

## ENFORCING ISLAMIC MAHR AGREEMENTS: THE AMERICAN JUDGE'S INTERPRETATIONAL DILEMMA

Chelsea A. Sizemore\*

### INTRODUCTION

Sitting behind your bench, clothed in your long black robe, you stare down at the contract before you. *Prompt Mahr: One gold coin; Postponed Mahr: \$25,000. This contract shall be governed by Islamic law.* The wife demands enforcement; the husband pleads that this is a purely religious obligation—unenforceable in your court. An expert witness asserts that the wife cannot receive her “bride price,” because she initiated the divorce. There is no time to study all the intricacies of Islamic marriage custom before your decision; what do you do?

Non-Muslim American judges are increasingly placed in similar circumstances as more Muslim couples enter American courts seeking to enforce religious marriage contracts.<sup>1</sup> Unfamiliar with these short agreements' foreign terms, judges have reached deeply inconsistent results.<sup>2</sup> Courts struggle to find a balance between allowing Muslims the benefit of their bargained-for agreements and finding an appropriate constitutional method for enforcement. The most problematic provision within the marriage contracts is the *mahr* provision, which provides that the husband must give

---

\* George Mason University School of Law, Juris Doctor Candidate, May 2012; Senior Notes Editor, GEORGE MASON LAW REVIEW, 2011-2012; University of Delaware, B.A. Philosophy & Political Science, May 2009. I would like to thank Tim Beason and the Legal Services of Northern Virginia for introducing me to this topic, and Professor Frances Buckley and Luke Sizemore for their guidance and feedback.

<sup>1</sup> Richard Freeland, *The Islamic Institution of Mahr and American Law*, 4 GONZ. J. INT'L L. 1, 1 (2000-2001), available at <http://www.gonzagajil.org/content/view/85/26/> (describing the increasing number of Muslims presenting American courts with Islamic law issues).

<sup>2</sup> E.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001) (finding a *mahr* agreement invalid because it failed to satisfy the statute of frauds); *Akileh v. Elchahal*, 666 So. 2d 246, 248-49 (Fla. Dist. Ct. App. 1996) (enforcing a *mahr* agreement as a prenuptial agreement); *Aleem v. Aleem*, 947 A.2d 489, 500-02 (Md. 2008) (finding a *mahr* agreement inequitable and, thus, unenforceable); *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at \*4 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam) (forcing the wife to refund her *mahr* agreement because she was at fault in the divorce); *Odatalla v. Odatalla*, 810 A.2d 93, 95-96 (N.J. Super. Ct. Ch. Div. 2002) (holding that a *mahr* agreement was enforceable as a civil contract). See also Tracie Rogalin Siddiqui, *Interpretation of Islamic Marriage Contracts by American Courts*, 41 FAM. L.Q. 639, 639 (2007) (“[E]nforcement of the delayed *mahr* provisions of these agreements upon divorce has been inconsistent in U.S. courts.”).

something of value to the wife, part of which will be deferred until the husband's death or the couple's divorce.<sup>3</sup>

The issue is whether American courts can abstract neutral principles of law from the *mahr* agreements while still enforcing the parties' original intent. Some American courts have used the "neutral principles of law" approach to interpret *mahr* agreements and have ruled enforcement constitutional.<sup>4</sup> This enforcement method ignores the fact that *mahr* agreements are essentially boilerplate contracts with vague enforcement provisions.<sup>5</sup> In order to decipher the agreements, courts cannot escape using parol evidence from parties and experts in Islamic law.<sup>6</sup> This Comment argues that the *mahr* agreement's vague nature: (1) causes courts to unconstitutionally apply the neutral principles approach; (2) allows the parties to use parol evidence to rewrite their agreements; and (3) creates misleading precedent, harmful to the *mahr* agreement's future enforcement.

To avoid these problems, courts should refuse to enforce overly vague *mahr* agreements for failure to satisfy the statute of frauds or general contract-certainty requirements.<sup>7</sup> This will prevent courts from continually mischaracterizing the *mahr* agreement and creating further inconsistent precedent.<sup>8</sup> Non-enforcement will incentivize the American Muslim community to develop marriage contracts with specific terms or arbitration clauses.<sup>9</sup> Reforming the contractual terms will better enable American courts to wade through misleading party testimony and avoid unconstitutional religious entanglement.<sup>10</sup> Thus, terms that are more specific will

---

<sup>3</sup> Siddiqui, *supra* note 2, at 639.

<sup>4</sup> See *Akileh*, 666 So. 2d at 248; *Odatalla*, 810 A.2d at 95-96; *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985).

<sup>5</sup> See Lindsey E. Blenkhorn, Note, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 210-11 (2002).

<sup>6</sup> See *id.*

<sup>7</sup> See *Shaban*, 105 Cal. Rptr. 2d at 865 (finding a *mahr* agreement invalid because it failed to satisfy the statute of frauds); *Habibi-Fahnrich v. Fahnrich*, No. 46186/93, 1995 WL 507388, at \*3 (N.Y. Sup. Ct. July 10, 1995) (refusing to enforce an overly vague *mahr* agreement).

<sup>8</sup> See Blenkhorn, *supra* note 5, at 213-14 (arguing that *mahr* agreements are improperly characterized as prenuptial agreements); Emily L. Thompson & F. Soniya Yunus, Comment, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 374-75 (2007) (explaining how inconsistent precedent disillusiones and confuses the Muslim community).

<sup>9</sup> See Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are They Compatible with Traditional American Notions of Justice?*, 28 WIS. INT'L L.J. 108, 138-39 (2010) (arguing for the active pursuit of Islamic law-based arbitration tribunals); Azizah Y. al-Hibri, Professor, T.C. Williams Sch. of Law, Univ. of Richmond, *Muslim Marriage Contract in American Courts*, Lecture at the Minaret of Freedom Banquet (May 20, 2000), available at <http://www.islamfortoday.com/usmarriage.htm> (advocating for inclusion in standard Islamic marriage contracts).

<sup>10</sup> See *infra* text accompanying notes 257-60.

equip judges with the necessary tools to develop consistent precedent with sensitivity to Islamic law and the parties' original intent.

Part I of this Comment explains *mahr* agreements, related tenets of Islamic law, and the Establishment clause. Part II explores how courts have unconstitutionally relied on parol evidence and expert testimony in interpreting the boilerplate *mahr* provisions in a way that confuses the parties' original intent. Part III concludes that courts should not enforce *mahr* agreements until the parties draft contracts with concrete terms that more precisely express the parties' intentions.

## I. *MAHR* AGREEMENTS AND THE ESTABLISHMENT CLAUSE

Muslim couples continually confront American courts with *mahr* agreements, but most non-Muslim judges do not fully comprehend the *mahr* agreement's nature and its foundation in Islamic legal principles. To understand the interplay between *mahr* agreements and the Establishment clause, courts must appreciate the *mahr*'s meaning within the greater context of Islamic law.

### A. *Mahr Agreements*

The *mahr* is property given by the husband as an effect of the marriage and as a mark of respect for the wife.<sup>11</sup> Although often equivocated in translation to a "dower," the two arrangements are different.<sup>12</sup> A *mahr* is not a dower in the sense that it is a "bride price" for the bride's father to pay the groom, but rather the groom pays the wife a specified amount upon marriage.<sup>13</sup> The *mahr* is not a gift, but a mandatory requirement for all Muslim marriages.<sup>14</sup> If the marriage contract does not contain a specified *mahr*, the husband still must pay the wife a judicially determined sum, typically based on the *mahr* amount that women of equivalent social status receive.<sup>15</sup>

The structure of the *mahr* agreement reflects the inherent purpose of easing financial and social inequities between the husband and wife.<sup>16</sup> For instance, the *mahr* is separated into two parts.<sup>17</sup> First, there is the *muajjal* or the prompt *mahr*, which the husband gives to the wife immediately after the

---

<sup>11</sup> DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* ¶ 7-10, at 178-79 (3d ed. 1998).

<sup>12</sup> Blenkhorn, *supra* note 6, at 199.

<sup>13</sup> PEARL & MENSKI, *supra* note 11, ¶ 7-12, at 179.

<sup>14</sup> Kecia Ali, *Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 11, 19 (Asifa Quraishi & Frank E. Vogel eds., 2008).

<sup>15</sup> PEARL & MENSKI, *supra* note 11, ¶ 7-16, at 180.

<sup>16</sup> Blenkhorn, *supra* note 5, at 202.

<sup>17</sup> PEARL & MENSKI, *supra* note 11, ¶ 7-15, at 180; Blenkhorn, *supra* note 5, at 200-01.

marriage ceremony.<sup>18</sup> The second part of the *mahr*, the *muwajjal*, is often referred to as the deferred *mahr* and is held in trust strictly for the wife and paid only in the event of divorce or the husband's death.<sup>19</sup> The deferred *mahr* saves the wife from complete financial destitution if the husband ceases to support the family financially.<sup>20</sup> Hence, the *mahr* acts as the wife's security deposit for the marriage in case she suddenly loses her husband and her means of financial support.<sup>21</sup> Accordingly, the majority of the *mahr* is deferred because the wife may only consider a large sum necessary upon divorce or her husband's death.<sup>22</sup>

Although expressed differently in contemporary jurisprudence, traditional Islamic family law consisted of three main forms of divorce.<sup>23</sup> First, *talaq* divorce allows the husband to unilaterally divorce his wife without cause through oral or written pronouncement.<sup>24</sup> The deferred *mahr* counterbalances the husband's right to *talaq* by making divorce more costly.<sup>25</sup> The wife has no similar inherent right to unilateral divorce; the parties must have expressly delegated any such right within the marriage contract.<sup>26</sup> However, the wife may initiate a *khul* divorce, a form of divorce that requires her husband's prior consent and court approval.<sup>27</sup> By seeking divorce, the wife typically forfeits her right to the deferred *mahr*.<sup>28</sup> The third form of divorce, a *faskh* divorce, occurs when the wife initiates the divorce, but proves that the husband is at fault.<sup>29</sup> With *faskh* divorce, the woman is sometimes still entitled to her deferred *mahr*.<sup>30</sup>

The importance of a *mahr* agreement and the husband's obligation to comply with its terms is firmly rooted in religious law.<sup>31</sup> The Qur'an states that "the divorced women, too, shall have [a right to] maintenance in a goodly manner: this is a duty for all who are conscious of God," and later decrees, "[m]arry them, then, with their people's leave, and give them their

---

<sup>18</sup> Pascale Fournier, *Flirting with God in Western Secular Courts: Mahr in the West*, 24 INT'L J.L. POL'Y & FAM. 67, 69 (2010).

<sup>19</sup> *Id.*

<sup>20</sup> See Blenkhorn, *supra* note 5, at 200-01.

<sup>21</sup> *See id.*

<sup>22</sup> Siddiqui, *supra* note 2, at 644 (explaining that young Muslim husbands also most likely cannot afford a large upfront payment).

<sup>23</sup> Fournier, *supra* note 18, at 69-70.

<sup>24</sup> Cyra Akila Choudhury, *(Mis)appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 17 COLUM. J. GENDER & L. 45, 72-73 (2008).

<sup>25</sup> Blenkhorn, *supra* note 5, at 201.

<sup>26</sup> Fournier, *supra* note 18, at 70.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Blenkhorn, *supra* note 5, at 217.

dowers in an equitable manner—they being women who give themselves in honest wedlock, not in fornication, nor as secret love-companions.”<sup>32</sup>

Since the *mahr* arrangement is a fundamental theological right of the wife, the husband may not reduce the *mahr*; Islamic courts strictly enforce the agreement and could imprison the husband for not complying with the contract.<sup>33</sup> Even upon the husband’s death, the deferred *mahr* is paid from his estate before all other debts.<sup>34</sup> Because there is no monetary cap on the *mahr*, the agreed amounts can range from a small token, real estate to a million dollars in cash.<sup>35</sup> Although the parties specifically bargain for the arrangement and appropriate sum, the parties often draft *mahr* agreements by filling in the blanks of form contracts that employ standard boilerplate terms.<sup>36</sup> The typical *mahr* agreement consists of the names of the parties, the amount of the *mahr*, the imam’s signature, the signature of two male witnesses, and a disclaimer that Islamic law will govern the contract.<sup>37</sup>

## B. *Islamic Law*

Islamic law provides context for the interpretation of *mahr* agreements.<sup>38</sup> In Islam, the *Shari’a* represents the path that God has laid out for man to follow, literally translated as “the pathway,” “path to be followed,” or “clear way to be followed.”<sup>39</sup> The *Shari’a* embodies both a moral code and way of life for Muslims.<sup>40</sup> The most important source for the *Shari’a* is the Qur’an.<sup>41</sup> Although the Qur’an is not a legal code, it supports Islamic legal principles and the general process of creating legal jurisprudence, or *fiqh*.<sup>42</sup> The *fiqh* derives from over 1,400 years of Islamic jurisprudence that defines the *Shari’a* in more concrete expressions.<sup>43</sup> The *fiqh* represents the process of applying the *Shari’a* to various situations in order to provide

---

<sup>32</sup> THE MESSAGE OF THE QUR’ĀN 65, 124 (Muhammad Asad trans., 2003) (first alteration in original) (footnote omitted).

<sup>33</sup> Blenkhorn, *supra* note 5, at 200-01.

<sup>34</sup> Siddiqui, *supra* note 2, at 644.

<sup>35</sup> PEARL & MENSKI, *supra* note 11, ¶¶ 7-14, at 179; Blenkhorn, *supra* note 5, at 200.

<sup>36</sup> Blenkhorn, *supra* note 5, at 211.

<sup>37</sup> *Id.* at 197, 215 n.133, 216.

<sup>38</sup> See generally PEARL & MENSKI, *supra* note 11, ¶¶ 1-01 to 1-71, at 1-19 (briefly describing the historical development of Islamic law).

<sup>39</sup> Rafeeq, *supra* note 9, at 116-17 (quoting Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 4 (Hisham M. Ramadan ed., 2006)) (internal quotation marks omitted); see also Charles P. Trumbull, Note, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 626 (2006).

<sup>40</sup> Trumbull, *supra* note 39, at 626.

<sup>41</sup> Rafeeq, *supra* note 9, at 117.

<sup>42</sup> *Id.*

<sup>43</sup> Trumbull, *supra* note 39, at 627.

Muslims with practical rules of conduct.<sup>44</sup> Thus, these laws did not develop as compulsory legal prescriptions, but as “instance-law” or law that only comes into being when applied to specific concrete events.<sup>45</sup> This differs from Western law’s tendency to set standards or rules that one can apply consistently across general situational arrays.<sup>46</sup>

Also dissimilar to Western law, Islamic law is completely inseparable from secular law.<sup>47</sup> Islamic law derives authority from God, not the state, and so religious scholars interpret the law instead of state authorities.<sup>48</sup> Thus, violation of Islamic law is a transgression against both the social order and God.<sup>49</sup> This differs from the Western secularization of the law, which stems from the ancient Christian separation between God and Caesar, a division between the law that governs the political sphere and the sacred law that governs the spirit.<sup>50</sup> No similar division between the sacred and the political exists in Islamic law.<sup>51</sup>

National and cultural differences also permeate across various interpretations of Islam.<sup>52</sup> Originally, jurisprudential differences resulted in nineteen schools of thought, but only five schools survive: *Maliki*, *Hanbali*, *Hanafi*, *Shafi*, and *Jafari*.<sup>53</sup> Each employs a slightly different method of jurisprudence, and so each promotes a different interpretation of the *Shari’a*.<sup>54</sup> Since all schools are equally valid, Islamic law lacks one ultimate religious authority.<sup>55</sup>

Varying interpretations of the *mahr* agreement highlight the differences between each school of thought. For example, the *Hanafi* School holds that when the woman initiates the divorce (*khul*) she absolutely cannot receive her *mahr*, while the *Maliki* School holds that when the husband is at fault for the divorce, the wife does not forfeit her right to the *mahr* even when she initiates the divorce.<sup>56</sup> The schools also differ over the requisite number of witnesses to the contract; the *Hanafi* School requires two wit-

<sup>44</sup> Rafeeq, *supra* note 9, at 118.

<sup>45</sup> Trumbull, *supra* note 39, at 631 (quoting FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA xiv (2000)) (internal quotation marks omitted).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 633.

<sup>48</sup> *Id.* at 630.

<sup>49</sup> *Id.*

<sup>50</sup> See Suzanne Last Stone, *Jewish Marriage and Divorce Law*, in THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 57, 58-59 (Asifa Quraishi & Frank E. Vogel eds., 2008).

<sup>51</sup> See Trumbull, *supra* note 39, at 630.

<sup>52</sup> *Id.* at 627-28.

<sup>53</sup> Rafeeq, *supra* note 9, at 118-19.

<sup>54</sup> Trumbull, *supra* note 39, at 627-28.

<sup>55</sup> *Id.* at 628.

<sup>56</sup> Blenkhorn, *supra* note 5, at 213.

nesses to the *mahr*'s proposal and acceptance, while the *Maliki* School holds that witnesses are only needed for the marriage's publication.<sup>57</sup>

### C. *The Establishment Clause*

Since *mahr* provisions are grounded in Islamic law and arise out of religious ceremony, courts must first address the constitutional question of whether interpreting and enforcing these religious agreements violates the Establishment Clause.

The First Amendment states, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>58</sup> In *Lemon v. Kurtzman*,<sup>59</sup> the Supreme Court outlined a three-prong test for interpreting the Establishment Clause.<sup>60</sup> The "Lemon Test" holds that state action is permissible only if it (1) has a "secular legislative purpose," (2) does not have a "principal or primary effect" of advancing or inhibiting religion,<sup>61</sup> and (3) does not foster "an excessive government entanglement with religion."<sup>62</sup> The Supreme Court has further held that the government must be neutral and not endorse one religious sect over another.<sup>63</sup> More specifically, courts cannot use their enforcement power to advance one side over another in a religious doctrinal controversy.<sup>64</sup> With these principles in mind, the government may violate the First Amendment even when acting unintentionally.<sup>65</sup>

Even though Supreme Court precedent demonstrates that civil courts cannot make independent determinations involving religious doctrine,<sup>66</sup> the Court, in *Jones v. Wolf*,<sup>67</sup> established a constitutionally sound method for resolving religious disputes. In *Jones*, the Court decided that civil courts may resolve disputes involving the ownership of church property, but only by using "neutral principles" of law.<sup>68</sup> The Court reasoned that applying neutral principles of contract law was a better alternative than automatically

---

<sup>57</sup> Rafeeq, *supra* note 9, at 134.

<sup>58</sup> U.S. CONST. amend. I.

<sup>59</sup> 403 U.S. 602 (1971).

<sup>60</sup> *Id.* at 612-13.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (internal quotation marks omitted).

<sup>63</sup> *Larson v. Valente*, 456 U.S. 228, 246 (1982).

<sup>64</sup> See *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

<sup>65</sup> *Capitol Square Review & Advisory Bd. v. Pinnete*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring); see also *Trumbull*, *supra* note 39, at 617.

<sup>66</sup> See *Trumbull*, *supra* note 39, at 620.

<sup>67</sup> 443 U.S. 595 (1979).

<sup>68</sup> *Id.* at 602, 604 (internal quotation marks omitted).

deferring these sorts of disputes to an authoritative church tribunal.<sup>69</sup> The Court stated that as long as civil courts made no inquiry into religious doctrine and applied secular laws, civil courts would not violate the First Amendment in adjudicating church property disputes.<sup>70</sup>

The court in *Avitzur v. Avitzur*<sup>71</sup> applied the neutral principles of law approach to a religious marital agreement.<sup>72</sup> The parties to the litigation entered into a Jewish marriage contract, which recognized the *Beth Din*, a rabbinical tribunal, as having authority concerning troubles in the marriage.<sup>73</sup> Upon the couple's civil divorce, the wife sought to compel the husband to appear before the *Beth Din*.<sup>74</sup> The New York Court of Appeals ruled that judicial intervention did not violate the Constitution because the court could look solely to neutral principles of contract law in interpreting the contract.<sup>75</sup> Since the husband made a promise to appear in front of the *Beth Din*, he was contractually bound to that obligation.<sup>76</sup>

The dissent in *Avitzur* declared, "We depart from the conclusion of the majority that in this case the courts may discern one or more discretely secular obligations which may be fractured out of the [Jewish marriage contract], indisputably in its essence a document prepared and executed under Jewish law and tradition."<sup>77</sup> The dissent argued that nothing in the record suggested that the parties intended to have their promises enforced in civil courts, and for the court to decide on the parties' intent for enforcement "would itself necessarily entail examination of Jewish law and tradition."<sup>78</sup>

A New Jersey court closely followed *Avitzur* in *Odatalla v. Odatalla*.<sup>79</sup> In this case, the wife brought an action for divorce against her husband and sought enforcement of her *mahr* agreement.<sup>80</sup> The court stated that if a court can enforce a *mahr* agreement based on non-religious principles of contract law, and the agreement meets those contract principles, then the court should uphold the *mahr* agreement as a binding contract.<sup>81</sup> Since the husband's signature on the Islamic marriage license represented an offer of the *mahr* and the wife's signature served as the acceptance, the court deter-

---

<sup>69</sup> See *id.* at 605 (explaining that a rule of compulsory deference to religious authority would lead to courts having to make an impermissible, searching inquiry).

<sup>70</sup> *Id.* at 603-04.

<sup>71</sup> 446 N.E.2d 136 (N.Y. 1983).

<sup>72</sup> *Id.* at 138-39.

<sup>73</sup> *Id.* at 137.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 138-39.

<sup>76</sup> *Id.* at 139.

<sup>77</sup> *Avitzur*, 446 N.E.2d at 139 (Jones, J., dissenting).

<sup>78</sup> *Id.* at 142.

<sup>79</sup> 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002).

<sup>80</sup> *Id.* at 94-95.

<sup>81</sup> *Id.* at 95-96.



mined that the agreement met the applicable contract requirements.<sup>82</sup> Even though the parties executed the marital agreement during an Islamic ceremony, the court held that enforcing the secular parts of the contract would not violate the Establishment Clause.<sup>83</sup>

In *Aziz v. Aziz*,<sup>84</sup> a husband and wife entered into a *mahr* agreement as part of their Islamic wedding ceremony, and the court considered the agreement's enforceability during the parties' divorce proceedings.<sup>85</sup> Despite the husband's contentions that the marriage contract was a purely religious document, the court held that it could enforce the contract's secular terms.<sup>86</sup> Since the *mahr* agreement was consistent with New York contract law, the court ordered the husband to pay the wife the agreed-upon amount.<sup>87</sup>

Thus, the neutral principles of law approach marks an appropriate pathway through which state courts may constitutionally enforce religious contracts. *Odatalla* and *Aziz* proceeded through the pathway and declared *mahr* agreements enforceable in American courts.

#### D. *Mixed Reactions: Judges and Scholars*

Due to the foreign nature of the *mahr* and the lack of explanation within the written terms of the agreement, courts have reached different conclusions on methods of enforcement.<sup>88</sup> Scholars in the field are also split on how to enforce the *mahr* agreement; some advocate for enforcement as a civil contract,<sup>89</sup> some for enforcement as a prenuptial agreement,<sup>90</sup> others for forced arbitration,<sup>91</sup> and still others for non-enforcement altogether.<sup>92</sup>

Despite this, one discernable trend is that courts are not inclined to enforce these agreements if they are financially inequitable to one of the parties.<sup>93</sup> If treated as a prenuptial agreement that preempts all other forms of

---

<sup>82</sup> *Id.* at 97-98.

<sup>83</sup> *Id.* at 96-97.

<sup>84</sup> 488 N.Y.S.2d 123 (Sup. Ct. 1985).

<sup>85</sup> *Id.* at 124.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See *supra* note 2 and accompanying text.

<sup>89</sup> E.g., Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV. 579, 601 (2010); cf. Siddiqui, *supra* note 2, at 640.

<sup>90</sup> E.g., Freeland, *supra* note 1, at 6-8 (explaining the problems created by courts' interpretation of *mahr* agreements as "ante-nuptials"); Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & RELIGION 67, 71-72 (2000-2001).

<sup>91</sup> Cf. Trumbull, *supra* note 39, at 613.

<sup>92</sup> Cf. Blenkhorn, *supra* note 5, at 192.

<sup>93</sup> *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865-66 (Ct. App. 2001) (finding a *mahr* agreement invalid as a prenuptial agreement when the deferred *mahr* was equivalent to \$30); Akileh v.

post-marriage community property or equitable division schemes, the agreements are sometimes unfair to Muslim women.<sup>94</sup> For example, in one instance, a Muslim husband asked a court to enforce a deferred *mahr* agreement for the equivalent of \$30, when under state law, the wife was entitled to half of the \$3 million marital estate.<sup>95</sup>

Situations similar to this raise issues over whether the parties intend these agreements as prenuptial contracts that exclusively divide the marital assets or contracts that supplement traditional equitable division schemes.<sup>96</sup> Without any written expression of the parties' intentions, courts are split on how to enforce the agreements. When equitable, some courts enforce the *mahr* agreement as akin to a secular prenuptial agreement.<sup>97</sup> A separate line of decisions has instead evaluated *mahr* agreements as civil contracts, which do not preempt equitable division and so allow women their *mahr* along with their legal share of marital assets.<sup>98</sup> Still, some courts simply refuse to enforce *mahr* agreements as either prenuptials or civil contracts.<sup>99</sup>

Decisions that enforce *mahr* agreements commonly rely on parol evidence to flesh out the terms of the skeletal agreements.<sup>100</sup> Indeed, judges admit parol evidence to resolve the *mahr* agreement's ambiguity and to establish guidelines for enforcement.<sup>101</sup> Unfamiliar with Islamic law, many judges heavily rely on expert testimony as well as testimony from the parties to fill in the blanks of Islamic law and the meaning of the *mahr* contract.<sup>102</sup> However, at least two courts refused to admit parol evidence to fill in the terms of the entire agreement because doing so would run afoul of the

---

Elchahal, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996) (enforcing a *mahr* agreement that entitled the wife to \$50,000 after a marriage lasting a little over a year); Aleem v. Aleem, 947 A.2d 489, 493 n.5, 501-02 (Md. 2008) (finding a *mahr* agreement inequitable and, thus, unenforceable because the agreement only called for the husband to pay the wife \$2,500, when under Maryland law, the wife was entitled to at least half of \$2 million in marital assets).

<sup>94</sup> See Blenkhorn, *supra* note 5, at 191.

<sup>95</sup> See *Shaban*, 105 Cal. Rptr. 2d at 865-66, 870.

<sup>96</sup> See Blenkhorn, *supra* note 5, at 210-11.

<sup>97</sup> E.g., *Akileh*, 666 So. 2d at 248.

<sup>98</sup> E.g., *Odatalla v. Odatalla*, 810 A.2d 93, 95-96 (N.J. Super. Ct. Ch. Div. 2002); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985).

<sup>99</sup> E.g., *Aleem v. Aleem*, 947 A.2d 489, 491, 502 (Md. 2007); *Chaudhary v. Ali*, No. 0956-94-4, 1995 WL 40079, at \*2 (Va. Ct. App. Jan. 31, 1995) (per curiam); *In re Marriage of Altayar & Muhyaddin*, 139 Wash. App. 1066, 1066 (Ct. App. 2007) (per curiam).

<sup>100</sup> See, e.g., *Rahman v. Hossain*, No. A-5191-08T3, 2010 WL 4075316, at \*1-2 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam) (relying on expert testimony to clarify the terms of the *mahr* agreement); *Odatalla*, 810 A.2d at 97-98 (relying on the wife's testimony to clarify the terms of the *mahr* agreement); *Ahmed v. Ahmed*, 261 S.W.3d 190, 195 (Tex. Ct. App. 2008) (relying on the wife's testimony to clarify the terms of the *mahr* agreement).

<sup>101</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 214(c) (1981); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 535 & n.4 (1998) (explaining the use of parol evidence to clarify an ambiguous contract).

<sup>102</sup> See *supra* note 100 and accompanying text.

statute of frauds.<sup>103</sup> According to the statute of frauds, contracts in consideration of marriage must be in writing.<sup>104</sup> As some courts recognize, allowing the parties to use parol evidence to completely rewrite the agreement undermines the statute of frauds.<sup>105</sup> Moreover, the overreaching use of parol evidence also threatens certainty requirements within contract law.<sup>106</sup> The Restatement (Second) of Contracts provides that “contracts should be made by the parties, not by the courts,” and so “remedies for breach of contract must have a basis in the agreement of the parties.”<sup>107</sup> Accordingly, a court cannot enforce a contract unless the terms are reasonably certain and indicate the parties’ intent to form a contract.<sup>108</sup>

## II. VAGUE TERMS AND INTERPRETATION ROADBLOCKS

In attempting to enforce *mahr* agreements, courts have used the neutral principles of law approach combined with parol evidence to interpret the agreement’s meaning.<sup>109</sup> However, the *mahr* agreement’s vague nature precludes valid application of the neutral principles method. Judicial reliance on parol evidence problematically intertwines courts with religious doctrinal dispute and often replaces the parties’ original intent with ex post interpretations influenced by the prospect of economic gain.<sup>110</sup> By allowing the parties to rewrite their agreements on the witness stand, courts have created inconsistent and misleading precedent that hinders the *mahr* agreement’s potential for consistent enforcement.<sup>111</sup>

---

<sup>103</sup> *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001); *Habibi-Fahrnich v. Fahrnich*, No. 46186/93, 1995 WL 507388, at \*1-3 (N.Y. Sup. Ct. July 10, 1995).

<sup>104</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 110(1)(c), 131(c); Annotation, *What Constitutes Promise Made in or upon Consideration of Marriage Within Statute of Frauds*, 75 A.L.R.2d 633, § 2, at 638-39 (1961).

<sup>105</sup> *Shaban*, 105 Cal. Rptr. 2d at 865 (holding that, because parol evidence “in effect would have written a contract for the parties,” the agreement failed to satisfy the statute of frauds); *Habibi-Fahrnich*, 1995 WL 507388, at \*3 (holding a *mahr* too vague to satisfy the statute of frauds); see also *Blenkhorn*, *supra* note 5, at 210-11 (explaining that “the substance of the agreement cannot be the product of parol evidence”).

<sup>106</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 33 (describing the certainty requirement).

<sup>107</sup> *Id.* § 33 cmt. b.

<sup>108</sup> *Id.* § 33(1), 33(3); see also *Waldner v. Carr*, 618 F.3d 838, 846 (8th Cir. 2010) (“[C]ourts cannot create a contract when one does not already exist . . . .”); *Cal. Sun Tanning USA, Inc. v. Elec. Beach, Inc.*, 369 F. App’x 340, 347 (3d Cir. 2010) (“If . . . there exist ambiguities and undetermined matters which render a settlement agreement impossible to understand and enforce, such an agreement must be set aside.” (quoting *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999))); *APS Capital Corp. v. Mesa Air Grp., Inc.*, 580 F.3d 265, 272 (5th Cir. 2009) (“In order to be a legally enforceable contract, an agreement must be formed around the contours of sufficiently specific terms.”).

<sup>109</sup> See *infra* Part II.A.

<sup>110</sup> See *infra* text accompanying notes 160-62, 175-76.

<sup>111</sup> See *infra* Part II.C.

A. *Walking the Line: Unconstitutional Use of Parol Evidence*

The Supreme Court declared that courts may constitutionally interpret religious contracts by using the neutral principles of law.<sup>112</sup> *Odatalla* and *Aziz* both found that the husband's promise to pay the *mahr* agreement was a secular promise that courts could enforce constitutionally.<sup>113</sup> Consequently, the *mahr* agreement's religious nature does not render the agreements facially unconstitutional.<sup>114</sup> Any assertion otherwise ignores the highly contractual nature of Islamic marriage;<sup>115</sup> parties negotiate, sign, and have witnesses attest to *mahr* agreements.<sup>116</sup> Although the signing is steeped in religious ceremony and sacred duty, the neutral principles of law approach allows courts to look past the religious nature and examine the *mahr* agreement's purely contractual obligations.<sup>117</sup>

However, in practice, the *mahr* agreement's vague nature often obscures the exact contractual obligations and, thus, leads to unconstitutional use of parol evidence. Both the *Odatalla* and *Aziz* courts did not apply neutral principles of law by examining the face of the agreement; instead, each court used party testimony to further explain the contractual terms.<sup>118</sup> Indeed, parol evidence is almost always necessary because Islamic marriage contracts are typically standard form contracts given to the parties by an imam or other religious authority.<sup>119</sup> A *mahr* is only a small part of the entire marriage contract, and within the form contract, the parties fill in the blanks for the amount of the prompt and deferred *mahr*.<sup>120</sup> Muslim couples find it unnecessary to further define the *mahr* because the obligation is fundamental to Islamic marriage custom.<sup>121</sup> For instance, contracts without *mahr* provisions are automatically void in some Islamic schools of thought while, according to other schools, Islamic courts must infer a *mahr* amount into the contract according to a judicial determination of the bride's fair worth.<sup>122</sup>

---

<sup>112</sup> See *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

<sup>113</sup> *Odatalla v. Odatalla*, 810 A.2d 93, 96-97 (N.J. Super. Ct. Ch. Div. 2002); *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985).

<sup>114</sup> *But cf.* *Blenkhorn*, *supra* note 5, at 217 ("Given that many parties create *mahr* agreements out of religious piety and respect for cultural and familial traditions, many parties may not foresee any use for the *mahr* . . . other than a religious one.").

<sup>115</sup> *Rafeeq*, *supra* note 9, at 134.

<sup>116</sup> *Siddiqui*, *supra* note 2, at 642.

<sup>117</sup> See, e.g., *Avitzur v. Avitzur*, 446 N.E.2d 136, 138-39 (N.Y. 1983).

<sup>118</sup> *Odatalla*, 810 A.2d at 97-98; *Aziz*, 488 N.Y.S.2d at 124.

<sup>119</sup> See *al-Hibri*, *supra* note 9.

<sup>120</sup> *Id.*; see also *Aleem v. Aleem*, 947 A.2d 489, 492 (Md. 2008) (providing an example of an Islamic marriage contract).

<sup>121</sup> *Blenkhorn*, *supra* note 5, at 210.

<sup>122</sup> See *id.* (describing that an unspecified *mahr* will be judicially inferred "according to other females in the bride's family, her own beauty, her age, or her virginity").

The boilerplate terms abstracted from background Islamic law provide no insight into the parties' intentions or how a court can functionally order specific performance of the agreement.<sup>123</sup> As one scholar explains, "[M]ahr agreements are too short on operative details, definitions, and explicit requests to have their terms represent an entire remedy at law in a civil courtroom."<sup>124</sup> Since the terms are so vague, it is virtually impossible to enforce only "neutral" or secular terms of the writing solely by examining the four corners of the document.<sup>125</sup> In *Odatalla*, a videotape of the entire familial negotiations leading up to the signing of the marriage contract and the wife's testimony explaining Islamic custom behind the *mahr* informed the court's judgment.<sup>126</sup> Hence, parol evidence provided the court a superficial understanding of the *mahr* agreement, and through this superficial gloss, the court successfully avoided getting mired in the many differences between Islamic schools of thought.<sup>127</sup>

If the parties had presented the *Odatalla* court with conflicting interpretations of Islamic law, then the court could not have permissibly proceeded with the neutral principles approach.<sup>128</sup> The court would have had to make an independent determination on religious doctrine, and thus would have unconstitutionally intertwined the state with religion.<sup>129</sup> Doctrinal dispute is almost unavoidable within Islamic law because, unlike other religions, Islam offers no hierarchical authoritative interpretation of religious principles.<sup>130</sup> There are several different schools of thought, each with various interpretations of the *mahr* agreement.<sup>131</sup> One important variation is whether the wife should receive the *mahr* when she initiates the divorce.<sup>132</sup> The *Hanafi* School holds that when the woman initiates the divorce she cannot receive the *mahr*, while the *Maliki* School holds that when the husband is at fault for the divorce, the wife does not forfeit her right to the *mahr*.<sup>133</sup>

---

<sup>123</sup> See Blenkhorn, *supra* note 5, at 210 (explaining that "mahr agreements are often vague and sparsely, if at all, defined"); al-Hibri, *supra* note 9 ("We have not told the judges what the parties contracted upon; we just told the judges to go back to Islamic law. You can immediately see that we have inadequate marriage contracts.").

<sup>124</sup> Blenkhorn, *supra* note 5, at 210.

<sup>125</sup> Trumbull, *supra* note 39, at 624-25.

<sup>126</sup> *Odatalla v. Odatalla*, 810 A.2d 93, 97 (N.J. Super. Ct. Ch. Div. 2002).

<sup>127</sup> See *id.* at 97-98.

<sup>128</sup> See Trumbull, *supra* note 39, at 624-25 ("Courts may not enforce religious contracts when the contracting parties disagree on the meaning of a religious term, the application of religious law, or an issue of religious doctrine.").

<sup>129</sup> *Id.* at 625.

<sup>130</sup> *Id.* at 633-34.

<sup>131</sup> *Id.* at 634.

<sup>132</sup> Blenkhorn, *supra* note 5, at 213.

<sup>133</sup> *Id.*

In *Odatalla*, the wife filed for divorce and pled extreme cruelty as the cause, thus bringing into question whether she was even entitled to her *mahr* under Islamic law.<sup>134</sup> Under the *Maliki* School, she would still receive her *mahr*, but not under the *Hanafi* school. However, the court's opinion lacked any discussion concerning this issue. By missing this intricacy in Islamic law, the court may have distorted the intention of the parties and the meaning of the contract. However, if the *Odatalla* court had fully explored when and under what circumstances the *mahr* agreement should be enforced, the court would have found itself embroiled in debate over Islamic law, thus surpassing purely neutral principles of law.

For example, one California trial court interpreted Islamic law and found that the wife could not recover her *mahr* since she initiated the divorce.<sup>135</sup> In *In re Marriage of Dajani*,<sup>136</sup> an expert in the Islamic faith testified on behalf of the husband that the wife forfeited her *mahr* when she initiated the divorce; however, the wife's expert witness testified that the husband owes the wife her *mahr* no matter which party commences the divorce proceedings.<sup>137</sup> After determining that Jordanian or Islamic law governed the interpretation of the marriage contract, the trial court held that the wife lost her right to the *mahr* when she initiated the divorce.<sup>138</sup> By fully litigating background Islamic principles and the parties' intentions, the trial court failed to apply the neutral principles of contract law.<sup>139</sup> The court endorsed the husband's view and, thus, endorsed one sect of Islam over another, which equaled unconstitutional court involvement in a religious dispute.<sup>140</sup>

A similar controversy arose in *Akileh v. Elchalal*.<sup>141</sup> In this case, a Florida court found all elements of a valid contract present.<sup>142</sup> The court disregarded the husband's interpretation of the *mahr* agreement and found the wife could recover even when she initiated the divorce.<sup>143</sup> Under the guise of using purely neutral principles of contract law, the Florida court ended up selecting one interpretation of Islam over another, which plainly overstepped the court's constitutional role.<sup>144</sup> Even if the court was completely unaware that its decision supported one school of Islamic doctrine

---

<sup>134</sup> *Odatalla v. Odatalla*, 810 A.2d 93, 94-95 (N.J. Super. Ct. Ch. Div. 2002).

<sup>135</sup> *In re Marriage of Dajani*, 251 Cal. Rptr. 871, 872 (Ct. App. 1988).

<sup>136</sup> 251 Cal. Rptr. 871 (Ct. App. 1988).

<sup>137</sup> *Id.* at 871-72.

<sup>138</sup> *Id.* at 872.

<sup>139</sup> The California Court of Appeals affirmed the trial court's decision, but refused to delve into Islamic law and voided the *mahr* on other unrelated grounds. *Id.* at 872-73.

<sup>140</sup> See *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969); Trumbull, *supra* note 39, at 634.

<sup>141</sup> 666 So. 2d 246 (Fla. Dist. Ct. App. 1996).

<sup>142</sup> *Id.* at 248-49.

<sup>143</sup> *Id.* at 249.

<sup>144</sup> Trumbull, *supra* note 39, at 640.

over another, unintentional state action still may violate the Establishment Clause.<sup>145</sup> Justice O'Connor explained, "Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated."<sup>146</sup>

These decisions expose the constitutional line that courts must walk. Enforcing a *mahr* agreement is not fundamentally unconstitutional; courts may legitimately enforce religious contracts by abstracting the purely secular principles of law.<sup>147</sup> However, the *mahr* agreement's uncertain terms preclude valid application of the neutral principles approach. The parties bargain for the agreements within the greater context of Islamic law, and so courts can only ascertain the *mahr* agreement's complete meaning by using parol evidence to illuminate Islamic law principles.<sup>148</sup> Thus, fully litigating which interpretation of Islamic law applies will inevitably lead courts through the constitutionally forbidden path of endorsing one religious sect over another.<sup>149</sup>

### B. *Distorting Intentions*

By treating the *mahr* agreement as a purely secular contract, courts can avoid the constitutionally forbidden path. But simply ignoring all Islamic law and focusing solely on the *mahr* agreement's neutral terms will often warp the parties' intentions.<sup>150</sup> The parties negotiated the agreement within the context of Islamic law tradition, and simply disregarding this ignores the parties' contractual intent.<sup>151</sup> As one scholar notes, "By a priori rejecting the pertinence of the Islamic shadow behind which husband and wife negotiate, bargain, and determine *mahr* and its amount, courts have paradoxically refused an appreciation of contract law that would account for the parties' particular, peculiar, private ordering regime."<sup>152</sup>

Judicial abstraction of secular terms inherently ignores the religious tenets that inform when and how courts should enforce the *mahr* agreement. The *mahr* serves as a counterbalance to the husband's right to *talaq*, and some schools hold that the woman forfeits her *mahr* through a *khul* di-

---

<sup>145</sup> *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring).

<sup>146</sup> *Id.* at 777 (citation omitted).

<sup>147</sup> *See Jones v. Wolf*, 443 U.S. 595, 604 (1979).

<sup>148</sup> *Cf. Blenkhorn*, *supra* note 5, at 216 (stating that, by "failing to inquire into the different possible religious and cultural dogmas that formed the basis of the couple's agreement," courts "may either overlook or rewrite the true intent of the parties").

<sup>149</sup> *Trumbull*, *supra* note 39, at 634.

<sup>150</sup> *Fournier*, *supra* note 18, at 77-78.

<sup>151</sup> *Id.* at 78.

<sup>152</sup> *Id.*

voiced.<sup>153</sup> The agreements contain no reference to different forms of divorce, and, thus, the neutral principles approach will enforce the *mahr* agreement no matter the divorce type.<sup>154</sup> In other words, the parties may have only intended for courts to enforce the agreement in particular circumstances, but the neutral principles approach only looks at the terms in the abstract and thus enforces the agreements across broad situational arrays.<sup>155</sup>

Even if judges abandon secular abstraction and delve deeper into Islamic law, the standard *mahr* agreement still presents judges with several interpretational roadblocks. In particular, lay Muslims most likely did not understand the complex doctrinal differences when negotiating the *mahr* agreement, and even upon litigation, courts cannot assume that the parties fully comprehend the *mahr* agreement's meaning.<sup>156</sup> Couples most likely did not have a mutual understanding of the exact terms of the *mahr* agreement but, instead, included the provision with the implicit understanding that a religious scholar would resolve any future dispute over the meaning or interpretation.<sup>157</sup> Furthermore, the contracts do not designate one governing Islamic school of thought.<sup>158</sup> Nor are particular parties bound to particular schools; indeed, Muslims have the right to switch to different legal schools for convenience or when one school's legal regime is more favorable to their needs.<sup>159</sup>

With no governing Islamic school or uniform meaning, the parties are free to rewrite the agreements on the witness stand when, in all likelihood, they never had an *ex ante* meeting of the minds.<sup>160</sup> The economic interests at stake provide a powerful incentive for the parties to testify to an interpretation of Islamic law that aligns with what will garner the most monetary gain.<sup>161</sup> Unfamiliarity with Islamic law will make it difficult for each non-Muslim, American judge to weed through potential exaggerations and misinterpretations.<sup>162</sup>

One scholar tracked this temptation for self-interested testimony and diagrammed how proposed interpretations of Islamic law differed depend-

---

<sup>153</sup> *Id.* at 69-70.

<sup>154</sup> *See id.* at 78 (explaining how the actual contemplations of the parties have "been buried from the discourse of secular *mahr*" through vague terms).

<sup>155</sup> *See id.* (explaining how the courts in *Odatalla*, *Aziz*, and *Akileh* dissociated the *mahr* "from the Islamic social and legal meaning to which it was once attached" and instead morphed the *mahr* into something "enforceable in all cases . . . so long as 'the neutral principles of law' are met and respected").

<sup>156</sup> Trumbull, *supra* note 39, at 644.

<sup>157</sup> *Id.*

<sup>158</sup> Blenkhorn, *supra* note 5, at 213.

<sup>159</sup> *Id.*

<sup>160</sup> *See* Trumbull, *supra* note 39, at 643 ("[T]here is no evidence that the married couple had a meeting of the minds . . .").

<sup>161</sup> *See* Fournier, *supra* note 18, at 79.

<sup>162</sup> al-Hibri, *supra* note 9.



ing on what each party desired from the court.<sup>163</sup> For instance, in *Akileh*, a Muslim woman argued that the *mahr* should be the absolute right of the wife, no matter the circumstances, even though in most schools of Islamic thought, the wife must forfeit the *mahr* when she seeks *khul* divorce.<sup>164</sup> Either the wife believed the *mahr* was her undeniable right, or she mischaracterized the law to maximize her economic gain.<sup>165</sup>

Husbands also frequently argue for the *mahr* agreement's enforceability based on what they stand to gain or lose.<sup>166</sup> Faced with having to pay a \$10,000 *mahr*, the husband in *Odatalla* argued that the *mahr* was a purely religious obligation that he never intended a secular, civil court to enforce.<sup>167</sup> Similarly, in *Aziz*, the husband argued that his \$5,000 deferred *mahr* was a religious document not enforceable as a contract.<sup>168</sup> However, in *In re Marriage of Altayar and Muhyaddin*<sup>169</sup> the husband's *mahr* obligation was only nineteen gold pieces, a small sum compared to the \$65,000 trial court judgment against him.<sup>170</sup> On appeal, the husband argued the *mahr* agreement was a valid prenuptial agreement that should preempt any other equitable division of the couple's marital estate.<sup>171</sup> In *Ahmad v. Ahmad*,<sup>172</sup> the husband similarly argued that his \$6,600 deferred *mahr* obligation was a prenuptial agreement, but the court rejected his argument and instead awarded the wife a judgment totaling \$44,222.<sup>173</sup> These instances mark only two examples of many Muslim husbands arguing that their *mahr* agreements were prenuptial contracts when they stood to lose more money under state equitable division or community property laws.<sup>174</sup>

---

<sup>163</sup> Fournier, *supra* note 18, at 78-84 (describing the parties' approach to *mahr* litigation within the context of the Holmes's "bad man theory" of law).

<sup>164</sup> *Akileh v. Elchahal*, 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996); *see also* Fournier, *supra* note 18, at 82 (discussing *Akileh*).

<sup>165</sup> *See* Fournier, *supra* note 18, at 82 (describing the wife's testimony "of the legal transplantation of *mahr*" as "one that entirely disregards Islamic theory").

<sup>166</sup> *See id.* at 79-81 (discussing the husband's litigation strategy in the context of "bad man theory").

<sup>167</sup> *Odatalla v. Odatalla*, 810 A.2d 93, 98 (N.J. Super. Ct. Ch. Div. 2002); *see also* Fournier, *supra* note 18, at 79-80.

<sup>168</sup> *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985).

<sup>169</sup> No. 57475-2-I, 2007 WL 2084346 (Wash. Ct. App. July 23, 2007) (per curiam).

<sup>170</sup> *Id.* at \*3.

<sup>171</sup> *Id.* at \*2.

<sup>172</sup> No. L-00-1391, 2001 WL 1518116 (Ohio Ct. App. Nov. 30, 2001).

<sup>173</sup> *Id.* at \*2-4; *see also* Siddiqui, *supra* note 2, at 647-48 (discussing *Ahmad*).

<sup>174</sup> *See, e.g., In Re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865-67 (Ct. App. 2001) (describing that the husband argued for enforcement as a prenuptial agreement when the deferred *mahr* was equivalent to \$30); *Aleem v. Aleem*, 947 A.2d 489, 493 n.5 (Md. 2007) (discussing that the husband argued that the *mahr* was a valid prenuptial when the *mahr* only called for the husband to pay the wife \$2,500 when, under Maryland law, the wife was entitled to at least half of \$2 million in marital assets); *Chaudhary v. Ali*, No. 0956-94-4, 1995 WL 40079, at \*1-2 (Va. Ct. App. Jan. 31, 1995) (per curiam) (describ-

Thus, *ex post* economic incentives often influence party testimony. Nevertheless, without concrete contractual terms, judges must rely on the parties' descriptions of their intentions at the time of contracting, even though the parties most likely never, in fact, had a mutual understanding of the exact terms of the *mahr* agreement.<sup>175</sup> Accordingly, the *mahr* agreement's vague nature allows the parties' to effectively rewrite their marriage contracts according to their individual needs after divorce.<sup>176</sup>

Neither can judges rely upon Islamic expert witnesses to provide more accurate interpretations. Muslim men often serve as expert witnesses in these trials.<sup>177</sup> But whether these men are imams or professors of religion, they often confuse their cultural beliefs with accurate interpretations of Islam.<sup>178</sup> An American judge, unfamiliar with the vast differences in Islamic law, often takes the expert at his word and decides the case on this single interpretation of Islamic law.<sup>179</sup> As one legal scholar explained:

If I am a non-Muslim American judge and . . . a Muslim professor of Islam . . . or the imam of a *masjid* walks into my court, then I am inclined to believe that I am going to get the real story. But that is not always the case.<sup>180</sup>

For example, in *Rahman v. Hossain*,<sup>181</sup> the court ordered a Muslim woman to return her \$12,500 prompt *mahr* (the first part of the *mahr* given immediately after marriage) after the couple's marriage disintegrated.<sup>182</sup> The court based its decision in part on the husband's expert witness, a Muslim lawyer, who stated that the wife had to return her prompt *mahr* if she is at fault for the divorce.<sup>183</sup> However, in most schools of thought, once contracted, a *mahr* agreement binds husband, and neither party can revoke or diminish the agreement.<sup>184</sup> The husband may only retake the prompt *mahr*,

---

ing that the husband argued that his Islamic marriage contract was an enforceable prenuptial when the marital property totaled over \$700,000).

<sup>175</sup> See Trumbull, *supra* note 39, at 644 (explaining that Muslims often incorporate Islamic legal terms for reasons other than demonstrating legal intent).

<sup>176</sup> See Blenkhorn, *supra* note 5, at 212 (“[C]ourts cannot disregard the Statute of Frauds by allowing couples to rewrite their contracts at divorce and potentially alter their intended effect.”).

<sup>177</sup> al-Hibri, *supra* note 9.

<sup>178</sup> *Id.*

<sup>179</sup> See *id.* (explaining that an American judge has no way of discerning reliable testimony from biased testimony).

<sup>180</sup> *Id.* (emphasis added). Azizah al-Hibri further recounted a time when a well-known Muslim scholar referred to the *mahr* as a bride price. *Id.* She explained that this type of description probably was what caused the Virginia judge to strike down the *mahr* and state that “slavery is over in the U.S., if Islamic marriage law says women are sold into marriage, then we will not enforce it in this country.” *Id.* (internal quotation marks omitted).

<sup>181</sup> No. A-5191-08T3, 2010 WL 4075316 (N.J. Super. Ct. App. Div. June 17, 2010) (per curiam).

<sup>182</sup> *Id.* at \*1-2, 4.

<sup>183</sup> *Id.* at \*1.

<sup>184</sup> Thompson & Yunus, *supra* note 8, at 364-65.

according to some schools, if the marriage dissolves before consummation.<sup>185</sup> But Islamic authority is also not clear on this point; some scholars maintain that if the marriage is not consummated, the wife is still entitled to half of her prompt *mahr*.<sup>186</sup> The court referenced the fact that the wife had withheld sex from her husband, but never made an explicit factual finding that the couple did not consummate the marriage.<sup>187</sup>

The court relied on the husband's expert witness to cure its unfamiliarity with Islamic law, and instead of accurately describing the variation in Islamic custom, the expert verbally rewrote the contract in a way that maximized the husband's economic gain.<sup>188</sup> The court attempted to reach an equitable result, finding it unfair for a husband to have to pay such a steep sum for a short and unhappy marriage, but instead the court altered what most likely was the *ex ante* intention behind the contract.<sup>189</sup> Even if the wife had submitted more accurate evidence on Islamic custom, the court would have become enmeshed in Islamic doctrinal controversy over whether the full prompt *mahr* is forfeited for failure to consummate the marriage.

This case illustrates the dilemma courts face. American judges, unschooled in Islamic tenets, receive no instruction from the vague terms of *mahr* agreements.<sup>190</sup> Judges wish to uphold Muslim couples' right to freely contract, but prejudicial party and expert testimony hinders the judge's ability to fairly enforce the agreements.<sup>191</sup> Combined, this demonstrates the pragmatic difficulty in enforcing *mahr* agreements. Non-Muslim judges do not fully understand Islamic religious doctrine and can do harm by enforcing skewed interpretations supplied by unreliable experts and party witnesses.

### C. *Creating Harmful Precedent*

Since *mahr* agreements lack specific written terms, the United States currently has no consistent method for enforcing *mahr* provisions.<sup>192</sup> This inconsistency in the common law deprives Muslim Americans of predictable judicial outcomes.<sup>193</sup> This problem is unlikely to subside; as the number of Muslim immigrants continues to increase, the number of Muslims seek-

---

<sup>185</sup> PEARL & MENSKI, *supra* note 11, ¶ 7-18, at 180.

<sup>186</sup> Ali, *supra* note 14, at 19.

<sup>187</sup> *Rahman*, 2010 WL 4075316, at \*4.

<sup>188</sup> *See id.* at \*1 (describing the expert testimony); *see supra* text accompanying notes 180-86.

<sup>189</sup> PEARL & MENSKI, *supra* note 11, ¶¶ 7-10, 7-15, at 178-80 (describing the *mahr* as a sum paid to the wife "as a mark of respect to her" and that the prompt *mahr* "is an inalienable right of the wife").

<sup>190</sup> al-Hibri, *supra* note 9.

<sup>191</sup> *Id.* (explaining several more instances in which experts have mischaracterized Islamic tradition on the witness stand).

<sup>192</sup> Thompson & Yunus, *supra* note 8, at 394.

<sup>193</sup> *Id.*

ing to enforce these boilerplate agreements will also increase.<sup>194</sup> Muslim Americans are not only faced with unpredictability, but also must overcome misleading precedent. For example, in the Florida jurisdiction that decided *Akileh*, Muslim husbands confront precedent that holds a woman is absolutely entitled to her *mahr* even when she initiates divorce.<sup>195</sup>

In other jurisdictions, courts classify the *mahr* agreement as a prenuptial contract and then proceed to void the *mahr* agreement for failure to meet the state's statutory standards for prenuptials.<sup>196</sup> For example, the Uniform Premarital Agreement Act, adopted by 26 states, provides that premarital agreements must be conscionable, entered into voluntarily, and executed only after both parties fully disclose their financial assets.<sup>197</sup> Some states also require that independent legal counsel represent each party or that parties expressly waive representation.<sup>198</sup> Most *mahr* agreements do not meet these requirements, and so, if treated as a prenuptial, many courts refuse to enforce the contracts.<sup>199</sup>

Each voided *mahr* agreement establishes the misleading precedent that *mahr* agreements are equivalent to prenuptial contracts, when, in fact, the two are conceptually distinct.<sup>200</sup> Indeed, the *mahr* developed for the sole benefit of the wife, as a way to ease an inequitable marriage custom and prevent financial destitution.<sup>201</sup> In contrast, American prenuptial contracts formed to protect the economically superior party from sharing assets with

---

<sup>194</sup> See *id.* at 395.

<sup>195</sup> *Akileh v. Elchahal*, 666 So. 2d 246, 248-49 (Fla. Dist. Ct. App. 1996) (holding a *mahr* enforceable as a prenuptial agreement even though the husband testified that the wife forfeited her *mahr* by initiating the divorce).

<sup>196</sup> *E.g.*, *Aleem v. Aleem*, 947 A.2d 489, 501-02 (Md. 2007); *Chaudhary v. Ali*, No. 0956-94-4, 1995 WL 40079, at \*2 (Va. Ct. App. Jan. 31, 1995) (per curiam); *In re Marriage of Altayar & Muhyaddin*, No. 57475-2-I, 2007 WL 2084346, at \*1 (Wash. Ct. App. July 23, 2007) (per curiam).

<sup>197</sup> UNIF. PREMARITAL AGREEMENT ACT § 6(a)(1)-(2), 9C U.L.A. 39 (1983).

<sup>198</sup> *E.g.*, CAL. FAM. CODE § 1615(c)(1) (West 2004).

<sup>199</sup> *E.g.*, *Ahmad v. Ahmad*, No. L-00-1391, 2001 WL 1518116, at \*4 (Ohio Ct. App. Nov. 30, 2001) (holding that a *mahr* was unenforceable as a prenuptial agreement "because at the time the agreement was entered into, [the wife] was not represented by counsel, there was no disclosure of [the husband's] assets, and the agreement did not take into consideration the assets subsequently acquired in Ohio during the eight-year marriage"); *Chaudhary*, 1995 WL 40079, at \*1-2 (refusing to enforce a *mahr* as a prenuptial because the *mahr* "was not negotiable and required no disclosure of assets"); *Altayar*, 2007 WL 2084346, at \*1, \*3 (holding the *mahr* invalid as a prenuptial because the terms were unfair, there was no disclosure of assets, and the wife had no opportunity to seek advice from independent counsel).

<sup>200</sup> Oman, *supra* note 89, at 600-01 (stating that applying premarital contract requirements to *mahr* agreements analyzes the agreements within an erroneous social script); Siddiqui, *supra* note 2, at 646 (stating that, unlike a prenuptial agreement, the *mahr* is not the final financial agreement in the case of divorce, but is instead solely considered for the benefit and protection of the wife); Thompson & Yunus, *supra* note 8, at 375 (describing prenuptial agreements as instruments designed to define the character of property brought into marriage, while the *mahr* is meant to protect the wife from inequities in divorce law).

<sup>201</sup> Blenkhorn, *supra* note 5, at 203.

the economically inferior party upon divorce.<sup>202</sup> Thus, the *mahr* and the prenuptial contract developed to protect different parties and accomplish disparate goals.<sup>203</sup>

Also dissimilar to prenuptials, *mahr* negotiations do not represent an attempt to bargain around default divorce law.<sup>204</sup> When forming marital contracts in their home countries, Muslim parties most likely did not anticipate litigating in American courts and confronting state equitable division or community property laws.<sup>205</sup> In Islamic tradition, each spouse retains their own assets as separate property during the marriage, and so marital or community property is foreign to Islam.<sup>206</sup> And, finally, prenuptials represent the final financial agreement upon divorce, but Muslim couples may not have intended the *mahr* agreement to represent the exclusive post-divorce settlement because, under some schools of thought, the woman is entitled to alimony separate from her *mahr*.<sup>207</sup>

Hence, the *mahr* agreement's vagueness creates a judicial guessing game that allows non-Muslim judges to falsely equivocate the *mahr* agreement with a prenuptial contract that preempts equitable division laws.<sup>208</sup> One scholar explains that these cases have "created a serious warping of American judicial understanding of Islamic law as well as a hindrance to providing justice to US Muslim litigants."<sup>209</sup> Thus, this insensitive use of parol evidence creates deceptive precedent that frustrates the proper enforcement of *mahr* agreements.<sup>210</sup>

### III. FORGING AHEAD: MEETING ON MIDDLE GROUND

Due to the problems associated with enforcing *mahr* agreements, courts should refrain from the guessing game and void overly vague agreements for failure to satisfy the statute of frauds or contract-certainty re-

---

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* (explaining that "*mahr* agreements, by religious tradition and legal definition, are far different both in purpose and effect" than prenuptial contracts).

<sup>204</sup> *See* Oman, *supra* note 89, at 600 (explaining that avoiding American divorce law could not possibly be the purpose behind the *mahr* because the *mahr* predates American divorce law by centuries).

<sup>205</sup> *See id.*

<sup>206</sup> *Id.* at 590.

<sup>207</sup> PEARL & MENSKI, *supra* note 11, ¶¶ 7-27 to 7-28, at 183-84; Christina Jones-Pauly, *Marriage Contracts of Muslims in the Diaspora: Problems in the Recognition of Mahr Contracts in German Law*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 299, 323 (Asifa Quraishi & Frank E. Vogel eds., 2008); Siddiqui, *supra* note 2, at 646; Thompson & Yunus, *supra* note 8, at 373.

<sup>208</sup> Blenkhorn, *supra* note 5, at 213-14.

<sup>209</sup> Thompson & Yunus, *supra* note 8, at 375 (quoting Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in *WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM* 177, 201 (Lynn Welchman ed., 2004)).

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

quirements. Non-enforcement will prevent future precedent that harmfully misrepresents the *mahr* agreement, while state equitable division schemes will continue to protect Muslim women going through divorce. Non-enforcement should incentivize the American Muslim community to develop marriage contracts with specific terms or arbitration clauses. With these improvements, courts can avoid constitutional violations and interpretation errors.

#### A. *American Courts Should Not Enforce Vague Mahr Agreements*

To avoid unconstitutional interpretations and further judicial mischaracterization, courts should refuse to enforce *mahr* agreements that require parol evidence to establish what a *mahr* is and under what circumstances the *mahr* agreement should be enforced.<sup>211</sup> Since the *mahr* agreement's uncertain terms are the root of many enforcement troubles,<sup>212</sup> voiding the *mahr* agreement for vagueness is the most suitable method for non-enforcement. *Mahr* agreements typically fall within the statute of frauds because they are made in consideration of marriage.<sup>213</sup> As a result, the essential terms of the agreement must be in writing and stated with reasonable certainty.<sup>214</sup> Courts may admit parol evidence in order to resolve ambiguity within the contract, but not to completely rewrite the agreement.<sup>215</sup>

At least two courts have found these sparse agreements too vague to satisfy the statute of frauds. In *In re Marriage of Shaban*,<sup>216</sup> a California court found that, in order to satisfy the statute of frauds, the document must state with reasonable certainty the major terms of the contract.<sup>217</sup> It also found that a contract whose only substantive term is that Islamic law will govern the agreement is "hopelessly uncertain as to its terms and conditions."<sup>218</sup> The court upheld the trial court's refusal to allow an expert to ex-

---

<sup>211</sup> See Blenkhorn, *supra* note 5, at 210-11.

<sup>212</sup> See discussion *supra* Part II.

<sup>213</sup> See, e.g., *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 865 (Ct. App. 2001); see also RESTATEMENT (SECOND) OF CONTRACTS § 110(c) (1981); Blenkhorn, *supra* note 5, at 210-11.

<sup>214</sup> RESTATEMENT (SECOND) OF CONTRACTS § 131(c); see also *Shaban*, 105 Cal. Rptr. 2d at 865.

<sup>215</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 214(c). In other areas of law, courts have continually held that relying on parol evidence could not satisfy state statute of frauds requirements. *168th & Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 953 (8th Cir. 2007) ("[W]hen essential elements of the contract are lacking, the contract must fail, because essential elements cannot be supplied by parol testimony."); *Whitney v. G. Harvey Kennington Revocable Trust*, 62 F. App'x 794, 795 (9th Cir. 2003) ("[W]hen a contract is subject to the statute of frauds, 'gaps in essential terms cannot be filled by parol evidence.'" (quoting *Lawrence v. Jones*, 864 P.2d 194, 196 (Idaho Ct. App. 1993))); *W. Chance No. 2, Inc. v. KFC Corp.*, 957 F.2d 1538, 1542 (9th Cir. 1992) ("[P]arol evidence cannot be used to cure a deficient memorandum.").

<sup>216</sup> 105 Cal. Rptr. 2d 863 (Ct. App. 2001).

<sup>217</sup> *Id.* at 865.

<sup>218</sup> *Id.*

plain the terms of the agreement because the “expert in effect would have written a contract for the parties,” and thus refused to enforce the agreement for failure to satisfy the statute of frauds.<sup>219</sup>

Moreover, in *Habibi-Fahnrich v. Fahnrich*,<sup>220</sup> a New York court found that in order for a contract to satisfy the statute of frauds, the “material terms of the contract must be so specific that anyone reading the contract should be able to understand the dictates of the agreement.”<sup>221</sup> But the terms of the *mahr* agreement were too vague to allow the court to grasp the meaning of the contract.<sup>222</sup> Because the agreement did not define the word “postponed,” the court could not tell from the writing that the husband only had to pay the “postponed” portion in the event of his death or divorce.<sup>223</sup> With no clear understanding of the agreement’s terms, the court refused to enforce the *mahr* agreement.<sup>224</sup>

Alternatively, some Islamic scholars argue that the husband gives the *mahr* as an effect of the marriage and not as consideration for the marriage,<sup>225</sup> rendering the statute of frauds inapplicable.<sup>226</sup> Even if courts find the statute of frauds inapplicable to the *mahr* agreement, general contract-certainty requirements should prevent overreliance on parol evidence. The Restatement (Second) of Contracts states that “[e]ven though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.”<sup>227</sup> If courts cannot readily determine the remedies for breach of contract, then, by enforcing vague provisions, courts will be writing the agreements and not the parties.<sup>228</sup> Without defining reasonably certain terms or guidelines for legal enforcement, the parties did not manifest an intention to form a legally binding contract.<sup>229</sup> Thus, judicial enforcement does not properly vindicate contractual intent, but instead allows the parties to write over their vague *mahr* provisions *ex post*.

In sum, using parol evidence to manufacture the terms of the contract is both legally and practically flawed. Legally, the use of parol evidence is

<sup>219</sup> *Id.*

<sup>220</sup> No. 46186/93, 1995 WL 507388 (N.Y. Sup. Ct. 1995).

<sup>221</sup> *Id.* at \*2.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* (internal quotation marks omitted).

<sup>224</sup> *Id.* at \*3.

<sup>225</sup> PEARL & MENSKI, *supra* note 11, ¶ 7-10, at 179.

<sup>226</sup> Annotation, *supra* note 104, § 4[b] (“Some courts have recognized that where marriage is not the consideration for the promise made by the prospective spouse, the promise is not an ‘agreement’ made upon consideration of marriage within the statute of frauds.”).

<sup>227</sup> RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981).

<sup>228</sup> *See id.* § 33 cmt. b.

<sup>229</sup> *See id.* § 33(3) (“The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.”).

an improper route to overcome the inherent vagueness of the agreements, and, thus, courts should void the boilerplate agreements for failure to state important terms with reasonable certainty.<sup>230</sup> Practically, non-enforcement will prevent American courts from completely distorting the nature of the agreements by overreliance on party testimony and expert witnesses.<sup>231</sup>

### B. *Effect on the Parties*

If judges void the *mahr* agreement, then U.S. default equitable division and community property laws will apply.<sup>232</sup> The result of equitable division is consistent with the purpose of the *mahr*, which is to lessen harsh inequities in Islamic divorce custom and prevent the wife from becoming financially destitute upon losing her husband.<sup>233</sup> Furthermore, judicial non-enforcement does not prevent the parties from seeking to enforce these agreements through religious or community mechanisms.<sup>234</sup>

Still, the parties bargain for *mahr* agreements as part of the marriage contract, and when courts do not enforce the *mahr*'s provisions the parties lose the benefit of that specific bargain.<sup>235</sup> For example, *mahr* agreements could entail precise sums that are not encapsulated within equitable division schemes, such as when there is little marital property to divide or when the *mahr* is for non-monetary items like a family business.<sup>236</sup> Courts should not lightly single out Muslim couples and aggravate their rights to freely contract.<sup>237</sup> In fact, the court in *Odatalla*, explained, "Today's community is not as concerned with issues of a state sponsored church. Rather, the challenge faced by our courts today is in keeping abreast of the evolution of our community from a mostly homogeneous group of religiously and ethnically similar members to today's diverse community."<sup>238</sup>

Better cultural understanding is an important goal for our modern judicial system, but this should not translate into flouting Supreme Court precedent. Lower courts have consistently dismissed cases in order to avoid violating the Constitution.<sup>239</sup> As one scholar details, "The expanded prohibi-

---

<sup>230</sup> Blenkhorn, *supra* note 5, at 212.

<sup>231</sup> See Fournier, *supra* note 18, at 84-90 (describing that American courts have transformed the *mahr* into either a bonus or a penalty for the contracting parties).

<sup>232</sup> Siddiqui, *supra* note 2, at 640.

<sup>233</sup> Blenkhorn, *supra* note 5, at 201-02.

<sup>234</sup> *Id.* at 233.

<sup>235</sup> Siddiqui, *supra* note 2, at 642-43.

<sup>236</sup> *Id.* at 640.

<sup>237</sup> *But see* Blenkhorn, *supra* note 5, at 197 (explaining that the Muslim woman does not usually negotiate for herself, but a male guardian, or *wali*, negotiates on her behalf).

<sup>238</sup> *Odatalla v. Odatalla*, 810 A.2d 93, 96 (N.J. Super. Ct. Ch. Div. 2002).

<sup>239</sup> See Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 520 (2005).



tion on judicial examination of religious questions has led state and federal courts to dismiss disputes in seemingly every area of litigation—including consumer fraud, child custody and divorce, employment discrimination, torts, professional malpractice, and contracts—whenever their resolution would require analysis of religious questions.<sup>240</sup> These cases span across various major religions and are representative of how lower courts are unwilling to expound judicial opinions on religious doctrine.<sup>241</sup> When referring to judicial involvement in religious questions, Justice Souter once explained that he could “hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided wherever possible.”<sup>242</sup>

With respect to other religious marital agreements, this Comment does not unfairly single out Islamic *mahr* agreements. The enforceability of the Islamic marriage license is not questioned here, but only the husband’s promise to pay the *mahr* amount. Christian marriage licenses contain nothing comparable to a *mahr* agreement.<sup>243</sup> Prenuptial agreements typically handle western post-divorce property division, but American prenuptial agreements are dissimilar to *mahr* agreements in that prenuptial agreements are completely secular and gender-neutral.<sup>244</sup> When enforcing prenuptials, specific statutes and legal precedents aid courts;<sup>245</sup> courts do not base their decisions on disputed religious doctrine.

Jewish marriage contracts are more analogous to Islamic marriage contracts because both stem from non-secular law and contain specific religious obligations within the contract.<sup>246</sup> In *Avitzur*, the court commanded a husband to appear before a rabbinical tribunal in accord with his Jewish marriage contract.<sup>247</sup> Unlike the vague *mahr* agreements, the Jewish marriage contract specifically stated:

[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 summon either party at the request of the other, in order to enable the

---

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* at 520-25.

<sup>242</sup> Trumbull, *supra* note 39, at 618 (quoting *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992)) (internal quotation marks omitted).

<sup>243</sup> *See* Siddiqui, *supra* note 2, at 642 (describing Christian marriage as a “sacrament” and Islamic marriage as a contractual arrangement (internal quotation marks omitted)).

<sup>244</sup> Blenkhorn, *supra* note 5, at 203-04.

<sup>245</sup> *See, e.g.*, CAL. FAM. CODE § 1615 (West 2004); 23 PA. CONS. STAT. ANN. § 3106 (West 2010); VA. CODE ANN. §§ 20-148 to 20-151 (West 2001).

<sup>246</sup> *See generally* Stone, *supra* note 50, at 58-80 (explaining in more detail Jewish law as applied to marriage contracts).

<sup>247</sup> *Avitzur v. Avitzur*, 446 N.E.2d 136, 138-39 (N.Y. 1983).

party so requesting to live in accordance with the standards of the Jewish law of marriage throughout his or her lifetime.<sup>248</sup>

According to the express terms, the court found the husband had bound himself to appear in front of the *Beth Din* at his wife's request.<sup>249</sup> The court did not need to excessively rely on parol evidence or weigh religious doctrine—the obligation was clear from the express terms of the contract.<sup>250</sup> Furthermore, the husband did not dispute the wife's interpretation of Jewish law, only the necessity that he abide by the religious contract.<sup>251</sup> When there is no dispute over religious doctrine, the court may apply the neutral principles of law without unintentionally adopting one sect of Judaism over another.<sup>252</sup>

*Mahr* agreements pose unique problems to American courts. Unlike in *Avitzur*, judges cannot only look to the neutral principles of law because the agreements' vagueness opens the door for parties to dispute which religious doctrine governs.<sup>253</sup> The general concern for multiculturalism cannot overcome the inherent difficulties in interpreting the vague *mahr* provisions.

### C. *Reforming the Written Terms of a Mahr Agreement*

The trend of voiding the agreements as insufficient prenuptial contracts hinders future enforcement by inaccurately characterizing the *mahr* agreement.<sup>254</sup> Conversely, voiding *mahr* agreements for vagueness will not harm the *mahr* agreement's future characterization. Instead, consistently voiding the *mahr* agreement for vagueness will create one predictable outcome that will help the Muslim community understand exactly what courts expect from these agreements. If Muslim Americans desire judicial en-

---

<sup>248</sup> *Id.* at 137 (first and second alterations in original).

<sup>249</sup> *Id.* at 138-39.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 138.

<sup>252</sup> See Trumbull, *supra* note 39, at 621-22.

<sup>253</sup> See *supra* Part II.A.

<sup>254</sup> See Siddiqui, *supra* note 2, at 646 (stating that, unlike a prenuptial agreement, the *mahr* is not the final financial agreement in the case of divorce, but is instead solely considered for the benefit and protection of the wife); Blenkhorn, *supra* note 5, at 203 (noting that prenuptial agreements are dissimilar from *mahr* agreements because prenuptials are intended to protect the financially superior spouse from the financially inferior spouse while the *mahr* agreement is intended to have the opposite effect); Thompson & Yunus, *supra* note 8, at 375 (describing prenuptial agreements as instruments designed to define the character of property brought into marriage, while the *mahr* is meant to protect the wife from inequities in divorce law).

forcement, then the Muslim community will move toward more precise written terms within their standard form contracts.<sup>255</sup>

If the parties could *ex ante* (1) define the circumstances in which the “deferred” or “postponed” portion of the *mahr* is due, (2) declare what school of Islamic thought will apply, and (3) identify whether the *mahr* sum is the exclusive division of property upon divorce, then the parties will better define and clarify the contractual terms that currently hinder judicial enforcement.<sup>256</sup> These are only a few suggestions; overall, the parties should draft the contracts so that American courts can understand the parties’ *ex ante* intentions without relying on their *ex post* declarations of intent. The more written operative details the parties supply, the easier American courts can enforce the originally intended agreement instead of an agreement distorted by interpretations that maximize economic gain.

The parties must state with specific terms how they wish the court to enforce the *mahr* agreement. A more detailed definition will satisfy the statute of frauds requirement of having the contract state with reasonable certainty the essential terms.<sup>257</sup> Furthermore, if the parties agree *ex ante* to the Islamic school that will govern the agreement, then courts may avoid religious doctrinal dispute and the endorsement of one Islamic school over another.<sup>258</sup> Also, with more specified terms, courts can appropriately hear parol evidence to aid in further interpretation without the risk of the parol evidence completely rewriting the agreement.<sup>259</sup> Courts must still be wary of unreliable experts and party testimony, but with more specific terms to cabin proffered interpretations, the risk of distortion is no greater than in any other civil litigation.

It is difficult to specify the extent to which additional detail is needed to make the contracts amenable to constitutional enforcement, but any additional terms will be a step in the right direction. Future litigation and scholarship could deduce a more exact level of detail needed. For example, Professor Azizah al-Hibri, a law professor at the University of Richmond, is advocating the creation of a new standard Islamic marriage contract that will be less problematic for American courts to enforce.<sup>260</sup>

---

<sup>255</sup> Since the *mahr* agreement is drafted using a fill-in-the-blank standard form contract provided by a local imam, reform must start with American Muslim religious authorities crafting more detailed standard form contracts. *See supra* text accompanying notes 36-37.

<sup>256</sup> *See* Blenkhorn, *supra* note 5, at 228 (“Enforcement of American-made *mahr* agreements can only be enforced on an ad hoc basis, depending on . . . the specificity of the agreement, an indication of which of the many Islamic legal schools apply, and a clear manifestation of an intent to forgo or add upon traditional property dissolution rules.”).

<sup>257</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 131(c) (1981).

<sup>258</sup> *See* Trumbull, *supra* note 39, at 621-22.

<sup>259</sup> *See* Blenkhorn, *supra* note 5, at 210-12.

<sup>260</sup> al-Hibri, *supra* note 9.

Alternatively, the parties could include an arbitration clause within the marriage contract.<sup>261</sup> This would completely sidestep the need to create more specified terms because the parties could select an arbitrator who is familiar with Islamic custom and tradition.<sup>262</sup> Because the court defers interpretation to the neutral arbitrator, the court will not unconstitutionally entangle itself with religion.<sup>263</sup> The arbitrator will clarify the terms and the original intent of the parties, and the court will merely enforce this determination.<sup>264</sup> Since the parties previously agreed to an arbitrator and, in effect, to an Islamic school of thought, the judge avoids unconstitutionally endorsing one interpretation over another.<sup>265</sup> Although scholars argue that the U.S. judicial system is compatible with Islamic faith-based arbitration,<sup>266</sup> the U.S. judicial system has not yet developed a foolproof system.<sup>267</sup> Still, arbitration remains an option for parties who want their *mahr* agreements interpreted by authorities familiar with Islam while still contractually binding in the American judicial system.<sup>268</sup>

However, both proposed solutions only work for parties who anticipate litigating in American courts or who belong to religious communities that develop standard form marriage contracts with expectations of American enforcement. Couples who do not anticipate moving or litigating within the United States may remain unaffected by broader change. Nevertheless, change must start somewhere. Unaffected couples may still seek enforcement within religious organizations and can benefit from state equitable division laws.

#### D. *Avoiding Future Inequitable Enforcement*

As *mahr* agreements develop greater specificity, courts should still be cognizant of other enforcement dangers. Some scholars are resistant to the *mahr* agreement's enforcement because of the strong potential for duress or undue influence in signing the agreements.<sup>269</sup> Indeed, in many instances, a guardian, usually a male relative, bargains on behalf of the woman, and, in some circumstances, the woman may only consent to the marital contract

---

<sup>261</sup> Cf. Rafeeq, *supra* note 9, at 111 (“Islamic law arbitration tribunals can be implemented in the United States in a manner that will further both American and Islamic ideals of justice.”); Trumbull, *supra* note 39, at 641 (arguing that courts should automatically imply arbitration clauses in Islamic contracts).

<sup>262</sup> See Rafeeq, *supra* note 9, at 114-15 (describing the U.S. system for arbitration).

<sup>263</sup> Trumbull, *supra* note 39, at 641.

<sup>264</sup> *Id.* at 642.

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

<sup>266</sup> E.g., Rafeeq, *supra* note 9, at 137.

<sup>267</sup> Trumbull, *supra* note 39, at 644-47.

<sup>268</sup> Rafeeq, *supra* note 9, at 115-16.

<sup>269</sup> E.g., Blenkhorn, *supra* note 5, at 218-19.

out of extreme familial or cultural pressure.<sup>270</sup> Her male guardian may threaten physical abuse or familial abandonment unless she consents to a small deferred *mahr*.<sup>271</sup> As one scholar explains, “[E]nforcing *mahr* provisions against women who do not personally bargain for or even sign the agreements effectively substitutes the meager *mahr* payment for the divorcing wife’s rights under community property or equitable distribution regimes, leaving them unfairly and needlessly destitute.”<sup>272</sup>

Muslim women are not the only parties victimized by coercive *mahr* agreements; courts have also voided *mahr* agreements after finding the husband signed under coercion or duress.<sup>273</sup> In *Zawahiri v. Alwattar*,<sup>274</sup> a Muslim wife’s family did not inform the Muslim husband of the *mahr* agreement until two hours before the ceremony when the guests had already begun to arrive for the wedding.<sup>275</sup> The court found that the contract was a result of coercion and, thus, not a valid prenuptial.<sup>276</sup> Likewise, in *In re Marriage of Obaidi and Qayoum*,<sup>277</sup> the husband signed a \$20,000 agreement written in *Farsi*.<sup>278</sup> The husband could not speak or understand *Farsi*, and the wife’s family only explained to him what a *mahr* was fifteen minutes before he signed the agreement.<sup>279</sup> Hence, the court refused to enforce the *mahr* agreement in part because the husband’s consent was influenced by duress.<sup>280</sup>

Creating more specific contracts does not guarantee that every party will bargain individually for more specific terms, but instead it is more likely that the Muslim community will develop more specific boilerplate language in its standard form contracts.<sup>281</sup> The added detail in terms may help judges parse through the agreements without violating the Constitution, but more specific terms will do little to prevent issues arising from duress or undue influence. This is not especially problematic because judges have the necessary legal tools to prevent these adverse results. Common law doctrines of duress and undue influence allow parties to avoid contractual obligations, which they entered into as a result of high-pressure tactics by close

---

<sup>270</sup> Oman, *supra* note 89, at 603-04; Blenkhorn, *supra* note 5, at 197, 218-20.

<sup>271</sup> Oman, *supra* note 89, at 603-04; Blenkhorn, *supra* note 5, at 220.

<sup>272</sup> Blenkhorn, *supra* note 5, at 191.

<sup>273</sup> See, e.g., *Zawahiri v. Alwattar*, No. 07AP-925, 2008 WL 2698679, at \*6 (Ohio Ct. App. July 10, 2008); *In re Marriage of Obaidi & Qayoum*, 226 P.3d 787, 791 (Wash. Ct. App. 2010).

<sup>274</sup> No. 07AP-925, 2008 WL 2698679 (Ohio Ct. App. July 10, 2008).

<sup>275</sup> *Id.* at \*6.

<sup>276</sup> *Id.*

<sup>277</sup> 226 P.3d 787 (Wash. Ct. App. 2010).

<sup>278</sup> *Id.* at 788.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 791.

<sup>281</sup> See Blenkhorn, *supra* note 5, at 211, 216 (explaining that Muslim marriage contracts are not a manifestation of promises, but rather a boilerplate form).

family members.<sup>282</sup> Thus, even with complete certainty in the agreement, courts must not overlook other important tenets of contract law.<sup>283</sup> Moreover, if the *mahr* agreement contains an arbitration clause, judges must also carefully look for signs of duress before confirming the arbitration tribunal's judgment.<sup>284</sup>

Further issues may arise if Muslims decide to develop boilerplate terms that label the *mahr* agreement as equivalent to a prenuptial contract. Although the traditional *mahr* agreement is conceptually distinct from the American prenuptial contract,<sup>285</sup> Muslims may nevertheless choose to treat the *mahr* agreement as akin to a prenuptial agreement, thus preempting state default rules. If the parties intentionally and expressly opt into this method of enforcement, courts must treat the *mahr* agreement as equivalent to any other agreement that waives American divorce rights.<sup>286</sup> Hence, the parties must satisfy state laws specifically developed to protect economically inferior parties from signing prenuptials under coercive circumstances.<sup>287</sup>

For example, the Uniform Premarital Agreement Act outlines specific instances in which courts should not enforce prenuptial contracts.<sup>288</sup> The Act states prenuptials are not enforceable when the party seeking to void the agreement can prove:

- (1) that party did not execute the agreement voluntarily; or
- (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:
  - (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
  - (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

---

<sup>282</sup> Oman, *supra* note 89, at 603-05 (describing in more detail how common law doctrines of undue influence and duress can prevent enforcement of *mahr* agreements reached under coercive circumstances).

<sup>283</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (unconscionable contracts or terms); *id.* § 178 (public policy); *id.* § 177 (undue influence); *id.* §§ 174-76 (duress); *id.* § 17 (mutual assent).

<sup>284</sup> See Trumbull, *supra* note 39, at 645-46 (explaining how even when “a judge defers a matter to arbitration, she can still protect the parties’ and society’s interests” by refusing to enforce arbitration awards that are unconscionable or against public policy).

<sup>285</sup> See *supra* Part I.C.

<sup>286</sup> See UNIF. PREMARITAL AGREEMENT ACT § 6(a)(1)-(2), 9C U.L.A. 48 (1983) (setting forth the necessary conditions to avoid enforcement of a premarital agreement).

<sup>287</sup> See Robert Roy, Annotation, *Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Circumstances Surrounding Execution—Modern Status*, 53 A.L.R.4th 85, § 2(a), at 92 (1987) (“Though not yet married, these persons share an intimate relationship which affects the caution which would otherwise be exercised in a contracting relationship, and increases the potential for one party to take advantage [of] the other.”).

<sup>288</sup> Cf. Oman, *supra* note 89, at 595.

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.<sup>289</sup>

Thus, if Muslims desire enforcement as prenuptial contracts, then the parties' bargaining and subsequent contracting must meet the voluntariness and conscionability standards in most state laws.<sup>290</sup> Furthermore, most states will require both parties to disclose their pecuniary assets during negotiations in order for courts to enforce *mahr* agreements as prenuptials.<sup>291</sup>

But if the *mahr* agreement develops as more akin to a simple contract in that it does not preempt state equitable division schemes, courts do not need to apply these same stringent state law bargaining requirements. Since the woman will get the benefit of her bargained for exchange, plus her fair share of the marital assets, courts need not fear as much that the woman will receive an inequitable result.<sup>292</sup>

Even with more specific terms or arbitration clauses, *mahr* agreements are not immune from other contractual deficiencies. Still, resolving uncertainty is the first step toward more consistent, constitutional enforcement. By developing more specific terms, courts will more readily ascertain the method of desired enforcement and, thus, can look through the appropriate lens in guarding against inequities.

## CONCLUSION

Enforcing Islamic *mahr* agreements as any kind of contract ignores the boilerplate nature of the *mahr* provisions and the necessity of using parol evidence from expert witnesses in Islamic law. This reliance on Islamic law and expert testimony often confuses the parties' intent and causes courts to become unconstitutionally entangled in varying interpretations of Islamic law. The various approaches taken by American courts have resulted in inconsistent and misleading precedent that will only further harm future enforcement.

To create a better environment for future enforcement, courts should void *mahr* agreements for failing to lay out terms with adequate specificity. This will incentivize the Muslim Community to reform standard form *mahr* agreements by adding arbitration clauses or more specific terms that Amer-

---

<sup>289</sup> UNIF. PREMARITAL AGREEMENT ACT § 6(a)(1)-(2), 9C U.L.A. 48.

<sup>290</sup> *See id.*

<sup>291</sup> *See id.* § 6(a)(2)(i)-(iii); *see also* CAL. FAM. CODE § 1615(c)(1) (West 2004) (requiring that independent legal counsel represent the party against whom the agreement is enforced or that such party expressly waive representation).

<sup>292</sup> *See Oman, supra* note 89, at 604-05 ("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 litigation a wife will wish to challenge the validity of the *mahr* contract.").

ican judges can interpret with sensitivity to Islamic culture. When more specific terms develop, American Muslims can contract in accord with their religious beliefs, and courts will no longer unnecessarily distort the parties' intentions or surpass constitutional bounds.