

Paper Presented at

AMSS 34th Annual Conference

**“Muslims and Islam in the Chaotic Modern World:
Relations of Muslims among Themselves and with Others”**

Cosponsored by
Temple University, Philadelphia, PA
September 30 – October 2, 2005

**“Whose Place to Decide?
Islamic Family Law Issues in American Courtrooms”**

By: Sylvia Whitman
(Georgetown University: M.A. in Arab Studies &
Ph.D. in Middle East history)

It is interesting to see what happens when marriage and divorce cases of Muslims end up in American courts—and there are many lessons to learn.
~ Asifa Quraishi¹

When Ahmad and Rima Nahavandi appeared before New Jersey Superior Court Judge Alexander Waugh at the end of 1998 to finalize their divorce, they were still quarreling over children and money. Although they had agreed that their two young daughters would live with Rima, Ahmad wanted joint legal custody while Rima insisted on sole legal custody. Both Muslims, they nonetheless disagreed about religious practice and the girls' upbringing, and each feared the other would abscond with the children to a country beyond the reach of American law. Rima, the defendant, was also asking the court to compel Ahmad to pay the \$20,000 *mahr* stipulated in their Islamic marriage contract.²

¹ Asifa Quraishi, "American Muslims and American Law," speech at conference on "Challenges Muslim Women Face in America," Muslim Community Center for Human Services, Dallas, Texas, April 1996
<<http://www.zawaj.com/articles/legalities.html>> (4 May 2005).

² *Nahavandi v. Nahavandi*, Superior Court of New Jersey Chancery Division—Family Part, Middlesex County, Docket No. FM-12-2237-97, copy of opinion provided by the presiding judge, Alexander Waugh.

In turning to the secular American court for help resolving their differences, the Nahavandis were grappling with what John Esposito calls “the primary question facing” the seven million Muslims in America: “whether or not they can live Muslim lives in a non-Muslim country.”³ It is not a new question; Muslims have lived as religious minorities within other states since the first century of Islam.⁴ Nor is it an unexplored question, for Islamic scholars have long debated whether Muslim minorities should return to the Islamic heartlands or stay on the frontier. At the crux of the discussion lie two Qur’anic sura: one that “commands those who are oppressed to resist by migrating to more just lands” (5:44) and another that reminds believers that “God wishes ease and not hardship for you” (2:185).⁵

In the first 500 years of Islam, according to law professor Khaled Abou El Fadl, jurists presented “a variety of unsystematic views that ranged from the rejectionist to the accommodating,” but opinion about Muslim minorities consolidated into a more consistent “pack up and go” when Christians besieged the western territories and Mongols conquered the east.⁶ Most affected by the Christian conflict around their stronghold of Andalusia, Maliki scholars advised emigration, warning that minority Muslims would lose their language and culture and eventually be forced to convert. While the Hanbali and Shi’i schools saw similar risks and always recommended emigration, they allowed exceptions for hardship. An even wider range of advice emerged from Hanafi and Shafi’i jurists, who suddenly found themselves subject to Mongol domination after the twelfth century. Although the oppressed must move, they agreed, Muslims who could “openly practice their religion” with “a degree of autonomy and independence” must stay—because their following the *shari`a* in effect transformed *bilad al-kufr* (lands of unbelievers) into *bilad al-islam*, at least on a moral

³ John Esposito, “Introduction,” in *Muslims on the Americanization Path?* ed. John Esposito and Yvonne Yazbeck Haddad (New York: Oxford University Press, 2000), 5.

⁴ Khaled Abou El Fadl, “Striking a Balance: Islamic Legal Discourse on Muslim Minorities,” in *Muslims on the Americanization Path?* ed. John Esposito and Yvonne Yazbeck Haddad (New York: Oxford University Press, 2000), 49.

⁵ *Ibid.*, 61.

⁶ *Ibid.*, 51.

level. “Muslim jurists renegotiated and reformulated the concept of dar al-Islam in light of [their] historical realities,” says Abou El Fadl.⁷

The renegotiating did not end in the thirteenth century, adds Abou El Fadl. Nor is it restricted to jurists (most of them writing in Muslim majority lands). Today a third of world’s 1.2 billion Muslims live in non-Muslim states, and their practice “is as much an articulation of Islam” as is the traditional discourse.⁸ Muslim minorities juggle sometimes competing imperatives—to uphold Islamic law but also to serve their own interests and escape suffering, to resist oppression but also to honor their promises, including the implicit one of abiding by the law of their host state.⁹ To Muslims like the Nahavandis, the legality of settlement or sojourn in the United States is somewhat of a moot issue. *Whether* they can live Muslim lives in this non-Muslim land matters, but more to the point is *how*. As Abou El Fadl makes clear, the answer always depends on historical circumstances.

THE AMERICAN CONTEXT

Over the past 125 years, Muslims have immigrated to American shores in five waves.¹⁰ The first through the third consisted largely of uneducated, unskilled Arabic speakers from rural areas of Syria, Jordan, Lebanon, and Palestine. A more diverse group followed after World War II, including many urban, educated, and Westernized elites from the Middle East, Asia, Eastern Europe, and the Soviet Union. The U.S. Immigration Act of 1965, which abolished national quotas and favored select occupations, set off the latest swell of students, professionals, and semiskilled workers “eager to enjoy the economic and political advantages of the United States.”¹¹ The Nahavandis belong to this generation. Born in Beirut in 1966, Ahmad arrived in the United States in 1985 on an Iranian

⁷ Ibid., 52.

⁸ Ibid., 49.

⁹ Ibid., 61.

¹⁰ Yvonne Yazbeck Haddad and Adair T. Lummis, *Islamic Values in the United States: A Comparative Study* (New York: Oxford University Press, 1987), 13-14.

¹¹ Haddad and Lummis, 14; Kathleen Moore, *Al-Mughtaribūn: American Law and the Transformation of Muslim Life in the United States* (Albany: State University of New York Press, 1995), 7-9.

passport with “the equivalent of a high school education” and “eventually became part owner” in a family rug business in New Jersey with his father and brother. Born in Damascus in 1964, college-educated Rima moved to New York in 1991 to open an office of a Syrian travel agency.¹²

In contrast to earlier immigrants, who “tended to be absorbed into the local communities where they settled, sometimes intermarrying and Americanizing their names,” immigrants since the mid-1960s have been holding firm to “their separate identity.”¹³ Although “a mosaic of many ethnic, racial, and national groups,” including many converts, the contemporary Muslim-American community has asserted a unified distinctiveness, generating some tension with older accommodationists.¹⁴ Why the change? Having grown up in the wake of European colonialism, immigrants born, socialized, and educated abroad tend to view the United States more critically than older generations of Arab Americans; they admire American technology, for instance, but not its foreign policy, or the Judeo-Christian chauvinism they perceive.¹⁵ The number of U.S. Muslims has also reached a “critical mass,” argues Kathleen Moore.¹⁶ Increasingly prevalent and affluent, Muslims have been institutionalizing their religion, now the third largest in the United States: they are expanding and building mosques and schools, publishing educational materials, and founding student and social welfare organizations.¹⁷ Starting fresh, immigrants can pick and choose components of their identity from both new country and the old. Since the 1980s, the Islamic revival across the Muslim world has colored the American pastiche, steering newcomers, converts, and more established immigrants toward a religious rather than ethnic identification.¹⁸ Technology has also bolstered the “Muslimness” of the American minority by facilitating ties with majority

¹² *Nahavandi v. Nahavandi*.

¹³ Moore, 11.

¹⁴ Esposito, 4; Haddad, “The Dynamics of Islamic Identity in North America,” in *Muslims on the Americanization Path?* ed. John Esposito and Yvonne Yazbeck Haddad (New York: Oxford University Press, 2000), 22.

¹⁵ Haddad, “The Dynamics of Islamic Identity in North America,” 20-24.

¹⁶ Moore, 11.

¹⁷ Esposito, 3; Haddad and Loomis, 5.

¹⁸ Moore, 11.

lands. In the age of slow boats and snail mail, *mughtaribūn*¹⁹ easily lost touch with the Middle East, Asia, and Europe. Nowadays, jets whisk them home for weddings and funerals and yearly vacations while satellite dishes and personal computers transmit news, advice, scholarship, and legal opinions from “home”—as well as from Muslims with varied perspectives around the world.

As part of this public assertion of identity, American Muslims have been bringing legal issues before U.S. courts in increasing numbers since the 1970s, especially in the area of family law.²⁰ Since Islam makes no distinction between law and religion—*shari`a* refers not to a civil/criminal code but to a spiritual path—American judges and lawyers are straining to accommodate this new constituency without crossing the church/state divide mandated by the Constitution. “Denying enforcement of a marital agreement signed by two individuals in a religious context might infringe on their free exercise rights, but interpreting and enforcing such an agreement on the basis of religious law verges dangerously on an establishment of religion.”²¹ Since other minority groups are also choosing to affirm their heritage, the courts’ encounters with *shari`a* belong to a broader challenge—how to administer justice in a multicultural society based on a mosaic rather than a melting pot.

At stake is the trust of the citizenry—or of legal residents like the Nahavandis who might be contemplating the commitment to citizenship. One of the most visible faces of government, courts by their efficiency and fairness build confidence in public institutions; they also reduce social conflict. Before American judges confront other traditions, however, they need to acknowledge the

¹⁹ Moore, ix. The word *al-mughtaribun* refers to emigrants but derives from a verb with multiple meanings: to be far from one’s homeland, to become Westernized, and to assimilate to Western life in *gharaba*, the edge of Christendom.

²⁰ Richard Freeland, “The Islamic Institution of Mahr and American Law,” *Across Borders: The Gonzaga Journal of International Law*, 2001, <<http://www.across-borders.com>> (4 May 2005), para 1.

²¹ Ann Laquer Estin, “Embracing Tradition: Pluralism in American Family Law,” 63 Md. L. Rev. 540 (2004), 542.

Christian underpinning of American family law, contends University of Iowa law professor Ann Estin.²²

American practice grew out of Roman and then English ecclesiastical law, first Catholic and then Anglican. Although the church allowed private consensual marriages (a holdover from earlier Roman law), it encouraged religious ceremonies with a priest and witnesses. It also outlawed divorce. In 1753 Lord Hardwicke's Act tightened regulations, setting minimum-age requirements, for instance, and banning bigamy.²³ Since ecclesiastical courts did not operate in the American colonies, secular authorities administered essentially religious law.²⁴

American family law shares *shari`a*'s commitment to marriage as a “bulwark against social discord and disorganization”—not surprising given their mutual roots in Roman and Judaic traditions.²⁵ At times the two systems have paralleled each other and at others diverged. In early modern Europe, religious and customary laws intertwined and then crossed the Atlantic. Under English common law—but contrary to *shari`a*—the rules of coverture often denied married women property and other rights.²⁶ As in Muslim countries, though, an American man was expected to provide for his dependents and by law and custom had authority over his wife and children.

In the early nineteenth century, American courts “increasingly declined to enforce the father's common law prerogative” in custody cases, so that by the 1840s they were balancing the husband's and wife's right of guardianship and redefining the “best interests of the child.” The resulting “tender age doctrine” resembled classical Islamic custody guidelines although with different

²² *Ibid.*, 542.

²³ Margaret C. Jasper, *Marriage and Divorce*, 2nd ed., Law for the Layperson (Dobbs Ferry, NY: Oceana Publications, Inc., 2001), 1-3.

²⁴ *Ibid.*; Estin, 543.

²⁵ Judith Tucker, *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998), 40. In *The Origins and Evolution of Islamic Law* (Cambridge University Press, 2004) Wael Hallaq describes the synergy rather than linearity of the development of Islamic and Western law. Roman heritage was in fact “heavily indebted to the indigenous Semitic cultures of the ancient Near East” (p. 27).

²⁶ Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003), 152.

parameters. Hanafi jurists, for instance, believed a mother could best care for boys to the age of seven and girls to the age of nine, with additional rights stemming from “the fullness of her affection.”²⁷ Like their Ottoman counterparts, eighteenth- and nineteenth-century Americans lived in a gendered society that hallowed women’s separate sphere at the same time that it enshrined male privilege and decision making. Since U.S. judges considered women biologically and emotionally suited to reproduce and nurture, they ruled that young children and adolescent girls should remain with their mothers, but after age eleven or twelve, boys belonged with their fathers, often to learn a trade.²⁸

American domestic relations laws evolved slowly. In sharp contrast to *shari`a*, which discourages divorce but clearly lays out the steps to effect one, the American system made ending a marriage difficult. Here again religious tenets—Catholic refusal to dissolve a holy union and sanctify a second marriage, Protestant distinction between guilty and innocent parties—influenced legal practice. Only “unsavory” acts such as adultery qualified as justification for divorce during the nineteenth century.²⁹ In the Progressive era, courts assumed a bigger role in mediating domestic disputes and paid more attention to children’s and women’s rights, slightly extending grounds for divorce.³⁰ But more than a half century passed before “no fault” divorce reform passed into law, spurred by the social revolution of the 1960s and ‘70s.³¹ As feminists campaigned against gender distinctions, in the 1980s maternal preference gave way to equal custody rights, although individual judges sometimes harbor opinions at odds with statutes on the books.³²

²⁷ Mufti Khayr al-Ramli, quoted in Tucker, 113.

²⁸ Jamil S. Zainaldin, “The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851,” *Northwestern Law Review*, 73:4 (Feb. 1979), 1052; 1070-1073.

²⁹ Jasper, 17.

³⁰ Zainaldin, 1039.

³¹ Jasper, 17.

³² Jasper, 27.

The Christian bias that long inhibited divorce also surfaced in the nineteenth-century battle over Mormon polygamy. In *Reynolds v. United States* (1878) the U.S. Supreme Court denied religious freedom arguments and outlawed this “odious” practice.³³ As historian Nancy Cott has posited, the “Christian model” of marriage “lodged deep in American political theory, as vivid as belief in popular sovereignty or in voluntary consent of the governed or in the necessity of a government of laws.”³⁴ With similar intensity, many Westerners latched onto the polygamy provisions of *shari`a* to label all of Islam backward and un-American. When mufti Muhammed Sadiq arrived in Philadelphia in 1920, for instance, U.S. immigration barred him entering the country because he represented a polygamist religion. A philologist with a degree from the University of London, Sadiq explained some of the legal nuances: he was allowed but not commanded to take multiple wives, which he had not, and would not since a Muslim must follow the law of the land where he lives. Although Sadiq eventually won his case, officials jailed him for the two months his appeal was pending.³⁵ Judges and lawyers bring to the courtroom the assumptions of their upbringing, training, and legal tradition—and they have to recognize that family law is not as secular and neutral as they suppose.³⁶

As American families changed at the end of the twentieth century, domestic relations law responded, reports Estin. “It draws increasingly on contractual rather than moral discourse,” and “it is less hierarchical and more concerned with gender and race equality.”³⁷ In dealing with religious minorities, however, American jurists are still struggling with the complexity and variability of other traditions—the centurieslong discursive interpretations of *shari`a*, for example, or the differing details from the four main *madbhabs* and many subschools, or the mix of religious injunction and

³³ Estin, 545.

³⁴ Quoted in Estin, 545. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000).

³⁵ Moore, 61-63.

³⁶ Estin, 541.

³⁷ Estin, 556-7.

customs that vary from country to country and even village to village.³⁸ The Nahavandis have roots in Lebanon, Iran, and Syria. They have lived in several U.S. states. In an age of global and domestic nomads, which practices and which laws apply?

While the Islamic system considers a judge's ruling binding only for the case at hand, American jurisprudence cherishes precedent. Because of the invisibility of American Muslims until the 1970s, few cases before then addressed Islamic issues, although jurists have made use of rulings on Jewish family law, which shares Islam's strong contractual basis.³⁹ Over the past few decades American courts have been accumulating a body of case law that is defining their (sometimes inconsistent) stance on the compatibility of *shari`a* with American notions of justice. As Muslim scholars note, case law is a skewed sample since "most family issues involving Islamic law in this minority population are handled informally through internal mechanisms (family, community leaders, close friends, etc.) because Islamic law per se is not enforceable by state authority in the USA."⁴⁰ Nonetheless, as legal anthropologist Ziba Mir-Hosseini argues, "[s]trategies adopted by litigants in the course of marital disputes give us insight into not only power relations in the family but how these relations are sustained or modified by the legal order."⁴¹ Although the decisions represent a selective interaction with the outcome determined by the dominant culture, they have also been shaped by the Muslim minority. In the courtroom encounter of judge, lawyers, witnesses, and principals, everyone gives and everyone takes.

The back and forth does not end with the ruling. Although the American legal system does not separate theory from practice as starkly as the classical Islamic system, where judges (*qadis*) heard cases but jurisconsults (*muftis* and *mujtahids*) wrote quotable opinions, both systems recognize that

³⁸ Ibid., 541.

³⁹ Ibid., 569

⁴⁰ Asifa Quraishi and Najeeba Syeed-Miller, "No Altars: A Survey of Islamic Family Law in the United States," <<http://www.law.emory.edu/IFL/cases/USA.htm>> (12 April 2005), para 4.

⁴¹ Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law*, 2nd ed., (New York: I.B. Tauris, 2000), 15.

jurists need to step back from the specific and often messy details of individual cases to reflect on broad principles. Scholars from majority and minority communities are beginning to critique how Muslims pose their family law dilemmas and how courts arrive at their solutions. Most Americans leave this discussion to specialists: while the media may feature odd cases, broad trends, and Supreme Court decisions, most detailed examination of law, especially domestic relations, takes place in law review articles and other scholarly forums. Within the Muslim community, ordinary citizens bear more responsibility, a religious duty in fact, to understand and implement the *shari`a*, the will of God. It is—down to its philological roots as “the path to the waterhole”—an “entire way of life,” perfect but also just beyond the reach of man, although trained scholars can offer sound interpretations of it.⁴² Hence when jurists speak, the faithful listen. For their part, Muslim scholars fulfill a religious obligation by making their discourse accessible. Just as one sixteenth century mufti lowered a bucket so that passersby could drop in their queries, so contemporary *fuqaha* give speeches at community centers, write newsletter articles, create websites, and issue fatwas online.⁴³ As Abou Fadl contends, all of these articulations are enlarging the classical *fiqh* about Muslim minorities and defining the United States’ place within, or on the edges of, *dar al-islam*.

IS THE MARRIAGE VALID?

In marriage as elsewhere, American courts grant wide latitude to religious ceremony. All states require couples to obtain a license, and most require either a state official (such as the proverbial justice of the peace) or religious clergy to solemnize the union, but the definition of clergy ranges from an Islamic imam to a Hindu *pandit* to the gathering of witnesses at a Quaker meeting for marriage. Here First Amendment protection of religious freedom meets state interest in social cohesion, an implicit recognition that different cultures may share similar ends but employ different means.

⁴² Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: The University of Georgia Press, 1998), 17.

⁴³ Colin Imber mentions the bucket in *Ebu’s-su’ud: The Islamic Legal Tradition* (Stanford: Stanford University Press, 1997).

So strong is the legal “presumption in favor of marriage” that judges often recognize marriages with missing or “defective” components, and twelve jurisdictions continue to honor a history of cohabitation as man and wife as a common-law marriage. On the principle of *lex domicile*, American courts grandfather in foreign marriages legal in their place of origin which may violate state rules (which vary)—accepting first cousin unions common in the Middle East, for instance.⁴⁴ “Arranged marriages”—a common Muslim practice but not a *shari`a* requirement, many Muslim scholars point out—withstand U.S. scrutiny as long as parties enter them willingly.⁴⁵ Despite American stereotypes about child marriages in the Middle East and Asia, minimum age requirements in the United States do not differ significantly from those in Muslim countries; with parental consent, girls can marry at twelve in Kansas and Massachusetts, but not until fifteen under the personal status law of Jordan, or seventeen in Tunisia.⁴⁶ To a limited extent, U.S. courts even recognize “odious” polygamous relationships formalized abroad but illegal here. Although second wives cannot immigrate, for instance, judges have acknowledged them in inheritance and workmen’s compensation claims.⁴⁷

Because American bureaucracy is unlikely to challenge a couple presenting itself as married, it is usually Muslims who question the validity of their own marriages as part of a divorce strategy. In *Farah v. Farah* (1993), husband Ahmad sued to invalidate his marriage to Naima and won on appeal, thereby avoiding a property settlement. After the Farahs had signed a *nikah* form in Virginia and proxies finalized their Islamic marriage in England, they flew to Pakistan for the customary

⁴⁴ Estin, 543-544.

⁴⁵ Asifa Quraishi and Najeeba Syeed-Miller, para 35.

⁴⁶ Jasper, 53-54. Also see Dawoud El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London: Kluwer Law International, 1996). Here again American and Islamic law share an understanding that early marriages are more likely to fail because of the parties’ immaturity thereby harming both individuals and society, especially if the couple produces offspring. Both systems recognize that parents have a stake in their children’s marital relationships and are the proper source of guidance. But they differ in the social practices they are trying to ameliorate: while the American statutes are often reigning in the runaway individualism of impulsive teens, personal status laws based on *shari`a* are often protecting minors from family coercion until they are better able to give or withhold consent to a marriage.

⁴⁷ Estin, 565.

wedding reception. Before a Virginia court a year later, Naima argued that Pakistan would recognize their marriage, but Ahmad prevailed with the argument that it had not met the standards of the Marriage Act of England, where the actual ceremony had taken place.⁴⁸ As Estin noted with disappointment, applying the “choice of law” rule here, accepting English law as *lex loci*, countered the American presumption in favor of marriage.⁴⁹

In *Aghili v. Saadatnejadi* (1997), however, a Tennessee appeals court ruled against an Iranian American who wanted to annul his marriage and avoid paying *sadaq*. A state transportation engineer, Hossein Aghili met Hamideh Sabeh Saadatnejadi while she was student and negotiated a marriage contract with her father. Marriage license in hand, the couple asked an imam for a blessing in the bride’s home in the presence of four witnesses and then filed a certificate with a Nashville mosque. Later that month, they celebrated with a reception. Yet a month after the honeymoon the couple separated, with Hamideh reporting that Hossein had threatened not to file their marriage license unless she relinquished her “dowry,” 1,400 gold coins up front and 10,000 due if the groom breached the marriage contract. After some legal wrangling, Hussein filed for annulment on the grounds that the imam was not qualified and the license never recorded. The trial court agreed.⁵⁰

The appeals court mentioned Tennessee’s broad support for religious clergy solemnizing marriages and asked Hussein to prove that imam Ghalam Hossein Azam Tarahian was not qualified. Hussein submitted an affidavit with his own opinion that the state does not recognize an Islamic blessing as a marriage and two letters, which the court dismissed as hearsay, that the Persian community in Nashville did not accept Tarahian as an imam—even though Tarahian testified that he had performed many nuptial blessings. Most convincing to the court was an affidavit submitted by Hamideh’s lawyers from a Boston University professor, an “expert in Islamic Studies.” In a

⁴⁸ *Ibid.*, 563.

⁴⁹ *Ibid.*

⁵⁰ *Aghili v. Saadatnejadi*, 958 S.W. 2d 784 (TN Ct. App. 1997).

teacherly tone, the professor explained that unlike Christian and to some extent Jewish practice, Islam “has consistently rejected the distinction between clergy and laity.” Although Tarahian was not the official imam of the local mosque, “[h]is competence before Islamic law to perform Muslim ceremonies is determined solely by his knowledge of that legal corpus.”⁵¹ The judge ruled that Tarahian, a proper religious authority, had wed the couple, a fact that overrode the irregularities in filing the civil paperwork.

Muslim legal advisers draw lessons from cases like *Aghili v. Saadatnejedi*. Technically, an Islamic marriage requires only an offer and an acceptance between a man and a woman, according to a mufti of the Fiqh Council of North America, although the Prophetic model added a third party and witnesses.⁵² Couples need to recognize that state licensing requirements vary and that not all officiants qualify as “registered” imams. Those couples who choose a Muslim ceremony but skip the U.S. paperwork run the risk of losing “state-enforceable rights upon each other, thus impacting inheritance, health insurance, and even immigration issues.”⁵³ Legal considerations sometimes shape the form of a Muslim wedding in the United States, spurring couples to choose a certain imam or to marry in a civil as well as religious ceremony.⁵⁴

Unlike U.S. law, *shari`a* considers not just a marriage’s validity but its desirable qualities and obligations. Usually well below the radar of American legal scholarship, Muslim scholars debate a host of issues, from polygamy to guardians’ roles, in-law relations to interfaith unions. Is the U.S. ban on multiple marriages religious and gender oppression, as some argue, especially since polygamy extends to women financial support they do not receive as mistresses? Should it be an underground practice? No, weighs in the Muslim Women’s League. Not only must Muslims follow the law of

⁵¹ Ibid., 787-788.

⁵² Yusuf Talal Delorenzo, “The Fiqh Council in North America,” in *Muslims on the Americanization Path?* ed. John Esposito and Yvonne Yazbeck Haddad (New York: Oxford University Press, 2000), 68.

⁵³ Quriashi and Syeed-Miller, para 25.

⁵⁴ Ibid.

the land, but the *shari`a* makes clear that a Muslim must treat his wives equally, and in the U.S., a second wife cannot make a spousal claim to health insurance and other benefits.⁵⁵ Although the U.S. courts do not comment on interfaith marriages, classical Islamic jurists opined that a Muslim woman should not marry a *dhimmi*.⁵⁶ While some American Muslims object to that restriction, which they feel does not make sense in this multicultural society, others believe that it should apply to men as well as women on the principle of fairness and as a way to keep the pool of marriageable American Muslims brimming with bachelors. Looking back to the classical reasoning behind the rule—to safeguard Muslim women from religious coercion by their spouse—University of Virginia law professor and Muslim activist Azizah al-Hibri elaborates that all Muslims in the United States need that protection. Should they lose custody in a divorce, for instance, they will not be able to guarantee their children’s Islamic upbringing.⁵⁷ As the Nahavandi case illustrates, however, heterogeneous Muslims do not always agree on how to raise children either.

THE DANCE OF DIVORCE

Although a similarly vibrant conversation about divorce takes place in the Muslim community—“Divorcing One’s Wife via E-mail or Cell Phone Text Message,” reads one entry in an online “fatwa bank”⁵⁸—property settlements and custody are usually the only issues to rise to the level of litigation in U.S. courts. Observers have long noted that the “secular embrace” of religious marriage does not extend to religious divorce.⁵⁹ Although the U.S. regularly upholds Muslim divorce decrees from foreign courts, it requires a judicial proceeding, not the verbal formula of a *talaq* or the private agreement of a *khul*.⁶⁰ In the days of restricted divorce, the ease with which

⁵⁵ *Ibid.*, para 31-32.

⁵⁶ Tucker, 80.

⁵⁷ Quraishi and Syeed-Miller, para 33.

⁵⁸ “Fiqh of Muslim Minorities,” Live Fatwa, 3 May 2005, <<http://www.islamonline.net>> (4 May 2005).

⁵⁹ Bernard J. Meislin, “Jewish Divorce in American Courts,” *Journal of Family Law* 16:1 (Nov. 1977), 19-20.

⁶⁰ Quraishi and Syeed-Miller, para 60-61.

Muslim husbands could detach from their wives “for any or no reason”⁶¹ alarmed American jurists, especially those who believed in the prevailing Christian vision of marriage. How can a man tear asunder a sacred bond simply by saying “I divorce you” three times? In today’s no-fault era, when men and women both have the unilateral right of repudiation, the court has turned its attention away from the rupture to its fallout, “its financial incidents and issues of custody and child support.”⁶²

Islamic marriage contracts have posed a dilemma for the American legal system. If the court interprets them based on religious law, is the state establishing religion—a constitutional no-no? If it is a valid contract, should the court treat it as a prenuptial agreement? What terms are enforceable? Does deferred *mahr* then replace alimony or other financial support?

Case law illustrates the lack of consensus on these questions among American jurists. In *Chaudry v. Chaudry* (1978), a Pakistani psychiatrist practicing in New Jersey divorced his wife in Pakistan, where she lived with their three children, and she sued him in the States for alimony and child support. The husband, Hanif, argued that he had complied with all his obligations under Pakistani law, including paying a \$1500 *mahr*. The trial judge refused to recognize the divorce and awarded the wife, Parveen, \$430 a month. The appeals court reversed, however, validating the divorce and the marriage contract, calling it an antenuptial agreement. Had her parents negotiated it better, “it could have lawfully provided for giving her an interest in her husband’s property,” but it did not.⁶³

In *Odatalla v. Odatalla* (2002), the Superior Court of New Jersey explained more fully its justification in recognizing and enforcing “an Islamic Mahr Agreement.” It did not violate the First Amendment: “Why should a contract for the promise to pay money be less of a contract just

⁶¹ Tucker, 79 & 88.

⁶² Estin, 580-590.

⁶³ *Chaudry v. Chaudry*, 388 A.2d 1000 (NJ 1978).

because it was entered into at the time of an Islamic marriage settlement?”⁶⁴ Under the doctrine of “neutral principles of law,” the court could enforce the agreement’s secular components. As defendant, Zuhair Odatalla tried several arguments: that *mahr* is a gift, that the phrase “Postponed: Ten Thousand U.S. Dollars” made the contract too vague, that the whole practice violated public policy and was unenforceable. Houida Odatalla presented their wedding video showing two families on separate couches in a living room negotiating terms as the imam prepared the document, which everyone read before signing. The judge concluded that it was “nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society.”⁶⁵ As for the phrasing, he compared “postponed” to a promissory note, payable on demand.

Although the judge in *Odatalla* called *mahr* “a novel issue,” it had come before many U.S. jurisdictions in the decades since *Chaudry*. While the Odatalla opinion does not mention *In Re Marriage of Dajani*, Zuhair Odatalla appears to have borrowed his argument from this 1988 case, in which a California appeals court ruled that a “[f]oreign dowry agreement which benefited wife who initiated dissolution of marriage facilitated divorce or separation and was thus void as against public policy.”⁶⁶ Married by proxy in Jordan in 1982, Awatef and Nabil Dajani also had a civil ceremony when Awatef joined Nabil in California. Their Islamic marriage contract called for a deferred *mahr* of 3,000 Jordanian dinars and more in cash and furniture, which Nabil had balked at paying. His expert, “an Iman [sic], the Islamic equivalent of a priest or rabbi, who taught local college courses on Islamic law,” explained to the court that “the dowry” could be a gift or an insurance policy in case of death or divorce, but in either case the wife forfeited her right to it if she initiated the dissolution of the marriage. Awatef’s expert, “an attorney admitted to practice in California and Egypt” disputed

⁶⁴ *Odatalla v. Odatalla*, 810 A.2nd 93 (N.J. Super.Ch. 2002), 95.

⁶⁵ *Odatalla v. Odatalla*, 98.

⁶⁶ *In Re Marriage of Dajani*, 251 Cal.Rptr. 871 (Cal.App. 4 Dist. 1988, 871).

the forfeit. While the trial judge favored Nabil's expert, the appeals court likened the whole notion of *mahr* to "profiteering by divorce," a reference to an earlier case which had invalidated a Jewish marriage contract (*kethuba*).⁶⁷

As recently as 2001, another California appeals court also nullified an Islamic marriage contract, this time on the grounds of vague wording. When Ahmad and Sherifa Shaban married in Egypt in 1974, their one page contract, in Arabic, specified a token payment with a deferred mahr of 500 pounds (worth about \$30 in 2001). The trial judge refused to let the husband's expert testify and ruled the document a certificate not a prenuptial agreement, awarding Sherifa half the couple's estate under community property law—about \$1.5 million. The appeals court judge seconded that result through a slightly different route, nullifying the contract under "the statute of frauds" because it lacked clarity and substance. "An agreement whose only substantive term in any language is that the marriage has been made in accordance with 'Islamic law' is hopelessly uncertain as to its terms and conditions."⁶⁸ He also complained that the document "provided far more information about the two witnesses to the wedding" than about the couple's agreement.

This last comment points to the historical difference between Islamic and Western law on the credence of oral testimony. American and Muslim American legal experts agree that U.S. family law is riddled with many such cultural misunderstanding and misinformation—but beyond that, they have reached no consensus either. Did *Odatalla* get it right by recognizing marriage as a contract or wrong by calling it nothing more? Both perhaps. One earnest young American lawyer worries that American courts will "sanction the continued economic and cultural subjugation of Muslim women by enforcing foreign-made dower agreements against them."⁶⁹ She urges courts, à la *Shaban*, to

⁶⁷ *In Re Marriage of Dajani*.

⁶⁸ *In Re Marriage of Shaban* 105 Cal. Rptr.2d 863 (Cal. App. 4 Dist 2001), 865 & 869.

⁶⁹ Lindsey E. Blenkhorn, "Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements and Prenuptials and their Effect on Muslim Women," 76 S. Cal. L. Rev. 189 (Nov. 2002), 191.

“override all mahr agreements and apply ordinary property dissolution rules to Muslim divorces.”⁷⁰ U.S. based Muslim legal scholars, many of them advocates for women, find much more potential within their tradition provided that the court search for a more nuanced interpretation of marriage contracts. Since they are, not strictly speaking, prenuptial agreements, judges should not subject them to that contract’s heightened scrutiny and regulation.⁷¹

The catch-all English translation “dowry” may also mask *mahr*’s unique qualities. It serves as an economic safety net and deters impulsive divorce. But it is also a right and a token of friendship (*sadaqa*) that “signifies a husband’s love and appreciation for his wife.”⁷²

Was the *Dajani* judge correct to align with the husband’s expert and not the wife’s? Asifa Quraishi and Najeeba Syeed-Miller assert that classical jurisprudence rather than the reformed personal status law of a particular country is of the most relevance to American Muslims of diverse backgrounds.⁷³ In traditional Hanafi practice, the contract distinguished between a prompt and a deferred dower to be paid upon death or *talaq*, as Nabil Dajani’s expert testified. Women who initiated a *khul* divorce waived the balance of *mahr*.⁷⁴ But what happens in a country where *talaq* and *khul* merge?

Out of context, *mahr* rules may lose their grounding in the spirit of Islamic family law. While the Fiqh Council of North America consults the opinions of all the *madbhabs*, one member contends, “The concern of Islamic law, before all else, is justice; [sic] and not the opinions of jurists who lived under circumstances very different from our own.”⁷⁵ At least one modern mufti says that a wife may demand her *mahr* at any time—perhaps not so coldly as she would a promissory note but

⁷⁰ *Ibid.*, 233.

⁷¹ Quraishi and Syeed-Miller, para 56.

⁷² Muzammil Siddiqi, “Mahr (Dower): Concept and Rulings,” 11 July 2003, IslamOnline, <<http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=11952>> (4 May 2005).

⁷³ Quraishi and Syeed-Miller, para 10.

⁷⁴ Tucker, 95.

⁷⁵ Delorenzo, 71 & 74.

with roughly the same effect.⁷⁶ Was Awatef Dajani out of line to expect her *mahr* and Asifa Shaban to pursue a property settlement in addition to her *mahr*? Not necessarily, argue legal scholars like Azizah al-Hibri and Yusef Delorenzo. In Islamic societies, divorcees can usually return to their extended natal family and expect “every manner of social service, including counseling, moral support, shelter, and so on.”⁷⁷ Not so in the United States, where a divorced woman often finds herself alone and on her own.

⁷⁶ Muzammil Siddiqi

⁷⁷ Delorenzo, 74; Azizah al-Hibri, “Muslim Marriage Contract in American Courts,” address at the Minaret of Freedom Banquet, 20 May 2000 <<http://www.karamah.org/sp/azizah200000520.php>> (1 April 2005).

BEST INTERESTS—WHOSE DEFINITION?

In child custody, American civil law prevails—except when the dispute goes international. Even if an Islamic marriage contract contains a clause about child rearing—that parents will raise their children as Muslims, say—U.S. courts will enforce it only when written into a custody agreement negotiated at the time of divorce.⁷⁸ In deciding what form of custody to award, courts continue to seek “the best interests of the child.”⁷⁹

Higher in profile than in proportion, international custody disputes sometimes pit U.S. respect for a foreign country’s sovereignty against human rights considerations, including children’s rights. Drafted in 1980 “[t]o stem the tide of international parental kidnapping,” the Hague Convention on the Civil Aspects of International Child Abduction directs signatories to return children to their “habitual residence,” addressing a jurisdictional question but not other sources of conflict.⁸⁰ Scholars disagree about the exact number of countries that have signed onto the treaty—but it is less than third of the possible total and includes not a single Muslim country.⁸¹ Yet cross-cultural custody battles are more likely to arise when Muslims divorce non-Muslims, especially since parents who return to non-Hague states have an advantage in U.S. courts.⁸²

Nonetheless, U.S. appellate courts are more likely to assert jurisdiction when a parent or child is a U.S. citizen or longtime resident.⁸³ In *Ali v. Ali* (1994), American-born Faiza Ali contested the divorce and custody degree of the Shari`a Court in Gaza. Husband Qassem claimed that his wife had had ninety days to appeal; he placed a notice in *Al-Quds*, and her Gaza-based family should have informed her. Although the Alis had lived most of their marriage in the occupied territory, son

⁷⁸ Quraishi and Syeed-Miller, para 44.

⁷⁹ Jasper, 37.

⁸⁰ June Starr, “The Global Battlefield: Culture and International Child Custody Disputes at Century’s End,” *Arizona Journal of International and Comparative Law*, 15 *Ariz. J. Int’l & Comp Law* 791 (1998), 792.

⁸¹ *Ibid.*, 807 & 829.

⁸² *Ibid.*, 807.

⁸³ *Ibid.*, 827.

Nader was born in the United States and had been attending kindergarten and first grade in New Jersey. Bothered by the lack of notice and missing the actual Gaza decree, a New Jersey judge found the *hidana* guidelines a “mechanical formula” and ordered the boy returned to his mother. In the opinion of the court, “[t]he law of the Sharia Court is undeniably arbitrary and capricious.”⁸⁴

As that parting slap by the New Jersey court suggests, international custody battles stir ferocious emotions and reinvigorate stereotypes. One footnote mentioned that Betty Mahmoody, American author of the inflammatory memoir-turned-movie *Not Without My Daughter*, served as an expert witness at least once. At the same time, many U.S. jurists fumble toward cultural relativism. Although the *madhhabs* differ in their specifics, Islamic scholars say that “the main principle of the Islamic matter of custody is ‘the welfare of the child’ (maslaha al-mahdun).”⁸⁵ In *Hosain v. Malik* (1996), the “leading [U.S.] case in this area,” a Maryland court validated a Pakistani custody order disputed by the mother. The relevant Pakistani statute, the Guardians and Ward Act of 1890, dates back to the British colonial period, and although both parents agreed that it directed a “best interests” evaluation, they disagreed about whether the judge actually performed one when he applied *hidana*. Although the American judge pointed out that assigning children to parents by age and sex is “widely considered outdated, discriminatory, and outright false in today’s modern society,” he added that “we are simply unprepared to hold that this longstanding doctrine of one of the world’s oldest and largest religions ... is repugnant to Maryland public policy.”⁸⁶ While some American jurists howled about “male-biased judges” practicing “patriarchal justice,” others reflected that the understanding of a child’s best interests varies from culture to culture, and American judges receive little guidance in assessing them.⁸⁷

⁸⁴ *Ali v. Ali*, 652 A2d 253 (N.J. Super.Ct 1994), 262.

⁸⁵ Anne Sofie Roald, *Women in Islam: The Western Experience* (New York: Routledge, 2001), 232.

⁸⁶ *Estin*, 595, referring to *Hosain v. Malik*, 108 Md. App. 284 (Md. Ct. Spec. App. 1996).

⁸⁷ *Starr*, 810; *Estin*, 595-596.

BACK TO THE NAHAVANDIS

Judge Alexander Waugh felt very much on his own when Rima and Ahmad Nahavandi appeared in his courtroom in 1998, his first and only trial as a family court judge that involved Muslim law.⁸⁸ As is customary, his opinion charted the history of this couple's ill-fated match. When Rima met Ahmad, she had divorced her first husband, a Massachusetts resident, under Islamic law, so she and Ahmad married under Islamic law in June 1992. But she was waiting for a civil decree of her divorce, which followed in December, so she and Ahmad married again in a civil ceremony in Brooklyn in January 1993. She gave birth to their first child, Sara, in April, and their second, Selma, arrived a year later.⁸⁹

According to the record, "the parties' marriage was 'stormy' and they fought "about money and religion, in particular." For the first year of their marriage, they lived off Rima's income from the travel agency, which she ran from home, but with an infant and a toddler in her care, she decided to close her business, and Ahmad began to draw from the rug store, which was failing. His father had died, his brother left to work at A.T.&T., and while Ahmad "is undoubtedly very capable at the rug business, especially the repair aspect, the Court is convinced that Mr. Nahavandi is not a particularly skilled business person."⁹⁰ Although Rima began to help out at the store, debts piled up, and Ahmad sold off the name and inventory in 1996. Around that time, Ahmad went on vacation with his mother, leaving Rima to pay living expenses with a credit card. On his return they argued heatedly over the phone; Rima ducked out before he reached home, but Ahmad "proceeded to cause considerable physical damage at the apartment."⁹¹

Soon Ahmad left. Rima applied for welfare, and the state ordered child support payments. When Ahmad returned to pick up children for his "parenting time," he often pushed his way in,

⁸⁸ Alexander P. Waugh, Jr., personal interview with the author, 8 May 2005.

⁸⁹ *Navahandi v. Navahandi*.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

once taking some rugs and the children's passports. After that 1996 incident, Rima obtained a restraining order—which Ahmad violated several months later when he attacked her during a clash about rent, and the court suspended his parenting time, which did not resume until he had returned from a court-permitted year abroad in 1998.⁹²

To resolve the custody issue, Waugh held that “the primary and overarching consideration is the best interest of the child” with an understanding that analysis begins “with the assumption that there will be joint legal custody.” For this to succeed, however, parents must communicate and cooperate, and the Nahavandis' history of conflict about education and religion troubled him. Ahmad had been growing “more rigorous in his adherence to orthodox Islamic traditions,” while Rima was “apparently less ‘observant,’” in the words of the court record, “although she testified that she considers herself a faithful adherent of Islam.” Rima had long disputed, for instance, that the religion requires women to cover their heads in public. These disagreements, Ahmad's record of domestic violence, and his shallow ties to the United States contributed to the decision in favor of sole custody for Rima with ample visitation for Ahmad. Waugh cautioned both parties to “show respect for the lifestyles chosen by each parent”: Ahmad could supervise his daughters' head covering when he took them to the mosque to pray, but “he should not pressure them to adopt his approach when they are with others.”⁹³

The judge did not speak with the same assurance about the *mabr*. “I come from a time when more people felt the separation of church and state was a good thing,” says Waugh, who graduated from law school in 1975. He had no training in comparative law, or experience other than divorce trials for a number of Hindu couples.⁹⁴ The Islamic marriage contract presented as evidence mentioned under the bride's conditions an initial payment of ten silver dollars and \$20,000 “upon

⁹² *Navahandi v. Navahandi*

⁹³ *Ibid.*

⁹⁴ Waugh interview.

demise of this marriage” or “immediately if groom decides a second wife” and on the groom’s side “all matters of judgment to be decided by Allah (Qur’an) and sunnah of Prophet Mohammed.”⁹⁵ Rima testified that the imam at their marriage chose the *mahr* figure: although she said “she wanted nothing because money could not replace a marriage,” the imam had urged a dollar amount to make it harder for Ahmad to divorce. Before Judge Waugh, both Rima and Ahmad agreed Ahmad must pay only if he initiated the divorce or if it resulted from “some sort of fault on his part.” Even though Ahmad filed for divorce, he maintained that Rima was pushing the split and that she had not held up her side of the bargain, to adhere to Islamic custom.⁹⁶

In the court opinion, Judge Waugh defined the “threshold issue” as the nature of the marriage contract: was it “a purely secular one governed by [the precedent of] ‘neutral principles,’” as Rima’s lawyer argued, or one “so inextricably intertwined with the tenets of the Islamic faith that it cannot be enforced in this Court?” He mentioned that neither side called an expert witness “apparently because Islamic clerics are reluctant to testify in the civil courts.”⁹⁷

Years later, Waugh, now a civil judge, remembers the frustration but not the details of the case. “I probably asked, ‘Can’t you get an expert?’ It could be just that the attorneys did not want to be bothered.” He did a lot of research through the West Law search engine, he says, but found little about Islam, although New Jersey did have some case law on Jewish divorce, the *get*, in which a judge decided that he did not have the authority to order a *get* to free a woman to marry. “Sketchy” in its language, the marriage contract struck Waugh as “purely a religious agreement,” similar to the *get*. Because the Nahavandis had staggered their religious and civil marriage ceremonies, he saw the contract tied to the religious union—and therefore not a proper prenuptial agreement. “Although

⁹⁵ *Navahandi v. Navahandi*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

New Jersey does recognize common law marriages,” he muses. “Perhaps you could analogize [*mahr*] to palimony.”⁹⁸

Instead, Waugh ruled that “the agreement should be enforced in an appropriate Islamic tribunal.” He noted that “the Islamic marriage had not been terminated.” Post-trial, Rima responded that she would take the civil decree to an imam; Ahmad would not seek a religious divorce, she wrote the judge, because “the Imam would make him pay.” The opinion concluded with the promise that if the “Islamic tribunal” decided in Rima’s favor, she could seek enforcement through the court.⁹⁹

Waugh says he does not know if the Nahavandis left “happy customers.” They never came back, and he believes they did not appeal. Had an expert testified about Islamic law, Waugh says he might have ruled on the *mahr*, but if the couple had produced conflicting witnesses, “I still would have been inclined to say it’s not my place to decide.”¹⁰⁰

FINDING COMMON GROUND

Given the small number of cases over a short span of time, scholars are not yet generalizing about how American Muslims use U.S. family law courts. Some of the divorce cases suggest that men may seek to nullify Islamic marriage contracts to avoid paying *mahr*, a traditional protection for women. But women will also file suit to seek or void the *mahr* as it suits their interests.

Observers in both the majority and minority communities agree that rulings to date reveal both potential and flaws. Muslim-American scholars sympathize with the U.S. courts’ confusion about *shari`a* fundamentals. Courts want “an immediate, definitive answer that can withstand appeals and/or further litigation,” but “[t]hese questions are at least fourteen hundred years old in

⁹⁸ Waugh interview.

⁹⁹ *Nahavandi v. Nahavandi*.

¹⁰⁰ Waugh interview.

Muslim circles and have over the centuries been given various answers.”¹⁰¹ How can judges reach sound conclusions when expert witnesses oversimplify—or worse, provide wrong information? Imams and professors, sighs Azizah al-Hibri, often “confuse their cultural beliefs and practices with Islam itself.”¹⁰²

Many voices within the Muslim community urge the faithful to become more informed legal consumers and advocates. Read the juristic literature. Visit the fatwa websites. Question the experts—and their credentials. “The responsibility of the jurists is to diligently investigate the law,” according to Abou El Fadl, “and the responsibility of the laity is to diligently investigate the jurists.”¹⁰³ Look for a councilor with sound academic credentials who has lived in the United States for at least five years, advises Yusef Delorenzo, not an “imported” scholar, or any “bearded and robed shaykh with a green card.”¹⁰⁴

Although Muslim scholars say the Islamic legal tradition contains all the necessary tools, they add that Muslims need to approach American institutions with the creativity and flexibility that was the hallmark of classical jurisprudence. Instead of relying on a minimalist marriage contract, Muslims should write one more “like a book,” defining all the terms, the rules, and the couple’s preferred *madhhab*, argues Azizah al-Hibri.¹⁰⁵ Although Judge Waugh was probably thinking of a Jewish institution when he referred the Nahavandis to a “tribunal,” Muslims are developing bodies such as the Fiqh Council of North America to help mediate family disputes outside the civil courts.¹⁰⁶

¹⁰¹ Aminah Beverly McCloud, “The Scholar and the Fatwa: Legal Issues Facing African American and Immigrant Muslim Communities in the United States,” in Gisela Webb, ed., *Windows of Faith: Muslim Women Scholar-Activists in North America* (New York: Syracuse University Press, 2000), 137.

¹⁰² Al-Hibri, para 7.

¹⁰³ Khaled Abou El Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: One World, 2001), 51.

¹⁰⁴ Delorenzo, 66.

¹⁰⁵ Al-Hibri, para 32.

¹⁰⁶ Quraisi and Syeed-Miller, para 71-73.

For its part, the American system needs to improve legal education about the *shari`a*, in law schools as well as in courtrooms, many scholars say.¹⁰⁷ “Expert testimony from both sides should be admitted to account for the diversity of Islamic law, and the courts should beware of constructing terms according to Christian or Jewish custom.”¹⁰⁸ Despite the press of business, courts must heed the details of a case and the broader cultural contexts, always looking for ways to accommodate diverse traditions without compromising core American values.¹⁰⁹

And all the parties to a case, whether from the Muslim minority or from the dominant culture represented by the American court, must accept that living in a multicultural society takes work. It is not simple—nor should it be. “Simplicity,” contends Abou El Fadl “is antithetical to individual accountability, egalitarianism and diversity,” values that American and Muslim legal cultures share.¹¹⁰

¹⁰⁷ Gloria M. Sanchez, “A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century,” 34 San Diego L. Rev. 635 (1997).

¹⁰⁸ Freeland, para 11.

¹⁰⁹ Estin, 604.

¹¹⁰ Abou El Fadl, 68.

WORKS CITED

- Abou El Fadl, Khaled. *Speaking in God's Name: Islamic Law, Authority and Women*. Oxford: One World, 2001.
- Al-Hibri, Azizah. "Muslim Marriage Contract in American Courts." Address at the Minaret of Freedom Banquet, 20 May 2000 <<http://www.karamah.org/sp/azizah200000520.php>> (1 April 2005).
- Blenkhorn, Lindsey E. "Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements and Prenuptials and their Effect on Muslim Women." *Southern California Law Review*, 76 S.Cal. L. Rev. 189, Nov. 2002.
- Estin, Ann Laquer. "Embracing Tradition: Pluralism in American Family Law." *Maryland Law Review*, 63 Md. L. Rev. 540, 2004.
- Freeland, Richard. "The Islamic Institution of Mahr and American Law." *Across Borders: The Gonzaga Journal of International Law*, 2001. <<http://www.across-borders.com>> (4 May 2005).
- Haddad, Yvonne Yazbeck and John L. Esposito, ed. *Muslims on the Americanization Path?* New York: Oxford University Press, 2000.
- Haddad, Yvonne Yazbeck and Adair T. Lummis. *Islamic Values in the United States: A Comparative Study*. New York: Oxford University Press, 1987.
- Jasper, Margaret C. *Marriage and Divorce*, 2nd ed. Oceana's Legal Almanac Series Law for the Layperson. Dobbs Ferry, NY: Oceana Publications, Inc., 2001.
- Meislin, Bernard J. "Jewish Divorce in American Courts." *Journal of Family Law* 16:1 (Nov. 1977): 19-35.
- Mir-Hosseini, Ziba. *Marriage on Trial: A Study of Islamic Family Law*. 2nd ed. New York: I.B. Tauris, 2000.
- Moore, Kathleen. *Al-Mughtaribun: American Law and the Transformation of Muslim Life in the United States*. Albany: State University of New York Press, 1995.
- Peirce, Leslie. *Morality Tales: Law and Gender in the Ottoman Court of Aintab*. Berkeley: University of California Press, 2003.
- Quraishi, Asifa. "American Muslims and American Law." Speech at conference on "Challenges Muslim Women Face in America," Muslim Community Center for Human Services, Dallas, Texas, April 1996. <<http://www.zawaj.com/articles/legalities.html>> (4 May 2005).
- Quraishi, Asifa and Najeeba Syeed-Miller. "No Altars: A Survey of Islamic Family Law in the United States." <<http://www.law.emory.edu/IFL/cases/USA.htm>> (12 April 2005).
- Roald, Anne Sofie. *Women in Islam: The Western Experience*. New York: Routledge, 2001.

- Sanchez, Gloria M. "A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century." 34 San Diego L. Rev. 635 (1997).
- Siddiqi, Muzammil. "Mahr (Dower): Concept and Rulings." 11 July 2003, IslamOnline, <<http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=11952>> (4 May 2005).
- Starr, June. "The Global Battlefield: Culture and International Child Custody Disputes at Century's End." *Arizona Journal of International and Comparative Law*, 15 Ariz. J. Int'l & Comp Law 791 (1998).
- Tucker, Judith. *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley: University of California Press, 1998.
- Waugh, Alexander P., Jr. Telephone interview with the author, 8 May 2005.
- Webb, Gisela, ed. *Windows of Faith: Muslim Women Scholar-Activists in North America*. New York: Syracuse University Press, 2000.
- Zainaldin, Jamil S. "The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851." *Northwestern Law Review*, 73:4 (Feb. 1979): 1038-1089.

Legal cases

- Aghili v. Saadatnejadi*, 958 S.W. 2d 784 (TN Ct. App. 1997).
- Ali v. Ali*, 652 A2d 253 (N.J. Super.Ch 1994).
- Chaudry v. Chaudry*, 388 A.2d 1000 (NJ 1978).
- In Re Marriage of Dajani*, 251 Cal.Rptr. 871 (Cal.App. 4 Dist. 1988).
- In Re Marriage of Shaban* 105 Cal. Rptr.2d 863 (Cal. App. 4 Dist 2001).
- Nahavandi v. Nahavandi*, Superior Court of New Jersey Chancery Division—Family Part, Middlesex County, Docket No. FM-12-2237-97, copy of opinion provided by the presiding judge, Alexander Waugh.
- Odatalla v. Odatalla*, 810 A.2nd 93 (N.J. Super.Ch. 2002).