious religious displays in public schools might have been oppressive to Muslim schoolgirls, at least they have had the option of attending private schools rather than taking off their headscarves.[140] By contrast, the new French law turns *burqa*-wearing Muslim women from victims into criminals. Even though the penalties are small,[141] the harm of a criminal record strikes me as ultimately worse than simple social and political denunciation. A criminal ban also seems to grant stronger permission by the French state to anti-headscarf private citizens to resume their harassment, since the criminals are now the Muslim women and not those who harass them.

While the threat of a *burqa* ban in the United States seems remote,

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[137] Rustici, *supra* note 10, at 2.

[138] SCOTT, *supra* note 17, at 3.

[139] *See supra* note 10 and accompanying text. It might be argued that the ban was not necessarily less restrictive because the denunciation of the *hijab* covered more women than the *burqa* ban. However, the *burqa* ban has not replaced the denunciation of the *hijab*. It has simply reinforced that denunciation and caused even further rifts in French society between supporters and objectors to any form of political expression on headscarves.

[140] *See* Mildrade Cherfils, *French Muslim Girls Flee to Private School*, GLOBALPOST (June 17, 2010, 10:14 AM), http://www.globalpost.com/dispatch/education/100612/france-education-muslim-girls-headscarves (describing choice of Muslim girls to attend private schools opened in 2001 because they can wear headscarves); Davis, *supra* note 13, at 123–25 (describing the history of conflicts over the rule against headscarves in French public schools).

[141] *See* Rustici, *supra* note 10 (noting that the fine is approximately $215). Other estimates say $190. *See France's Burqa Ban in Effect Next Month*, *supra* note 11.

the rash of cases involving headscarf prohibitions in the United States, both public and private, suggests some need for the courts to be mindful of the religious interests at stake, and not simply write them off as unprotected religious conduct under *Smith* or protectable only under the Speech Clause. While current Free Exercise jurisprudence seems to offer shelter only to those headscarf wearers targeted by the government for their religious beliefs, federal civil rights legislation offers some hope of protection for such self-expression against private actors,[142] and the Speech Clause may be available as well.[143] Moreover, if denunciation of a particular religious practice has the effect of disapproving of the religion in the eyes of the objective observer, the non-endorsement principle of the Establishment Clause is potentially available as a remedy.

Where women's equality conflicts with individual rights of expression, social denunciation of those practices that in fact are shown to cause symbolic or other harm to women may be all that is needed to make the point. To the extent that public disapproval is targeted at changing religious behavior believed to oppress women, government and social denunciation of the practice is as likely as anything else to get religious communities to weigh more fully the consequences of abandoning versus keeping such a practice. A religious community's voluntary decision to abandon a practice in the face of social disapproval is, in my view, more likely to result in long-term compliance with social norms than if the government forces them to abandon their practices under threat of punishment. Such coerced abandonment may offer an excuse for religious communities to engage in civil disobedience in order to symbolically guarantee women's allegiance to their religion.

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[142] While *Webb v. City of Philadelphia* ultimately denied the claim of a police officer who wanted to wear a *hijab*, the court found that she had presented a prima facie case and determined that the City would suffer undue hardship because of the need for uniformity and the appearance of neutrality by police officers. 562 F.3d 256, 261, 264 (3d. Cir. 2009). It is therefore not clear that the *Webb* rationale would be applied to all Title VII claims by headscarf wearers. A similar claim by a New Jersey corrections official was settled in her favor including an accommodations policy. United States v. Essex Cnty., 2010 WL 4926806 (D.N.J. 2010). The *Webb* court noted that a case involving a free-exercise complaint by a Philadelphia teacher who wore a headscarf was dismissed because the court did not believe that the school board was required to expose itself to criminal sanctions under Pennsylvania's "Garb Law" which prohibits teachers from wearing religious "garb." *Webb*, 562 F.3d at 260 n.3.

[143] *See, e.g.*, A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248 (5th Cir. 2010) (arguing that under the First Amendment, students should be permitted to wear braids as an expression of their cultural heritage, decided on other grounds).

As I have suggested, religious conduct intended to define and maintain the boundaries of a religious community may pose a different set of problems than mere religiously expressive behavior. Shachar has cogently argued that women's religious conduct is particularly important because religious women are often the situs of community-protective and community-exclusive practices: they make an "indispensable contribution in transmitting and manifesting a group's 'culture' . . . . [I]dealized and gendered images of women as mothers, caregivers, educators, and moral guardians of the home come to represent the ultimate and inviolable repository of 'authentic' group identity . . . through carefully crafted binary codes of 'respectable' behaviour . . . ."[144] As such, the decisions they make to conform to or dissent from the norms of, or exit from, a religious community can have particularly profound consequences on their religious communities as well as themselves.

2. Community Constituting Religious Conduct: Jurisdictional Approaches

Where religious practices help constitute communities in the critical way Shachar described, the conflict between religious women, religious communities, their rivals, and the state may be at its sharpest. There is an important and sophisticated literature about whether the state should cede jurisdiction to religious communities whose values and practices conflict with democratic liberal societies on gender justice, potentially causing severe harm to women in those communities. Some have argued that secular governments must always overrule religious communities on important issues of justice such as gender fairness, even if the women involved consent to being treated wrongly.[145] Others, particularly in what Shachar calls "first wave" multiculturalism, have advocated for differentiated rights of minority groups, overlooking potential costs to their dissenting or vulnerable members.[146] For example, Shachar cites Will Kymlicka's advocacy on behalf of rights of self-government and "polyethnic rights" that may include financial support and the legal right to engage in cultural practic-

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[144] Shachar, *Religion*, *supra* note 8, at 51.

[145] *See* SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 64–68 (describing what she terms the "reuniversalized citizenship" approach).

[146] *See* Shachar, *Religion*, *supra* note 8, at 55–58.

es.[147]

Still others want to respond to the conflicts between religious and secular communities by dividing jurisdiction over issues critical to religious community constitution between the state and religious community. Shachar describes these divisions of jurisdiction as geographical, temporal, consensual, and contingent.[148] Geographical divisions of jurisdiction provide a large measure of sovereignty over a limited physical space, as with native tribes.[149] Temporal divisions allow the religious community to have primary authority over some matters at some stages of an adherent's life; as an example, she notes how in *Yoder*, the Supreme Court allowed the Amish to have authority over their children's education in adolescence only.[150] The state may also cede jurisdiction if it is consensual among the parties (for example, private alternative dispute resolution processes).[151] Or the state may make jurisdiction contingent on the religious communities' agreement to abide by fundamental national, legal, and social standards such as some basic human rights.[152]

In her 2001 book, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Shachar proposed an imaginative and respectful scheme, transformative accommodation, to deal with conflicting demands of religious and national communities.[153] In this book, she focused on the plight of Orthodox Jewish and Muslim women who may be potentially harmed by granting sole family law jurisdiction to religious communities as other nations do, particularly noting the plight of the *agunah*.[154]

Recognizing the advantage of placing these communities of value in both collaborative and competitive positions *vis-à-vis* each other, Shachar proposed to split political authority for legal matters critical to the religious communities between the community and the state.[155] Thus, for ex-

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[147] *Id.* at 55–56 (noting Kymlicka's discussion of a third form of rights, "special representation rights," that permit minority groups designated representation in wider democratic lawmaking bodies).

[148] SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 90.

[149] *Id.* at 92–93.

[150] *Id.* at 96–97.

[151] *Id.* at 103.

[152] *Id.* at 109.

[153] *Id.* at 117–18.

[154] *Id.* at 59–60.

[155] *Id.* at 119–20.

ample, neither the religious community nor the state would be given exclusive jurisdiction over family law: one (for example, the religious community) might have demarcating jurisdiction over who is entitled to membership in the class of, say, the married; and the other (the state) would have distributive jurisdiction over the rights and benefits provided to that class.[156] Under the "no monopoly" rule she ascribes to Madison, Montesquieu, and others, neither the state nor the religious group should "acquire exclusive authority" over all aspects of a particular area of conflict between the two legal authorities, forcing each authority to "compete for the loyalty of their shared constituents."[157]

Finally, Shachar would allow religious women "clearly delineated choice options,"[158] that is, clear points in the progress of a marriage or its dissolution where they may reject one authority and submit to the other. The "opt-outs" are not provided at every whim of the individual but only when the relevant authority has "failed to provide remedies to the plight of the individual."[159] By placing the relevant authority in competition with its rival for the loyalty of the religious woman on a particular matter, this scheme would provide an incentive to both communities to engage in "best practices" designed to keep the loyalty of that citizen on that particular matter.[160] At the same time, the religious woman would not be required to completely give up allegiance to one of her centers of loyalty to embrace the other: she could selectively choose which would be her authority for which matters.[161]

To make this all happen, Shachar envisions close bargaining between religious communities and nation-states to establish which sub-matters each will control and a continued jurisdictional dialogue over shared governance in order to be true to the "no monopoly" rule.[162] Such a joint governance scheme would not only resolve the immediate problems involving conflicting jurisdictional loyalties of religious women, but also "contribute to a broader contemporary endeavor to re-define the role of

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[156] *Id.* at 50–51.

[157] *Id.* at 120–21.

[158] *Id.* at 122.

[159] *Id.* at 122–24.

[160] *Id.* at 125–26.

[161] *Id.* at 122–23.

[162] *Id.* at 128–30.

state law in relation to competing sources of authority from 'above' and 'below' the national level."[163]

3. American Options for State-Religious Community Interactions

Shachar's proposal has much to offer from an ideal ethical and political perspective. But I am not optimistic that it is a model that the United States would be willing to adopt in any future I expect to see. As Shachar has noted, the United States has not invested nearly the time and energy into the search for multicultural equilibrium that Canadians and others have done.[164]

In part, this is because, as compared with Canada and other Anglo countries, the United States has always glorified individual liberty, particularly the market economy, a devotion that apparently has strengthened since conservatives have found their footing in many states during the 2010 elections.[165] This dedication to individual liberty has meant that the nation-state, whether conceived of as those in government seats or those who hold political power in the United States, has not really cared much about the plight of women in insular communities, particularly religious ones. It seems to have no interest, as in Shachar's model, in competing for their loyalty. When the state does intervene, as in the raid on the FLDS compound in Texas, the justification often centers on protection of children, not vindication of women's rights.[166] Although this is somewhat of an overstatement, in the U.S. national view, adult religious women, like all other women, seem to be expected to bear the risk of the choices they make, whether they are marrying a deadbeat dad, joining a religious community that requires women to wear a headscarf, or submitting to discip-

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[163] *Id.* at 131.

[164] *See generally id.* at 17–24 (discussing multicultural accommodation in the United States and abroad).

[165] *See* Jill Lawrence, *GOP Wave of Change Hits House; Republicans Also Gain Governorships*, POLITICS DAILY (Nov. 3, 2010), http://www.politicsdaily.com/2010/11/02/2010-midterm-elections-news-and-results ("Republicans catapulted back into relevance and power Tuesday, taking majority control of the House and winning governorships all over the country.").

[166] *See, e.g.*, Paul Nelson & John Hollenhorst, *Top Stories of 2008, #3: FLDS Ranch Raid*, KSL.COM (Dec. 30, 2008, 7:30 AM), http://www.ksl.com/index.php?nid=462&sid=5190396 (noting evidence of underage marriages of girls as young as twelve, and quoting a child protective services worker) ("This is about children who are at imminent risk of harm, children that we believe have been abused and neglected.").

line from their husbands.

In part, the likely disinterest of American political brokers in moving toward a shared governance model with religious communities is shaped by pressing economic realities: the sheer bureaucratic energy required to engage in this continuous negotiation seems to be a luxury in state governments with looming financial crises.[167] Moreover, American governments may not have an incentive to bargain over jurisdiction because they have always felt free to exert their muscle over religious communities as private voluntary associations rather than competing legal communities. They can flex that power largely without any severe political or social repercussions because of the failure of the Supreme Court to provide any meaningful protection for minority communities.[168]

Assuming that Shachar's model is not politically feasible in the United States, the question remains: what role should feminist lawyers now propose for the state in cases where religious women are choosing (or at least not protesting the expectation that they engage in) religious behaviors that feminists consider inimical to their welfare as women, or to women's causes generally?

The state does have four relatively noncontroversial options other than prohibitory regulation to counter the effects of religious community norms that are oppressive to religious women: education, mediation, economic incentives, and support for private efforts to enforce social norms of gender justice.

a. Education

First, the state can educate, as it has done in other arenas where freedom-loving Americans have resisted prohibitory attempts by the state. As an example from my own community, Minnesota, like many states, has used the money it obtained from a settlement with the big tobacco companies to fund a comprehensive anti-smoking campaign through a nonprof-

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[167] *See* Michael Cooper & Mary W. Walsh, *Mounting Debt by States Stokes Fears of Financial Crisis*, N.Y. TIMES (Dec. 4, 2010), http://www.nytimes.com/2010/12/05/us/politics/05states.html.

[168] *See, e.g.*, Stephen Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 224 (2003) ("[H]istory reveals that . . . the First Amendment often has failed to provide equal liberty to religious minorities.").

it.[169] Using network television and radio, physically visible advertising like billboards, education in the schools, and social media, it has attempted to counter teen peer pressure to smoke and encourage adults to quit, and backed up the education campaign by quit-smoking services made easily available by phone, internet, or in the workplace to those who want to take the plunge.[170] In the case of religious women, with perhaps the exception of very closed communities, the state has many opportunities to offer positive messages about their rights and options, from abstract "Know Your Rights" brochures, to K–12 educational programs, to narratives of positive female role models whose lives and achievements challenge normatively problematical messages they receive from their religious communities.

Religious communities may object that by attempting to educate women about their secular rights and lifestyle alternatives, the state is making an inappropriate value judgment on the religion that amounts to an Establishment Clause violation. To be sure, if the state leads off an educational campaign disparaging a religious community and its views on women in a specific targeted fashion, the community may have a valid constitutional argument.[171] To borrow an example from the anti-smoking campaign, if the state were to use the same kind of graphic photos of women in religious communities like those currently being rolled out by the U.S. government on cigarette packs—"rotting and diseased teeth and gums, the corpse of a smoker, [and] diseased lungs"[172]—that would be a civil rights lawyer's dream of a lawsuit under the non-endorsement principle's prohibition of state disapproval of that religion.[173]

But in reality, in terms of communication about gender discrimination in religious communities, all the state has to do is to get out of the

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[169] *See Our History*, CLEARWAY MINN., http://www.clearwaymn.org/index.asp?Type=B_BASIC&SEC={203FDB04-37A3-4BFD-8E6F-39CEE840B399} (last visited Feb. 10, 2012).

[170] *See* CLEARWAY MINN., http://www.clearwaymn.org/ (last visited Jan. 3, 2012) ("[Outreach and Quitplan services] combine counseling, medication and community to help smokers quit [including web-based, phone, and workplace counseling.]").

[171] It goes without saying that the first obligation the state has is to be in possession of the facts about what is actually going on in these communities, rather than to accept stereotypes and rumors.

[172] *See From Bad Teeth to a Corpse: New Cigarette Labels Revealed*, MSNBC.COM (June 21, 2011, 10:58 AM), http://www.msnbc.msn.com/id/43478041/ns/health-cancer/t/bad-teeth-corpse-new-cigarette (describing the FDA's redesigned graphic cigarette labels).

[173] Additionally, any attempt to tout beneficial aspects of the religious community is conversely likely to suggest "endorsement" of the religion.

way in most cases. Private advocacy groups already provide much of this material on internet forums, television and radio, and in print form.[174] With these private efforts, a combination of positive, non-disparaging educational efforts about women's rights and opportunities, and readily available services to respond seamlessly to women's immediate needs as they transition out of (or even find ways to survive more authentically in) repressive religious communities, is likely sufficient to make women's choices somewhat more meaningful and autonomous. It may even put pressure on the religious communities to consider changes so their valuable members do not leave, as Shachar suggests might be the case.[175]

Mentioning public education about women's rights to such communities may be terribly obvious, but sometimes it is important to remind state actors that such tools should be a first resort that may make coercive measures such as regulation or criminalization of religious activities unnecessary.

b. Quasi-Mandatory Dispute Resolution

Second, the state could design dispute resolution opportunities for religious women that are a hybrid of consensual and authoritative jurisdiction. Such opportunities can protect the primary freedom of individuals or religious communities to define the terms of settlement of a conflict, while challenging oppressive practices that can be carried on by sheer habit in closed religious communities. There may be various types of cases that come to such dispute resolution bodies. For example, the state may impose a condition on religious women that both they and their religious communities object to, such as the headscarf ban or a pattern of criminal prosecution against consensual CDD. Or the religious community may impose

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[174] In addition to advocacy organizations such as the Feminist Majority and National Organization for Women, there are public policy organizations such as the Center for Women in Public Policy, the Institute for Women's Policy Research, and even organizations advocating on behalf of girls. *See 6. Social Justice Organizations*, STARTGUIDE.ORG, http://www.startguide.org/orgs/orgs06.html (last updated Aug. 14, 2011). *See also NOW and Constitutional Equality*, NAT'L ORG. WOMEN, http://www.now.org/issues/constitution/index.html (last visited Jan. 3, 2012) (describing examples of initiatives on ending sex discrimination); Azmat Khan & Anna Seifried, *The Promise Keepers: Men's Right-Wing Religious Movement Takes Aim at Your Rights*, NAT'L ORG. WOMEN, http://www.now.org/issues/right/061104pk.html (last visited Jan. 3, 2012) (describing discrimination within the Promise Keepers, a conservative Christian religious group).

[175] *See* SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 124–25.

constraints on women that are deemed unjust by the state or the religious community may apply traditions that religious women themselves dispute, such as the Jewish law of the *get*.[176] Another possibility is that private actors in the community may attempt to impose a disadvantage on religious women in employment, commercial or other public activities, either because of their own concerns, as in the Abercrombie and Fitch case,[177] or in order to enforce their own views about gender equality.

In some cases, all of the interested parties may not be willing to come to the table if the state merely offers traditionally voluntary dispute resolution options like private mediation. The state may not be willing to bargain because it does not need to—it has the power of legislation to force its will upon religious women and their communities. The religious community may refuse to come to the table because it considers even a mere state inquiry into its practices inappropriate interference into a jurisdiction granted by God to the community, and perhaps as a threat that legal coercion will be used if the community is non-compliant. On the other side, the community may feel threatened by dissent from within.

Individual women, the subject of these concerns, may similarly find interference with their religious choices constitutionally offensive, or they may believe that state involvement will threaten many of the benefits that they derive from membership. Perhaps most importantly, they may be worried about losing internal relationships fractured by outside interference or internal division as conflicts are adjudicated in secular forums. This concern is very real. One might turn to the experience of the community of Kiryas Joel when its fight to establish a separate special education district for its children turned into an intra-community dispute about the constitutionality of the special district.[178] Or one might look at the bitter dispute among the Amish of Minnesota who fought for a religious exemption from Minnesota's "Slow Moving Vehicle" triangle, only to split among them about what kind of exemption would be consistent with their faith.[179]

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[176] *See* Greenberg-Kobrin, *supra* note 34, at 373–74 (discussing New York's "*get* law").

[177] *See* Greenhouse, *supra* note 24 (discussing Abercrombie and Fitch's alleged employment discrimination against Muslims).

[178] *See* Stolzenberg, *supra* note 102, at 208 (describing internal opposition in Kiryas Joel community over the district).

[179] *See* Bob Sector & Rhonda Bergman, *Amish Clash over Orange Traffic Signs*, L.A. TIMES (Aug. 9, 1988), http://articles.latimes.com/1988-08-09/news/mn-212_1_amish-farmer

However, the growth of mediation and restorative justice processes has made available new forms of dispute resolution that can accommodate community disputes involving numerous actors as well as simple forms of interpersonal dispute. In numerous states, courts have ordered court-annexed or mandatory mediation as a way of getting recalcitrant conflicting parties to, at a minimum, confront one another about their dispute and at least briefly give up the power that some parties use to enforce their demands against the other parties.[180] The processes employed to respond to these conflicts are flexible and varied. Some are traditional forms of mediation where a mediator focuses on obtaining a particular settlement agreement from parties who would otherwise be in traditional litigation.[181] Others are restorative justice processes such as circle sentencing and family group conferencing, which may involve members of the community, prosecutors, judges, law enforcement, and others, and may have larger and longer-term aims than settling a particular legal dispute.[182]

There is no reason, in principle, why a state could not demand that religious women and their communities show up for mediation if a conflict between them arises, for example, when an Orthodox Jewish woman demands a *get* and her local religious community refuses to grant one. That mediation can explore, at least briefly, some of the dynamics of the relationships and commitments of the various parties, and require the parties to articulate their concerns. Even with a very limited mediation between a religious community and a particular disputant, mediation may offer the woman some external perspectives on her situation and some opportunity to articulate her concerns in a less oppressive atmosphere than if she has to

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(describing conflict within Amish community over propriety of various "slow-moving vehicle" signs).

[180] *See, e.g.*, Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 907–08 (1997) (describing Florida's court-connected mediation and arbitration project, which orders parties into mediation in cases over $15,000, and noting that mandatory orders to mediate have not been litigated); Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 480–81 (2010) (describing the distinction between categorical referrals when the state requires mediation and discretionary referrals when judges are given authority to order any case they wish to and to specify the alternative dispute resolution option).

[181] Press, *supra* note 180, at 904.

[182] *See* HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 50–51 (2002) (describing restorative practices, such as sentencing circles and family group conferencing). *See also* Press, *supra* note 180, at 904 (noting the use of mediators to assist in international crises, contract disputes, and school peer conflicts).

make her case completely inside her community.

For issues of larger scope, including those in which the state is one of the actors creating a conflict, restorative processes might be even more effective. Taking the CDD case as an example, one might imagine a concerned relative or neighbor calling the police about a case of domestic discipline that has resulted in physical harm, even when the woman herself has not sought or even has resisted state involvement, which is not atypical in domestic disputes. While there may be good reasons to pursue prosecution even against the victim's will (under the so-called "no-drop" policy which has been heavily debated in domestic abuse circles[183]), the state might take another route where a "no-drop" policy runs headlong into religious freedom claims by a woman or her community.[184] A prosecutor might seek a court order mandating a restorative circle to be convened: that circle might include the religious wife, her husband, concerned relatives or friends, the office of the prosecutor, law enforcement, domestic abuse advocates, and others who are traditionally included in such circles.[185] That circle could convene as many times as necessary to ensure, from the state's side, that the woman was sufficiently safe, and the circle could ensure that all sides are educated about the others' perspectives.[186]

Similarly, if a school district proposed a policy prohibiting high-school girls from wearing certain religious garments because they interfered with curricular needs (such as the girls' ability to participate in a required gym class) or the school's attempts to socialize students into gender equality norms, the family could request a mediation or restorative circle directly or through the local county attorney's office to resolve that dispute.[187] Such a circle might involve school officials, teachers in the classes

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[183] *See* Michelle M. Dempsey, *What Counts As Domestic Violence? A Conceptual Analysis*, 12 WM. & MARY J. WOMEN & L. 301, 303 (2006) (providing a bibliography of work for and against no-drop policies).

[184] *See* Brooke Adams, *Escape from Polygamy: Ex-Plural Wife Alleges Rampant Abuse in FLDS Unions*, SALT LAKE TRIB. (Oct. 16, 2007, 1:25 AM), http://archive.sltrib.com/article.php?id=7190582&itype=NGPSID&keyword=&qtype= (describing the violence faced by women in certain religious communities). This supports the inference that certain religious communities may assert religious freedom claims to protect their violent customs.

[185] *See* ZEHR, *supra* note 182, at 50–51 (describing restorative practices such as sentencing circles).

[186] *See id.*

[187] *See* Press, *supra* note 180, at 917 (describing the successful use of mediators to assist in school conflicts).

at issue, counselors who are responsible for the girl's relationships with teachers and peers, and members of the girl's family and religious community.

Such a restorative circle might be able to develop practical solutions to this conflict which might avoid (or even escape discussion in) litigation—for example, practical choices about modest dress that meet both school and community expectations, education of the school community about the girls' religious beliefs and practices, and dialogue in the community about religious differences and values. What is required of the state is only legislation to identify an agency that is authorized to seek such an order, such as the county attorney's office, and to give permission to state judges to grant such orders to try mediation.[188] Guidelines already exist in other mandatory mediation programs about the nature of the mediation and minimum expectations of the parties' participation.[189] For example, some mandatory programs require parties only to attend an orientation program, while others require that the parties participate in good faith in the mediation process itself.[190]

In the case of religious arbitration, Shachar and others have made telling points that private dispute resolution (such as the *beth din* or the Islamic arbitration court proposed in Canada) can take conflicts with potentially important public consequences out of the public eye.[191] When the state carves out a separate jurisdiction for religious communities or when religious disputes are allowed to be privately negotiated, the state may be unable to enforce public norms,[192] such as non-discrimination, leaving individuals such as these religious women beyond the state's protection. As noted, Shachar's proposed solution to this dilemma is to split governance between the state and the religious community so that the religious com-

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[188] *See* Quek, *supra* note 180, at 488–90 (describing the "continuum of mandatoriness" from categorical referral without sanctions, the requirement to attend mediation sessions, the soft sanctions such as costs to opt-out, and "no-exemption" schemes in U.K. countries).

[189] *See id.*

[190] *See id.*

[191] Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRES L. 573, 575 (2008) [hereinafter Shachar, *Privatizing Diversity*] (discussing problems with permitting non-state norms to function in private dispute resolution); Christina L. Brandt-Young, *Book Review: Multicultural Jurisdictions at the National and International Levels*, 24 MICH J. INT'L L. 241, 257 (2002) (discussing Shachar's thesis).

[192] *See* Brandt-Young, *supra* note 191, at 258.

munity cannot violate important political norms simply by arguing that it is exercising jurisdiction granted by the state and its decisions are no longer any of the state's business.[193]

Mediation may raise fewer of these concerns because it concludes only upon agreement of the parties and not when a religious decision-maker, such as an arbitrator, issues a judgment based on religious law.[194] At the same time, mediation and restorative justice can include one or several religious advisors as part of the process.[195] This will allow parties recourse to religious expertise about their rights and duties that will not be limited to one arbitrator's view of how Jewish or Islamic law, for example, governs women's rights in divorce or inheritance. However, religious mediation, like domestic mediation, may be subject to the same concern that a power imbalance will affect even a supposedly consensual outcome,[196] and that important public norms will be violated out of public view.

However, as Shachar admits, this fact does not necessarily distinguish mediation of religiously informed disputes from the mediation of secular disputes, which are also settled outside the public eye.[197] What makes religious mediation settlements (or arbitration awards) tricky is the question of what, if anything, a secular court will do to enforce such a settlement.[198] Many secular courts have held that alternative dispute settlements or agreements, such as *ketubahs* requiring the husband to present himself to the *beth din* for a Jewish divorce, can be enforced so long as they are written clearly in secular terms so that no theological judgments are needed to interpret or enforce them.[199]

While this issue may be partially resolved by statutorily identifying the types of agreements that the state is willing to enforce through court order, it seems that the main concern here—that public values may be sa-

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[193] *See id.*

[194] Shachar, *Privatizing Diversity*, *supra* note 191, at 604, 607 (noting that informal religious mediation does not have any legal effect in the courts' perspective, and therefore does not change family regulation).

[195] *See* ZEHR, *supra* note 182, at 50–51.

[196] Shachar, *Privatizing Diversity*, *supra* note 191, at 607 (cautioning that religious mediation may be affected by power relations within the community).

[197] *Id.* at 605 ("[There is a variation in divorce agreements being] upheld under the growing trend of standard (i.e., secular) 'private ordering' of the family.").

[198] *See id.* at 604.

[199] *See* Lazerow, *supra* note 33, at 114 (describing enforcement of *ketubahs* requiring a *get*).

crificed because these agreements or decisions are being made outside the public eye—may be somewhat overstated.[200] As anyone who has tried a case in a state trial court can attest, state trial judges are not always paragons of fair-minded and just decision-makers who follow the state law and public norms.[201] Often times, particularly in areas where legal norms are general or vague (for example, the best interests of the child), power differentials or judicial disinterest and occasionally incompetence can lead to unjust results that never come to light.[202] Unjustly deprived litigants therefore may have little recourse since appeals are so costly.[203]

Thus, in my view, the key to ensuring that public values will be enforced is not whether the adjudication is public or private (religious), but whether there is an avenue for appeal for the victim of unjust and incompetent rulings, or coerced "mediated" settlements.[204] Thus, one form of "shared governance" that Shachar seems to downplay—the ability to appeal to a secular court if one disputant believes that the settlement terms violate public policy[205]—should also be available to religious disputants whose mediation is the product of uneven bargaining power or distorted relationships that result in terms that violate important social norms. For example, if a Christian mediator allowed a settlement that permitted a husband to beat his wife, the court could reject it as encroaching on the prosecutor's responsibility to enforce the state's overriding domestic abuse policies.[206] While it may be important for the courts in these cases to leave room to be educated about religious practices and their particular importance to faith, a court usually should not enforce a mediation agreement that shocks the judicial conscience by violating a basic norm of political democracy, whether or not its grounding is religious.[207] While there are

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[200] *See* Shachar, *Privatizing Diversity*, *supra* note 191, at 576.

[201] *See id.*

[202] *See id.*

[203] *See* Brandt-Young, *supra* note 191, at 263 (noting that group members are already burdened by a difficult legal and social system making it arduous to take the initiative to file an appeal).

[204] *See id.* at 649–50.

[205] *See* SHACHAR, MULTICULTURAL JURISDICTION, *supra* note 47, at 108–09 (discussing "consensual accommodation"). *See also* Brandt-Young, *supra* note 191, at 250 (suggesting that including a right of appeal would improve the transformative accommodation approach).

[206] *See* SHACHAR, MULTICULTURAL JURISDICTIONS, *supra* note 47, at 109.

[207] *Id.* at 109.

concededly difficult questions around deciding which norms are so fundamental that they must always trump claims of religious conscience, these problems attend any religious freedom adjudication or conflict.[208]

Mediation requires encounters, not outcomes; however, the "stick" that the state has in such circumstances is that it will not use state power to enforce agreements between parties that have not engaged in mediation.[209] Thus, just as a state will not grant a divorce unless a couple has attempted mandatory mediation, so a state might follow New York's lead on forcing husbands to remove barriers to remarriage such as a refusal to give a *get*.[210] It might, for example, refuse to grant a civil divorce or to equitably distribute assets unless an Orthodox Jewish husband, a member of his supporting community, his wife, and any other appropriate parties come to the table to discuss their differences over the *get* and try to resolve them.[211] That does not put the state in the constitutionally awkward position of determining whether a *get* can be *halakhicly* demanded.[212]

Similarly, if the state objects to a husband's intolerable abuse of a "consenting" religious woman, the state court could order the woman, the offender, members of the community who support him, and perhaps a state social worker or law enforcement official representing the state's concerns about domestic abuse into a restorative circle or mediation.[213] The state might then use that process to clarify its values on the use of physical abuse, to probe whether the woman's consent is truly informed and voluntary, and to inform both parties of the limits of its willingness to tolerate physical contact before it will file criminal charges even without the wife's cooperation.[214]

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[208] *Id.* at 108–09 (describing the competition between a religious group and state for an individual's loyalty).

[209] *See* Quek, *supra* note 180, at 488–90.

[210] *See* Greenberg-Kobrin, *supra* note 34, at 373 (discussing New York's "*get* law"); *Orthodox Jewish Women 'Get' Divorce Support*, *supra* note 33 (discussing Maryland's efforts to pass *get* legislation).

[211] *See Orthodox Jewish Women 'Get' Divorce Support*, *supra* note 33.

[212] *See id.*

[213] *See Criminal Case Study 1*, *supra* note 43; *Christian Domestic Discipline Marriages*, *supra* note 43.

[214] *See id.*

c. The Carrot Approach: Public Benefits

Third, the state can condition the discretionary economic benefits that it offers to religious institutions on compliance with basic democratic norms.[215] In fact, the United States already does this through, for example, Title IX, which prohibits sex discrimination in education or employment by any educational program receiving federal financial assistance.[216] An expansion of Title VI, which prohibits racial discrimination in any federally funded program,[217] to include gender, and an extension of this legislation at the state level would have an enormous impact on the largest religious and secular sub-communities that maintain unjust practices toward women. This option preserves the choice model, since no religious community is required to seek state funding, while putting the state in the position of defining gender justice and offering religious communities an incentive to abandon values or practices that are not at the true center of their faith.[218]

d. Support for Gender Justice Organizations and Activists

Finally, the state can provide moral, economic, and other support to private entities working to achieve gender justice within religious communities.[219] For example, we might look at the state's response to women who had the courage and luck to escape the FLDS communities in Arizona and Utah when they literally had nowhere to turn as strangers with only the clothes on their backs, few marketable skills, and no basic welfare supports.[220] In response to some publicized stories of escape, such as that of Carolyn Jessop, the state of Utah has supported the creation of a net-

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[215] *See* Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 35 (2007) (describing enforcement of Title IX through funding denials).

[216] *See id.*

[217] *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 596 (1983) (explaining that Title VI involves consensual arrangement between the federal government and the recipient of federal funds).

[218] *See id.*

[219] *See* Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 359 (2003).

[220] *See id.*

work of social services available to such women.[221] States with similarly oppressive religious communities can fund and publicize the availability of services for such women, and word of these services is likely to spread informally among the women who are psychologically ready to leave but do not see a realistic future without some help.

As Shachar also suggests, we should never discount the power of religious women (and men) within their religious communities to resist gender oppression in the name of their religion and thereby effect change for women from within. The efforts to "unchain" the *agunah* are an example of how the most important changes can come from combined forces within and without a community. First, there has been a concerted effort by Jewish legal thinkers to come up with theories acceptable under Jewish law to explain why a man should be considered to have given his consent to a *get*, including theories of express or implied promise to give a *get*.[222] Others have attempted to give a rationale for state courts to intervene, such as explaining why a court should have the right to sanction a man who does not give a *get*, under such theories as intentional infliction of emotional distress or equitable division of property.[223] Second, the Rabbinical Council of America has required an agreement to give a *get* in the marriage contract or *ketubah* as a condition of solemnizing marriages.[224] Third, rabbinical authorities have been sanctioning husbands who will not come to the *beth din*.[225] Indeed, some rabbis have taken the controversial

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[221] *See* Adams, *supra* note 184, at 2 (noting that the Utah Attorney General credits Jessop for inspiring a services network for those leaving polygamy).

[222] *See* Lazerow, *supra* note 33, at 115–22 (describing express and implied contract theories).

[223] *See* David Cobin, *Jewish Divorce and the Recalcitrant Husband—Refusal to Give a Get As Intentional Infliction of Emotional Distress*, 4 J.L. & RELIGION 405, 415–21 (1986) (describing European opinions and possible arguments for upholding tort claims against husbands who refused *gets*); Lazerow, *supra* note 33, at 124–26 (discussing arguments for intentional infliction of emotional distress). Lazerow also discusses arguments based on breach of the duty of good faith and fair dealing and unconscionability. *Id* at 127–28, 130–31.

[224] *See, e.g.*, *Ta'anit Esther and International Agunah Day*, VOICES-MAGAZINE.COM BLOG (Feb. 28, 2011), http://voices-magazine.blogspot.com/2011/02/taanit-esther-and-international-agunah.html (describing Rabbinical Council prenuptial agreement on *get*-giving, Heskem Lekavod Hadadi (the agreement for mutual respect), required as a condition of marriage).

[225] *See, e.g.*, Jill Wexler, *Gotta Get a Get: Maryland and Florida Should Adopt Get Statutes*, 17 J.L. & POL'Y 735, 742–44 (2009) (describing a theory of constructive consent permitting *beth din* to award divorces and noting that we should require husbands to provide *gets*) ("[We should] engage in forceful acts to compel the husband to give a get to his wife"); Rachel

step of annulling marriages over the objections of husbands even without any prior agreement.[226] Finally, women have mounted an international protest movement, anchored by International Agunah Day on the Feast of Esther, complete with highlights of the rabbinic courts' hit list of "men most wanted" for not giving *gets*.[227]

Although the response of state courts may be important, the efforts of the Jewish community itself to come up with a faithful solution to the problem of the *agunah* seem more promising in terms of creating a respected "unchaining" procedure rather than relying on the heavy hand of the state that does not have *halakhic* authority and therefore lacks the assent of the entire community. Additionally, these efforts are more likely to be authentic expressions of the religious woman's own community's values and traditions as they change over time; by contrast, state intervention is more likely to be ill-informed, clumsy, and burdensome.

We should also not underestimate the power of girls and women to find a sweet spot in forming their religious identity between the demands of their religious communities and the gender equity that feminists and others seek for them. Muslim American Girls Magazine, an online publication for Muslim girls,[228] offers a fascinating display of the way in which religious girls can dialogue about and reach their own sense of repose about religious demands for modest dress that conflict with their desire to be a part of Western mainstream culture. While some bloggers in this conversation propose a rigid, legal construction of the demands of the *Qur'an*, one blogger writes:

Levmore, *'Wanted' on International Aguna Day*, JERUSALEM POST (Mar. 16, 2011, 11:15 PM), http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=212482 (describing sanctions levied by rabbinic judges against recalcitrant spouses).

[226] *See* Susan Aranoff, *Halachic Principles and Procedures for Freeing Agunot*, JEWISH WEEK, Aug. 28, 1997, *available at* http://www.agunahinternational.com/halakhic.htm#1; Susan Aranoff, *A Response to the Beth Din of America*, AGUNAH INT'L (Winter 1998), (describing a theory that marriage was defective and void ab initio and the controversy surrounding this theory). For a sample ruling of an annulment following this theory, see Haim Toledano, *Bet Din Le'Inyenei Agunot in the Case of Rebecca vs. Saul*, AGUNAH INT'L (last visited Jan. 3, 2012), http://www.agunahinternational.com/pesak.htm.

[227] *See, e.g.*, Levmore, *supra* note 225 (describing Israeli rabbinic courts' "'wanted' list" of husbands who have failed to give *gets*); *Ta'anit Esther and International Agunah Day*, *supra* note 224 (describing International Agunah Day).

[228] *See generally* MUSLIM AM. GIRLS MAG., http://www.muslimamericangirls.com (last visited July 1, 2011).

> Have you ever had a really cute outfit, then you look at your hijab and its [sic] not so cute anymore? Do you choose to wear the hijab or not? A lot of people choose to wear it, but only becaused [sic] they are forced to.
>
> Girls all over the world think the hijab is to jail you, or they just don't know what it is. It's not like that; the hijab shows freedom. It means so much more than to just cover your hair. The problem in our generation is that we don't understand the true meaning of it.
>
> . . . .
>
> The majority of girls think its [sic] so important to blend in that they dress completely unIslamicly [sic]. In their minds dressing Islamicly is unfashionable, which is not true at all.
>
> There are many ways you can dress cute and Islamicly at the same time. [The author then goes on to suggest ways that Islamic girls can pair hijabs with skinny jeans, or use Pashima scarves to cover their hair.][229]

It is this kind of dialogue that is most likely to promote effective change for women in religious communities that do not fully embrace secular norms of gender justice, because it can permit women to embrace the complex identity that is theirs as a result of their gender and their religion.

At the same time, we need to recognize what is at stake when we support internal efforts at change rather than coercive state intervention: as these efforts slowly proceed, some religious women in oppressive religious communities will be seriously harmed. In these cases, it is incumbent on the secular state and other private associations supporting women's empowerment to provide the support needed to ameliorate the harsh effects of these laws until they can be changed. As one example, just as Utah has stepped up to help FLDS members in transition, the state and women's rights associations could support Jewish Orthodox women in ways that do not implicate the coercive power of the state. Both state and non-state social organizations can aid abused Orthodox Jewish women coerced into financially disastrous settlements by their husbands as a condition of giving a *get* by offering the financial support that the woman gave up as a condition of giving the *get*. Similarly, activist groups could use social pressure in the husband's workplace or social setting to shame the husband into giving a *get* without extortion of the wife.

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[229] Sadiyya B., *Fashion and the Hijab*, MUSLIM AM. GIRLS MAG., Mar.–Apr. 2010, at 23, *available at* http://www.calameo.com/read/000209626f93ce87213f7?authid=f7edLteWoBUx.

E. RELIGIOUS CONDUCT AS POLITICAL ENGAGEMENT

In the previous section, I addressed religious conduct that was primarily directed by and to the internal religious community, conduct that challenges state norms on gender justice. However, as previously discussed, religious conduct may serve as a form of political engagement, including political dissent against the woman's own religious community or against the outside community of which she is a part. Such conduct may be described as religious conduct because, though it is not a religious ritual, it stems from political actors' religious beliefs. For example, the sanctuary movement, which smuggled many Salvadoran refugees into the country to prevent them from being persecuted by the military government there, was clearly motivated by Christian and Jewish religious beliefs about the duty owed to strangers.[230] But the political conduct itself may enact religious rituals as well. That same sanctuary movement was designed and carried out to follow a centuries-old tradition of religious sanctuary to fugitives; even the ways in which movement participants adjudicated whom they would cross into the United States were inflected with a sense that this was the official business of the church.[231]

Religious conduct may also engender and reinforce beliefs and actions that are primarily sited in the secular world. It is hard to imagine, for example, that the civil rights movement would have been as successful had it not been undergirded by the traditions and rituals of the African American church. The church meetings thoroughly infused with religious imagery and ritual, and the prayers and singing among people in jails throughout the South, literally created the solidarity, vision, and fortitude that made it possible for individuals to work with each other and take the next dangerous steps toward freedom.[232]

In our own day, religious conduct affects American political life in any number of ways. Sometimes, such conduct is a direct attempt to undo

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[230] *See* Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 924–28 (1995) (describing religious motivations of sanctuary movement participants).

[231] *Id.* at 942–43 (describing how sanctuary workers adjudicated asylum claims of those they decided to help cross the border).

[232] *See* Dena S. Davis, *Ironic Encounter: African Americans, American Jews and the Church-State Relationship*, 43 CATH. U. L. REV. 109, 125–35 (1993) (describing the many roles of the historically black church in the civil rights movement).

the law, as in the case of pro-life attempts to close down abortion clinics. Other times, the conduct is merely aimed at protesting a proposed or implemented law before the general public, with religion functioning largely to signal the righteousness of the cause and draw other private citizens of similar religious persuasions to the same movement.[233] Sometimes religiously originated political protest is a way of calling attention to the fact that legislators, representing a majority, never really considered the effects of a proposed law on a minority. And sometimes the point of the action is to influence the very act of legislation by engaging the conscience of political actors and exposing their hypocrisy, inconsistency, or indifference to human suffering.[234]

When religious people engage in conduct as a form of political protest, that expression may be directed at the state, other private actors, or even internally to members of the religious community. In terms of the state's response to such religious conduct (at least that not already protected by the Speech Clause), we might first concede that the state has a responsibility to evaluate the effects of the conduct and respond when those effects are serious. The state cannot, for example, tolerate murder or torture of innocents by religious communities even when such practices might be considered legitimate and effective methods of accomplishing the community's political goals.

Beyond the harms that would easily pass any test, including the compelling state interest test, the question remains whether the state should tolerate religious conduct motivated by political reasons, including protests against the state's own values and regulation against religious communities. For example, should the state push back against the civil disobedience that occurred in France after the *hijab* ban, or Nashala's decision to wear her *hijab* to school despite officials' threats to send her home?

As just suggested, the state has a strong interest in protecting the ability of religious dissenters to engage the religious community about its failure to provide justice to all within its communities. Therefore, just as states make contextual judgments about when they will choose to employ force against dissenters who, for example, lie down in front of the gates of weapons manufacturers, picket union-busting employers, or sit in the gov-

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[233] *See* Susan Tiefenbrun, *Civil Disobedience and the U.S. Constitution*, 32 S.W.U. L. REV. 677, 686–87 (2003).

[234] *See id.* at 683, 687.

ernor's office, so too they should also make contextual judgments about when they should take sides in a religious community's internal battles. For example, the state's decision whether to deploy the police immediately where religious dissenters are conducting peaceful sit-ins on commonly owned religious property should be respectful not only of the powerful elite who exercise title rights to the property but also of those who claim that they are acting in the spirit of the religious community's values. The state may, for example, condition an exercise of force against peaceful protesters who are not disrupting vital services on the religious authority's willingness to converse or mediate with the protesters.

When the religious/political conduct is aimed at the state itself, the state should be very cautious about exercising its prerogative of force. Even for conduct that is not clearly protected by constitutional speech or assembly jurisprudence, the state has the opportunity to learn from religious communities engaging in dissenting conduct about the nature of their grievances and to reconsider whether those grievances are just.

When the state simply bulldozes over religious conduct aimed at objecting to the state's own thoughtlessness, there can be a grave threat to a cohesive political community in which all citizens believe their participation matters. We might give any number of examples of bad government responses to religious conduct aimed at protesting government action that infringes on religious practices, such as sacred lands cases. Using my own community as an example, we might consider what happened in Minnesota, in December 1998, when government officials sent more than six hundred armed law enforcement officers to disrupt Camp Coldwater so they could continue construction on a highway.[235] At the Coldwater encampment, members and supporters of the Mendota Mdewakanton Dakota were attempting to protect four old-growth trees sacred to the Dakota, along with Coldwater Spring, a site used for native ceremonies and burials.[236] In the words of one Minnesota activist, "Camp Coldwater Spring has flowed for 11,000 years. Unless there is a combined consciousness of government

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[235] *See* Evan Lovett-Harris, *Police Raid Protests Blocking Highway Construction*, 23.1 CULTURAL SURVIVAL (1999), *available at* http://www.culturalsurvival.org/ourpublications/csq/article/police-raid-protesters-blocking-highway-construction (last visited Jan. 3, 2012). *See generally* Susu Jeffrey, *Saving Coldwater*, 9 THE NEWSLETTER OF SACRED SITES INT'L FOUND., SITE SAVER 1 (2000), http://sacred-sites.org/preservation/camp_coldwater_saving.html (providing additional details on the Dakota sacred site and controversy).

[236] *See* Lovett-Harris, *supra* note 235, at 1; Jeffrey, *supra* note 235.

and developers to protect and preserve the flow of the spring, we will witness its extinction due to bureaucratic ignorance and indifference."[237] Another activist claimed that the enforcers "are aware their actions are in violation of federal and state law and have told us they don't care about Native American's [sic] fight to freedom of religion."[238] Protesters noted that they had offered a number of alternatives to the highway route, including the possibility of light rail transit that would obviate the need for the highway expansion into the sacred areas.[239] Their sit-in and attempts at dialogue were instead met with overwhelming force.[240]

Minnesota's reaction to this political protest was problematical in several respects, at least if the news report I have relied on accurately represents the facts. First, as noted, the show of force[241] did not permit a considered review, at least in public view, of whether the protesters had a good argument that the demolition of this site was illegal even under the secular law. Second, the state's reaction raises questions about whether the protesters were offered a fair opportunity to show either that the damage to their religion was greater than the benefit to Minnesota citizens of extending the highway along this particular route, or that both interests could be accommodated through alternate routes.[242] Third, the state's show of force suggests that it had little respect for the religious claims of Native Americans; if the Dakota were right,[243] the state of Minnesota was violating the law of the Creator in running asphalt through a place set aside by the Creator for worship and burial. Thus, the state's action could have effectively violated the non-endorsement test by disclaiming any possibility that the Dakota's religious claims could be true. By contrast, the willingness to

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[237] *See* Lovett-Harris, *supra* note 235.

[238] *Id.*

[239] *Id.*

[240] *Id.*; Jeffrey, *supra* note 235.

[241] Lovett-Harris, *supra* note 235.

[242] Perhaps ironically, this land was ultimately turned over to the National Park Service when the need for more highway lanes was made irrelevant by light rail, and is currently being restored as part of the Park Service program on sacred sites. *See Coldwater Restoration*, NAT'L PARK SERV., http://www.nps.gov/miss/parkmgmt/bomcoldwater_restoration.htm (last visited Oct. 28, 2011). *See also* SACRED SITE AND TRADITIONAL CULTURAL PROPERTY ANALYSIS, NAT'L PARK SERV. 1, 1–12 (Oct. 4, 2006), http://www.nps.gov/miss/parkmgmt/upload/ TCP CommentsFinal.pdf (analyzing whether Coldwater Spring should be considered a "Traditional Cultural Property" and/or a "Sacred Site").

[243] *See supra* text accompanying note 219.

continue negotiating for another alternative to the highway would have signaled that the state did not come down on one side, but elected to leave that question open for believers and non-believers alike to decide.

In other cases, of course, the "harm principle" will counsel that the state simply cannot take the chance that the religious believers' politically dissenting conduct is based on possibly truthful religious beliefs. Such was the case with the Rajneesh of Antelope, Oregon, who attempted to poison the non-believing citizens of Antelope on Election Day.[244] The Rajneesh calculated this would give them the balance of power in Antelope and the ability to impose their religious views as law.[245] Even a state that acknowledged it was constitutionally required to be agnostic about the Rajneesh's beliefs could not take the chance that their beliefs about a theocratic state were correct, when the cost was the lives of others who disagreed with them.[246]

F. THE STATE AND THEOLOGICALLY DIRECTED CONDUCT

This leaves us with the question of how should the state respond to religious conduct that the believer engages in primarily to form or keep community with the perceived divine? The Christian religion has been granted religious preferences throughout American history, most clearly in the exemption of communion practices from prosecution during the days of Prohibition; however, minority religions have often not been afforded these same privileges.[247] Admittedly, some (though not all) religious conduct occurring on the private property owned by the religious community and out of public sight has been protected because of the sacredness of private property in the American legal lexicon.[248] But once religious con-

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[244] *See* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 80–88 (2001) (describing takeover of Antelope, Oregon, by Rajneesh and poisoning of residents at election time).

[245] *Id.*

[246] *See id.*

[247] *See* Emp't Div. v. Smith, 494 U.S. 872, 877–78 (1990) (claiming that a ban on alcohol and similar sacraments would violate Free Exercise Clause only if the state targeted the practice because it was religious or because it displayed a particular religious belief). *But see id.* at 913 n.6 (Blackmun, J., dissenting) (discussing exemption for sacramental wine during Prohibition and arguing that the state does not have a compelling interest in enforcing either peyote or wine prohibitions).

[248] *See* Angela Carmella, *Religion-Free Environments in Common Interest Communities*, 38

duct is "out in public," most minority religious Americans have found that their religious conduct (apart from thinking and speaking) will be protected only to the extent that it does not offend or scare majorities; otherwise, the heavy hand of the law will come down, even when the religious adherent is only attempting to communicate with her God.[249]

We could offer many examples of the state's willingness to interfere in an individual's religious community with God. Virtually all of the constitutional Native American sacred sites cases have held that community with the divine must give way to such trivial interests as extending a logging road through a forest or giving tourists a place to recreate.[250] *Smith* stands for the proposition that even acts of worship can be prohibited unless there is evidence that the government is targeting a particular religion because of its beliefs or practices.[251] *Braunfeld v. Brown* is a similar case: the state imposed a penalty on Orthodox Jews who observed the Sabbath by closing their businesses on Saturday.[252]

It seems easiest, from an American constitutional perspective, to privatize religion by protecting only religious conduct intended to make community with the divine when it is privately engaged in—for example, on private property, involving no visible external harm to individuals or social values.[253] But that, once again, trivializes the nature of the claim that religious people make. Even the Muslim girl bloggers who wear the *hijab* and skinny jeans and want to be "cute" Muslims[254] are making a claim about what is true about the nature of our relationship with God, as it is and as it should be. By wearing the *hijab*, they are making a claim that God exists and that God demands something of us, including "out in public."

PEPPERDINE L. REV. 57, 83–88 (2010) (discussing the tradition of religious protections on private property and erosion of that protection in private property communities).

[249] *See infra* note 250 and accompanying text.

[250] *See* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians As Non-Owners*, 52 U.C.L.A. L. REV. 1063, 1072–85 (2005) (discussing denial of Indian religious freedom claims for state interests in dams, parks, ski areas, and logging roads).

[251] *Emp't Div.*, 494 U.S. at 877–78.

[252] *See* Braunfeld v. Brown, 366 U.S. 599, 602 (1961) (describing Jewish Sabbath observance).

[253] *See supra* text accompanying notes 231–33.

[254] *See supra* notes 228–29 and accompanying text.

Once again, it is easy for the state to walk right over that claim, to essentially deny its truth by denying women and girls the right to engage in this self-expressive and community-forming action by alleging substantial or even trivial social reasons. But the state has an alternative. It can publicly acknowledge that the religious believer sincerely believes the truth of that claim without making a judgment on the underlying validity of the claim itself. That is, it can be truly agnostic, leaving open the possibility that the claim is true as well as the possibility that the claim is not. An interesting example is the National Park Service ("NPS") approach to the problem to whether Native American sites are sacred.[255] In the Coldwater Spring dispute, the NPS suggested:

> The NPS does not make the determination of whether a sacred site exists. It is up to a federally recognized tribe to make such a determination .
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> Inherent in E.O. 13007 is the idea that a sacred site is sacred to the specific tribe declaring it so. Just because one tribe declares a site sacred does not mean it is sacred to other tribes or to the general public. When a tribe declares a site sacred, the agency does not normally ask for details or evidence supporting why the site is sacred.[256]

If the government concedes that it is not in a position to make a judgment about whether the truth-claim of the adherent is correct, the government may have to approach religious exemptions more modestly. Often, that will mean receding from the state's prohibitory laws because, in fact, it is not necessary to prohibit such religious conduct in order to achieve the state's objectives. This is because an alternative will do just as well, and can be employed as an accommodation as soon as the state becomes aware that it is preventing someone from a relationship with God. In other situations, as suggested,[257] the stakes for the state if the religious believer is wrong are simply too high. Thus, perhaps a judge can legitimately say to a Christian Scientist who refuses to get his son standard medical care, "I acknowledge that you believe that God does not want this for your son,

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[255] SACRED SITE AND TRADITIONAL CULTURAL PROPERTY ANALYSIS, *supra* note 242, at 1. However, perhaps ambivalently, the report does require more evidence to place the site on the National Register of Historic Places, thus protecting it from desecration. *See id.* at 9.

[256] *Id.* at 2.

[257] *See supra* notes 225–27 and accompanying text.

and I acknowledge that I cannot tell you for sure that you are wrong about that. However, my duty as an officer of the state is to accept the legislature's judgment that the stakes are too high in this world for your son if you are wrong about your belief."[258]

The state's willingness to acknowledge the seriousness and even the possibility of the truth-claim of the religious dissenter engaging in conscientiously demanded conduct better respects the constitutional demand that the state should not determine religious truth. It acknowledges the possibility that the state's action, taken under the factual assumption that the belief is wrong, may be incorrect and prevent a believer from forming community with God. Like virtually all judicial decisions, there is no way for the judge to know for sure that he or she is correct about the facts or the law. But not to acknowledge that a truth-claim made by the religious believer may possibly be true is ultimately more damaging to religious freedom than the state's getting it wrong on what God, if God exists, expects of God's creatures.

There is, I admit, some tension between my previous argument that the state has a duty to publicize its own gender norms and the argument that the state should acknowledge and respect the theological claims of a religious person that are at odds with those norms. But I think there is no necessary contradiction. As with most disagreements, it is not necessarily a sign of disrespect to say, "I acknowledge your views. I acknowledge that they may be true. But I must act according to my own responsibilities and understandings."

IV. CONCLUSION

Initially, I tried to argue that the state should better seek to understand the nature of religious conduct and abandon adjudicatory tropes such as the belief-action distinction that trivialize what it means for a believer to act out of his or her religious identity. Instead, I have argued that there should be presumptively more freedom for religious conduct, and a constitutional return to a focus on whether a state has exceptionally good reasons for suppressing or regulating religious conduct. On the other hand, where the state is not regulating or punishing religious conduct, I believe

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[258] Perhaps a close analogy is *Walker*, where the court attempts to honor religious treatment until the child's life is placed in danger. Walker v. Superior Court, 763 P.2d 852 (Cal. 1988).

there is more room for the state to respond to religious communities whose norms violate key democratic commitments such as gender justice. Through alternative responses such as public education, the creation of mandatory dispute resolution mechanisms, the use of public benefits (carrots and sticks) and the support of private efforts to ensure gender justice, the state can express its own commitments without running roughshod over the commitments and practices of religious communities.

As with all reforms that rely on the good faith of all parties involved, such as Shachar's transformative accommodation proposal, these proposals may be properly accused of too much idealism. The elements that make for conflict—ignorance of the Other, the need to keep power, and a fear of change—are no less evident in either governments or religious communities than they are in other social encounters. But providing more opportunities and support for religious women to unchain themselves from oppressive situations, without demanding that they give up important communities and commitments, can only serve to give them a measure of autonomy that is consistent with their own authenticity as religious women.