
NOTE

ISLAMIC MARRIAGE CONTRACTS IN AMERICAN COURTS: INTERPRETING MAHR AGREEMENTS AS PRENUPTIALS AND THEIR EFFECT ON MUSLIM WOMEN

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“[There is a] continuing misuse of religion as a mask behind which man hides his vindictive desire to maintain his absolute supremacy over woman by forcing her into servitude, making her the creature of his whim, a mere vessel and purchasable ware.”

—Anwar el-Sadat, former president of Egypt¹

I. INTRODUCTION

In 1958 in Pakistan, Parveen Chaudry’s parents introduced her to Hanif Chaudry, the man they had chosen to be her husband.² In accordance with Islamic tradition, Parveen’s parents negotiated the terms of her marriage contract with Hanif, consenting to and even signing the contract

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1. Jennifer Jewett, Note, *The Recommendations of the International Conference on Population and Development: The Possibility of the Empowerment of Women in Egypt*, 29 CORNELL INT’L L.J. 191, 203 (1996).

2. See *Chaudry v. Chaudry*, 388 A.2d 1000, 1003 (N.J. Super. Ct. App. Div. 1978).

on Parveen's behalf.³ According to Islamic law, Parveen's marriage contract included a *mahr* provision, or dower, in the amount of 15,000 rupees (approximately \$1,500),⁴ to protect Parveen if Hanif suddenly divorced her. Islamic law provides that couples retain their assets before, during, and after marriage, and because Parveen would likely not be permitted to work outside the marriage home without her husband's permission, the *mahr* was a nest-egg in case the marriage soured.

One year after their marriage, Hanif moved to London to pursue a career in medicine, leaving Parveen behind in her native Pakistan with her parents and one-year-old child until her parents were able to pay for plane tickets to London.⁵ Once Parveen joined Hanif in London, he moved his family to New Jersey, where Parveen gave birth to their second child.⁶ Five years later, Hanif sent his wife and children back to Pakistan with the understanding that he would join them shortly.⁷ During the next five years, Parveen, who by now had three young children, attempted to rejoin Hanif in New Jersey, while Hanif took affirmative action to prevent her return and ultimately responded with divorce proceedings.⁸

The divorce, which was obtained through the Pakistani Consulate in New York, left Parveen without alimony or child support, and with only her \$1,500 *mahr* with which to support her three children. When Parveen brought suit in New Jersey, Hanif argued that Parveen's *mahr* was a prenuptial agreement and that her parents' assent to the agreement signified her intent to forgo any additional rights to her husband's property under New Jersey divorce law.⁹ The court agreed, effectively precluding Parveen—after fourteen years of marriage—from any portion of her psychiatrist-husband's estate.¹⁰

The story of Parveen Chaudry is not unique. Islam is America's third largest religion, and with the number of Muslim immigrants into the United States on the rise,¹¹ courts are more frequently overseeing divorce proceedings between Muslim couples. Adjudicating an Islamic divorce forces a court to decide whether the Qur'an-based *Shari'a*, the body of law that dictated the couple's marriage in their native country, should apply to

3. *See id.*

4. *See id.* at 1004.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.* at 1006.

11. *See* John L. Esposito, *The Future of Islam*, 25 FLETCHER F. WORLD AFF. J. 19, 28 (2001).

the divorce proceeding, or whether state dissolution rules are more appropriate. As this Note illustrates, this determination is fraught with numerous legal, constitutional, and policy minefields.

Islamic law has a storied, if frequently misportrayed, relationship with Muslim women. Although the Western press routinely mischaracterizes the situation of Muslim women, it is true that very little change has occurred in the area of Islamic family law since the tenth century.¹² This stagnation explains why some of the more draconian laws with respect to women persist today, and why many American courts understandably balk at applying them. With Islamic religious fundamentalism on the rise, any attempt at feminist reform in Muslim countries continues to be derided as immoral, heretical, and as a source of destruction both to the sanctity of the family and to the basic pillars of Islam itself.¹³

It is the treatment of Muslim women here in the United States, however, with which this Note is concerned. This Note addresses whether and to what extent American courts sanction the continued economic and cultural subjugation of Muslim women by enforcing foreign-made dower agreements against them. As the case of Parveen Chaudry illustrates, enforcing *mahr* provisions against women who do not personally bargain for or even sign the agreements effectively substitutes the meager *mahr* payment for the divorcing wife's rights under community property or equitable distribution regimes, leaving them unfairly and needlessly destitute. Little to no scholarship addresses the reception Muslim women receive in the American legal system—so preoccupied have scholars and feminists been with exposing the alleged mistreatment of Muslim women in the Middle East. This Note attempts to fill that void by exposing the subjugation of Muslim women occurring right here in our own courtrooms.

12. See Ghada Karmi, *Women, Islam and Patriarchalism*, in *FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES* 69, 81 (Mai Yamani ed., 1996). Renowned Egyptian feminist Nawal el Saadawi remarks that changes in other areas of Islamic law have been implemented easily, while female reform continues to stagnate:

The political leaders and the State moved rapidly in the task of changing religious legislation so as to ensure that it remained in line with the economic structures that were under continuous remoulding as society moved from one stage to another, from feudalism to capitalism and then to socialism. The same political leaders and the same State apparatus, which acted so decisively and quickly in so far as religious legislation related to economic needs was concerned, reversed its attitude in the question of women's status and suddenly became as slow, lethargic and negative as it had been fast moving, dynamic and full of initiative.

NAWAL EL SAADWI, *THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD 194–95* (Sherif Hetata trans., Beacon Press 1982).

13. See Adrien Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 *HARV. INT'L L.J.* 149, 166 (1994).

In order to fully comprehend the potential economic and cultural inequalities that occur in these cases, it is important to first appreciate the social, legal, and religious implications of being a Muslim woman. Part II of this Note describes the position that women hold in Islamic religious texts and the dichotomy between the Qur'an, Islam's holy book, and the statutory regulations and cultural practices in Islamic countries. Part II also explains the Muslim woman's role as bride and wife, and how cultural norms shape the creation of *mahr* agreements. Part III delineates the inherent differences between a *mahr* agreement and a prenuptial, and why contracting parties do not intend at the point of inception to have their religious marriage contract serve as a prenuptial agreement in a distant American courtroom. Part IV addresses the fact that, due to unwavering, patriarchal cultural and religious forces, most Muslim women in Islamic countries do not enjoy the freedom to contract in their own best interests or to assent to the terms of the *mahr* agreement. This Part also addresses the unique situation of American Muslims who create *mahr* agreements. Lastly, Part V addresses the tension between respecting cultural and religious differences, while calling for an end to the gender apartheid that currently exists in many Muslim communities.¹⁴ This Note concludes that until Muslim women are freed from the patriarchal and cultural ties that bind them, American courts cannot interpret *mahr* agreements as waivers of women's property rights under domestic marital dissolution regimes.

II. WOMEN IN ISLAM

In most Muslim countries, Islamic law, or the *Shari'a*, is the law of God, dictating every aspect of the legal system, from international law to criminal, civil, commercial, and constitutional law. Family law, however, has been called the "heart" of the *Shari'a*.¹⁵ The *Shari'a* is considered

14. See Ann Elizabeth Mayer, *A "Benign" Apartheid: How Gender Apartheid Has Been Rationalized*, 5 UCLA J. INT'L L. & FOREIGN AFF. 237, 237 (2000).

15. See, e.g., DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* 3 (1996); JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW*, at x (1982); JAN GOODWIN, *PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD* 36 (1994) ("[E]ighty percent of Koranic rulings are devoted to regulating marital relations and the conduct of women.").

There are four main legal schools or sects within Islam: the Hanafi, Maliki, Shafi'i, and Hanbali. It should be stressed that there are many variations within the four schools as to interpretations and implementation of the Qur'an, and thus, it is difficult to generalize across many regions, tribes, and countries. I attempt, however, to provide a broad picture of how most schools interpret the *Shari'a*. Similarly, because there is no standard method of transliteration from Arabic to English, there are numerous ways to spell certain key words relevant to a discourse on Islam. For consistency, the *Shari'a* is herein spelled as such (instead of, for example, *Shari'ah* or *Sharia*). Further, the Qur'an is herein

divine in origin, based on the traditions and revelations of the Prophet Muhammad.¹⁶ Although a significant portion of current Islamic family law incorporates ancient Arabian customs developed centuries before the rise of Islam, it is generally believed that the Prophet Muhammad and the introduction of the Qur'an significantly ameliorated the lot of women.¹⁷ In fact, as the following Section illustrates, the Qur'an itself is relatively revolutionary with respect to women, especially considering the oppressive treatment of women found in the religious texts of the other major world religions that developed during the same period.¹⁸

A. THE STATUS OF WOMEN, SEX, AND MARRIAGE IN THE MUSLIM WORLD

1. Muslim Men and Women: Separate, Different, but Equally Important

Despite Western reports of Islam's alleged oppression of women, the holy Qur'an itself grants Muslim women rights at least theoretically equal to, albeit different from, those of men.¹⁹ Although the Qur'an does not purport to give equal rights to women the way that most Western feminists would expect or prefer, the Qur'an realizes that the spheres of potential capabilities of men and women are equally important, if not exactly the same—equality does not mean similarity in Islam:²⁰

Both the husband and the wife enjoy equal social and legal rights and their duties merely reflect a functional distribution between them. It merely points out that the field of work of each member of the family is different from the other and is based on their biological and

spelled with a "Q" with punctuation (other forms include Koran and Quran), while the Islamic dower will be referred to as a *mahr* (other forms include *sadaq* and *nahlah*). Also, the Prophet is referred to as Muhammad (other forms include Mahomet and Mohammed).

16. JUDITH E. TUCKER, *IN THE HOUSE OF THE LAW* 5 (1998).

17. See, e.g., V.R. JONES & L. BEVAN JONES, *WOMAN IN ISLAM* 70 (Hyperion Press 1981) (1941); Tamilla F. Ghodsi, Note, *Tying a Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT'L L. 645, 652–53 (1994); Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX INT'L L.J. 311, 322 (1995).

18. In fact, the Prophet is often called "a very earnest champion of women's rights." JONES & JONES, *supra* note 17, at 70. Of course, this statement is relative to the oppression pre-Muslim women faced in nonreligious tribes in the Middle East, not relative to modern-day Western feminists. Female reforms the Prophet instituted include forbidding female infanticide, restraining guardians from marrying underage female orphans, establishing a law of inheritance for women, and promising religious favors for those who help widows and orphans. *Id.* at 233. See also GOODWIN, *supra* note 15, at 29–31 (describing Muslims as "the [f]irst [f]eminists" and arguing that "Islam, in fact, may be the only religion that formally specified women's rights and sought ways to protect them").

19. See ASGHAR ALI ENGINEER, *THE RIGHTS OF WOMEN IN ISLAM* 98 (1992).

20. THE ISLAMIC CTR. OF S. CAL., *ISLAM AT A GLANCE* (n.d.) (on file with author).

psychological differences. Both are equal but not similar in the eyes of the law.²¹

Numerous verses in the Qur'an explicitly recognize this belief, stating that "nowise is the male like the female,"²² but also that "be [it] male or female: you are members, one of another."²³ Muslims believe that God made women and men "equal participants in the human species," and thus, any gender-based oppression is considered a grave offense.²⁴

Similarly, the Qur'an repeatedly addresses both men and women equally in its exhortations of faith,²⁵ giving comparable social responsibility to both sexes to "enjoin what is just, and forbid what is evil."²⁶ Importantly, unlike the Judeo-Christian tradition where Eve was created from the rib of Adam, God created both men and women from "a single Person" that is not gender-specific.²⁷ It should be noted, however, that Muslims view equality not as one general concept pertaining to all aspects of life, but rather, as separately applicable to different spheres. Thus, most Muslims believe that women and men are spiritually equal before God, but that women are socially inferior to men due to distinct, asymmetrical domestic duties.²⁸

2. Domestic Marital Relations and the Qur'an

It has been said that the marital rights that women enjoy in their culture and religion are often a good indicator of women's status in society at large.²⁹ Just as in Islam in general, women enjoy separate but equally important roles in the institution of marriage, and both spouses are viewed as owing a religious duty to the other: "They [the wives] are your garments and you [the husbands] are their garments."³⁰

21. TOVE STANG DAHL, *THE MUSLIM FAMILY: A STUDY OF WOMEN'S RIGHTS IN ISLAM* 141 (Ronald Walford trans., 1997).

22. *THE QUR'AN*, 3:36 (Abdullah Yusuf Ali trans., 7th Am. ed., Tahrike Tarsile Qur'an 2001) [hereinafter *QUR'AN*].

23. *Id.* at 3:195.

24. FATHI OSMAN, *MUSLIM WOMEN: IN THE FAMILY AND THE SOCIETY* 1 (1996).

25. *See, e.g., id.* at 5 ("And thus does their Lord answer their prayer: I shall not lose sight of the work of any of you who works (in My way) *be it man or woman*: You are members, one of another.") (quoting *QUR'AN*, *supra* note 22, at 3:195) (emphasis in original).

26. *QUR'AN*, *supra* note 22, at 9:71.

27. *Id.* at 4:1.

28. ANNE SOFIE ROALD, *WOMEN IN ISLAM: THE WESTERN EXPERIENCE* 122 (2001) ("Man and woman were created from the same origin without specifying who was created first. – It may be that they were created at the same time, which indicates a spiritual equality of man and woman.").

29. ALI ENGINEER, *supra* note 19, at 98.

30. *QUR'AN*, *supra* note 22, at 2:187.

Marriage is very important in Islam. It is viewed as the key to social harmony, a “bulwark against social discord and disorganization.”³¹ The Qur’an encourages those who are able to marry, stating, “Let those who find not the wherewithal for marriage keep themselves chaste, until Allah gives them means out of His grace.”³² Islam considers marriage to be an all-important safeguard of chastity, as well as a life-affirming act central to the growth of society and Islam.³³

While marriage plays a very important role in the Muslim family and society in general, the initiation of marriage itself is interestingly a matter-of-fact proposition. The Islamic marriage is purely a contractual agreement between two parties, devoid of the sacramental significance found in the Christian tradition, for example.³⁴ The significance of the civil contract of marriage in Islam is an authorization of intercourse and the procreation of children between two equal partners,³⁵ as well as fulfillment of human nature as created by God.³⁶

Before a marriage can actually take place, consideration of the social status of a potential spouse, although not mandated by the Qur’an, is required by the *Shari’a*. The doctrine of *kafaah*, or equality, requires that the man be of equal status to the woman,³⁷ because if marriages are to reinforce social harmony, society cannot afford to risk the instability inherent in unequal matches.³⁸ The practical effect of this law is that a bride may only marry a husband who is in an occupation either comparable or superior to the occupation of her father, while men may marry beneath them and thus raise the woman to their superior status through marriage.³⁹ Similarly, women are prohibited from marrying non-Muslim men, while

31. TUCKER, *supra* note 16, at 40.

32. QUR’AN, *supra* note 22, at 24:33.

33. ESPOSITO, *supra* note 15, at 15.

34. See ALI ENGINEER, *supra* note 19, at 98. Note, however, that the Qur’an warns contracting parties that marriage is “a solemn covenant.” QUR’AN, *supra* note 22, at 4:21.

35. ESPOSITO, *supra* note 15, at 16.

36. OSMAN, *supra* note 24, at 10.

37. ESPOSITO, *supra* note 15, at 22. Equality is often determined by the following criteria: (1) family, (2) Islam, (3) profession, (4) freedom, (5) good character, and (6) means. *Id.*

38. TUCKER, *supra* note 16, at 41. Thus, a free woman was not permitted to marry a slave, a woman from “people of learning and religious piety” could not marry an “illiterate profligate,” and a woman with a good background could not marry a man who is “sinful, poor, or employed in a vile profession.” *Id.*

39. ESPOSITO, *supra* note 15, at 22.

men are permitted to marry "People of the Book," or Jewish and Christian women.⁴⁰

Once married, a man bears the primary responsibility to sustain his wife and family financially, regardless of the woman's wealth. The wife is entitled to maintenance according to her husband's means, including food, clothing, housing, toiletries, medical attention, and servants for those women at certain social positions.⁴¹ Theoretically, the wife is not required to prepare food for the family, clean the home, or even nurse the baby, but if she chooses to do so, such acts are viewed as voluntary, charitable contributions to the family done only with her consent.⁴² As a result of the man's religious responsibility to maintain his wife and family, the Qur'an states that a good Muslim wife recognizes and respects her husband's authority over the entire family.⁴³

Although Muslim women are routinely characterized as sexually oppressed, women enjoy equal access to sex, which is viewed as neither sinful nor taboo, albeit only in the context of marriage.⁴⁴ The Qur'an

40. JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* 28 (1990). Interestingly, the rationale advanced for the restriction on eligible men for Muslim women is explained in terms of feminism:

Under Islam, woman enjoys more rights. A Christian girl coming into a Muslim home becomes elevated in her human dignity and rights. A Muslim girl going into a Christian home loses her elevation; for according to Christianity, woman is the cause of all evil and thus impure and unclean . . . In Islam woman is as good as man. A Christian woman merges her identity in that of her husband, losing her very name and adopting that of her husband.

JONES & JONES, *supra* note 17, at 107. See also Symposium, *Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud*, 16 *LOY. L.A. INT'L & COMP. L. REV.* 9, 67 (1993) (advancing the argument that the ban on women marrying non-Muslim men is due to the fear that patriarchal structures in other religions will interfere with a Muslim wife's right to the free exercise of her Muslim faith) [hereinafter *Symposium*].

41. NASIR, *supra* note 40, at 59. Many Islamic jurists believe that a woman forfeits her right to maintenance if she works outside the home without the permission of her husband. *Id.* at 62. The more liberal Egyptian law provides that a woman forfeits the maintenance right only if her outside work conflicts with the family and only if she was actually forbidden by her husband from working. *Id.* at 63. Similarly, the wife may risk her maintenance right if she is disobedient, or a *nashiza* (literally, a rebellious wife), by withholding sex from her husband or leaving the marriage home indefinitely without permission. *Id.*

42. OSMAN, *supra* note 24, at 54. This principle reflects the Muslim belief that the marriage is not a service contract, but rather, is a contract for human companionship. Azizah al-Hibri, *Muslim Marriage Contract in American Courts*, Address at the Minaret of Freedom Banquet (May 20, 2000), at <http://www.minaret.org/azizah.htm> [hereinafter *Azizah al-Hibri Address*].

43. Barbara Freyer Stowasser, *Women and Citizenship in the Qur'an*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 23, 32 (Amira El Azhary Sonbol ed., 1996).

44. See Mary Ann Fay, *The Ties That Bound: Women and Households in Eighteenth-Century Egypt*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY*, *supra* note 43, at 155, 170. One woman traveler in eighteenth century Turkey noted that "I look upon Turkish women as the only free people in the Empire," because the veils that women were forced to wear actually gave them a

recognizes and even fears the normal human sexual urges of both men and women, and thus encourages marriage in the belief that such a union is the only way to safely express and satisfy those urges.⁴⁵ Sex is thus very important to marriage; in fact, the full legal consequences of marriage are not realized until sexual intercourse consummates it.⁴⁶ Evidence of equal access to sex is indicated by the law that, once a woman moves in with her husband, she has the right to demand sex from him, and if he does not perform, she may either request a divorce or receive additional monetary compensation.⁴⁷ The Qur'an is quite careful, however, to forbid sex for "lustful" purposes or for "taking paramours,"⁴⁸ because it cheapens the act by focusing on physical pleasure.⁴⁹ Similarly, Islam forbids unmarried men and women from mingling in secluded places where sexual relations are possible.⁵⁰

3. The Act of Marriage and the Islamic Marriage Contract

The marriage itself, or *nikah*, is negotiated by the groom and the bride's guardian, or *wali*, who is usually her father, grandfather, or uncle.⁵¹ The actual marriage contract includes the names and lineages of the bride and groom, the names of two witnesses who are chosen to swear that both parties consent to the marriage, and the details of the dower, or *mahr*.⁵² Like most contracts, the Islamic marriage contract requires the making of an offer (*ijab*) and acceptance (*qabul*) at the same meeting in the presence of two male witnesses.⁵³ Under most interpretations of the *Shari'a*, one

certain degree of anonymity in the streets to pursue sexual opportunities. *Id.* Because a jealous husband could never recognize his wife from the numerous other veiled women, and because it would be inappropriate to touch or follow a suspected wife in public, women easily moved in and out of different relationships with illicit partners. *Id.*

45. DAHL, *supra* note 21, at 51.

46. TUCKER, *supra* note 16, at 44. Many Muslim families contractually marry their children to one another at a very young age before they are ready for sexual intercourse, but the marriage does not itself begin until sexual intercourse occurs. *Id.*

47. *Id.* at 45.

48. QUR'AN, *supra* note 22, at 4:25.

49. ALI ENGINEER, *supra* note 19, at 100.

50. OSMAN, *supra* note 24, at 37.

51. TUCKER, *supra* note 16, at 46-47. Some schools only allow the *wali* to contract a marriage where the parties have not yet reached majority, while others have a *wali* for the woman regardless of her age. See DAVID PEARL, A TEXTBOOK ON MUSLIM LAW 44 (1979).

52. TUCKER, *supra* note 16, at 38.

53. See, e.g., EL ALAMI & HINCHCLIFFE, *supra* note 15, at 5; NASIR, *supra* note 40, at 6. If two men are not available, a man and two women witnesses suffices, thus indicating that the word of two women is equal to the word of one man: "And get two witnesses, . . . and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs the other can remind her." ESPOSITO, *supra* note 15, at 17. This law was recently justified by a writer for the Islamic Center

can contract a marriage when they reach puberty, an age which varies according to country and region, but for males ranges from twelve to twenty-one, while females can be as young as nine or as old as eighteen.⁵⁴

According to the Qur'an, the bride has an unfettered right to withhold her consent from any term in the marriage contract, including whether to marry the proffered groom in the first place.⁵⁵ Realistically, however, the bride has little choice in either the terms of the contract or the choice of the groom. 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.⁵⁶ In order to avoid such situations, the bride's consent or acceptance is defined quite differently than in the Anglo-American legal tradition: Smiles, tears, and sullen silence by the bride are deemed a sufficient sign of acceptance, not a refusal to marry the groom.⁵⁷ Also, marriages contracted in jest or even under duress are given effect.⁵⁸

Similarly, the bride herself has little to no involvement in the negotiation of the *mahr*. 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.⁵⁹ Theoretically, the bride has the right to add conditions to the

of Southern California as "not [an] impl[ication of] any inferiority of a woman physically or morally. It refers to a general observation that some women may not be interested to keep in their memories such financial details, or be familiar with the legal aspects that should be accurately noticed." OSMAN, *supra* note 24, at 40.

54. See, e.g., PEARL, *supra* note 51, at 43. Many schools hold that a woman married by her guardian before she reaches puberty may repudiate the marriage when she reaches majority. *Id.* at 44–45.

55. Indeed, there is evidence in the Qur'an that one goal of Islam was to elevate women to the status of men. See ALI ENGINEER, *supra* note 19, at 107–08. Over time, however, the tribes, who were long used to having guardians represent women in most affairs, added the presence of a *wali* to the contracting of marriage, thus robbing women of their newfound ability to determine their domestic fate. See *id.* Today, her consent is little more than a mere "nod or to keep silent." *Id.* at 108.

56. See GOODWIN, *supra* note 15, at 32.

57. EL ALAMI & HINCHCLIFFE, *supra* note 15, at 6 ("If the woman remains silent on hearing the offer of marriage, this will be construed as acceptance, as also if she laughs or even if she cries a little, for a few tears will be seen as a sign that she regrets leaving her parents, and not as a refusal of the offer of marriage."). See also Judith Romney Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L.J. 1, 11 n.41 (1982) (arguing that although a bride's consent may be inferred from her silence, this is contrary to the objections of the Prophet's wife, A'isha, who remarked that a young girl's modesty would prevent her from protesting).

58. EL ALAMI & HINCHCLIFFE, *supra* note 15, at 6.

59. PEARL, *supra* note 51, at 44. In the Shafi'i and Maliki schools, a woman may only contract a marriage herself when she is no longer a virgin, either because of a consummated marriage, divorce, or an illicit relationship. *Id.*

marriage contract through her *wali*, ranging from forcing the husband to pledge never to take an additional wife, to promising never to relocate away from the wife's hometown.⁶⁰ This ability has raised the status of women in marital relationships considerably and has compensated somewhat for the oppressive laws of the *Shari'a* over time, although not all Muslim legal schools allow the practice.⁶¹ Empirical research indicates that such stipulations are more "an ideal than a reality" because they suggest that the husband will be imperfect in the marriage, thus offending his honor and dignity and providing an explanation as to why few marriage contracts include such specifications.⁶²

The marriage dower is an essential part of the Islamic marriage ceremony; without the *mahr*, some schools hold that the *nikah* is improperly solemnized.⁶³ The *mahr* is defined as "[t]he property given by the husband to indicate his willingness to contract marriage, to establish a family, and to lay the foundations for affection and companionship."⁶⁴ Its role is grounded in the Qur'an, which urges men to "give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer."⁶⁵ Contrary to Western misconceptions, the *mahr* is not a "bride-price" to be paid to the father or guardian, but rather, is designed for receipt by the bride herself,⁶⁶ although there are circumstances where the bride's *mahr* is taken by her father or brothers.⁶⁷ According to most Islamic legal systems,

60. See, e.g., NASIR, *supra* note 40, at 15. One condition that may nullify the contract altogether is imposition of a time-limit: Sunni Muslims hold that any implication of a time-limit on the marriage is contrary to the institution of marriage itself and is void *ab initio*. *Id.* at 16. Other schools may recognize temporary marriages, or *muta* (pleasure) marriages, contracted in order to avoid illicit sex. *Id.* at 17-18.

61. ESPOSITO, *supra* note 15, at 23 (noting that the *Hanafi* school does not allow the wife to contract for additional requirements in the marriage).

62. DAHL, *supra* note 21, at 70. See also Wing, *supra* note 13, at 162-63 (noting that stipulations to the contract are rarely used, either because of a reluctance to defy custom or because of a lack of knowledge that stipulations are an option). For more information on using contract stipulations to protect women's rights, see generally 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 (1999).

63. ALI ENGINEER, *supra* note 19, at 111. The dower is not consideration for the marriage contract, however, but is an effect of the contract itself. PEARL, *supra* note 51, at 57.

64. NASIR, *supra* note 40, at 43 (quoting the Moroccan definition of a *mahr*).

65. QUR'AN, *supra* note 22, at 4:4.

66. NASIR, *supra* note 40, at 43. See also Sayeh & Morse, *supra* note 17, at 327 ("Because the amount of the dower has been viewed as contingent on the resources of the husband rather than upon any attributes of the wife or her status, it is evident that the *mahr* cannot be considered as the price paid for a wife.").

67. See, e.g., TUCKER, *supra* note 16, at 48 (describing an instance in which the village head pocketed the *mahr* instead of giving it to the bride); Fariba Zarinebaf-Shahr, *Women, Law, and Imperial*

the husband relinquishes all right to the *mahr* and the bride may spend it freely. Accordingly, she cannot be forced to use it to purchase furniture or other domestic necessities.⁶⁸

There is no actual monetary ceiling on the *mahr*, and thus it can range from a small token to a heap of gold, to property or to “anything that can be valued in money.”⁶⁹ If the marriage contract does not specify the amount of the *mahr*, the wife is entitled to a “dower of equivalence” (*mahr al-mithl*), which is calculated according to the amount received by other females in the bride’s family upon their marriage, in addition to consideration of the bride’s beauty, age, and virginity.⁷⁰ Importantly, the husband cannot reduce the *mahr* on a whim after contracting the marriage; the Islamic courts will force the husband to adhere to the original, agreed-upon amount.⁷¹

B. MAHR PROVISIONS IN MUSLIM COUNTRIES: NEEDED PROTECTION FOR WOMEN

Mahr provisions were originally conceived in part as a protective mechanism for women, who rarely have assets of their own as a result of restrictions from either working outside the home or leaving the home without their husbands’ permission.⁷² The *mahr*’s two parts reflect this purpose: There is the *muqaddam*, or the portion of the dower that is paid by the groom upon marriage to honor his bride, and the *mu’akkhar*, or the deferred portion of the dower that is paid in the event of divorce or death to

Justice in Ottoman Istanbul in the Late Seventeenth Century, in WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY, *supra* note 43, at 81, 92–93 (noting that seventeenth century family court proceedings indicate numerous complaints by wives of husbands who, in order to retain the deferred *mahr*, often forced wives to initiate divorce proceedings, which legally freed the husband from having to pay the wife her dower); 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, 1074–75 (1997) (noting that a study of women in the West Bank indicates that wives often give up their *mahr* to their families, especially their fathers, and often that the husband takes it back as well).

68. NASIR, *supra* note 40, at 44.

69. *Id.* at 44–45. The only items excluded from the dower are wine and pigs, which are viewed as traditionally unclean. *Id.* at 45.

70. EL ALAMI & HINCHCLIFFE, *supra* note 15, at 19.

71. TUCKER, *supra* note 16, at 54.

72. EL SAADAWI, *supra* note 12, at 191 (arguing that men prevent women from working because of a fear that their earnings would “lead the wife to be more conscious of her personality, and her dignity, and that therefore she will refuse to accept the humiliations she was subjected to before . . . [Thus a] ‘woman who works without the permission of her husband would be considered an outcast’”).

provide for the wife when her husband discontinues maintenance of her.⁷³ The payment of the deferred *mahr* is taken very seriously in Muslim countries, as it is legally considered an unsecured debt ranking equally with other unsecured debts that must be paid by court order or jail term if necessary.⁷⁴

The deferred dower acts as a constraint on the husband's ability to divorce his wife—by making divorce an expensive endeavor, families prevent the return of their now non-virgin daughters.⁷⁵ Of course, there are circumstances where the husband manages to avoid paying the *mahr* upon divorce, ranging from an inability to pay to abuse of his wife such that she initiates the divorce (in legal schools that allow female-initiated divorce) in order to force the woman to forfeit her share.⁷⁶ Furthermore, the amount of the *mahr* is often too small to act as an effective constraint on the husband from divorcing his wife,⁷⁷ and oftentimes women are pressured to illustrate their devotion to their husbands by forgiving the debt of the *mahr* altogether.⁷⁸ On the whole, however, the deferred dower has allowed women in Muslim countries to receive relatively better protection within the patriarchal, male-constructed legal system.⁷⁹ In fact, a study of Palestinian women concluded that the *mahr* is the major vehicle through which women gain property of their own.⁸⁰

The deferred dower is also viewed as compensation to women for men's unlimited, unilateral right to divorce. The much-publicized Islamic divorce procedure *talaq*, whereby the husband severs the marriage by simply repeating "I divorce thee" three times, in most schools is an extra-judicial proceeding that does not require formal witnesses or cause, does not consider the wife's consent or objections, and cannot be readdressed in

73. DAHL, *supra* note 21, at 70. Social custom dictates the amount of the prompt and deferred dower. *Symposium*, *supra* note 40, at 68.

74. ESPOSITO, *supra* note 15, at 25; TUCKER, *supra* note 16, at 92.

75. See JONES & JONES, *supra* note 17, at 136–38. Importantly, however, the *mahr* does not act as a constraint against divorce among the poor because the amount of the deferred *mahr* is already set at such a low value. See *id.* at 138.

76. *Id.* at 138–39. Where the woman initiates the divorce, or *khul'*, she waives her right to collect the deferred dower in most legal schools. PEARL, *supra* note 51, at 102–03.

77. Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, in ISLAMIC FAMILY LAW 147, 161 (Chibli Mallat & Jane Connors eds., 1990) ("The notion . . . that to pay [*mahr*] would commonly bankrupt the husband seems extremely far-fetched.")

78. Azizah al-Hibri Address, *supra* note 42.

79. See DAHL, *supra* note 21, at 70.

80. Webber, *supra* note 67, at 1062. Significantly, however, many women never even receive their dower after divorce because they often are afraid to sue their husbands. *Id.* at 1074–75.

a court of law.⁸¹ Although under limited circumstances women may occasionally initiate divorce, the primary mode of divorce in Muslim countries is through men's initiation of the *talaq*.⁸² Thus, because the typical Muslim woman lives in constant fear of being repudiated at-will by her husband,⁸³ the deferred *mahr* is akin to a security deposit in case she suddenly finds herself divorced and without a home.⁸⁴ As indicated above, because most Muslim countries restrict women from working outside the home, many women become instantly destitute upon divorce, and because of their now non-virgin status, have little hope of remarrying. Consequently, although the concept of the *mahr* conflicts with traditional Western-feminist principles of sex equality, it appears to be a necessary, potentially ameliorating side-effect of the more oppressive practices inherent in the *Shari'a* and other such traditions.⁸⁵

III. INTERPRETING MAHR AGREEMENTS AS PRENUPTIALS: CONTRARY TO BOTH THE DESIGN OF THE AGREEMENT AND THE INTENT OF MUSLIM BRIDES AND GROOMS

While a necessary protection for women in Muslim countries, *mahr* provisions should not be enforced in American courts as prenuptial agreements. Interpreting *mahr* agreements as prenuptials both ignores the inherent differences in a prenuptial agreement and a *mahr* provision in Muslim societies, and more importantly, contravenes the original intent of

81. EL ALAMI & HINCHCLIFFE, *supra* note 15, at 22. In fact, the wife herself need not be present to validate the *talaq*. *Id.* Also, the husband retains the right to rescind the *talaq* and take his wife back at any point during a three-month waiting period (*idda*) during which the wife ensures that she is not pregnant with her husband's child. *Id.* at 23.

82. *Id.* at 22.

83. See ALI ENGINEER, *supra* note 19, at 126 (“[*Talaq*] has made the lives of thousands of women most miserable. If the husband says divorce thrice, even in a state of anger or inebriation, or just for fun, the woman is irrevocably divorced No one can help the wife either. . . . Often husbands use this form of divorce to punish their wives for not submitting to their authority.”).

84. *Id.* at 113.

85. There is strong evidence suggesting that the *mahr* itself perpetuates gender inequalities. If a woman is divorced before the marriage has been consummated, she is only entitled to half the *mahr*, not the entire *mahr*, which indicates that the dower is a form of financial compensation paid for the sexual enjoyment of a woman. Mona Siddiqui, *Law and the Desire for Social Control: An Insight into the Hanafi Concept of Kafa'a with Reference to the Fatawa 'Alamgiri (1664-1672)*, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES, *supra* note 12, at 49, 54. See also Shahla Haeri, *Divorce in Contemporary Iran: A Male Prerogative in Self-Will*, in ISLAMIC FAMILY LAW, *supra* note 77, at 55, 57-58. In fact, the word “*nikah*,” which refers to the marriage itself, has been interpreted to mean unlimited ownership or use of the vagina by the husband. Ghodsi, *supra* note 17, at 665. Thus, the *mahr* is a “confirmation of gendered roles” whereby the man gets unlimited sexual enjoyment and the woman is entitled to economic maintenance and protection in return. Siddiqui, *supra*, at 54. Others argue that *mahr* is a “mark of respect for [the wife].” Ghodsi, *supra* note 17, at 665 n.101.

the contracting parties. Such an interpretation effectively and unfairly precludes Muslim women in America from enjoying their rights under community property or equitable division schemes, while unnecessarily leaving them destitute.

A. ISLAMIC *MAHR* PROVISIONS ARE NOT SYNONYMOUS WITH AMERICAN PRENUPTIAL AGREEMENTS

Although several courts have reasoned that *mahr* provisions are tantamount to prenuptial agreements,⁸⁶ a comparison between the two indicates that *mahr* agreements, by religious tradition and legal definition, are far different both in purpose and effect. Unlike the *mahr*, prenuptial agreements do not provide for a sum of money solely to the wife in order to compensate for inequities in marital law. Rather, prenuptial agreements seek either to protect the separate character of property owned before marriage or to define the character of any property acquired during the course of the marriage.⁸⁷ There is no tradition or history of either attempting to compensate for unusually harsh property laws or supporting a woman after divorce by utilizing a prenuptial. In fact, the prenuptial evolved to *protect* assets from the spouse (usually the wife), not *provide* for her: The “purpose and effect of most premarital agreements is to protect the wealth and earnings of an economically superior spouse from being shared with an economically inferior spouse.”⁸⁸ In contrast, *mahr* provisions were created to protect women from abandonment in an extremely patriarchal society, ameliorate the harsh effects of unilateral divorce, and adhere to Qur’anic traditions. Further, a prenuptial agreement is gender-neutral—both men and women can contract around community

86. See, e.g., *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978) (holding that the *mahr* agreement was an “antenuptial agreement” and leaving the wife with a \$1,500 deferred *mahr* instead of half of the doctor-husband’s estate); *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872 (Ct. App. 1988) (concluding that the *mahr* agreement was a prenuptial agreement, albeit an unenforceable one). Cf. *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at *1 (N.Y. Sup. Ct. July 10, 1995) (stating that since there were no marital assets involved, the issue of equitable distribution did not need to be discussed while interpreting the *mahr* provision). One court rejected the argument that a the *mahr* agreement was a prenuptial and rejected that finding in favor of the wife. See *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001) (refusing to find that the *mahr* agreement was a prenuptial because the contract was void under the Statute of Frauds). One court interpreted a *mahr* agreement, but did not specify whether the agreement would block equitable distribution. See *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985).

87. Dennis Wasser, *Prenuptial Disagreements*, 23 L.A. LAW. 26, 30 (Dec. 2000).

88. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 149 (1998) (quoting Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 234 (1994)).

property laws to protect their assets—while the *mahr* is gender-specific by definition and design, and thus not comparable.

An example of an American court recognizing this distinction is *In re Marriage of Shaban*, in which the California Court of Appeal carefully considered whether a couple's *mahr* was a premarital agreement.⁸⁹ The court found that the document was merely a marriage certificate, not a prenuptial, because it provided more information about the parties to the wedding, including the address and descriptions of the witnesses, than it did about any agreement between the two parties as to property dissolution in an American court.⁹⁰ A New York court reached the same conclusion, finding that “the [wedding contract] simply stated where the marriage took place, who . . . the participants [were,] and who officiated the ceremony.”⁹¹

Importantly, as evidenced by these cases, Muslim parties to a marriage contract do not contemplate the assets of each party. Because Islamic law requires that both parties retain their own assets before, during, and after the marriage, consideration of divvying their assets is a non-issue beyond the agreed-upon dower.⁹² In contrast, the sole point of the prenuptial agreement is to contemplate the character of certain assets and provide for their ownership upon divorce.

The importance of determining whether *mahr* agreements are identical to prenuptials or are simply elements of the Islamic marriage contract cannot be overlooked. The financial security of divorcing Muslim women depends on this determination because in many Muslim communities, couples provide for a *mahr* that is more of a symbolic, rather than a practical, component of the marriage contract. In other words, instead of a large dower, the couple simply designates a small, religiously significant amount embodying a traditional meaning that dates back to the times of the Prophet.⁹³

For example, in *In re Marriage of Shaban*, the couple contracted their marriage in Egypt, providing for an immediate *mahr* of approximately twenty-five piasters, or about one dollar, and a deferred *mahr* equal to

89. See 105 Cal. Rptr. 2d at 867–69.

90. See *id.* at 869.

91. *Habibi-Fahnrich*, 1995 WL 507388, at *3 (holding that a *mahr* provision was unenforceable in part because it told more information about the couple than it did about the agreement; the small portion relating to the *mahr* did not signify an agreement by itself).

92. See *Shaban*, 105 Cal. Rptr. 2d at 866–67.

93. See *Symposium*, *supra* note 40, at 68. In the Hanafi school, the traditional figure is ten dihrans, while in *Maliki* law, it is three dihrans. PEARL, *supra* note 51, at 58.

about thirty dollars.⁹⁴ Had the court found that the deferred *mahr* was a valid prenuptial agreement, the wife would have received thirty dollars instead of sharing in half of the more than three-million-dollar estate she shared with her physician-husband under California community property rules.⁹⁵

While the *Shaban* court appreciated this distinction and avoided the potentially disastrous effects of classifying the couple's *mahr* as a prenuptial, some courts, out of ignorance of Islamic law and custom, have interpreted the *mahr* as preempting ordinary property dissolution schemes. For example, a New Jersey court in *Chaudry v. Chaudry*, held that the *mahr* agreement was an "antenuptial agreement" such that it superceded alimony or equitable distribution, awarding the wife her \$1,500 deferred *mahr* instead of half of her doctor-husband's estate.⁹⁶ Although the court based its conclusion in part on the husband's Pakistani divorce and international divorce comity,⁹⁷ the extent to which the New Jersey court assumed that the *mahr* agreement was a property waiver is nevertheless illustrative of the ignorance of Islamic law under which many courts operate. Another example of a court's failure to appreciate the nuances between a prenuptial and *mahr* agreement was *Akileh v. Elchahal*, where the Florida Court of Appeal concluded that the *mahr* was enforceable as an antenuptial agreement without inquiry into Islamic custom or the legal significance of the document.⁹⁸ Presumably, the conclusion that the document was a prenuptial agreement forestalled any additional discussion of the couple's marital property and its dissolution according to ordinary property rules.⁹⁹

Scholars have also misinterpreted *mahr* provisions. One author argues that treating *mahr* provisions as prenuptials "is an appropriate way to interpret and enforce" them.¹⁰⁰ The author, however, fails to explore

94. 105 Cal. Rptr. 2d at 865–66.

95. *See id.* at 870. Interestingly, the wife significantly contributed to the value of the husband's medical practice by working in his office for many years. Had the court ruled differently, her picture would have been bleak. According to law professor and Muslim legal scholar Aziza al-Hibri, "she does not have the family arrangement in the U.S. Today, if she gets divorced, she is out on the street. She might not have children. Her parents are God knows where—if they're still alive. She has nobody." Azizah al-Hibri Address, *supra* note 42.

96. 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978).

97. *See id.* at 1006–08.

98. *See* 666 So. 2d 246, 248–49 (Fla. Dist. Ct. App. 1996).

99. *See id.*

100. Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & RELIGION 67, 72 (2000–2001). The author also argues that

whether classifying the *mahr* as a premarital agreement will preclude women from exercising their additional rights under community property or equitable distribution regimes. Because a prenuptial is a mechanism that usually preempts ordinary property rules in favor of a system of its own design, arguing that the *mahr* is a prenuptial often has the unfortunate effect of leaving Muslim women unfairly destitute.

1. Further Evidence that Mahr Provisions Are Not Identical to Prenuptial Agreements: The “Profiteering by Divorce” Theory

Further militating against classifying *mahr* agreements as prenuptials is the fact that *mahr* agreements, by definition, are documents that preemptively attempt to deal with the divorce of the parties in monetary terms, leading several courts to refuse enforcement because they allow “profiteering by divorce,” which is inconsistent with public policy.¹⁰¹

In *In re Marriage of Dajani*, a Muslim couple married in Jordan, agreeing to a deferred *mahr* equivalent to approximately \$1,700 in case of divorce.¹⁰² The California Court of Appeal struck down the agreement because it “clearly provided for [the] wife to profit by a divorce,” despite the fact that the *mahr* was worth very little.¹⁰³ The court reached a similar conclusion in *In re Marriage of Noghrey*, where shortly before the wedding, two Iranian immigrants agreed to a *kethuba*, the Jewish equivalent of the *mahr*. The *kethuba* provided the mate with either \$500,000 and the husband’s house or one-half of his assets, whichever was

mahr provisions should always be upheld, apparently ignoring the harsh effect such a course will have on many Muslim women in this country. *See id.*

101. Note that some courts do not hold that premarital agreements establishing property and maintenance rights upon divorce are per se invalid. *See, e.g.,* *Burtoff v. Burtoff*, 418 A.2d 1085, 1088–89 (D.C. 1980). As “public policy considerations change with societal conditions” and because societal conditions are such that divorce has now become a “commonplace fact of life,” the profiteering by divorce theory may no longer apply. Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R. 4th 22 (1987). Therefore, an important distinction must be made between agreements that encourage divorce by allowing one party to profit, and agreements that merely contemplate divorce as a circumstance itself (for example, which party owns what upon divorce), which are not void as against public policy. *See, e.g.,* *Belcher v. Belcher*, 271 So. 2d 7, 7 (Fla. 1972); *Hill v. Hill*, 356 N.W.2d 49, 49 (Minn. Ct. App. 1984).

102. *See* 251 Cal. Rptr. 871, 871 & n.3 (Ct. App. 1988).

103. *Id.* at 872. An interesting side-note to this case is the lower court’s analysis about whether a Muslim woman forfeits her rights to the *mahr* if she files for divorce. Depending on which legal school applies, if the wife does forfeit the *mahr* by filing, the argument that *mahr* agreements, unlike prenuptials, encourage profiteering would not apply because she would not divorce her husband if doing so put her ability to “profit” at risk. *Id.* But the wife may still profit by divorce without endangering her *mahr*, because she can simply make the husband’s life miserable such that *he* initiates divorce, while she profits. Either way, *mahr* agreements do not comply with American requirements for prenuptial agreements, because in the end, one party profits only on condition of divorce.

greater upon divorce.¹⁰⁴ When the wife filed for divorce only seven months after the marriage, the court dryly concluded that “[t]he prospect of receiving a house and a minimum of \$500,000 by obtaining the no-fault divorce available in California would menace the marriage of the best intentioned spouse.”¹⁰⁵

These cases illustrate that *mahr* agreements are substantively different from prenuptial agreements. As both cases emphasize, *mahr* agreements by design do not mention the respective spouses’ rights to preexisting property or property acquired during the marriage; instead, they deal only with voluntary gifts of money or property upon divorce:

The agreement before us, however, is not of the type that seeks to define the character of property acquired after marriage nor does it seek to ensure the separate character of property acquired prior to the marriage. This agreement is surely different and speaks to a wholly unrelated subject. It constitutes a promise by the husband to give the wife a very substantial amount of money and property, *but only upon the occurrence of divorce*.¹⁰⁶

As a result, legal practitioner’s guides caution attorneys that in order to ensure enforcement, valid prenuptials must address issues of property owned prior to and during the marriage, not provide for payment only in the event of divorce.¹⁰⁷

2. What If Defining *Mahr* Agreements As Religious Marriage Certificates Instead of Prenuptials Actually Hurts Muslim Women in American Courts?

Urging American courts to interpret *mahr* agreements as religious marriage contracts instead of *mahr* agreements will, in most cases, benefit Muslim women by allowing them to exercise their rights under community property or equitable distribution regimes. Nevertheless, what if this policy actually hurts women instead of helping them? One prominent Muslim legal scholar has suggested that encouraging Muslim women to abandon their rights under Islamic marriage contracts in the belief that American

104. *In re Marriage of Noghrey*, 215 Cal. Rptr. 153, 154–55 (Ct. App. 1985).

105. *Id.* at 157.

106. *Id.* at 156 (emphasis in original).

107. See Wasser, *supra* note 87, at 30. Technically, it is probably incorrect to conclude that *mahr* provisions encourage or promote divorce given that they are read into every Muslim marriage contract. See Qaisi, *supra* note 100, at 78–80. Nonetheless, their very nature still supports the proposition that they differ by design from ordinary prenuptial agreements.

law is more favorable is incorrect.¹⁰⁸ She argues that such advice is borne out of ignorance and “implicit bias” against Islam. Whereas, if Islamic law were applied in American courts, she argues, women would receive a fuller and more religiously appropriate vindication of their rights.¹⁰⁹

One case where the wife was financially better off exercising her rights under the religious marriage contract was in *Akileh v. Elchahal*, where the wife appealed the lower court’s decision invalidating a deferred *mahr* worth \$50,000.¹¹⁰ Concluding that the *mahr* was enforceable, the Florida Court of Appeal awarded the full amount of the deferred dower to the wife, which appears to have been more valuable than half of her husband’s assets.¹¹¹ Thus, the court probably gave the wife more money by enforcing the *mahr* agreement than she otherwise would have received under Florida property rules.

This result begs the question of whether it is fair to enforce *mahr* agreements only in the rare case where the wife profits financially. Revisiting the original purpose of *mahr* agreements provides the answer: The agreements are meant in part to act as a restraint on the ease with which a husband—and only a husband, not a wife—can unilaterally and verbally divorce his spouse. *Mahr* agreements are not meant to be prenuptials in the Western sense and thus should not act to dictate the terms of a marriage’s dissolution, no matter how lopsided or favorable they might be to one of the parties.¹¹²

Moreover, if actually enforcing *mahr* provisions protected the rights of Muslim women more effectively, does that mean that we must also recognize men’s asymmetrical, extra-judicial, unlimited, and undocumented right to divorce, since the *mahr* was created in part to

108. See Panel Discussion, *Does Professionalism Leave Room for Religious Commitment?*, 26 *FORDHAM URB. L.J.* 875, 890 (1999) [hereinafter *Panel Discussion*]. A student note also takes this position, arguing that Muslim women are denied their rights to contract where *mahr* agreements are considered profiteering via divorce. See Qaisi, *supra* note 100, at 78. This argument, while superficially provocative, ignores the truth of the matter: Muslim women can create prenuptials, just as any other woman or man may. If people of any creed wish to exercise their right to contract in the form of a prenuptial agreement, they may, provided they do so in a manner that does not encourage divorce. Indeed, the public policy of striking down premarital agreements that encourage divorce applies to women of every creed, not just Muslim women.

109. See *Panel Discussion*, *supra* note 108, at 890.

110. See 666 So. 2d 246, 247–48 (Fl. Dist. Ct. App. 1996).

111. See *id.*

112. Muslim women might attempt to enforce *mahr* agreements in addition to the ordinary property dissolution proceedings, but the agreements should not be read to supercede the property rules of the state.

prevent this?¹¹³ Although at least one husband has tried to enforce an American-issued *talaq* in court,¹¹⁴ many courts hopefully would not recognize a divorce procured in the United States through such means.¹¹⁵ Because we would probably not recognize the *talaq* mechanism of divorce as effective in this country, we should not recognize the mechanism created to prevent it, either, regardless of whether it may occasionally ameliorate the plight of women. Doing so only privileges the reception that one part of Islamic law, *mahr*, receives in U.S. courts, while condemning the other, *talaq*. Such a policy seems to allow Muslim women to have their proverbial cake and eat it too by protecting them from U.S.-issued *talaq*, while allowing monetary recovery of foreign-made dowers if more profitable. Therefore, if Muslim couples take their religious commitment to give *mahr* gifts seriously, they should seek religious intervention by an *imam* or other religious arbitration counsel to enforce it, not a civil courtroom.

113. While the right to divorce in American jurisdictions is also unilateral in that the other party cannot block a divorce, it is still substantively and procedurally different from a *talaq*. *Talaq* is asymmetrical and gender-defined in that only men can divorce with such ease. A woman must go to court and suffer through extensive litigation regarding her marriage, proving that she had cause to divorce based on one of four reasons: the husband cannot consummate the marriage, has a venereal disease, has leprosy, or is insane. PEARL, *supra* note 51, at 108. Alternatively, she can petition for a judicial divorce, which is granted only if the husband consents—there is no such thing as a unilateral divorce for women. *Id.* at 89–90, 102. In contrast, domestic divorce does not favor one party or gender over the other. Further, the *talaq* that is the “most approved method of repudiation” is one where the husband repudiates his wife once, then waits for the *idda*, or three menstrual cycles, of his wife to pass. *Id.* at 89. Anytime during these three months, the husband can take his wife back and thus cancel his repudiation; the wife has absolutely no say and must wait patiently to see what her fate will be. *Id.* at 90. If he does take her back, she has no choice but to accept and become his wife again, bearing the duty of sexual relations with the man who has just threatened to get rid of her. *See id.* If the husband pronounces *talaq* while drunk, in many schools it is still effective. *Id.* at 93. The differences between unilateral divorce in America and *talaq* are quite clear.

114. *See Shikoh v. Murff*, 257 F.2d 306, 309 (2d Cir. 1958) (refusing to recognize the husband’s attempt to divorce his wife via the *talaq* procedure, noting that “[w]here the divorce is obtained within the jurisdiction of the State of New York, it must be secured in accordance with the laws of that State”).

115. *Shikoh v. Murff* suggested that, had the husband obtained a *talaq* divorce properly in Pakistan according to its procedures, the court may have recognized the divorce as valid. *See id.* More importantly, though, we are concerned with divorces procured in the United States, not outside of it, and thus most courts would probably never recognize a domestic *talaq* as effective. *See Seth v. Seth*, 694 S.W.2d 459, 463 (Tex. Ct. App. 1985) (refusing to recognize the *talaq* that the husband tried to enforce because “[t]he harshness of such a result . . . runs so counter to our notions of good morals and natural justice that we hold that Islamic law in this situation need not be applied”).

B. DISCERNING THE ORIGINAL INTENT OF THE BRIDE AND GROOM:
UNCERTAIN TERMS IN *MAHR* AGREEMENTS PRECLUDE ENFORCEMENT

Cultural and class differences, time, and varying legal schools within Islamic law prevent enforcement of *mahr* agreements because accurately ascertaining the original intent of a divorcing couple when they created the *mahr* decades ago is very difficult, if not impossible. Uncertainty as to the couple's intent manifests itself in two ways. First, *mahr* agreements are too short on operative details, definitions, and explicit requests to have their terms represent an entire remedy at law in a civil courtroom. Second, filling in the details and contractual intent of the parties by reference to then-existing cultural and legal practices is significantly hindered by varying interpretations of the *Shari'a*.

1. Uncertainty Regarding the Terms and Intended Effect of the *Mahr*
Agreement

As part of a larger marriage contract, *mahr* agreements are often vague and sparsely, if at all, defined. The reason is that Muslim couples do not need to define the operative details of the *mahr*, as it is steeped in both tradition and religion familiar to all marrying Muslims. Also, specificity is not necessary because there is no other property dissolution arrangement to contend with other than Islamic law, which dictates that each party retains its own assets. Most parties marrying in Islamic countries do not foresee that they will someday move to America and eventually divorce under different property rules. Further, *mahr* agreements are so culturally entrenched in marriage itself that, where a contract does not specify a *mahr*, it is either void *ab initio* in some schools or is inferred by the courts according to other females in the bride's family, her own beauty, her age, or her virginity.¹¹⁶

Uncertainty in interpreting the actual terms of *mahr* agreements in American courts occurs when it is unclear whether couples intended their *mahr* agreement to be the only remedy upon divorce in America. Also, the terms of the dowers are vague such that courts cannot determine how to dissolve the property or which property has been selected for dissolution. These uncertainties implicate the Statute of Frauds. Contracts involving either marriage or a promise to marry, as well as contracts that are not capable of performance within a year (as presumably most marriages and ensuing prenuptials are not), must state with reasonable specificity the

116. See PEARL, *supra* note 51, at 61.

terms and conditions of the contract.¹¹⁷ Further, the substance of the agreement cannot be the product of parol evidence; otherwise, the “whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.”¹¹⁸ Both variations of uncertainty are often issues in interpreting *mahr* agreements because Islamic marriage contracts are usually standard forms provided by the government. The boilerplate, fill-in-the-blank forms lack the detail from which a court can conclusively discern their intended effect.

Failure to specify an expressed desire to have Islamic law govern divorce in *In re Marriage of Shaban* led a California appellate court to override a *mahr* agreement.¹¹⁹ The court affirmed the lower court’s refusal to allow the husband to introduce parol evidence in the form of an expert witness who was prepared to testify that the contract manifested an intent by both the husband and wife to have their property dissolution governed exclusively by Islamic law.¹²⁰ Islamic law would have given the wife her deferred *mahr* of thirty dollars and would have prevented the wife from receiving any part of her physician-husband’s estate. The court concluded that there was no valid prenuptial agreement:

It is one thing for a couple to agree to basic terms, and choose the system of law that they want to govern the construction or interpretation of their premarital agreement. . . . It is quite another to say, *without any agreement as to basic terms*, that a marriage will simply be governed by a given system of law and then hope that parol evidence will supply those basic terms.¹²¹

The second type of ambiguity that precludes enforcement of *mahr* agreements is where the actual terms of the agreement relating to property

117. See, e.g., CAL. FAM. CODE § 1615 (Deering 1994); *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001); *Burge v. Krug*, 325 P.2d 119, 123 (Cal. Ct. App. 1958); 9 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 21:4 (4th ed. 1999). The court in *In re Marriage of Shaban* further stressed the need to state with clarity the provisions of prenuptial agreements:

There is no reason the same requirement that the writing evidence with reasonable certainty the terms of the contract should not also apply to prenuptial agreements. The policy considerations behind the statute of frauds apply, if anything, with even more force to prenuptial agreements. Such agreements will often be litigated in the highly emotional aftermath of the breakup of an intimate relationship, and will involve subject matter far more personal and more likely to “strike home” than an impersonal real estate transaction. The temptation for selective memory is usually greater in domestic relations cases than it is in real estate deals.

105 Cal. Rptr. 2d 863, 868 (Ct. App. 2001).

118. *Id.* at 867–68.

119. See *id.* at 865.

120. See *id.*

121. *Id.* at 864–65 (emphasis in original).

division lack operational and definitional details. Many *mahr* agreements include tangible property like buildings, real estate, and gold coins, for example, instead of specifying an actual dollar amount.

This type of ambiguity arose in *Habibi-Fahnrich v. Fahnrich*, where the court found that the terms of a *sadaq* (another word for *mahr*), which included a ring upon marriage and half of the husband's possessions upon divorce, were "not specific enough that a person reading it would be able to grasp the gist of the agreement."¹²² The court concluded that the term relating to half of the husband's "possessions" did not describe exactly what constituted a "possession" in order for the court to split them, nor did the document detail how or at what point the assets would be measured and divided.¹²³ Additionally, the agreement suffered from the first type of imprecision above; namely, it failed to specify whether the dissolution arrangement represented the sole property division upon divorce or whether it was supposed to be in addition to division according to ordinary New York property rules.¹²⁴

Operational difficulties may occur even when the *mahr* specifies a dollar amount. Some families are eager to represent their socioeconomic status as higher than it really is, so couples create "sham dowers" by agreeing in writing to large sums for public-image purposes only to orally modify the contract to make the sum much smaller in reality.¹²⁵ Oral modifications to a written marriage contract or prenuptial are clearly prohibited under the Statute of Frauds, and by refusing to admit oral testimony as to the true amount, doubt is cast upon the legitimacy of the specified *mahr*, further preventing enforcement.¹²⁶ Unless *mahr* agreements become more detailed and specific at inception, courts cannot disregard the Statute of Frauds by allowing couples to rewrite their contracts at divorce and potentially alter their intended effect.

122. No. 46186/93, 1995 WL 507388, at *2 (N.Y. Sup. Ct. July 10, 1995).

123. *Id.* at *2-3. The court also invalidated the *sadaq* on two other grounds. First, the parties did not agree to the material terms of the *sadaq*, as indicated by conflicting testimony as to what the terms meant at trial. *Id.* Second, it was invalidated on insufficiency grounds because the *sadaq* was really just evidence of the marriage itself, not evidence of a prenuptial agreement. *Id.*

124. *See id.*

125. Werner F. Menski, *The Reform of Islamic Family Law and a Uniform Civil Code for India*, in *ISLAMIC FAMILY LAW*, *supra* note 77, at 253, 278.

126. *See id.*

2. Uncertainty in Determining the Couple's Intent by Reference to Then-Existing Legal Schools

The other uncertainty in attempting to interpret *mahr* agreements as prenuptials is that the existence of several Islamic legal schools and different cultural and class traditions significantly obscure a clear determination of the couple's original intent. Many Islamic marriage contracts state an oblique desire to have Islamic law govern,¹²⁷ and courts may again encounter parol evidence and Statute of Frauds problems when it is unclear exactly what a reference to "Islamic law" means in practice.

"Islamic law" has many different meanings. There are at least four different legal schools within Islam, and some states, like Egypt, adhere to more than one of these schools, such as the *Hanafi* and *Maliki*.¹²⁸ Thus, as the *In re Marriage of Shaban* court noted, experts would have to opine whether, based on their knowledge of Egypt thirty years ago when the couple was married, whether the couple intended to have codified Egyptian law apply, or whether they intended to have a particular legal school govern the division of the assets upon divorce.¹²⁹ Different legal schools within Islam affect adjudication of the *mahr*. For example, the *Hanafi* school holds that where the woman initiates divorce, she forfeits her *mahr*, while the *Maliki* school holds that if the husband is at fault, the wife retains the *mahr*.¹³⁰ Thus, if the husband was at fault in *Shaban*, the court would have had to speculate whether the couple meant to adhere to the *Maliki* or *Hanafi* school—which itself assumes that the couple intended to make such a determination, which they likely did not—in considering whether the *mahr* should be granted.

This guessing game is made more complicated by the fact that Muslims enjoy the right to "switch" legal schools either for the sake of convenience or where one school's legal regime is more favorable to their purposes.¹³¹ The difficulty in determining when and if a couple voluntarily chose to switch legal schools, coupled with the fact that Islamic marriages

127. See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 866 (Ct. App. 2001) (describing the marriage contract, which stated that "[t]he above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of his Prophet to whom all God's prayers and blessings be, by legal offer and acceptance from the two contracting parties," and that the parties have "taken cognizance of legal implications").

128. Bharathi Anandhi Venkatraman, Comment, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1970, 1984–85 (1995).

129. 105 Cal. Rptr. 2d at 869 n.4.

130. PEARL, *supra* note 51, at 102, 105.

131. Venkatraman, *supra* note 128, at 1971.

do not involve lawyers and many parties are not aware of this ability, suggests that there are too many variables in interpreting standard *mahr* provisions. Such ambiguity as to the original intent of the parties cannot support the existence of a prenuptial agreement, because it would potentially contravene the couple's own original purpose in the process.

3. Constitutional Constraints on Deducing the Parties' Original Intent

Another complexity that prevents enforcement of *mahr* agreements in American courts is that, in determining the couple's original intent, the court may run afoul of the Constitution. The question of whether the couple meant to waive community property and equitable distribution rules implicates the Establishment Clause¹³² because interpreting *mahr*

132. Enforcing *mahr* agreements in American courts may run afoul of the Establishment Clause of the Constitution, which is governed by the three-pronged *Lemon* test, first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612–13 (internal citations omitted). Although far too comprehensive a subject to address by way of a footnote, it is likely that enforcing *mahr* agreements may fail the *Lemon* test:

(1) *Secular Purpose*: Prenuptial agreements currently enjoy legislative and judicial support, in the belief that they promote marital stability by setting forth the expectations and responsibilities of the parties, Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059, 1069 (1988), which is certainly a secular state interest. On the other hand, contracting prenuptials is a secular concern, but to condition the enforcement of *mahr* provisions on religious status—Islamic law applies only to Muslims, and only Muslims can contract *mahr* agreements—is not a proper secular concern of the state.

(2) *Primary Secular Effect*: The primary effect of enforcing the religious law or contract must neither advance nor inhibit the practice of religion. *Lemon*, 403 U.S. at 612. The primary effect of enforcing *mahr* agreements is to advance Islamic family law by requiring compliance with its principles in order to qualify for the civil benefit of opting out of state property dissolution schemes. Cf. Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 GEO. L.J. 193, 206 (1984). By recognizing the *mahr* as a prenuptial, the court effectively forces the woman to adhere to Islamic law by accepting only the proffered dower. Thus, forcing women to abide by a religious principle that they had no choice but accept has a largely religious effect, not a secular one.

(3) *Excessive Government Entanglement With Religion*: A potential entanglement problem may occur because the court has to decide religious questions; the application of Islamic law is fraught with a number of difficulties and interpretations. See Poulter, *supra* note 77, at 147–58. Apart from the division between Sunni and Shi'i Muslims, within each sect there exists at least four additional sects of legal schools, all of which have different legal rules regarding marriage and divorce. *Id.* at 158. If an American court were to attempt to interpret a *mahr* provision, the outcome of the case would vary wildly based on the nationality, domicile, and country of origin of the parties, not to mention differing expert opinions. See, e.g., *Akileh v. Elchahal*, 666 So. 2d 246, 247–49 (Fla. Dist. Ct. App. 1996) (enmeshed in a battle of experts to determine whether the wife forfeited her *mahr* because she initiated the divorce under Islamic religious law); Poulter, *supra* note 77, at 158.

For more information on the Establishment Clause and religious prenuptial agreements, see generally Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359 (1999); Kahan, *supra*, at 193; Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional*

agreements necessarily entails an analysis of Islamic religious doctrine.¹³³ Courts have increasingly dealt with the constitutional barrier to religion in regard to prenuptials by adhering to a “neutral principles” approach, whereby the courts attempt to avoid religious doctrine when interpreting the secular terms of a contract.

The neutral principles approach to enforcing religious marriage contracts began in the context of a Jewish marriage contract, or *ketubah*, in *Avitzur v. Avitzur*.¹³⁴ In interpreting the religious marriage contract, the court concluded that the husband must abide by his contractual promise to grant a *get*, or Jewish divorce, to his wife.¹³⁵ *Avitzur* credited its neutral principles approach to an amalgam of cases culminating in *Jones v. Wolf*,¹³⁶ which used the neutral principles approach in the context of a property dispute between competing churches. The issue in *Jones* was the separation by a local church from its hierarchical organization and the ensuing dispute over which church—the local faction or national organization—owned the land.¹³⁷ The Supreme Court held that neutral principles of law can be applied to resolve religious issues so long as there is no issue of religious practice or doctrinal controversy.¹³⁸

Separations, 80 NW. U. L. REV. 204 (1985); Tanina Rostain, Note, *Permissible Accommodations of Religion: Reconsidering the New York Get Statute*, 96 YALE L.J. 1147 (1987); Patti A. Scott, Comment, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117 (1996); Jodi M. Solovy, Comment, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493 (1996).

133. Azizah al-Hibri addresses this issue:

Now consider the fact that the Islamic marriage contract . . . is usually a one-page document. Fill in your name and the name of your spouse, the names of two witnesses, the name of the imam, the amount of the *mahr*, and underneath in fine print it says “governed by Islamic law.” That’s it. What is a judge to do with that, given the separation of church and state? The judge can’t tell the clerk, “Go back to the Qur’an and tell me what the Qur’an says” or “what does Islamic jurisprudence say?” We have not told the judges what the parties contracted upon; we just told the judges to go back to Islamic law. You can immediately see that we have inadequate marriage contracts.

Azizah al-Hibri Address, *supra* note 42.

134. 446 N.E.2d 136, 138 (N.Y. 1983).

135. *See id.* at 138–39. *See generally* Solovy, *supra* note 132 (explaining the history of the *get* procedure and Jewish family law in general).

136. 443 U.S. 595 (1979).

137. *Id.* at 597.

138. *See id.* at 604. *Avitzur* and its progeny probably extended the *Jones v. Wolf* rationale beyond what the Supreme Court intended, however. Clearly, the state has a much stronger interest in resolving a property dispute than in intervening in a dispute about a religious marriage contract. *See id.* at 602 (“The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.”). Further, there is evidence in *Jones* that the Court meant only to endorse a neutral principles approach with respect to church property disputes, not for just any variety of religious issues coming before a civil court. *See id.* at 604 (“We therefore hold that a State is constitutionally entitled to adopt neutral

Avoiding Islamic doctrinal controversy in attempting to deduce whether the couple intended to forgo American property dissolution rules in favor of Islamic ones necessarily requires the court to become enmeshed in the principles of the religious-based *Shari'a*. Ironically, failing to inquire into the different possible religious and cultural dogmas that formed the basis of the couple's agreement may either overlook or rewrite the true intent of the parties.

The marriage contract, which contains the terms of the *mahr*, consists of a one-page document written in boilerplate language on a form provided by the Muslim state, and includes blank spaces where the couples write in their names, addresses, and *mahr* amount.¹³⁹ As the dissent in *Avitzur* emphasized, it is incorrect to assume that couples intend their marriage contracts to “manifest secular promises or have any civil or secular status or any legal significance independent of the religious ceremony.”¹⁴⁰ Further, couples may agree to a *mahr* only because the Islamic system does not provide for any other property rights for the wife upon divorce—perhaps they would not have created the agreement had they foreseen their move to America and been aware of the differing, more generous property rules. Cases that cannot be decided on secular terms alone are not proper for civil adjudication under *Jones*.¹⁴¹ Moreover, even a determination of which terms in an Islamic marriage contract are secular and which are not is impermissible because this determination by itself rests upon judicial evaluation of Islamic doctrinal issues.¹⁴²

principles of law as a means of adjudicating a *church property dispute*.”) (emphasis added). In fact, the primary reason the Court adopted the neutral principles approach in the context of property disputes was that although the parties involved were religious, the issue was secularly familiar: “The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.” *Id.* at 603. As indicated by *Avitzur*'s extensive discussion and explanation of Jewish law and custom, see *Avitzur*, 446 N.E.2d at 136–39 (discussing and explaining the duty of a husband to give a *get*, the tradition of the *ketubah*, and other “standards of the Jewish law of marriage”), what I call the “familiarity principle” endorsed in *Jones* is clearly lacking in both *Avitzur* and other cases attempting to discuss and interpret religious marriage contracts, try though courts might cast the issue as an ordinary contract dispute. See, e.g., *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (discussing Islamic family law and whether a woman forfeits the *mahr* if she initiates divorce). For more information on why the neutral principles approach may not be dispositive on religious marriage issues, see Scott, *supra* note 132, at 1159–63.

139. See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 n.1 (Ct. App. 2001).

140. 446 N.E.2d at 140–41 (Jones, J., dissenting). See also *In re Marriage of Goldman*, 554 N.E.2d 1016, 1020 (Ill. App. Ct. 1990) (husband testifying that he did not know the legal significance of the *ketubah* he signed, thinking instead that it was merely “poetry or art rather than a contract”).

141. See Elizabeth R. Lieberman, Note, *Avitzur v. Avitzur: The Constitutional Implications of Judicially Enforcing Religious Agreements*, 33 CATH. U. L. REV. 219, 241 (1983).

142. See *id.* at 241–42.

Given that many parties create *mahr* agreements out of religious piety and respect for cultural and familial traditions, many parties may not foresee any use for the *mahr* (especially where the amount is symbolic) other than a religious one. In the context of a *ketubah*, a commentator vividly describes many parties' nonlegal approach to religious marriage contracts:

[T]he religious ceremony and the signing of a *ketubah* are part of a ritual that is adopted because of a feeling for tradition and respect for family expectations. The *ketubah* usually is signed in the rabbi's study just minutes prior to the ceremony, often in the presence of family members and photographers. The moment is obviously a highly emotional one. . . . [However], it is unlikely that their signatures manifest knowing assent to specific obligations enumerated in that document.¹⁴³

Islamic marriage contracts are often created in similar circumstances. Rarely, if ever, do the parties contemplate how their document will affect property dissolution in a potential divorce in an American court—a place far both spatially and temporally from their wedding in the Middle East. That civil courts might enforce *mahr* agreements where the couple is not aware of the legal significance of the act, or where they meant only to soften harsh Islamic property divorce rules, combined with the fact that courts are purposely ignorant of the religious and cultural atmosphere during the contract's inception, makes application of neutral principles of law problematic.

Moreover, civil courts cannot apply neutral principles of law in deducing the couple's intent in a document that is inherently religious. The obligation by the husband to pay the *mahr* is a religious duty, addressed in the *Shari'a* and required by the Qur'an.¹⁴⁴ As the dissent argued in *Avitzur*, enforcement of a religious marriage contract necessarily requires reference to substantive religious and ecclesiastical law,¹⁴⁵ especially where there is a dispute as to which of the numerous legal or religious schools apply. Further, any conclusion by civil courts that Muslim couples intend for the *mahr* to be their exclusive remedy upon divorce necessarily entails an examination of Islamic law and tradition. For example, in *Akileh v. Elchahal*, the court applied "neutral principles" only to become mired in a

143. Kahan, *supra* note 132, at 216–17.

144. ALI ENGINEER, *supra* note 19, at 111–13.

145. 446 N.E.2d at 141–42 (Jones, J., dissenting). The dissent also noted that the wife's attempt to enforce the Jewish marriage contract depended on an expert opinion with respect to Jewish law and tradition. *See id.* at 141. Likewise, resolving *mahr* disputes also depends on the law as presented by different Islamic family law experts. *See, e.g., Akileh v. Elchahal*, 666 So. 2d 246, 247–48 (Fla. Dist. Ct. App. 1996).

debate about whether Islamic law forces women to forfeit their *mahr* when they initiate divorce.¹⁴⁶ As this case illustrates, an attempt to neutrally interpret *mahr* agreements, which are by definition and design religious, is practically unfeasible.

IV. INTERPRETING *MAHR* AGREEMENTS AS PRENUPTIALS OVERLOOKS MUSLIM BRIDES' LACK OF FREEDOM TO CONTRACT

Treating a *mahr* provision as a valid prenuptial agreement that is "freely negotiated [when] the marriage took place"¹⁴⁷ overlooks a central, sad fact of life for many women in Muslim countries: They 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.¹⁴⁸ 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.¹⁴⁹ 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.

A. THE ROLE OF THE BRIDE'S *WALI* AND OTHER CULTURAL FORCES IN COERCING HER ASSENT TO THE MARRIAGE CONTRACT

Although every marriage and family custom varies, many marriages in Islamic countries are contracted out of physical, economic, emotional, and cultural duress or undue influence.¹⁵⁰ The *wali* often exerts extreme pressure on the bride to accept the chosen terms. Enjoying unilateral,

146. 666 So. 2d at 247–48. See also *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985) (applying neutral principles to what the court deemed were the *mahr*'s secular terms without determining whether the parties intended to displace equitable division principles in favor of Islamic law).

147. *Chaudry v. Chaudry*, 388 A.2d 1000, 1006 (N.J. Super. Ct. App. Div. 1978).

148. See Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 128–29, 131–33, 141 (1993).

149. *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 540 (Ct. App. 1966).

150. "Undue influence involves the combination of overpersuasion by one party and vulnerability on the part of the other." Bix, *supra* note 88, at 186. "[T]he apparent will of the servient person [is] in fact the will of the dominant person." *Odorizzi*, 54 Cal. Rptr. at 540.

The legal definition of duress is defined as a demand by one party that is wrongful or unlawful, where the other party has no means of immediate relief from the duress other than compliance with the demand. See *Liebelt v. Liebelt*, 801 P.2d 52, 55 (Idaho Ct. App. 1990) (finding that the threat by the groom not to marry the bride unless she signed a prenuptial agreement was not duress because the threat of a refusal to marry is not wrongful in the eyes of the law).

virtually unchecked power in contracting his charge's marriage in most Muslim countries, the *wali* may even legally prevent a marriage that he does not believe is an equal match, annul the marriage if the husband is deemed "ineligible," and, in some legal schools, force the woman to marry someone she vehemently refuses.¹⁵¹ Were the *wali* to contract a low *mahr*, the bride has little legal recourse unless she is brave enough to sue her *wali*, which is unlikely considering he is usually her father.¹⁵² In many Islamic communities, the *wali*'s influence over his charge is so great that women who are divorced do not even attend court to oversee the dissolution; instead, they have their *wali* litigate the divorce because "[a] woman is given in marriage by her male guardian . . . and similarly she is helped out of marriage by her guardian."¹⁵³

The *wali*'s influence continues to be greatest in the initial, contracting stage of the marriage. Although many schools allow for the bride to add additional stipulations to the contract in order to soften the harsh laws of the *Shari'a* toward women, this rarely, if ever, occurs because the *wali* is also under pressure: Failure to marry his daughter adds yet another woman to his household whom he must support, and whose honor he must defend if necessary (read: additional trouble).¹⁵⁴ Further complicating the failure of the *wali* to demand additional rights for his charge is the fact that stipulations to the contract are often seen as insulting to the groom because they suggest that he will be an abusive, inadequate husband.¹⁵⁵ The *wali* must try to avoid offending the dignity and honor of the groom, lest he drive the groom away and be left without a provider for his daughter.¹⁵⁶ The bride, for her part, avoids demanding additional rights because "there are always other women who are willing to contract a marriage without these conditions."¹⁵⁷ The social pressure that both the *wali* exerts and is under, coupled with the often very young, impressionable age of the bride,

151. Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 15-18 (1997).

152. See *id.* at 17. Litigation against the bride's father is "not realistic in Muslim countries, even in extreme cases," because such litigation would cause negative social consequences for the bride, especially since the *wali* is probably her sole financial support. *Id.* One scholar urges Islamic legislatures to create more realistic ways to punish abuses by the *wali* besides suit. See *id.* For more on why the *wali* requirement continues to persist today, see *id.*

153. Mai Yamani, *Some Observations on Women in Saudi Arabia*, in FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES, *supra* note 12, at 263, 274.

154. See EL SAADAWI, *supra* note 12, at 198 (explaining that a bride-daughter who is returned to "her family's house . . . will be another unwanted or rather doubly unwanted female, since she will have become a permanent burden").

155. DAHL, *supra* note 21, at 70.

156. See *id.*

157. Haeri, *supra* note 85, at 67.

results in the frequent abrogation of her will in favor of the *wali*'s.¹⁵⁸ The end result is a compliant, quiet bride who "consents" to the terms of the *mahr* probably more from fear of her *wali* and resulting negative social consequences than from voluntary approval.¹⁵⁹

In more conservative communities, especially the more rural ones, the bride actually harbors a physical fear of both her *wali* and her brothers, who also seek a profitable marriage for their sibling and often covet the *mahr* for themselves.¹⁶⁰ Fear of physical abuse at the hands of her family rises to the level of legal duress, which is frequently defined as "consent to a transaction through fear."¹⁶¹ Although perhaps at the risk of overgeneralizing, many women who marry in Islamic countries do so out of fear of the harmful physical consequences they might suffer were they to refuse or protest, ranging from familial fratricide—so-called dowry deaths, where the bride's in-laws kill her for protesting or failing to provide money to her new family¹⁶²—to physical ostracism from her nuclear family and community. In a culture where women are viewed as "repositories of family honor," they must be extremely careful not to offend or disgrace their family in order to preserve their existence.¹⁶³

Another source of pressure or duress on the bride is intense cultural and religious pressure. The bride and the groom are in a unique situation when contracting the *mahr*: Both are engaged in a discourse about the possible demise of the marriage. Given that Islam frowns upon divorce as "abhorrent to God,"¹⁶⁴ and views marriage as the fulfillment of human nature, both parties are likely not animated by rational bargaining power.¹⁶⁵ As one commentator puts it, "[t]he unique emotional atmosphere

158. In 1991, approximately 33% percent of women in Qatar were married between the ages of fifteen and nineteen, while 17.3% of women in Bahrain were ages fifteen and younger. Munira Fakhro, *Gulf Women and Islamic Law*, in FEMINSIM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES, *supra* note 12, at 251, 258.

159. Although an adult woman can marry without the consent of her guardian under the law, very few women do so because most women either are not adults when married or are engaged before they are of age. See Siddiqui, *supra* note 85, at 52–53. Those who are old enough to object rarely do so for the same reasons mentioned above.

160. See Webber, *supra* note 67, at 1073–74.

161. See, e.g., *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 538 (Ct. App. 1966).

162. Although this largely happens in the Indian Muslim and Hindu communities, it is nevertheless a fear of Muslim brides in other countries and regions. See generally Laurel Remers Pardee, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?*, 13 ARIZ. J. INT'L & COMP. L. 491 (1996).

163. Wing, *supra* note 13, at 154.

164. Mai Yamani, *Introduction*, in FEMINSIM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES, *supra* note 12, at 1, 17.

165. See Atwood, *supra* note 148, at 134–35.

surrounding the execution of premarital agreements may lead a person to sign without careful deliberation, since hesitancy may reveal a lack of commitment to the relationship, lack of confidence in the relationship, or a suspicion of the bona fides of the other party.”¹⁶⁶ Certainly a young bride, at the mercy of her father or grandfather, does not have the luxury of appearing to distrust the groom chosen for her. Similarly, the seriousness with which Islam views marriage also prevents the bride from appearing to lack a dedication to the institution of marriage itself, especially since marriage is her primary mode of protection and survival. The patriarchal belief that marriage is the only appropriate course for women still flourishes in Muslim countries: Numerous women who have committed the “crime” of living alone instead of marrying have been murdered and their homes set afire.¹⁶⁷

The straits that Muslim women are often in when agreeing to marriage contracts are frequently overlooked by courts in depriving women of their rightful property upon divorce. Interestingly, however, American-grown prenuptial duress is of a relatively less virulent strain than that described above. One example includes the groom’s conditioning marriage on the signing of the prenuptial when the bride was pregnant, had a strong moral objection to abortion, and lived in a small southern town in Alabama where legitimacy of the child was extremely important.¹⁶⁸ Another American case finding duress concerned the husband’s threats to take the house and children from the wife unless she agreed to transfer her interest in the house and stock, although she was extremely inexperienced in business, did not know the value of the stock or the house, and was unemployed.¹⁶⁹ The physical fears of death, isolation, or insolvency that face a Muslim woman were she to object to a proposed marriage contract put even these disturbing American duress cases into perspective.

One court displayed a unique and refreshing awareness of the lack of freedom that women in many Muslim countries have in contracting their marriages. In *Chaudry v. Chaudry*, a New Jersey trial court commented on the involuntariness of *mahr* provisions as compared to state-sanctioned prenuptial agreements:

While the State does recognize [prenuptial] agreements, it is essentially because there is a freedom of choice between the parties, and if they with full knowledge of their rights and with proper guidance and counseling

166. *Id.*

167. Karmi, *supra* note 12, at 71.

168. *See Ex parte Williams*, 617 So. 2d 1032, 1035 (Ala. 1992).

169. *See Link v. Link*, 179 S.E.2d 697, 703 (N.C. 1971).

come to a certain determination to waive or give up rights this certainly may be enforced in the proper case in this State; but, where as here there was no choice given to the plaintiff under the law of Pakistan and the Islamic law, which I do not criticize . . . she had no choice. She had to waive, give up or not claim support or alimony in the event of a divorce, and it cannot be said that with that choice she chose to do it, because there was no choice involved. To that extent it is so clearly contrary to the public policy of this State that I decline to enforce it¹⁷⁰

Unfortunately, the appellate court reversed, stating both that the *mahr* provision was a prenuptial and that it was “freely negotiated [when] the marriage took place.”¹⁷¹

1. Cultural and Gendered Pressures on Muslim Women Preclude Enforcement of *Mahr* Agreements Under the Uniform Premarital Agreement Act

Even where courts insist on interpreting *mahr* agreements as prenuptials, or alternatively, where a couple actually intends for the *mahr* to be a prenuptial agreement, the Uniform Premarital Agreement Act (“UPAA”) proscribes enforcement of any marital agreement entered into involuntarily.¹⁷² Adopted by approximately half of the states,¹⁷³ the UPAA refuses enforcement of agreements contracted out of duress.¹⁷⁴

170. 388 A.2d 1000, 1003 (N.J. Super. Ct. App. Div. 1978) (quoting the trial judge in the reversing appellate opinion).

171. *Id.* at 1006.

172. *See, e.g.*, CAL. FAM. CODE § 1615 (Deering 1994).

173. Bix, *supra* note 88, at 154. For more information on the UPAA, see generally Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037 (1993).

174. Note that challengers to a prenuptial may show either a lack of voluntariness, or that the contract was unconscionable at the time it was entered and that the party did not have actual or constructive “fair and reasonable” knowledge of the assets and obligations of the other party. *See, e.g.*, CAL. FAM. CODE § 1615(a) (Deering 1994). *See also* Wasser, *supra* note 87, at 28. Significantly, very few prenuptial agreements have been nullified on the grounds that the agreement was unconscionable, largely because of unconscionability’s demanding and exacting standards. *See id.*

In fact, some commentators believe that the UPAA created a stricter standard for nonenforcement of prenuptials because ordinary contract law simply requires a showing of unconscionability, not unconscionability *plus* disclosure of the party’s assets. *See* Suzanne D. Albert, *The Perils of Premarital Provisions*, 48 R.I. B.J. 5, 35–36 (2000); Atwood, *supra* note 148, at 128–29; Bix, *supra* note 88, at 155–56; Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 254–63 (1994) (arguing that the UPAA has increased financial disparity between the sexes). Because unconscionability is determined as of the time the agreement was entered into, not as of the time of dissolution, CAL. FAM. CODE § 1615(a)(2), it is unlikely that a Muslim wife can invalidate a *mahr* on these grounds because the contract only becomes unconscionable when a woman moves to the United States and gets divorced.

A voluntariness inquiry under the UPAA considers elements of normal contract law like duress and undue influence, but also considers other, broader factors because of the parties' confidential relationship.¹⁷⁵ Therefore, even if a court does not invalidate a *mahr* based on duress or undue influence by the *wali* or some other cultural force, the court may nevertheless invalidate it under the broader definition of involuntariness found in the UPAA.¹⁷⁶ In determining whether the challenging party voluntarily agreed to a prenuptial, courts regularly consider several factors, the most important of which include: (1) the ages, education, and sophistication of the parties; (2) whether the party seeking to set aside the agreement fully understood the legal significance of its terms when it was executed; (3) the challenging party's opportunity to be represented by independent counsel; and (4) the overall fairness of the terms of the agreement.¹⁷⁷ As the discussion above indicates,¹⁷⁸ Muslim women typically marry at a young age, often lack formal education,¹⁷⁹ and are often ignorant as to the potential legal consequences of their actions. Furthermore, their right to independent counsel is often severely constrained by their culture. Accordingly, *mahr* agreements, even where interpreted as prenuptials, fail under the UPAA.¹⁸⁰

2. Coercing Muslim Women to Assent to Dower Terms Is Unlawful Under a "Pure" Reading of the Qur'an

Any argument that suggests that Muslim women do not enjoy freedom to contract because of cultural pressure must also confront the reality that such an argument smacks of Western ethnocentrism and cultural bias. Therefore, it is important to emphasize that the duress women face is culturally and customarily inspired, not religious-based. It is generally

175. Brod, *supra* note 174, at 257.

176. *See id.*

177. *See* CAL. FAM. CODE § 1615; Wasser, *supra* note 87, at 28.

178. *See supra* notes 150–171 and accompanying text.

179. The female adult literacy rates in Muslim countries ranges from 12% in Afghanistan to 22.3% in Pakistan, to as high as 55% in Iran. MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 100 (1999). Preventing women from receiving education is often justified on religious grounds: For example, preventing them from learning the written word protects their religious purity and honor. *Id.* at 100–01.

180. There is another ground on which to invalidate the *mahr* agreement under the UPAA. Any agreement that causes one party to the marriage to be "eligible for support under a program of public assistance" at the time of divorce because of a prenuptial agreement may receive court-ordered additional support from their spouse. Atwood, *supra* note 148, at 144. Although empirical evidence is wanting, it is not hard to imagine that a divorced woman with no assets of her own, in a country far from her family, who has no education or skills but who has a brood of children, might be relegated to public assistance were the *mahr* to be enforced against her.

accepted among legal scholars that portions of the *Shari'a* differ from the Qur'an on the issue of consent; most agree that a "pure" reading of the Qur'an indicates that duress-based consent in marriage is wholly against its basic principles.¹⁸¹ They argue that the Prophet himself established the unfettered right of women to protest the terms of a marriage contract and that the advent of the marriage contract and dower in Islam was designed to raise the status of women from an object-for-sale to a party to the marriage agreement itself.¹⁸² This has been misapplied over time to the point where most state versions of the *Shari'a* do not require the *wali* to inform the bride that her silence constitutes consent to both the marriage and the *mahr*.¹⁸³ Thus, although technically legal under the *Shari'a*, duress is generally viewed as unlawful under an ungendered reading of the Qur'an, despite cultural norms to the contrary.

B. WOMEN'S LACK OF FREEDOM TO CONTRACT PRECLUDES APPLICATION OF ISLAMIC LAW IN AMERICAN DIVORCE PROCEEDINGS ON PUBLIC POLICY GROUNDS

Most Islamic marriage contracts express at least an oblique desire to have Islamic law govern the contract.¹⁸⁴ Such a desire creates a quagmire for the courts: Should a court apply Islamic law—a body of law that they are unfamiliar with and that is composed of foreign religious doctrine that may offend public policy—or should the court contravene the contract and apply domestic law, possibly altering the terms of the contract in the process? Determining whether Muslim women's lack of freedom to contract bars application of Islamic law in American courts necessarily involves a choice-of-law discussion.¹⁸⁵

181. See, e.g., ALI ENGINEER, *supra* note 19, at 98–100, 107; ESPOSITO, *supra* note 15, at 106–08; TUCKER, *supra* note 16, at 46–70. "It would be interesting to understand how Islamic jurisprudence developed in order to understand certain practices which are not mentioned in the *Qur'an* but are an integral part of Islamic *shari'ah* today." ALI ENGINEER, *supra* note 19, at 107.

182. ESPOSITO, *supra* note 15, at 107.

183. al-Hibri, *supra* note 151, at 15.

184. See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 866 (Ct. App. 2001). The court employed three different translators to determine whether the Arabic phrase that formed the basis of the husband's appeal truly expressed a desire for Islamic law to govern. See *id.* The court accepted the version most beneficial to the husband, which read, "The above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of his Prophet to whom all God's prayers and blessings be, by legal offer and acceptance from the two contracting parties." *Id.* at 866. The other basis of the husband's appeal was the following phrase in the contract: "two parties [having] taken cognizance of legal implications." *Id.* (word added in original).

185. Because choice-of-law approaches vary by state, for information on which jurisdiction applies what approach, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1 (2001).

In determining whether a forum will apply the laws of a foreign nation, courts regularly consider several factors, including the needs of the international system, the relevant policies of the forums, the uniformity of the result, the ease and determination of the law being applied, and which forum has the “most significant relationship” to the event at issue.¹⁸⁶ Importantly, absent a treaty, American courts are under absolutely no obligation to legitimate or enforce foreign law.¹⁸⁷ When American courts choose to recognize or apply foreign law, they do so as a matter of custom—a party in court cannot demand the application of foreign law,¹⁸⁸ although in order to avoid violating the parties’ due process rights, the state must have a sufficient nexus to the subject matter of the litigation.¹⁸⁹

While most courts routinely apply the laws of other countries, an important exception exists to the application or recognition of foreign law: public policy. If the forum finds that the foreign law is either repugnant to its own policies or prejudicial to its interests or citizens, the court need not apply the law.¹⁹⁰ This principle is reflected in an oft-quoted definition stating that foreign law need not be applied when it “violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”¹⁹¹ Public policy is a useful vehicle to invalidate prenuptial agreements because it is a flexible, catch-all objection that is frequently used to invalidate provisions under various rationales,¹⁹² including a desire to preserve the integrity of marriage¹⁹³ and a refusal to recognize agreements contracted out of duress or undue influence. Use of the exception in the context of marriage and divorce has particular pertinence because the state has a strong interest in

186. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 6, 145 (1971). See also Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora’s Box?*, 18 ARIZ. J. INT’L & COMP. L. 867, 889–91 (2001) (also setting out choice of law principles). This is, of course, only one method courts apply in determining choice of law, but it continues to be the dominant one among most states.

187. David F. Forte, *Islamic Law in American Courts*, 7 SUFFOLK TRANSNAT’L L.J. 1, 2 (1983).

188. *Id.* at 2–3.

189. L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”*: *How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 38 (1998).

190. Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447, 1450 (1986).

191. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918). The standard of what, exactly, offends public policy is unclear, however. See Sprague, *supra* note 190, at 1452.

192. See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 81 (1998).

193. *Id.*

protecting the institution itself and in regulating dissolution of marital property.¹⁹⁴

In some circumstances, public policy can restrict the application of Islamic law in American divorce proceedings. It is a common law principle that agreements contracted out of duress or undue influence are voidable. Given the possibility of duress and other forms of cultural and physical pressure in the offer and acceptance process of many Islamic marriage contracts, most courts should refuse to apply Islamic law and should instead apply community property or equitable division rules. Enforcing a contract against a party that had little to no freedom to object to its terms is contrary to our egalitarian system of offer, acceptance, consideration, and equal bargaining power.

Moreover, in most cases, overriding the wife's rights under community property or equitable division regimes by applying Islamic law unnecessarily leaves the wife destitute. This result is far too harsh. Indeed, any marriage contract that creates a substantial possibility that the wife becomes a ward of the state may "cast[] enough negative spillovers on society for the law to refuse enforcement."¹⁹⁵ Even if the wife does not become a ward of the state per se, the fact that Islamic divorce law operates in a way that unduly prejudices the wife while overwhelmingly favoring the husband runs counter to the state's interest of ensuring a just dissolution of marital property. The Texas Court of Appeals in *Seth v. Seth*, for example, concluded that recognizing an Islamic *talaq* divorce would be so harsh to the woman that the public policy of preventing *ex parte* divorces outweighed the other choice-of-law concerns, such as the needs of the international system.¹⁹⁶ Similarly, the *Shari'a*—whereby the wife is not permitted to work without permission, but then is not allowed to claim ownership in anything that she does not herself earn—is so repugnant to public policy that it outweighs any other choice-of-law concern.¹⁹⁷

Lastly, parties attempting to enforce *mahr* agreements in American courts almost always bear a significant enough relationship to the state to justify application of domestic, rather than Islamic, law. In order to avoid

194. Hogue, *supra* note 189, at 29–30.

195. Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 487 (1998).

196. See 694 S.W.2d 459, 463–64 (Tex. Ct. App. 1985).

197. Iranian Ayatollah Mutahari, who created the policy on women in the workplace after the Iranian Revolution, wrote: "[T]he specific task of women in this society is to marry and bear children. They will be discouraged from entering legislative, judicial, or whatever careers may require decision making, as women lack the intellectual ability and discerning judgment required for these careers." NUSSBAUM, *supra* note 179, at 94.

violating the parties' due process rights, the parties must have a sufficient nexus to the state. A review of the cases dealing with Islamic marriage contracts illustrates that most parties marry in an Islamic country and immigrate to the United States, where they avail themselves of the benefits of the state in which they divorce. In *In re Marriage of Shaban*, although the husband and wife were married in Egypt, the husband operated a medical practice in California for more than seventeen years before divorcing,¹⁹⁸ and in *Chaudry v. Chaudry*, the husband lived and worked in New Jersey for more than nine years before filing for divorce.¹⁹⁹ Thus, not only are the parties' due process rights satisfied, their residence in the United States gives them adequate notice that they may be subject to its laws. Further, because the state has such a historically strong interest in marriage and divorce, especially where one spouse may be left destitute or where children are involved, there is no doubt that the state has just as much, if not more, of a significant relationship to the dissolution of property than the parties' native country.

C. WHAT ABOUT AMERICAN MUSLIMS?: SHOULD MAHR AGREEMENTS CONTRACTED IN THE UNITED STATES BE ENFORCED?

This Note establishes that *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. However, what about *mahr* agreements that are contracted in the United States by American Muslims? Do the same arguments about duress, lack of freedom to contract, cultural and gender pressure, and unclear intent still apply?

A couple of cases deal with American or immigrant Muslims who contracted *mahr* agreements in the United States. In *Akileh v. Elchahal*, two Middle Eastern immigrants married in Florida, agreeing to a deferred *mahr* in the amount of \$50,000.²⁰⁰ When they were divorced, the Court of Appeals overturned the lower court, holding that the *mahr* agreement was enforceable.²⁰¹ There was no discussion of the effect the *mahr* agreement had on the wife's rights under community property, but because the wife was trying to enforce the agreement, it could be inferred that she would have received more money by enforcing the *mahr* than by exercising her

198. 105 Cal. Rptr. 2d 863, 865, 867 (Ct. App. 2001).

199. 388 A.2d 1000, 1002 (N.J. Super. Ct. App. Div. 1978).

200. 666 So. 2d 246, 247-48 (Fla. Dist. Ct. App. 1996).

201. *See id.*

rights under traditional community property rules.²⁰² A different result was reached in *Habibi-Fahnrich v. Fahnrich*, where the couple's New York *mahr* agreement was struck down for vagueness and failure to adhere to the Statute of Frauds.²⁰³ Again, the wife was the party seeking to enforce the *mahr*, largely because there were no marital assets involved in the marriage and, thus, there was no issue of equitable distribution.²⁰⁴

As these cases illustrate, women are often the parties seeking to enforce American *mahr* agreements. Does their eagerness to collect the *mahr*, as well as a potential absence of duress and cultural pressure, mean that they necessarily should be enforced? The answer to this question is that they occasionally should be enforced on a case-by-case basis. Although some Muslim women in America are presumably under the same cultural pressures that they often are under in Muslim countries, and while some *mahr* agreements are still bargained for and signed by the American bride's *wali*, the right of Muslims and all religious peoples to make contracts in adherence to their religion should be preserved.²⁰⁵

One caveat must be emphasized: Enforcement of American-made *mahr* agreements can only be enforced on an ad hoc basis, depending on the relative bargaining power of the bride, the role of the *wali*, the specificity of the agreement, an indication of which of the many Islamic legal schools apply, and a clear manifestation of an intent to forgo or add upon traditional property dissolution rules.²⁰⁶ As *Habibi-Fahnrich* illustrates, marrying couples who fail to protect their *mahr* agreements by neglecting to spell out the material terms of the *mahr* or to adhere to the

202. See *id.* at 247.

203. No. 46186/93, 1995 WL 507388, at *1–*3 (N.Y. Sup. Ct. July 10, 1995).

204. *Id.* The amount of the *mahr* was a “ring advanced and half of husband’s possessions postponed.” *Id.* at *1.

205. For more information on this view, see generally Weisbrod, *supra* note 62. For more on this view in the context of recognizing foreign divorces, see generally Alan Reed, *Transnational Non-Judicial Divorces: A Comparative Analysis of Recognition Under English and U.S. Jurisprudence*, 18 LOY. L.A. INT’L & COMP. L. REV. 311 (1996).

206. In fact, Islamic legal scholar Azizah al-Hibri is writing a book on how to create an American-made *mahr* agreement that will be enforceable by civil courts. See AZIZAH AL-HIBRI, *THE ISLAMIC MARRIAGE CONTRACT IN AMERICAN COURTS* (forthcoming 2003).

She recently has stated that:

One thing we can do for the judge when we execute a Muslim marriage contract is to define the terms, define all the rules, make it clear which *madhhabwe* [legal school] are following, which point of view this couple is committed to. . . . What are the definitions of the various concepts in the Islamic marriage contract? What are the rules of the various *madhhabs*? And how do they work in the case of divorce?

Azizah al-Hibri Address, *supra* note 42. Note, however, that even American-made *mahr* agreements still must avoid being struck down under the profiteering by divorce theory discussed *supra* in Part III.A.1.

Statute of Frauds cannot be helped by civil courts; it is the parties' duty to spell out their intent clearly in order to avoid constitutional and Statute of Frauds problems.²⁰⁷ Further, where courts decide to enforce *mahr* agreements, judges should take account of the lump sum payment of the *mahr* in their overall assessment in dissolving the marital estate and should credit the *mahr* payment to the total amount owed the wife.²⁰⁸

Even where a *mahr* agreement clearly states its intent, it is imperative for the court to inquire into the circumstances of the bride's assent to the agreement. *Akileh v. Elchahal* suggests that enforcing the *mahr* agreement without inquiry into the bride's freedom to contract may have been in error.²⁰⁹ There is an indication in the case that the bride, whom the court notes "had never socialized with a man outside the presence of her family," may not have had unfettered freedom to reject the proffered groom or the terms of the agreement.²¹⁰ The opinion describes in some detail the groom's presenting himself to the father to discuss the marriage long before the bride ever met him.²¹¹ Also, the opinion notes that the father negotiated the terms and amount of the *mahr*, without any participation on the part of the bride.²¹² These facts should have served as a red flag to the court of the possibility of an arranged marriage against the bride's will and also that the bride may not have consented to the terms of the *mahr* or been apprised that her assent waived her rights under ordinary property dissolution rules. Therefore, courts that attempt to enforce American-made *mahr* agreements must be especially sensitive to cultural nuances that may affect the validity of the documents.

V. IS A REFUSAL TO ENFORCE MAHR PROVISIONS IN AMERICAN COURTS NECESSARILY A CONDEMNATION OF ISLAM?

The Western world is infamous for perpetuating distortions and inaccuracies about Islam, especially with regard to women. This problem has increased in recent years to the point that one Muslim feminist claims that the "Western obsession" with Muslim women's so-called plight has

207. See, e.g., *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985) (upholding an American-made *mahr* agreement based on its secular terms because, inter alia, it met the specificity guidelines under the Statute of Frauds).

208. English courts enforcing *mahr* provisions have taken *mahr* payments into account in divvying up marital property. See Poulter, *supra* note 77, at 156.

209. See 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996).

210. *Id.* at 247.

211. See *id.*

212. See *id.*

made religious and social equality that much more unattainable in the Muslim world.²¹³ The Western media, although a significant force in the dissemination of such inaccuracies, is not the only culprit, as law journals, foreign affairs newsletters, and politicians get involved in the act as well.²¹⁴ Therefore, any Western discussion of women in Islamic family law necessarily begs the question of whether this Note, which urges the cancellation of *mahr* agreements in American courts, condemns Islam as a religion, people, or body of law. Instead of falling lockstep into the cadence of Islamic inaccuracies and Western condescension, and instead of portraying Muslim women as perennial victims, this Note makes the case that Islam has the potential to be the tolerant, liberating religion its Prophet once envisioned—a religion that was intended to “[give] women a new status . . . to create a *new woman* as much as a new man.”²¹⁵

A. PATRIARCHAL INTERPRETATION OBSCURES THE EGALITARIAN PRINCIPLES OF ISLAM

Those who are resistant to change in the Muslim world argue that “neo-colonialist Western women” seek to impose their ideas about feminism and equality— notions supposedly alien to Islam—on the Middle East.²¹⁶ To the contrary, most feminist Islamic scholars believe that equality of the sexes is not inconsistent with Islam or an “import from Western capitals”²¹⁷—but that of all the world religions, Islam was the first to envision a truly egalitarian society.²¹⁸ As Part II indicates, the Prophet initiated feminist reforms that significantly ameliorated the lot of women in the Middle East, predating any female revisions in other world religions, including those in the West. One example of this is the verse in the Qur’an that states that both men and women were made out of “a single Person”

213. See Mai Yamani, *supra* note 164, at 7 (discussing the views of Raja’ El-Nimr).

214. See Sayeh & Morse, *supra* note 17, at 312.

215. ALI ENGINEER, *supra* note 19, at 108.

216. Mayer, *supra* note 14, at 300 (quoting Islamic legal professor and scholar, Azizah al-Hibri). See also FATIMA MERNISSI, WOMEN’S REBELLION AND ISLAMIC MEMORY 13 (1996) (“Feminism is not home-grown in Arab lands, it is an import from Western capitals.” This often-heard statement is shared by two groups of people one would never think of as having anything in common: Conservative Religious Arab Male Leaders, and the Provincial Western Feminists. The implication of this statement is that the Arab woman is a semi-idiotic submissive subhuman who bathes happily in patriarchally organized degradation and institutionalized deprivation.”).

217. MERNISSI, *supra* note 216, at 13.

218. See, e.g., al-Hibri, *supra* note 151, at 26–27; Sayeh & Morse, *supra* note 17, at 322–24; Joelle Entelis, Note, *International Human Rights: Islam’s Friend or Foe?*, 20 FORDHAM INT’L L.J. 1251, 1254–55 (1997).

who is not gender-specific.²¹⁹ Even religious scriptures, however, cannot escape the rigid grip of patriarchy and class structures, which have distorted many of the world religions' texts, including the progressive Qur'an, over time. In fact, the *Shari'a* in some places contradicts the spirit of the Qur'an to the point that it takes a "diligent search . . . to reconstruct Islamic law in its true, liberal, humanistic, and progressive spirit."²²⁰ One scholar believes that the Qur'an itself is actually two documents, one part eternal and unchanging, the other part reflective of social conditions and patriarchal structure.²²¹ The at-times misogynistic, other times infantilizing, misinterpretations and customs continue to persist throughout the *Shari'a* to date, however, and as a result, women will be prevented from enjoying the same rights as men in marriage and divorce so long as religious norms continue to disguise harmful cultural traditions.²²²

The best example of this continuing problem is the requirement in the *Shari'a* that a woman contract her marriage only through a *wali*. Never mind the fact that the Qur'an created the *wali* only in order to prevent minors from making poor decisions—not in order to substitute women's autonomy for the will of their male guardian.²²³ This misapplication, which has been inspired by the historical and continuing practice of male guardianship of women the world over, is one of many examples where the true spirit of Islam has been lost in male-constructed laws. Even those elements of the *Shari'a* that preserve originally female-friendly laws, like one that allows an adult woman to reject an arranged marriage, are undercut by an accompanying law that preserves the right of the *wali* to invalidate the marriage by petitioning its cancellation in court.²²⁴ Another manifestation of patriarchal custom is the requirement of *kafaah*, or social equality in marriage, that is not found in the Qur'an but that is found in the *Shari'a*. This requirement supplants women's autonomy by the state in contracting marriage because women are restricted from marrying entire groups of people depending on nothing more than their social status.²²⁵ These are just some of the retreats from the liberality and freedom envisioned by Islam.²²⁶ Were the stranglehold of patriarchy and class

219. QUR'AN, *supra* note 22, at 4:1.

220. ALI ENGINEER, *supra* note 19, at 14.

221. *See* Karmi, *supra* note 12, at 83.

222. *See* EL SAADAWI, *supra* note 12, at 203.

223. Sayeh & Morse, *supra* note 17, at 326.

224. Siddiqui, *supra* note 85, at 53–54.

225. *See* ALI ENGINEER, *supra* note 19, at 109 ("Society is unable to keep pace with divine justice.").

226. Sayeh & Morse, *supra* note 17, at 326.

removed from the *Shari'a*, scholars generally agree that Islam would come closer to its original egalitarian principles.

B. IS THE ATTEMPT TO PROTECT MUSLIM WOMEN IN AMERICAN COURTS
YET ANOTHER FORM OF SUBJUGATION?

In attempting to prevent Muslim women from unwittingly losing their rights under marital property rules in the United States, we risk creating a new kind of subjugation: paternalism and infantilism. By “protecting” Muslim women, are we merely perpetuating their lack of equality by preventing them from being free to contract as they wish? Are we forcing them from their precarious pedestal as half “repositories of family honor,” half sexual temptresses, only to be infantilized and imprisoned in a Western-constructed cage of benign paternalism?

On the one hand, preventing Muslim women from contracting around property rules upon marriage sounds as if we view the situation of Muslim women as so benighted that they should simply not be permitted to choose, even though they are technically, if not actually, free.²²⁷ On the other hand, instead of portraying women as perennial victims, this Note makes the Kantian demand that women be treated as free agents—ends in themselves—and not merely “adjuncts to the plans of men.”²²⁸ Urging the law to help radically force this change is not infantilizing women, but supporting the idea that the plight of Muslim women is a struggle that our democracy values as worth fighting for.²²⁹

227. Weisbrod, *supra* note 62, at 93–94.

228. NUSSBAUM, *supra* note 179, at 20.

229. *See id.* This argument invokes the debate between universalism and cultural relativism. While a subject far too vast to explore in the concluding remarks of this Note, invalidating foreign-made *mahr* agreements for lack of freedom and intent is subject to the reader’s belief in one of the two schools. Universalism promotes the belief that all people are born with human rights regardless of religion or culture, while cultural relativists believe that human rights vary from culture to culture and that most definitions of human rights are Western-based. For more information on cultural relativism versus universalism, see generally Mayer, *supra* note 14; Elene G. Mountis, *Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context*, 15 DICK. J. INT’L L. 113 (1996); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001). Of the two schools of thought, I favor universalism, even though change from within is probably the most effective route for Muslim women: “Under the banner of their fashionable opposition to universalism march ancient religious taboos, the luxury of the pampered husband, educational deprivation, unequal health care, and premature death.” NUSSBAUM, *supra* note 179, at 36.

VI. CONCLUSION

As the second largest religion in the world,²³⁰ and as more Muslim couples immigrate to the United States, American courts will be increasingly faced with the intersection between Islamic and domestic law. Many complexities stem from these cases, including a desire by courts to give due respect to Islamic law and culture. Unfortunately, this desire can be misapplied in harmful ways. By attempting to adhere to Islamic law out of respect for legal and cultural differences, courts risk perpetuating gender and economic inequalities. This danger is vividly illustrated by the interpretation of *mahr* agreements as prenuptials. Interpreting *mahr* agreements as prenuptials prevents women from exercising their rights to the marital estate upon divorce, unfairly leaving Muslim women destitute, if not actually wards of the state. This effect is especially damning considering that Muslim women are culturally constrained from working in the community, especially when they have children.

Instead, courts should override *mahr* agreements and apply ordinary property dissolution rules to Muslim divorces. If a court is particularly determined to honor the *mahr* agreement civilly, perhaps the court might at least credit the *mahr* payment to the amount owed by the husband in dissolving the estate between the two parties. If Muslim couples take their religious Qur'anic duty to pay *mahr* agreements seriously, they should seek enforcement through their own religious institutions, not a civil court. Further, American Muslims who contract *mahr* agreements may seek enforcement—constitutional constraints allowing—but only where the court inquires into the circumstances of the agreement to ensure that the bride's consent was not forced. American Muslims also might avoid civil litigation by seeking a more religiously appropriate adjudication from an Islamic counsel or *imam*.

This Note also suggests that an unadulterated, ungendered application of Islam and the Qur'an will lead Islam to become the only major world religion that truly is a “guarantor *par excellence* of women's rights.”²³¹ Unfortunately, however, because Muslim women tend to be highly religious and do not want to act in contradiction to their faith,²³² and because religious fundamentalists continue to deride “facile adoption of western feminist notions,”²³³ reform is stagnant. The most promising

230. Esposito, *supra* note 11, at 19.

231. al-Hibri, *supra* note 151, at 2.

232. *Id.* at 3.

233. Wing, *supra* note 13, at 165–66.

vehicle of hope for Muslim women is to encourage change from within the religious institutions themselves by calling for a reinterpretation of the religious texts (*ijtihad*) that is free from the shackles of patriarchy and class.²³⁴ Until *ijtihad* forces a return to the true ideals of Islam in the crucial areas of family law, the all-too-common stereotype of Muslim women as incapable of freely providing for their own destinies in many cases remains an all-too-frequent reality. Until and unless this reality becomes nothing more than a recent memory, American courts should be prevented from conspiring to enforce cultural and economic subjugation against Muslim women within their jurisdictions.

234. See EL SAADAWI, *supra* note 12, at 196; ESPOSITO, *supra* note 15, at 105.