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# How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts

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# HOW TO JUDGE *SHARI'A* CONTRACTS: A GUIDE TO ISLAMIC MARRIAGE AGREEMENTS IN AMERICAN COURTS

Nathan B. Oman\*

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## I. INTRODUCTION

For many in the West, the term *shari'a* conjures images of brutal punishments such as cutting off the hands of thieves or stoning adulterers to death.<sup>1</sup> Others associate the term with the subjugation of women and a set of misogynistic rules governing status and power within family relationships.<sup>2</sup> For the ever-growing

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<sup>1</sup> See, e.g., CHRISTOPHER CALDWELL, REFLECTIONS ON THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM, AND THE WEST 220 (2009) (“For Europeans, *shari'a* is a frightening tabloid specter: lopping off people’s hands for theft, as occurs in Saudi Arabia; [and] stoning adulteresses to death, as has been the practice in Iran since the Khomeini revolution of 1979.”).

<sup>2</sup> Zainah Anwar & Jana S. Rumminger, *Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform*, 64 WASH. & LEE L. REV. 1529, 1536–37 (2007) (“Such codification, however, was generally based on the classical *fiqh* conception of the marriage contract developed by Muslim jurists in the ninth and tenth centuries in a socio-historical context in which gender inequality and the subjugation of

Muslim minorities in Western countries, however, shari'a is a term with very different connotations. For them it gestures towards living a pious life devoted to realizing God's justice in the world. According to many pious Muslims in the West, being a good Muslim is synonymous with living, in so far as possible, in accordance with God's law, or in other words, the shari'a.<sup>3</sup> The intersection between this religious impulse and secular legal systems has proven to be politically charged on more than one occasion.

For example, in 2003, a group called the Islamic Institute of Civil Justice announced that it would seek to apply shari'a law under the Canadian province of Ontario's Arbitration Act, which had earlier been amended to allow for binding, faith-based arbitration.<sup>4</sup> The result was a firestorm of protests. A dozen separate demonstrations were held across Canada and Europe.<sup>5</sup> Caroline Di Cocco, head of the Ontario Liberal Women's Caucus, led a unanimous group of female provincial members of parliament in calling for a ban on shari'a-based arbitration.<sup>6</sup> "Some of the aspects of shari'a law put women on an unequal footing in being able to defend themselves,"<sup>7</sup> Di Cocco said. "We don't want any of that to be part and parcel of Ontario law because Ontario law is about equality."<sup>8</sup> Ultimately, the provincial government amended the Act to eliminate all faith-based arbitration rather than allow shari'a-based arbitration.<sup>9</sup>

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women were taken for granted. Therefore, modern Muslim family laws are grounded in assumptions that are centuries old and have little bearing on today's realities.").

<sup>3</sup> For instance, this accounts for the popularity of English-language websites in which Muslims may submit questions to religious jurists and receive back a *fatwa*—legal opinion—on how to conform their conduct to Islamic law. See, e.g., *Living Shari'ah Compliant*, LIVING MUSLIM, <http://www.livingmuslim.com/living-shariah-compliant/> (last visited Mar. 7, 2011).

<sup>4</sup> See Clifford Krauss, *When the Koran Speaks, Will Canadian Law Bend?*, N.Y. TIMES, Aug. 4, 2004, at A4. In 1991, Ontario amended its Arbitration Act to allow faith-based arbitration. See *id.*; see also BOYD, *infra* note 9, at 10–12. At the time, this was done primarily to accommodate the province's Orthodox Jewish community, whose members had been turning to *beit din*—Jewish religious courts—to resolve disputes according to the principles of Jewish law. As amended, the Arbitration Act provided that if the parties consented, religious courts were allowed to issue binding arbitration decisions, subject to appellate review by the province's secular courts; See Arbitration Act, S.O. 1991, c. 17 (Can.).

<sup>5</sup> See Karen Howlett, *Female MPPs Spearheaded Ban on Sharia; Unanimous Opposition by Women's Caucus Played Key Role in McGuinty's Decision*, GLOBE & MAIL (Toronto), Sept. 14, 2005, at A8.

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

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Initially, provincial premier Dalton McGuinty commissioned Marion Boyd, a prominent female lawyer and former provincial attorney general, to conduct a study of the issue. When Boyd's report concluded that the safeguards in the present law were sufficient and suggested that Muslims should enjoy the same access to voluntary arbitration panels as other religious Canadians, McGuinty's government repealed the 1991 amendments to the

Likewise, in February 2008, Rowan Williams, Archbishop of Canterbury and nominal leader of the world's Anglicans, gave a lecture at the Royal Courts of Justice in London in which he called for "crafting a just and constructive relationship between Islamic law and the statutory law of the United Kingdom."<sup>10</sup> He later told the BBC that in some limited situations, the British courts should apply shari'a law when called upon to do so by the parties to litigation.<sup>11</sup> The result was a tidal wave of public outrage against England's high prelate.<sup>12</sup> In response, Williams issued a "clarification," insisting that he was not calling for the wholesale application of shari'a to British Muslims.<sup>13</sup>

The United States has yet to experience a cause célèbre on quite the scale of the explosions over the Ontario Arbitration Act or Williams's remarks. In the 2010 elections, however, shari'a law did emerge as a minor issue, with Oklahoma adopting a state referendum banning the use of Islamic law in the state's courts.<sup>14</sup> In part, the lower saliency of shari'a law as a political issue in the United States may be because America's Muslim population is proportionately smaller than the Muslim population of either Britain or Ontario.<sup>15</sup> In addition, the United States is a

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Arbitration Act rather than allow shari'a courts to function. See MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 3–6, 133 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>; Family Statute Law Amendment Act, S.O. 2006, c. 1 (Can.).

<sup>10</sup> Rowan Williams, Archbishop of Canterbury, Archbishop's Lecture—Civil and Religious Law in England: A Religious Perspective at the Royal Courts of Justice (London) (Feb. 7, 2008), available at <http://www.archbishopofcanterbury.org/1575>.

<sup>11</sup> Interview by Christopher Landau, BBC World, with Rowan Williams, Archbishop of Canterbury (Feb. 7, 2008), available at <http://www.archbishopofcanterbury.org/1573> ("That is why there is a place for finding what would be a constructive accommodation with some aspects of Muslim law as we already do with some kinds of aspects of other religious law.").

<sup>12</sup> See John F. Burns, *Top Anglicans Rally to Besieged Archbishop*, N.Y. TIMES, Feb. 12, 2008, at A11. A columnist in the *Daily Mail* captured the responses of many Britons, writing:

How on earth would human rights law help protect a British Muslim woman who is exposed to manifold injustice, violence and even "honour killings" under sharia family law Dr. Williams wishes to entrench? . . . Dr. Williams's prescriptions would spell the end of British identity. Until now, all minorities have set up their own communities of faith and culture under the law of the land, which binds us all as equally loyal citizens of this country.

Melanie Phillips, *Seven Deadly Reasons Why the Archbishop Must Not Be Allowed to Get Away with It*, DAILY MAIL (UK), Feb. 13, 2008, at 14.

<sup>13</sup> See Burns, *supra* note 12.

<sup>14</sup> See Nathan B. Oman, *Sharia Law Poses No Threat to American Courts*, DESERET NEWS, Dec. 19, 2010, at G06 (discussing the politics behind the Oklahoma referendum).

<sup>15</sup> See *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook> (follow "Select a Country or Location" drop-down menu; then select both "Canada" and "United States") (last visited Mar. 6, 2011) (listing, as

less secular society than either Canada or the United Kingdom, and therefore Americans may feel less threatened by highly religious minorities.<sup>16</sup> That said, American courts increasingly must grapple with how to treat shari'a law.<sup>17</sup> The overwhelming majority of cases come before American courts not as arbitral decisions—the issue that sparked controversy in Canada and Britain—but rather as contract disputes. In particular, when Muslim couples divorce in the United States, they are increasingly invoking their rights under Islamic marriage agreements, forcing American courts to grapple with contracts whose meaning is given by Islamic law.<sup>18</sup>

Understanding the shari'a contract cases American courts have grappled with requires first an understanding of the place of law in Muslim thought and practice. Islam is a juristic religion. In contrast to Christianity, which places faith at the center of piety, Islam—like Judaism, the other great monotheistic tradition—is an othopraxic religion in which right conduct (conduct according to God's law) plays at least as vital a role as orthodoxy.<sup>19</sup> For the devout Muslim, shari'a is more than simply a set of religious rules or traditions. It represents the primal mode of rightly relating to God. Accordingly, Islam invests enormous intellectual, emotional, and spiritual energy in religious law.

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a percentage of population, the Muslim demographic of Canada as 1.9% and of the United States as 0.6%).

<sup>16</sup> See Steve Crabtree, *Analyst Insights: Religiosity Around the World*, GALLUP.COM (Feb. 18, 2009), <http://www.gallup.com/video/114694/analyst-insights-religiosity-around-world.aspx> (noting that among developed countries, the United States has by far the highest level of religiosity).

<sup>17</sup> This is not to suggest, of course, that the appearance of shari'a law in American courts has failed to spark any controversy. See, e.g., Eric Lichtblau, *After Attacks, Supporters Rally around Choice for Top Administration Legal Job*, N.Y. TIMES, Apr. 1, 2009, at A19 (“Mr. Koh had made a ‘favorable reference’ to Shariah, or Islamic law, and had said it could be used to ‘govern a controversy’ in an American court.”).

<sup>18</sup> See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865–66 (Cal. Ct. App. 2001); *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 871–72 (Cal. Ct. App. 1988); *Akileh v. Elchahal*, 666 So. 2d 246, 247–48 (Fla. Dist. Ct. App. 1996); *Aleem v. Aleem*, 947 A.2d 489, 494 (Md. 2008); *Aleem v. Aleem*, 931 A.2d 1123, 1126, 1129 (Md. Ct. Spec. App. 2007); *Chaudry v. Chaudry*, 388 A.2d 1000, 1003, 1006 (N.J. Super. Ct. App. Div. 1978); *Odatalla v. Odatalla*, 810 A.2d 93, 95, 98 (N.J. Super. Ct. Ch. Div. 2002); *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at \*1 (N.Y. Sup. Ct. Jul. 10, 1995); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 123–24 (N.Y. Sup. Ct. 1985); *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at \*1 (Ohio Ct. App. Jul. 10, 2008); *Mir v. Birjandi*, No. 2006 CA 63, 2007 WL 4170868, at \*1 (Ohio Ct. App. Nov. 21, 2007); *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at \*4 (Ohio Ct. App. 2001); *Ahmed v. Ahmed*, 261 S.W.3d 190, 193 (Tex. Ct. App. 2008).

<sup>19</sup> See JACOB NEUSNER & TAMARA SONN, *COMPARING RELIGIONS THROUGH LAW: JUDAISM AND ISLAM* 5 (1999) (“But Judaism and Islam in one important way stand closer together than either does to the third companion in the trilogy of monotheism, Christianity. That way is their conviction that law embodying public policy as much as theology sets forth religious truth.”).

Over the centuries, Muslim jurists have painstakingly constructed a body of legal interpretations of the Muslim revelation, a *corpus iuris* known as the *fiqh*. Hence, there is a considerable body of Muslim religious law governing marriage and divorce, and in many Muslim countries the formal municipal law closely follows the *fiqh* on matters of marriage and family. In Islam, marriage is a contract rather than a sacrament.<sup>20</sup> Accordingly, when Muslims marry they necessarily enter into a marriage contract. One of the chief features of this contract is the so-called *mahr* or *sadaqa*, a sum of money that the husband agrees to pay to the wife.<sup>21</sup> Generally speaking the *mahr* is divided between an immediate gift to the wife and a deferred payment to be made upon divorce or the husband's death.

Both husbands and wives have invoked *mahr* contracts, contending that the agreements entitle them to a more favorable settlement than American divorce law provides.<sup>22</sup> American courts are thus faced with two difficult inquiries. The first goes to matters of interpretation. What exactly are *mahr* contracts? What did the parties in fact agree to? The second goes to matters of enforcement. Having interpreted the terms of the contract, should it be honored by the court? Are there reasons of public policy or traditional contractual defenses that bar enforcement? Both inquiries require that courts make sense of contracts embedded in a legal and cultural context that most American judges find foreign and bewildering.

In at least one case, an American court has reached an extremely harsh result in interpreting and enforcing a *mahr* contract.<sup>23</sup> The fear of repeating such a result has led some commentators to argue in favor of a blanket prohibition on the enforcement of *mahr* contracts. Others have argued that the adjudication of such contracts should be removed entirely from the ordinary courts to private, religious arbiters. This Article takes a middle ground, arguing that courts should be careful to properly understand the meaning of such contracts on their own terms, but that current doctrines provide sufficient tools to police overreaching or unduly harsh results.

At the heart of the courts' difficulties with *mahr* contracts lies a failure of cultural and religious understanding. In particular, American law tends to understand both marriage and the concept of religion through a set of categories inherited from a particular religious tradition: Christianity. This is true despite the fact that the United States is a nominally secular republic, and despite the modern revolution in the conceptualization of family law. This Christian legacy reveals itself in our law's special concern with matters of religious belief, and the tripartite structure of the act of marriage as consisting of bride, groom, and an officiator

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<sup>20</sup> See *infra* notes 87–89 and accompanying text.

<sup>21</sup> The *mahr* is sometimes mistakenly referred to as a “bride price” or “dowery.” Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 589–91 (2010). It is important to understand, however, that it is not a sum of money paid by the husband to the wife's family or vice-versa. *Id.* It is a payment from husband to wife. *Id.*

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *Chaudry*, 388 A.2d at 1007–08 (affirming the denial of alimony and equitable distribution because divorce had already been litigated and decided in Pakistan courts).

performing the marriage.<sup>24</sup> Both of these assumptions are foreign to Islam, where religion centers around law rather than theology, and where the act of marriage is conceptualized as a contract rather than the tripartite structure bequeathed to the law from the Christian sacrament of marriage.<sup>25</sup> These differences are key to understanding the meaning that parties ascribe to mahr contracts, and that meaning in turn is vital to the law's treatment of these agreements.

This Article thus has two goals. The first is to show how the Muslim conception of marriage diverges from the Christian-influenced norms that dominate American law and society. Understanding this divergence provides a necessary background to Islamic mahr contracts. The second goal is to provide lawyers and judges with a doctrinal framework within our current law for analyzing these contracts and reaching sensible results in concrete cases.

The remainder of this Article will proceed as follows: Part II provides an introduction to Islamic law in general, and the law of marriage and divorce in particular, as well as some discussion of how these rules function in practice. Part III summarizes the way in which American courts have dealt with mahr contracts, showing how both husbands and wives seek to deploy arguments based on contract law, the law of premarital agreements, and constitutional law. Part IV provides a framework for analyzing mahr contracts. It argues that such contracts are best dealt with using traditional contract doctrines. Indeed, once the meaning of mahr contracts are properly understood, this Article argues that the common law of contracts is capable of dealing with potential problems presented by mahr contracts without any dramatic legal innovations.

## II. ISLAM, *SHARI'A*, AND MARRIAGE CONTRACTS

For a pious Muslim, marriage contracts are bargained for in the shadow of God's law, the shari'a. Islamic law both explains the motivation for entering such contracts and provides the terms and concepts used. Understanding such contracts requires an understanding of the role of law in Islam, the content of the Islamic law of marriage and divorce, and the complex social reality of Muslim marriages.

### *A. The Role of Law in Islam*

Consciously or unconsciously, thinking about religion in American law proceeds from an analogy to Christianity. Stated in the bluntest terms, the core idea of religion is defined in terms of mainline Protestantism and, to a lesser extent, Catholicism. Other religious traditions are then understood in terms of analogies to this core. Hence, for example, Jewish rabbis are implicitly understood as being a kind of "Jewish version" of a minister.<sup>26</sup> Likewise, a Muslim mosque or a Mormon

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<sup>24</sup> See *infra* notes 75–81.

<sup>25</sup> See *infra* notes 83–89 and accompanying text.

<sup>26</sup> See *Wingo v. Comm'r*, 89 T.C. 922, 932 (1987) (using a three-prong ministerial test to determine whether a rabbi fell within the category of minister for tax purposes).

temple is thought of as being “like” a Protestant church.<sup>27</sup> We talk of the problem of “church and state” rather than “mosque and state” or “synagogue and state.”<sup>28</sup> We have a “ministerial” or “priest-penitent” privilege, rather than an “iman” or “rabbinical” privilege.<sup>29</sup> And so on. Of course, the task of conceptualizing religion in general, untainted by any implicit analogies, presents formidable intellectual problems of its own and may well be impossible.<sup>30</sup> Professor George Santayana, for example, suggested that “the attempt to have a religion that shall be no religion in particular” is as hopeless as “[t]he attempt to speak without any particular language.”<sup>31</sup> Given the history of the United States, the persistence of the

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<sup>27</sup> See *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 294–95 (5th Cir. 1988) (referring to a mosque as a “church” under a city zoning requirement); see also CYRIL GLASSE, *THE NEW ENCYCLOPEDIA OF ISLAM* 361–63 (3d ed. 2008) (discussing mosques in Islam, noting their contrast to “a Gothic Christian cathedral”); Immo Luschin, *Temples: Latter-Day Saint Temple Worship and Activity*, in 4 *THE ENCYCLOPEDIA OF MORMONISM* 1447, 1449 (Daniel H. Ludlow ed., 1992) (“After being dedicated, LDS temples are not open to the public but are restricted to Latter-day Saints. Even among themselves, Latter-day Saints do not talk about the details of the temple ceremony outside the Temple, because they are sacred.”).

<sup>28</sup> See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) (discussing “the ‘wall of separation’ between church and state” (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947))); *C.F. v. Capistrano Unified Sch. Dist.*, 615 F. Supp. 2d 1137, 1144 (C.D. Cal. 2009) (“The Supreme Court has held that the separation of church and state mandated by the First Amendment ‘rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere . . . . [T]he First Amendment ha[s] erected a wall between Church and State which must be kept high and impregnable.” (alteration in original) (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948))); *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1091 (Pa. 2009) (citing the “underpinnings” of the “more general doctrine of separation of church and state”).

<sup>29</sup> See *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”); *Atwood v. Schriro*, 489 F. Supp. 2d 982, 1027 (D. Ariz. 2007) (stating that the “priest penitent privilege” means that “a ‘clergyman or priest’ shall not be examined ‘as to any confession made to the clergyman or priest in his professional character in the course of discipline enjoined by the church to which the clergyman or priest belongs’ without consent of the person making the confession”) (quoting ARIZ. REV. STAT. § 13-4062(3) (West 1978 & Supp. 1984)); *Commonwealth v. Kebreau*, 909 N.E.2d 1146, 1158 (Mass. 2009) (stating the “priest-penitent privilege” may not be invoked if the statements “were not ‘motivated by a religious or spiritual purpose’” (quoting MASS. GEN. LAWS ch. 233, § 20A (2009))).

<sup>30</sup> See, e.g., Jonathan Z. Smith, *Religion, Religions, Religious*, in *CRITICAL TERMS FOR RELIGIOUS STUDIES* 269, 269 (Mark C. Taylor ed., 1998) (discussing the immense difficulties that scholars of religion have faced in defining “religion”).

<sup>31</sup> GEORGE SANTAYANA, *THE PHILOSOPHY OF SANTAYANA* 141–42 (Irwin Edman ed., 1953).

subliminal Christian analogy is understandable and perhaps unavoidable.<sup>32</sup> It can, however, have a distorting effect on thinking about Islam.

In the Gospel of John in the New Testament, Jesus teaches, “Truly, truly, I say to you, he who believes has eternal life.”<sup>33</sup> The saying captures one of the distinctive features of Christian spirituality: its enormous emphasis on the centrality of belief. This is not to claim, of course, that other religious traditions are unconcerned with belief. In Islam, for example, one becomes a Muslim through the recitation of a statement of belief, the *shahada*.<sup>34</sup> Nevertheless, in Christianity, faith is not only a virtue and wellspring of religious motivation, but a central aspect of salvation.<sup>35</sup> This emphasis, for example, accounts for the intellectual development of Christianity, where theology—rational explication of right belief (orthodoxy)—has always occupied pride of place.<sup>36</sup> Not surprisingly, the American law of religion has been unusually sensitive to matters of belief and theology. For example, in its earliest foray into the construction of the Free Exercise Clause, the United States Supreme Court went so far as to define freedom of religion entirely in terms of freedom of *belief*.<sup>37</sup> Likewise, the Court has taken pains to insist that

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<sup>32</sup> See, e.g., JON BUTLER, *AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE* 1–6 (1990) (discussing the central place of Christianity in American religious history).

<sup>33</sup> *John* 6:47 (Revised Standard Version).

<sup>34</sup> *Shahada* means “to testify” or “to bear witness.” SACHIKO MURATA & WILLIAM C. CHITTICK, *THE VISION OF ISLAM* 10 (1994). The *shahada* is: “There is no God but Allah; Muhammad is His Prophet.” *Id.* at 45; cf. *THE MEANING OF THE HOLY QUR’AN* 392 (Abdullah Yusuf Ali trans. 2004) (“Say: He is Allah, the One and Only; Allah, the Eternal, Absolute; He begetteth not, nor is He begotten; And there is none like unto Him.” (citations omitted)).

<sup>35</sup> See SAINT AUGUSTINE, *ON FREE CHOICE OF THE WILL* 69 (Anna S. Benjamin & L.H. Hackstaff trans., Hackett Publ’g Co. 1993) (395) (“But since we cannot pick ourselves up voluntarily as we fell voluntarily, let us hold with confident faith the right hand of God—that is, our Lord Jesus Christ—which has been held out to us from on high.”); MARTIN LUTHER, *ON CHRISTIAN LIBERTY* 7 (Harold J. Grimm ed., W.A. Lambert trans., Fortress Press 2003) (1520) (“Faith alone is the saving and efficacious use of the Word of God.”).

<sup>36</sup> See Avihu Zakai, *The Rise of Modern Science and the Decline of Theology as the ‘Queen of Sciences’ in the Early Modern Era*, 9 *REFORMATION & RENAISSANCE REV.* 125, 126 (2007).

<sup>37</sup> See *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? . . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”).

the Constitution's prohibition on the establishment of religion precludes the government from adjudicating theological claims.<sup>38</sup>

Among the three great monotheisms, however, Christianity is notable for its emphasis on faith and theology. In contrast, both Islam and Judaism emphasize orthopraxis rather than orthodoxy.<sup>39</sup> To be a Christian is in large part about holding a particular set of beliefs about God, Jesus Christ, and salvation.<sup>40</sup> In contrast, Judaism and Islam place a greater emphasis on pious conduct. The difference can be seen in the way that medieval Christianity received Islamic thought. During the thirteenth century, Europe experienced an intellectual flowering that culminated in the philosophical synthesis of Aristotelian thought and Christian theology in the work of Thomas Aquinas.<sup>41</sup> A key spur to this development was the Latin translation of earlier Arabic translations of ancient Greek philosophical texts, along

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<sup>38</sup> See, e.g., *Watson v. Jones*, 80 U.S. 679, 733 (1871) (stating unequivocally that the Court has no jurisdiction over a matter which is "strictly and purely ecclesiastical in its character . . . a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them").

<sup>39</sup> See MALISE RUTHVEN, *ISLAM: A VERY SHORT INTRODUCTION* 4 (1997) ("Muslims who dissented from the majority on issues of leadership or theology were usually tolerated provided their social behaviour conformed to generally accepted standards. It is in enforcing behavioural conformity (orthopraxy) rather than doctrinal conformity (orthodoxy) that Muslim radicals or activists look to a 'restoration' of Islamic law backed by the power of the state."); Samuel Belkin, *A Democratic Theocracy*, in *THE JUDAIC TRADITION* 580, 580–83 (Nahum N. Glatzer ed., 1969) ("Many attempts have been made to formulate a coherent and systematic approach to Jewish theology. All such attempts, however, have proved unsuccessful, for Judaism was never overly concerned with logical doctrines. It desired, rather, to evolve a corpus of practices, a code of religious acts, which would establish a mode of religious living. . . . In Judaism, articles of faith and religious theories cannot be divorced from particular practices. . . . The . . . theology[] of Judaism is contained largely in the *Halakhah* [Jewish law]—in the Jewish judicial system—which concerns itself not with theory but primarily with practice.").

<sup>40</sup> For example, the Nicene Creed, one of the earliest documents seeking to define orthodox Christianity does so in terms of belief:

*We believe* in one God, the Father, the Almighty, maker of heaven and earth, of all that is, seen and unseen. *We believe* in one Lord, Jesus Christ, the only Son of God eternally begotten of the Father, God from God, Light from Light, true God from true God, begotten, not made, one in Being with the Father. Through him all things were made.

CATECHISM OF THE CATHOLIC CHURCH 56 (2d ed. 2003) (emphasis added).

<sup>41</sup> See *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY*, at xxv (Robert L. Benson & Giles Constable eds., 1982) ("[W]hat marked the twelfth-century renaissance most distinctively was the consciousness of its position in history, its sense of time and of times, of change and innovation.").

with Muslim commentaries on the Greek works.<sup>42</sup> The infusion of ideas was not simply Greek, but also Islamic. For example, the Arab thinkers Ibn Rushd and al-Ghazali, under the Latinized names of Averroes and Algazel, became important influences on scholastic debates over the relationship between faith and reason.<sup>43</sup> To Christian thinkers, these authors were of interest purely as philosophers and theologians, that is, as theorists of *belief*.<sup>44</sup> Within Islam, however, their reputation is different. While their philosophical acumen is acknowledged, their accomplishments as jurists of Islamic law bulks far greater than any work they did in the relative intellectual backwater of theology.<sup>45</sup> The legal works of both men continue to be standard references for millions of ordinary Muslims today, while their theological writings are of interest mainly to a much smaller group of professional intellectuals.<sup>46</sup>

The prominence of both men illustrates the extent to which Islamic spirituality is not simply orthopraxic, but also juristic. The notion of right behavior is formulated as a legal concept, the *shari'a*. Westerners usually translate the word *shari'a* as “Islamic law,” but this in some ways obscures the meaning of the term. The word literally means “a path to water,” and though it sometimes refers to the detailed rules of Islamic jurisprudence, there is actually a separate word in Arabic—*fiqh*—for this corpus.<sup>47</sup> Rather, for a Muslim the word has connotations much closer to those that the term “gospel” has for a devout Christian or “Torah” has for an orthodox Jew. Beyond any detailed system of belief or practice, it refers to the primal way in which humans should relate themselves to God. Working out the operational details of the *shari'a* is the task not of theology, but of the *usul al-fiqh*, Islamic legal theory.<sup>48</sup>

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<sup>42</sup> See *id.* at xxii (noting the “important influence of non-Latin cultural traditions on particular developments—of the Arabic translations”).

<sup>43</sup> See 2 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 186–200 (Edmund F. Sutcliffe ed., 1950) (discussing the influence of the Islamic philosophers, particularly Algazel and Averroes, on medieval Christendom).

<sup>44</sup> See *id.* at 186 (noting that the interpretation of Aristotle “was incompatible with the Christian theology and faith”).

<sup>45</sup> See FRANK GRIFFEL, AL-GHAZĀLĪ’S PHILOSOPHICAL THEOLOGY 31–36 (2009) (describing Al-Ghazali’s rise as a famous jurist); DOMINIQUE URVOY, IBN RUSHD (AVERROES) 30 (Olivia Stewart trans., Routledge 1991) (noting that Ibn Rushd is a “recognized specialist in the field of juridical methodology and the study of the various legal solutions put forward by the major schools of Law (*Ikhtilaf*)”).

<sup>46</sup> See 1 IBN RUSHD, THE DISTINGUISHED JURIST’S PRIMER, at xxix (Imran Ahsan Khan Nyazee trans., 1994) (noting that “Ibn Ruchd’s works on philosophy are well known”).

<sup>47</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 1 n.1 (1964) (distinguishing between “*sharī’a*, *shar’*, the sacred Law” and “*fiqh*, the science of the *sharī’a*”).

<sup>48</sup> Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 1, 14 (Hisham M. Ramadan ed., 2006) (describing *usul al-fiqh*).

Islam rests on the revelation of God to the prophet Mohammed. The core of that revelation is the *Quran* (or *Qur'an*). According to the traditional account, in 610 C.E., Mohammed, a merchant in the Hejaz city of Mecca, received a divine command to “recite.”<sup>49</sup> This resulted in a series of sacred texts, often in verse or rhyming prose, that were later collected as the “*Qur'an*.”<sup>50</sup> The Quran is not really a Muslim Bible.<sup>51</sup> The Bible is a collection of disparate texts, all of which claim to have human authors, although the authors are regarded as divinely inspired in some way.<sup>52</sup> In contrast, pious Muslims regard the Quran as having been dictated word for word in classical Arabic to Mohammed. The Prophet is in no way regarded as the book’s author. Indeed, during the classical period Muslim intellectuals debated whether, strictly speaking, the Quran itself had ever been created or was rather an eternal and unchanging emanation from the mind of God.<sup>53</sup> In Christianity, the closest analogy to the Quran is not the Bible, but Jesus Christ, whom the Gospel of John declares to be the Word that “was in the beginning with God.”<sup>54</sup> As a practical matter, however, the text of the Quran was given to Mohammed over a twenty-year period, often in response to the particular situation in which the Prophet and the early Muslim community found themselves.<sup>55</sup> After the journey—*hijrah*—from Mecca to the neighboring city of Yathrib (renamed Medina), Mohammed became not only a spiritual but also a political leader.<sup>56</sup> The Quran thus contains many passages—*suras*—from this

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<sup>49</sup> See DANIEL C. PETERSON, *MUHAMMAD: PROPHET OF GOD* 51 (2007).

<sup>50</sup> See *id.*

<sup>51</sup> See Gary Miller, *The Difference Between the Bible and the Quran*, *QUR'ANIC STUDIES* (Dec. 9, 2003), <http://www.quranicstudies.com/pdf/articles/the-quran-and-the-bible/the-difference-between-the-bible-and-the-quran.pdf> (describing the fundamental differences between the Quran and the Bible). *But see* PETERSON, *supra* note 49, at 54 (making the comparison that “[a]s with Jesus, the earliest writing of the teachings of the Prophet of Islam came from his followers and disciples”).

<sup>52</sup> See THE NEW JEROME BIBLICAL COMMENTARY 1024 (Raymond E. Brown et al. eds., 1990) (“Those divinely revealed realities which are contained and presented in sacred Scripture have been committed to writing under the inspiration of the Holy Spirit. . . . In composing the sacred books, God chose men and while employed by him they made use of their powers and abilities, so with him acting in them and through them, they, as true authors, consigned to writing everything and only those things which He wanted.”).

<sup>53</sup> See HENRY CORBIN, *HISTORY OF ISLAMIC PHILOSOPHY* 108–09 (Liadain Sherrard trans., 1993) (discussing the Mu’tazilite controversy over the nature of the Quran). During the ninth century this controversy took on political overtones, with successive caliphs suppressing first one position and then the other. *Id.* at 10.

<sup>54</sup> *John* 1:2 (Revised Standard Version).

<sup>55</sup> See generally PETERSON, *supra* note 49 (describing the life of Muhammad, including the beginning of revelations around age forty and their cessation with his death around age sixty-one).

<sup>56</sup> See *id.* at 91 (“Muhammad became a prophet-statesman, the founder of a political order and eventually of an empire that would change the history of the world.”).

period instructing the Prophet on the proper organization of the community.<sup>57</sup> These texts form the core of Islamic law.

The shari'a is also revealed in the life of the Prophet himself. In the generations after his death, Muslims began looking to the example—*Sunna*—of Mohammed to determine how a pious follower of Islam should live.<sup>58</sup> Stories, known as *hadith*, regarding the Prophet's life circulated. Islamic thinkers realized, of course, that many of the circulating hadith were false, and they began trying to trace the provenance—*isnad*—of each story, in order to sort out authentic from inauthentic hadith.<sup>59</sup> The Sunna of Mohammed does not have the same authority as the Quran.<sup>60</sup> Mohammed was merely a messenger of God. Unlike Jesus, for example, his followers never imputed to him divine status.<sup>61</sup> Nevertheless, as a great prophet, leader, and pious Muslim, Mohammed's actions command enormous respect.

Christianity has always acknowledged some sort of existential divide between God and Caesar.<sup>62</sup> Even so-called Ceasoropapism, for example, distinguished between the two swords—the spiritual and the temporal.<sup>63</sup> Jesus was never a political leader.<sup>64</sup> In contrast, Mohammed was the governor of Yathrib and the Quran assumes that part of his mission was to establish a just political order based

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<sup>57</sup> See *id.* at 93 (“The ideal Islamic paradigm, however, is Muhammad, who ruled a state for nearly half his prophetic ministry and received numerous revelations instructing him how to do it.”).

<sup>58</sup> See SCHACHT, *supra* note 47, at 17–18 (describing the rise of the idea of “*sunna* of the Prophet” as a theological as well as political theory).

<sup>59</sup> See Kimberly Yonce Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights—Toward a Communitarian Vision*, 25 CUMB. L. REV. 651, 663 n.62 (1994) (describing how the reliability of hadith is judged by examining whether the “chain of narrators (*isnad*) is consistent and continuous” as traced back to Mohammed); cf. SCHACHT, *supra* note 47, at 34–36 (describing how various false hadith, supported by fabricated *isnad*, were circulated among practitioners of Islam, and that “[h]ardly any of these traditions . . . can be considered authentic”).

<sup>60</sup> See Abdal-Haqq, *supra* note 48, at 13 (“[T]he Prophet establishes in Islam the supremacy of the Qu’ran and then his Sunnah.”)

<sup>61</sup> See *id.* at 8 (“[P]romulgation of the concept of man as God, or woman as God, or the incarnation of God through a created thing, whether material or spiritual, is an anathema in Islam.”)

<sup>62</sup> See *Luke* 20:20–26 (King James) (“And he said unto them, Render therefore unto Caesar the things which be Caesar’s, and unto God the things which be God’s.”).

<sup>63</sup> See HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 88 (1983) (describing Caesaropapism as distinguishing between political leaders and priests, or spiritual leaders, while noting that in the eleventh century kings and emperors were considered to be “deputies of Christ” and spiritual leaders of their subjects).

<sup>64</sup> *But see generally* JOHN DOMINIC CROSSAN, *THE HISTORICAL JESUS: THE LIFE OF A MEDITERRANEAN JEWISH PEASANT* (1992) (arguing that Jesus should be seen as the leader of a political protest movement); JOHN DOMINIC CROSSAN, *JESUS: A REVOLUTIONARY BIOGRAPHY* (1994) (same).

on God's revelations.<sup>65</sup> Hence, law and politics are existentially intertwined with religion in Islam in a way that they are not in Christianity.

During the classical period of Islamic history, a class of legal intellectuals—the *uluma*—began painstakingly interpreting the Quran and the Sunna of the Prophet in order to construct a set of rules for an Islamic society.<sup>66</sup> They were aided by two additional sources: The first was a process of analogical reasoning from the Quran or the Sunna known as *qiyas*.<sup>67</sup> The second was an appeal to the consensus of Muslim belief and practice, on the theory that it was unlikely that any rule commanding universal assent would be mistaken.<sup>68</sup> This is known as *ijma'*.<sup>69</sup> Together these four sources of law—Quran, Sunna, *qiyas*, and *ijma'*—form the *usul al-fiqh*, the foundations of Islamic law.<sup>70</sup> Through a process of rigorous analysis and hermeneutic struggle known as *ijtihad*, the jurists produced a body of detailed rules—the *fiqh*—which came to define a pious Muslim life.<sup>71</sup>

To be sure, it is possible to overemphasize the juristic tradition in Islam to the exclusion of other important elements of Muslim spirituality, for example, the mystical tradition of *Sufism*.<sup>72</sup> Some contemporary Muslims have argued that the juristic element within Islam can be overemphasized to the detriment of its more ethical core.<sup>73</sup> Nevertheless, it is important to understand that for many Muslims, living a pious Islamic life is defined less in terms of holding particular beliefs than in terms of following, in so far as one can, the demands of correctly reasoned *fiqh*. Islamic law is therefore not the system of rules that happened to evolve within Islamic societies. It is not even analogical to the canon law that governs the

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<sup>65</sup> See generally PETERSON, *supra* note 49, at 90–98 (discussing Mohammed's time as the leader of the Islamic community in Yathrib).

<sup>66</sup> See generally 1 MARSHALL G. S. HODGSON, *THE VENTURE OF ISLAM: CONSCIENCE AND HISTORY IN A WORLD CIVILIZATION* (1974) (discussing the rise of the classical schools of Islamic jurisprudence).

<sup>67</sup> See Abdal-Haqq, *supra* note 48, at 5–6.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* at 5–6, 14.

<sup>71</sup> See generally BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 88–112 (1998) (discussing the role of *ijtihad* in dealing with uncertainty about the scope of divine law); Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 AM. J. COMP. L. 199 (1978) (describing the methods of Islamic legal interpretation); see also Frank Vogel, *The Closing of the Door of Ijtihad and the Application of the Law*, 3 AM. J. ISLAMIC SOC. SCI. 396 (1993) (discussing the decline of independent *ijtihad* and the increasing reliance on classical legal commentaries in applying the *shari'a*).

<sup>72</sup> See generally CORBIN, *supra* note 53, at 187–203 (describing Sufism as Islam's attempt to live according to the Prophet's message by purifying one's inner heart and turning towards God through asceticism, mysticism, and transcendence); HODGSON, *supra* note 66, at 393–409 (discussing the mystical traditions of the *Sufis*).

<sup>73</sup> See generally ALI A. ALLWALI, *THE CRISIS OF ISLAMIC CIVILIZATION* (2009) (criticizing contemporary Islamic religious and political thought).

internal institutional machinery of Christian churches.<sup>74</sup> Rather, the shari'a is central to Islam as a spiritual system in the way that faith is central to a Protestant Christian, sacraments are central to a Catholic Christian, or Torah is central to a Jewish believer. With this background, we turn to the classical Islamic law of marriage.

### *B. A Brief Introduction to Islamic Marriage Law*

The legal concept of marriage under American law is a lineal descendant of the Christian sacrament of marriage.<sup>75</sup> According to the Catholic Catechism, for example, a sacrament is an “efficacious sign[] of grace, instituted by Christ and entrusted to the Church,”<sup>76</sup> and the sacrament of marriage “signifies the union of Christ and the Church.”<sup>77</sup> On this view, a wedding is more than simply a party celebrating a new marriage.<sup>78</sup> Rather, at its heart it is a ceremony in which one having priestly authority performs some sacred act that results in a couple becoming married.<sup>79</sup> This same basic structure continues in American law.<sup>80</sup> A couple cannot marry themselves. Rather, they must go to some government official—or a religious leader exercising specially delegated state power—who

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<sup>74</sup> Imad-ad-Dean Ahmad, *American and Muslim Perspectives on Freedom of Religion*, 8 U. PA. J. CONST. L. 355, 364 (2006) (stating that Islam has “no ‘Church’ in the Christian sense of the term”).

<sup>75</sup> See generally JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (1997) (discussing the religious origins of the legal concept of marriage).

<sup>76</sup> CATECHISM OF THE CATHOLIC CHURCH, *supra* note 40, at 320.

<sup>77</sup> *Id.* at 463.

<sup>78</sup> See *id.* (“[The sacrament of marriage] gives spouses the grace to love each other with the love with which Christ has loved his Church; the grace of the sacrament thus perfects the human love of the spouses, strengthens their indissoluble unity, and sanctifies them on the way to eternal life.”).

<sup>79</sup> Within Catholicism, the issue is slightly more complicated. The official Catechism of the Catholic Church states, “[According to Latin tradition], the spouses, as ministers of Christ’s grace, mutually confer upon each other the sacrament of Matrimony by expressing their consent before the Church.” *Id.* at 405. Since the time of the Protestant Reformation, however, the Catholic Church has required a public ceremony for the sacrament of matrimony. See *id.* at 407 (“The priest (or deacon) who assists at the celebration of a marriage receives the consent of the spouses in the name of the Church and gives the blessing of the Church. The presence of the Church’s minister (and also of the witnesses) visibly expresses the fact that marriage is an ecclesial reality.”). The Lutheran theology of marriage, perhaps ironically, places less emphasis on the contractual aspect of marriage, emphasizing the social authority of the marriage officiator and with it the social basis of marriage. See generally HAROLD BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 184–85* (2003) (discussing the effect of the Lutheran reformation on the legal conceptualization of marriage).

<sup>80</sup> See, e.g., VA. CODE ANN. § 20-13 (2008) (directing that every marriage in Virginia “be under a license and solemnized” according to the dictates of Virginia law).

then performs the act of marrying the couple.<sup>81</sup> If a couple makes a contract regarding their marriage, the most common example being a premarital agreement, we understand the contract as something quite different from the marriage itself.<sup>82</sup> A premarital agreement does not marry a couple in the way that a magistrate marries a couple. Indeed, a couple need not enter into any contracts at all to become married, provided that one having the proper legal authority declares the couple husband and wife.

The Islamic conception of marriage is different because Islam has no concept of priesthood and it has no sacraments.<sup>83</sup> Rather, all believers are to relate to God immediately and without the mediation of any priestly class.<sup>84</sup> Of course, in Islam the shari'a may command the performance of certain ritual acts, such as the daily regime of prayer required of a Muslim believer.<sup>85</sup> These rituals, however, are not sacraments in the sense of constituting moments when a divine priestly authority is exercised.<sup>86</sup> The absence of any concept of priesthood or sacrament is key to understanding marriage under the shari'a.

Under the rules developed in the classical fiqh, marriage is a contract.<sup>87</sup> One does not become married through the performance of any priestly ritual. Rather, a marriage comes into existence when a man and a woman enter into a contract.<sup>88</sup> In other words, a Muslim marriage contract is not a premarital agreement—that is, an agreement made in contemplation of a later act that will bring the marriage into existence. Instead the marriage contract *is* the marriage. There is no subsequent act that constitutes a final solemnization that brings the marriage into existence.<sup>89</sup> A

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<sup>81</sup> See, e.g., *id.* § 20-23 (setting out the requirements for a minister to celebrate marriages in Virginia); *id.* § 20-25 (permitting a judge to issue an order authorizing a person to celebrate the rites of marriage).

<sup>82</sup> See *Lieberman v. Lieberman*, 587 N.Y.S.2d 107, 109 (N.Y. Sup. Ct. 1992) (“[A premarital] agreement does not become effective until the parties marry.”).

<sup>83</sup> JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION 1* (1990) (noting one difference between Islam and Christianity is the absence of a clerical hierarchy).

<sup>84</sup> See HODGSON, *supra* note 66, at 318 (noting that in Islam “every person, as such, with no exceptions, was summoned in his own person to obey the commands of God: there could be no intermediary, no group responsibility, no evasion of any sort from direct confrontation with the divine will”).

<sup>85</sup> See WAEL B. HALLAQ, *SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS* 227–31 (2009) (outlining the prayer requirement in Islamic law).

<sup>86</sup> See *id.* at 225 (“These performative works are constructionist, in that they are constituted and created by the believers as devotional acts for the purpose of fulfilling a covenant with God.”).

<sup>87</sup> See *id.* at 271 (“[M]arriage as *nikah* [is] a contract with a narrow scope . . .”).

<sup>88</sup> See, e.g., NASIR, *supra* note 83, at 9–12 (outlining the two forms of guardianship recognized in shari'a law, one that has a right of compulsion exercised over minors or others with limited legal capacity and one that does not have this right of compulsion but instead is chosen in deference to social custom).

<sup>89</sup> See HALLAQ, *supra* note 85, at 272–73 (discussing the minimum requirements for an Islamic marriage contract).

couple need not even be present at the inception of their marriage; it can be formed through agents, just like any other contract.<sup>90</sup> An Islamic marriage contract requires two capable and eligible parties, at least two witnesses, one guardian, and the proper form of offer and acceptance.<sup>91</sup> In addition a virgin—that is, a woman who has never been married before—must be represented by a *wali*, or guardian. The wali is the bride’s closest male relative, generally a father or uncle. His role is to negotiate the contract and insure that the bride’s interests are protected.<sup>92</sup>

The chief object of negotiation is the mahr. The standard Islamic marriage contract must contain deferred dower, called a mahr or sadaqa.<sup>93</sup> Contrary to the way that it is sometimes discussed in non-Muslim sources, the mahr is not a “bride price.”<sup>94</sup> Rather, it is a sum of money or some other economically valuable asset that a husband must give to a wife. Upon marriage the wife is entitled to the mahr; any delay is a matter of contractual forbearance on her part.<sup>95</sup> Such delays are standard, however, and the mahr is almost always divided between a nominal payment upon marriage with the bulk of the mahr due upon divorce or the husband’s death.<sup>96</sup> The mahr is thus supposed to provide wives with some measure of financial independence, ensuring that they have some pool of property that is uniquely their own.<sup>97</sup>

There are three ways in which a marriage can be dissolved under Islamic law. The first method is called *tafriq*.<sup>98</sup> This is a judicial proceeding in which a wife petitions an Islamic judge, known as a *qadi*, for dissolution of the marriage for cause.<sup>99</sup> The most common reasons are abuse, a husband’s failure to financially support his wife, or abandonment.<sup>100</sup> In addition, according to the dominant interpretations of the shari’a, a wife has a right to sexual intercourse with her

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<sup>90</sup> See *id.* at 274 (“Either of the two contracting parties could be represented by a person acting on his/her behalf as a legally empowered agent.”).

<sup>91</sup> See NASIR, *supra* note 83, at 3–16 (discussing in detail the requirements of an Islamic marriage contract); see also HALLAQ, *supra* note 85, at 271–78 (also describing the necessary provisions of a marriage contract).

<sup>92</sup> See Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. Cal. L. Rev. 189, 197–98 (2002).

<sup>93</sup> See HALLAQ, *supra* note 85, at 277 (“The delayed dower was normally stipulated as protection, becoming due to the wife from the husband if he repudiated her through *talaq* or if either of them died.”).

<sup>94</sup> See *supra* note 21.

<sup>95</sup> See NASIR, *supra* note 83, at 48–49 (discussing how dower is treated as part of the marriage contract).

<sup>96</sup> See HALLAQ, *supra* note 85, at 277.

<sup>97</sup> Blenkhorn, *supra* note 92, at 200–02.

<sup>98</sup> See HALLAQ, *supra* note 85, at 279–80 (discussing the requirements and function of *tafriq*).

<sup>99</sup> See *id.* at 280 (stating that “a judicial order known as *tafriq*” is literally translated in Arabic to mean “to separate the spouses from each other”).

<sup>100</sup> See NASIR, *supra* note 83, at 90–95 (outlining the reasons a wife petitions a court for dissolution of marriage).

husband at least once every four months.<sup>101</sup> As a practical matter, qadis are loath to dissolve marriages in any case where they think reconciliation between the parties is possible, and hence in practice, obtaining a tafaqih can be difficult for a wife.<sup>102</sup>

The second method by which a divorce may be dissolved is by *khul'*.<sup>103</sup> This method does not require any intervention by an Islamic court and occurs as a matter of agreement between the parties.<sup>104</sup> A *khul'* can only be obtained if the other spouse consents.<sup>105</sup> If the husband consents to divorce, the law requires that the wife provide consideration, known as *'iwad*, equal to the amount of mahr.<sup>106</sup> The *'iwad* can be paid in a variety of ways.<sup>107</sup> Sometimes it consists of a cash payment.<sup>108</sup> It may also be paid if the wife provides child care for the minor children of the marriage upon divorce.<sup>109</sup> In the eyes of Islamic law, by caring for the children, the wife provides the husband with a service for which she may demand compensation.<sup>110</sup> Hence, the provision of such care gratis could constitute a proper *'iwad*.<sup>111</sup> The most common method of paying the *'iwad*, however, is for the wife to forego her claim to a deferred mahr.<sup>112</sup> As mentioned previously, while

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<sup>101</sup> See HALLAQ, *supra* note 85, at 278–79 (noting the requirement of sexual pleasure as part of Islamic marriages).

<sup>102</sup> See NASIR, *supra* note 83, at 87–90 (detailing tafaqih and its application in Islamic law countries); see also Sylvia Brooks & Felix Hoover, *Religions Have Rules for Dealing with Divorce*, COLUMBUS DISPATCH (Ohio), June 5, 1998, at 1E (describing the Quran's preference for reconciliation over divorce); M. Rafique Goraya, *Jamaat-I-Islami Demands Reconstitution of IICP*, BUSINESS RECORDER (Pakistan), Feb. 25, 2009 (recommending that the government not adopt a law requiring a husband to grant a wife's request for a divorce because "[t]he Holy Quran advises reconciliation between the spouses"); Ruqaiyyah Waris Maqsood, *Women and Islam*, TELEGRAPH (Nov. 15, 2001, 12:00AM GMT), <http://www.telegraph.co.uk/news/uknews/1399889/Women-and-Islam.html> ("In good Islamic practice, before divorce can be contemplated, all possible efforts should be made to solve a couple's problems.").

<sup>103</sup> See HALLAQ, *supra* note 85, at 283–86 (discussing the application of *khul'*).

<sup>104</sup> See NASIR, *supra* note 83, at 78 ("[M]arriage may be dissolved by mutual consent by the wife giving the husband something for her freedom under the Quranic ruling . . .").

<sup>105</sup> See *id.* at 78–81 (providing a general description the requirements of *khul'*).

<sup>106</sup> See HALLAQ, *supra* note 85, at 285–86 (discussing the five required elements of a *khul'* contract, including consideration).

<sup>107</sup> See NASIR, *supra* note 83, at 79 ("The consideration for the *khula* [i.e., *khul'*] may be pecuniary, advanced or deferred, or may be the nursing, maintenance, and custody of their child.").

<sup>108</sup> See *supra* note 94–95 and accompanying text.

<sup>109</sup> See HALLAQ, *supra* note 85, at 286 ("The consideration may consist of . . . a usufruct, including her work/service in suckling their children for a specified duration . . .").

<sup>110</sup> See *id.* at 279 ("As in the case of dower, [a wife] is under no obligation to spend any of this support or any portion of her own property on others, including her own children whose needs are, in their entirety, looked after by the father.").

<sup>111</sup> See *supra* note 109 and accompanying text.

<sup>112</sup> See HALLAQ, *supra* note 85, at 286 (noting the amount of consideration required for *khul'* will not exceed the amount of the dower).

not required by classical fiqh, as a practical matter, most marriage contracts divide the dower between an initial, often nominal payment, and a delayed payment upon dissolution of the marriage.<sup>113</sup> In most khul' transactions, the wife simply forgoes this claim as the price of dissolving the marriage.<sup>114</sup>

The final method of dissolving a marriage is known as *talaq*.<sup>115</sup> *Talaq* allows a husband to unilaterally divorce his wife without cause, judicial proceeding, or her consent.<sup>116</sup> Divorce through *talaq* can occur in several ways.<sup>117</sup> The first way is for a man to say to his wife "I divorce thee" in three successive months during the period when his wife is not menstruating.<sup>118</sup> Another form of *talaq*, known as *ila'*, is for a man to take an oath that he will abstain from sexual intercourse with his wife for four successive months.<sup>119</sup> If he keeps the oath, then *talaq* occurs.<sup>120</sup> If he fails to keep the oath, and has sexual intercourse with his wife, then he must perform penance (the oath being a breach of his marital obligation to provide sexual access to his wife) and the marriage remains valid.<sup>121</sup> Finally, *talaq* can be performed by a husband declaring, "I divorce thee" three times in succession.<sup>122</sup> *Talaq* can also be performed by proxy.<sup>123</sup> Indeed, a husband may confer the independent power of *talaq* through either a revocable (*talaq tawkil*) or irrevocable (*talaq al-tafwid*) power of attorney.<sup>124</sup> This power of exercising *talaq* is sometimes given to a wife in a marriage contract, in effect giving her the same unilateral right

<sup>113</sup> See *id.* at 277 (discussing the two types of dower present in Islamic marriages).

<sup>114</sup> See *supra* notes 103–105 and accompanying text.

<sup>115</sup> See HALLAQ, *supra* note 85, at 280–83 (outlining the requirements and procedure of *talaq*).

<sup>116</sup> See NASIR, *supra* note 83, at 70–78 (discussing *talaq* and noting that many countries have begun to curb this nearly unlimited power of the husband).

<sup>117</sup> See HALLAQ, *supra* note 85, at 280–83 (noting the different ways to effect *talaq*); see also NASIR, *supra* note 83, at 73–75 (comparing how *talaq* is treated in various Islamic law countries).

<sup>118</sup> Under Islamic law, sexual intercourse during menstruation is forbidden. The logic of the *talaq* rule is that the husband must demonstrate his seriousness by declaring "I divorce thee" during successive periods of sexual access. According to the classical fiqh, an important element of marriage is that both husbands and wives are required to provide their spouse with sexual access. See HALLAQ, *supra* note 85, at 281–82.

<sup>119</sup> See *id.* at 286 ("Should the period of *ila* lapse without resumption of sexual intercourse, the oath will have the force of a final *talaq*.").

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 286 ("The latter penalty is imposed on the grounds that the husband has caused his wife undue hardship by depriving her of sexual enjoyment without having intended or succeeded in effecting the dissolution of the marriage.").

<sup>122</sup> See *id.* at 281 (This form of *talaq* "terminates the [marriage] contract once and for all").

<sup>123</sup> See *id.* at 282–83 (discussing the delegation of authority to a proxy).

<sup>124</sup> See NASIR, *supra* note 83, at 76–78 (discussing the difference between the two forms).

of divorce as her husband.<sup>125</sup> Some Muslim feminists have argued that such provisions should be a standard part of marriage contracts on equality grounds.<sup>126</sup>

The potential for the abusive use of *talaq* is recognized by Muslim jurists.<sup>127</sup> As a practical matter, the delayed *mahr* is meant to act as a check upon the husband's otherwise unfettered power of *talaq*, requiring that he pay what amounts to a fine to his wife upon divorce.<sup>128</sup> It is important to realize, however, that the wife's right to the dower vests upon marriage.<sup>129</sup> There is no other act that she must take in order to become entitled to the *mahr* under Islamic law.<sup>130</sup> Furthermore, she may only be deprived of her immediate right to *mahr* by her own consent, either through the voluntary delay of its payment stipulated in the marriage contract or through a subsequent contract, as in a *khul'* divorce.<sup>131</sup> Hence, while the *mahr* functions as a *de facto* penalty clause upon the husband's use of *talaq*, strictly speaking, *talaq* is not a condition precedent to its payment. Rather, it must be paid upon dissolution of the marriage, however that occurs, unless the wife otherwise consents.

Under Islamic law, there is no disability on women—married or otherwise—holding property.<sup>132</sup> Indeed, the Prophet Muhammed married an older widow who held and managed considerable property.<sup>133</sup> Following her example, Islamic law has never included any device equivalent to the common-law doctrine of coverture

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<sup>125</sup> *See id.* at 72.

<sup>126</sup> A man may dissolve his marriage by pronouncing that he has dissolved the marriage, whereas Islamic law limits the ability of a wife to divorce her husband. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 30–33 (1982). Female Muslim activists propose that women also have a contractual right to pronounce divorce by *talaq-i-tafwid*. *See TALAQ-I-TAFWID: THE MUSLIM WOMAN'S CONTRACTUAL ACCESS TO DIVORCE: AN INFORMATION KIT* (Lucy Carroll & Harsh Kapoor eds., 1996), available at <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/misc/talaq-i-tafwid-eng.pdf>; Michèle Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 *HASTINGS WOMEN'S L.J.* 3, 26 (2007) (suggesting that Islamic polygamists should grant each wife a right to instigate a unilateral divorce); L. Elizabeth Chamblee, *Rhetoric or Rights?: When Culture and Religion Bar Girls' Right to Education*, 44 *VA. J. INT'L L.* 1073, 1112 n.252 (2004).

<sup>127</sup> *See HALLAQ*, *supra* note 85, at 282 (“The message the jurists wished to urge upon men was that they should not resort to *talaq* unless there is a compelling cause, and even when such a cause appears to exist, they should proceed with caution.”).

<sup>128</sup> *Id.* at 282 (noting that husbands “stood to lose most from marital dissolution” by exercising *talaq*).

<sup>129</sup> *See NASIR*, *supra* note 83, at 45 (“[T]he dower . . . shall be the right of the wife once the valid contract is made.”).

<sup>130</sup> *See supra* notes 94–95 and accompanying text.

<sup>131</sup> *See NASIR*, *supra* note 83, at 49–52 (describing how a wife is entitled to the dower specified in the contract).

<sup>132</sup> *See NASIR*, *supra* note 83, at 2 (claiming that a Muslim woman enjoys “full autonomy as far as her property is concerned”).

<sup>133</sup> PETERSON, *supra* note 49, at 44–46 (describing Muhammad's relationship with his older widowed wife).

or other restrictions on married women holding property.<sup>134</sup> Accordingly, there is no equivalent to marital property or community property under the classical fiqh.<sup>135</sup> Property does not belong to the couple as a married community or to the husband as the sole legal personality of the marriage.<sup>136</sup> Rather, any property brought to the marriage by the wife or acquired during the marriage by her remains her property.<sup>137</sup> Likewise, any property acquired by the husband during the marriage remains his property.<sup>138</sup> Upon divorce, a wife has no claim upon her husband's assets under the theory that they constitute marital property.<sup>139</sup> The lack of marital property means that Islamic marriage contracts are not premarital agreements in the sense of allocating the division of marital property upon divorce. Under Islamic law there is no such thing as marital property to distribute.<sup>140</sup>

In cases where the wife is a homemaker, and hence has not earned substantial income during the marriage, the absence of marital property can work economic hardship in the event of divorce.<sup>141</sup> The classical fiqh seeks to mitigate this in a couple of ways. First, a wife is entitled to maintenance from her husband during the marriage, and this right to maintenance continues for a period of a few months after divorce.<sup>142</sup> In addition, husbands will sometimes provide their ex-wives with *mutat*. This is a sum of money in addition to the mahr provided by the husband. It "is a matter of custom and goodwill,"<sup>143</sup> but the custom is based on a Quranic passage and is widely encouraged.<sup>144</sup> Finally, under Islamic law the concepts of custody and guardianship are separated.<sup>145</sup> While fathers are always made the guardians of their children, the law presumptively awards custody of minor

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<sup>134</sup> See HALLAQ, *supra* note 85, at 279 (describing the historic property rights given to Muslim women).

<sup>135</sup> See *id.* at 279 ("Marriage does not create community property.").

<sup>136</sup> See *id.* ("Any inheritance or gift she may receive before or during the marriage remains hers exclusively, and so does her dower and all property that accrues to her.").

<sup>137</sup> See *id.* at 279 ("But the wife, like her husband, maintains an independent financial status throughout the marriage.").

<sup>138</sup> See *id.*

<sup>139</sup> See *supra* note 135 and accompanying text.

<sup>140</sup> *Id.*

<sup>141</sup> See *supra* notes 135–139 and accompanying text.

<sup>142</sup> See DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 182 (1998) (discussing a wife's maintenance rights). The period, known as an *iddat*, extends for three-months after a revocable divorce. The purpose of the *iddat* is to "avoid confusion over paternity in the event that the wife is pregnant" at the time of divorce. *Id.* at 183.

<sup>143</sup> *Id.* at 184.

<sup>144</sup> See Hafiz Nazeem Goolam, *Gender Equality in Islamic Family Law: Dispelling Common Misconceptions and Misunderstandings*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY, *supra* note 48, at 117, 122 ("It is stated in the Koran: 'For divorced women maintenance (should be provided) on a reasonable (scale).'").

<sup>145</sup> See PEARL & MENSKI, *supra* note 142, at 410–11 (discussing guardianship and custody).

children to mothers.<sup>146</sup> While schools of jurisprudence differ on how long the period of a mother's custody lasts, they all agree that during that period she is entitled to child support payments from the father.<sup>147</sup> However, the impact of this rule is limited by the fact that a father is free to transfer custody of his minor children to another woman—such as an aunt or grandmother—who is willing to provide child care gratis.<sup>148</sup>

### C. *Islamic Marriage in Practice*

The rules of fiqh outlined above inform Muslim marriage as a social practice, but its actual contours are influenced by factors other than the decrees of the classical jurists. First, the rules can reinforce pre-existing disparities of power between men and women. For example, a woman's consent is nominally required for a valid marriage contract. However, the requirement that marriage contracts by virgins be made only with the consent of a guardian means that, in practice, the rules facilitate arranged and sometimes even coerced marriages.<sup>149</sup> Likewise, in practice, qadis can be biased against women in tafriq proceedings, by either the hope that abusive relationships can be repaired or because they do not regard certain kinds of abuse as severe enough to warrant divorce.<sup>150</sup> As discussed above the alternative to tafriq for a woman, khul', necessarily leaves her at her husband's mercy, not only because he must consent to a divorce but also because she must provide an 'iwad.<sup>151</sup> Particularly in the absence of marital property regimes, giving up a deferred dower may amount to the loss of a woman's chief economic asset.

The starkest disparity, however, comes in talaq. Despite the moral disapproval with which its abuse is regarded, talaq is nevertheless guarded as a husband's legitimate right. Coupled with the absence of any concept of marital property, it leaves women in a vulnerable position and gives husbands a potent threat against their wives.<sup>152</sup> The potency of the threat comes not only from the unilateral right of divorce given to the husband, but also from the fact that formal equality and

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<sup>146</sup> See NASIR, *supra* note 83, at 187; PEARL & MENSKI, *supra* note 142, at 411; Goolam, *supra* note 144, at 127.

<sup>147</sup> See PEARL & MENSKI, *supra* note 142, at 430.

<sup>148</sup> See NASIR, *supra* note 83, at 196–97 (discussing a mother's right to child support payments).

<sup>149</sup> See *id.* at 49 (“Guardianship with the right of compulsion’ (*al-wali al-Mujber*) is exercised over a person of no or limited legal capacity, wherein the guardian may conclude a marriage contract which is valid and takes effect without the consent or acceptance of the ward.”).

<sup>150</sup> YVONNE YAZBECK HADDAD ET AL., MUSLIM WOMEN IN AMERICA: THE CHALLENGE OF ISLAMIC IDENTITY TODAY 84 (2006) (“Most Muslims . . . consider divorce a last and most undesirable alternative. The Prophet himself is often quoted as having said that of all hateful things in the world, divorce is among the worst.”).

<sup>151</sup> See HALLAQ, *supra* note 85, at 286.

<sup>152</sup> *Id.* at 114 (“[W]omen are vulnerable in marriage to the man's privilege to execute a ‘talaq’ divorce.”).

independence of property rights granted to men and women within marriage means that a wife who does not work outside the home will be left with few economic resources beyond her deferred dower.<sup>153</sup> The husband's power is further entrenched by strong social pressure for the wife not to work outside the home, and the difficulty of remarriage for divorcees in many Muslim cultures.<sup>154</sup>

The classical fiqh has always been, at some level, the theoretical creation of religious scholars and intellectuals.<sup>155</sup> Even during the classical period it was never the sole functioning law in Muslim lands.<sup>156</sup> Today, with the exception of Saudi Arabia and a few other Persian Gulf states that are nominally governed solely by shari'a, it does not function as the municipal law of any jurisdiction.<sup>157</sup> It does, however, inform the enacted family law codes of many Muslim countries.<sup>158</sup> Hence, many of the Islamic marriage contracts that come before American courts are shaped not only by the classical fiqh, but also by the laws of the foreign jurisdictions in which they were contracted.<sup>159</sup> Likewise, among immigrant communities, perceptions of what constitutes an Islamic marriage are often

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<sup>153</sup> See *supra* notes 135–139, 141 and accompanying text.

<sup>154</sup> AMINAH BEVERLY MCCLLOUD, *TRANSNATIONAL MUSLIMS IN AMERICAN SOCIETY* 70–71 (2006) (stating that “once a female divorces she is no longer eligible for marriage inside the community,” whereas “[i]f men get divorced there is no stigma” (internal quotation marks omitted)); Azizah Yahia al-Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 J.L. & RELIGION 37, 37–38 (2000–01) (discussing that “divorce and remarriage have been rendered much easier for men” in Muslim culture); Kathryn J. Webber, *The Economic Future of Afghan Women: The Interaction Between Islamic Law and Muslim Culture*, 18 U. PA. J. INT'L ECON. L. 1049, 1066 (1997) (“Husbands effectively possess the power to prevent their wives from working. Under the obedience doctrine, if a woman wants to work and gain access to economic resources, her husband may turn to the courts for recourse. He can stop supporting his wife and even physically punish her with little restriction.”).

<sup>155</sup> Anver M. Emon, *Toward a Natural Law Theory in Islamic Law: Muslim Juristic Debates on Reason as a Source of Obligation*, 3 UCLA J. ISLAMIC & NEAR E.L. 1, 2 (2003) (discussing the theoretical debates among Muslim jurists as to which fiqh “ruling was ‘right’ or could authoritatively be considered ‘God’s law’”).

<sup>156</sup> See Asifa Quraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law*, 2009 MICH. ST. L. REV. 339, 343–44 (discussing the different functioning laws in classical Muslim lands).

<sup>157</sup> *The World Factbook*, *supra* note 15 (follow “Select a Country or Location” drop-down menu, then select the names of the countries in the following parenthetical) (stating that the legal system of Saudi Arabia is based on shari'a law and that the legal systems of the United Arab Emirates, Yemen, and Oman are influenced by Islamic law).

<sup>158</sup> See Sameer Ahmed, *Recent Developments: Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, 33 YALE J. INT'L L. 491, 492 (2008) (“While many of the twentieth-century postcolonial Muslim states adopted European criminal and commercial laws, most developed their own family law codes inspired by Islamic legal rulings.”).

<sup>159</sup> See, e.g., cases cited *supra* note 18.

influenced by the nominally secular law of their countries of origin.<sup>160</sup> For example, in Pakistan a marriage is contracted by going before a government official and executing a marriage “license.”<sup>161</sup> This license, however, mirrors a traditional Islamic marriage contract, requiring that the wife’s guardian consent to the marriage and that the parties name the amount of the deferred dower.<sup>162</sup> The pre-printed forms, however, do not provide for additional provisions in the marriage contract—such as a *talaq al-tafwid* giving the wife a right of *talaq* equal to that of the husband—despite the fact that such provisions are allowed under the classical *fiqh*.<sup>163</sup>

Finally, and perhaps most importantly, in the vast majority of cases the classical *fiqh* will be only one determinant in how marriages function in practice. Claiming, as it does, approximately 1.3 billion adherents, Islam necessarily includes a huge amount of regional and cultural variation.<sup>164</sup> A marriage between Filipino Muslims will necessarily have a different cultural background than one contracted between Muslims at the opposite side of Eurasia, in the Atlas Mountains of Morocco.

For example, the practice of honor killings, in which male relatives will murder female relatives for fornication or even romantic involvement with non-Muslims has understandably garnered public attention.<sup>165</sup> Honor killings, however, are concentrated among particular ethnic and cultural groups stretching from the Kurdish regions of eastern Anatolia and east into Pakistan and Afghanistan.<sup>166</sup> Among women in these regions—and among immigrant women from these regions who have reason to fear such actions—honor killings clearly create strong incentives to enter only into culturally approved relationships.<sup>167</sup> The practice, however, is foreign to the vast majority of Muslim communities.

Less spectacularly, arranged marriage is the norm in many Muslim communities, including some immigrant communities in the United States. Such marriages are perhaps best thought of on a continuum. At one pole are coerced marriages in which a man or woman is forced to marry someone against their will.<sup>168</sup> At the other pole are marriages that involve substantial vetting by family

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<sup>160</sup> See *Aleem v. Aleem*, 947 A.2d 489, 492 (Md. 2008) (reproducing a marriage license issued in Pakistan containing provisions for dower, the consent of the wife’s guardian, and limits on divorce).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See NASIR, *supra* note 83, at 211.

<sup>165</sup> See CALDWELL, *supra* note 1, at 217 (discussing cases of honor killings).

<sup>166</sup> See *id.* at 217–18 (discussing the geographic origins of the practice of honor killings).

<sup>167</sup> See *id.* at 217–19 (discussing honor killings among Muslim immigrants in Europe).

<sup>168</sup> See Blenkhorn, *supra* note 92, at 198.

members, but ultimately allow the prospective bride or groom to veto an undesirable match.<sup>169</sup>

To get some sense of the complexity involved, consider the following case. A young man might be attracted to a particular young woman. He would inform his parents or older siblings of this fact. They would then approach the young woman's family. A series of closely supervised meetings between the young man and the young woman would result. The young man and his parents or older siblings would then collectively decide to propose marriage to the young woman. She would be approached through her family. A similar collective deliberation would follow among her family. Provided that the woman accepts the offer and her family agrees, her parents or older siblings would then negotiate the terms of the marriage contract with the groom's family. On the day of the marriage, the prospective couple would sign the contract.

Variations on this scenario might include parents initiating the contact with a young woman of their own choosing, followed by the same closely controlled contact. Likewise, the final decision by a man or woman may be subject to greater or lesser pressure from family members, or no pressure at all. Indeed, one study in Houston revealed a wide variety of marital practices within the same families.<sup>170</sup> One daughter, for example, might contract a marriage under the close supervision of her family, following the traditional patterns of proxy arrangements and strong parental involvement. Her sister, however, might opt for marriage via the kind of self-directed dating and romance one finds in the wider non-Muslim culture.

In short, the rules of the fiqh are but one force determining how Muslim marriages unfold, and given the diversity of Muslim communities and practices, it would be foolish to hazard blanket generalizations about Muslim marriages. Rather, in assessing how any particular Muslim couple entered their marriage, the specific facts of the case provide a better guide than stereotypes about a "typical Muslim marriage." Despite this diversity, however, the fiqh does create certain core elements present in most Muslim marriages.

### III. ISLAMIC MARRIAGE CONTRACTS IN AMERICAN COURTS

In American divorce proceedings between Muslim spouses, both husbands and wives have invoked their Islamic marriage contracts. Husbands invoke the contracts as a way of limiting their liability to ex-wives upon divorce. Those adopting the most aggressive position argue that the contracts are an agreement that every legal aspect of the couple's marriage will be governed by Islamic law.

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<sup>169</sup> See *id.* at 231.

<sup>170</sup> See Denis Al-Johar, *Muslim Marriages in America: Reflecting New Identities*, 95 MUSLIM WORLD 557, 562–572 (2005) (discussing arranged marriages in Muslim communities in Houston, Texas and offering some empirical data); see also Arshia U. Zaidi & Muhammad Shuraydi, *Perceptions of Arranged Marriages by Young Pakistani Muslim Women Living in a Western Society*, 33 J. COMP. FAM. STUD. 495 (2002) (discussing the changing perception of young women toward arranged marriages and the different ways they may approach the situation with their parents).

Hence, the ordinary rules of American property and family law ought not to apply to the divorce proceeding. Rather than applying the rules regarding community property or equitable distribution, a wife's claim in divorce ought to be limited to the property to which she held title at the time of marriage, and any property acquired by her during the course of the marriage. Further, all wealth acquired by the husband during the marriage should be exempt because of the agreement that Islamic marriage law ought to apply to the couple's divorce. This aggressive reading of the marriage contract has also been invoked as a contractual backstop for husbands seeking to have a talaq valid under the laws of a Muslim country recognized by American courts.

A less aggressive claim that husbands put forward is that the marriage contract constitutes a premarital contract in which the wife agreed to receive the mahr in lieu of any claims on marital property under American law. While this reading does not seek to completely displace American family law with Islamic law in property disputes, it would have the same effect in practice: the wife would lose any claim on wealth earned by the husband during the marriage.

Wives have also sought to enforce Islamic marriage contracts. All of these actions take the form of claims for the mahr upon divorce. Wives can make the claim in two situations. First, wives may try to enforce the mahr provision as an ordinary debt, in addition to whatever distribution of marital assets they are entitled to under state divorce law. Second, in cases where the marital assets are essentially non-existent, wives seek to enforce the mahr agreement as an ordinary debt that must be paid out of the husbands' future wealth. In cases where there are no marital assets, a generous mahr provision may potentially give wives much more than they would otherwise receive under state divorce laws.

Examining how the courts have dealt with the defenses raised by both husbands and wives in enforcing the mahr illustrates the struggle to understand the meaning of these contracts and the need to understand the context in which they are made.

#### *A. Husbands Invoking the Marriage Contract in American Courts*

The most aggressive position that a Muslim husband could adopt in divorce litigation in an American court would be to claim that by executing the marriage contract the couple has agreed that the Islamic law of marriage and divorce in its entirety should govern the marriage.<sup>171</sup> In *In re Marriage of Shaban*, a couple married in Egypt by executing a traditional marriage contract, which ended with the words:

The above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of the Prophet to whom all

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<sup>171</sup> See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Cal. Ct. App. 2001) (rejecting the claim that the execution of an Islamic marriage contract in Egypt meant that a couple's divorce should be governed by Islamic law).

God's prayers and blessings be, by legal offer and acceptance from the two contracting parties.<sup>172</sup>

The husband argued that this language excluded any law but Islamic law from governing the couple's California divorce proceeding.<sup>173</sup> This was more than simply a claim that the language represented a choice-of-law clause. Instead of claiming that the contract was to be construed according to Islamic law, the husband in effect claimed that the parties had agreed, as a matter of contract, to be subject to the whole of Islamic family law.<sup>174</sup> Obviously, the whole of Islamic law was not specified in the contract, and therefore would have to be established by parol evidence.<sup>175</sup> Such a contract, the California Court of Appeals concluded, could not satisfy the statute of frauds, which requires that the essential terms of agreements made in consideration of marriage be in writing.<sup>176</sup>

A slightly less aggressive position is for husbands to cite marriage contracts in support of their efforts to get American courts to recognize the validity of talaq divorces. When Muslim marriages in the United States break down, a husband from a country that recognizes the validity of talaq may seek to preempt American divorce proceedings by traveling to that country or to its consulate or embassy to perform talaq on his wife.<sup>177</sup> The husband will then claim that the American court must recognize the foreign divorce and that the wife's claim to any marital property is limited to what would be available to her in his country of origin.<sup>178</sup> While the Constitution requires that states give the judgments of sister states full faith and credit, American recognition of foreign acts is a matter of comity.<sup>179</sup> American courts have uniformly refused to recognize such opportunistic talaqs, holding that to do so would violate state and federal constitutional provisions of

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<sup>172</sup> *Id.* at 866.

<sup>173</sup> *See id.* at 866–67 (outlining the husband's argument).

<sup>174</sup> *See id.* ("Ahmad made an offer of proof that the phrase signified a written intention by the parties to have the property relations governed by 'Islamic law,' which provides that the earnings and accumulations of each party during a marriage remain that party's separate property.").

<sup>175</sup> *See id.* at 868 n.4 (noting the difficulties of using parol evidence to find the Islamic law referred to in the contract).

<sup>176</sup> *Id.* at 869 (describing the references to Islamic law in the contract as "too attenuated a relationship to any actual terms or conditions of a prenuptial agreement to satisfy the statute of frauds").

<sup>177</sup> *See, e.g., Aleem v. Aleem*, 947 A.2d 489, 490 (Md. 2008) (husband performed talaq in the Pakistani embassy); *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at \*1 (Mich. Ct. App. 2009) (husband traveled to India in order to perform talaq).

<sup>178</sup> *See, e.g., Aleem*, 947 A.2d at 490 (arguing that on the basis of talaq the wife was not entitled to distribution of marital property); *Tarikonda*, 2009 WL 930007, at \*2 (same).

<sup>179</sup> *See, e.g., U.S. CONST.* art. IV, § 1 (Full Faith and Credit Clause); *Hilton v. Guyot*, 159 U.S. 113, 163–203 (1895) (discussing comity and the recognition of foreign judgments).

equal protection and due process.<sup>180</sup> The presence ex ante of a marriage contract conforming to the requirements of Islamic law has not persuaded them to shift their analysis.<sup>181</sup>

Most commonly, husbands have argued that the mahr provisions in their marriage contracts constitute premarital agreements governing the distribution of marital property upon divorce. Accordingly, they argue that their wives have no claim on the marital property beyond the sum specified as the mahr. In at least one case, this argument has been successful.<sup>182</sup> In *Chaudry v. Chaudry*, the Superior Court of New Jersey wrote:

[W]e have concluded that the wife is not entitled to equitable distribution by reason of the antenuptial agreement [i.e. the mahr provision], which was negotiated on her behalf by her parents. It could have lawfully provided for giving her an interest in her husband's property, but it contained no such provision.<sup>183</sup>

The court's analysis in *Chaudry*, however, is confused. It did not hold that the contract intentionally bargained away the wife's rights to equitable distribution of

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<sup>180</sup> See, e.g., *Aleem*, 947 A.2d at 502 (holding that the recognition of talaq would violate the Maryland equal rights amendment); *Tarikonda*, 2009 WL 930007, at \*3, \*4 (holding that recognition of talaq would violate the wife's due process rights); *Seth v. Seth*, 694 S.W.2d 459, 463 (Tex. Ct. App. 1985) (holding that recognition of talaq would be contrary to justice).

<sup>181</sup> See, e.g., *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978).

<sup>182</sup> The holding in this case has been subject to a great deal of commentary and criticism since it was decided. See Ann Laquer Estin, *Toward a Multicultural Family Law*, 38 FAM. L.Q. 501, 512 (2004) (using *Chaudry* as an example of a case where the "husband's divorce by *talaq*, made at the Pakistani consulate in New York, could be given respect as a matter of comity because it was later confirmed by trial and appellate courts in Pakistan in a proceeding for which the wife had notice and an opportunity to be heard"); J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts between Cohabitants*, 18 FAM. L.Q. 93, 104 n.44 (1984) (using *Chaudry* as an example of when a court enforced a premarital contract in spite of public policy); David S. Rosettenstein, *Comity, Family Finances, Autonomy, and Transnational Legal Regimes*, 23 INT'L. J.L. POL'Y & FAM. 192, 194 (2009) (discussing how a Maryland court distinguished *Chaudry* and concluded it would violate public policy to apply Pakistani law to the couple divorcing in Maryland); Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 647, 656 (2007) (citing *Chaudry* as an example of the harm that arises when courts treat Islamic marriage contracts as being identical to prenuptial agreements); Edward S. Snyder, *Premarital Agreements Reflect Society's Changes*, 134 N.J. L.J. 919, 919 (1993) (using *Chaudry* as an example of a case that lead the legislature to codify an act to deal with premarital agreements).

<sup>183</sup> *Chaudry*, 388 A.2d at 1006.

marital property in the United States.<sup>184</sup> Rather, the court rested its holding in part on a New Jersey conflicts analysis.<sup>185</sup>

The court reasoned that there was “no reason of public policy that would justify refusing to interpret and enforce the agreement in accordance with the law of Pakistan, where it was freely negotiated and the marriage took place.”<sup>186</sup> The problem with this analysis is that, while it is true that under Pakistani law the wife’s claim on the husband’s assets would be limited to the mahr provision, this result arose not from the agreement of the parties but from Pakistani property law.<sup>187</sup> In other words, under Pakistani law, the limitation on the wife’s rights arose not because she bargained those rights away, but from the fact that there was no marital property under Pakistani law upon which she might have a claim. Hence, in *Chaudry*, rather than interpreting the scope of the contract in light of Pakistani law, the court in effect adopted Pakistani property law as a whole under the guise of interpreting a contract and applied it to marital property in New Jersey.<sup>188</sup>

Other American courts have refused to enforce mahr agreements as premarital contracts bargaining away a wife’s claim on marital property.<sup>189</sup> In *Ahmad v. Ahmad*, for example, the trial court held that the marriage contract failed to meet the special formation requirements for premarital agreements.<sup>190</sup> According to the

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1005, 1007.

<sup>186</sup> *Id.* at 1006.

<sup>187</sup> See Rajni K. Sekhri, Aleem v. Aleem: *A Divorce from the Proper Comity Standard—Lowering the Bar that Courts Must Reach to Deny Recognizing Foreign Judgments*, 68 MD. L. REV. 662, 672 (2009) (“Under Pakistani law, property follows the possessor of its title upon divorce. Spouses may inherit property from each other, but neither acquires a marital interest in the other spouse’s property.”).

<sup>188</sup> To give a domestic analogy illustrating the *Chaudry* court’s error, if Jane Doe makes a contract in State A, which the courts of State B determine, as a matter of State B’s conflicts law, to be governed by the law of State A, it hardly follows that all of Doe’s property, including property acquired and held in State B, is subject to State A’s property law simply because State B’s conflicts rules require the application of State A’s law to the contract Doe made in State A. This is true even if the subject of the Doe’s contract in State A potentially includes property in State B. In *Chaudry*, the court in effect held that because Pakistani contract law should be used to interpret the marriage contract, Pakistani property law should also govern the treatment of the marital property in New Jersey. As discussed below, the court fell into this error because it failed to understand the meaning of a mahr agreement under Islamic law, wrongly concluding that its purpose is to allocate ownership rights to property acquired after marriage.

<sup>189</sup> See, e.g., Aleem v. Aleem, 947 A.2d 489, 490 (Md. 2008) (rejecting the claim that “the performance by him [i.e., the husband] of *talaq* . . . and the existence of a ‘marriage contract,’ deprived the Circuit Court for Montgomery County of jurisdiction to litigate the division of the parties’ marital property situate in this county”); Ahmad v. Ahmad, No. L-00-1391, 2001 WL 1518116, at \*6 (Ohio Ct. App. 2001) (rejecting the husband’s claim that the mahr provision bars the court from awarding equitable distribution of marital assets).

<sup>190</sup> *Ahmad*, 2001 WL 1518116, at \*6.

court, the “agreement was unenforceable under Ohio law because at the time the agreement was entered into, appellee was not represented by counsel, there was no disclosure of appellant’s assets, and the agreement did not take into consideration the assets subsequently acquired in Ohio during the eight-year marriage.”<sup>191</sup> In *Aleem v. Aleem*, rather than declaring that the contract was unenforceable, the trial court found that it was not a premarital agreement.<sup>192</sup> On appeal, the appellate court suggested that the mahr itself was not marital property and might be enforceable as an ordinary contract.<sup>193</sup> This conclusion was supported by the Maryland Court of Appeals, which stated “the Pakistani marriage contract in the instant matter is not to be equated with a premarital or post-marital agreement that validly relinquished, under Maryland law, rights in marital property.”<sup>194</sup>

### B. *Wives Invoking the Marriage Contract in American Courts*

Wives have also sued on marriage contracts trying to enforce the husband’s obligation to pay the deferred mahr. They have adopted two slightly different strategies. Some women sue on the theory that the mahr provision constituted a prenuptial agreement setting forth the proper distribution of the marital assets.<sup>195</sup> Other women sue on the theory that the mahr provision is an ordinary contract.<sup>196</sup> On this view, rather than displacing the state-law property rules regarding the distribution of marital property, the mahr is a simple debt owed by the husband to his wife. In cases where there are no marital assets, enforcing the mahr as an

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<sup>191</sup> *Id.* at \*4 (summarizing the lower court’s holding, with which the appellate court ultimately agreed).

<sup>192</sup> *See Aleem*, 947 A.2d at 491 (discussing the trial court’s holding).

<sup>193</sup> *See id.* at 502 (“[T]o accept the silence of the ‘contract’ signed by the wife on the day of her marriage in Pakistan, as a waiver of her rights to marital property acquired during the marriage, is, in direct conflict with our public policy.”); *see also id.* at 502 n.16 (“The *mahr*, deferred in the marriage certificate, would not normally be classified under Maryland law as marital property in any event, as it may not have been ‘acquired’ during the marriage.”). While the court suggests that the contract lacked consent on the part of the wife, it does so in the context of deciding whether to construe the agreement as a prenuptial waiver of claims to marital property, concluding that the contract should not be construed in this way. On the other hand, if the wife’s consent to the contract was in fact coerced or otherwise defective, as the court suggests, this would not keep her from suing on the contract as duress generally makes a contract voidable rather than void. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

<sup>194</sup> *Aleem v. Aleem*, 931 A.2d 1123, 1134 (Md. Ct. Spec. App. 2007).

<sup>195</sup> *See, e.g., Ahmed v. Ahmed*, 261 S.W.3d 190, 194 (Tex. Ct. App. 2008) (rejecting the wife’s claim that the mahr provision ought to be enforced as a prenuptial contract or as a post-nuptial division of marital property).

<sup>196</sup> *See, e.g., Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985) (enforcing the mahr provision under the New York General Obligations Law codifying the ordinary common law of contracts).

ordinary contract allows wives to obtain wealth from their ex-husbands even where they would not be entitled to any property under the ordinary rules of divorce.<sup>197</sup> Alternatively, in some cases wives argue that the marriage agreement is an ordinary contract, and that they are entitled to the deferred mahr payment in addition to any equitable distribution in the divorce proceeding.<sup>198</sup> Husbands have responded with a variety of defenses.

In those cases where wives sue on the theory that the mahr provision is a premarital agreement, husbands can argue that the marriage contract failed to comply with the heightened formation requirements that most states have for contracts that alter property distributions in divorce. In *Zawahiri v. Alwattar*, an Ohio court concluded that a wife could not enforce a mahr provision against her ex-husband because “the parties entered the marriage contract under circumstances that rendered the contract invalid and unenforceable.”<sup>199</sup> At the time of *Zawahiri*’s marriage to Alwattar, he was presented with a pre-printed marriage contract by a local imam, which contained a blank space for the amount of the deferred mahr.<sup>200</sup> At that point *Zawahiri* and Alwattar’s father both responded that they had not agreed on a sum for the mahr. After considering the suggestions of various witnesses, the groom and the bride’s father agreed on a sum of \$25,000.<sup>201</sup> Under Ohio law, prenuptial contracts can only be enforced where there is no fraud, duress, or overreaching, and there is full disclosure of the value of a prospective spouse’s assets.<sup>202</sup> Presumably the court concluded that *Zawahiri* did not have adequate information regarding Alwattar’s assets, or else that the last minute negotiations with her father constituted overreaching or coercion of some kind.<sup>203</sup>

Husbands have also attacked mahr provisions on public policy grounds. For instance, for a time California refused to enforce mahr provisions on the theory that they violated the state’s public policy against contracts that encouraged

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<sup>197</sup> See, e.g., *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at \*1 (Ohio Ct. App. July 10, 2008) (“Due to their largely separate lives, the parties did not acquire any marital property or debts. Therefore, the enforceability of the mahr provision of the marriage contract became the central controversy of the divorce proceedings.”).

<sup>198</sup> See *Mir v. Birjandi*, No. 2006 CA 63, 2007 WL 4170868, at \*7 (Ohio Ct. App. Nov. 21, 2007) (describing a case where the wife claimed rights to property in a divorce proceeding notwithstanding the husband’s payment of the mahr as the result of a separate legal action in Iran; the court ultimately used its equitable power in the distribution of the marital property to adjust the husband’s obligations in light of the mahr payment in Iran).

<sup>199</sup> *Zawahiri*, 2008 WL 2698679, at \*2 (summarizing the trial court’s findings).

<sup>200</sup> *Id.* at \*1.

<sup>201</sup> *Id.*

<sup>202</sup> See *id.* at \*3 (setting forth the requirements to form a prenuptial agreement under Ohio law).

<sup>203</sup> See *id.* at \*1–2. Because the wife was trying to argue a new theory on appeal—namely that the mahr provision was an ordinary contract—the published opinion in this case focuses on issues of waiver rather than revisiting the unreported trial court’s analysis of the prenuptial argument.

divorce.<sup>204</sup> The court reasoned that because payment was made to the wife upon divorce, mahr agreements created an incentive for wives to divorce their husbands.<sup>205</sup> The case establishing this precedent, however, was subsequently overruled by the California courts.<sup>206</sup>

Husbands may also object that the terms of the mahr agreement are unconscionable. For example, although the argument was unsuccessful in this case, in *S.I. v. D.P.I.*, the couple married in Bangladesh with a deferred mahr of 10,000 Lac Taka—approximately \$17,000 in American currency.<sup>207</sup> When the wife sued for the mahr during the couple's subsequent divorce in Delaware, the husband argued that the contract should be set aside as unconscionable.<sup>208</sup> In this case, the husband's sisters and the wife's relatives had arranged the marriage, and on the day of the marriage the husband was presented with a contract to sign.<sup>209</sup> He did so, insisting that he thought it "had no 'consequences' since the agreement is 'nothing' in his native country and divorce is rare."<sup>210</sup> He admitted, however, that he did expect to sign a marriage contract and that the contract would contain a promise to pay a sum of money to his wife in the event of divorce.<sup>211</sup> While the court did not rule out the possibility that with different evidence a mahr agreement might be unconscionable, it concluded that the "[h]usband's testimony essentially indicates that he believes the contract should not be enforced merely because he did not expect it to be. This is not adequate."<sup>212</sup>

Another defense is to argue that the mahr or sadaq provision is too vague to be enforced. In cases where the contract specifies a certain and liquidated sum to be paid upon divorce, such arguments have not been persuasive.<sup>213</sup> In *Habibi-*

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<sup>204</sup> See *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872–73 (Cal. Ct. App. 1988) (holding that prenuptial agreements that facilitate divorce are unenforceable).

<sup>205</sup> See *id.* at 872 ("The contract clearly provided for [the] wife to profit by a divorce, and it cannot be enforced by a California court.").

<sup>206</sup> See *In re Marriage of Bellio*, 129 Cal. Rptr. 2d 556, 559 (Cal. Ct. App. 2003) (noting that *Dajani* was wrongly decided due to the relatively low amount of the dowry owed to the wife due upon dissolution of the marriage).

<sup>207</sup> No. CN04-091562006, WL 2389260, at \*1 (Del. Fam. Ct. 2006).

<sup>208</sup> See *id.* at \*2 (setting forth the husband's testimony at trial and on appeal).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at \*3. One may speculate at this point that one of the reasons he may have had this expectation is because in some Muslim countries sometimes wives do not pursue their mahr rights and other claims against ex-husbands because of fear and/or intimidation. See Blenkhorn, *supra* note 92, at 220–21 (2002) (discussing the fear and intimidation of a wife prior to the mahr agreement).

<sup>213</sup> See, e.g., *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (enforcing a mahr with a deferred value of \$50,000); *Odatalla v. Odatalla*, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002) ("This Court finds that all of the essential elements of a contract are present. Thus, this Court rules that the defendant owes to the plaintiff the sum of \$10,000.").

*Fahnrich v. Fahnrich*,<sup>214</sup> however, the argument proved successful.<sup>215</sup> In that case, the mahr provision read: “The Sadaq being: *a ring advanced and half husband’s possessions postponed*.”<sup>216</sup> The court concluded that “[i]n the case at bar, the material terms of the SADAQ are not specific enough that a person reading it would be able to grasp the gist of the agreement,” noting that the contract contained no definition of possessions, no method for determining or measuring their value, and no indication of when the possessions were to be measured.<sup>217</sup>

In *Akileh v. Elchahal*, the vagueness argument took an interesting twist. The wife instituted the divorce proceedings and asked the court to award her the \$50,000 deferred mahr specified in the couple’s marriage contract.<sup>218</sup> The husband responded by arguing that there was no “meeting of the minds” with respect to the contract because “he believed that the postponed portion of the *sadaq* was forfeited if a wife chose to divorce her husband,”<sup>219</sup> while the wife presented expert testimony that “the wife’s right to receive the *sadaq* was not negated if the wife filed for divorce.”<sup>220</sup> The court resolved the case in the wife’s favor, characterizing the husband’s reading of the terms as an undisclosed and idiosyncratic understanding.<sup>221</sup> In such cases, the court reasoned, the ordinary meaning (here the wife’s interpretation), should control.<sup>222</sup>

Finally, husbands have argued that the enforcement of mahr provisions would run afoul of the First Amendment’s prohibition on the establishment of religion

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<sup>214</sup> No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. July 10, 1995).

<sup>215</sup> *See id.* at \*3 (holding that a mahr contract was too vague to enforce).

<sup>216</sup> *Id.* at \*1.

<sup>217</sup> *Id.* at \*2.

<sup>218</sup> *See Akileh*, 666 So. 2d at 247 (describing the course of the litigation).

<sup>219</sup> *Id.* at 248. He went on to testify that he believed that an abused wife who institutes a divorce was nevertheless entitled to payment of the sadaqa. *Id.*

<sup>220</sup> *Id.* at 247.

<sup>221</sup> *See id.* at 249 (“At no time did the husband make known his unique understanding of a sadaq either during his negotiations with his wife’s father or prior to signing the certificate of marriage.”).

<sup>222</sup> *See id.* While the court’s opinion does not discuss the issue, it is interesting to speculate on the possible source of the husband’s understanding in the case. He may have been thinking of the case of a khul’, where the divorce may be dissolved at the wife’s instigation through mutual consent and by the wife giving up her deferred mahr. *See HALLAQ, supra* note 85, at 285–86 (discussing the requirements of khul’). Likewise, his expressed opinion with regard to the availability of the mahr when a wife institutes a divorce for cause may be explained by the treatment of the mahr in tafriq, where a qadi dissolves a marriage for cause most commonly for abuse. *See NASIR, supra* note 83, at 87–88 (discussing tafriq’s role in Islamic law countries). Even conservative Muslim jurists in the United States, however, have argued that because a mahr is the wife’s property upon marriage, the deferred portion being delayed only because of her forbearance, she cannot be deprived of the mahr except through her own consent. Even if the filing of divorce is wrong as a matter of Muslim morality, the wife’s right to the mahr remains absolute. *See NASIR, supra* note 83, at 53 (“[T]he dower becomes an exclusive right of the wife under a valid marriage contract.”).

and its state constitutional analogs.<sup>223</sup> These arguments have not been particularly successful.<sup>224</sup> Under the line of United States Supreme Court cases culminating in *Jones v. Wolf*,<sup>225</sup> courts are generally willing to enforce “religious” contracts so long as they may do so on the basis of neutral principles of contract law.<sup>226</sup> Accordingly, courts have rejected constitutional objections to mahr agreements, holding that they may make the award by inquiring into the expressed intentions of the parties without having to pass on questions of religious doctrine.<sup>227</sup>

#### IV. MAHR AGREEMENTS AND THE LAW OF CONTRACTS: A PROPOSED ANALYSIS

In construing mahr contracts, courts ought to be sensitive to context in understanding their terms, but I disagree with those who call for the wholesale invalidation of such contracts on the basis of the wife’s status within Muslim cultures. At the heart of these criticisms is the belief that the unequal position of men and women within Islamic culture renders feminine consent to marriage contracts doubtful.<sup>228</sup> Furthermore, they fear that regardless of the question of

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<sup>223</sup> See, e.g., *Odatalla v. Odatalla*, 810 A.2d 93, 95 (N.J. Super. Ct. Ch. Div. 2002) (describing the husband’s argument that the mahr contract violated both the First Amendment and that it was not a valid contract under New Jersey law); *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at \*1 (Ohio Ct. App. Jul. 10, 2008) (describing the husband’s argument that the mahr contract violated both the First Amendment and the Establishment Clause of the Ohio Constitution).

<sup>224</sup> But see *Zawahiri*, 2008 WL 2698679, at \*2 (“[T]he trial court refused to enforce the mahr provision on two grounds: (1) the Establishment Clause of the Ohio Constitution prohibited court-ordered enforcement of a contractual provision requiring performance of a religious act, i.e. the payment of the mahr.”).

<sup>225</sup> 443 U.S. 595 (1979).

<sup>226</sup> See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1217–19 (2d ed. 2002) (discussing the neutral principles line of cases).

<sup>227</sup> See, e.g., *Odatalla*, 810 A.2d at 97 (“Enforcement of this Agreement will not violate the First Amendment proscriptions on the establishment of a church or the free exercise of religion in this country.”).

<sup>228</sup> See Blenkhorn, *supra* note 92, at 218 (“Treating a mahr provision as a valid prenuptial agreement that is ‘freely negotiated [when] the marriage took place’ overlooks a central, sad fact of life for many women in Muslim countries: They often lack true freedom to contract and bargain for themselves.” (alteration in original) (citing *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978))); cf. Sameer Ahmed, *Pluralism in British Islamic Reasoning: The Problem with Recognizing Islamic Law in the United Kingdom*, 33 *YALE J. INT’L L.* 491, 496 (2008) (“[T]he British government should be wary of establishing a system in which Islamic family law is legally enforceable by the state.”); Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 *WASH. & LEE L. REV.* 1363, 1379 (2007) (“[S]ome religious authorities preclude payment of the *mahr* to a wife if she initiates the divorce. Other authorities go further, requiring a wife to waive her right to alimony before they will grant a divorce. Now, if society defers to religious authorities, divorce on these terms could impoverish the wife and her child.” (citations omitted)).

consent, enforcement of marriage contracts will further entrench inequality within Muslim communities.<sup>229</sup> According to one commentator:

[Muslim women] often lack true freedom to contract and bargain for themselves. Contracts are built on the presumption that there are two equally strong parties, freely bargaining for their mutual obligation to one another. The success of the contract is contingent upon the free agency of both contracting parties because both parties presumably bargain in their own best interests. Unfortunately, the current approach that Islamic family law takes toward women is far more paternalistic, routinely infantilizing the bride and rendering her virtually, if not actually, silent.<sup>230</sup>

The commentator concludes, “*mahr* agreements contracted in Muslim countries should be unenforceable because they lack the intent to function as prenuptial agreements and are frequently too vague or contracted under duress,”<sup>231</sup> and “courts that attempt to enforce American-made *mahr* agreements must be especially sensitive to cultural nuances that may affect the validity of the documents.”<sup>232</sup>

Such arguments proceed at too high of a level of legal abstraction, attacking the notion of party autonomy without paying sufficient attention to doctrinal detail in how these contracts might be analyzed under current law. Commenting on the controversy surrounding the Ontario Arbitration Act, one scholar noted “there are costs to isolating and dissociating Islamic law from the ‘informal’ marital web of rights and duties within which husband and wife love each other, fight, hope, and play through the use of various strategies.”<sup>233</sup> Likewise, there is a danger in analyzing Islamic marriage contracts independent of the web of doctrines that give “contract enforcement” its concrete meaning. Armed with an understanding of the

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<sup>229</sup> See Carol Weisbrod, *Universals and Particulars: A Comment on Women’s Human Rights and Religious Marriage Contracts*, 9 S. CAL. REV. L. & WOMEN’S STUD. 77, 90 (2000) (“Nevertheless, contract as an idea raises its own problems. If some clauses are good for women, then others might be not so desirable. Such clauses might involve the waiver of rights rather than the expansion of rights.”).

<sup>230</sup> Blenkhorn, *supra* note 92, at 218.

<sup>231</sup> *Id.* at 227.

<sup>232</sup> *Id.* at 229. One commentator has argued that such cultural sensitivity is beyond the constitutional capacity of secular courts. See generally Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609 (2006). Because Islamic marriage contracts are religious documents, he argues, they cannot be enforced by secular courts without running afoul of the Establishment clause and accordingly all litigation on such matters must be referred to Islamic tribunals for resolution. *Id.* As discussed below, I regard this conclusion as mistaken.

<sup>233</sup> Pascale Fournier, *In the (Canadian) Shadow of Islamic Law: Translating Mahr As a Bargaining Endowment*, 44 OSGOODE HALL L.J. 649, 677 (2006).

terms of mahr contracts and their relation to contract principles, current doctrine can reach a sensible result in mahr litigation.

*A. How Mahr Contracts Should Be Treated under Current Doctrine*

*1. Mahr Contracts Are Not Prenuptial Agreements*

Since the Florida Supreme Court's celebrated decision in *Posner v. Posner*,<sup>234</sup> the trend has been for courts to discard earlier public policy concerns about encouraging divorce and to enforce prenuptial agreements. To date, twenty-seven jurisdictions have adopted the Uniform Premarital Agreement Act (UPAA) in order to facilitate such contracts.<sup>235</sup> While the UPAA allows parties to contract regarding "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty,"<sup>236</sup> the overwhelming majority of prenuptial agreements concern the distribution of marital assets upon divorce. Most of these contracts are designed to protect the assets of a wealthy spouse from the subsequent claims of a poorer spouse.<sup>237</sup> According to the UPAA, however, "'premarital agreement' means an agreement between prospective spouses made in contemplation of marriage and intended to be effective upon marriage."<sup>238</sup>

A mahr contract's potential status as a prenuptial agreement is important because if a court deems a mahr as such, then under the UPAA as well as the common law of some states, defenses unavailable in ordinary contract cases would become available to defendants. Specifically, in addition to the ordinary requirements that a contract be voluntarily made and not be unconscionable, section 6 of the UPAA provides that a party "who was not provided a fair and reasonable disclosure of the property or financial obligations of the other party," and who "did not have . . . an adequate knowledge" of those obligations, may

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<sup>234</sup> 233 So. 2d 381 (Fla. 1970).

<sup>235</sup> See Myron E. Sildon, *Dealing with Divorce and Non-traditional Relationships in the Family Business*, ALI-ABA COURSE OF STUDY, July 22–24, 2009, at app. A ("The UPAA has been adopted by 27 states: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wisconsin.").

<sup>236</sup> UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8) (1983). According to the official commentary this section is designed to make clear "that the parties may also contract with respect to other matters, including personal rights and obligations . . . . [A]n agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on." *Id.* cmt.

<sup>237</sup> See Gail Frommer Brod, *Premarital Agreements in Gender Justice*, 6 YALE J.L. & FEMINISM 229, 234–35 (1994) (discussing the purpose of premarital agreements as changing the impact of state laws that govern the distribution of property at the end of a marriage).

<sup>238</sup> UNIF. PREMARITAL AGREEMENT ACT § 1(1).

avoid liability under the contract.<sup>239</sup> Hence, a husband wishing to avoid payment of a deferred mahr can argue that he should not be held liable because of the bride's failure to provide proper disclosure at the time of the marriage, provided that the court deems the marriage contract to be a premarital agreement.<sup>240</sup> Likewise, if a court concludes that the parties intended by the marriage contract that the wife's claim on marital assets was to be limited to the amount of the mahr, she might raise the husband's failure to disclose information as a defense.<sup>241</sup>

But Islamic marriage contracts fit awkwardly into our law of premarital agreements.<sup>242</sup> Reading them against the background of the fiqh that clearly gives them shape, they are not intended by the parties to be contracts "made in contemplation of marriage and effective upon marriage."<sup>243</sup> As noted above,<sup>244</sup> under Islamic law, marriage is not a ceremony that occurs subsequent to the marriage contract. Rather, the contract itself is what causes the parties to become husband and wife. When operating under American law, however, the parties must necessarily avail themselves of a later civil or religious ceremony. In the eyes of the fiqh, however, this later ceremony is a mere celebration of what has already occurred at the moment of signing the contract.<sup>245</sup> From the point of view of Islamic law, the liability for the deferred mahr is not contingent on a subsequent marriage ceremony. Of course, Islamic law does not control the law of marriage in the United States, but it is extremely relevant for understanding the intentions of the parties in entering into Islamic marriage contracts. Read against this context, parties do not intend for their obligations under these contracts to be "effective upon marriage."<sup>246</sup>

More importantly, *parties do not intend for the deferred mahr to be paid in lieu of a wife's claim upon marital property or for alimony upon divorce.*<sup>247</sup> Again, in understanding the intentions of the parties we should look to the fiqh that gives rise to the marriage contract. First, under Islamic law there is no such thing as marital or community property.<sup>248</sup> All property belongs to one spouse or the other and is not subject to equitable distribution on divorce. Accordingly, parties do not

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<sup>239</sup> See UNIF. PREMARITAL AGREEMENT ACT § 6(A)(2)(i)–(iii).

<sup>240</sup> See, e.g., *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at \*3 (Ohio Ct. App. Jul. 10, 2008) (noting that full disclosure of a prospective spouse's property is a required element under Ohio law).

<sup>241</sup> As I explain in detail below, it would be a mistake for courts to construe mahr provisions as agreements to limit a wife's claim on marital assets.

<sup>242</sup> See generally *Oman*, *supra* note 21 (discussing the relationship between Islamic marriage contracts and the specialized law of premarital agreements).

<sup>243</sup> UNIF. PREMARITAL AGREEMENT ACT § 1(1).

<sup>244</sup> See *supra* notes 80–81, 87–89 and accompanying text.

<sup>245</sup> Many classical jurists also insisted that until the marriage was consummated by sexual intercourse, the marriage contract was voidable without divorce, i.e. *tafriq, khul'*, or *talaq*. See e.g., *NASIR*, *supra* note 83, at 52–53.

<sup>246</sup> UNIF. PREMARITAL AGREEMENT ACT § 1(1).

<sup>247</sup> See *Oman*, *supra* note 21, at 605.

<sup>248</sup> See *supra* note 135 and accompanying text.

intend for the mahr to replace a wife's claim on marital property.<sup>249</sup> To impute to the parties such an intention is to import foreign legal intentions into the Islamic context. To be sure, a couple that marries in Iran might expect that upon divorce the wife's claim on the husband's wealth will be limited to the mahr.<sup>250</sup> This expectation, however, does not arise from the content of their marriage contract. Rather, it arises from the fact that Iranian property and divorce law, following the classical fiqh, does not recognize any analogy to marital or community property.<sup>251</sup> Should the couple subsequently divorce in, for example, California, this expectation will be violently disappointed when the wife is able to prosecute a successful claim to community property. The disappointed expectations, however, arise from the fact that the couple is now subject to California property and divorce law rather than Iranian property and divorce law. In other words, the expectation is not created by the marriage contract.

Even under Islamic law, the deferred mahr is not a claim (exclusive or otherwise) of the wife on the property of the husband. Rather, it is a simple debt, a promise to pay a sum of money upon divorce.<sup>252</sup> It is true that the background rules of Islamic law would limit the wife's claim on the husband's wealth upon divorce to the mahr. The parties, however, did not bargain for this limitation. To hold that it was part of the contract would be an innovation in contract interpretation. For example, if two parties enter into a contract in North Carolina they may have expectations about property rights based on North Carolina law. However, it would be extremely odd for a court to hold that merely making a contract in North Carolina means that the whole of North Carolina property law is an implicitly bargained for term of the contract. Likewise, even if courts use Islamic law to understand the intentions of the parties, as I discussed above, they should still confine themselves to construing the bargained for terms of the contract.

Given this analysis, courts should not treat mahr provisions as premarital agreements. The mahr provisions are not intended to alter the parties' rights to property upon divorce.<sup>253</sup> Because parties entering into a mahr agreement are not bargaining away claims to property of uncertain value, it does not make sense to require special disclosure of assets in order for parties to make informed decisions.<sup>254</sup> Nor are the special concerns regarding bargaining around marriage present in the case of mahr agreements. The special defenses available in cases involving premarital agreements are justified, in part, on the grounds that such

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<sup>249</sup> *Id.*

<sup>250</sup> See Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U. J. GENDER SOC. POL'Y & L. 57, 67–68 (1996) (discussing mahr provisions in Islamic marriages in Iran).

<sup>251</sup> See *id.* at 68–69 (noting the limited property rights of women after divorce in Iran).

<sup>252</sup> For example, the husband's obligation to pay the mahr under Islamic law is not tied to his wealth. Indeed, the debt continues to exist even if at the time of divorce the husband has no assets. In Iran, for example, a husband who is unable or unwilling to pay his wife's mahr can be imprisoned. Oman, *supra* note 21, at 591.

<sup>253</sup> *Id.* at 580–81.

<sup>254</sup> See *id.* at 602–03.

agreements are not ordinarily a part of the culture of marriage. Accordingly, they may be sprung unexpectedly on an unsuspecting prospective spouse on the way to the altar. In contrast, because under the classical fiqh, a mahr is a formal requirement of any valid Muslim marriage, it is not sprung on an unsuspecting prospective husband at the last moment. Given that a mahr is not intended to replace the state's default property rules and is an expected part of Islamic marriage, the justification for the heightened disclosure requirements of the UPA do not apply.<sup>255</sup>

## 2. Mahr Contracts Do Not Violate the Establishment Clause

In litigation, parties often argue that enforcing mahr contracts would violate the Establishment Clause.<sup>256</sup> According to the argument, because the mahr arises out of a contract whose meaning comes from the shari'a, a court construing such a contract would involve making religious determinations that it is constitutionally prohibited from making. Several courts have accepted this position and it has been urged by at least one commentator.<sup>257</sup> While it is conceivable that construing a mahr contract could cause the court to involve itself in unconstitutional activity, in virtually any case that is likely to actually find its way into litigation, there is no constitutional bar to interpreting and enforcing a mahr agreement.

The United States Supreme Court has never passed on the constitutionality of enforcing mahr contracts. The most relevant body of case law begins with the Court's decision in *Watson v. Jones*.<sup>258</sup> The case involved a schism among Kentucky Presbyterians over slavery and the Civil War.<sup>259</sup> The schism resulted in a dispute over the ownership of some church property, which ultimately made its way to the Supreme Court in 1871.<sup>260</sup> Although the case did not technically arise under the First Amendment, Justice Miller declared, "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."<sup>261</sup> The Court went on to hold that with regard to the ownership of church property, the civil law must defer to the decision of the sect's highest ecclesiastical tribunal rather than engage in independent interpretation of church doctrine.<sup>262</sup> In a

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<sup>255</sup> *See id.*

<sup>256</sup> *See supra* notes 223–224 and accompanying text.

<sup>257</sup> *See* Blenkhorn, *supra* note 92, at 214–18.

<sup>258</sup> 80 U.S. 679, 735 (1871).

<sup>259</sup> *See id.* at 683–87 (describing the conflict between pro-slavery and abolitionist sectors within the church, culminating in the marshal taking possession of the church).

<sup>260</sup> *Id.* at 717.

<sup>261</sup> *Id.* at 728. *Watson v. Jones* was a diversity case that applied the pre-*Erie* "general common law." *Id.* at 737 (Clifford, J., dissenting) (arguing that the majority's application of the general common law was inappropriate because "there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject-matter, within the same territorial limits, and governed by the same laws").

<sup>262</sup> *See id.* at 733 (stating that the civil courts do not exercise jurisdiction over theological matters).

subsequent series of cases involving litigation over church property in the wake of ecclesiastical disputes, the Court has developed the so-called neutral principles doctrine.<sup>263</sup> As articulated in its most recent extensive discussion of the doctrine, the Court declared, “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.”<sup>264</sup> Justice Blackmun went on to acknowledge, however, that “there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property.”<sup>265</sup> In such cases, he concluded, courts must defer to the interpretations of “the authoritative ecclesiastical body.”<sup>266</sup> The court’s role in resolving such religious disputes must be limited to the application of neutral, nonreligious principles of law.<sup>267</sup>

Transposing this church-centric doctrinal framework to the Islamic context is difficult. From a Muslim perspective, Islamic law can exist in two senses. First, there is the strongly religious sense of God’s actual law.<sup>268</sup> This is the *shari’a* in its purest sense. Human beings may struggle to understand this law in light of God’s revelation in the Quran, but it is at times necessarily indeterminate from a human perspective. Human beings are always fallible, and their attempts to specify God’s commands on the basis of his revelations may be mistaken. Islamic law, however, also exists as a corpus of scholarly elaboration with a relatively definite shape. This is law in the sense of *fiqh*.<sup>269</sup> The ultimate goal of the *fiqh*, of course, is to discover God’s *shari’a*, but as a matter of Islamic understanding the *fiqh* exists as a social and historical fact. It is not a revelation of God, and determining the *fiqh* of this or that school of Islamic jurisprudence is not a matter of interpreting God’s revelations. It is a matter of determining what learned but human jurists have said. Indeed, the technical vocabulary of Islam draws a distinction between these two ways of seeking Islamic law. A person who struggles to discern the will of God through a direct and unmediated interpretation of revelation engages in *ijtihad*.<sup>270</sup>

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<sup>263</sup> See *Jones v. Wolf*, 443 U.S. 595, 597 (1979); *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 733–34 (1976); *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 370 (1970); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929).

<sup>264</sup> *Jones*, 443 U.S. at 602.

<sup>265</sup> *Id.* at 604.

<sup>266</sup> *Id.*

<sup>267</sup> See *id.* at 603 (“The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity.”).

<sup>268</sup> See Abdal-Haqq, *supra* note 48, 1, 4 (noting that “*Shari’ah* refers to the canon law of Islam and includes the totality of Allah’s commandment”).

<sup>269</sup> See *id.* at 5–7.

<sup>270</sup> *Id.* at 5–6.

In contrast, the person who does not seek to directly discern God's law, but rather follows the established fiqh of some school, is engaged in *taqlid*.<sup>271</sup>

Transposing these distinctions into American constitutional law, a court that tried to engage in *ijtihad* would violate the Establishment Clause. Such a court would be looking directly to the revelations of Islam in an effort to distill what God actually commands as the shari'a.<sup>272</sup> To use the Christian-derived language in which the Supreme Court has couched its decisions, a court attempting *ijtihad* would necessarily be involved in the "consideration of doctrinal matters."<sup>273</sup> On the other hand, when a court seeks out Islamic law in the sense of *taqlid*, merely applying a particular fiqh rather than presuming to pronounce on the shari'a itself, it is seeking to answer a concrete historical and social question. It looks to a particular corpus iuris as a matter of fact, just as a court looking to foreign law treats the content of that law as a matter of fact.<sup>274</sup>

When a court is called on to construe the meaning of a mahr provision it necessarily must look to Islamic law because the intention of the parties is to include a term in their contract whose public meaning is specified by that law. The neutral principles doctrine requires that the court resolve questions of meaning according to neutral principles.<sup>275</sup> So long as it is being asked to construe the meaning of the mahr as a matter of social fact courts do not violate this doctrine, even if in determining social fact they must look to the fiqh. On the other hand, it is possible that the parties intended their mahr provision to encapsulate more than simply the shared public meaning of the term "mahr" as informed by a particular body of fiqh. Perhaps the parties intend for their obligations to be whatever it is that God commands when he commands that a mahr be paid as part of a marriage contract. In this case, the court could not interpret the contract without engaging in *ijtihad* and therefore violating the Establishment Clause. Note, however, that the

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<sup>271</sup> SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-AARĀFĪ 74 (1996).

<sup>272</sup> This is arguably what the Indian Supreme Court did in the controversial case of *Mohammed Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945 (India). Under Indian law, family law issues among Muslims are to be resolved according to shari'a. In seeking to limit the authority of a husband to engage in *talaq*, the court offered its own interpretation of the Quran in support of its rejection of the fiqh position. This is the kind of *ijtihad* that the Establishment Clause should foreclose. See generally Josh Goodman, *Divine Judgment: Judicial Review of Religious Legal Systems in India and Israel*, 32 HASTINGS INT'L & COMP. L. REV. 477, 494–506 (2009) (discussing the place of Islamic family law in Indian jurisprudence and the furor that greeted the Indian Supreme Court's decision in the *Shah Bano* case).

<sup>273</sup> *Md. & Va. Eldership of the Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368.

<sup>274</sup> *Cf. Ganem v. Heckler*, 746 F.2d 844, 854 (D.C. Cir. 1984) ("Foreign law is thus proved essentially as a matter of fact.").

<sup>275</sup> See *supra* note 267 and accompanying text.

Establishment Clause would only be triggered if this very specific intention could be shown.<sup>276</sup>

It is extremely unlikely, however, that a court could be called upon to engage in *ijtihad* in interpreting an Islamic marriage contract. First, when parties enter contracts in the context of particular Muslim communities, the most natural interpretation of their acts is that they have the meaning generally ascribed in the community to acts of that kind.<sup>277</sup> Even if one of the spouses was unusually pious, and intended for “mahr” to mean what God wants it to mean rather than what it is generally accepted as meaning in his or her community, this especially devout intention would not control unless it were known by the other spouse.<sup>278</sup> Of course, if both spouses attached the pious meaning to the term, this would ordinarily control.<sup>279</sup> However, the analysis is further complicated by the fact that mahr agreements will always be in writing both because they fall within the common law statute of frauds,<sup>280</sup> and because as a matter of Islamic law—and therefore of Muslim social practice—they must be in writing.<sup>281</sup> Accordingly, the parol evidence rule will apply and the written terms will be given their natural meaning within their particular context. At this point, parties would only be able to introduce parol evidence of their especially pious intentions if they were able to show that the term “mahr” was so vague as to justify such evidence.<sup>282</sup> This, however, will be a difficult case to make in a situation where there is a well-established *fiqh* that gives the term a determinate meaning. In short, both as a social matter and as a doctrinal matter, it is very unlikely that a court could properly conclude that a mahr contract required the judge to engage in *ijtihad*.

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<sup>276</sup> Note also that this analysis does not suggest that courts are unable to enforce contracts whose meaning is given by the own *ijtihad* of the parties, provided that their conclusions can be determined. The Establishment Clause would only be triggered if in interpreting the contract the court was itself called upon to engage in *ijtihad*.

<sup>277</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 200 cmt. b (1981) (“[T]he meaning of the words or other conduct of a party is not necessarily the meaning he expects or understands.”), *id.* § 201 cmt. a (“Words are used as conventional symbols of mental states, with standardized meanings based on habitual or customary practice. Unless a different intention is shown, language is interpreted in accordance with its generally prevailing meaning.”).

<sup>278</sup> See *id.* § 201(2).

<sup>279</sup> See *id.* § 201(1) (“Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.”).

<sup>280</sup> See PASCALE FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSLATION* 61 (2010).

<sup>281</sup> See Oman, *supra* note 21, at 589.

<sup>282</sup> See, e.g., *In re Marriage of Shaban*, 105 Cal.Rptr.2d 863, 869 (Cal. Ct. App. 2001) (“It is enough to remark that the need for parol evidence to supply the material terms of the alleged agreement renders it impossible to discuss any public policy issues.”).

### 3. *Duress and Undue Influence Doctrines Police Overreaching*

While fears about the freedom of Muslim women have motivated most of the critical commentary on the enforcement of mahr provisions, if the court properly interprets the scope of the contract, the issues of duress and undue influence are unlikely to come up in litigation. If they do, current doctrine is sufficient to police the mahr agreement. First, provided the courts reject the misguided attempt to interpret the mahr as a substitute for a wife's claim on marital property, husbands will have little or no incentive to sue on a mahr contract. If it does not displace state divorce law, then husbands have little to gain by its enforcement. Hence, we would expect that wives, rather than husbands, would be suing to enforce the mahr contract, seeking payments in addition to those to which they are entitled under state divorce laws.

We may suppose that in some cases Muslim women are pressured to marry and agree to mahr contracts. Current doctrine, however, approaches such cases with considerable subtlety. A contract made under duress or undue influence is generally not void but voidable.<sup>283</sup> In cases where a wife's manifestation of consent is physically coerced—for example if a father was to physically manipulate her hand into signing a document—then no contract is formed.<sup>284</sup> On the other hand, if a contract “is induced by an improper threat”<sup>285</sup> or “unfair persuasion of a party,”<sup>286</sup> then it is valid but voidable at the election of the coerced party. If duress and undue influence are at issue with Muslim brides, the law will allow them to use both doctrines as a shield against contractual liability. On the other hand, the doctrines will not pose a bar to her suing her husband on the contract. He will be unable to raise her coercion as a defense to his liability.<sup>287</sup>

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<sup>283</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. b (“The distinction between ‘void contract’ and voidable contract has important consequences. For example, a victim of duress may be held to have ratified the contract if it is voidable, but not if it is ‘void.’”).

<sup>284</sup> See *id.* § 174 (“If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.”).

<sup>285</sup> See *id.* § 175(1) (“If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

<sup>286</sup> See *id.* § 177(1) (“Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.”).

<sup>287</sup> This would be the case unless he can show that the duress or undue influence was exerted by a third party, such as a father acting as wali, and that he relied in good faith and without reason to know of the undue influence or duress. See *id.* § 175(2) (setting forth the limitation on the duress defense when duress was exerted by someone not a party to the contract); *id.* § 177(3) (setting forth the limitation on the undue influence defense when the influence was exerted by someone not a party to the contract).

The most common situation in which a wife would wish to disclaim a mahr contract using the doctrines of duress or undue influence would be where a husband was using it as a sword to cut off her claims under state divorce statutes. The best response to such an argument, however, is not to invalidate the contract but rather to point out that when a Muslim couple makes a marriage contract, they are simply not bargaining over their rights to marital property in divorce. Put in doctrinal terms, the court should protect the wife via contract interpretation rather than contract invalidation. Accordingly, only in the rarest of cases should courts be required to reach the issue of duress or undue influence.

Notwithstanding the stereotype of the domineering Muslim husband, as a practical matter, questionable circumstances involving a putative wife's agreement to a mahr contract are more likely to involve a male relative acting as her wali than her husband.<sup>288</sup> In particular, where marriages are arranged or otherwise represent a collective family decision rather than an individual romantic one, family members may place pressure on a woman to consent to a marriage contract. This pressure can range from the power of social expectations to the threat of economic abandonment or physical abuse.<sup>289</sup> To show duress, a defendant must demonstrate that she assented to a contract because of an improper threat that leaves her with no reasonable alternative.<sup>290</sup> Physical violence can easily pass the threshold of the "improper threat" requirement and provided the threatened violence was immediate, the woman would be left with no reasonable alternatives.<sup>291</sup> Threats of extreme economic pressure have also been held to rise to the level of duress.<sup>292</sup> On the other hand, the mere pressure not to upset social expectations is unlikely to be sufficient.<sup>293</sup>

While successfully making a case of duress would be difficult in any but the most extreme cases, the doctrine of undue influence offers a more promising route for a woman who wishes to avoid a mahr contract because of pressure from a wali or other family member.<sup>294</sup> Successful cases of undue influence routinely involve

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<sup>288</sup> See Blenkhorn, *supra* note 92, at 198 ("She may never conclude a marriage contract on her own in most Islamic legal systems; instead, she must defer to her *wali* to bargain for the terms of the contract and even to sign the finalized agreement.").

<sup>289</sup> See *id.* ("In most communities, if a bride were to protest an arranged marriage, she would be viewed as highly disrespectful and would risk permanent ostracism from her family and community and may even risk death.").

<sup>290</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 175(1).

<sup>291</sup> See *id.* § 176(1) (setting forth a threat to engage in criminal or tortious behavior is improper).

<sup>292</sup> See, e.g., *Perkins Oil Co. of Del. v. Fitzgerald*, 121 S.W.2d 877, 885 (Ark. 1938) (enlarging defense of duress when the coercion was directed against the plaintiff's stepfather's future employment, the loss of which would have seriously affected his family).

<sup>293</sup> See, e.g., *Mullins v. Oates*, 179 P.3d 930, 937 (Alaska 2008) (stating that duress "requires a threat that arouses such a fear as to preclude a party from exercising free will and judgment" (citing *Crane v. Crane*, 986 P.2d 881, 887 (Alaska 1999))).

<sup>294</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b ("The law of undue influence therefore affords protection in situations where the rules on duress and misrepresentation give no relief.").

overreaching by family members or other intimates.<sup>295</sup> In the case of a mahr contract, however, a father or other male relative acting as wali is more than simply a family member. The role of the wali is to look after the interests of the woman.<sup>296</sup> The wali is thus a kind of fiduciary to the putative bride.<sup>297</sup> Like the overreaching family member, the high pressure fiduciary is another common character in successful cases of undue influence.<sup>298</sup> Thus, provided that courts avoid construing mahr contracts as premarital agreements in which wives bargain away their rights in divorce, it is unlikely that a wife would wish to challenge the validity of the contract, and in the unlikely event that she has an incentive to challenge the mahr provision, the doctrines of undue influence and duress stand ready to police high pressure tactics by family members.

Finally, while it is important to acknowledge the very real possibility that a Muslim woman may be subject to undue pressure, it is equally important not to succumb to the common Western stereotype of all Muslim women as repressed and powerless. Among immigrant Muslim communities, for example, women frequently outperform their male counterparts both academically and economically.<sup>299</sup> Hence, while it is true that in many cases a Muslim wife is economically dependent on her family and her husband, it is also true that Muslim women are often successful participants in the workplace who have considerable bargaining power vis-à-vis their husbands. For example, the Ohio case of *Mir v. Birjandi*<sup>300</sup> involved the divorce of an Iranian couple who moved to the United States.<sup>301</sup> In Iran, the husband had been a successful engineer, but due to his poor language skills in the United States, he could find work only as a taxi driver.<sup>302</sup> In contrast, his wife enrolled in college in the United States, ultimately earned a PhD in engineering, and obtained work with a defense contractor.<sup>303</sup> At the time of their divorce, she was earning in excess of \$100,000 a year, while her husband's salary was less than \$20,000 a year.<sup>304</sup> Furthermore, the case reveals a wife who was extremely aggressive and savvy in using Islamic law to her advantage, having her

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<sup>295</sup> See, e.g., *Agner v. Bourn*, 161 N.W.2d 813, 818–19 (Minn. 1968) (dealing with a contract obtained from an elderly relative by undue influence).

<sup>296</sup> See, e.g., *NASIR*, *supra* note 83, at 9–12 (describing the role of the guardian).

<sup>297</sup> See *id.*

<sup>298</sup> See, e.g., *Strawbridge v. N.Y. Life Ins. Co.*, 504 F. Supp. 824, 829 (D.N.J. 1980) (discussing a fiduciary's responsibilities).

<sup>299</sup> See *Report on Muslim Americans Chips Away at Myths About Islam*, DAILY NEWS EGYPT, Mar. 3, 2009, available at PROQUEST, Document ID 1656442371 (“Muslim women stand out, both compared to their global counterparts and women from other religious groups in the United States, in that they are statistically as likely as their male counterparts to have earned a university degree or higher. Forty-two percent of Muslim women had degrees compared with 39 percent of Muslim men in the United States.”).

<sup>300</sup> No. 2006 CA 63, 2007 WL 4170868 (Ohio Ct. App. Nov. 21, 2007).

<sup>301</sup> *Id.* at \*1.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at \*4.

husband jailed during a visit to Iran for nonpayment of the mahr promised in her contract.<sup>305</sup> Given such realities, it is important that courts avoid the temptation to stereotype Muslim women.

### *B. Summary and Evaluation*

To summarize the doctrinal analysis put forward thus far, mahr agreements should not be interpreted as premarital contracts in which the wife bargains away her rights to marital property and alimony upon divorce. Because the concepts of marital property and equitable distribution do not exist in Islamic law, it is unreasonable to suppose that, in traditional marriage, contracts the wife meant to bargain away nonexistent (from the fiqh point of view) rights. While this means that divorce proceedings in American courts may unfold in ways very different than they would under Islamic law, this is not because the courts are refusing to enforce the contract made by the parties. Rather, any disappointed expectations arise because American rather than Islamic law provides the default rules upon divorce.

Contract law does not provide a global guarantee of the parties' legal expectations. It merely provides legal recognition of the terms for which they bargain. Accordingly, the deferred mahr should be treated as a simple promise by the husband to pay a sum of money to the wife. This promise operates independent of the property law surrounding divorce. Indeed, given the strict liability of contract, the husband's obligation to the wife is legally valid even if he has no property of any kind.<sup>306</sup> Because mahr agreements do not occupy the same social position as prenuptial agreements—bargaining away rights under state divorce laws—they should not be treated as prenuptial agreements. Accordingly, courts should not refuse to enforce these contracts simply because the parties failed to make full financial disclosures at the time of formation. Even if a court does decide that the mahr contract should be treated as a prenuptial agreement, the deferred mahr should still be treated as a personal obligation that does not affect property distributions or alimony rights. To do otherwise is to import common-law assumptions into a contract whose meaning is defined by a very different legal tradition.

Except in the unlikely event that the parties to a contract intend for a court deciding their case to engage in *ijtihad*, the enforcement of a mahr agreement does not violate the Establishment Clause. Courts can decide such cases without making “theological” determinations, even if in construing the meaning of particular terms and forms, they must necessarily look to Islamic law for guidance. So long as they are using fiqh to understand the social meaning of the parties' actions rather than

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<sup>305</sup> *Id.* at \*7.

<sup>306</sup> BLACK'S LAW DICTIONARY 921 (9th ed. 2009) (defining judgment proof as “unable to satisfy a judgment for money damages because the person has no property, [or] does not own enough property within the court's jurisdiction to satisfy the judgment”).

trying to give legal effect to God's intentions as revealed in the shari'a, they do not run afoul of the Establishment Clause.

Likewise, concern for the status of women in some Muslim subcultures, however justified in the abstract, does not justify a blanket refusal to enforce mahr agreements. If courts correctly construe their meaning, women will have little or no incentive to attack the validity of the contract. In the unlikely event that they do wish to attack it, the law of duress and especially undue influence provides a way for courts to police overreaching by family members.

This proposed treatment of mahr contracts strikes me as quite sensible. It is sensitive to Muslim sensibilities by treating their religious law with seriousness and sympathy, seeking to understand the mahr provision on its own terms rather than through a series of analogies to common-law concepts (prenuptial agreements) or Christian marriage practices (a contract made before the "real" marriage, which occurs at the wedding ceremony). To be sure, it will disappoint those Muslims who believe that their marriage contracts entitle them to have the entirety of Islamic marital and property law imported into American courts. To understand deferred mahr contracts in these terms would transform them into super choice of law clauses that not only specify that Islamic law will govern the construction of the contract but the entirety of the parties' property relationships. Suffice it to say that this is not how the contracts are understood in either the classical fiqh or in the countries where the fiqh is incorporated into the formally promulgated family law. Furthermore, by providing the wife with a legally enforceable right to her mahr, a right that is not contingent on giving up her rights under state divorce laws, the marriage contract may continue to limit the abuse of the husband's power of talaq, which even if it is not recognized by secular law continues to have important religious—and therefore social—consequences for Muslim women.

This happy result is reached without dramatically rewriting the common law of contracts. It looks to the context of the contract, but only for the traditional purpose of discerning the meaning of the terms that the parties agreed to. As relational contract theorists have long pointed out, traditional contract doctrine does not seek to recreate as legal liability the whole of the parties' complex and extended relationships.<sup>307</sup> Rather it picks out discrete transactions, enforcing contract terms without regard to the richer social context in which those obligations operate. It is precisely this transactional approach, however, that allows

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<sup>307</sup> See IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 6 (2001) ("[A]ll the standard texts on English law reflect a notion that the law of contract litigation is a relatively neat and logical structure of rules. [I] believe[] this idea to be inaccurate . . . . Contract law is hardly a neat and logical structure of rules, but like all law a social instrument designed to accomplish the goals of man." (alteration in original) (citing previous writing of author)); Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963) ("Some businessmen object that in such a carefully worked out relationship one gets performance only to the letter of the contract. Such planning indicates a lack of trust and blunts the demands of friendship, turning a cooperative venture into an antagonistic horse trade.").

traditional contract doctrine to function well in the case of Islamic marriage contracts. Attempts by husbands to invoke the whole of the classical fiqh's law of divorce and property allocation rest on a highly contextual and relational understanding of contracts. In effect, they insist that one cannot separate the expectations created by the mahr provision from the totality of expectations created by the operation of the background legal rules governing property and the cultural context in which the contract is embedded. Contract doctrine, in contrast, does not try to protect the totality of the parties' relational expectations. Rather, it protects only those expectations that result from clearly defined agreements. Other expectations are supported or disappointed by other bodies of law, but this is not ultimately a set of questions that the contract concerns itself with.

The analysis above likewise avoids the perverse result reached in *Chaudry v. Chaudry*,<sup>308</sup> where the Superior Court of New Jersey held that in signing a mahr contract, the wife had bargained away her rights to equitable distribution of marital property upon divorce.<sup>309</sup> This is simply not what parties to Islamic marriage contracts are bargaining over. Indeed, the main concerns underlying premarital agreement law do not apply to Islamic marriage contracts. Much of the judicial and legislative unease about premarital contracts comes from a particular vision of how they may operate in practice. Lawmakers imagine—not without justification—the prospective spouse, with a powerful bargaining position, presenting his or her weaker partner with an agreement on the way to the altar. Presented with a contract under such circumstances, we worry that prospective spouses will make inconsiderate or ill-informed decisions out of fear of the social costs and embarrassment of cancelling or delaying the wedding to engage in contract negotiations. Likewise, we worry that when prospective spouses negotiate about the disposition of assets upon divorce they are likely to be unreasonably optimistic about their chances of connubial success and accordingly, steeply discount the value of their divorce rights.

None of these concerns make sense in the Islamic context. Part of the American unease with premarital agreements is that contract negotiation is not part of the social script that American law inherits from Christianity, particularly late nineteenth-century Protestantism with its valorization of companionate marriage. Weddings are supposed to be about tuxedos, white dresses, walking down the aisle, throwing rice, and a marriage ceremony in which someone with authority will pronounce the couple husband and wife. In this tableau, contract negotiation seems like a jarring intrusion of adversarial, commercial values, an intrusion that may well take prospective spouses by surprise. In contrast, in the Islamic context, to become married means that one has made a marriage contract. Far from being an unexpected intrusion into the process of getting married, the contract lies at the heart of that process. Furthermore, because a mahr of some sort is a requirement for a valid marriage contract, it is unlikely that negotiation over the size of the mahr comes as a surprise to anyone involved in the process. Finally, because the

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<sup>308</sup> 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).

<sup>309</sup> *Id.* at 1006.

mahr does not bargain away claims on marital property, the Uniform Premarital Agreement Act's requirement that prospective spouses disclose the value of their assets makes little sense. Such a requirement insures that the parties to a traditional prenuptial agreement understand the value of what they are bargaining over. Such claims on property, however, simply are not part of what the parties to an Islamic marriage contract are bargaining over. Accordingly, it makes no sense to allow husbands and wives to opportunistically invoke the failure to disclose in subsequent litigation.

## V. CONCLUSION

The dominant paradigms for thinking about the relationship between law and religion in American jurisprudence are drawn from the Christian tradition. Increasingly, however, America is home to Muslim immigrants and citizens. As they bring their religious practices to American courts, judges will struggle to understand their meaning and police their possible abuse. Islamic mahr contracts present perhaps the most common issue of Islamic law and practice with which American courts have struggled. Islamic marriage contracts should be understood on their own terms, rather than as an idiosyncratic version of the more familiar premarital agreement. The move to conceptualize mahr contracts as premarital agreements ultimately rests on a set of analogies to norms about marriage and contract that have their origins in a very different religious tradition, namely Christianity. Treating mahr contracts as premarital agreements is not simply a misunderstanding; it can also have perverse results. Most seriously, courts may use the contract to limit a spouse's claims to equitable distribution of marital assets when those rights have not been bargained away. Less seriously, parties can opportunistically invoke the additional formation requirements for premarital contracts, despite the fact that the concerns that motivate such additional requirements are not present in the case of Islamic marriage contracts. When courts sensitively analyze mahr contracts under current doctrine, on the other hand, courts can reach sensible results that treat Islamic law—and by extension Muslim citizens—with respect, vindicate the contractual intentions of the parties, and avoid overreaching and abuse.