

BARGAINING IN THE SHADOW OF GOD'S LAW:
ISLAMIC *MAHR* CONTRACTS AND THE
PERILS OF LEGAL SPECIALIZATION

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INTRODUCTION

In 1978, the courts of New Jersey dissolved the marriage of the Chaudrys.¹ Hanif, the husband, was a successful physician in New Jersey.² Parveen, his wife, was a homemaker who returned to their native Pakistan with her children upon the dissolution of the marriage.³ Because they were Muslim, the Chaudrys signed a contract when they were married.⁴ Indeed, for a Muslim marriage *is* a contract.⁵ It is not possible to enter into a Muslim marriage without signing a contract.⁶ Like all Islamic marriage contracts, the Chaudrys' agreement contained what is known as a deferred *mahr*, a sum of money—in this case \$1500—that the husband promised to pay to the wife in the event of divorce.⁷ Hanif claimed that this provision in their marriage contract constituted a premarital agreement in which Parveen had bargained away any future claims under American divorce law.⁸ The New Jersey court accepted this

* Associate Professor, William & Mary Law School. This Article is part of a larger research project looking at the treatment of Islamic *mahr* agreements by American courts. In a longer subsequent article I hope to provide a more detailed discussion of the legal issues surrounding these contracts. Stay tuned. I wish to thank Robert Hillman and Brian Bix for extensive comments and criticism on an earlier draft of this Article. The faults that remain are mine alone. As always, I thank Heather.

1. *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978).
2. *Id.* at 1002.
3. *Id.* at 1004.
4. *Id.* at 1003.
5. WAEL B. HALLAQ, *SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS* 271 (2009) (discussing the contractual basis behind marriage in Islam).
6. *See id.* at 272 (noting that marriage in Islam depends on a indefinite contract). This is not literally true, as Islamic law allows marriage contracts to be concluded by proxies. *See id.* at 274 ("Either of the two contracting parties could be represented by a person acting on his/her behalf as a legally empowered agent."). This, however, simply serves to further emphasize the strongly contractual nature of marriage under Islamic law.
7. *See Chaudry*, 388 A.2d at 1003–04 (discussing the size of the deferred *mahr*); *see also* HALLAQ, *supra* note 5, at 277 (discussing the necessity of a *mahr* provision for a valid Islamic marriage contract).
8. *Chaudry*, 388 A.2d at 1002.

argument, denying Parveen any claim on the marital assets.⁹

Chaudry v. Chaudry is a vivid illustration of a broader issue. As the Muslim population of the United States increases, American courts increasingly must decide on the meaning of Islamic marriage contracts, particularly the much-litigated question of how to treat deferred *mahr* provisions. This Article uses the treatment of *mahr* provisions by the American courts to illustrate one of the perils of creating a specialized body of law. The common law of contracts has long been criticized for being too general and abstract, applying the same rules to parties regardless of their status or the nature of their agreement.¹⁰ In response, lawmakers have carved out particular classes of transactions from the common law of contract, creating specialized bodies of law such as labor law, employment law, or the like. This is an understandable and, at times, laudable development. The creation of such specialized bodies of law, however, is not without its problems. In particular, lawmakers often overestimate their knowledge of the particularities of certain kinds of transactions or fail to foresee new or unexpected transactional forms.¹¹ When this happens, two sorts of problems can arise.

The harsh result in *Chaudry v. Chaudry* illustrates the first problem posed by specialized bodies of law. The court in *Chaudry* almost certainly misinterpreted the meaning of the contract and the intentions of the parties. It made this error because it failed to understand the particular cultural and religious context that framed the Chaudrys' marriage contract and gave it meaning. The court assumed that the contract must be a premarital agreement, a contract bargaining away rights in divorce. The *mahr* provision in the Chaudrys' contract, however, was not intended to bargain away rights in divorce. Indeed, the requirement in Islamic law that a marriage contract contain a deferred *mahr* predates the existence of the common law—to say nothing of the United States—by centuries and was developed to solve a different set of social concerns than those presented by the ordinary premarital agreement.¹² No

9. See *id.* at 1006 (noting that the marriage did not have any adequate nexus to New Jersey for the court to rule in the wife's favor).

10. See, e.g., Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 79–86 (2009) (summarizing the critiques of general contract law); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 618–19 (2003) (noting that current contract law applies to parties of all types and arguing that contract law should be narrower and more deferential to contracting parties).

11. See, e.g., *infra* notes 27–38 and accompanying text (noting the oversimplification attendant to the Uniform Commercial Code's approach to the "battle of the forms").

12. See JAMAL J.A. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND MODERN ISLAMIC LEGISLATION* 33–34 (3d ed. 2009) ("The dower (*mahr*) is another right of the wife . . . [T]he dower is a sum of money or other property which becomes payable to a man's wife simply as an effect of marriage. . . . [I]t

approach to contract law can eliminate the risk of misconstruing the meaning of parties' agreements. Courts will always be called on to interpret the meaning of contracts, and such interpretation always carries with it the danger of misunderstanding meaning because of ignorance of the context in which the contract was made. It is possible, however, that the New Jersey court assumed that the Chaudrys were bargaining over their default rights in divorce when they signed their marriage contract because, in the United States, we have created a specialized body of contract law—the law of premarital agreements—structured around the assumption that such rights are what contracts made in contemplation of marriage are about.¹³ The strong assumptions that this specialized body of law makes about the content of contracts can lure courts into ignoring context because the law already purports to inform them of what is “really” going into particular kinds of contracts.

Legal specialization creates another problem that is also on display in American courts' treatment of Islamic marriage contracts. The law of premarital agreements has developed a set of specialized rules that are designed to closely fit a particular cultural script about marriage and the presumed problems of contracts made on the threshold of matrimony. Embedded in the law of premarital agreements is a story about marriage. Accordingly, this body of law creates special defenses that can be raised to contractual liability, defenses that are designed to protect parties from the particular pathologies assumed to lurk in the “typical” premarital agreement. Because they occur in a different cultural context, however, *mahr* contracts do not raise the concerns that motivate the law of premarital agreements. Hence, the Uniform Premarital Agreements Act (“UPAA”) creates requirements that are meant to act as a prophylaxis against inconsiderately bargaining away one's rights in divorce.¹⁴ *Mahr* contracts, by contrast, are not about bargaining away such rights. Nevertheless, in litigation, parties to *mahr* contracts can invoke the requirements of the law of premarital agreements to escape liability. In the context of Islamic marriage contracts, however, these special defenses cease to serve a purpose. Rather, they simply add to the complexity of the law, providing parties with a defense against liability in situations in which we have no reason to suppose that imposing liability is problematic. In short, when reality diverges from the narrative assumed by the law, specialized rules can become traps for the unwary, and can become meaningless technicalities to be exploited by the opportunistic.

is a token of the affection, esteem and respect that the man feels for the woman he is about to marry.”); *id.* at 87–104 (explaining the *mahr*).

13. See JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 99–100 (3d ed. 2005) (noting that marital agreements are often used to privately order marriage and divorce).

14. See generally UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001).

This Article proceeds as follows: In Part I, I argue that creating specialized bodies of law increases the danger of promulgating rules that diverge from transactional reality. In Part II, I illustrate these problems in the context of Islamic marriage contracts, explaining the religious context in which they arise and the way in which the law of premarital obligations can be perversely applied to them. Finally, in Part III, I argue that the general law of contracts, rather than the supposedly more nuanced law of premarital agreements, allows judges to reach defensible results in litigation over *mahr* contracts.

I. THE PERILS OF SPECIALIZATION

Much of contract doctrine is pitched at a very high level of generality. The common law of contracts, for example, purports to apply to all “persons,” regardless of whether they are actual human beings or corporations.¹⁵ Likewise, many rules, such as those involving offer, acceptance, consideration, and the like, purportedly apply equally to a contract over the sale of a cow and to a contract over the sale of a multibillion dollar international oil company.¹⁶ Over the course of the twentieth century, however, new bodies of law have been created to govern particular kinds of transactions. Hence, we have the law of the sale of goods codified in Article 2 of the Uniform Commercial Code (“U.C.C.”), the rise of labor law, and the proliferation of law at both the state and federal level governing employment contracts.¹⁷ The proliferation of these specialized bodies of transaction-specific law can be traced in part to a critique of the common law of contract’s drive toward generality and abstraction.¹⁸

15. See Daniel A. Farber, *Economic Efficiency and the Ex Ante Perspective*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 54, 54 (Jody S. Kraus & Steven D. Walt eds., 2000) (noting that the common law creates precedential rules); Schwartz & Scott, *supra* note 10, at 548 (recognizing that the mandatory rules of the common law of contracts apply to both individuals and corporations alike).

16. *Compare* *Sherwood v. Walker*, 33 N.W. 919, 921–22 (Mich. 1887) (contract for sale of cow), *with* *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 788–96 (Tex. App. 1987) (contract for sale of oil company).

17. See generally ANDREA BLOOM, *LENDER LIABILITY: PRACTICE AND PREVENTION* (1989) (discussing the special laws applying to loan contracts); MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS AND PROBLEMS* (6th ed. 2007) (providing a summary of American labor law); MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* (6th ed. 2007) (summarizing American employment law); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (5th ed. 2000) (discussing the Uniform Commercial Code); MARGARET WILKIE ET AL., *LANDLORD AND TENANT LAW* (Marise Cremona ed., 5th ed. 2006) (summarizing American landlord-tenant law).

18. See Oman, *supra* note 10, at 79–86 (discussing the critique of general contract law); Christopher T. Wonnell, *The Abstract Character of Contract Law*,

In the traditional telling, the movement toward generality and abstraction in classical contract doctrine is the lingering remnant of a discredited set of late-nineteenth-century assumptions about the nature of law. In this story, Christopher Columbus Langdell and his minions are cast as the villains, seeking to create a “scientific” body of contract law devoted to formal consistency and abstract intellectual elegance without responding to the practical vagaries of real transactions.¹⁹ When Holmes called Langdell “the greatest living legal theologian,” it was not meant as a compliment.²⁰ Rather, “theologian” was offered as a term of intellectual abuse, suggesting that Langdell had disregarded social realities in favor of ethereal abstractions that, like the mythical angels of the scholastics, danced on the heads of pins but offered scant guidance to the practical work of the law.²¹

Elsewhere, I have argued that the normative basis for contract law’s generality is less incoherent than critics have suggested and that generality serves important pragmatic goals.²² In particular, I have claimed that contractual generality serves as a prophylaxis against capture by special interest groups.²³ Like the extended republic of James Madison’s *Federalist Number 10*,²⁴ a general law of contract is more difficult for any particular faction to rig for its own benefit.²⁵ The generality of contract law also promotes

22 CONN. L. REV. 437, 439–48 (1990) (recognizing the erosion of contract abstraction).

19. See generally Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (offering an influential interpretation of Langdell’s legal thoughts in the context of intellectual trends during the Gilded Age); Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277 (2004) (summarizing historical work on Langdell). More recent historical scholarship has tended to soften the indictment against Langdell and other architects of classical contract doctrine. See generally, e.g., Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345 (2007); Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2004) (offering an account of Samuel Williston that questions the characterization of him and of classical contract doctrine as overly formalistic and abstract).

20. See Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880).

21. See *id.*

22. See Oman, *supra* note 10, at 86–105 (setting forth practical purposes served by contract law’s generality). See generally Nathan B. Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101 (2005) (arguing that contrary to claims made by some critics, autonomy theories of contract do not provide reasons for separating contracts by corporations from contracts by natural persons).

23. Oman, *supra* note 10, at 90 (“The more general the application of a body of law, however, the less likely it is to be subject to such capture by special interests.”).

24. See generally THE FEDERALIST No. 10 (James Madison).

25. See Oman, *supra* note 10, at 91–94 (describing the decreased incentives special interests have in investing to capture general contract law).

innovation in transactional structure by remaining largely agnostic about how parties should order their contracts.²⁶ This, in turn, allows for a diffused process of trial and error by which parties using differing transactional structures can find solutions to their collective problems.²⁷

If generality has unappreciated virtues, legal specialization—the process of creating transaction-specific bodies of law—also has its own vices. Any kind of contract law will necessarily rest on either implicit or explicit assumptions about the shape of typical transactions. Another way of putting this point is that behind every legal rule there is a narrative. This narrative tells the story of a deal, of how it could go wrong (or right), and how the law should deal with it. Hence, one of the important questions in assessing any rule is whether the narrative on which it rests corresponds to reality, or at least corresponds frequently enough for the rule to be serviceable. The fact that the law makes narrative assumptions is, of course, true whether the law in question consists of the highly abstract rules of classical contract doctrine or the specialized rules of transaction-specific bodies of law. Indeed, one of the persistent critiques of general contract law is that its implicit narrative of equal bargaining is false, a point pithily captured in James Gordon's summary of the curriculum of a first year contracts class: "Contracts. Study rules based on a model of two-fisted negotiators with equal bargaining power who dicker freely, voluntarily agree on all terms, and reduce their understanding to a writing intended to embody their full agreement. Learn that the last contract fitting this model was signed in 1879."²⁸

The divergence of the law's narrative from reality, however, becomes particularly acute when dealing with specialized bodies of contract law precisely because such rules aim to capture transactional structure at a much finer level of granularity. Accordingly, there are more ways in which legal rules can fall prey to reality. Consider section 2-207 of the U.C.C.²⁹ This section is drafted around a very specific narrative about the so-called "battle of the forms."³⁰ The battle arises when parties engage in negotiations by exchanging preprinted forms.³¹ Under the common law, no contract is formed until the offeree proffers an acceptance that

26. *See id.* at 103 ("Allowing the widest possible innovation in transactional forms responds to these concerns by allowing the disaggregated process of experimentation with contracts in particular situations to gradually evolve toward effective solutions to a myriad of collective problems.")

27. *See id.* at 104 (noting that general contract law allows much more innovation than specialized bodies of law).

28. James D. Gordon III, *How Not To Succeed in Law School*, 100 YALE L.J. 1679, 1696 (1991).

29. U.C.C. § 2-207 (2003).

30. *See* WHITE & SUMMERS, *supra* note 17, § 1-3, at 29-48.

31. *Id.* at 29-30.

exactly matches the terms of the offeror.³² The drafters of 2-207 imagined that the technicality of this rule allowed some parties to escape contractual obligations to which they ought to be held.³³ In the paradigmatic case, Buyer orders goods from Seller using a preprinted order form. Seller agrees to supply the goods by replying with a preprinted invoice. Buyer then changes his mind and seeks to escape his obligations to Seller by noting the difference between Seller's invoice and Buyer's order form. Buyer's offer was never accepted by Seller and under the mirror image rule no contract was ever formed!³⁴ To the drafters of 2-207, this result was perverse, injecting uncertainty into the validity of unobjectionable agreements through the application of a technical rule to texts that no one reads and on which no one relies.³⁵ Accordingly, 2-207 jettisons the mirror image rule, stating instead that "[a] definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered or agreed upon"³⁶ Problem solved.

The drafters of 2-207, however, assumed a much greater familiarity with commercial practice than they in fact possessed.³⁷ In fact, very few parties get caught in the snares of the mirror image rule so as to allow their counterparties to escape from otherwise unobjectionable agreements.³⁸ Indeed, the narrative of competing forms assumed by 2-207 has proved dangerously simplistic. In contrast to the simple exchange of forms with differing terms, the cases reveal a much more variegated world. One survey of reported decisions showed "cases where there were three documents, a solicitation, a purchase order, and an acknowledgement; where one party signed the other's documents; and where a party's behavior

32. See RESTATEMENT (SECOND) OF CONTRACTS § 39 (1981) (setting forth the mirror image rule).

33. See WHITE & SUMMERS, *supra* note 17, at 30.

34. See, e.g., *Poel v. Brunswick-Balke-Collender Co.*, 110 N.E. 619, 623 (N.Y. 1915) (holding that no contract between the parties had been formed because of minor differences between the offer and the putative acceptance).

35. See WHITE & SUMMERS, *supra* note 17, at 30 ("The original drafter of 2-207 designed it mostly to keep the welsher in the contract."); James J. White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7, 32-33 ("[Section 2-207] appears to have been drafted for two types of transactions. First, it was meant to reverse the outcome in cases like *Poel v. Brunswick-Balke-Collender Co.* Second, it was intended to protect an oral agreement from surprise alterations when one or both parties send 'confirming' forms containing terms additional to or different from those already agreed upon."); see also John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1319 (1986).

36. U.C.C. § 2-207(1) (2003).

37. White, *supra* note 35, at 33 (stating that the drafters of 2-207 "grossly overestimated their knowledge of the underlying transactions").

38. See Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1233-36 (1982).

appeared to indicate assent to materially different terms in the other's responsive form."³⁹ Rather than protecting expectations by ensuring that a party could not weasel out of contractual liability on a technicality, the rule has injected uncertainty into the contracting process by allowing parties to litigate endlessly about which of the terms in the various conflicting writings control. In short, section 2-207 displays the confusion and difficulties that result when the narrative implicit in a transaction-specific rule diverges from actual practice.⁴⁰

This Article, fortunately, is not the place to sort out the best approach for dealing with the chaos that section 2-207 has wrought. Rather, I bring up the section because it provides a familiar illustration of a more general set of problems. The drafting of transaction-specific rules will necessarily involve lawmakers in assumptions about the standard shape of the underlying transaction. The more detailed the transaction-specific rule becomes, the stronger those assumptions will necessarily be. This creates two problems. The first is that in mastering a specialized body of law judges come to internalize the narrative implicitly assumed by that law. This can lead them to mischaracterize transactions and even misapply the law. For example, in *ProCD v. Zeidenberg*, the pull of the underlying narrative of the battle of the forms led an otherwise well-informed and sophisticated judge to erroneously conclude that 2-207 does not apply to the formation and interpretation of contracts where no forms are exchanged, even though the language of the section clearly contains no such limitation.⁴¹ My claim is not that specialized bodies of law require judges to misinterpret contracts. Rather, I am making the more modest claim that specialized bodies of law embed in judges' minds a particular script about transactions, and once this script is entrenched, it may be difficult for judges to recognize and apply the law to fact patterns that diverge from it.

The second problem is that specialized bodies of law provide parties with defenses and other doctrinal tools based on a particular set of assumptions about the problems to which their transaction is prone. When the transactions that the rules are called on to govern deviate significantly from the script that the rules implicitly assume, however, these doctrines cease to serve their original purpose. Rather, they simply add to the complexity of legal arguments. This creates the danger of turning litigation into a lottery, with winners and losers being chosen through the

39. White, *supra* note 35, at 34 (footnotes omitted).

40. See WHITE & SUMMERS, *supra* note 17, at 30 (stating that section 2-207 "is like an amphibious tank that was originally designed to fight in the swamps, but was sent to fight in the desert").

41. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (Easterbrook, J.) ("Our case has only one form; UCC § 2-207 is irrelevant.").

application of rules that serve little functional purpose in the litigants' context. Less worryingly, it adds to the burden and complexity of litigation, a fact testified to by the continual tide of cases over section 2-207.⁴² At best, courts will be forced to offer strained interpretations of the transaction-specific rule in order to reach sensible outcomes.⁴³ At worst, parties will be able to escape liability in situations in which we have no reason to suppose that imposing liability is problematic.

It is possible, of course, to overstate the dichotomy between specialized bodies of contract law and the general law of contracts. Discussing issues in terms of these two poles is useful because it allows us to sharpen our sense of the problems that our approach to the law can create. The reality, however, is always messier than any neat dichotomy suggests. The common law of contracts, for example, always contained specialized, transaction-specific doctrines.⁴⁴ Likewise, specialized statutes governing particular transactions never wholly displace the general law of contracts. Rather, even when such laws displace particular doctrines or rules, the background law of contracts always stands ready to answer questions in areas in which specialized bodies of law are silent.⁴⁵ In practice this means that when litigating and deciding cases, lawyers and judges move seamlessly from arguments based on general principles of contract to arguments based on transaction-specific rules without noting or even being aware of any distinction between them.

That said, both of the problems discussed above are on display in the application of a specialized body of contract law—in this case the law of premarital agreements—to Islamic marriage contracts. Rather than conforming to the culturally specific script envisioned by the law of premarital agreements, Islamic marriage contracts operate in a very different context, one in which the transactional

42. See White, *supra* note 35, at 34–35 (noting that section 2-207 has provoked substantial litigation).

43. See *id.* at 37 (“Worse, [a particular case under section 2-207] exhibits exactly the kind of statute-torturing that Llewellyn and the other realists most despised. To think that the realist’s own statute has reduced a smart judge to such dishonest behavior would embarrass Llewellyn’s ghost.”).

44. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 28 (1981) (offers in auctions); *id.* § 64 (rule regarding acceptance by telephone); *id.* § 82(2)(c) (promise to perform a contract unenforceable under the statute of limitations); *id.* § 83 (promise to perform a contract discharged in bankruptcy); *id.* § 87 (option contracts); *id.* § 88 (guaranty contracts); *id.* § 313 (third-party beneficiaries and government contracts).

45. See, e.g., U.C.C. § 1-103 (2003) (stating that principles of law and equity with regard to contracts continue to govern agreements for the sale of goods unless specifically displaced by the U.C.C.). The importance of common law and equity under the U.C.C. is testified to by the existence of a treatise devoted to the subject. See generally ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE (1985).

assumptions of the law of premarital obligations prove misleading.

II. MAHR CONTRACTS

In order to understand the problems that legal specialization has created in the enforcement of Islamic marriage contracts, it is necessary to understand the context in which such contracts arise. In particular, their meanings as well as the practices surrounding them have their origins in Muslim religious law. Accordingly, before looking at the American case law, it is necessary to provide a brief introduction to the Islamic law of marriage and divorce.

A. *The Islamic Law of Marriage and Divorce*

Islamic law has its origins in the life of the Prophet Muhammed. In 610 C.E., Muhammed, then a successful merchant in the city of Mecca, heard the voice of the angel Gabriel in the desert commanding him to “Recite!”⁴⁶ The results were the first *suras* (chapters) of what became the Qu’ran and eventually the founding of a new monotheistic faith.⁴⁷ Unlike Jesus, who was never an overtly civic leader,⁴⁸ the religion that Muhammed promulgated was necessarily political. Perhaps the key moment in the ministry of Muhammed came in 622 C.E., when he left Mecca and migrated in the so-called *Hijra* to the city of Yathrib, also known as Medina.⁴⁹ There Muhammed became not only a spiritual but also a civic and military leader.⁵⁰ The portions of the Qu’ran received by Muhammed in this period, unlike those received during the so-called Meccan period, frequently dealt with matters of civic administration—in short, with matters of law.⁵¹ Law is thus deeply woven into the sacred texts and founding myths of Islam.⁵² For a Muslim, following Muhammed’s example as a pious adherent of Islam necessarily means trying to emulate his effort to realize God’s

46. See DANIEL C. PETERSON, MUHAMMAD: PROPHET OF GOD 51 (2d ed. 2007).

47. See *id.*

48. See *id.* at 92–93 (observing that Jesus held no political office). *But see generally* JOHN DOMINIC CROSSAN, JESUS: A REVOLUTIONARY BIOGRAPHY (1994) (arguing that Jesus should be seen as the leader of a political protest movement); JOHN DOMINIC CROSSAN, THE HISTORICAL JESUS: THE LIFE OF A MEDITERRANEAN JEWISH PEASANT (1991) (same).

49. See PETERSON, *supra* note 46, at 91 (“For the move of Muhammad from Mecca to his new home placed Islam and its message, as well as the Prophet himself, on an entirely new plane.”).

50. *Id.* (“Muhammad became a prophet-statesman, the founder of a political order and eventually of an empire that would change the history of the world.”).

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

52. The word “myth” is not used here in the pejorative sense of a false story, but to denote a profound story meant to provide meaning to the world.

justice in the world. Later generations of Muslims built on the Medinan passages of the Qua'ran and the stories recounting the actions and teachings of the Prophet, known as *sunna* or *hadith*, to create an elaborate system of religious law. This system is known as the *shari'a* or *fiqh*.⁵³ Among the issues that the *fiqh* treats in great detail are matters of marriage and divorce.

In Islam, marriage is a contract, not a sacrament.⁵⁴ Indeed, there is no notion of priesthood or of a priestly class in Islam and hence no sacramental or liturgical rules.⁵⁵ In order for a marriage to be formed, the prospective husband and wife must consent to their union in a written contract.⁵⁶ In the case of a "virgin"—a woman who has not been previously married—the marriage negotiations are conducted by a *wali*, generally her closest male relative.⁵⁷ The purpose of the *wali* is to safeguard the interests of the prospective wife in the marriage negotiations.⁵⁸ The husband must also confer on the wife a dower known as a *mahr* or *saddaq*.⁵⁹ Contrary to how it has been characterized by some, the *mahr* is not a "bride price."⁶⁰

53. *Shari'a* and *fiqh* have slightly different connotations. *Shari'a* refers to the primal way in which man ought to relate to God. See M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135, 141 (2002). One can think of the *shari'a* as the juridical expression of God's will for man. It is thus always in some sense transcendent and imperfectly grasped by human minds. *Fiqh*, in contrast, refers not to the transcendent law of God per se, but rather to the body of human interpretation of the divine revelation. See HALLAQ, *supra* note 5, at 3; Lino J. Lauro & Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 109 n.260 (1996). The purpose of the *fiqh* is to grasp the *shari'a*, to put it into practice but as an effort of the human mind; *fiqh* is in theory contingent and fallible in way that *shari'a* is not. See Asifa Quaraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law*, 2009 MICH. ST. L. REV. 339, 342.

54. See HALLAQ, *supra* note 5, at 271 (discussing the contractual nature of marriage in Islam).

55. There is a strong tradition of Muslim clerics, or *ulama*. See Dale F. Eickelman & James Piscatori, *Foreward* to MUHAMMAD QASIM ZAMAN, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE*, at ix, ix-x (2002). These clerics, however, are either scholars or preachers. See *id.* They enjoy no special sacerdotal authority in the way that Catholic or Orthodox clergy do. See *id.*

56. See HALLAQ, *supra* note 5, at 271 ("[M]arriage as *nikah* [is] a contract with a narrow scope.").

57. See NASIR, *supra* note 12, at 49-52 (outlining the two forms of guardianship recognized in *shari'a* law: one that has a right of compulsion exercised over minors or others with limited legal capacity and one that does not have this right of compulsion but instead is chosen in deference to social custom).

58. See HALLAQ, *supra* note 5, at 274-76 (describing the role of the *wali* in negotiating the marriage contract).

59. See NASIR, *supra* note 12, at 87-88 (discussing how dower is treated as part of the marriage contract).

60. See *id.* at 87.

Rather, it is meant to ensure that a woman begins her marriage with some measure of financial independence.⁶¹ Under the classical *fiqh*, a marriage contract is not valid without a *mahr*.⁶² In practice, the *mahr* is always divided into an immediate gift of property—in modern Muslim marriages this can take the form of anything from a wedding ring to a substantial pool of personal property such as an apartment, a car, or furniture—and a deferred sum of money to be paid on either the death of the husband or the couple's divorce.⁶³

There is no analogy under Islamic law to the common law idea of coverture. A Muslim woman does not lose her legal identity upon marriage.⁶⁴ Likewise, there is nothing in Islamic law analogous to community or marital property.⁶⁵ Any assets brought to the marriage by either party remain the individual property of that person.⁶⁶ Property acquired during marriage remains the sole property of the person acquiring it.⁶⁷ Upon divorce, Islamic law provides nothing similar to the equitable distribution of marital property.⁶⁸ Rather, each spouse walks away from the marriage with his or her individual property.⁶⁹ Because there are frequently strong moral and social pressures against Muslim women working outside the home after marriage,⁷⁰ however, in practice this often means that a divorced wife is left with little or no claim on the collective wealth of the couple. The most dramatic exception to this is the deferred *mahr*. Absent the wife's consent, the husband's obligation to pay the deferred *mahr* promised upon divorce is virtually

61. See HALLAQ, *supra* note 5, at 277 (“Immediate dower, paid upon conclusion of the contract, remained the wife’s property throughout the marriage, and she was not obliged to spend it on anything or anyone other than herself . . .”).

62. See *id.* (“The dower may not be stipulated in the marriage contract, ‘nor is it the point of marriage,’ but both theory and practice require[] that it be paid.”).

63. See NASIR, *supra* note 12, at 90–91 (noting the practices relating to the *mahr*).

64. See HALLAQ, *supra* note 5, at 279 (“But the wife, like her husband, maintains an independent financial status throughout the marriage.”).

65. *Id.* (“Marriage does not create community property.”).

66. *Id.* (“Any inheritance or gift she may receive before or during the marriage remains hers exclusively, and so does her dower and all property that accrues to her.”).

67. *Id.*

68. See, e.g., Ahmad v. Ahmad, No. L-00-1391, 2001 WL 1518116, at *4–6 (Ohio Ct. App. Nov. 30, 2001) (rejecting husband’s claim that the *mahr* provision barred the court from awarding equitable distribution of marital assets).

69. See HALLAQ, *supra* note 5, at 279.

70. See Nagat el-Sanabary, *Women and the Nursing Profession in Saudi Arabia*, in ARAB WOMEN: BETWEEN DEFIANCE AND RESTRAINT 71, 75–77 (Suha Sabbagh ed., 2003) (describing the social and moral stigma often associated with women working outside of the home).

absolute.⁷¹ The *mahr* is not treated as a distribution of marital assets.⁷² Rather, it is a debt owed by the husband to the wife.⁷³ Indeed, the husband owes the debt even if the couple has no assets.⁷⁴ In Iran, for example, a husband who fails to pay a deferred *mahr* upon divorce will be jailed.⁷⁵

Under Islamic law divorce may take several forms. If a woman wishes to divorce her husband she has two options. First, she may seek what is known as a *tafriq*.⁷⁶ This is essentially divorce for cause. It must be granted by a religious judge—a *qadi*—and is generally only available in cases of abuse or abandonment.⁷⁷ If the woman is successful in obtaining a *tafriq* the marriage is dissolved and the husband is obligated to pay her the deferred *mahr* in their marriage contract.⁷⁸ The second method is known as a *khul'*.⁷⁹ This is a divorce by mutual consent. It does not require any showing of cause or the intervention of a *qadi*.⁸⁰ However, it does require the husband's consent.⁸¹ Furthermore, in order to be valid, a *khul'* must be supported by consideration that passes from the wife to the husband.⁸² As a practical matter, this consideration virtually always consists of the wife relinquishing her claim to the deferred

71. *See id.* at 277 (“The delayed dower was normally stipulated as protection, becoming due to the wife from the husband if he repudiated her through *talaq* or if either of them died.”).

72. *See* JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* 89 (2d ed. 1990) (“The dower . . . shall be the right of the wife once the valid contract is made.”).

73. *See* NASIR, *supra* note 12, at 88.

74. *See id.* at 90–91 (describing how a wife can enforce the *mahr* as a debt owed to her by her spouse).

75. Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 201 (2002).

76. *See* HALLAQ, *supra* note 5, at 279–80 (discussing the requirements and function of *tafriq*).

77. *Iranian To Pay 124,000-Rose Dowry*, BBC NEWS, Mar. 3, 2008, http://news.bbc.co.uk/2/hi/middle_east/7275506.stm; *see also* JUDITH E. TUCKER, *IN THE HOUSE OF THE LAW: GENDER AND ISLAMIC LAW IN OTTOMAN SYRIA AND PALESTINE* 92 (1988) (documenting the practice of jailing a husband for failure to pay the *mahr* upon divorce).

78. *See* HALLAQ, *supra* note 5, at 280 (noting that “a judicial order known as *tafriq*” is literally translated in Arabic to mean “to separate the spouses from each other”).

79. *See id.* at 283–86 (discussing the application of *khul'*).

80. *See* NASIR, *supra* note 12, at 129 (“[M]arriage may be dissolved by the wife literally paying her husband for her freedom under the Qur’anic ruling.”).

81. *See* HALLAQ, *supra* note 5, at 284 (“*Khul'* is an offer made to the husband by the wife in respect of marital dissolution If the husband accepts the offer, he will then repudiate his wife once, considered to be an irrevocable utterance (*ba'in*).”).

82. *See id.* at 285–86 (discussing the five required elements of a *khul'* contract, including consideration).

mahr in the marriage contract.⁸³

In contrast to a woman's options, a husband may unilaterally divorce his wife through a mechanism known as *talaq*.⁸⁴ The husband's power of *talaq* is essentially unlimited. There is no requirement to show cause, nor is there any intervention by a *qadi*.⁸⁵ However, upon *talaq*, the husband must pay the wife her deferred *mahr*.⁸⁶ Indeed, one of the reasons that the custom of a deferred *mahr* developed was to limit the husband's power of *talaq*.⁸⁷ Women have no power analogous to *talaq*; their divorce options are limited to *tafriq* or *khul'*. A husband's power of *talaq*, however, may be delegated to another party by contract,⁸⁸ and some Muslim feminists have advocated marriage contracts in which the husband delegates the power of *talaq* to his wife, in effect equalizing spousal access to unilateral divorce.⁸⁹ While such a provision would be unobjectionable under most interpretations of Islamic law, it is not a common feature of most Muslim marriage contracts.⁹⁰

With the exception of a few jurisdictions, such as Saudi Arabia, the classical *fiqh* is not the municipal law of most Islamic countries.⁹¹ It has, however, exercised a profound influence on the formally enacted law of many nations with large Muslim populations.⁹² Hence the law of marriage in a country such as Jordan or Pakistan follows the broad outlines of traditional Islamic law.⁹³ Marriage is formed by a contract between the husband and the wife or, more commonly, between a husband and the wife's

83. See *id.* at 280 (noting the amount of consideration required for *khul'* will not exceed the amount of the dower).

84. See *id.* at 280–83 (outlining the requirements and procedure of *talaq*).

85. See HALLAQ, *supra* note 5, at 282 (stating that in *talaq*, men are “not so queried as to their motives”). But see NASIR, *supra* note 12, at 120–29 (discussing *talaq* and noting that many countries have begun to curb this nearly unlimited power of the husband).

86. See HALLAQ, *supra* note 5, at 282 (noting that husbands “stood to lose most from marital dissolution” by exercising *talaq*).

87. See Blenkhorn, *supra* note 75, at 202 (equating the deferred *mahr* to a security deposit against *talaq*).

88. See HALLAQ, *supra* note 5, at 282 (“A husband can repudiate his wife by proxy, a right that he can delegate to the wife herself, enabling her to dissolve her marriage on his behalf.”).

89. See Kathleen A. Portuan Miller, *Who Says Muslim Women Don't Have the Right To Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y. INT'L L. REV. 201, 225–26 (2009) (discussing how marriage contracts may be used to enhance a woman's access to divorce).

90. See Blenkhorn, *supra* note 75, at 202 (noting the rarity in Islamic marriage contracts of allowing the wife to initiate divorce).

91. JAN MICHIEL OTTO, *SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY* 8–9 (2008).

92. See generally OTTO, *supra* note 91 (describing the influence of Islamic law in Muslim countries).

93. See *id.* at 76–104 (discussing Jordanian marriage law in relation to Islamic law).

wali.⁹⁴ The marriage contract will be required to contain a *mahr* provision to be valid.⁹⁵ The law of divorce and the distribution of a couple's assets will likewise closely follow the rules of the classical *fiqh*.⁹⁶ Some countries with large Muslim minorities—such as Israel and India—have created a parallel family court system for Muslims in which judges apply Islamic law, even if such law is not applied generally or to the marriages of non-Muslims.⁹⁷ In addition, religious Muslims living in non-Muslim societies—such as Muslim immigrants in Europe or the United States—often conform to the requirements of the *fiqh* as a matter of piety in contracting their marriages.⁹⁸ Accordingly, when Muslim marriages in the United States end in divorce, American courts often face the question of how to treat Islamic marriage contracts.⁹⁹

B. Mahr Contracts in American Courts

The overwhelming majority of these cases deal with the effect of the *mahr* provision on the distribution of marital property under American divorce statutes. Litigation over these contracts often becomes complex, especially when the marriage was entered into overseas and the court must deal with difficult questions of the applicable law under principles of international comity.¹⁰⁰ In addition, because Islamic marriage contracts are religious agreements, objections to their enforcement have been raised under

94. See *supra* notes 54–58 and accompanying text.

95. See *supra* notes 59–63 and accompanying text.

96. See NASIR, *supra* note 12, at 76–104 (discussing the intersection of Islamic law and the law of Arabian countries).

97. See Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 109, 120 (2000).

98. See, e.g., *Aleem v. Aleem*, 947 A.2d 489, 490–91 (Md. 2008) (adjudicating a dispute over an Islamic marriage contract); *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at *1–3 (Mich. Ct. App. Apr. 7, 2009) (same).

99. See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 864–65 (Ct. App. 2001); *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 871 (Ct. App. 1988); *Akileh v. Elchahal*, 666 So. 2d 246, 247–48 (Fla. Dist. Ct. App. 1996); *Aleem*, 947 A.2d at 490–91; *Aleem v. Aleem*, 931 A.2d 1123, 1124–31 (Md. Ct. Spec. App. 2007); *Odatalla v. Odatalla*, 810 A.2d 93, 94–95 (N.J. Super. Ct. Ch. Div. 2002); *Chaudry v. Chaudry*, 388 A.2d 1000, 1002–03 (N.J. Super. Ct. App. Div. 1978); *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at *1 (N.Y. Sup. Ct. July 10, 1995); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985); *Zawahiri v. Alwattar*, No. 07-AP-925, 2008 WL 2698679, at *1 (Ohio Ct. App. July 10, 2008); *Mir v. Birjandi*, Nos. 2006 CA 63, 2006 CA 71, 2006 CA 72, 2007 WL 4170868, at *1–2 (Ohio Ct. App. Nov. 21, 2007); *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at *1–3 (Ohio Ct. App. Nov. 30, 2001); *Ahmed v. Ahmed*, 261 S.W.3d 190, 192–94 (Tex. App. 2008).

100. See, e.g., *Chaudry*, 388 A.2d at 1003–04 (discussing the application of Pakistani law to the couple's marriage contract); *Birjandi*, 2007 WL 4170868, at *1 (discussing the effect of legal proceedings in Iran under the marriage contract on divorce proceedings in the United States).

both the First Amendment and state constitutional equivalents.¹⁰¹ Such issues are beyond the scope of this Article, but I flag them because they explain why courts' discussions of the pure contract issues in these cases are frequently short and confused by other legal theories. As a matter of contract, both husbands and wives invoke the *mahr* provision, albeit in different factual circumstances. In divorces in which there are substantial marital assets subject to potential distribution, husbands invoke the *mahr* provision in the hope of obtaining the bulk of the marital property. In *Ahmad v. Ahmad*,¹⁰² for example, a Jordanian student in Ohio married a woman in Jordan that he met through a courtship arranged by the couple's families.¹⁰³ On returning to the United States, the marriage deteriorated, and the wife instituted divorce proceedings in Ohio.¹⁰⁴ Over the course of the marriage, the couple acquired real estate in Ohio, which became the subject of litigation in the divorce.¹⁰⁵ The husband invoked the *mahr* contract signed in the course of the couple's marriage in Jordan, insisting that the court lacked jurisdiction to distribute the Ohio property because "the parties had previously entered into a contract delegating their rights and responsibilities upon divorce."¹⁰⁶

Wives, in contrast, invoke the *mahr* provision in cases in which there are relatively few marital assets on which they could make a claim under American divorce statutes. In these cases, they claim that regardless of the equitable distribution of the marital estate, they are entitled to the amount of money promised them in the *mahr* contract. Another Ohio case, *Zawahiri v. Alwattar*,¹⁰⁷ provides an example. A medical student and a college student met through their families and subsequently were married under Ohio law.¹⁰⁸ The students and their families, however, were observant Muslims and the marriage contract contained a deferred *mahr* of \$25,000.¹⁰⁹

101. See, e.g., *Odatalla*, 810 A.2d at 95 (discussing husband's argument that the enforcement of the *mahr* provision would violate the First Amendment); *Zawahiri*, 2008 WL 2698679, at *1 (discussing husband's argument that the enforcement of the *mahr* provision would violate the Ohio constitution's religion clauses).

102. No. L-00-1391, 2001 WL 1518116 (Ohio Ct. App. Nov. 30, 2001).

103. See *id.* at *2-3 (describing the events leading up to their marriage).

104. *Id.* at *2 (noting that the husband had already obtained a divorce in Jordan before the wife filed in the Ohio courts).

105. *Id.* at *3 (finding that the property at issue included the couple's residence and a block of apartments).

106. *Id.* at *1 (listing the husband's points of error).

107. No. 07-AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008).

108. *Id.* at *1 ("Alwattar and Zawahiri courted for a month before she accepted his proposal.").

109. *Id.* ("Ultimately, Zawahiri and the bride's father settled on \$25,000 for the 'postponed' portion of the mahr. They also agreed that the 'advanced' portion of the mahr would consist of a ring and gold that Zawahiri and his family had already given Alwattar.").

According to the court, “Unfortunately, the parties’ marriage quickly foundered. They never lived together and, instead, remained in their respective parents’ homes while Zawahiri studied for his medical board exams and Alwattar completed her college degree. Due to their largely separate lives, the parties did not acquire any marital assets or debts.”¹¹⁰ There being no assets of which the wife could have a claim in divorce, she instead sued to enforce the \$25,000 deferred *mahr*.¹¹¹

Both husbands and wives have sought to shield themselves using the law of premarital contracts. The UPAA,¹¹² which has been adopted in twenty-six states and the District of Columbia,¹¹³ creates special defenses against liability for premarital contracts. In addition to the ordinary requirements that a contract be voluntarily made and not be unconscionable, section 6 of the Act provides that a party who “was not provided fair and reasonable disclosure of the property or financial obligations of the other party” and who “did not have . . . an adequate knowledge” of those obligations may avoid liability under the contract.¹¹⁴ Wives wishing to avoid having their claim to marital property limited to the value of their deferred *mahr* have relied on this provision, arguing that prior to signing the marriage contract their prospective husbands failed to disclose their assets.¹¹⁵ Likewise, husbands wishing to avoid the obligation to pay the deferred *mahr* have insisted that they are relieved of any obligation under the marriage contract because their prospective wives failed to make the same disclosure.¹¹⁶

With a few exceptions,¹¹⁷ most American courts faced with *mahr*

110. *Id.*

111. *Id.* (“Alwattar argued that the marriage contract constituted a valid and enforceable prenuptial agreement that entitled her to an award of \$25,000.”).

112. UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001).

113. Jana Aune Deach, Case Comment, *Premarital Settlements: Till Death Do Us Part—Defining the Enforceability of the Uniform Premarital Agreement Act in North Dakota*, In Re Estate of Lutz, 563 N.W.2d 90 (N.D. 1997), 74 N.D. L. REV. 411, 417 n.52 (1998).

114. See UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2)(i)–(iii), 9C U.L.A. 48 (2001).

115. See, e.g., *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at *4 (Ohio Ct. App. Nov. 30, 2001) (“[The] antenuptial agreement was unenforceable under Ohio law because at the time the agreement was entered into, appellee was not represented by counsel, there was no disclosure of appellant’s assets, and the agreement did not take into consideration the assets subsequently acquired in Ohio during the eight-year marriage.”).

116. See, e.g., *Zawahiri*, 2008 WL 2698679, at *1–2 (holding that a \$25,000 deferred *mahr* would not be enforced against the husband because “the parties entered the marriage contract under circumstances that rendered the contract invalid and unenforceable”).

117. See, e.g., *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985) (enforcing a *mahr* contract under the New York General Obligations Law, which codifies the ordinary common law of contracts); *Ahmed v. Ahmed*, 261 S.W.3d 190, 194 (Tex.

contracts have treated them as premarital agreements.¹¹⁸ Generally speaking, judges have reached fairly sensible results in these cases. Husbands have not been particularly successful in using *mahr* contracts as an upper limit on their wives' claims to marital assets. In some of the cases this is because the husbands' legal arguments overreached. For example, in *In re Marriage of Shaban*,¹¹⁹ a couple married in Egypt using a traditional contract ending with the words: "The above legal marriage has been concluded in Accordance with his Almighty God's Holy Book and the Rules of his Prophet to whom all God's prayers and blessings be, by legal offer and acceptance from the two contracting parties."¹²⁰

The husband argued that with this language the parties had imported the whole of the Islamic law of marriage and divorce into their agreement.¹²¹ The court dismissed this argument on parol evidence and statute of frauds grounds.¹²² Husbands making the more modest claim that their wives had bargained away their rights to equitable distribution of marital property in return for the deferred *mahr* have been met with the holding that they failed to properly disclose their financial situation.¹²³ While wives seeking to enforce the *mahr* claim have been met on occasion with the same failure-to-disclose defense,¹²⁴ courts have generally been friendlier to their claims for the payment of the deferred dower.¹²⁵

Treating *mahr* contracts as premarital agreements, however, creates a risk of perverse outcomes. In *Chaudry v. Chaudry*,¹²⁶ the New Jersey appellate court considered the divorce of a couple who had married many years before in Pakistan by executing a traditional marriage contract.¹²⁷ Pakistani family law follows the

App. 2008) (rejecting the wife's claim that the *mahr* contract should be treated as a prenuptial agreement).

118. See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 867–69 (Ct. App. 2001).

119. 105 Cal. Rptr. 2d 863 (Ct. App. 2001).

120. *Id.* at 866.

121. See *id.* at 866–67 ("Ahmad made an offer of proof that the phrase signified a written intention by the parties to have the property relations governed by 'Islamic law,' which provides that the earnings and accumulations of each party during a marriage remain that party's separate property.").

122. See *id.* at 867–69.

123. See, e.g., *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at *4–6 (Ohio Ct. App. Nov. 30, 2001) (rejecting husband's claim that the *mahr* provision barred a court from awarding equitable distribution of marital property to the wife).

124. See, e.g., *Zawahiri v. Alwattar*, No. 07-AP-925, 2008 WL 2698679, at *1–2 (Ohio Ct. App. July 10, 2008).

125. For cases enforcing *mahr* provisions against husbands, see *S.I. v. D.P.I.*, No. CN04-09156, 2006 WL 2389260, at *3–4 (Del. Fam. Ct. Apr. 5, 2006); *Odatalla v. Odatalla*, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985).

126. 388 A.2d 1000, 1002–03 (N.J. Super. Ct. App. Div. 1978).

127. *Id.* at 1003–04.

classical *fiqh* in providing no equitable distribution of property upon divorce.¹²⁸ The couple moved to America where they lived for many years.¹²⁹ The husband was a successful doctor and the wife was a homemaker.¹³⁰ During the course of the marriage, the couple acquired substantial property in New Jersey.¹³¹ Upon their divorce, the husband invoked the *mahr* contract, arguing that he was entitled to exclusive control of the couple's property over and above the amount of the deferred *mahr*.¹³² The New Jersey appellate court wrote:

[W]e have concluded that the wife is not entitled to equitable distribution by reason of the antenuptial agreement [i.e., the *mahr* provision], which was negotiated on her behalf by her parents. It could have lawfully provided for giving her an interest in her husband's property, but it contained no such provision.¹³³

Accordingly, the court concluded, she was entitled to a mere \$1500 in the couple's divorce.¹³⁴ The husband walked away with the rest of the marital assets.¹³⁵

Less dramatically but more frequently, the specialized law of premarital agreements provides parties with special defenses to liability not available under ordinary rules of contract law. Litigation over *mahr* agreements in Ohio illustrates the issue. In *Gross v. Gross*,¹³⁶ the Ohio Supreme Court considered the general enforceability of prenuptial agreements. The court sought a middle ground between the position that prenuptial agreements should be treated as ordinary contracts and the position that they should be

128. *See id.* at 1006 ("The expert testimony establishes that alimony does not exist under Pakistan law and an antenuptial agreement providing therefor is void as a matter of law in that country.").

129. *Id.* at 1004.

130. *Id.* at 1002.

131. *See id.* (finding the husband owned substantial assets in New Jersey and intended to remain domiciled there).

132. *See id.* at 1006 ("It also makes it clear that the antenuptial agreement could [have] provided for the wife's having an interest in her husband's property, but no such provision was made; instead, it provided only for her receiving 15,000 rupees.").

133. *Id.*

134. *Id.*

135. *Id.* While the court in *Chaudry* did conclude that the *mahr* contract was a premarital agreement in which the wife had bargained away any rights to equitable distribution of property, the court's decision also rested in part on choice of law grounds; although, as I discuss in a forthcoming article on *mahr* contracts, the court's conflicts analysis is ultimately confused and unpersuasive. Nathan B. Oman, *How To Judge Shari'a Contracts: A Guide to Islamic Mahr Agreements in American Courts*, UTAH L. REV. (forthcoming) (manuscript at 28–30, on file with author).

136. 464 N.E.2d 500 (Ohio 1984).

void as violating public policy.¹³⁷ It concluded:

Upon our considered view and analysis of the very specialized purpose of these types of agreements, *i.e.*, the disposition of property, and provision for support or sustenance alimony at the time that a divorce or separation might take place between the parties, we conclude that a strict application of the law of contracts would not be appropriate.¹³⁸

Accordingly, the court concluded that in addition to the ordinary requirement that there be no duress or overreaching in contract formation, there must be “a full disclosure of the assets of the parties” and the contract must “not promote or encourage divorce.”¹³⁹ This disclosure requirement—not present in the ordinary law of contracts—is essentially identical to that required under the UPAA.¹⁴⁰

The so-called *Gross* requirements have been invoked by both husbands and wives litigating *mahr* provisions. In the case of *Zawahiri v. Alwattar* mentioned above, the husband was able to successfully invoke *Gross* to avoid liability to pay the *mahr*.¹⁴¹ At trial, the wife had urged the court to enforce the contract as a premarital agreement, but the court held that “the parties entered the marriage contract under circumstances that rendered the contract invalid and unenforceable as a prenuptial agreement.”¹⁴² Likewise, in *Ahmad v. Ahmad*, also mentioned above, the wife invoked the same *Gross* disclosure requirements against her husband, who wished to have the *mahr* contract enforced as a relinquishment of her rights in divorce.¹⁴³ The court concluded that:

[T]he sadaq or antenuptial agreement was unenforceable under Ohio law because at the time of the agreement was entered into, appellee was not represented by counsel, there was no disclosure of appellant’s assets, and the agreement did not take into consideration the assets subsequently acquired in Ohio during the eight-year marriage.¹⁴⁴

137. *See id.* at 505–06 (discussing the treatment of prenuptial agreements under previous Ohio cases and by courts in other states).

138. *Id.* at 507–08.

139. *Id.* at 510.

140. *See* UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9C U.L.A. 48 (2001).

141. *Zawahiri v. Alwattar*, No. 07-AP-925, 2008 WL 2698679, at *3–5 (Ohio Ct. App. July 10, 2008).

142. *Id.* at *2. On appeal, the court upheld the trial court’s decision on an abuse of discretion standard by suggesting that the husband may have failed to meaningfully consent to its terms because of overreaching by family and in-laws at the time of marriage. *Id.* at *6. This aspect of the court’s opinion is discussed below.

143. *See Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at *4 (Ohio Ct. App. Nov. 30, 2001).

144. *Id.*

One might see the application of this doctrine to both husbands and wives as laudable evenhandedness by the Ohio courts. As discussed below, however, it more likely represents the more or less arbitrary invalidation of contracts in situations in which the absence of the required disclosure is unobjectionable.

III. THE VIRTUES OF GENERAL CONTRACT LAW

The law of premarital agreements is based on a social script about premarital bargaining. This script yields a set of assumptions about both the typical content of premarital agreements and the primary concerns presented by such agreements. As a practical matter, most premarital agreements are designed to shield the assets and income of a wealthier spouse (generally, but not always, the husband) from the claims of a poorer spouse (generally, but not always, the wife) upon divorce.¹⁴⁵ Premarital agreement law is therefore geared around the assumption that a prospective spouse presented with a premarital contract is being asked to bargain away his or her rights to equitable distribution of marital property upon divorce.¹⁴⁶ This bargaining dynamic creates an awkward and dangerous situation. In negotiating the terms of the premarital contract, the interests of the parties are adverse. On the threshold of marriage, however, there are likely to be high levels of trust and optimism. The trust creates a temptation for the wealthier prospective spouse to take advantage of his or her poorer partner by getting him or her to sign away claims on future assets and income without providing full disclosure of the value of what is being lost.¹⁴⁷ Likewise, the law fears that in the midst of prenuptial optimism men and women underestimate the likelihood of divorce and inconsiderately give up valuable rights that they erroneously believe they will never wish to exercise.¹⁴⁸ Given these concerns, invalidating premarital agreements in which parties fail to take the

145. See Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 234–35, 294 (1994) (arguing that this premise of premarital agreements renders them hostile to women).

146. See GREGORY ET AL., *supra* note 13, at 103 (“Premarital agreements, also called antenuptial or prenuptial contracts, are most often utilized when prospective spouses wish to contractually vary, limit, or relinquish certain marital property and support rights that they would otherwise acquire by reason of their impending marriage.”).

147. See, e.g., Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 193 (1998) (“Premarital agreements are good examples of contracts that illustrate problems with rational judgment, as they involve long-term planning and the consideration of possible negative outcomes at a time when the parties are most likely to be optimistic that no such negative outcomes will occur.”).

148. See *id.* at 193–95 (discussing studies that show that even well-educated people are prone to overstating the probability that their marriage will not end in divorce).

prophylactic step of full disclosure of assets and liabilities makes sense.¹⁴⁹

When these assumptions are transposed to the context of Islamic marriage contracts, however, problems arise. Understood in their own terms, Islamic marriage contracts do not fit within these narratives. When the parties make these contracts, they do not intend to bargain away their rights under American divorce law.¹⁵⁰

The requirement that a marriage contract contain a *mahr* predates the existence of the United States by centuries. Indeed, it predates the very existence of the common law by centuries.¹⁵¹ Within the context of Islamic law, it does not make sense to say that a wife is bargaining away her claim on her husband's future assets or income. Islamic law gives her no such claim to bargain away. Given this social context, it is implausible to interpret these contracts as bargaining away such rights. To be sure, a man who gets married under *shari'a* law in Saudi Arabia may well expect that upon divorce his wife will have no claim on the wealth he has acquired during the course of the marriage. This expectation, however, does not arise as a matter of contract. Rather, it arises because of the background rules of Islamic property law. Such expectations will be disappointed in an American divorce proceeding after the couple moves to America. The disappointment, however, arises not because of a refusal to enforce the marriage contract but because American rather than Saudi Arabian property law governs the case.

The presence of a specialized law of premarital agreements, however, encourages American courts to understand *mahr* contracts as analogous to ordinary prenuptial agreements. Accordingly, numerous courts have concluded that *mahr* contracts are intended to bargain away a wife's right to marital property upon divorce, even when those courts have successfully labored to find some reason for invalidating the contract so as to avoid this harsh result.¹⁵² This

149. *But see* Steven L. Schwarcz, *Disclosure's Failure in the Subprime Mortgage Crisis*, 2008 UTAH L. REV. 1109 (arguing for the ineffectiveness of disclosure requirements in the subprime mortgage market); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure* (Univ. of Chi. Law Sch. Olin Law & Econ. Prog., Research Paper No. 516 & Univ. Mich. Law Sch., Law & Econ. Empirical Legal Studies Ctr., Paper No. 10-008, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567284 (arguing that mandated disclosure rules serve as poor prophylactics against misbehavior or poor decision making).

150. *See* Blenkhorn, *supra* note 75, at 200 (noting *mahr* provision is used as protective mechanism for Muslim women).

151. *See id.* at 191 (noting that Islamic family law has changed very little since the tenth century).

152. *See, e.g., In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 867-69 (Ct. App. 2001) (holding that the statute of frauds prevented the court from enforcing the *mahr* as a premarital agreement); *Chaudry v. Chaudry*, 388 A.2d 1006 (N.J. Super. Ct. App. Div. 1978) (finding that the *mahr* agreement in the case limited the wife's claim to the husband's assets to the specified \$1500).

creates the risk of *Chaudry*-like outcomes in cases in which courts are unable to find some other reason to deny enforcement. This is a problem of interpretation that can be cured within the framework of premarital agreement law. Nothing in that law requires courts to interpret *mahr* provisions as bargaining away rights in divorce. Courts, however, must resist the temptation to assume that the contract before them falls within the implicit social script of premarital agreement law simply because that law can arguably be applied to it. Rather, they should strive to understand the contract within its actual social context and according to the intentions and expectations of the parties. There is nothing in the UPA that prohibits them from doing this, but the courts' error is understandable given the script that the Act presents to them. Indeed, part of the purpose of having a specialized body of law, ironically, is to relieve courts of the need to devote so much energy to understanding the transaction in the parties' terms. Rather, we invest energy in understanding transactional forms and drafting specialized laws in part to spare courts from having to invest in understanding transactional forms at the level of adjudication. There are limits, however, on the drafters' ability to understand and foresee new or different transactional forms.

Once they are properly understood, there is little reason, absent special circumstances, not to enforce *mahr* contracts as written. Doing so respects the intentions of the parties, and when the courts give effect to such religiously motivated bargains, they take citizens' religious convictions seriously in ways that do not undermine the separation of church and state or religious freedom. Furthermore, enforcing such contracts helps to limit the abuse of *talaq* by Muslim men. Indeed, the Islamic law of *talaq* assumes that a wife's enforceable claim to a deferred *mahr* will limit its abuse.¹⁵³ American courts that have been asked to acknowledge the legal validity of *talaq* have refused to do so on equal protection grounds or under state conflicts law.¹⁵⁴ Regardless of its legal validity, however, *talaq* remains an important social institution in the lives of many Muslim men and women. When a husband performs *talaq* against his wife, she is no longer married in the eyes of Islamic law—and often in the eyes of the Islamic community—even if she remains married in the eyes of the state.¹⁵⁵ Accordingly, *talaq* can create most of the social and economic consequences of divorce without the

153. Blenkhorn, *supra* note 75, at 201.

154. *See, e.g.,* Aleem v. Aleem, 947 A.2d 489, 500–02 (Md. 2008) (holding that the recognition of *talaq* would violate the Maryland equal rights amendment); Tarikonda v. Pinjari, No. 287403, 2009 WL 930007, at *1–3 (Mich. Ct. App. Apr. 7, 2009) (holding that recognition of *talaq* would violate wife's due process rights); Seth v. Seth, 694 S.W.2d 459, 463 (Tex. Ct. App. 1985) (holding that recognition of *talaq* would be contrary to good morals and natural justice).

155. *See* HALLAQ, *supra* note 5, at 280–83.

formal protections provided by a secular divorce proceeding. To the extent that women and their families wish to use legally enforceable contracts as a way of protecting wives from the abusive use of *talaq* by their husbands, there seems little reason not to recognize such agreements.

Not only are the implicit assumptions of premarital agreement law with regard to the substance of *mahr* contracts incorrect, the implicit assumptions about the areas of concern are also misplaced. The social script on which the UPAA is based assumes that there is necessarily something awkward about injecting the antagonistic norms of bargaining into the context of an impending marriage. The fear is that parties will inconsiderately bargain away their rights in these circumstances.¹⁵⁶ A key element of this script is the notion that bargaining and contract are foreign and unexpected in the context of marriage. Within Islam, however, marriage *is* a contract.¹⁵⁷ It is not possible for a pious Muslim to become married without making a formal contract.¹⁵⁸ Furthermore, because the existence of a *mahr* is necessary for a valid marriage contract but the amount of the *mahr* is left to the parties, negotiation over the size of the *mahr* is an integral part of the parties' social expectations. For a person operating within the Muslim context nothing could be more natural than premarital haggling over the size of the dower followed by the parties formally signing the contract. Such activities are as much a part of the social script of Muslim marriages as church bells, aisles, altars, and priests or ministers are for Christian marriages.¹⁵⁹

Given that no one is surprised by the presence of premarital bargaining in the Muslim context, the cautionary rules that the UPAA suggests for prenuptial agreements are beside the point for *mahr* contracts. There is no special need to make the prospective wife aware of her potential husband's assets and income because she is not bargaining away her claims on these assets and income when she assents to the *mahr* provision. Nor do the disclosure requirements serve an important cautionary function. The parties

156. See UNIF. PREMARITAL AGREEMENT ACT § 6, 9C U.L.A. 48 (2001) (noting the conditions under which a premarital agreement is not enforceable, including involuntariness, unconscionability, and nondisclosure of property or financial obligations).

157. Blenkhorn, *supra* note 75, at 195.

158. See HALLAQ, *supra* note 5, at 272–73.

159. There are, of course, cases where Muslims comply with the requirements of an Islamic marriage contract without necessarily understanding its historical meaning, just as there are many Catholics who get married without understanding the intricacies of canon law. See Blenkhorn, *supra* note 75, at 204 (noting that today some couples deem *mahr* only as symbolic religious practice). Nevertheless, just as canon law should serve as the starting point for understanding the social meaning of Catholic liturgy, the classical *fiqh* should be the starting place for understanding Muslim social practices.

expect to engage in contract negotiations. Certainly, a Muslim husband will have a difficult time plausibly claiming to have been surprised in some way by the notion that he would be asked to agree to some payment to his new wife upon divorce, given that the *mahr* is a necessary element of a valid marriage contract. Accordingly, in the Muslim context, the disclosure requirements serve as little more than a trap for the unwary—providing parties with technical excuses for avoiding liability *ex post*, even when the absence of disclosure *ex ante* provides no reason for supposing that the contract is suspect.

Ironically, to the extent that bargaining over the *mahr* presents special concerns, the general law of contracts provides better tools for policing abuse than does the UPAA. Muslim marriages are frequently arranged through family members. In the case of unmarried women this social fact is formalized through the requirement of the *wali*.¹⁶⁰ Prospective husbands, however, will often be represented by their parents in negotiations over the marriage contract.¹⁶¹ Hence, it is quite common for a couple to be presented with a contract on their wedding day that has been negotiated on their behalf by others.¹⁶² Generally, both the wife's family and the husband's family have good incentives to represent the financial interests of their children. However, this will not always be the case, and when there is misfeasance by a *wali* or parent in negotiating a contract, the couple will be subject to strong pressure to sign the document on the wedding day. The UPAA's prophylactic disclosures, however, will do nothing to deter abuse in such situations. On the other hand, the common law doctrines of duress and undue influence are specifically designed to allow parties to escape their obligations under contracts entered into as a result of high-pressure tactics by intimates.¹⁶³

The most likely situation involving questionable assent to a contract will involve pressure from family or in-laws, in particular pressure on the wife by her father or other male relative acting as a *wali*.¹⁶⁴ The pressure placed on a woman to consent to a marriage contract may range from physical abuse to economic and social

160. NASIR, *supra* note 12, at 49–52.

161. *Id.* at 50 (noting a father may conclude marriage on behalf of his minor sons).

162. See Tamilla F. Ghodsi, Note, *Tying a Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT'L L. 645, 664 (1994).

163. See, e.g., *Eckstein v. Eckstein*, 379 A.2d 757, 759–65 (Md. Ct. Spec. App. 1978) (holding an agreement voidable in which the husband sought to induce his wife, who had a history of severe emotional disturbances, to sign a separation agreement on unfavorable terms).

164. See Blenkhorn, *supra* note 75, at 198 (“She may never conclude a marriage contract on her own in most Islamic legal systems; instead, she must defer to her *wali* to bargain for the terms of the contract and even to sign the finalized agreement.”).

abandonment to social pressure not to disappoint familial expectations.¹⁶⁵ In order to make out a claim of duress, a wife would need to show that she entered into the contract because of an improper threat that left her with no reasonable alternative.¹⁶⁶ Any threat of physical violence would clearly satisfy the “improper threat” requirement and would likely leave the woman with no reasonable alternative in cases in which the threatened violence was immediate.¹⁶⁷ Likewise, threats of economic abandonment have been deemed sufficient to make out a case of duress.¹⁶⁸ It is unlikely, however, that mere social pressure will be sufficient to support a case of duress.¹⁶⁹

On the other hand, someone who enters a contract due to pressure from family members, especially a father acting as a *wali*, likely has a fairly strong claim for undue influence.¹⁷⁰ Undue influence is much more likely in cases in which family members use their influence to induce one another to sign contracts.¹⁷¹ Furthermore, when a father or other male relative acts as a *wali* his purpose is to look after the interests of the putative bride.¹⁷² While not formally required by the *fiqh*, as a practical matter fathers or older male relatives routinely represent their sons in marriage negotiations in the same manner.¹⁷³ These agents are thus in a fiduciary-like relationship with their children. A fiduciary, of course, is a classic example of one who can easily exercise undue influence.¹⁷⁴

If courts correctly interpret the meaning of *mahr* provisions and refuse to construe them as premarital agreements relinquishing the wife’s claims under state divorce laws, it is very unlikely that during

165. See *id.* at 198 (“In most communities, if a bride were to protest an arranged marriage, she would be viewed as highly disrespectful and would risk permanent ostracism from her family and community and may even risk death.”).

166. See RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

167. See *id.* § 176(1)(a) (noting that a threat to engage in criminal or tortious behavior is improper).

168. See, e.g., *Perkins Oil Co. v. Fitzgerald*, 121 S.W.2d 877 (Ark. 1938) (allowing the defense of duress when the coercion was directed against the plaintiff’s step-father’s future employment, the loss of which would have seriously affected his family).

169. See, e.g., *Mullins v. Oates*, 179 P.3d 930, 937 (Alaska 2008) (defining duress as “requir[ing] a threat that arouses such a fear as to preclude a party from exercising free will and judgment”).

170. See RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b (1981) (“The law of undue influence . . . affords protection in situations where the rules on duress and misrepresentation give no relief.”).

171. See, e.g., *Agner v. Bourn*, 161 N.W.2d 813 (Minn. 1968) (finding undue influence in a contract with elderly relative).

172. See NASIR, *supra* note 12, at 49–52 (describing the role of the guardian).

173. See *id.* at 50.

174. See, e.g., *Strawbridge v. N.Y. Life Ins. Co.*, 504 F. Supp. 824, 829 (D.N.J. 1980) (discussing a fiduciary’s responsibilities).

litigation a wife will wish to challenge the validity of the *mahr* contract. Nevertheless, should she wish to do so, the laws of duress and especially undue influence are available to protect her from overreaching. Likewise, a husband who was railroaded into signing an agreement through the high-pressure tactics of family and in-laws can object to such tactics using standard contract defenses. Indeed, on appeal in the *Zawahiri* case discussed above, the husband was successful in making precisely such an argument.¹⁷⁵ There is nothing about the law of premarital agreements that forecloses the application of such doctrines. It is striking, however, that the supposedly nuanced and context-sensitive law of premarital agreements provides no doctrinal tools for policing the sorts of abuse that are likely to arise in *mahr* contracts. The usefulness of the specialized rules is limited by the understandable failure of the drafters of the UPAA to foresee the issues presented by *mahr* contracts. On the other hand, the policing doctrines provided by the general law of contracts prove more serviceable precisely because their agnosticism toward transactional structure make them less tied to a particular account of contractual problems.

CONCLUSION

Context is important in contract law. Islamic marriage contracts vividly illustrate the importance of understanding the context not only of the parties' agreement but also of the concepts that they incorporate into their agreements. In *Chaudry v. Chaudry*, the court wrongly assumed that when a Muslim couple—or more often their families—negotiates over the deferred *mahr* to be included in the marriage contract they are negotiating over the wife's rights under American divorce statutes. Once the religious context of Islamic marriage contracts is understood, the absurdity of this interpretive claim is apparent. Of course, the common law of contracts has never denied that in interpreting the meaning and intentions of the parties we must consider the context in which the contract is made. This is a simple point, but one that is worth

175. The court wrote:

No one disputes that the marriage contract, and specifically the *mahr* provision, was not discussed until the day of the wedding ceremony. According to *Zawahiri*, the imam raised the issue of the *mahr* only two hours before the ceremony was scheduled to begin. At that point, family and guests had already arrived. After a hurried negotiation, *Zawahiri* agreed to a "postponed" *mahr* of \$25,000 because he was embarrassed and stressed. Moreover, *Zawahiri* did not have the opportunity to consult with an attorney prior to signing the marriage contract. Given these facts, we conclude that the evidence demonstrates that *Zawahiri* entered into the marriage contract as a result of overreaching or coercion.

Zawahiri v. Alwattar, No. 07-AP-925, 2008 WL 2698679, at *6 (Ohio Ct. App. July 10, 2008).

remembering, if only because it can be forgotten by courts.

Context, however, also presents a deeper problem. The desire for a law that pays closer attention to the specifics of different kinds of transactions has spawned numerous bodies of law that apply to particular classes of contracts. Embedded in all of these rules is a narrative about how particular transactions work and the particular challenges that they create. When reality diverges from this implicit script, the very specificity of particularized contract law can become a problem. First, the entrenchment of the law's implicit script in the minds of judges can encourage them to ignore conflicting context because the law encourages them to think they understand what is "really" happening in such contracts. Second, shorn of their connection to the reality of the transaction, the specialized rules can become traps and technicalities.

The law of premarital obligations assumes a particular cultural script about marriage, a script in which contract is an awkward intruder at the wedding feast. The law assumes that what parties will normally be doing in premarital agreements is bargaining away valuable rights upon divorce. Accordingly, it creates special defenses to protect parties from their own ill-considered decisions. In contrast, within Islam, far from being a foreign element at the wedding, contract is at the heart of what it means to get married. One does not get married by walking down the aisle to be pronounced husband and wife by some priestly authority or a modern stand-in in the form of a state official. Rather, one marries by signing a contract. Likewise, the *mahr* provision, rather than bargaining away preexisting rights in divorce, is designed in large part to constrain *talaq*, a very specific Muslim practice that has no clear analog in American law. Indeed, the very idea of divorce as a single unitary legal concept does not exist in Islamic law. Rather, there are only the specific forms of *tafriq*, *khul'*, and *talaq*. Given the very different cultural script involved in Muslim marriages, it is little wonder that the law of premarital agreements is an awkward fit at best.

Strikingly, however, the much-maligned generality of the common law of contracts performs quite well in the context of Islamic marriage contract. It provides resources in the doctrine of undue influence to police the most likely kind of overreaching in the context of *mahr* negotiations. Furthermore, by focusing the court's attention on the actual intentions of the parties and the meaning of their contractual actions in social context, it allows the *mahr* to function as it was intended without creating potentially perverse outcomes. In contrast, the law of premarital obligations focuses the court's attention on a social script that has limited relevance in the context of Islamic marriage contracts.