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EMBRACING TRADITION: PLURALISM IN AMERICAN FAMILY LAW

ANN LAQUER ESTIN*

Courts deciding family law disputes regularly encounter unfamiliar ethnic, religious, and legal traditions, including Islamic and Hindu wedding celebrations, Muslim and Jewish premarital agreements, divorce arbitration in rabbinic tribunals, and foreign custody orders entered by religious courts. On one level, this is not at all surprising: millions of Americans identify themselves as members of minority cultural and religious traditions, including Judaism, Islam, Buddhism, Hinduism, and hundreds of others. At the same time, the question of multiculturalism in this context is something of a surprise, as we are used to understanding contemporary family law as secular and universal. This Article explores the problem of cultural and religious pluralism in American family law, focusing on the courts' efforts to understand and accommodate diverse traditions in the context of specific disputes. The cases discussed in this Article emphasize both the particularity of our legal tradition and the broader variety of American family practices. Courts and judges take the parties to these disputes as they find them, with all the specificity and complexity of their personal circumstances. Following the pragmatic tradition of family law,

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1. Weighted estimates based on data for 2001 collected by the American Religious Identification Survey showed that 1.3% of the population (2,831,000) described their religious identification as Jewish, 0.5% (1,104,000) as Muslim, 0.5% (1,082,000) as Buddhist, and 0.4% (766,000) as Hindu. BARRY A. KOSMIN ET AL., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 13 (Dec. 19, 2001), available at http://www.gc.cuny.edu/studies/arls.pdf. By comparison, 24.5% (50,873,000) described their orientation as Catholic and 16.3% (33,830,000) as Baptist. Id. at 12. Note that these numbers reflect current religious identification, rather than background or birth. Many Americans do not affiliate themselves with any religious group. Id. at 10.

2. While different beliefs are accorded constitutional respect, cultural and religious practices that conflict with prevailing cultural norms are often not protected. See, e.g., Employment Div. v. Smith, 494 U.S. 872, 884-85 (1990) (finding that a generally applicable statute criminalizing the possession of peyote was not unconstitutional as applied to Native American religious use).
the courts respond to each unique situation with the doctrinal tools available. Working from these cases and from the concrete experiences of real families, it is possible to sketch broader outlines of a more international and multicultural family law practice and to note several points of particular difficulty.

A pluralistic approach to family law reflects a contemporary understanding of our society as a diverse and multicultural one, and of the family as central to the establishment of identity and meaning in private life. It is based on a commitment to inclusion and respect for difference, grounded in our political and constitutional values of equality, nondiscrimination, and religious freedom. At the same time, because pluralism is a practice situated within the larger framework of a specific legal tradition, the process of accommodating diverse traditions is subject to constraints imposed by the same fundamental values. The cases discussed here implicate general norms of equality and due process, as well as the protective policies that form the foundation for our particular rules of family law. Many of these values draw further support from emerging principles of international human rights.

Developing a multicultural family law is complicated by several further challenges. The first of these is definitional. Culture and tradition are complex and variable, difficult to define, and easily subject to misunderstanding and caricature. Just as there are differences between Quaker and Episcopal wedding services, there are many varieties of Hindu marriage celebrations, many schools of Islamic legal interpretation, and many degrees of Jewish observance. Cultural practices change over time and across geographic space. Beyond these differences, there are questions of personal identity, equally complex and fluid, and essential to the resolution of particular cases. Family


members may disagree about the meaning or interpretation of a particular practice or the level of adherence to tradition they wish to maintain.

A second source of complexity is the boundary between church and state in our legal tradition.\(^5\) Because family law is understood to be secular, the blend of legal and religious authority over family life in other traditions poses a dilemma for American courts. Denying enforcement of a marital agreement signed by two individuals in a religious context might infringe their free exercise rights, but interpreting and enforcing such an agreement on the basis of religious law verges dangerously on an establishment of religion.\(^6\)

In light of these dilemmas, the task for courts and lawmakers in these cases is not to construct and apply a series of legal rules applicable to Hindu weddings, Islamic marriage contracts, or Jewish divorces. Rather, the challenge is to elaborate broader legal principles that allow individuals greater freedom to express their cultural or religious identity and negotiate the consequences of these commitments. By establishing this framework, courts can make space for traditions to flourish, and at the same time, protect the rights of individuals to full membership and participation in the larger political community.

I. DEFINING BOUNDARIES

Although American family law was once based explicitly on Christian principles, our political and legal institutions are today committed to an ideal of religious neutrality. As a result, we often ignore or deny the religious underpinnings of our family law system. These roots explain some of the cultural gap between our legal tradition and the traditions of other groups. Beyond specific differences, the secularized American tradition contrasts sharply with systems in which family regulation is a matter of personal status regulated by religious courts or religious law.

A. Religion and American Family Law

Marriage in England was regulated by the Roman Catholic Church from about the twelfth century until the English Reformation in 1534, and then by the Anglican Church until the mid-nineteenth century.\(^7\) Throughout this period, ecclesiastical law controlled the re-

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5. See infra notes 39-43 and accompanying text.
6. See infra notes 176-218 and accompanying text.
7. See Homer H. Clark, Jr., The Law of Domestic Relations in the United States 21-25 (2d ed. 1988) (describing the historical and religious basis of marriage and how
quirements for marriage, rules for solemnization, and the circum-
stances in which parties might be permitted to live separately. The
Church recognized informal marriages until Lord Hardwicke's Act
was passed in 1753, requiring publication of banns, a license, and a
church ceremony. Civil marriage ceremonies were not possible until
the Marriage Acts of 1836 and 1898, and English ecclesiastical courts
retained authority over annulment and divorce until the Matrimonial
Causes Act of 1857, when jurisdiction was transferred to the civil
courts. Because there were no ecclesiastical courts in the American
colonies, the regulation of marriage was taken up by secular authori-
ties. The content of marriage rules, however, was drawn from En-
glish ecclesiastical law.

In the United States, parallels still exist between the ecclesiastical
and present-day rules governing the consent required for marriage
and the impediments to marriage. Although these rules now appear
to be entirely secular, their religious character is apparent on closer
examination. For example, very broad rules in the Roman Catholic
ecclesiastical law, prohibiting certain marriages on grounds of consan-
guinity or affinity, were narrowed in England 1540 to a shorter list
based on the Bible's Levitical degrees. This list was revised again in
the twentieth century. The American states are divided on this
point, with some states retaining a relatively wider range of prohibi-

traditions and attitudes toward marriage have changed over the years); see also John Witte,
Jr., From Sacrament to Contract: Marriage, Religion, and Law in the Western Tra-

8. See Clark, supra note 7, at 22, 125, 406-07.
9. Id. at 23. The Marriage Act exempted Quakers, Jews, and members of the Royal
Family. Michael Grossberg, Governing the Hearth: Law and the Family in Nine-
teenth-Century America 66 (1985). In Roman Catholic countries, informal marriages
were abolished by the Council of Trent in 1563. Joseph M. Snee, The Canon Law of Mar-
10. See Witte, supra note 7, at 202; Nigel Lowe & Gillian Douglas, Bromley's Family
11. CLARK, supra note 7, at 407 & n.21.
12. Id. at 408.
13. See id. at 408-09 (noting the adoption of ecclesiastical defenses to divorce by Ameri-
can courts). For the evolution of marriage rules in the United States, see Grossberg, supra
note 9, at 64-152.
14. Id. at 23; see also Snee, supra note 9, at 322-56 (discussing ecclesiastical law).
15. CLARK, supra note 7, at 82-83 (citing Leviticus 18:6-18). The prohibitions included
marriages of parties "related both by blood and by marriage in the ascending and descend-
ing line, brothers and sisters, uncles and nieces and aunts and nephews." Id. at 83; see also
Sebastian Poulter, English Law and Ethnic Minority Customs 8-11 (1986). Ironically,
the Jewish tradition, based on the same biblical authority, permits marriage between an
uncle and niece, while the English ecclesiastical law does not. Id. at 9.
16. CLARK, supra note 7, at 83 & n.24.
tions. These differences generate difficult conflict of laws questions, and courts deciding such questions have found themselves enmeshed in a debate about natural law, struggling to analyze in secular legal terms a problem based on religious doctrine. These impediments to marriage are significantly different in other religious traditions, but American law only rarely acknowledges this diversity.

The Christian religious roots of American family law reach far beyond the impediments to marriage. The traditional restrictions on divorce, based on Roman Catholic and Anglican teachings, contrast with the acceptance of divorce in Jewish and Islamic law. The bar on polygamy contradicts the current practice in many Islamic and African cultures, and historical practice among Jews, Hindus, and Native Americans. Age and consent requirements for marriage are in tension with some types of arranged marriage, which remain common in various Asian, Islamic, and Jewish communities, and with those traditions that grant a father or guardian the authority to consent to a marriage of his minor children.

The close identification between our civil concept of marriage and the Christian religious tradition also operates at a deeper level. Nancy Cott describes the political importance of marriage norms dat-

17. Id. at 83-85; see also GROSSBERG, supra note 9, at 110-13.
18. Id. at 85-87; see, e.g., In re May's Estate, 114 N.E.2d 4, 7 (N.Y. 1953) (concluding that an uncle-niece marriage "was not within the prohibitions of natural law"). Even within the Christian traditions, there are significant differences in religious doctrine concerning marriage. See WITTE, supra note 7; see POULTER, supra note 15, at 8-10.
20. See, e.g., In re May's Estate, 119 N.E. 2d at 7. This case involved a Jewish marriage between uncle and niece expressly permitted by the Rhode Island statute cited infra at note 145.
21. Falk, supra note 19, at 46-50 (Jewish law); Anderson, supra note 19, at 69-73 (Islamic law).
22. See Anderson, supra note 19, at 57, 63-65.
23. See Falk, supra note 19, at 31-32, 35-36 (describing the Jewish law); Derrett & Iyer, supra note 19, at 81-82 (noting that India permitted polygamy until the Hindu Marriage Act of 1955).
24. Falk, supra note 19, at 36 (Jewish tradition); Derrett and Iyer, supra note 19, at 81 (Hindu tradition).
25. This was permitted in Jewish communities in ancient times but the power was gradually limited under rabbinic law. Falk, supra note 19, at 33, 42. The practice has been narrowed by legislation in Islamic countries over the past century. See Anderson, supra note 19, at 62-63. In India, child marriages have been officially prohibited since 1929. See Derrett and Iyer, supra note 19, at 83 & n.623.
ing back to the founding of the United States.\textsuperscript{26} For the founders, family governance based on marriage was a model and metaphor for the notion of government by consent.\textsuperscript{27} Moreover, the institution of marriage made white, male citizens the political and legal representatives of their households.\textsuperscript{28} The equation of Christian monogamy with civilization, moderation, and liberty gave political meaning and urgency to these marriage norms, which were preserved and enforced through various government policies over several centuries.\textsuperscript{29} She writes, "A commitment to monogamous marriage on a Christian model 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."\textsuperscript{30}

As Cott explains, national policies treated this model of marriage as essential to the process of civilizing and Americanizing peoples with different customs.\textsuperscript{31} Practices including polygamy among Native Americans, informal cohabitation and separation among former slaves, and arranged marriage among Asian immigrants generated suspicion and hostility.\textsuperscript{32} Government responses were often coercive, either excluding members of these groups from the civil polity or forcing them to adopt new norms of marital behavior as the cost of full membership.\textsuperscript{33}

Against this background, the intense conflict over Mormon polygamy in the years after the Civil War appears as part of a larger story about American identity, politics, civilization, and race. Cott's work helps explain why, despite the constitutional commitment to free exercise of religion, courts in the United States refused to protect marital practices that fell outside these Christian norms.\textsuperscript{34} When the issue reached the Supreme Court in \textit{Reynolds v. United States},\textsuperscript{35} the Court wrote that "[p]olygamy has always been odious among the northern

\textsuperscript{27} Id. at 10.
\textsuperscript{28} Id. at 11.
\textsuperscript{29} See id. at 21-23 (noting roots of these ideas in Montesquieu's political theory).
\textsuperscript{30} Id. at 23.
\textsuperscript{31} Id. at 24-27.
\textsuperscript{32} See id. at 25-28 (noting disapproval of Native American family practices); id. at 77-104 (discussing efforts to remake families of former slaves after the Civil War); id. at 139, 149-54 (examining immigration policies concerning polygamy and arranged marriages).
\textsuperscript{33} Id. at 139, 152-54. Marriage to a white person was considered to contribute towards the civilization of a Native American, see id. at 27, but generally the pressure to assimilate did not extend to permitting intermarriage with whites. Id. at 26-27, 99-103, 184-85.
\textsuperscript{34} See id. at 105-31.
\textsuperscript{35} 98 U.S. 145 (1878).
and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. After describing the history of laws against bigamy in the English ecclesiastical and civil law tradition, the Court concluded "it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." As in the contemporaneous English case of Hyde v. Hyde, the Supreme Court defined civil marriage as Christian marriage and found that polygamy contradicted its very essence.

Since Reynolds, the Supreme Court has recognized rights in marriage and family life that trigger significant constitutional protection. Several of these decisions recognize a link between free exercise rights and family privacy, suggesting some level of constitutional protection for religious family law traditions. The Court has never overruled Reynolds, and although it rejected the rationale for the decision in Wisconsin v. Yoder, constitutional protection for relig-

36. Id. at 164.

37. Id. at 164-65. The Court sustained the defendant's bigamy conviction, concluding that while his religious beliefs were constitutionally protected, his religious practices were not. Id. at 166. The Court asked rhetorically whether the government should be required to allow human sacrifice as a part of religious worship, or if it should defer to a wife's religious belief that "it [is] her duty to burn herself up on the funeral pile of her dead husband." Id. In the years after Reynolds, the court continued to condemn polygamy, most recently in Cleveland v. United States, 329 U.S. 14 (1946) (sustaining conviction of Mormon polygamist for "immoral" conduct under the Mann Act).

38. Hyde v. Hyde, 1 L.R.-P. & D. 130, 135-37 (H.L. 1866) (refusing to recognize potentially polygamous Mormon marriage for purpose of granting a divorce). The court stated that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." Id. at 133.


40. See Pierce v. Soc'y of Sisters, 268 U.S. 510, 518-19 (1925) (recognizing parents' rights to have their children educated in Catholic schools); Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing a religious exception to compulsory school attendance law for old-order Amish children after eighth grade).
ious polygamy still seems unlikely. Under the Court’s more recent First Amendment decisions, a plaintiff seeking to establish a free exercise claim must establish that the disputed law is targeted at a specific religious practice and thus not neutral or generally applicable. Ironically, despite their ecclesiastical origins, our marriage and divorce laws are understood today to be “neutral and generally applicable.”

With the notable exception of polygamy, accommodation of religious and cultural traditions in family settings is relatively easy when it is clear that individual family members have chosen to participate in a particular institution or practice. Often, there will be no occasion for the law to intervene. Disputes that implicate religious disagreements within a family pose a different problem. Family courts encounter this problem in some custody cases, when one parent’s claim

41. While the majority opinion in Yoder cites Reynolds for the proposition that activities of individuals, even when religiously based, are often subject to regulation by the states, Justice Douglas observes that the decision “even promises that in time Reynolds will be overruled.” Yoder, 406 U.S. at 220, 247 (Douglas, J., dissenting in part). Following Yoder, however, an appellate court rejected the free exercise claim of a Mormon polygamist in Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985), writing, “Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which our culture is built. . . . In light of these fundamental values, the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.” Id. at 1070 (citations omitted).

See also Keith E. Sealing, Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause, 17 GA. ST. L. REV. 691, 747-52 (2001); Todd M. Gillett, Note, The Abolition of Reynolds: The Constitutionality of Religious Polygamy, 8 WM. & MARY L. RTS. J. 497, 526-28 (2000). These writers describe these as “hybrid” claims based both on free exercise grounds and the constitutionally-protected interest in marriage and family life. There is also an argument that laws prohibiting polygamy are not “neutral, generally applicable laws,” but rather targeted at a specific religious practice.


Beginning with its 1963 decision in Sherbert v. Verner, 374 U.S. 389 (1963), the Court applied a balancing test that considered whether a law substantially burdened a particular religious practice, and whether a compelling government interest justified the burden. Id. at 403-11. The Court repudiated Sherbert in Employment Division v. Smith, 494 U.S. 872 (1990), restoring the distinction made in Reynolds between religious belief, which is protected, and religious practice, which is not. Id. at 882-85. Although Congress made an attempt to restore the Sherbert test in the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), the Court found the Act unconstitutional in City of Boerne v. Flores, 521 U.S. 507, 531-35 (1997).

43. See also Universal Life Church v. Utah, 189 F. Supp. 2d 1302, 1313-14 (D. Utah 2002) (holding that a statute which denies authority to solemnize marriages to clergy ordained through mail or by Internet does not violate the Free Exercise Clause of the First Amendment); Bierer v. Brown, 6 Vet. App. 563 (1994) (holding that federal law defining eligibility for spousal benefits based on state laws, where state statute required marriage license in addition to religious ceremony, was neutral and valid under the First Amendment).
for free exercise and accommodation of religious practices is met by
the other parent's argument against the establishment of religion. Courts cannot decide these cases on religious grounds, and must therefore either find a neutral basis for a ruling or refuse to intervene.

There are analogues of this problem in court cases concerning internal church disputes. The Supreme Court has concluded that civil courts may resolve such disputes using "neutral principles" of contract, property, or trust laws, but may not make decisions on the basis of religious doctrine and practice. Therefore, courts faced with a family-religious disagreement would be required to rely on neutral principles. To the extent that family members have used the tools of contract, property, and trust law in marriage and divorce disputes, courts may attempt to resolve those issues as private law matters.

B. Pluralist Traditions

While regulation of marriage and the family in Europe and North America is the province of secular law, religious and customary family law retains its authority in many other parts of the world. European colonial powers typically extended their laws to the business and commercial activities of their colonies, but left matters of personal status, including marriage, divorce, and inheritance to be regulated by local norms. In colonies with culturally and religiously diverse populations, the result was a pluralist family law, composed of separate laws


45. See, e.g., Kendall, 687 N.E.2d at 1233-35 (affirming a judgment limiting the father's right to share his religious beliefs based upon evidence that the religious conflict was causing substantial harm to the children, who had a strong and different religious self-identity). In Sagar, 781 N.E.2d at 56-60, the court approved an order that the ritual should not be performed until the parents reached agreement or the child was old enough to make her own determination.

46. R.W. Jones v. Wolf, 443 U.S. 595, 603-04 (1979). See generally Kent Greenawalt, Hands Off! Civil Court Involvement in Conflicts Over Religious Property, 98 COLUM. L. REV. 1843, 1844-45 (1998). Greenawalt suggests that the argument for non-involvement in these cases draws force from the Court's determination in Smith that "courts should not have to assess religious understandings and the strength of religious feeling in order to decide if the religious claim is strong enough to warrant an exemption." Id. at 1906. As he points out, this inquiry is even more difficult when a court is asked to decide "which of the competing assertions from within the group is right or more true to a tradition." Id.

47. See RENÉ DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 474-79, 495, 555-59 (3d ed. 1985) (giving examples of the many variations of legal sources in religiously diverse populations); M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975).
and systems of regulation for different religious or ethnic groups.\textsuperscript{48} Many of these systems still exist today.\textsuperscript{49}

In Israel, for example, in a practice dating back to the Ottoman Empire and the British mandate, religious courts applying religious law exercise jurisdiction over marital status within the Jewish, Muslim, and Christian communities.\textsuperscript{50} Kenya, like other African nations colonized by the British, maintains a system of customary law as well as separate statutes regulating Christian, Muslim, and Hindu marriages and divorces.\textsuperscript{51} Colonial authorities intervened in some aspects of local family law by prohibiting traditional Hindu practices in India, such as dowries and child marriage,\textsuperscript{52} and by extending to Hindu and Muslim women limited rights to divorce.\textsuperscript{53} The "official" religious and customary law applied by colonial courts differed notably from the traditional law that preceded it and often continued to operate outside the formal legal system.\textsuperscript{54}

Within a single legal and religious tradition, there may be substantial variations in religious or customary family law. In Islamic law,
these variations trace to different schools of Islamic jurisprudence, and to different codifications of the tradition in different jurisdictions. Hindu family law in India is not the same as the Hindu law applied in parts of Africa. African customary law may have many different variations within a single nation, corresponding with different tribal and cultural groups.

While multiculturalism has drawn significant scholarly attention and debate in the past decade, legal pluralism of this sort has not taken root in the west. There are traces of legal pluralism in the United States, where Native Americans retain powers of self-government that extend to family law. In Australia and New Zealand, Aboriginal and Maori customary law receive some recognition, but courts do not apply or enforce this customary law directly. Religious clergy have legal authority to formalize marriages in common law countries, provided that the parties obtain a marriage license from the state.


56. See al-Hibri, supra note 55, at 229-30 (Islamic family law codes in Egypt, Syria, Morocco, and Tunisia); Haider, supra note 53, at 298-315 (examining historical tensions between traditionalist and modernist approaches to Pakistani Islamic law); Sebastian Poulter, The Claim to a Separate Islamic System of Personal Law for British Muslims, in ISLAMIC FAMILY LAW 147, 158 (Chibli Mallat & Jane Connors eds., 1990) (noting that one problem with implementing Islamic family law in England is choosing which tradition of Muslim law to follow).

57. Derrett & Iyer, supra note 19, at 80-81.

58. See Kabeberi-Macharia, supra note 51, at 193-94 (noting that customary law within Kenya reflected the individual values and customs of different indigenous communities).


60. E.g., Poulter, supra note 56, at 157-64 (discussing the unsuccessful campaign in Britain for a separate system of Islamic family law). However, until the nineteenth century in Europe, European Jewish communities were self-regulating and rabbinic courts had authority over marriage and divorce. David Novak, Jewish Marriage and Civil Law: A Two-Way Street?, 68 GEO. WASH. L. REV. 1059, 1068-69 (2000).


63. See infra notes 112-114 and accompanying text.
maintain unified legal systems, and persons of all religious, cultural, and ethnic backgrounds are subject to the same family law rules and institutions.64

Ayelet Shachar characterizes the governance model in which different religious communities are vested with legal power over their members' personal status as a "religious particularist" paradigm, and contrasts it with systems in which the state retains authority over family law matters and all citizens are subject to a uniform secular family law.65 In evaluating these models, Shachar notes the powerful role of family law in transmitting culture and determining group membership through personal status and lineage rules.66 Family law traditions "do not simply define membership boundaries: they also regulate the distribution of rights, duties, and ultimately power between men and women within the community."67 She also observes that women's unique role in perpetuation of the group often results in their being subject to heightened control, constrained by rules that entrench their dependence and inequality within the community.68 Thus, a pluralist system "maintains the autonomy and sovereignty of different minority cultures," but it may put at risk the equality rights of vulnera-

64. In the United States today, provision for an explicitly religious family law regime would violate the bar on established religion under the First Amendment. But see Carol Weisbrod, Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 J. Fam. L. 741, 752 (1988) (noting that formal separation of church and state was not required at the state level until the twentieth century).

65. Shachar, supra note 48, at 78-79. Shachar distinguishes the "secular absolutist" model of civil law countries such as France, Germany, and the Netherlands, in which there is strict separation of church and state, and the modified absolutist system employed in Australia, Britain, Canada, and the United States, which permits some formal recognition of religious traditions, such as by authorizing religious officials to solemnize marriages. Id. at 72-78.

66. She describes this as a demarcating or gatekeeping function. Id. at 49-54.

67. Id. at 57.

68. Id. at 54-55. Shachar describes a variety of ways in which women are regulated by the group, including these:

Since women reproduce future members of the collective, their reproductive activities are often the first to be closely monitored by their identity groups. Women are generally controlled in terms of the situations in which they are allowed to marry and have children. In other words, they must procreate in ways that will preserve the membership boundaries and autonomous identity of their group. Second, the conditions under which marriage and childbearing are considered legitimate are of special importance. Third, women's function as cultural conduits for the group's unique history and identity imposes a duty to faithfully transmit the group's social norms, customs and traditions, collective memories, and specific expectations to the next generation.

Id. at 56; see also Judith Romney Wegner, The Status of Women in Jewish and Islamic Marriage and Divorce Law, 5 Harv. Women's L.J. 1, 1 (1982) (tracing "women's progress from a status of near-chattel to one of near-person").
ble group members. Conversely, while the uniform systems do a better job protecting citizenship rights and ensuring equal treatment, they deny the importance of particular cultural or religious norms and may discriminate against minority groups whose traditions are distinct from those embedded within the dominant culture.

International human rights laws address both the rights of vulnerable group members and protections for cultural minority groups. Women's equality within the family was addressed in the 1948 Universal Declaration of Human Rights, which declares that "[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution." This principle was reiterated and made binding in 1966 with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Universal Declaration also provides that "[m]arriage shall be entered into only with the free and full consent of the intending spouses," a principle elaborated in the 1962 United Nations Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.

The interface between family law and gender equality was addressed more fully in the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and..."
family relations." CEDAW's mandate of gender equality in matters of marriage and family relations was met with strong objections from a number of nations because of its incompatibility with provisions of Islamic law. Some countries have made similar objections to provisions of the Convention on the Rights of the Child (CRC). The CRC, which has been almost universally ratified, requires that "the best interests of the child . . . be a primary consideration" in all actions concerning children. This standard was understood to be flexible and indeterminate enough to accommodate a wide range of cultural

77. Id. art. 16(1), 1249 U.N.T.S. at 20. Article 16(1) continues:

In particular, [States Parties] shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Id. In addition, Article 5 provides that:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.]

Id. art. 5, 1249 U.N.T.S. at 17.


81. CRC, supra note 79, art. 3(1), 1577 U.N.T.S. at 46.
variation. Despite this consensus, there is continuing disagreement over the suggestion that traditional practices may in some instances need to give way in order to protect children’s welfare.

These international covenants also endorse the ideal of cultural and religious pluralism. Various conventions prohibit discrimination on grounds such as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” and others protect the “freedom of thought, conscience and religion.” The agreements extend explicit recognition to ethnic, religious, and linguistic minority groups, with provisions that protect the right of individuals, “in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” According to the ICCPR, “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Human rights principles can offer some guidance to courts in the United States, but the treaty provisions are not directly enforceable

82. The drafters used the indefinite article—“a” primary consideration rather than “the” primary consideration—to provide additional flexibility. Philip Alston, The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights, 8 INT’L J.L. & FAM. 1, 12-13 (1994). Alston notes that despite the commonality of the “best interests” standard, the principle is given “very diverse interpretations” in different settings. Id. at 5. During the drafting of the CRC, several Islamic countries were able to secure modifications of some objectionable provisions of the CRC. Alison Dundes Renteln, Cultural Bias in International Law, 92 AM. SOC’Y INT’L L. PROC. 232, 239 (1998).

83. The CRC requires states to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” CRC, supra note 79, art. 24(3), 1577 U.N.T.S. at 52; see David Pearl, A Note on Children’s Rights in Islamic Law, in Children’s Rights and Traditional Values 86, 86-87 (Gillian Douglas & Leslie Sebba eds., 1998) (discussing reservations made by several Islamic countries to the CRC); Alison Dundes Renteln, Who’s Afraid of the CRC: Objections to the Convention on the Rights of the Child, 3 ILSA J. INT’L & COMP. L. 629, 633-36 (1997) (describing objections to the CRC in the United States).

84. UDHR, supra note 71, art. 2; ICESCR, supra note 73, art. 2(2), 993 U.N.T.S. at 5; ICCPR, supra note 72, art. 2(1), 999 U.N.T.S. at 173.


86. ICCPR, supra note 72, art. 27, 999 U.N.T.S. at 179; CRC, supra note 79, art. 30 (covering ethnic, religious or linguistic minorities and “persons of indigenous origin”).

87. ICCPR, supra note 72, art. 18(3), 999 U.N.T.S. at 178.

88. The United States has signed these agreements and it has ratified the ICCPR. 138 CONG. REC. S4781, S4783 (daily ed. Apr. 2, 1992). See generally S. EXEC. REP. NO. 102-23
in federal or state courts. Their terms suggest important and often persuasive policy considerations for courts encountering diverse family traditions, and may be treated as customary international law. These agreements have certainly not obviated the difficult conflicts in values between legal traditions, but they reflect a level of international consensus that is particularly relevant to resolving cultural conflicts in domestic law.

C. Multicultural Family Law

Since 1965, immigration to the United States has increased and shifted, bringing many more individuals and families from Asia, Africa, and South America. With this immigration, the pluralist challenges that were once characteristic of family law in colonial legal systems have diffused beyond the former colonies and into the nations of the west. Immigrants, indigenous peoples, and those whose culture or religion placed them within a minority group now seek more openly to preserve aspects of their family traditions or to use those


89. The ICCPR is subject to a declaration that the covenant is not self-executing, and an understanding that it will be implemented by the federal government to the extent that it exercises legislative and judicial jurisdiction over matters covered in the treaty. S. Exec. Rep. No. 102-23, at 19. Family law matters are heard primarily in state courts, and the federalism issues present a controversial problem. Compare Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int’l L. 341, 345-36 (1995) (arguing that, as treaties, international agreements preempt state law within the U.S., even in areas of traditional state control, such as family law), with Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 393-94 (1998) (arguing that the treaty power should be subject to federalism limitations).


91. E.g., Beharry, 183 F. Supp. 2d at 604.

92. This was the result of the Immigration and Nationality Act of 1965, which eliminated national origin quotas. Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 Cal. L. Rev. 863, 865-66, 918-19 (1993). As Hing describes, assimilation pressures have continued. See id. at 869-75.
traditions to maintain their identity. As we recognize a right to culture and religion, we are forced to acknowledge the multiplicity of identities, loyalties, and commitments of Americans today. For the dominant society, the challenge of pluralism lies in making space for legal principles, social relationships, and group affiliations that have often been ignored.

A pluralism that permits members of cultural or ethnic groups to maintain distinct communities with significant social and political autonomy is controversial in the American context, because of the perceived costs to the coherence of the larger union and to the meaning of individual citizenship. For this reason, the development of separate legal systems regulating distinct minority communities is not a broadly viable alternative. In the context of private family law disputes, however, the primary purpose of cultural and religious pluralism is to allow individuals to express and maintain their identity and beliefs in the setting of their family relationships.

In our contemporary understanding, family law is a centrally important arena for these expressive purposes. Many commentators have described aspects of the transformation of the family during the latter part of the twentieth century, and the corresponding shifts in the law. Family law has been privatized; it has shifted toward a focus on the individual rather than the family as an entity; it draws in-

93. See Shachar, supra note 48, at 33-36; see also Pearl and Menski, supra note 48, at 52-61.
94. Shachar, supra note 59, at 255-56.
95. See id. at 259-60 (describing the “external critique of multiculturalism”). This is not a purely American problem. See Elaine Sciolino, A Maze of Identities for the Muslims of France, N.Y. Times, Apr. 9, 2003, at A3 (describing the rapidly increasing Arab population in France and the resulting breakdown of a uniform “French” identity).
96. See, e.g., Poulter, supra note 56, at 158-59 (describing failed efforts by Islamic community in England to establish separate family law system, due partly to the lack of societal cohesion such system would engender). However, legal autonomy has been recognized in the context of indigenous or Native American tribes. Atwood, supra note 61, at 593-95. These groups continue to exercise powers of self-government and are understood to retain important aspects of their sovereignty. See id. (noting sovereignty exercised by tribal courts over areas such as family law).
97. See Poulter, supra note 56, at 147 (explaining that moral, religious, and legal norms of a particular society “are often regarded as embodying the quintessential culture of a distinctive group of people”).
creasingly on contractual rather than moral discourse;\textsuperscript{101} it is less hierarchical and more concerned with gender and race equality.\textsuperscript{102} These changes permit a wider range of personal choice, and the flourishing of a greater diversity of values and private understandings.\textsuperscript{103}

At the same time, despite the move toward greater private ordering of family life, courts and legislatures continue to enforce a set of background norms based on constitutional values. Family law rules cannot perpetuate discrimination based on race,\textsuperscript{104} gender,\textsuperscript{105} or legitimacy of birth.\textsuperscript{106} The rights of parents—even unmarried parents—receive both procedural and substantive protection from the due process clause.\textsuperscript{107} These principles emerged as constraints on

\begin{itemize}
  
  \item \textsuperscript{102} See infra notes 104-105 and accompanying text (discussing the intersection of family law rules and racial and sexual discrimination).
  
  \item \textsuperscript{103} Despite these dramatic transitions, marriage law in the United States adheres to two aspects of its traditional religious code. One is the prohibition of polygamy, discussed \textit{supra} at notes 35-41 and \textit{infra} at notes 151-155 and accompanying text. The other, recently highly contested, is the refusal to permit marriages of same-sex couples. See generally \textit{Cott}, \textit{supra} note 26, at 215-21. In both these contexts, arguments may be made from principles of gender equality. See \textit{infra} note 105 (discussing intersection of family law principles and gender equality).
  
  
  \item \textsuperscript{105} See, e.g., Orr v. Orr, 440 U.S. 268, 271 (1979) (holding unconstitutional an Alabama statute that required only men to pay alimony); Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding unconstitutional a New York statute that allowed unwed mothers, but not unwed fathers, to block the adoption of children by the other parent). Ironically, both \textit{Orr} and \textit{Caban} rejected legal rules that discriminated against men. The process of eliminating the legal disabilities of married women has taken several centuries. See generally \textit{Clark}, \textit{supra} note 7, at 286-305 (summarizing the development of the legal rights of married women). One court has taken the position that rules barring same-sex marriage constitute gender discrimination. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding that sex is a suspect classification and that statute barring same-sex marriages was presumptively unconstitutional as discrimination based on sex).
  
  \item \textsuperscript{106} See, e.g., Levy v. Louisiana, 391 U.S. 68, 70, 72 (1968) (holding unconstitutional a Louisiana law barring illegitimate children from recovering for the wrongful death of their mother); Clark v. Jeter, 486 U.S. 456, 463-65 (1988) (holding unconstitutional a Pennsylvania statutory scheme requiring an illegitimate child to prove paternity within six years of birth in order to receive paternal financial support).
  
\end{itemize}
courts and legislatures, but they are equally important in a world in which the role of the state is to facilitate and monitor bargaining and dispute resolution within the family.108

Beyond this constitutional framework, there are norms that effectuate what Carl Schneider has called the "protective function" of family law.109 Statutes define property rights and child support obligations, particularly in the event of death or divorce. Other statutes provide basic protections against physical and emotional abuse. Contracts within the family are subject to substantive limits and heightened scrutiny for procedural fairness.110 Alternative dispute resolution is encouraged, but courts maintain final authority to decide matters of child custody, visitation, and child support.111 Custody and child support decisions must further the child's best interests.

Within the outside boundaries defined by these norms, there is substantial room for the expression of diverse religious and cultural traditions. Individuals and families should be accorded the freedom to shape and express their own values and beliefs within these broadly defined parameters, making use of familiar legal tools and principles. To the extent that the legal framework constrains the expression of different values and traditions, these limits should be carefully considered, and understood as defining a common set of legal and social entitlements that establish in concrete terms the meaning of membership in the larger society.

II. ENCOUNTERING DIVERSITY

Confronted with the marriage rituals of Islamic and Hindu tradition, the religious divorce proceedings of Jews, or the complexities of international custody disputes, judges deciding family law disputes face a three-part challenge. First, the court has an obligation to appreciate and attempt to understand the place and importance of unfamiliar cultural and religious practices caught up in the dispute. First, the court has an obligation to appreciate and attempt to understand the place and importance of unfamiliar cultural and religious practices caught up in the dispute. At the same time, the court must reevaluate familiar legal principles in order

109. Id. Schneider writes, "One of law's most basic duties is to protect citizens against harms done them by other citizens. This means protecting people from physical harm, as the law of spouse and child abuse attempts to do, and from non-physical harms, especially economic wrongs and psychological injuries." Id.
110. See Shultz, supra note 101, at 214, 218-19 (discussing procedural requirements and substantive restrictions on marital contracts).
111. See infra note 218 and accompanying text.
to determine whether they may be extended to or harmonized with a different tradition. Finally, if there is a conflict between the two that cannot be reconciled, the court must fashion a resolution that leaves as much room as possible for changes that will allow the two systems to coexist.

Typically, the parties present an account of their tradition, sometimes offering competing testimony from specialists or practitioners of foreign or religious law. The judge deciding the matter evaluates this evidence and attempts to locate and analyze the dispute within a larger framework of more familiar legal principles. This is a challenging assignment, and one that courts do not always get right. The process is most successful where it is built on a dynamic conception of families and cultures that recognizes both tradition and change, respecting diversity and religious norms without losing sight of the core values of the legal system and the democratic state. As the courts mediate the differences within families and the gaps between cultures, subtle and important changes are worked into the fabric of family law rules and traditional cultural practices.

A. Marriage Traditions

Families celebrate marriage as both a religious and a legal event, combining traditional ceremonies with whatever procedures are required by state law. Compliance with secular requirements assures that the state will recognize the marriage, and that the couple will receive all of the legal benefits attendant on marriage. The overlay between secular and religious marriage is explicit in the United States, where statutes in all states extend authority to religious clergy to solemnize marriages. When questions of religious practice and authority are raised in marriage cases, American courts have readily extended respect to less familiar wedding traditions in order to uphold the validity of marriages. Beyond the rules for celebration of marriages, however, substantive marriage regulations pose more difficult cultural and legal conflicts.

American marriage solemnization statutes are written broadly, with one common formulation specifying that a marriage may be sol-

112. See Clark, supra note 7, at 34-39 (describing statutory regulation of both religious and legal marriage requirements).
113. Id. at 34-44 (discussing statutory regulation of marriage in America).
114. Id. at 37. Rules for solemnization of marriages in Britain are more complex, with exceptions to allow for solemnization in accordance with Quaker or Jewish tradition but not others, such as Catholic, Muslim and Hindu traditions. Poulter, supra note 15, at 33-34; Lowe & Douglas, supra note 10, at 38-47.
emnized in accordance with the traditions of any religious denomina-
tion or Indian tribe. In a recent case, a New York state court relied
on First Amendment free exercise principles to construe a marriage
statute broadly to recognize the legal validity of a Hindu marriage cel-
ibration. The wedding celebration in Persad v. Balram was a
"Hindu marriage or 'prayer' ceremony" at the bride's home with 100
to 150 guests. "During the ceremony, the parties were adorned in
traditional Hindu wedding garments, prayers were articulated, the
defendant's parent's [sic] symbolically gave her to the plaintiff, vows
were made and rings and a flower garland were exchanged." At the
conclusion of the two-hour marriage ceremony, the Hindu priest, or
pandit, said a benediction and there was a large wedding reception.
After the parties had lived together for seven years and had a child,
the husband sought a declaration that they were never married, based
on their failure to comply with the marriage statute and the argument
that they did not intend to be legally married without a further civil
ceremony. The court rejected these arguments, finding that the
religious marriage ceremony was consistent with statutory require-
ments and noting the "strong presumption favoring the validity of
marriages."

In another case, Aghili v. Saadatnejad, the groom negotiated
and signed a marriage contract with the bride's father, and the parties
subsequently obtained a marriage license in Tennessee and had an
Islamic blessing performed by an imam. Several weeks after the
blessing, they had a formal wedding reception, and afterward began

115. See, e.g., COLO. REV. STAT. § 14-2-109 (1998) (corresponds to the UNIF. MARRIAGE &
DIVORCE ACT § 206(a), 9A U.L.A. 182 (1998)).
constitutional right is the freedom to be married in accordance with the dictates of one's
own faith.").
117. Id. at 562.
118. Id.
119. Id. The opinion notes that a reception for 275 people followed the wedding and
describes the wedding photos introduced as evidence in the case. Id.
120. Id. at 562.
121. Id. at 565. In an earlier New York case, the court annulled an arranged Hindu
marriage celebrated in India on the basis that an essential part of the ritual—the
saptapadi, or seven steps—was not performed. Singh v. Singh, 325 N.Y.S.2d 590, 590-91
(Sup. Ct. 1971). The evidence indicated that the bride, who opposed the marriage, re-
fused to perform this ritual, and that the parties never consummated the marriage or lived
together as husband and wife. Id. at 591.
122. 958 S.W.2d 784 (Tenn. Ct. App. 1997).
123. Id. The contract provided for a dowry of 1400 Iranian gold coins and specified that
Aghili, the husband, would pay the wife an additional 10,000 gold coins if he violated any
term of the contract. Id. This payment, or sadaq, was described by the court as a post-
poned dowry designed to protect the wife in the event of divorce. Id. at 786 n.1. In addi-
living as husband and wife. Within a month, the couple separated, and a few months later, Aghili filed an action for divorce or annulment in which he disputed the validity of the marriage. He claimed that an Islamic blessing is not recognized as a legal marriage in Tennessee, that the imam was not the official imam of the mosque, and that the imam did not return the marriage license to the county clerk following the ceremony as required by state statutes. The court rejected Aghili's arguments, relying in part on the affidavit of an Islamic Studies expert explaining that anyone with the requisite knowledge of Islamic law is competent to perform religious ceremonies, including marriage.

These cases draw upon a common practice in American courts, which often sustain the validity of marriages despite defects in licensing or solemnization. Legal presumptions in support of marriage take many forms, and marriage validation policies are particularly

124. Id.
125. Id.
126. Id. at 785-86.
127. Id. at 788. Tennessee law permits all regular ministers of any denomination to denomination marriages, and bases this determination on the tenets of the religion involved. Id. at 787. The ruling in Aghili allowed the court to grant a divorce rather than an annulment of the marriage. Ms. Saadatnejadi alleged that immediately after their honeymoon trip, Mr. Aghili told her that he would not record their marriage license unless she agreed to sign another agreement relinquishing the sadaq. After she refused, the parties separated, and several months later Mr. Aghili filed suit seeking a divorce or an annulment. Id. at 786.

128. CLARK, supra note 7, at 40-41. Marriages are sometimes upheld despite the parties' failure to procure any license at all. See Persad v. Balram, 724 N.Y.S.2d 560, 562, 565 (Sup. Ct. 2001); Carabetta v. Carabetta, 438 A.2d 109, 111-13 (Conn. 1980) (finding marriage valid even though the parties never obtained a marriage license).

Note, however, that not all states take this approach to defects in formalization of a marriage. California has codified a common-law presumption of the validity of a ceremonial marriage, but a party may defeat the presumption by proving that no marriage license was obtained. See, e.g., Estate of DePasse, 118 Cal. Rptr. 2d 143, 155 (Ct. App. 2002). See generally CLARK, supra note 7, at 40. A number of states refuse to recognize the authority to solemnize marriages of ministers "ordained" by the Universal Life Church (ULC). See, e.g., Ranieri v. Ranieri, 539 N.Y.S.2d 382, 389 (App. Div. 1989) (refusing to validate a marriage performed by a ULC minister and citing cases).

The practice in England with regard to formalities is much stricter than in the United States. See LOWE & DOUGLAS, supra note 10, at 82-83. Several recent English cases, however, have applied a presumption of the validity of a marriage based on cohabitation and repute. See Chief Adjudication Officer v. Bath, [2000] Fam. 91, at ¶¶ 31-32 (C.A. 1999) (judgment by Evans, L.J.) (requiring "positive, not merely 'clear,' evidence" to rebut the presumption of a valid marriage based on many years of cohabitation); Pazpena De Vire v. Pazpena De Vire, [2001] Fam. 95, at ¶¶ 9-21, 47-49 (Fam. 2000) (finding insufficient evidence to rebut the presumption of a valid marriage based on 35 years of cohabitation); A-M v. A-M, [2001] Fam. 495, at ¶¶ 34-41 (Fam. 2001) (upholding the presumption of mar-
strong where the parties have shared a life together as husband and wife. The tradition of common-law marriage reflects this policy, relying on cohabitation and reputation in the community to uphold the marriages of couples who never attempted to formalize their relationship. In jurisdictions with a less open approach to solemnization of marriages, there is much greater potential for a gap between religious and civil marital status.

For marriages celebrated in another country, the usual conflict of laws rule looks to the law of the place of celebration—the *lex loci contractus* or *lex loci celebrationis*—to determine the validity of the marriage ceremony. American courts sometimes extend the presumption favoring marriage to validate religious or traditional marriages solemnized in another country, despite evidence suggesting that the parties did not properly follow local rules. The general conflict of laws rule is difficult to apply to some marriages that are celebrated with a series of events that may be spread out over several days or even months.
In *Farah v. Farah*, after Ahmed and Naima signed a marriage contract described as a “proxy marriage form” (*nikah*) in Virginia, their representatives concluded their marriage at an Islamic ceremony held in England. A month later, the couple went to Pakistan for three days, where Naima’s father held a formal wedding reception (*rukh-sati*), which “symbolize[d] the sending away of the bride with her husband.” They returned to Virginia and separated a year later. Ahmed challenged the validity of the marriage because it did not comply with the statutory formalities of the Marriage Act of England. Although the trial court agreed with Naima and upheld the marriage, the court of appeals reversed, concluding that the reception had no legal significance in Islamic law and, therefore, that the marriage was not performed in Pakistan and could not be upheld under either Pakistani or Islamic law.

Although *Farah* appears to be a routine application of the traditional choice of law rule, allowing a husband to repudiate his marriage on this basis runs contrary to the strong marriage validation principle in American law. Reliance on the law of England—as the *lex loci*—to invalidate the marriage in circumstances in which the marriage was concluded in three stages—and in three places—seems arbitrary and unnecessary. There are strong social and cultural reasons to recognize and sustain a marriage seriously entered into within the formalities of a different tradition.

Validation principles also come into play where there are challenges to the substantive validity of a marriage rather than to its formalization. Here as well, religious and cultural traditions vary

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135. *Id.* at 627.
136. *Id.* at 628.
137. *Id.*
138. *Id.*
139. *Id.* at 628-29.
140. *Id.* at 627-29. As a result of the ruling, Naima was not entitled to a divorce decree or to equitable distribution of the parties’ property. *Id.* at 630.
141. See *Clark*, *supra* note 7, at 41-44 (citing Albert Ehrenzweig, *Conflict of Laws*, 78-79 (1962)).
142. Arguably, the English law would validate a marriage in this situation. See Taczanowska v. Taczanowski, 2 All E.R. 563, 566, 573 (C.A. 1957) (finding a marriage valid as an English common-law marriage where a couple from Poland was married in Italy in a religious ceremony that did not satisfy either Italian or Polish requirements).
143. See *Clark*, *supra* note 7, at 43 (finding that “very strong public policy in favor of upholding marriage[:] [exists], especially where the parties have behaved in all respects as if married”).
Marriages between uncle and niece or aunt and nephew, prohibited in many American jurisdictions, are sometimes permitted where they are consistent with particular religious or cultural traditions. First cousin marriages, which are prohibited in many states, are permitted across Europe, and certain types of cousin marriage are preferred unions in a range of cultures including many in the Islamic world. Under traditional conflict of laws principles, capacity to marry is governed by the law of the parties' place of domicile (lex domicilii), and foreign marriages intended to evade local marriage prohibitions may be deemed to be void. This rule is subject to exceptions, based on a balancing of the marriage validation principle against the policies embedded in substantive marriage regulations.

Notably, the normative standards set by international human rights conventions do not include marriage restrictions based on consanguinity or affinity. The fact that there is very little consensus about these standards around the world or within the United States suggests that, beyond a core of nearly universal marriage prohibitions, the public policy interests supporting these laws are relatively weak. The fact that these rules are derived primarily from religious and not

144. See supra notes 14-20 and accompanying text (discussing marriage requirements in different religious traditions).


147. CLARK, supra note 7, at 86.

148. Compare Catalano v. Catalano, 170 A.2d 726, 728-29 (Conn. 1961) (finding that an uncle-niece marriage celebrated in Italy was against Connecticut's public policy even though the marriage was valid in Italy), with In re May's Estate, 114 N.E.2d 4, 7 (N.Y. 1953) (upholding an uncle-niece marriage performed in Rhode Island where marriage was valid under the laws of Rhode Island). See generally CLARK, supra note 7, at 85-87; Alan Reed, The Essential Validity of Marriage: The Application of Interest Analysis and Deference to Anglo American Choice of Law Rules, 20 N.Y. L. SCH. J. INT'L & COMP. L. 387, 431-34 (2000) (describing different countries' policies towards enforcement of marriage rules).

149. The Convention on Consent to Marriage, supra note 75, 521 U.N.T.S. at 232-39, prohibits marriages of children and marriages entered into without the full consent of the parties. Id. arts. 1, 2, 521 U.N.T.S. at 234. Under a private international law treaty, contracting states may refuse recognition of marriages when one of the parties was already married or where the spouses are related "by blood or by adoption, in the direct line or as brother and sister." Hague Conference on Private International Law: Convention on Celebration and Recognition of the Validity of Marriages, art. 11, opened for signature, Oct. 1, 1977, 16 I.L.M. 18, 18 [hereinafter Hague Convention on Marriage Validity].

150. OTTENHEIMER, supra note 146, argues that modern genetic evidence establishes that there is no special risk to children of cousin marriages, and suggests that prohibitions on
secular norms further undermines the case for enforcement in situations that present strong reasons to validate a marriage.

Applying similar principles, American and English courts have recognized foreign polygamous marriages for limited purposes if the marriage was valid where celebrated and where the parties were domiciled.151 A polygamous foreign marriage is sufficiently valid to prevent the married party from marrying again in the United States while a previous partner is living and undivorced,152 and may be given effect for purposes such as determining inheritance or worker’s compensation claims.153 In terms of international law, the status of polygamy is more complex. While international agreements that address marriage and family issues do not address polygamy, it is generally understood to violate the guarantees of gender equality in marriage that are expressly articulated in these instruments.154 The United Nations Committee on the Elimination of Discrimination Against Women has argued that polygamous marriages ought to be discouraged and prohibited.155

cousin marriage in the United States can be traced to a policy of promoting assimilation of foreign immigrants.

151. See Clark, supra note 7, at 69-70 (discussing difficulties encountered by persons in polygamous marriages who come to the United States or England); Sooles, supra note 132, at § 13.16; Reed, supra note 148, at 437-44 (discussing the application of American and English law to polygamous marriages); see also Poulter, supra note 15, at 44-65.

152. See In re Sood, 142 N.Y.S.2d 591 (Sup. Ct. 1955) (finding a marriage entered into in India valid so as to refuse to allow the husband to marry a second woman in New York, while his first wife remained living and undivorced in India).


Courts are unlikely to recognize these marriages in either criminal or immigration law. See, e.g., People v. Ezeonu, 588 N.Y.S.2d 116 (Sup. Ct. 1992) (rejecting defendant’s contention that he had a valid polygamous marriage under Nigerian law with the thirteen-year-old complainant in statutory rape prosecution); In re Mujahid, 15 I. & N. Dec. 546, 546-47 (BIA 1976) (polygamous marriage not valid to confer preferential immigration status).


154. See supra notes 71-78 and accompanying text.

155. According to the United Nations Committee on the Elimination of Discrimination Against Women:

Polygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Commit-
Marriage celebration traditions of diverse groups are relatively easy to accommodate within the American legal tradition. Upholding the validity of Hindu or Islamic marriages honors the choices and expectations of the parties and their communities and frequently serves to protect a financially vulnerable spouse who might otherwise be left without a remedy. The same arguments support providing some measure of recognition to marriages, validly contracted in other jurisdictions, that contravene our religiously-derived norms barring consanguineous or polygamous marriage. In a post-colonial, interdependent world, marked by global travel and migration, public policy may no longer demand such a narrow and parochial view of marriage.

The question of whether American family laws should be amended to permit celebration of polygamous marriages raises issues that are beyond the scope of what can be addressed through the common law process described in this Article. Despite its religious origins, the equation of marriage and monogamy is deeply embedded in secular practice and the broad framework of American law. Any legislation respecting polygamy that applied across cultural and religious groups would bring opposing traditions into conflict and raise enormous practical challenges. However, legislation that applied only to particular religious or cultural groups would violate the norms of a universal family law and of separation of church and state. Moreover, because polygamy as it is practiced around the world is almost exclusively the prerogative of men, laws establishing this practice
would contradict norms of gender equality established under both international and domestic law.\textsuperscript{159}

Issues of marital age and consent also raise questions of cultural accommodation; here, as well, important international standards reinforce the limitations of domestic laws. In some traditions, a father or guardian has authority to consent to marriage on behalf of his child or ward.\textsuperscript{160} In this situation, the claims of family and community may be at odds with an individual’s right, recognized by international law, to give “free and full consent to marriage”,\textsuperscript{161} and with a child’s rights to protection and autonomy.\textsuperscript{162} CEDAW explicitly prohibits the betrothal or marriage of children.\textsuperscript{163} In other traditions, family members play a significant role in arranging marriages, but as long as the final decision remains with the prospective bride and groom this practice should be unobjectionable.\textsuperscript{164}

A pluralist approach, which respects cultural traditions such as arranged marriage, should also respect the constraints of legal rules designed to protect an individual’s ultimate right to make this decision.\textsuperscript{165} Marriages that violate the principle of free and full consent are appropriately set aside on the basis of lack of consent or duress.\textsuperscript{166}

\begin{footnotes}
\item[159] See \textit{supra} notes 154-155 and accompanying text.
\item[160] See generally Annie Bunting, \textit{Child Marriage, in 2 Women and International Human Rights Law} 669 (Kelly D. Askin & Dorean M. Koenig eds., 2000) (considering issues surrounding the early marriage of girls and young women in cultures around the world).
\item[161] See \textit{supra} notes 74-75 and accompanying text.
\item[162] See CRC, \textit{supra} note 79 and accompanying text. See generally Bunting, \textit{supra} note 160, at 683-88 (discussing the consequences of marriage for young girls).
\item[163] CEDAW, \textit{supra} note 76, art. 16(2), 1249 U.N.T.S. at 20 (“The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”).
\item[166] See Singh v. Singh, 325 N.Y.S.2d 590, 592 (Sup. Ct. 1971) (annulling an arranged Hindu marriage when the bride had opposed the marriage, refused to perform essential ritual and told the plaintiff she was not his wife); see also Hirani v. Hirani, 4 F.L.R. 232 (C.A. 1982) (annulling marriage because nineteen-year-old’s parents’ threats forced her to agree to marriage). See generally Clark, \textit{supra} note 7, at 103-05 (describing use of duress can be used to invalidate a marriage contract in the United States and England); Poulter, \textit{supra} note 15, at 27-33 (explaining use of duress in invalidating marriages in England).
\end{footnotes}
Marriages in violation of the statutory minimum age, however, present a more complex situation. While such marriages can be annulled, many youthful marriages are legally valid in the United States under minimum age statutes, which vary widely among the states. Some states permit marriages of young teenagers with parental consent and, in some cases, the approval of a court. In other cases involving youthful marriages, particularly when the facts suggest some level of parental coercion, a state may institute child protection proceedings against parents. Courts bear a particularly important responsibility in these cases to balance the claims of tradition against the strong public policies to protect children.

International family law reflects the tension between upholding marriages and enforcing substantive marriage regulations. The United Nations Marriage Convention provides that “[n]o marriage shall be legally entered into by any person under” the specified minimum age for marriage, but it does not invalidate marriages which violate this principle. The Hague Marriage Convention provides a conflict of laws rule based on a broad policy favoring marriage, but permits states to deny recognition in circumstances of polygamy.

167. *E.g.*, B v. L, 168 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1961) (granting annulment where sixteen-year-old was taken to Italy and married there; marriage was not consummated and plaintiff returned to U.S. five weeks later).

168. See generally *Clark*, supra note 7, at 88-98 (discussing history and application of marital age statutes in the United States). Marriages of young American teenagers typically involve a pregnant bride. See Chris Burritt, *N.C. May Raise Minimum Age for Marriages*, ATLANTA J.-CONST., Apr. 26, 2001, at 6A (reporting that more than 200 thirteen-year-olds were married in North Carolina in 1998); Amy Argetsinger, *Assembly Votes to Ban Some Teen Marriages*, WASH. POST, Apr. 11, 1999, at C4, available at 1999 WL 2210413 (discussing Maryland’s decision to raise the minimum age requirement for marriage to fifteen years old). The English common law, which permitted marriage of girls as young as twelve and boys as young as fourteen, was adopted in all of the American colonies. *Grossberg*, supra note 9, at 105-06. During the nineteenth century, many state legislatures raised these ages. *Id.* at 141-44. For a discussion of the current English law, see *Poulter*, supra note 15, at 18-22.


nonage, or lack of free consent.\textsuperscript{171} By considering these disputes on a case-by-case basis, American courts achieve the same sort of balance between the broader principles of family law and the individual circumstances of particular families. Courts extend recognition more readily to marriages that have given rise to settled expectations between the parties and their families, even where those marriages were solemnized within a different tradition or in a distant time or place.

\textbf{B. Religion and Divorce}

After a century of social and legal change, access to divorce today has come to be seen as a civil right.\textsuperscript{172} As courts and legislatures have liberalized divorce laws, they have pushed aside the religious objections of earlier eras, and today either husband or wife can readily secure a civil divorce despite the other’s opposition.\textsuperscript{173} In the Islamic and Jewish traditions, which have tolerated divorce for many centuries, divorce has been a husband’s prerogative.\textsuperscript{174} Within these traditions, there are protections for wives against the moral and financial hardships of divorce.\textsuperscript{175} These protections are different from those which have developed in the American system, however, and reconciling different cultural approaches to divorce has proved to be a difficult project.

\textit{1. Marital Agreements.}—In both Islamic and Jewish practice, marriage has a strong contractual dimension. One aspect of this practice is a written agreement, typically concluded as part of the formalization of the marriage, which includes provisions for payments to the wife in the event of divorce.\textsuperscript{176} The enforceability of these agreements in civil

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\item \textsuperscript{171} Hague Convention on Marriage Validity, \textit{supra} note 149, art. 11, 16 I.L.M. at 18.
\item \textsuperscript{172} \textit{See} Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971) (describing divorce as “the adjustment of a fundamental human relationship” and holding that mandatory filing fees violate due process rights of those who cannot afford to pay).
\item \textsuperscript{173} \textit{See}, e.g., Sharma v. Sharma, 667 P.2d 395 (Kan. Ct. App. 1983). The \textit{Sharma} court sustained a divorce decree despite the wife’s objection that their Hindu religion did not recognize divorce. \textit{Id.} at 396. The wife claimed that “if she returns to India as a divorced woman, her family and friends will treat her as though she were dead.” \textit{Id.} at 395.
\item \textsuperscript{174} \textit{See} Wegner, \textit{supra} note 68, at 15-18.
\item \textsuperscript{175} \textit{Id.} at 21-22.
\item \textsuperscript{176} \textit{Id.} Historically, this payment was made to the bride’s father or guardian. \textit{Id.} In many Jewish communities, this amount is now a small token payment. Irving Breitowitz, \textit{The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment}, 51 Md. L. REV. 312, 371 (1992), but see \textit{In re Marriage of Noghrey} discussed \textit{infra}. In contemporary settings, the payment specified in Islamic marital agreements may at times also be intended to be symbolic. Lindsey E. Blenkhorn, \textit{Note}, \textit{Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women}, 76 S. CAL. L. REV. 189, 204 (2002).
divorce proceedings is a recurring question on which American courts have reached notably different conclusions. In three separate decisions, the California Court of Appeals has denied enforcement in a variety of circumstances on the basis of public policy. In the first of these cases, *In re Marriage of Noghrey*, a wife sought to enforce a written promise made by her husband immediately before their marriage to settle on her, in the event of a divorce, his house in Sunnyvale, California and "$500,000.00 or one-half of [his] assets, whichever [was] greater." The court described this as a Jewish marriage contract, or *kethuba*, traditionally intended to provide economic security for the wife because the husband was entitled to divorce her at will. At trial, most of the evidence concerned whether the husband had been coerced into signing the agreement, with the trial court concluding that the agreement was validly made. On appeal, however, the court refused to enforce the agreement, based on the rule that premarital agreements that encourage or promote divorce are against public policy. Noting the wife's testimony that neither she nor her parents possessed great wealth, the court 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."

Several years later, the court reached a similar result in *In re Marriage of Dajani*. *Dajani* involved an Islamic proxy marriage contract that provided for payment to the wife in the event of the husband's death or a divorce of a dower with a value of 5000 Jordanian dinars, equivalent to about $1700. The husband offered testimony of an imam as an expert on Islam, that a wife who initiated divorce proceedings forfeited the right to her marriage payment. The trial court accepted this view, concluding that the dowry agreement was valid but

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178. *Id.* at 154.
179. *Id.* at 155 n.2.
180. *Id.* at 156-57.
181. *Id.* at 155-57. The court recognized that the agreement would discourage the husband from seeking a divorce, but concluded that it would have the opposite effect on the wife. *Id.* at 156. For a criticism of the court's reasoning in *Noghrey*, see Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 *San Diego L. Rev.* 635, 653-56 (1997).
182. *Id.* at 157. The fact that the wife filed for divorce after only seven-and-a-half months of marriage certainly did not help her case. *Id.* at 154.
183. 251 Cal. Rptr. 871 (Ct. App. 1988).
184. See *id.* at 871 & n.3.
185. *Id.* at 871-72.
that the wife could not enforce the agreement because she had filed for divorce.\textsuperscript{186} Citing Noghrey, the court concluded in dicta that if the wife’s interpretation of the agreement was correct it would be unenforceable in any event because it encouraged “profiteering by divorce.”\textsuperscript{187} Although the court did not acknowledge that the amounts in dispute in Noghrey and Dajani were dramatically different, a more recent decision from the court rejected the holding in Dajani on the basis that “[a] dowry worth only $1,700, payable upon dissolution, is insufficient to seriously jeopardize a viable marriage.”\textsuperscript{188}

On the facts of both Noghrey and Dajani, enforcement of the marital agreement would have benefited the wife, and commentators have criticized each of these cases for denying enforcement.\textsuperscript{189} In a third case, however, the wife opposed enforcement of the agreement. \textit{In re Marriage of Shaban}\textsuperscript{190} considered the husband’s claim for enforcement of an agreement, entered into by the parties at the time of their marriage in Egypt in 1974, which provided for the wife to recover a marriage payment, also known as a \textit{mahr} or \textit{sadaq}, of 500 Egyptian pounds.\textsuperscript{191} At the time of their divorce in 1998, the parties had lived in the United States for seventeen years.\textsuperscript{192} The \textit{mahr} was worth about $30, while the marital estate had a value of approximately three million dollars.\textsuperscript{193}

The court in Shaban considered several English translations of the marriage document, which recited the amount of the \textit{mahr} but had no substantive terms addressing marital property rights or property division in the event of divorce.\textsuperscript{194} The husband attempted to introduce

\textsuperscript{186} Id. at 872.
\textsuperscript{187} Id. at 872-73. For a criticism of the court’s reasoning in Dajani, see Ghada G. Qaisi, Note, \textit{Religious Marriage Contracts: Judicial Enforcement of Mehr Agreements in American Courts}, 15 J.L. & RELIGION 67, 77-80 (2000-01).
\textsuperscript{188} In re Marriage of Bellio, 129 Cal. Rptr. 2d 556, 559 (Ct. App. 2003). In Bellio, the court enforced a secular prenuptial agreement requiring the husband to pay the wife $100,000 upon divorce. \textit{Id.} at 559-60. The court found that the provision did not violate public policy, because its purpose was “to ensure that, if husband died or the marriage was dissolved, wife would be no worse off than she would have been had she remained single.” \textit{Id.} at 560.
\textsuperscript{189} See Sanchez, supra note 181, at 655-56 (criticizing the Noghrey decision); Qaisi, supra note 187, at 77-80 (criticizing the Dajani decision). \textit{But see} Blenkhorn, supra note 176, at 206-07 (analyzing the merits of the Noghrey and Dajani decisions).
\textsuperscript{190} 105 Cal. Rptr. 2d 863 (Ct. App. 2001).
\textsuperscript{191} Id. at 865-66.
\textsuperscript{192} Id. at 865.
\textsuperscript{193} Id. at 866, 870; see $30 Dowry No Prenup, Appellate Court Rules, SAN DIEGO UNION-TRIB., Apr. 14, 2001, at A3, available at 2001 WL 6454416 (reporting that the husband’s estate in Shaban was estimated to be three million dollars).
\textsuperscript{194} Shaban, 105 Cal. Rptr. 2d at 865-67.
as parol evidence the testimony of an expert witness in order to estab-
lish that the language of the agreement "signified a written intention
by the parties to have the property relations governed by 'Islamic law,'
which provides that the earnings and accumulations of each party dur-
ing a marriage remain that party's separate property." 195 The trial
court refused to allow the testimony, concluding that the document
was not a binding prenuptial agreement, and proceeded to apply Cali-
ifornia community property law to divide the estate. 196 The California
Court of Appeal affirmed, noting that "[a]n 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." 197

Other courts have been more willing to enforce terms of Islamic
that a contract for a mahr was enforceable in a divorce action despite
the fact that the parties entered into the agreement under Islamic law
as a part of a religious ceremony. 199 In Akileh v. Elchahal, 200 a Florida
court allowed a wife to recover a sadaq of $50,000, which was promised
in an agreement made between the groom and the wife's father prior
to the marriage. 201 At trial, there was contradictory testimony con-
cerning the circumstances in which a wife forfeits the right to her
sadaq, and the trial court concluded there had been no meeting of the
minds on the terms of the agreement. 202 The appellate court re-

195. Id. at 866-67. As the Court noted, "In practical effect, that would mean that there
would be no community interest in Ahmad's medical practice or retirement accounts." Id.
196. Id. at 865.
197. Id. at 865. The court noted in a footnote that there are at least four different
schools of interpretation of Islamic law, and that courts in England have rejected any at-
tempt to give effect to Islamic personal law because of the variety of these competing
approaches. Id. at 868 n.4. In addition, the court held that the writing must state its terms in
greater certainty in order to satisfy the statute of frauds. Id. at 868; see also Chaudhary v. Ali,
bond's request to enforce a marriage contract or nikah nama that did not make "fair and
reasonable provision" for the spouse or provide full disclosure of the husband's assets)
(internal quotation marks omitted); see also Habibi-Fahnrich v. Fahnrich, No. 46186/193,
1995 WL 507388, at *3 (N.Y. Sup. Ct. July 10, 1995) (holding that terms of sadaq were not
sufficiently definite to enforce).
199. Id. at 124. Evidently the wife, described as "defendant" in the opinion, was not the
party filing for divorce in this case.
201. Id. at 247, 249.
202. Id. at 247-48. The claim for divorce was filed by the wife, who testified that a wife
forfeited her marriage payment only if she cheated on her husband. Id. The wife's expert
testified that her right to receive the sadaq was not negated if she filed for divorce, and her
father testified that a wife had an absolute right to request the payment from her husband
versed, however, holding that the parties had understood and agreed to the essential terms of the contract, and remanded the case for entry of judgment in the wife's favor.203

In a New Jersey case, Odatalla v. Odatalla,204 the court ordered the husband to pay a mahr of $10,000.205 The evidence included a videotape of the marriage ceremony that showed the families of the bride and groom negotiating and signing the mahr agreement.206 Rejecting the husband's Establishment Clause defense, the court noted that "the challenge faced by our courts today is in keeping abreast of the evolution of our community from a mostly homogenous group of religiously and ethnically similar members to today's diverse community."207 The court held that "[a]greements, though arrived at as part of a religious ceremony of any particular faith," are enforceable if they are (1) "capable of specific performance under 'neutral principles of law'" and (2) if "the agreement in question meets the state's standards for those 'neutral principles of law.'"208 Finding that "all of the essential elements of a contract [were] present," the court approved enforcement of the mahr.209

Courts in other countries have also debated the enforceability of a sadaq or mahr agreement. A 1965 English case allowed enforcement of an agreement to pay mahr.

As a matter of policy, I would incline to the view that, there being now so many Mohammedans resident in this country, it is better that the court should recognise in favour of women who have come here as a result of a Mohammedan marriage the right to obtain from their husband what was promised to them by enforcing the contract and payment of what was so promised, than that they should be bereft of those rights and receive no assistance from the English courts.210

whenever she desired, but especially in the event of a divorce. Id. The husband testified that his understanding, based on his sister's experience, was that a wife was not entitled to a sadaq if she sought a divorce, unless she had been abused. Id. at 248.

203. Id. at 249.
205. Id. at 98.
206. Id. at 95.
207. Id. at 96.
208. Id. at 98; see also id. at 95-96 (citing Jones v. Wolf, 44 U.S. 595 (1979)).
209. Id. at 98. The husband also argued that the term "postponed" concerning the balance due under the agreement was too vague to be enforced; the court approved the use of parol evidence to determine the meaning of this term. Id.
210. Shahnaz v. Rizwan, 1 Q.B. 590, 401-02 (1964); see Poulter, supra note 15, at 129-30 (discussing English courts' power to enforce these agreements); Pearl & Menski, supra note 48, at 232-34 (discussing English Mahr cases).
More recently, a Canadian court declined to enforce an Islamic marriage contract that provided for a $30,000 deferred mahr payment.\textsuperscript{211} The court found that enforcement of the mahr was "fundamentally an Islamic religious matter" and "unsuitable for adjudication in the civil courts."\textsuperscript{212} The court's conclusion seems to have been influenced by the testimony of several experts that a Muslim wife could lose her right to mahr in certain circumstances, and that disputes over the obligation of mahr should be resolved according to Islamic religious principles.\textsuperscript{213}

Courts deciding these cases struggle with problems of cultural and legal context. The California opinions note that in Islamic tradition a husband has the right to divorce his wife unilaterally, while a wife's right to divorce is far more limited.\textsuperscript{214} Traditionally, the mahr or sadaq served as financial protection for the wife in the event the husband exercised this right.\textsuperscript{215} Taken out of their original context, the agreements present a dilemma. To the extent they are analogous to the premarital agreements known in American law, courts are understandably inclined to ask about disclosure, parol evidence, and the statute of frauds.\textsuperscript{216} But, to the extent these are subject to Islamic law, they are not like other marital agreements. Thus, courts are understandably hesitant to interpret or enforce them, particularly if the experts called by the parties themselves have different views of what Islamic law requires in a given situation.\textsuperscript{217}

In those countries with systems of Islamic personal law, a religious court can determine whether a wife is entitled to divorce, whether payment of mahr is required, and what other remedies may be appropriate. In a state like California, however, there is nothing to prevent a wife from seeking her own unilateral divorce, and no recognized


\textsuperscript{212} Kaddoura, 168 D.L.R. (4th) at 510-11.

\textsuperscript{213} Id. at 507-08. The marriage, which lasted only eighteen months, involved a young couple who turned out to have "fairly incompatible personalities" and no substantial income or property. Id. at 505. The husband did make a $5000 mahr payment due before the marriage; the couple used the money for a honeymoon trip to Jamaica. Id. at 509.

\textsuperscript{214} See In re Marriage of Noghrey, 215 Cal. Rptr. 153, 155 n.2 (Ct. App. 1985) (discussing ketubah as a device to provide economic security for the wife); see also In re Marriage of Dajani, 251 Cal. Rptr. 871, 872 (1988) (citing Noghrey).

\textsuperscript{215} Noghrey, 215 Cal. Rptr. at 155 n.2.

\textsuperscript{216} E.g., Akileh v. Elchalah, 666 So. 2d 246, 248-49 (Fla. Dist. Ct. App. 1996) (discussing a premarital agreement in contract terms).

\textsuperscript{217} Note the court's observation in Shaban that the term "Islamic law" is uncertain given the different schools of interpretation of Islamic law and the further variations among different Islamic nations. In re Marriage of Shaban, 105 Cal. Rptr. 2d 863, 868 n.4 (Ct. App. 2001).
source of Islamic legal authority to evaluate her claim for *mahr* or *sadaq*. In the United States, where a spouse may be entitled to support orders and marital or community property division under state law, it is not easy to determine whether enforcement of *mahr* or *sadaq* should substitute for these remedies.218

Contemporary Islamic marital agreements often reflect new expectations and circumstances,219 and Muslim communities in the United States actively debate how to adapt its traditions to the American legal environment.220 This fits within a larger trend in contemporary Islamic societies of using stipulations in marriage contracts to protect wives against various contingencies.221 One option is to draft agreements that are a better “fit” with American law;222 another is to

218. See Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, Part III B, at http://www.law.emory.edu/IFL/cases/USA.htm (last visited Mar. 5, 2004) (describing the intersection of Islamic law and American family law as it relates to *mahr* and *sadaq*). Islamic law may also provide additional remedies, including support during a three-month period after *talaq* is pronounced, and possibly a claim for compensation for services provided to the husband during the marriage. See id. at Part II E (describing historical compensation arrangements in Islamic law); see also PEARL & MENSKI, supra note 48, at 190-228 (discussing *mahr* and other remedies under South Asian Muslim law).

219. For example, the agreement in the *Aghili* case provided that the husband would not marry anyone else if the parties returned to live in Iran. *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 786 (Tenn. Ct. App. 1997), discussed supra notes 122-127 and accompanying text.


expand alternatives for religious marital dispute resolution. Writing about institutions such as the Islamic Shari’a Council in Britain, David Pearl and Werner Menski have described “a new form of shari’a, English Muslim law or angrezi shariat, which remains officially unrecognized by the state but is now increasingly in evidence as a dominant legal force within the various Muslim communities in Britain.” This new English Muslim law includes informal dispute resolution in divorce cases. These options may be especially important for women, who are vulnerable in divorce both when the mahr or sadaq is not enforceable and when a marital agreement is used to bypass the protections of the civil divorce law. It will be important to determine, however, how women are treated in these tribunals.

Taken together, these cases reject the view that enforcement of a mahr or sadaq agreement necessarily entangles the courts in a religious question or violates public policy. At one end of the spectrum, the Dajani case suggests that an extremely generous settlement, far in excess of what the state’s community property rules would provide, may be unenforceable under ordinary rules of public policy. At the other end of the continuum, the Shaban case suggests that the attempt to drastically curtail a spouse’s financial rights under the general divorce or inheritance laws will not prevail unless the parties clearly express this limitation and ensure that the agreement complies fully with

223. See, e.g., Jabri V. Qaddura, 108 S.W.3d 404 (Tex. Ct. App. 2003) (sustaining parties’ agreement to arbitrate all issues in their divorce before the Texas Islamic Court in Richardson, Tex); see Quraishi & Syeed-Miller, supra note 218, at Part IV (advocating the use of local Muslim tribunals to resolve family disputes).

224. Pearl & Menski, supra note 48, at 58.

225. Id.

226. The American case law discussed here suggests that courts are more readily prepared to enforce a mahr or sadaq agreement when a husband is seeking divorce and enforcement will protect rather than harm the wife. The problems of context are particularly severe in a case like Shaban, where the parties’ domicile and circumstances have changed dramatically since making the agreement. See In re Marriage of Shaban, 105 Cal. Rptr. 2d 863, 870 (Ct. App. 2001) (ruling for the divorced wife when the estate had grown to approximately $3 million).

227. See Lucy Carroll, Muslim Women and ‘Islamic Divorce’ in England, 17 J. MUSLIM MINORITY AFFAIRS 97 (1997) (arguing that the Islamic Sahria Council has imposed an unnecessarily harsh interpretation of Islamic law on women in divorce cases); see also the discussion infra at notes 267-277 and accompanying text (discussing experiences of Jewish wives in rabbinic tribunals).

228. In re Marriage of Dajani, 251 Cal. Rptr. 871, 872-73 (Ct. App. 1988). Enforcement may be more likely when there is a clear rationale for requiring a substantial payment. See, e.g., In re Marriage of Bellio, 129 Cal. Rptr. 2d 556, 560 (Ct. App. 2003), discussed supra note 188.
the legal requirements for enforcing prenuptial agreements. Between these two extremes, courts determining whether to enforce payment of *mahr* or *sadaq* look to the parties' understanding of their agreement at the time it was signed. Although expert testimony on the religious and cultural traditions involved may be helpful to the court, the judicial basis for enforcement lies in the secular law of contract and is not a question of religious law.

These principles define useful parameters for families who wish to conclude marital agreements that will be legally enforceable in American courts. A couple who intends the marriage payment to be extremely generous might look to their tradition for other devices to achieve this end. A couple who wishes to opt out of the secular marital property and alimony laws might prepare a different and more explicit agreement. In order to achieve the goal of secular enforceability, families should also consider the full range of contract law issues, including the statute of frauds, protections against duress and undue influence, and the financial disclosure requirements that are routinely applied to premarital waivers of support and property rights in the United States.


230. *E.g. Akileh*, 666 So. 2d at 248-49 (upholding a *sadaq* based on contractual principles where the husband did not make known his "unique understanding" of the agreement at the time of negotiations).

231. *See id.* at 247, 249 (using contractual principles to reach a decision—rather than the testimony of the plaintiff's expert).

232. This might be achieved through a larger gift at the time of the marriage, treated as the prompt portion of the *mahr*, which would no longer be subject to legal dispute at the time of a divorce.


234. *See Clark, supra* note 7, at 1-10 (outlining basic contract principles applied to premarital agreement); *see also* Unif. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001). Some form of the Act is in effect in 25 states and the District of Columbia. *Id.* In California, the Act was recently amended to require that a party who waives spousal support must be represented by independent counsel in order for the waiver to be effective and that a party against whom enforcement is sought must have had at least seven days between the time the agreement is presented and when it is signed. CAL. FAM. CODE § 1615(c)(1)-(2) (West 2004).

Conforming to the secular requirements for premarital agreements may require modification of some traditions, such as the custom of having the contract executed by the groom and the bride's father. *See, e.g.*, Atassi v. Atassi, 451 S.E.2d 371, 376 (N.C. Ct. App. 1995) (declining to enforce a Syrian premarital agreement over the wife's objections,
2. Religious Divorce.—In Jewish tradition, a divorce is concluded when a husband appears before a rabbinic court or bet din\textsuperscript{235} and delivers a divorce document known as a get to his wife.\textsuperscript{236} Without completion of this process, neither husband nor wife is free to remarry under Jewish law, although the consequences of this are significantly more serious for a woman, who is known as an agunah.\textsuperscript{237} Jewish law requires that the get be given and received freely: when either spouse refuses to cooperate, there are few sanctions the bet din can impose.\textsuperscript{238} Rabbinic authorities around the world have struggled for generations with the difficulties this presents for the agunah, a woman who remains "chained" to her former husband.\textsuperscript{239}

In the United States and Europe today, divorce is within the jurisdiction of civil courts, and rabbinic tribunals address only its religious

\textsuperscript{235} This is also transliterated as beth din or bais din. See Breitowitz, supra note 176, at 326-27. Halacha is the system of Jewish law that extends to both religious and secular matters. Id. at 318 n.17.

\textsuperscript{236} The get is described in Deuteronomy 24:1: "When a man takes a wife and marries her, if it then comes to pass that she finds no favor in his eyes for he has found something unseemly in her, he shall write her a document of divorce and give it to her hand, and send her out of his house." Breitowitz, supra note 176, at 313 n.2 (quoting Deuteronomy 24:1); see id. at 319-21 (describing the ceremony in which a get is executed).

Breitowitz explains that while Biblical and Talmudic law permitted polygamy and a husband's unilateral divorce, two decrees attributed to Rabbi Gershom of Mainz in the Tenth Century abolished polygamy and prohibited a husband from divorcing his wife without her consent in most circumstances. Id. at 322-23. The contemporary get process reflects this mutual consent requirement. Id. Although the bet din does not issue or decree the divorce, the formalities of drafting and delivering the document cannot practically be accomplished without rabbinical supervision. Id. at 320.

\textsuperscript{237} Id. at 313. Under Jewish law, the agunah commits adultery if she cohabits with another man, and any child she bears carries a stigma of illegitimacy (mamzer) that continues for generations and bars the child and his or her descendants from marrying other Jews. Id. at 323-24 & n.48. A married man is not guilty of adultery if he cohabits with another woman, and any children from such a relationship are not mamzerim. Id. at 316-18, 322-26, 324; see also Lisa Zornberg, Beyond the Constitution: Is the New York Get Legislation Good Law? 15 PACER L. REV. 703, 704-05, 713-20 (1995). Zornberg describes a number of organizations formed to address the get/agunah problem and assist Jewish women in these different circumstances.

\textsuperscript{238} Breitowitz, supra note 176, at 329-38. A get given under the compulsion of a civil court order is invalid under Jewish law. See id. at 359-61. Rabbinic courts have limited sanctions they can impose on a recalcitrant husband. See id. at 329-38; Zornberg, supra note 237, at 709-13.

\textsuperscript{239} Zornberg, supra note 237, at 705. In the aftermath of the September 11 attacks in New York, one additional difficulty for Jewish women who lost spouses was the prospect of being agunah and unable to remarry without sufficient proof under religious law to establish their husbands' death. Joshua Harris Prager, For Some Jews, 'Missing' Is Not 'Presumed Dead', WALL ST. J., Oct. 11, 2001, at B1, available at 2001 WL-WSJ 2878260.
For observant Jews, however, divorce requires both types of proceedings. Courts in the United States and other countries have considered the problem of the agunah in civil divorce cases, usually when a husband has refused to deliver a get in order to coerce his wife into making significant concessions on other disputed matters. In a number of these cases, courts have relied on contract theories as a basis for ordering a recalcitrant spouse to appear before the bet din to deliver or accept a get. When the parties’ separation agreement includes express promises regarding a get, courts have ordered specific performance. In other cases, courts have held that the parties’ execution of a religious premarital agreement, or ketubah, reciting the words “according to the law of Moses and Israel,” gave rise to an implied promise to grant or receive a get in the event of a civil divorce. These are controversial decisions, however, and other courts have refused to grant relief in these cases on First Amendment grounds.

240. Novak, supra note 60, at 1065-68.
241. See Michael Freeman, Law, Religion and the State: The Get Revisited, in Families Across Frontiers, supra note 50, at 361, 365-72 (describing get cases from secular courts in England, the United States, Australia, Germany, France, and the Netherlands).
244. E.g., In re Marriage of Goldman, 554 N.E.2d 1016 (Ill. Ct. App. 1990); Minkin v. Minkin, 434 A.2d 665 (N.J. Super. Ct. 1981); Stern v. Stern, 5 Fam. L. Rep. 2810 (Sup. Ct. N.Y. County 1979). There is a strong dissent in Goldman, 554 N.E.2d at 1025 (Johnson, J., dissenting). See generally Breitowitz, supra note 176, at 343-46. More recently, the court in Mayer-Kolker v. Kolker, 819 A.2d 17, 20-21 (N.J. Super. Ct. 2003) held that it could not determine legal effect of ketuba where there was no evidence as to the precise terms of the agreement or to what Mosaic law would require if it were applied to parties’ dispute.

The implied contract approach raises substantial contract law issues in addition to the first amendment concerns. See Breitowitz, supra note 176, at 346-50. Of particular concern in Goldman is the fact that husband and wife, who were married in a Reconstructionist Jewish ceremony but signed an Orthodox ketuba purchased at a bookstore, disputed whether they had intended the document to be legally binding and whether they intended to have their marriage governed by the strict Orthodox tradition. Although neither was Orthodox at the time of their marriage, the wife became Orthodox several years later. Husband testified that he viewed the ketuba as merely “poetry or art,” and that he was a liberal Jew and “abhorred the practices of Orthodox Jews, whom he characterized as “discriminatory, repulsive, and ‘antimodern’.” Goldman, 554 N.E.2d at 1023. The court concluded however, that his dislike of Orthodox tradition did not amount to a “religious belief” and that the order to appear before the bet din did not require him to “engage in any act of worship or to express any religious belief.” Id. at 1023-24.
grounds. The problem is compounded by Jewish law, which holds that a get entered under the compulsion of a civil court decree is invalid because a get must be given voluntarily.

In response to these difficulties, the ketubah used by the Conservative movement since the 1950s has included specific language placing jurisdiction over marital disputes with a bet din. In Avitzur v. Avitzur, after a husband refused to appear before the bet din or to provide his wife with a get, she sought specific performance of this term in their ketubah. The husband objected on the basis that an order enforcing the agreement would "violate the constitutional prohibition against excessive entanglement between church and State, because the court must necessarily intrude upon matters of religious doctrine and practice." The New York Court of Appeals disagreed, concluding that the case could "be decided solely upon the application of neutral principles of contract law, without reference to any religious principle." The court described the provisions of the ketubah as "nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum" and concluded that "the contractual obligation plaintiff seeks to enforce is closely analogous to


246. Breitowitz, supra note 176, at 359-61 ("The key problem in the prenuptial agreement, therefore, is halachic rather than secular in nature, and there is little the current legal system can do to resolve it.").

247. See id. at 361.


249. Id. at 137. The language of their agreement was as follows:

[W]e, the bride and bridegroom . . . hereby agree to recognize the Beth Din of the Rabbinical Assembly and the Jewish Theological Seminary of America or its duly appointed representatives, as having authority to counsel us in the light of Jewish tradition which requires husband and wife to give each other complete love and devotion, and to summon either party at the request of the other, in order to enable the party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime. We authorize the Beth Din to impose such terms of compensation as it may see fit for failure to respond to its summons or to carry out its decision.

Id. at 137 (alteration in original) (internal quotation marks omitted).

250. Id. at 138.

251. Id. But see id. at 139 (Jones, J., dissenting) (arguing against judicial intervention in religious issues).
an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties."

Taking both constitutional and religious law into account, Irving Breitowitz concludes that *Avitzur* is "an imperfect solution" to the agunah problem, noting that even a *bet din* cannot compel a "determined *get* resister" to do the right thing. He argues that the *Avitzur* approach can be successful in aiding agunah only in combination with a reconsideration of the grounds on which a *bet din* can order a divorce under Jewish law. A solution has not been forthcoming, however. Legal authority is not centralized within the Jewish religious community, and the consequences of an invalid *get* are very serious.

Within the Orthodox community, the favored approach to this dilemma is legislation intended to prevent a party from securing a civil divorce until a *get* has been delivered. The *get* law adopted in New York in 1979 with broad support from the Orthodox community requires that before a court may grant a divorce or annulment to a petitioner whose marriage was solemnized in the state by a religious official, the petitioner must provide a sworn statement that he or she has "taken all steps solely within his or her power" to remove any religious barriers to the other party's remarriage. Although this solution addresses the important concerns under Jewish law, it is subject

252. *Id.* at 138. On the First Amendment issues with the *Avitzur* approach, see Breitowitz, *supra* note 176, at 361-70, and Greenawalt, *supra* note 245, at 819-22. In First Amendment terms, the *mahr* cases present less difficulty than the *get* cases because the payment of money is not seen as a religious act. There is disagreement among cases and commentators as to whether the act of delivering a *get* is a religious act, and whether a reference for arbitration to a *bet din* involves the secular court in religious law. See, e.g., Minkin v. Minkin, 434 A.2d 665, 667-68 (N.J. Super. Ct. Ch. Div. 1981) (finding that delivery of a *get* is not a religious act); but see Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 384-87 (1999) (noting that the view that obtaining a *get* is secular is not "universally accepted").


254. *Id.* at 370. He suggests another technique for protecting wives: the possibility of prenuptial agreements that provide for generous amounts of financial support to be paid to the wife after a civil divorce until a *get* has been granted. *Id.* at 373.


to some of the same constitutional questions as the contractual approaches to the problem.\textsuperscript{258} The New York get law may be useful in preventing a husband from civilly divorcing his wife without also giving her a religious divorce. However, it does not assist wives who file for a civil divorce and want their husbands' cooperation in securing a get.\textsuperscript{259} Amendments to the New York statutes enacted in 1992 went a step further, permitting the civil courts to take religious impediments to remarriage into account in determining the financial incidents of divorce.\textsuperscript{260} The 1992 legislation, however, has been very controversial for the Orthodox community, which is divided over the question whether a get granted in a case subject to this statute has been compelled and is, therefore, invalid under the religious law.\textsuperscript{261} As commentators have observed, this result is a problem, both because it entangles the state in a disputed question of religious law\textsuperscript{262} and because it discourages observant Jewish women from pursuing divorce proceedings in the civil courts.\textsuperscript{263}

Each of these attempts to unwind the tangled threads of religious and secular divorce law has proved unsatisfactory. The most promising development has been a strategy developed within the Jewish community, built on the court's holding in \textit{Avitzur}. Orthodox rabbis are now encouraging couples to execute agreements to arbitrate marital disputes before a bet din, in a premarital agreement that is separate...

\begin{itemize}
\item \textsuperscript{258} Many scholars have debated the First Amendment issues posed by the New York statute, including Breitowitz, supra note 176, at 385-393, and Greenawalt, supra note 245, at 823-834. Various authorities discuss whether delivery of a get is a secular or religious act. E.g., Breitowitz, supra note 174, at 357-59 and 394-96; see also Greenawalt, supra note 245, at 812-816. Both writers conclude that the free exercise question is problematic in cases in which an individual's refusal to participate in the get process is conscientious. Breitowitz, supra note 176, at 395-96; Greenawalt, supra note 245, at 829.
\item \textsuperscript{259} For an analysis of the limitations of the 1983 New York get statute, see Zornberg, supra note 237, at 749-52. Jewish law limits the grounds on which a wife may be granted a divorce; the justifications include impotence, failure to support financially, refusal to live in the same home, physical or verbal abuse, persistent infidelity and a few other grounds. Breitowitz, supra note 176, at 333 n.80.
\item \textsuperscript{261} Zornberg, supra note 237, at 733-36 and 754, 756-58. Zornberg reports that the 1992 law was passed unanimously by the New York legislature in response to the Schwartz case.
\item \textsuperscript{262} Id. at 764-65; see also Greenawalt, supra note 245, at 835 ("A court should consider the claim that a statute undermines religious law in this way, but it cannot enter the thicket of debatable issues of Jewish law.").
\item \textsuperscript{263} Zornberg, supra note 237, at 762. Traditional Jewish law requires individuals to submit their civil disputes to a bet din. Breitowitz, supra note 176, at 326. Zornberg, supra note 237, at 765 n. 281.
\end{itemize}
from the *ketubah*.

These agreements are drafted carefully in order to ensure that secular courts will give them legal effect.

With an arbitration agreement, the parties begin in the *bet din*, and then present the tribunal’s orders to the civil divorce court for confirmation as an arbitration award.

Conferring jurisdiction over a divorce on the *bet din* helps to resolve the problem of the *get* and the *agunah*, but the case law suggests that it creates other risks. Wives sometimes face significant procedural or substantive disadvantages in proceedings before a *bet din*. Traditional gender roles and expectations may play a powerful role in this setting. Because it is very important within the traditional Jewish community that divorced women receive a *get*, and because the *bet din* cannot force the husband to provide one, a wife may be pressured to agree to her husband’s terms.

Applying Jewish law to the substantive terms of a divorce further disadvantages wives, because the tradition does not provide for property division or for spousal support after a divorce is concluded.

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265. *See* Stern, *supra* note 264. In some of the cases discussed *infra*, the parties signed an agreement to arbitrate before the *bet din* after disputes arose within their marriage.

266. In some contexts, Jewish law permits the secular courts to use coercion to enforce the orders of a *bet din*. See Novak, *supra* note 60, at 1067; Breitowitz, *supra* note 176, at 367-69.

267. This is not to suggest that these disadvantage issues are always present. There are a wide variety of *batei din*, some constituted for a particular proceeding and others which are standing tribunals affiliated with one of the major Jewish groups or institutions. See Breitowitz, *supra* note 176, at 326-30.

268. *See* Shachar, *supra* note 48, at 57-61 (describing the *agunah* problem and special pressures on women in the Orthodox Jewish tradition).

269. *E.g.*, Perl v. Perl, 512 N.Y.S.2d 372, 374 (App. Div. 1987) (considering a claim in which a *get* was used as leverage against the wife).

270. *See* Breitowitz, *supra* note 176, at 371. A traditional *ketubah* requires a husband who divorces his wife to make a one-time payment of “200 zuz,” which translates to a value of about $320. *Id.* at 371 & n.260. A husband who has not given his wife a *get* may be compelled to pay spousal support. *Id.* at 371-72.
Secular courts have considered allegations of duress and over-reaching in cases brought to a bet din, and have refused to enforce arbitration agreements signed under various types of pressure. The courts also utilize state arbitration laws to maintain some measure of supervision and enforce certain minimum requirements of fairness and due process. In the family law setting, courts generally will not confirm arbitration awards concerning child support or custody without an independent consideration of the best interests of the children. Thus, in Stein v. Stein, the court considered a case in which a bet din had awarded custody of both children and all marital assets to the husband, ordered the wife not to move outside New York City and

In response to the limitations of religious law, the agreements described in note 264 supra include a provision that the bet din will apply the state’s equitable distribution laws. See also Greenberg-Kobrin, supra note 264, at 393 n.230 (stating that bet din might apply secular law to issues of property division and spousal support).

271. See Segal v. Segal, 650 A.2d 996, 997-99 (N.J. Super. Ct. App. Div. 1994) (finding duress where a wife signed a marital settlement in response to extreme pressures; evidence also suggested that bet din had not undertaken to distribute the parties’ assets equitably but had simply awarded the husband everything he sought); Golding v. Golding, 581 N.Y.S.2d 4, 6 (App. Div. 1992) (finding duress where the husband threatened not to grant a get unless the wife gave him everything he wanted; rabbis acted merely as go-betweens and not arbitrators); Perl, 512 N.Y.S.2d at 374 (allowing action to set aside divorce stipulation based on husband’s coercion and objective unfairness of agreement). But see Greenberg v. Greenberg, 656 N.Y.S.2d 369, 370 (App. Div. 1997) (ruling that an agreement was not extracted under duress where a failure to agree would have led bet din to order a siruv, a type of communal ostracism).


273. Kovacs, 633 A.2d at 432-33; see In re Marriage of Popack, 998 P.2d 464, 468 (Colo. Ct. App. 2000) (requiring that lower court consider whether arbitration agreement was conscionable and entered into freely by parties); see also Hirsch v. Hirsch, 774 N.Y.S.2d 48 (App. Div. 2004) (denying motion to confirm arbitration award of bais din on grounds of public policy where rabbinic court directed husband to pay $457 a month as support for six children without considering his earning capacity when state court had previously ordered payment of $340 a week).

274. See Popack, 998 P.2d at 468-69 (requiring that court conduct de novo review of custody, visitation, and child support issues); Kovacs, 633 A.2d at 431 (requiring that trial court make independent determination of custody, visitation, and child support issues). The same rule is applied to other types of custody and child support arbitration. See, e.g., Faherty v. Faherty, 477 A.2d 1257, 1263 (N.J. 1984) (requiring de novo review of arbitrated child support awards "unless it is clear on the face of the award that [it] could not adversely affect the substantial best interests of the child"); Glauber v. Glauber, 600 N.Y.S.2d 740, 743 (App. Div. 1993) (holding that custody and visitation issues could not be arbitrated).

"directed that if the wife desired to move to another apartment, she must return to the Rabbinical Court."\textsuperscript{276} Reviewing this award, the civil court entered orders granting the wife custody, child support, and temporary financial support.\textsuperscript{277} It held that if the husband could not prove that he followed or properly waived the statutory requirements for arbitration, the court would vacate the award on the ground that fraud or misconduct had prejudiced the wife's rights.\textsuperscript{278}

Courts asked to enforce a rabbinic arbitration order utilize two sets of neutral principles. Rules of contract law are available to assure that the parties have agreed freely to this method of dispute resolution, and rules governing arbitration proceedings can be mobilized to ensure that the court does not enforce outcomes that violate minimum guarantees of due process. These safeguards are especially important in light of the protective policies behind the secular divorce laws and the difficult circumstances of some women within highly traditional religious communities.\textsuperscript{279}

Operating within these parameters allows the court to accommodate the parties' respective free exercise rights, and to find a balance between extending protection to a minority religious tradition and avoiding the establishment of religion.\textsuperscript{280} Allowing these choices to be binding enables group members to allocate to the tradition a significant measure of authority over their family lives. Careful attention to the formalities of contract and arbitration law is necessary, however, to assure that the courts are protecting religious choices freely made by the parties.

\textsuperscript{276} Id. at 757-58.

\textsuperscript{277} Id. at 759-60.

\textsuperscript{278} Id. at 761; see also Sue Lindsay, \textit{Old Religion v. Modern Divorce; Rabbi and Ex-Wife Duel over 12 Kids, Money, Abuse Charges; Case Heads to Jewish Court}, ROCKY MTN. NEWS May 28, 2002 at 5A (discussing further developments in Popack litigation).

\textsuperscript{279} In order to increase the likelihood that these agreements will be enforceable under standard principles of contract law, provisions regarding the role of the \textit{bet din} and the issues to be referred for arbitration should be clearer and more precise than the ones utilized in cases such as \textit{Avitzur}. Any waiver of rights under state divorce laws should be accompanied by appropriate disclosures and signed in advance of the wedding ceremony. Stern, supra note 264. Where the parties do not speak Hebrew, it is also important to have an English translation of the key terms of the agreement. See id. (explaining the need to translate the document into language that both parties understand); cf. Greenberg-Kobrin, supra note 264, at 378 (explaining that Jewish couples often view the signing of their prenuptial as a ritual, and therefore do not obtain legal advice or get the agreement translated into a familiar language).

\textsuperscript{280} Breitowitz, supra note 176, at 380-84 (discussing the "inescapable conflict" between the free exercise of religion and establishment); see also Greenwalt, supra note 245, at 828-29.
From this perspective, the most difficult cases are those in which either husband or wife makes a decision during the marriage to become either more or less observant. The right of exit and the opportunity for new religious commitments are an important dimension of religious freedom, and the get decisions have not always been sufficiently attentive to this issue. To allow for this possibility, courts must determine carefully which aspects of the civil family law system parties can bargain away in a premarital agreement. Under current law, an agreement constraining the right to a civil divorce on religious grounds would be problematic, as would agreements that purport to bind the parties on matters concerning their children.

Some women who choose to remain within the boundaries of a particular cultural or religious tradition will encounter difficulty in exercising the legal rights available to them in the larger society. A married Jewish woman who believes she needs a get may not be able to secure a divorce and remarry unless her husband files for divorce or gives her grounds for divorce under Jewish law. A Muslim wife may not be able to collect her mahr if she decides to institute no-fault divorce proceedings in circumstances in which she would not be entitled to divorce under Islamic law. However painful, these are difficulties that can only be solved from within the tradition and not by the civil courts.

3. International Divorce.—Courts in the United States are sometimes asked to extend recognition to religious divorces concluded in other countries, either by a get process or in the Islamic tradition allowing a husband to divorce his wife unilaterally by pronouncement, or talaq. Foreign divorce decrees are regularly enforced on the basis of comity, and this respect extends to divorce orders rendered

281. See the discussion of the Goldman case, supra at note 244
283. Cf. Kendall v. Kendall, 687 N.E.2d 1228, 1233-35 (Mass. 1997) (limiting a father's right to impose his religious beliefs on his children when his beliefs were causing substantial harm to his children who held conflicting beliefs); see also In re Marriage of Popack, 998 P.2d 464, 468 (Colo. Ct. App. 2000) (finding that the court needed to conduct de novo review of custody, visitation, and child support arbitration decisions).
284. Breitowitz, supra note 176, at 322-26, 333 n.80.
by religious authorities in countries where such orders are valid.\textsuperscript{287} The American case law generally requires that a foreign divorce court have jurisdiction based on domicile, and that proceedings include notice to the respondent and opportunity for a hearing.\textsuperscript{288} Based on these rules, courts often refuse to recognize divorce decrees obtained in other countries by parties domiciled in the United States.\textsuperscript{289}

Applying these principles, a New York court enforced the order of a rabbinic court in Israel requiring one of the parties to deliver a get in \textit{Shapiro v. Shapiro},\textsuperscript{290} as the order was “jurisdictionally well-founded, free from the taint of fraud and not contravening our public policy.”\textsuperscript{291} Conversely, in \textit{Tal v. Tal},\textsuperscript{292} a New Jersey court refused to enforce orders entered by a rabbinic court in Israel where the parties were Israeli citizens but had not lived in Israel for more than five years, the wife did not have notice or an opportunity to participate in the hearing, and a separation agreement signed in New York prior to the divorce in Israel was “manifestly unfair and . . . the product of overreaching.”\textsuperscript{293} Despite their international setting, these cases reflect the same difficulties and concerns as the domestic get cases described above.

\textsuperscript{287} Parties are entitled to “a meaningful opportunity to contest the validity” of a foreign court decree, including raising any defense that would be cognizable in the foreign state. \textit{E.g.}, \textit{In re Custody of R.}, 947 P.2d 745, 751 (Wash. Ct. App. 1998) (challenging validity of divorce by \textit{talag} in the Philippines).

\textsuperscript{288} \textit{See}, \textit{e.g.}, \textit{Dart}, 597 N.W. 2d at 86; \textit{see generally} \textit{Hilton v. Guyot}, 159 U.S. 113, 202-03 (1895) (listing factors to be evaluated in recognizing foreign court judgments on the basis of comity).

\textsuperscript{289} \textit{See} \textit{Atassi v. Atassi}, 451 S.E.2d 371, 374-76 (N.C. Ct. App. 1995) (denying recognition to Syrian divorce obtained by husband who was United States citizen domiciled in North Carolina); \textit{Ahmad v. Ahmad}, 2001 WL 1518116 (Ohio Ct. App. 2001) (denying recognition to Jordanian divorce where parties were domiciled in Ohio); \textit{cf.} \textit{Sherif v. Sherif}, 352 N.Y.S.2d 781, 784 (Fam. Ct. 1974) (extending recognition to Egyptian divorce where parties were domiciled in Egypt “at all crucial points in their marital history”). New York law holds that foreign divorces entered with personal jurisdiction over both spouses are binding without regard to domicile. \textit{See} \textit{Greschler v. Greschler}, 414 N.E.2d 694, 698 (N.Y. 1980) (extending comity to divorce decree entered by court in Dominican Republic); \textit{see also} \textit{Aranoff v. Aranoff}, 642 N.Y.S.2d 49, 50 (App. Div. 1996) (denying comity to rabbinic divorce decree obtained by husband who had moved to Israel where Israeli court did not have personal jurisdiction over the wife).

\textsuperscript{290} 442 N.Y.S.2d 928 (Sup. Ct. 1981).

\textsuperscript{291} \textit{Id.} at 931. Although both parties were domiciled in Israel at the time of their separation, the husband disappeared during the pendency of the divorce proceedings. \textit{Id.} at 929. The rabbinical court entered an order for a divorce sixteen years later, after the wife had located her husband in New York. \textit{Id.}

\textsuperscript{292} 601 N.Y.S.2d 530 (Sup. Ct. 1993).

\textsuperscript{293} \textit{Id.} at 535.
In *Chaudry v. Chaudry*, the court considered a case in which a husband lived in the United States while his wife and children resided in Pakistan. The husband obtained a divorce by *talaq* through the Pakistani consulate in New York, which was later confirmed by trial and appellate courts in Pakistan. When the wife later sued him in New Jersey for alimony and property division, the husband asserted his Pakistani divorce as a defense to her claims. Although the trial judge concluded that the Pakistani divorce was contrary to the public policy of New Jersey, the appellate court reversed. It held that the divorce was valid under Pakistani law based upon the parties' Pakistani citizenship, the wife's residence in Pakistan, and the judgment of the Pakistani appellate court confirming the divorce. Based on principles of comity, the appellate court found that the trial court should have recognized the Pakistani divorce judgment. The court distinguished this case from *Shikoh v. Murff*, which refused to recognize as valid a divorce based only on the pronouncement of *talaq* at the Pakistani consulate without a subsequent proceeding in the Pakistani courts.

Courts in other nations take a somewhat broader approach to recognition of foreign divorces. Based upon the Hague Convention on the Recognition of Divorces and Legal Separations, a number of countries recognize foreign divorces where jurisdiction is based

295. Id. at 1002.
296. Id. at 1003-04. In addition to the *talaq*, the husband, paid 15,000 rupees (about $1500) to the wife, the sum stipulated in the premarital agreement he had negotiated with the wife's parents. Id. at 1002, 1004.
297. Id. at 1002.
298. Id. at 1002, 1005.
299. Id. at 1005. The court also held, however, that the wife could pursue a claim against her ex-husband in New Jersey for modification or enforcement of the Pakistani child support orders. Id. at 1006-07. Regarding comity for foreign child support orders, see also Kalia v. Kalia, 783 N.E.2d 623, 629 (Ohio Ct. App. 2002) (India is not a "state" for purposes of Uniform Interstate Family Support Act; foreign child support order enforced on the basis of comity).
300. Chaudry, 388 A.2d at 1005.
301. Id. (citing Shikoh v. Murff, 257 F.2d 306 (2d Cir. 1958)).
on either the habitual residence, nationality or domicile of either spouse, and where the divorce or separation follows “judicial or other proceedings officially recognized in that State and which are legally effective there.” The Convention requires that there be notice and opportunity for a hearing, and does not apply to “orders relating to pecuniary obligations or to the custody of children."

Although divorces by get and talaq seem to fall within the scope of “other proceedings,” the Convention has proved difficult to apply to cases with facts like those in Chaudry, in which different phases of the divorce process occur in different countries. As a policy matter, the transnational divorce problem is similar to the transnational marriage validation question raised by Farah. International comity, respect for cultural difference, and the pragmatic difficulties generated by “limping marriages” all suggest the need for greater recognition of transnational divorce by get or talaq, provided the other conditions for recognition of a foreign decree are satisfied.

The suspicion of divorces by get or talaq traces to a time when divorces were difficult to obtain. Today, the primary issue is the ex parte character of some proceedings, and the concern to protect wives who may have little to say about the process and who may not have the same rights in divorce matters. In the American context, where

Recognition Convention]. This convention is in effect in seventeen member states. Estin, supra note 4, at 276.

305. Divorce Recognition Convention, supra note 304, arts. 1-2, 8 I.L.M. at 31. In contrast, the rule usually applied by courts in the United States requires that jurisdiction be based on the domicile of at least one of the spouses. See, e.g., Atassi v. Atassi, 451 S.E.2d 371, 375 (N.C. Ct. App. 1995) (finding genuine issue of material fact regarding husband’s domicile and holding that foreign divorces obtained by persons domiciled in the United States are not recognized in North Carolina).

306. See Divorce Recognition Convention, supra note 304, art. 8, 8 I.L.M. at 32 (“If, in the light of all the circumstances, adequate steps were not taken to give notice of the proceedings... to the respondent, or if he was not afforded a sufficient opportunity to present his case, the divorce or legal separation may be refused recognition.”).

307. Id. art. 1, 8 I.L.M. at 31.

308. These questions have come up in several English cases decided under the statute that implemented the Divorce Recognition Convention. See Reed, supra note 303, at 319-28 (discussing application of Family Law Act to non-judicial divorces). See generally Bernard Berkovits, Transnational Divorces: The Fatima Decision, 104 L.Q. Rev. 60 (1988) (discussing the treatment under English law of divorce proceedings instituted in England and concluded in another jurisdiction).


310. See Berkovits, supra note 308, at 60-61, 92-93; Reed, supra note 303, at 334-37. A limping marriage is one that has been terminated in one jurisdiction but is treated as still continuing in others. Berkovits, supra note 308, at 60.

311. Unequal access to divorce raises an issue under Article 16(1) of CEDAW. CEDAW, supra note 76, art. 16(1), 1249 U.N.T.S. at 20. This has been a basis in France for refusing
unilateral no-fault divorces are readily available to husbands or wives in every state, the important concern today is not with divorce itself but its financial incidents and issues of custody and child support. 312

In both the Jewish and Islamic tradition, the rules of divorce that have evolved over centuries still operate to the disadvantage of women in many circumstances. 313 These difficulties have been addressed from within these traditions, through the creative use of marital agreements and through new legislation in some countries. Unless these reforms are widely adopted, however, the tension between these traditions and the practices of American divorce law will continue. Free access to divorce is a relatively recent phenomenon in the United States, and the American law is premised on a different view of relations between men and women and of the importance of equality in their legal and financial positions. As American courts and those in other western countries accommodate the divorce practices of other cultural and religious traditions, it is important to protect against reinscribing into our family law the gender discrimination that has only recently been ameliorated.

C. International Custody Disputes

When state courts in the United States are asked to recognize and enforce custody orders entered by foreign courts, there is frequently tension between the demands of comity and the courts' concern for the parties' rights and children's welfare. As with divorce decrees, courts ask whether a foreign custody decree was based on adequate jurisdictional grounds and whether the respondent had adequate notice and opportunity for a hearing. In custody disputes, however, there is the additional problem of whether a foreign decree was based substantively on consideration of the best interests of the child. This determination is more difficult when a court applying notably different religious or cultural custody norms issued the decree.

In the United States, the inquiry begins with the rules contained in the uniform jurisdictional statutes that courts ordinarily apply to
interstate custody disputes. These statutes extend to international custody disputes and require recognition of child custody determinations made in foreign countries "under factual circumstances in substantial conformity with the jurisdictional standards" of the uniform statutes. In the more recent version, the statute includes a proviso that a court need not defer to the jurisdiction of another nation "if the child custody law of a foreign country violates fundamental principles of human rights." Jurisdiction to make an initial child custody determination under these statutes may ordinarily be exercised only in the child’s home state, defined as a state “in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.”

American courts have applied these rules to international custody disputes, recognizing the possibility that a foreign country may be the child’s “home state” and giving effect to custody orders entered by

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315. UCCJEA § 105(b), 9 U.L.A. Part IA at 662; see also UCCJA § 23, 9 U.L.A. Part IA at 639 (applying to decrees “involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons”).

316. UCCJEA § 105(c), 9 U.L.A. at 662.

317. UCCJEA § 201(a)(1), supra note 314, at 671, and UCCJEA §102(7) (definition of “home state”), supra note 314, at 658. If there is no “home state”, the court of a state with certain significant connections to the child may take jurisdiction, but for purposes of making this inquiry the court must consider the possibility that a foreign country may be the child’s “home state.” UCCJEA §105(a), supra note 314, at 662. When an initial custody determination has been made consistently with the provisions of the statute, the court making the determination has “continuing exclusive jurisdiction” over the matter, unless it determines that there is no longer a sufficient connection between the child and the state or unless “the child, the child’s parents, and any person acting as a parent do not presently reside” in the state. UCCJEA §202(a), supra note 314, at 674. At this point, a court in another state may modify the initial determination, provided that it has jurisdiction under §201. Id. §§ 102(7), 201(a)(1), 9 U.L.A. at 658, 671.

318. See generally Ivaldi v. Ivaldi, 685 A.2d 1319, 1323-25 (N.J. 1996) (listing cases). Cases in which courts determined that a foreign country was a child’s “home state” under the UCCJA and declined to exercise jurisdiction for this reason include Dincer v. Dincer, 701 A.2d 210 (Pa. 1998) (Belgium); In re Marriage of Ieronimakis, 831 P.2d 172,176-79 (Wash. Ct. App. 1992 (Greece); and Suarez Ortega v. Pujals de Suarez, 465 So. 2d 607 (Fla. Dist. Ct. App. 1985)).
foreign courts with a similar jurisdictional basis.\textsuperscript{3} Once satisfied that the foreign court provided notice and an opportunity for a hearing, American courts generally defer to and enforce custody orders entered in other countries.\textsuperscript{322}

International custody disputes are also subject to the Hague Convention on the Civil Aspects of International Child Abduction,\textsuperscript{321} which has gained seventy-four contracting states since its promulgation in 1980.\textsuperscript{322} The Child Abduction Convention requires the “prompt return” of a child who has been removed from or wrongfully retained outside the child’s state of habitual residence in breach of rights of custody under the law of habitual residence.\textsuperscript{323} The Convention includes a variety of affirmative defenses that may be raised against a claim for return, including a provision that a court may re-

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\textsuperscript{3}1985) (Mexico). See also In re the Marriage of Medill, 40 P.3d 1087, 1095-96 (Ore. Ct. App. 2002) (applying UCCJEA and concluding that Oregon court had no jurisdiction to modify custody order where Germany was the home state of the children).

Cases in which courts refused to treat a foreign country as a state under the UCCJA, despite statutory language extending “the general policies of this Act . . . to the international arena,” include In re Marriage of Honiba, 950 P.2d 340,344-46 (Or. Ct. App. 1997) (Japan); Kliën v. Kliën, 533 N.Y.S.2d 211, 214 (Sup. Ct. 1988) (Israel) (dictum). See also Rashid v. Drumm, 824 S.W.2d 497, 505 (Mo. Ct. App. 1992) (noting that state version of UCCJA did not provide for international application); Schroeder v. Vigil-Escalera Perez, 664 N.E.2d 627, 636-37 (Ohio Com. Pl. 1995) (same). In Amin v. Bakhaty, 798 So. 2d 75 (La. 2001), the court ruled that a state court has discretion under the UCCJA not to recognize the home state jurisdiction of “a foreign Islamic state” based on a finding that the foreign nation would not apply a best interests of the child test in a custody dispute.


323. Child Abduction Convention, supra note 321, arts. 1, 20, 19 I.L.M. at 1501, 1503. A court may deny return of the child when proceedings are not commenced for a year or more following the child’s removal or retention if it is shown that “the child is now settled in its new environment.” Id. art. 12, 19 I.L.M. at 1502.
fuse to return the child if the return "would not be permitted by the fundamental principles... relating to the protection of human rights and fundamental freedoms."³²⁴ Under the Child Abduction Convention, the state from which return is requested is not permitted to “decide on the merits of rights of custody” unless it has already determined that the child is not to be returned.³²⁵

Although the Child Abduction Convention has been widely embraced, it is generally not in force in those parts of the world in which religious courts exercise jurisdiction over child custody matters.³²⁶ For this reason, courts in the United States determine custody disputes involving Islamic countries by applying interstate custody jurisdiction statutes and the doctrine of comity.³²⁷ Under United States law and the Hague conventions, respect for a foreign court’s jurisdiction and custody decrees is not affected by whether the court applies secular or religious law, but American courts have insisted that they must determine custody on the basis of the child’s best interests.

American courts are prepared to recognize that religious and cultural factors are a legitimate part of a best interests analysis. For example, in In re Marriage of Malak,³²⁸ the California Court of Appeal reversed a trial court ruling that denied enforcement of custody orders entered by an Islamic court in Lebanon.³²⁹ In Malak, the parties lived together for over five years in the United Arab Emirates before the wife removed the children to California.³³⁰ Neither California nor Lebanon was the home state of the children, but both parents were

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³²⁶. But see Bruch, supra note 322, at 54-55 (explaining that Convention is in effect in Israel, where religious courts in Israel decide custody issues).

³²⁷. Id.

³²⁸. 227 Cal. Rptr. 841 (Ct. App. 1986).

³²⁹. Id. at 848.

³³⁰. Id. at 843.
Lebanese nationals and they maintained a home there. The wife was notified of the proceeding in Lebanon and did not appear. The judgment of the Lebanese court described various factors it took into account in deciding that the children’s best interests were consistent with a custody award to the father. These factors included the children’s environmental, traditional, moral, and cultural links to Lebanon; the fact that Arabic was their native language and that they had been raised in the Islamic religion; the difficulties of moving to a place with radically different customs and traditions; and their father’s material prospects in Lebanon as compared to their mother’s uncertain situation in the United States.

Courts are more wary, however, where a foreign custody decree appears to be based solely on religious principle. In Ali v. Ali, the New Jersey Superior Court refused to enforce a custody decree of the Sharia Court of Gaza based on due process concerns and evidence that under the law applicable in that court, “a father is automatically entitled to custody when a boy is seven . . . the mother can apply to prolong custody until the boy is nine . . . however, at that time, the father or the paternal grandfather are irrebuttably entitled to custody.” The New Jersey court ruled that such presumptions “cannot be said by any stretch of the imagination to comport” with an analysis of the best interests of the child, and that because the decree was “diametrically opposed to the law of New Jersey,” the court would not recognize it on the basis of comity.

331. Id. at 843, 846-47. The husband unsuccessfully attempted to have the California courts enforce a separate custody decree, entered by the Abu Dhabi Sharia Court in the United Arab Emirates (UAE). Id.
332. Id. at 843.
333. Id. at 847 n.1.
334. Id. In addition, the Lebanese court noted that the mother was unemployed, “constantly moving from one place to another,” and that she might not be able to remain legally in the United States. Id. at 847-48 & n.1. The wife contended that in a Sharia divorce in Lebanon, custody of minor children would invariably be given to the father, but the evidence she offered did not persuade the court. Id. at 848 n.2.
336. Id. at 259-60.
337. Id. This analysis was approved by the New Jersey Supreme Court in Ivaldi, 685 A.2d at 1327 (noting that court may decline to recognize decree entered without notice and without application of a best interests analysis). See also Amin v. Bakhaty, 798 So. 2d 75, 85 (La. 2001) (finding that the court need not defer to an Egyptian court that would not apply a best interests test); Tataragasi v. Tataragasi, 477 S.E.2d 239, 246 (N.C. Ct. App. 1996) (emphasizing that the Turkish decree did not address best interests); Tazziz v. Tazziz, 533 N.E. 2d 202 (Mass. Ct. App. 1988) (remanding case for consideration of law applied in custody proceeding in Sharia court in Israel).
The leading case in this area is *Hosain v. Malik*, decided by the Maryland Court of Special Appeals, which considered whether a Pakistani custody order was "in substantial conformity with Maryland law" and therefore entitled to enforcement on the basis of comity. Experts testifying for both the mother and the father agreed that the applicable statute—a British colonial enactment known as the Guardians and Wards Act of 1890—required the Pakistani court to consider the welfare of the minor child. They disagreed on whether the court in fact applied a best interests test, or if it instead based its decision on the Islamic doctrine of *hazanit*, applicable under the statute as part of the personal law of the parties. The court described *hazanit* as a system of "complex Islamic rules of maternal and paternal preference, depending on the age and sex of the child." The Maryland court noted that *hazanit* was in some respects similar to "the traditional maternal preference" once applicable in Maryland. Acknowledging that such preferences "are based on very old notions and assumptions (which are widely considered outdated, discriminatory, and outright false in today's modern society)," the court nevertheless sustained enforcement of the Pakistani decree, writing:

we are simply unprepared to hold that this longstanding doctrine of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country, as applied as one factor in the best interest of the child test, is repugnant to Maryland public policy.

These cases suggest the enormously difficult problem of translation between different definitions and understandings of what constitutes a child's best interests. Although there is general international


339. *Hosain*, 671 A.2d at 989. In a previous appeal, the court had identified two specific issues to be considered: "(1) whether the Pakistani courts applied the 'best interests of the child' standard or its equivalent," and (2) whether the court had afforded sufficient procedural and substantive rights to the mother. *Id.* at 997.

340. *Id.* at 998.

341. See *id* at 991-92, 1003 (describing the conflicting expert testimony); see also *id.* at 1001, 1004-05 (describing right of *hazanit*).

342. *Id.* at 1004.

343. *Id.*

344. *Id.* at 1004-05. A dissenting opinion disagreed that the Pakistani order was in fact based on a best interests analysis. *Id.* at 1011, 1016-21 (Hollander, J., dissenting).
agreement that a best interests test is appropriate, the standard clearly has different meanings in different places.\textsuperscript{345} Despite these wide differences, it remains the only common denominator of international custody law. Judges have no further guidance in determining what best interests should mean in an international or cross-cultural context.

Under United States custody jurisdiction law, a court need not defer to a foreign court if the child custody law of that country “violates fundamental principles of human rights.”\textsuperscript{346} Under the Child Abduction Convention, a child need not be returned to the state of habitual residence when return “would not be permitted by the fundamental principles . . . relating to the protection of human rights and fundamental freedoms.”\textsuperscript{347} Because the child’s right to have a custody determination based on his or her best interests is one of the fundamental principles of the CRC,\textsuperscript{348} the obligation to return a child also depends upon the court’s determination of whether a foreign court has applied, or will apply, a best interests test.\textsuperscript{349}

In addition, there is another human rights dimension to these disputes. Laws that do not give men and women “[t]he same rights and responsibilities as parents” violate both the principles of CEDAW\textsuperscript{350} and other human rights agreements that prohibit discrimination on the basis of sex.\textsuperscript{351} Hosain, like other difficult international custody cases, involved a mother who fled to the United States and invoked the jurisdiction of its courts in order to avoid litigating custody under laws likely to favor the father.\textsuperscript{352} In Pakistan, the mother’s claim for custody was jeopardized because she began living with another man shortly after leaving her husband, and because she appeared in the Pakistani proceeding only through counsel.\textsuperscript{353} Another

\textsuperscript{345} See supra note 82 and accompanying text.
\textsuperscript{346} See supra note 316 and accompanying text.
\textsuperscript{347} See supra note 324 and accompanying text.
\textsuperscript{348} See supra note 81 and accompanying text.
\textsuperscript{349} See supra note 322, at 54-55. But see Beaumont & McEleavey, supra note 324, at 174-75 (noting that parties have not successfully raised the argument in United States cases). Very few of the countries with Islamic personal law systems are members of the Child Abduction Convention at present, and Carol Bruch has argued that the United States should exercise caution in accepting accessions to the convention from countries with legal systems that pose these human rights concerns. Bruch, supra note 322, at 51-55.
\textsuperscript{350} See CEDAW, supra note 76, art. 16, 1249 U.N.T.S. at 20 (mandating gender equality in family matters).
\textsuperscript{351} E.g., UDHR, supra note 71, art. 16; ICCPR, supra note 72, art. 23, 999 U.N.T.S. at 179; ICESCR, supra note 73, art. 10, 993 U.N.T.S. at 7.
\textsuperscript{353} Id. Hosain argued that she would have been considered an apostate and disqualified for custody on that basis. Id. at 1004. Additionally, she contended that she could have
international case, *Amin v. Bakhaty*,\(^\text{354}\) was brought by an Egyptian woman married to an anesthesiologist who was domiciled in, and is a citizen of, the United States.\(^\text{355}\) The wife and their child lived in Egypt, but traveled to America for a visit with her family.\(^\text{356}\) After they arrived, the husband returned to Egypt, where he secured an *ex parte* divorce, filed for a "declaratory judgment of permanent custody," and had his wife prosecuted and convicted for removing the child from Egypt without his permission.\(^\text{357}\) An argument could be made on the facts of *Hosain* and *Amin* that returning these mothers and children to their home countries, to face custody proceedings based on discriminatory laws and also sanctions for conduct that defies the gendered cultural norms of their societies, would violate their fundamental human rights.\(^\text{358}\)

The international custody cases pose a particularly difficult challenge because courts must balance competing values of international law. Respect for the jurisdiction and sovereignty of other nations may be in conflict with the norms of human rights, particularly with respect to gender equality. Reference to the child's welfare or best interests does not resolve the dilemma, because these standards may be very differently understood in different places.

Family law disputes on a global scale are further complicated by the problem of citizenship. To the extent that rules of other countries

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\(\text{354. 798 So. 2d 75 (La. 2001).}\
\(\text{355. Id. at 77-78.}\
\(\text{356. Id. at 78.}\
\(\text{357. Id. Under the circumstances, the court in *Amin* declined to defer to the jurisdiction of the Egyptian courts, but this is difficult to square with the provisions of the UCCJA. See id. at 80-88 (finding that Egypt was both the home state of and the state with the most significant ties to the child, but ruling that Louisiana had jurisdiction because Egypt would not consider the best interests of the child).}\
\(\text{358. See id. at 77-80; *Hosain*, 671 A.2d at 992; see also *Bruch*, supra note 322, at 51-55.}\

are based on different legal and cultural standards, it becomes important to determine who should be entitled to invoke the substantive and procedural protections of American family law. Both our jurisdictional rules and the provisions of the Hague Child Abduction Convention limit the remedies available to a parent who removes his or her child from the child's habitual residence and then invokes the jurisdiction of a foreign court. This approach, however, seems less equitable in cases such as Amin and Chaudry in which individuals who have chosen to live and work in the United States for an extended period of time, leaving a spouse and children in another country, ask American courts to limit the entitlements of those family members to what would be available under the laws of the country where they have been left behind.

III. DIALOGUE, ACCOMMODATION, AND CHANGE

In his work on legal traditions, H. Patrick Glenn describes an accelerating process of exchange between different legal traditions, facilitated by processes of globalization and development. Modern means of transportation allow people of other traditions to settle "[w]ithin the geographical areas where western tradition has been developed," and modern communications link individuals within a given tradition and accelerate contact amongst traditions. Glenn emphasizes that "[g]lobalization, in whatever form, implies the extension of traditions beyond the states in whose form they may have crystallized." Glenn suggests a vision of the state as "a place of overlapping traditions," and predicts that "[w]e may see more internal choice of law; we may see more in the way of personal laws . . . ; we may see more explicit legal recognition of social identities (that is, traditions); we may see state support of a broader range of identities and traditions."

359. See Hosain, 671 A.2d at 1009-11. Hosain's claim was complicated by the facts that both mother and father were citizens of Pakistan and domiciled in Pakistan before the dispute began. Id. at 990; see also In re Marriage of Malak, 227 Cal. Rptr. 841 (Ct. App. 1986) (declining jurisdiction over claims of Lebanese mother who removed children to California).


361. Glenn, supra note 52, at 30-53. Glenn suggests "globalization" is not only a process of expanding western influence, noting also the expansion of Islam and the spread of Asian management techniques. Id. at 47-48.

362. Id. at 30-41.

363. Id. at 49.

364. Id. at 53.
As these cases are decided, judges are, in effect, practicing comparative law in the trenches of family court, developing the "internal choice of law" principles that Glenn suggests are necessary when traditions co-exist. In some cases, the traditions of the common law provide a ready framework for assimilation of the legal principles and practices of other traditions. Our marriage validation rules can be readily adapted to the traditions or ceremonies of Hindu or Islamic weddings. The discretion to determine property division and support awards on divorce provides latitude for enforcement of financial provisions in traditional premarital agreements. Consideration of children's best interests allows a wide range of variables to factor into the calculation of parental responsibilities. Other cases are more difficult, and courts are more noticeably cautious when asked to apply religious law or defer to the rulings of a religious tribunal.

It is evident from the family law cases that our legal tradition is not infinitely flexible and accommodating, and that there are limits to the pluralist approach. As they determine how far to embrace distinct cultural practices within the larger legal tradition, American courts adhere to a few fundamental principles. Norms of due process establish one important baseline. Courts limit their recognition of foreign divorce or custody orders to circumstances in which there has been notice and an opportunity for a hearing, and they will not enforce arbitration awards unless the parties follow or appropriately waive procedural requirements for arbitration. Nondiscrimination principles are also fundamental, and orders that are explicitly based on race, sex, or religious affiliation are equally subject to challenge. The familiar tension between free exercise and nonestablishment principles presents courts with an unusual challenge in some cases: facilitating family practices that have a religious basis without presuming to resolve religious disputes or to order performance of religious acts, and without denying an individual the freedom to exit from a traditional religious and family milieu.

Other fundamental principles follow from the courts' understanding of their function in family law matters. Many of these flow from the "protective function" of family law. This principle is given expression in the best interests test that may limit the respect ex-

365. See id. at 255.
366. See supra notes 228 and 320 and accompanying text.
367. See supra notes 271-278 and accompanying text.
368. See supra notes 104-105 and accompanying text.
369. See supra notes 280-283 and accompanying text.
370. Schneider, supra note 108, at 497.
tended to a foreign custody award or the result of a rabbinic arbitration.\textsuperscript{371} It is also reflected in the background of state statutes that define the distributive consequences of divorce or the death of a family member.\textsuperscript{372} It explains why some principles given wider scope in the law more generally—such as the idea of freedom of contract—are more limited in the context of family law.\textsuperscript{373} Thus, courts scrutinize premarital and separation agreements, or contracts to submit to arbitration of family disputes, more carefully than ordinary commercial agreements.

Additionally, in the working out of this process, courts face particularly important questions in relation to traditional practices that are heavily gendered. For reasons described by Ayelet Shachar, women are particularly vulnerable to oppression within traditional family law systems, where they face greater restrictions on their rights to marry, their rights to pass on their nationality or membership to their children, their options and access to divorce, their financial circumstances and their opportunities to be awarded custody.\textsuperscript{374} Shachar suggests that even as they face greater restrictions within the tradition, women face more difficulty in choosing to exit from it.\textsuperscript{375} To the extent that religious authorities assume jurisdiction over family law matters, there is a risk that women will remain vulnerable, and courts need to be particularly alert to this possibility.\textsuperscript{376}

Courts also face difficult questions concerning the boundaries around communities and the circumstances in which individuals may move between traditions. The state certainly cannot require that individuals remain within a cultural or religious group and subject to its legal norms. Rules that prohibited divorce for Catholics or Hindus, or restricted Jewish or Islamic women to traditional divorce grounds of their religion, would clearly violate the nondiscrimination and free

\textsuperscript{371} Cf. supra notes 311, 345-348 and accompanying text. The goal of protecting children also explains the limited acceptance of cultural and religious defenses in the context of child abuse and neglect cases. See Terhune, supra note 3, at 165-67, 172-73 (discussing the use of cultural and religious defenses in child abuse cases).

\textsuperscript{372} Shachar, supra note 48, at 54-55. Shachar refers to this as family law's distributive function, and her discussion underlines the fact that approaches to these distributive questions vary significantly between cultures. Id.

\textsuperscript{373} See generally Clark, supra note 7, at 3-5 and 755-68 (regarding principles applied to premarital and separation agreements). See supra notes 308-315 and accompanying text (regarding arbitration agreements).

\textsuperscript{374} Shachar, supra note 48, at 36, 55-56.

\textsuperscript{375} Id. at 59-60.

\textsuperscript{376} See supra notes 267-278 and accompanying text.
exercise principles.\textsuperscript{377} The questions become more difficult when an individual has committed by contract to religious jurisdiction over his or her marriage.\textsuperscript{378} This issue lurks at the edges of disputes over mahr payments and arbitration by a bet din.\textsuperscript{379} Respect for distinct family law traditions and the primacy of “freedom of contract” within our own legal tradition suggest that even long-term agreements for religious jurisdiction should be broadly enforceable. A concern for free exercise and free exit, and the protective traditions of our family law, suggest different limits.\textsuperscript{380}

Questions of movement between legal traditions also arise on an international level. In a few cases, individuals with very attenuated ties to the United States invoke the jurisdiction of United States courts, evidently hoping to take advantage of more favorable rules for custody or divorce.\textsuperscript{381} For women facing the systematic discrimination of some family law traditions this exit alternative may be particularly attractive.\textsuperscript{382} Courts sometimes respond sympathetically, despite conflict of laws principles that suggest a different outcome, particularly where the respondent spouse has strong ties to the United States.\textsuperscript{383}

As courts and legislatures open a space for pluralism and clarify the parameters within which different traditions may be accommodated, the practitioners of those traditions have responded by adapting traditional practices to American circumstances. Priests, rabbis, and imams have adapted to the requirements for marriage licenses or, in some contexts, civil weddings conducted prior to a religious ceremony.\textsuperscript{384} Traditional premarital agreements may be revised to include more explicit choice of law provisions and more sophisticated

\textsuperscript{377} This is also the basis for refusing to recognize a religions “defense” to a spouse’s claim for divorce. See supra note 171.

\textsuperscript{378} Cf. Shachar, supra note 48, at 103-09 (discussing “consensual accommodation” of different traditions).

\textsuperscript{379} See supra notes 176-234 and 235-284 and accompanying text.

\textsuperscript{380} See supra notes 280-283 and accompanying text.

\textsuperscript{381} This is in some ways reminiscent of “migratory divorce” in the United States before the spread of no-fault divorce grounds.

\textsuperscript{382} See supra note 68-70 and accompanying text.

\textsuperscript{383} See supra notes 350-358 and accompanying text. These cases do not address the immigration law aspects of this problem, and do not consider the question whether an oppressive family law regime could ever be the basis for seeking asylum. See generally Estin, supra note 4, at 300-06 (discussing the challenges faced by women and children seeking asylum).

\textsuperscript{384} See supra notes 112-114 and accompanying text (describing interaction of religious and secular marriage requirements).
As this development continues, arbitration agreements designed to protect the jurisdiction of religious authorities may include a provision that the tribunal will apply state laws on the financial incidents of divorce and tribunals conducting marital arbitrations will come to understand what procedural standards are sufficient to protect its orders from challenge after the fact.

Thus, the process of accommodation works in two directions. Debate is ongoing within these traditions about the boundaries and relationship between civil and religious law and the desirability of harmonizing the two systems. Just as some scholars are working to develop contemporary Islamic marriage contracts that address women's needs in a religious context, others are looking for ways to resolve the problem of the "agunah" from within the Jewish tradition.

At the international level, there is a similar process of dialogue about international human rights and the circumstances and traditions of particular cultural groups. Many Islamic nations have shown great creativity in recent generations in the development of new principles of family law within the larger framework of their religious tradition.

This fluidity within and between traditions enhances the process of dialogue and change. Opportunities for exit and choice that can

385. See supra notes 219-234 (describing adaptation of Islamic marriage agreements to United States law); see supra notes 278-283 (describing modifications to Jewish marital agreements).

386. See supra notes 223-227 and accompanying text; see also Stern, supra note 264. Even at an international level, courts deciding custody disputes may learn to formulate their rulings to satisfy the demands of comity. See, e.g., In re Marriage of Malak, 227 Cal. Rptr. at 848 discussed supra at notes 328-334 and accompanying text; see also Moussa Abou Ramadan, The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001), 26 FORDHAM INT'L. L.J. 595 (2003) (describing incorporation of best interests standard into rulings of Islamic court in Israel).

387. See particularly the work of Azizah al-Hibri at the University of Richmond School of Law, working with the organization Karamah.

388. E.g., Breitowitz, supra note 176; Novak, supra note 60, at 1075 ("Traditional Jews . . . should be even more concerned with this non-Jewish, secular remedy to a Jewish moral problem when they . . . could largely solve the problem by the exercise of their own authority within their community.").


390. See generally Haider, supra note 53 (discussing Pakistani developments in women's right to divorce); al-Hibri, supra note 55 (advocating new Islamic jurisprudence); Ramadan, supra note 386 (describing changes in approach to custody cases in Islamic court in Israel).
be exercised in both directions help to maintain the vitality of distinct legal traditions, and enrich the diversity of institutions and practices of family life.\footnote{See Shachar, supra note 48, at 35-37, 39-40. Shachar argues that pressure to assimilate increases the tendency toward fundamentalism, or "reactive culturalism" in a society. \textit{Id.} at 35-37. Conversely, creation of alternative sources of authority creates incentives to address the grievances of group members. \textit{Id.} at 123-25; see also Madhavi Sunder, \textit{Cultural Dissent}, 54 \textit{Stan. L. Rev.} 495, 560-61 (2001) (noting efforts by Muslim women to challenge and reinterpret their religion and culture).} Allowing for this movement is also essential in a system that protects both religious freedom and family relations as a matter of individual right.

In her work on multicultural jurisdictions, Shachar makes a strong argument for "joint governance" of family law by the state and traditional community authorities.\footnote{Id. at 120-26. While Shachar argues that neither the state nor other authorities should be permitted a monopoly in regulation of family law, she acknowledges the greater power of the state and has more to say about the state's role in fostering change within subordinate groups. \textit{Id.} at 129-43.} In her vision, shared governance pushes each jurisdiction to increase its accountability and responsibility to group members, particularly when individuals have a choice to shift their loyalty from one power-holder to another.\footnote{Id. at 128.} Shachar suggests "it will be necessary to negotiate the precise jurisdictional boundaries between competing authorities such as the group and the state" in order "to best accommodate the different affiliations and facets of individual group members."\footnote{Id. at 88-116.}

The process described here, while it serves some of the purposes of the negotiations that Shachar envisions, is notably different. In the American context, legal authority is not pluralistic, and the dialogue or negotiation that takes place between cultural and religious traditions is largely metaphorical. In family law, the jurisdictional boundaries between civil law and religious tradition emerge slowly over time as the courts decide individual cases. With each decision, judges define the scope of multicultural accommodation, and establish new opportunities for exchange and transformation.

\section*{IV. Conclusion}

The growing body of multicultural family law in the United States reflects a creative interchange between the American legal tradition and a number of fundamentally different family law traditions. The decisions in these cases have begun to define a framework for accommodation of diverse cultural and religious practices. Taken together,
the cases demonstrate both the potential for embracing these traditions and deeper values that structure and constrain the process of accommodation. These values, which are deeply embedded in the American system and paralleled by norms of international human rights, include principles of due process, nondiscrimination, and religious freedom, as well as the protective policies reflected in our system of family law. Within the outlines established by these fundamental principles, there is substantial room for members of religious and cultural communities to maintain their traditions and adapt them to the American legal environment.

For American judges and lawyers, multicultural accommodation in family law demands respect for these core values and for diverse beliefs and practices. It requires careful attention to the particulars of a dispute as well as its larger cultural context. As courts take up these cases, however, the challenge is a deeply familiar one within our common-law tradition: to achieve pragmatic and just results in the particular case at hand, and to contribute toward the accumulation of experience that gradually defines the contours of the law.