

When Secular Law and Religious Law Collide:
Orthodox Jewish and Muslim Women and Divorce in America

When contemporary observant Jewish and Muslim couples with troubled marriages deal with divorce in America, both classical-historical religious jurisprudence, and secular law impact their situations. Issues surrounding divorce in the tightest-knit, most religiously, culturally or ethnically homogeneous communities can be the most problematic for women who want to be able to continue to live within their own communities. Because of the large population clusters of Orthodox Jews and Muslimsⁱ in certain regions of North America, the number of court cases involving family law are higher, and the media coverage frequently more extensive. Such places as New York, New Jersey, Los Angeles, Montreal, Detroit, and Florida yield extensive data for my inquiry into the dual legal life of such women whose issues have become part of the current North American public discourse.

Observant women have a bipartite identity— they function simultaneously in two legal systems. Although there is current thinking in both religious and secular communities that problems and possible solutions are intertwined within existing religious traditions, there are many with fundamentalist attitudes who reject both equal rights for women and redress by secular law entirely. (Of course there are also contemporary secular legal decisions which interpret civil rights in such a way as to maintain the religious status quo.) Such traditional religious divorce outcomes as the ability to remarry and to obtain custody, maintenance, and inheritance, previously, have been controlled exclusively by patriarchal religious courts and rationalized with fundamentalist interpretations of sacred text in Orthodoxⁱⁱ Judaism and Islam. As evolving economic, technological and social realities intrude on such communities, threatened leaders and community members counter with an aggressive and expansionist fundamentalism enforcing the isolation and control of wives, mothers, widows, daughters,

divorcees, even sons. ⁱⁱⁱ Many women in America have been unsuccessful at obtaining just settlements within such system, as Norma Baumel Joseph, speaking about Orthodox Jewish women, comments here :

...there are many orthodoxies in Judaism today. The distribution or diversity in the orthodox community is wider than in any other denomination - from modern orthodox to hasidic and haredi (which are not the same thing). You should also note that these communities from the religious right exert a tremendous pressure and influence over the rest of the Jewish — especially orthodox—world. Also they are isolationist - which impacts on the whole divorce issue. Thus their rabbis stress that they should only go to Jewish Batei Din - courts- and not to secular courts. And while that is the only place a Jew can go for Jewish divorce, they insist that the rabbis settle issues of custody and marital assets — which is usually not favourable for women.”^{iv}

In the United States (and other countries which are not governed solely by religious law,) there are conflicts, contradictions and, occasionally, benefits to such complex (political and religious) dual citizenship for women. The gender bias of the religious courts against contemporary Jewish and Muslim women in^v the United States (and Canada- see footnote^{vi}) has begun to be perceived by the secular legal system as a civil rights violation for which there are legal avenues of relief. Although the defending individuals and organizations are intrinsically religious, the cases and decisions are not church/state issues in the eyes of the secular court: they are raised in connection with contract violations, gender discrimination, and equal treatment under the law. Though the freedom of religion provisions in the American legal system were what initially enabled diverse religious communities to become established in the US in the first place, their evolution was affected by the same factors which influenced the development of the larger national culture.(Racial, ethnic, and religious diversity and multi-cultural social, economic and political interaction within the nation itself have been frequently been perceived as a threat to a religious group’s identity, manifest as fear of assimilation, as a danger to purity, etc.) It is even possible that, until propelled by relatively recent changes in civil rights law, the

American legal system tacitly facilitated such isolationism and patriarchal control through its dismissive attitude. It is important to remember that the American Women's Rights Movement, which provided the theory of gender equity and the background for changes in secular family law, is a relatively recent legal phenomenon. For example, American women only received voting rights in 1920; other significant legislation came about half a century later: the Equal Pay Act in 1963; No-Fault Divorce Law in California in 1969; (it would be sixteen years before all the states would sign on,) the Equal Rights Amendment in 1972; Title IX, banning sex discrimination in schools the same year; the Equal Credit Opportunity Act in 1974; the Violence Against Women Act in 1994. The enfranchisement of women, the subsequent political, educational, and professional gains, as well as religious feminism and scholarship, certainly affected the shift in the legal climate for American women's issues in family law.

When the full weight of jurisprudence of the modern secular state has been employed, some disadvantaged observant Orthodox Jewish and Muslim women have received immediate pragmatic quittance like any other citizens whose civil rights have been violated. Such litigation seems to have sometimes catalyzed internal religious reform as the publicity around such litigation sometimes exposes corruption— for example, malpractice and malfeasance in the Jewish religious judicial system, at whose head is the *beit din*.

According to a February 2000 article by Marilyn Henry in the *Jerusalem post*,^{vii} "...in American law, the *beit din* is recognized as an arbitration panel and the civil courts have been used to enforce the *beit din*'s judgments, primarily in commercial disputes..." In one particular case, a Manhattan civil court judge allowed a Hasidic woman's defamation suit to proceed against the Union of Orthodox Rabbis of the US and Canada, its *beit din*, and five rabbis, saying, "the U.S. Constitution 'was not intended to shield bribery and harassment.'"^{viii} The charge was

that the religious court took a bribe and defamed the wife in order to permit the husband to remarry even as they were negotiating a divorce and arranging arbitration. Though prominent professionals quoted in the article would like to have had the woman's divorce handled in a religious court, an unidentified rabbi was quoted as recognizing the impossibility of policing rabbinical courts.

“If the secular courts can't be the watchdog over the integrity of the beit-din system in cases such as this, then who is the watchdog?” asked David Zwiebel, general counsel of Agudath Israel of America, (which had not taken a position on the case.) Justice Martin Schoenfeld of the State Supreme Court in Manhattan disagreed that the court's action was an intrusion into religion and a violation of the First Amendment which protected the rabbi's action. At issue, he said, was whether there was a violation of the woman's secular rights. Zwiebel went on to say that public confidence in the batei din had seriously eroded; the problem for the community was how to restore confidence, installing “qualified, competent people who act with integrity.”^x

Many Muslims, including Muslim feminists, claim that successful cases, with their surrounding publicity, can function as a challenge to narrow or fundamentalist readings of religious law. Each case brought to trial affects not just the litigants (and the amelioration of bi-systemic discrepancies,) but contributes to a pluralistic public discourse as well.

The engagement of American secular law in divorce issues in religious communities speaks about religious freedom and civil liberties as it addresses the relationship of Jewish and Islamic jurisprudence to modernity. A significant feature of modernity is the relationship between technology and the circulation and interaction of ideas.^x Equally important is the size of the religious community and the mobility of its members. Mass communication, such as media including the Internet, and mass audiences, facilitate advocacy, disclosure, criticism, and support. Removing the knowledge of religious oppression from private to public sphere can potentially influence long term change within religious establishments themselves.^{xi}

Although *Modernity VS Religion* initially appears to be a contemporary and novel cultural issue, there has always been tension between the exigencies of daily life and religious law based on ancient sacred text. The complexities of a twenty to twenty-first century conception of modernity itself may have stimulated such reactionary responses as an insistence on the absolute power of patriarchal religious leaders; such practices are not necessarily either traditional or typical according to text and history. What may be novel today is the character of the relationship between religious and secular law in a secular state; tension between diaspora observance and the religious law of a theocracy is also at play here. Although Jewish and Islamic religious history have traditionally reflected the dynamic relationship between text, theoretical religious law, and lived reality, lived reality has, around the turn of the millennium in the United States, meant the life of a minority culture within a larger one. Lived reality can be a religiously isolated community within an American city, where women are even further constrained by the customs of a homogeneous community under the patriarchal and harsh monolithic religious authority. For both Muslims and Jews, this has also meant functioning in essentially a Christian environment, as Christian theistic values predominantly inform secular American life and law; frequently, the culture of many of these litigants are personally unfamiliar to secular legal authorities as are the intricacies of their religious law codes and community practice. As Joseph indicated, there is much diversity within Jewish orthodoxy; neither is Islamic jurisprudence monolithic.

Though secular legal involvement hasn't eliminated, and, in fact, may sometimes exacerbate hardship in the lives of women within the ultra-religious sub-cultures, many are heartened by the advent of some avenues of relief from abuse in the name of religion and religious authorities are aware and concerned. Legal issues are being aired, discussed, analyzed,

criticized, advertised, debated, refuted, quoted, misquoted in a most public way—from the mundane to the scholarly, in journals, newspapers, legal documents (all proceedings are a matter of public record) religious leaders' outpourings, from victims, from advocates—many of these sources are most accessible and most widely circulated on the Internet.

Noting the many sites on the net dealing with specific aspects of Jewish divorce, I asked orthodox Jewish feminist activist, Normal Baumel Joseph, a Judaic Studies scholar whose special interest is the plight of the agunah, about the Internet's importance for women in that situation:

LW: Do you think the Internet has been helpful to Jewish women personally dealing with divorce in terms of moving the discourse to a public venue, or for women seeking support and information, or do you feel its impact is more on sensitizing others, including non-Jews, outside those communities, in the secular and legal world, for example, to some of the injustices and contradictions in religious law and secular law affecting the observant?

NJ: The internet presents us with a series of problems as well as possibilities. It often has incorrect information so women are led to make mistakes etc. It also violates privacy issues which bothers me a lot. It also disseminates information that men use in their arsenal of blackmail against women. So I am not a fan. but and this is a big but, many of us who are activists in this area use the internet to communicate and share cases and strategies. and that is very helpful. We also have just started two internet activities, a getlink chat group just for activists, international, and an agunah referral system. So we can help women and keep the info confidential. One final point. I am often asked by women around the world for get help. They can reach me via email and I send out help calls to find activists or friendly rabbis near them. Finally we use the internet now to promote or publicize vigils and demonstrations against recalcitrant husbands. I have used it to promote civil legislation like we have here in Canada.

Issues observant women find problematic within the larger domain of divorce in family law have to do with the process of initiating religious divorce/ obtaining the religiously legal status of a divorcee; obtaining the return of her money and property/ assuring her financial stability; assuring the legitimate status of children, and establishing a just custodial relationship with her children as well as their maintenance.^{xii}To see where and why secular courts have been and might be involved, consider traditional-orthodox family law in theory and history, as well as how women are treated under religious law in contemporary practice.^{xiii}

To understand judicial rulings on divorce, it is essential to understand how marriage is conceived, entered into, and recognized. In Islam, marriage is defined, not as a sacrament, but as a contract governed by certain rules, consisting of a declaration and acceptance, the giving of a dower, *mahr*. A comprehensive article by Abed Awad, in the *New Jersey Law Journal*,^{xiv} lays out some of the problems the *mahr* has presented to the American judicial system. *Mahr*, he says, under Islamic law, is a required gift under the marriage contract. He calls it “an effect,” rather than an “exchange or consideration.”^{xv} (The marriage is valid if the offer is accepted in the presence of two witnesses, so the *mahr* neither validates nor does its absence invalidate the marriage; therefore it is an effect.) Nor is it comparable to a “bride price.” The wife is not required to use her *mahr* for household purchases; further, the woman may assign her *mahr* as she chooses.^{xvi} With the *mahr* amount agreed before the marriage, there is an initial symbolic amount which is usually conveyed at the marriage, and a deferred amount tied to a particular situation, such as divorce or the husband’s death. There is a clear distinction between the return of the *mahr*, and any alimony (*nafaqa*) or inheritance. For example, in case of the death of her husband, she receives both her rightful share of the estate in addition to her *mahr*. Awad therefore characterizes the *mahr* as a nuptial gift/contract, distinct from either a marriage contract or pre-nuptial contract. “A woman’s *mahr* also has no impact on her right to full ownership of any property she separately acquires at any time before or after the marriage, nor does it detract from any financial support obligations of her husband during the marriage,” continues Awad.^{xvii} American courts have not always been cognizant or interested in such distinctions.

The secular judicial system of the United States has addressed issues in Islamic family law in a variety of ways. A majority of decisions have been based on misunderstanding *mahr* as a

prenuptial contract.^{xviii} Awad reasons that civil prenuptial agreements usually are based on full financial disclosure prior to marriage, where the mahr is not, and that mahr is not a substitute for alimony or equitable distribution of assets after marriage. A case he successfully argued before a Family Court judge in New Jersey resulted in an award to a woman of the postponed portion of her mahr, a significant sum; he stated that “the traditional promise in an Islamic marriage agreement is binding in a U.S. court....the first time an American court viewed mahr as a simple contract.”^{xix} The marriage ceremony, performed by a Muslim imam, included the videotaped evidence of the defendant, Zuhair Odatalla signing the agreement of \$10,000, and making the symbolic first payment of a golden coin.^{xx} The court saw no reason that a contract should not be perceived as a contract though initiated at a marriage ceremony, and thus applied neutral principals of contract law. Awad was encouraged by this approach as it is “the most consistent both with Islamic law and American notions of equity and justice.....and not contrary to public policy under American jurisprudence.”

Jewish marriage is also a contractual relationship and is not conceived as a sacrament in the Christian sense. There is a similar variability in the way the ketubah has been perceived in American courts. The Jewish marriage contract outlines a groom’s financial responsibilities and his bride’s legal rights and remedies in case of divorce.^{xxi} The language of the text is formulaic and it must be signed by two witnesses to be valid. A traditional Jewish marriage, as specified in Mishnah Kiddushin 1:1 specifies that a binding marriage is effected if any one of three conditions—the giving of money, a contract, and sexual intercourse. The giving of money, kinyon, a nominal sum (sufficient according to the Mishnah) has been replaced by a ring given by the man and accepted by the woman. It is not a “bride price.” It is neither down payment on future support in case of divorce, like the mahr, or concentrated wealth which can be sold in case

of divorce. The marriage contract will specify what the bride will receive in case of divorce, and may include additional provisions. Ketubah issues come into the American law courts in relation to divorce issues. Like many mahr cases, they were initially frequently dismissed as religious covenants,^{xxii} and it was felt that trying such cases in court was a violation of the separation of church and state.^{xxiii} A good example of how thinking changed can be seen by comparing the reasoning of the lower court and the appellate court in *Minkin vs Minkin*:

Perhaps because it is adjacent to New York, courts in New Jersey have been called upon to address the issue more than once. In *Minkin v. Minkin*, 180 N.J. Super. 260 434 A.2d 665 (Ch. Div. 1981), the wife moved for a postjudgment order requiring the husband to obtain and pay for the costs of obtaining a Get. The Chancery Division granted her motion. It found that the parties had entered into a contract, a ketubah, wherein the parties agreed that the husband would give the wife a Get if he alleged that she violated a law of Israel, of which the commission of adultery is one such violation. It further found that no provision of the ketubah violated public policy or the laws of the state.

[T]he ketuba contract requires the participants to comply with certain reciprocal obligations pertaining to the marriage. For example, the wife is to perform the role of homemaker and to supply a dowry; the husband is to support and care for the wife. The ketuba is devoid of any requirement that could be construed to be against public policy. *No interest of society is affected or impaired by its provisions, nor does it conflict with public morals. On the contrary, its purpose is obviously to promote a successful marital relationship and its enforcement, therefore, actually advances public policy.* [italics mine] The contract simply calls for defendant [husband], in securing a get, to do that which he agreed to do. Without compliance plaintiff [wife] cannot remarry in accordance with her religious beliefs. For these reasons the contract should be specifically enforced.

434 A.2d at 666. Most significantly, the court found that requiring the husband specifically to perform would constitute no first amendment violation. The court solicited the testimony of several rabbis. Two testified that the Get is a civil document. They emphasized that it contains no reference to God's name. They additionally said that it does not affect the religious beliefs of people but is merely concerned with a wife's right to remarry. Two other rabbis testified that Jewish law does not simply entail religious law. Rather, it is comprised of two components, one regulating the relations between man and God, which is religious in nature, and one regulating the relations between man and man, which is civil in nature. The Get involves the latter and thus is not religious.

The following section cites the decisive clarification of church state relationships in civil law.

*Based on this testimony, the court found no conflict with the three-part test announced by the Supreme Court in *Lemon v. Kurtz*, 403 U.S. 602 (1971): (1) compelling the husband to secure a Get would have the secular purpose of completely dissolving the parties' marriage; (2) compelling the obtaining of a Get neither advances nor prohibits religion; and (3) compelling the securing of a Get is not an excessive entanglement of church and state.*

As did the New York courts, the Minkin court noted that the New Jersey legislature has authorized clergy to perform marriages, and that has never been considered an excessive entanglement of church and state.

The get procedure is a release document devoid of religious connotation and cannot be construed as any more religious than the marriage ceremony itself. ^{xxiv}

from the court decision of *Minkin v. Minkin*, supra, 434 A.2d at 668.

Divorce is acceptable within traditional Jewish law. The Talmud says that a man may divorce a woman for any reason (A man is required to divorce an adulterous wife) and a woman's consent is not required.^{xxv} In that respect, Jewish divorce is no-fault divorce. Its function is to release the woman so that she may remarry, and to assure legitimacy to her children. It is initiated by a man and requires two male and observant witnesses; he must write her a bill of divorce (get) and hand it to her. The document "must be prepared by a recognized scribe in the presence of the husband and a witnessing bet din.....a minimum of three qualified Jews, usually rabbisthe acceptance of the get must also be witnessed... the bet din can appoint messengers[if the couple do not want to meet] and the writing ...and accepting can take place at different times and places."^{xxvi}....A couple is married until the woman receives the get, even if there is a civil divorce. If he divorces her and there is no misconduct, he is required to compensate her as specified in her ketubah.

"The position of husband and wife with regard to divorce is not an equal one. According to the Talmud, only the husband can initiate a divorce, and the wife cannot prevent him from divorcing her. Later authorities took steps to ease the harshness of these rules by prohibiting a man from divorcing a woman without her consent. In addition, a rabbinical court can compel a husband to divorce his wife under certain circumstances: when he is physically repulsive because of some medical condition or other characteristic, when he violates or neglects his marital obligations (food, clothing and sexual intercourse), or, according to some views, when there is sexual incompatibility."^{xxvii}

In Amoraic times, Jewish women, as in Islam, could ask the rabbinic court to coerce the husband into granting a divorce in exchange for forfeiting her dowry — if he failed to support

her, or if he disgusted her.^{xxviii} Although in the tenth century a woman could sue for divorce, her husband would still have to initiate the *get*. Although polygamy was prohibited in the early middle ages, it wasn't eliminated, and there was a double standard for the legitimation of children; a man's children were acceptable, whereas a woman in the same situation was blemished and her children considered bastards. Subsequent changes in divorce law followed. A husband had to obtain his wife's consent to divorce her, and divorce was no longer a private act but required a religious court, the *beit din*, and communal authorities to authorize it. The situation changed as a result of Emancipation, when the Jewish judicial system was supplanted by secularized Christian law.^{xxix} Historically, there were mechanisms used for ending a troubled marriage. Bernard Jackson, discussed three of them: conditions, coercion^{xxx} and annulment.^{xxxi} The coercion provision, in which a *beit din* "coerces" the husband into giving a *get*, resurfaces in secular court proceedings, as we will see.

" In an early case, *Koeppel v. Koeppel*, 138 N.Y.S.2d 366 (Sup. Ct. 1954), the parties were married in August 1951. In December 1953, the wife commenced an action to have the marriage annulled because of fraud in the inducement. In January 1954, while separated, the parties entered into an agreement settling property and monetary matters. Pursuant to Paragraph Five of that agreement, the parties stipulated that if either requested the other to appear before a rabbinical assembly selected by the party so requesting and to execute the necessary documents to effect dissolution of the marriage in accordance with the Jewish faith, the other party would comply.

The parties were granted a final judgment of annulment in July 1954. The wife demanded that the husband execute documents to obtain a *Get*. He refused. Two rabbis, a scribe, and a witness called upon the husband at his place of business to compel him to sign the necessary documents, but he nevertheless refused. In August 1954, the wife brought an action to obtain specific performance of the agreement.

The husband alleged that the action was academic because the wife had already remarried. The court rejected this answer, explaining that she might have been remarried in a civil ceremony but not in a religious ceremony, and that it could not be said that a religious ceremony was of little importance. The husband also alleged that an order compelling him to obtain a *Get* would be an impermissible interference with his freedom of religion. The court similarly rejected this answer:

Defendant has also contended that a decree of specific performance would interfere with his freedom of religion under the Constitution. Complying with this agreement would not compel the defendant to practice any religion, not even the Jewish faith to which he still admits adherence (paragraph Second of the complaint not denied in the answer). His appearance before the Rabbinate to answer questions and give evidence needed by them to make a decision is not a profession of faith. Specific performance herein would merely require the defendant to do what he voluntarily agreed to do. *Koeppel v. Koeppel*, 138 N.Y.S.2d 366, 373 (Sup. Ct. 1954). Finally, the

court rejected the husband's claim that the ceremony would take too much time: Defendant's statement that the ceremony before the Rabbinat takes from two to two and one-half hours is not worthy of discussion. That is not much out of a lifetime, especially if it will bring peace of mind and conscience to one whom defendant must at one time have loved. Id. at 373. The court thus ordered the husband to abide by the terms of the separation agreement and secure for his wife the Get.

The two dilemmas of significant contemporary concern to women and the secular courts are consequences of dual authority are the "chained wife," the agunah, and the related stigma of "mamzer(illegitimate) "status of children. A woman who is secularly, but not religiously, divorced and who has not received a get who remarries and adds to her family is at risk; those children's legitimacy even extends to a prohibition against marrying within Orthodox Judaism. Also affected by agunah status is a woman whose husband leaves her; she is still considered married in the eyes of the religious community, as is a "war widow."A civil divorce, or a civil marriage, for that matter, and children in a second marriage, would not change her status within her own religious community.

While Orthodox Judaism does not allow a woman to initiate divorce, contemporary rabbis have employed various strategies to end problematic marriages. Conservative Judaism, in order to prevent such a dilemma, has added a stipulation on the ketubah, known as the Lieberman clause. (see appendix)It is signed by both woman and man at the wedding ceremony, in which they agree that a beit din will act for the woman and award her a get even if the husband refuses. In this respect, such a ketubah functions as a pre-nuptial agreement.^{xxxii} And it is in respect to such contract provisions that many cases come into civil courts.

The Qur'an guarantees the right to divorce, however mediation is encouraged. There is diversity among the various Islamic legal schools on many points of law. The procedures for men and women differ. Divorce is either revocable or irrevocable depending on the fulfilling of certain conditions some of which vary according to the different schools of jurisprudence. An

Islamic divorce is initiated by a man (*talaq*) through verbal or written pronouncement. Divorce can be retracted twice. A divorce is revocable between the time of the first pronouncement until the third pronouncement. After the third pronouncement, the divorce is irrevocable, and a man cannot remarry his wife unless she has been married to someone else in between, a second husband, the *muhallil*. A Muslim wife may take the initiative, *khul'* or there is *muharat*, mutual aversion. To obtain her divorce, a " wife agrees to pay a certain amount of property in cash or kind to her husband if he divorces her. In Shi'ite law, 'the amount of *muharat* must not exceed the amount of the dower, while in *khul'* there are no conditions....except according to the Shi'is, ...during the waiting period the woman may take back her property from her husband. ...Hanbalis maintain that *Khul'* is a form of annulment, not divorce."^{xxxiii} A third party may offer the man money in return for which he will divorce his wife; except for Shi'is who forbid this practice.

Where the man may initiate the divorce through declaration to his wife, she has no such right. The woman must petition a judge if her husband is at fault and she wants a divorce for cause. She has to prove that her husband hasn't fulfilled his responsibilities. If there is a " *tafriq*, a judicial dissolution based on grounds, she receives the deferred mahr. Of course if her marriage contract had stipulations, she could get a conditional divorce, according to a 1999 publication of the Muslim Women's League, and is entitled to the mahr.

Two aspects of Islamic family law have limited parallels in the American legal system— polygamy and temporary marriage— but will not be discussed in this paper.^{xxxiv}

It is not surprising that American courts have difficulty with the intricacies of Islamic jurisprudence, for it is diverse, complex, and subtle. For example, after a divorce or the death of a husband, a Muslim woman must wait four months and ten days to remarry if she is not pregnant. If pregnant, the waiting period is over when she gives birth.^{xxxv} If the wife was celibate

or prepubescent, there is no waiting period. (Hanbalis and Shi'is) Hanifis specify three months. There are more variations by the different law schools on the duration of the waiting period between divorce and remarriage than I can address in this paper—and this is only one subtopic; here is another one where the different schools diverge, but it does exemplify the fine points of Islamic jurisprudence.

Regarding inheritance; if woman is in a period of revocable divorce when she or her husband die, if there are no children, the husband inherits half her property, she inherits a fourth. If they had children, he inherits a fourth, she inherits an eighth. Without relatives, all property goes to the husband; if the husband dies, the wife would get half, the community treasury, the other half. However, in irrevocable divorce, there is no inheritance. However, if he is ill, and she dies, he does not inherit from her. The Hanbalis say that if she is not remarried, the wife inherits; the Hanafis say she does if she is in her waiting period; the Malikis say she inherits anyway. The Shi'is are divided; some follow the Hanafis, others say if it is within the year and she has not remarried, she may inherit.

There are really two central themes that underlie the previous discussions. There is a question of religious authority/interpretation and then, pertinent to the situation of American Muslims, there is a question of how secular law in the United States understands such religious authority. On a practical level, religious authority is embodied in the legal code and its administrators.

For Orthodox Jews in the United States, the batei din, as described, are neither geographically centralized, nor halachically consistent in their reading of the Law. There are many Jewish communities of varying sizes in the United States, with many schools of rabbinic thought and leadership.^{xxxvi} The cases which come into American courts usually involve Orthodox

or Conservative couples. Broyde worries that they have bypassed religious courts because they are confident the civil court system “is inherently just.”^{xxxvii} “We cannot be fully governed by secular law” he said. ‘Jewish law recognizes the law of the land; but we have values that are separate and distinct. We have ideas in common that produce different results. In a divorce case, we can agree with the civil system that the best interests of the child come first, without agreeing on what the best interest would be.’^{xxxviii}

For a discussion of Muslim experience, a summary of the findings of an ongoing Emory University Law School Project would be pertinent.

At the time this survey was done, the authors estimated six to eight million Muslims in America, half of whom were immigrants, the other half a combination of indigenous peoples (Hispanics, Blacks, Amerinds) or American-born second or third generation. This pluralism within Islam means that there is no single perspective on family law— people seek their own religious community leaders in contrast to Shari`a -based governments. “in Muslim countries with a formal system of shari`a-based family law in place, as well as private pious and learned individuals available to guide the individual petitioner, there are likely to be state-recognised and sometimes state-appointed muftis to issue guidance on issues of law, and state-appointed judges to apply it” Without such oversight, imams in the United States vary in experience, scholarship, and attitude, and as is the case with Orthodox rabbis, many have little experience or understanding of American law. Apparently some imams will not conduct marriages if the couple is sans civil marriage license, some will be qualified in both systems. The lawyer who won the mahr case, Abed Awad indicated that:

“some mosques in the New York and New Jersey officiate Muslim marriages, issue marriage licenses, and in some cases even issue divorce and alimony orders where, arguably, Islamic law would not even justify it. Maryland attorney Naima Said reports the same phenomenon in the Washington D.C. area (Said 1998).

Similarly, Cherrefe Kadri, (interview, 2000) a lawyer based in Toledo, Ohio, comments on the sharp difference in family dispute resolutions undertaken under the authority of an untrained imam versus those from, for example, an imam not only Islamically-knowledgeable but also with experience as a social worker in the west.”

Extended family frequently function as mediators, with social workers and lawyers working informally, sometimes, with Muslim scholars. There are several organizations, particularly Muslim women’s organization (eg., the Muslim Women’s League, Karamah: Muslim women Lawyers for Human Rights) which share information on family law.

Interestingly, it is in the area of contractual stipulations on the religious marriage contracts where there is much innovation in both Judaism and Islam which can resemble, in its specificity, a secular pre-nuptial agreement but which speaks to empowering women within the joint religious-secular tradition. On the internet site Zawaj.com, on a site dealing with Islamic weddings, marriage, family and parenting issues, there was an article by Rabia Mills on Women’s Rights in the Islamic Pre-Nuptial agreement. She makes the point that to be enforceable by law—to be legally binding— it must comply with both Shaaria law and the laws of the country.

(checking over by local imams and lawyers)A recommended stipulation-- refusing to allow a second wife, which is permissible if stated at the outset of a marriage. A woman may demand the right to divorce herself without any reason, at any time, called *‘ismah*, or “keeping the ismah in her hand”or to write it for either to have the unilateral right to divorce. Regarding finances, American states are either separate or community property states, so the women’s property needs to be defined. Mills says, “Muslim women may restate their Godgiven Islamic rights to education and independence to work(employment, business, professions, etc.... Additionally a provision for religious education and upbringing of children could be included”

Azizah Y. al-Hibri warns of the shortcomings of the usual marriage contract which she says is usually a one page document with basic information and a statement that it is governed by Islamic law. When an American judge looks at the term “mahr” or “sadaq” how does he understand it? If an American court is depending on an Imam to be an expert witness, who in the court is informed enough to assess the expertise of the expert? She cites the case of a woman who had kept her “ismah” but her Jewish lawyer and the court did not realize that she did not need her husband’s consent for divorce for that reason. Further, she says that if American Courts view the contracts as pre-nuptial agreements, only marriage contract provisions apply and women can suffer because of inadequate and misperceived provisions. “It could be a nuptial agreement rather than a pre-nuptial agreement because you sign it at the same time as the marriage. You have to study under the laws of the various jurisdictions. Therefore, she recommends a more elaborate contract, defining all terms, rules, what school is being followed.... “ A Muslim woman in America, unlike in the rest of the world, can find herself on the street if she gets divorced, cautions the article’s author, emphasizing the potential alienation from the religious and ethnic community while conspicuously not acknowledging the social service safety net of the secular state.

A group of Orthodox rabbis have broken ranks and addressed the dilemma from a new perspective. A Modern Orthodox group called Edah included a discussion of the agunot on their conference agenda in February, 2003. At the third International Conference of Edah,” a panel of three widely respected rabbis: Shlomo Riskin of Efrat, Israel; Michael Broyde of Atlanta and the Beth Din of America, and [the internationally controversial] Emanuel Rackman of Bar Ilan University, as well as a female scholar, Michelle Greenberg Kobrin” each presented a different approach to solving the problem. One, the prenuptial agreement, while approved by Orthodox

courts (who would be the designated arbiter in a divorce dispute) is not widely used. According to a July 19, 1998 Jerusalem Post article, it was a 30 percent increase in divorce rates among Orthodox Jews and the rise in agunot which prompted a 1992 amendment to the New York state equitable distribution laws, which awards a woman more money if her husband withholds a get. A bill before New York Governor Pataki at the beginning of August 2003 would require a pre-nuptial agreement (containing such provisions as financial penalties for not appearing before a court, or accepting the decision of a religious court. or providing a get)) to be notarized. this would allow anyone authorized to perform a wedding to serve as notary for agreements executed in relation to that wedding, in which case they would be perceived as agreements to arbitrate disputes. While introduced to deal with the Jewish women's issues, the dual religious and secular authorization is consistent with current Islamic lawyers' recommendations to protect Muslim women.

The idea of community consensus and custom are important for Judaic, Islamic, and civil law. In American jurisprudence, a roughly equivalent concept might be the term "public policy." Use of the term is threaded through court decisions addressing divorce issues; clearly there is civil acknowledgment of the difference between the letter of the law (corresponding to the theoretical) and the spirit of the law ("social values in action" = lived reality.)

There is much historical precedent for a contemporary discussion which links textual marital jurisprudence with custom. The concept of communal enactment relative to ending a marriage, in this case, annulment, makes its appearance at the turn of the thirteenth century in the responsa literature. Rashba (R. Solomon b. Abraham Adret, of Spain) is asked about the power of the community to effect annulments or whether that power lay solely in rabbinic pronouncements. While his reply suggests that if there is community consensus, in the absence

of rabbinic veto, they have the authority of a *beit din*, he also follows it with a comment that authorities may be reluctant to use them. In the fourteenth century, Ribash (R. Isaac b. Sheshet Perfet) confirms that the Talmud grants authority to “*the people of the city*, and a statement that *communal institutions represent the people, and, additionally, they may enact binding conditions*. If we were to look at the 1983 New York Domestic Relations Law, and its 1992 amendment in terms of its reasoning, we might see an interesting Talmudic parallel in that the community, embodied by the New York State Legislature, enacted a binding condition to granting a divorce in order to assure the woman equal treatment under law. In essence, a plaintiff must remove any barriers to spousal remarriage (*give a get*) in order to receive a civil divorce, and the further stipulation (like the Talmudic *tenai*) that refusal to remove those barriers could work to the plaintiff’s disadvantage in terms of distribution of property. On the surface there appears to be some similarities to *tafriq*, or judicial dissolution (for grounds) when a woman obtains the return of her *mahr*. The legal distinction between annulment and divorce is important to Muslims as well; e.g., the Hanbalis consider *kuhl* an annulment. However an annulment(*faskh*) more usually relates to specified physical or mental disabilities, (insanity, emasculation, impotence, leprosy, a blocked vagina) which are treated differently according to the different schools.

The annulment of a Jewish marriage, the *hafka*’at *kiddushin*, used rarely by a religious court when husbands are taking advantage of their wives, is favored by Riskin. A third alternative, advocated by Broyde, and implemented by Rackman since 1997, used in the case of a hidden defect revealed, is the” *kiddushei ta’ut*, or ‘error in the creation of a marriage’to dissolve a marriage” through a religious court. There are only four Talmudic precedents for

annulment in relation to the get, which makes it challenging to apply them as Rachman has done, comments one author. The legal reasoning, the halacha, is “complicated:

If endemic cruelty characterized the marriage; and if coercion by a beit din of the husband to divorce his wife is warranted; then the woman can assert she was deceived in entering the marriage, and the Talmudic presumption that ‘a woman prefers any kind of marriage to none’ is not applicable; the rabbinical court then can exercise its Talmudically sanctioned power to dissolve the matrimonial union retroactively.

If this were viewed as a civil law case, there might be a question of whether to address an abusive marriage/divorce as tort law rather than contract law. Tort law addresses an intentional acts (such as assault) or inflicting emotional harm or unintentional acts, such as negligence in providing for someone and compensates for damages." In 1987, *Perl v Perl*, the Appellate Division of the New York State Supreme Court dismissed a wife’s claim for damages based on Intentional Infliction of Emotional Distress." To recover damages under tort law, the wife would have had to show that inflicting distress was intentional. Since distress was a consequence of the refusal to deliver a get, and not distress intended for its own sake, it didn’t fit within tort requirements for remedy.

The impetus for the Domestic Relations law in New York was the result of Jewish organizations (not individual women) who petitioned the state legislature to enact and amend laws which would address the get situation. Many in the Orthodox community have been critical, and vocal, about the use of the civil court for divorce; they deny the validity of divorces obtained in this venue. At issue is the halachic question of indirect coercion, in which the wife, not the state, is seen as the perpetrator. The Orthodox reasoning does not even pretend to dispense even handed marital justice: such rabbis state that “reducing a recalcitrant husband’s share in the marital assets or increasing his support liability constitutes direct compulsion... financial loss imposed on the husband is illegitimate under Jewish Law.. the divorce is invalid.”

Child custody is another important realm of overlap and confrontation between religious and civil law. Religious law identifies the father as head of household with an obligation to provide for his family. Traditionally, custody is a function of the age of a child and its gender, which, though it may be part of the thinking in a civil custody arrangement, does not view the father as the default custodian. While both religious and secular jurists agree to place the emphasis on the best interests of the child, their social values may differ and their custody decisions are a function of those values.

Jurisdiction is an area in which where there are complex considerations and legal hierarchies which have bearing on the resolution of custody. Mobility and modernity go hand in hand; whose laws govern divorcing couples who have multiple changes of residence across borders and whose laws determine custody?

Typically, a Muslim woman will initiate divorce in an American court, while the man does so in his own land. In the case of *Ivaldi v. Ivaldi*, 147N.J. 190 (1996), dealing with the courts of Morocco, and *In re the custody of R*, 88Wn.App.746 (1997) dealing with the courts of the Phillipines, the American court upheld the custody decision of the Muslim country's court; however, in the case of *Ali v. Ali*, 279 Super. 154 (1994) dealing with the courts of Gaza, and *Amin v Bakhaty*, 798 So. 2d 75 (2001) dealing with the Courts of Egypt, they rejected the decision. "In two other cases, an appellate court instructed a trial court to examine whether or not to uphold the decision." It is important to clarify that a Muslim country's laws are not necessarily in accord with Islam. American court records do make it clear that they understand the distinction between family law and religion. The key language in such decisions is *whether it is contrary to or in accordance with public policy*, as noted elsewhere in this paper.

The specific language of the New Jersey Superior Court in “Ali” rejected the father’s claim for comity which he supported with proof in Islamic law, under which he (or the child’s grandfather) is entitled to custody of a seven year old son, though the mother can prolong her custody til he is nine. They said that the law of New Jersey considers the best interests of the child, not a formula, thus it was not Islamic law that was at issue, it was that *any* formula was against public policy in that it did not place the child’s needs first. In the “ Amin” case, The Supreme Court of Louisiana’s understanding of Egyptian law was that the father has absolute right to guardianship and physical custody of a minor child, and it is he who retains control, even though a young child could be in the custody of its mother, as long as she remained nearby, and further that the Egyptian father controlled the habitual residence of the child. Similarly to Ali, the court ruled against the father. In *Malik v. Malak*, 182 Cal. App. 3d 1018 (1986), dealing with the courts of Lebanon, the best interests of the child, short and long term, had been taken into consideration as was clear from the proceedings of the Lebanese courts, and the California courts supported their decision. Likewise, the Maryland Court, acting in *Hosain v. Malik*, 108 Md. App 284(1996) found the Pakistani court to have applied legal procedures that were not contradictory to Maryland public policy. It appears that the difference in the determination depends on how much American counsel and judges know of other cultures, how the material is presented, and how that information relates to public policy.

The central legislation affecting such divorces is the Uniform Child Custody Jurisdiction Act adopted in 1997 by all the states, and replaced in some states in 1999 by the Uniform Child Custody Jurisdiction and Enforcement Act. Significant provisions include: Providing a “ basic framework for determining initial jurisdiction to make child custody orders (“home state” and “significant connection” jurisdiction) and provides for recognition of custody orders made

consistently with these jurisdictional standards.... Most states, but not all, have included Section 23, which extends the general policies of the Act to international cases.”But nevertheless, international disputes, which frequently are triggered when one parent removes a child or children or fails to return them following a visit, can become quite complex. The following summary sketches such an issue.

United States Court of Appeals, For the First Circuit, No. 98-2332, SHLOMO DANIEL TOREN, Plaintiff, Appellant, v.RACHAEL ELISABETH TOREN, Defendant, Appellee.

September 8, 1999, TORRUELLA, Chief Judge. In the underlying action filed against defendant-appellee Rachael Elisabeth Toren (“the mother”), plaintiff-appellant Shlomo Daniel Toren (“the father”) petitioned the district court for an order requiring the immediate return of his two minor children from the mother’s residence in Massachusetts to the father’s residence in Israel. The father’s action was brought pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”), incorporated into United States law by the International Child Abduction Remedies Act (“ICARA”), 42 U.S.C. §§ 11601-11610. The district court denied the father’s petition, and this appeal followed..... In conclusion, neither the mother nor any court has denied the father access to his children. Although the mother has filed a complaint in the Massachusetts Probate and Family Court seeking to modify the parties’ agreement with respect to custody, visitation, and financial support, the father continues to possess and exercise albeit limited rights of access to his children. We recognize that the father may have valid legal arguments as to why the Massachusetts court should not exercise jurisdiction over the mother’s claims. However, we conclude that the state court — and not this court — is the proper forum for those arguments.

We conclude that the father has failed to allege facts sufficient to state a claim for retention or removal, let alone “wrongful” retention or removal. For this reason, the district court erred in proceeding directly to an inquiry into “wrongfulness.” Absent a threshold showing that there has been a retention or removal, the district court lacked jurisdiction to grant or deny the father’s petition. We therefore vacate the district court opinion and dismiss for lack of jurisdiction.

Within American borders, many custody cases involve Jewish couples who may have changed their affiliation within the Jewish community, as in becoming more or less Orthodox, or changed their state of residence, or have left the Jewish community entirely, possibly even remarrying outside the Jewish community. Many cases work their way through the civil courts, but the Beth

Din of America," one of several batei din," has decided a number of cases involving child custody issues, and regularly employs child therapists and professional experts to assist in ...determination. No child custody matter resolved by....[them] has been overturned in secular court."

According to Michael Broyde there are two theories which form a basis for child custody-- parental rights-- and "the best interests of the child." Even though they may generate the same results, there is a halachic dispute concerning parental rights. Rabbi Asher ben Yecheil (Rosh) asserts support of children to be an obligation for a man; biblically he is required to support them, so that even if a marriage ends, his obligation, custody, does not, unless he is unfit. Custody to the mother is a function of a "rabbinically ordered transfer of rights," and does not consider custody as a function of a child's needs. Developing this, the rule determines custody. R. Solomon be R. Aderet, (Rashba) on the other hand, understands the law via the Sages, to serve "the best interests of the child," allowing custody to be transferred to whomever would raise him, though preferring, for example, in the case of a deceased father, male relatives of the father. According to the Talmud, children younger than six are given into the custody of their mother; boys over six, to the father, girls over six, to the mother. Mothers are under no legal obligation to support their children. However, there are circumstances when talmudic rules are rejected, and in that case, the other of the two rules described above should obtain. In general, the guiding principle is that the beit din determines what is in the best interest of the child.

The support of children and their mother following a divorce is not always handled in the same way between civil and religious law. The mahr, as we have seen, is distinct from an ongoing financial settlement or maintenance or inheritance. The obligation of a Muslim man to support his former wife is limited in duration, the period of iddah (i.e. three month's waiting

period after divorce before which she cannot remarry). The concept of a divorce property settlement is foreign to Islamic law." There are eight community property states in the U.S. including: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. The primary issue of importance with community property states is that they divide the income and property earned or acquired during marriage equally between the two spouses upon dissolution. This is done even if only one spouse was the predominant source of income. Allen 1992, quotes a Minneapolis imam stating that "in Muslim marriages, there is no notion of community property [; w]hatever a woman earns outside the home she may keep, but a man is obligated to support his family") "The Emory study notes the difficulty of documenting family law issues as "the majority of them are never published... and therefore are largely unavailable as a subject of research. Thus, most of the cases discussed in the section are appellate court cases, which may or may not be representative of Muslim family litigation in the United States. Moreover, family law cases are almost always a matter of individual state jurisdiction and thus the case precedent of one state does not bind another." One such example is from the court records of the California Court of Appeal, Fourth Appellate District, division three, regarding the marriage of Ahmad and Sherifa Shaban.(filed 4/11/01). The case was appealed because the husband claimed that their divorce under Islamic law disobliged him from paying anything but mahr, (in this case about \$30 US) and that the lower American court, which demanded that he reimburse his ex-wife for an attorney fee award in addition to half of an estate worth \$3 million, was in error because an agreement had been signed in her name by her father in Arabic in Egypt agreeing only to the mahr in case of divorce. The Court of Appeals supported the lower courts award, citing the "Family Code allows the cash poor party to litigate."

Sura II Al-Baqarah Verse 241 addresses the concept of a settlement, or alimony for [a wife's] future use, as distinct from the return of the dowry, without specifying an amount as a duty on the righteous. The Fiqh Council of North America published this statement in an article available in March of 2003.

“As Muslims, we cannot ignore the rules and customs that maintain the welfare and interests of people in non-Muslim countries. A great many of the domestic laws comply with shari’ah. Those which contradict shari’ah, of course, are rejected. All those aspects of social services in this country, i.e. health, retirement, social security, disability—all these are institutions that Muslims would be advised to develop in their own countries, and thus would be implementing Islam, as none of these institutions are in conflict with sharia’ah. We take issue, however with the law that divides the marital wealth in half between the husband and wife. We acknowledge that the data from which this formula was derived, was originally based on legitimate criteria. No doubt it took into consideration both spouses’ contributions to the collective wealth of duties performed by the wife. Why shouldn’t we as Muslim scholars review this data to determine the minimum compensation to which a divorced woman is entitled. ...it is of vital importance to re-evaluate the traditional fiqh regarding the issue of post-divorce financial settlements in light of new data and the particular circumstances of each individual case.”

While the unnamed writer of this article is clearly cognizant of civil law regarding community property following civil divorce, he takes an ambiguous, rather than dismissive, position regarding the rationalization of Islamic and secular law, and does at least imply that the principle of civil compensation is consistent with shari’ah. I suggest that as more lawyers, such as Awad, who are knowledgeable in both legal worlds, and more American- Muslim women lawyers take such issues to divorce court, there may be more discussion of this issue within the American- Muslim world.

A Jewish man’s obligations are somewhat different under secular and Orthodox religious law. I’d like to return to the New York Domestic Relations Law which was enacted to address the agunah problem and focus instead on some of the provisions under a July 1992 amendment to Section 23B, which “details a variety of factors that courts are to consider in setting spousal maintenance (alimony) and property division (“equitable distribution”) in the event of a divorce. As presently amended, the statute now provides that one of the factors the court shall consider both in determining maintenance and in allocating marital property is the “maintenance (by one

spouse) of a barrier to remarriage” (of the other spouse). It is a given, according to state law, that there will be division of property and alimony; the state recognizes “the very real economic hardships and dislocations that women face after divorce, particularly when civil law declares them unmarried but by virtue of their adherence to halacha they are unable to marry anyone else.”

However, Rabbi Yitzchok Breitowitz, writing on Domestic Law 236B in a Jlaw.com article, expresses serious reservations about its viability in halachic divorce. While he applauds it as a mechanism to facilitate the removal of barriers to remarriage, and as leverage for husbands who do not accept the decision of a beit din, he nevertheless feels that there is excessive entanglement of church and state; it is, in most cases, a variant on a coerced get, illegal in Jewish law as there is nothing tying the secular court to the decision of a beit din. Others view it in an alternative way, seeing the law as supporting the wife, rather than as coercing the husband. Breitowitz finds “an intriguing jurisprudential question: whose intent is controlling?”

A similar maintenance issue in which both secular and religious courts have been concerned relates to the period between the initial divorce papers and a final settlement. The “pendente lite relief“ is temporary maintenance, and can cover regular expenses, child support, reimbursement for expenses such as health insurance, tuition, use of the marital residence inter alia. In the New York Supreme Court, Queens County, in June 14, 1999, Avi Stein sought the court’s help to uphold a beit din decision which awarded him custody of two minor children and all of the marital resources except the wife’s assets in her own name, and her private possessions. The husband’s earnings were \$87, 661; their home, worth \$235,000. In that same religious court, the wife was prohibited from moving from New York, or even changing her apartment without their consent, and the court set the visitation schedule.

The New York court established that the beit din's proceedings happened in the absence of the wife, Mira Stein, or her attorney on the same day that they submitted an agreement to beit din arbitration. The Supreme Court agreed that outside arbitration was valid, but pointed out that child custody and visitation was one of the exceptions which could not be addressed through arbitration; since the beit din's decision was such an exception, their making a decision was contrary to public policy. Therefore the court had jurisdiction to set child support under the Child Support Standards Act.. The required procedures for arbitration proceedings require written notification not less than eight days before, in writing, conditions which the husband could not show he had met.

The court made a judgment "without prejudice to renew" were the husband to show those requirements had been adhered to. And because the husband's petition to confirm the beit din's decision was denied, so was the dependent proposal to dismiss his wife's claims.

The court considered the factors in the Domestic Relations Law 236 Part B(6)(a 1986 version of the 1992 amendment,) such as "financial status of the respective parties, their age, health, necessities and obligations, the nature and duration of the marriage, the present and future capacity of each of the parties to be self-supporting, the tax consequences to the parties, the income which the parties are capable of earning by honest effortsthe standard of living , established during the marriage."This court awarded temporary maintenance, child support, exclusive use of the marital residence, paid for by the husband, all insurance and unreimbursed medical expenses, the use, repair, and insurance on a car, private schooling; further the husband and agents were forbidden, while the action was pendant, from transferring or encumbering or secreting, etc., any resources described to the beit din. Shira Stein was awarded money to pay to her attorney, and to hire an appraiser, inasmuch as equitable distribution was an issue. She was

also allowed to come back to the court to petition again for more money if necessary. The husband had sixty days to renew his claim if he could show that he followed the rules, or that both waived the rules.

The *beit din*'s attitude in the Stein case is slightly similar to the Fiqh council, in that it took a narrow and limited view of a husband's responsibility for maintenance after divorce and found the secular law flawed in a religious sense because it treated spouses as equals. The secular court was evenhanded in applying similar standards to both spouses, and to the religious court's decisions as it would have in a secular case, as well as its requirements for following specified legal procedures. Clearly in the Stein and Shaban cases, the secular court's judgments on the basis of public policy towards wives and their children achieved a degree of relief impossible in their respective religious courts.

The involvement of the American courts in dealing with religious Jewish and Muslim's women's divorce issues has had a significant impact on many communities. The American legal community has evolved because of legislation enacted to address inequities in women's treatment under divorce law; there is now a body of case law which addresses women's equality in relation to maintenance, custody, inheritance, and dowry return when such rights were denied in religious courts. The legal community's familiarity with the religious family law among American minority religious groups has been augmented.

On a larger scale, the American public as a community has benefited from these issues being raised. The current historical period is one in which large scale questions about the future of the American family, and family values are high on the political and social policy agenda; frequently, the complexity of family life, including its spiritual values, has been sometimes oversimplified and consequently misunderstood. For many Americans outside these religious

communities, the complexity of the divorce issues of these religious minorities may have been surprising. American legal thinking is learning to address these new and intricate family problems. Perhaps the courts' experience with these groups will set precedents and lay the groundwork for other novel family jurisprudence in the mobile pluralistic and global society that America has again become.

The Orthodox community in America has continued to explore remedies for the agunah problem in reaction to the civil courts' divorce decisions, whether its thinkers are for or against the United States Justice system's version of a "coercive get." Innovative thinking in ketubah law, such as the addition of automatic get clauses in pre-nuptial agreements, has certainly been well received by many Orthodox women. American Jewish women are benefiting directly from court decisions both for pendente lite relief, and final settlements, as well as from information, support, and advocacy from their religious peers on the Web, and elsewhere. The religious court system in America, the batei din, at least some of them, have recognized the need for reform in order to reestablish credibility as a corruption-free system of justice. Without the pressure of a secular court, would those reforms have been initiated?

The Muslim community has embarked on a course of self-empowerment. Trained lawyers and advocates who have dual-system professional legal expertise continue to educate both the Muslim and the non-Muslim communities in legal issues that concern Muslim-American families. Through the Muslim women's support and advocacy groups which make knowledge of legal rights and how to secure them available to a wide audience through the Internet and through publications and lectures, and through new understandings of traditional religious ideas, such as the expanded mahr agreement, the situation for married observant Muslim women in America is changing.

On a more global scale, aspects of international law relating to divorce and custody issues have been evolving in many countries from the models like that of the recent American state and federal laws; the concept of international public policy reflects and expands on ideas contained in particular decisions like those referenced in this paper. They have become embodied in international treaties such as the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention"), 19 I.L.M. 1501 (1980)

While the application of American family law to divorces between religious couples has been one factor in their legal situation which I have addressed in this paper, I have not spoken about another important element—the impact of alternative understandings of sacred text in which gender bias is dissected or eliminated. But it is important to conclude with a reference to such thinking which may lie behind such decisions to pursue justice in a civil court. A religious American woman who goes to American courts for justice does not believe she is inferior or unequal, despite a religious court's insistence that she is. However, American jurisprudence is limited in its domain. It cannot address the philosophical or existential questions behind such a contradiction. It is in the field of contemporary religious/feminist scholarship and spiritual self-searching that, in some cases, facilitate gender equality as it is reclaimed from historical and contemporary interpretations of religious text or new interpretations are made which remove gender prejudice from sacred documents. The overlapping area of civil rights and religious rights for women will probably remain an ongoing issue for the American courts and religious communities. What began as a collision, has become a connection, a reluctant and careful embrace.

APPENDIX

The Mamzer Factory

By Rabbi Dovid E. Eidensohn

There is no more unpleasant word in Judaism than “mamzer,” or bastard. A child born of adultery or incest is a mamzer, or bastard, and may not enter the Israelite Community with marriage. A mamzer may marry another mamzer or a convert to Judaism. Some bastards have become Torah scholars, as the Mishneh teachers, “Greater is the bastard sage than the High Priest ignoramus.” Nonetheless, the holy Jewish strain cannot tolerate a link with such a product of sin.

A woman who divorces and remarries, without a proper GET or Orthodox divorce, is considered to be in an adulterous relationship. The product of the second marriage or relationship could very possibly be a “mamzer,” heaven forbid. Although adultery is quite rare, fortunately, there is another way for

mamzerim to be produced which is not so far fetched, when a woman marries Orthodox and divorces without a proper GET. She is Orthodox married even if she has a civil divorce. Only a GET, divorce paper, prepared by a competent Orthodox rabbi or rabbinical court can divorce a Jewish woman married Orthodox.

A woman married in a civil ceremony without a rabbinical or Jewish ceremony may not be considered married by Jewish law. If so, if she remarries without a GET her children are not suspect because they are not products of adultery. The first marriage, the civil one, may not be valid. On the other hand, a woman married Orthodox can only terminate her marriage with the death of the spouse or a GET. A woman married with an Orthodox marital ceremony and who remarries without an Orthodox GET is still married. If she remarries without a GET she is an adulteress, and her children are mamzerim, heaven forbid.

A woman who forces her husband to give a GET with serious threats, such as if she has people approach the husband with threats to his physical person, money or other sensitive areas, such as reputation, may have destroyed her GET, because a GET must be done willingly. Women who begin divorce proceedings with a threat from their tough lawyer may have ruined themselves and their generations. The New York State GET Law is a "mamzer" factory. We must be very careful when dating to inquire where a divorcee got her GET. We must then find out if the husband gave it willingly, or if the woman forced him in court, or pressured him against his will in a manner unacceptable in Jewish law.

Although all divorces usually entail some form of pressure, there are pressures and there are pressures. The pressure of going through civil courts with judges completely in sympathy with the wife is a severe pressure, and may destroy a GET.

How sad it is that there are wicked neo-Orthodox women going around arousing hate for husbands, instigating divorces, and teaching women how to have mamzerim. In an age where Gloria Steinem finally married, even though her feminist men-haters howled in pain, can Orthodox women learn how important a husband is to a woman, and leave a wife in peace? There is a special place in Gehenum (Hell) for idealists that teach a decent and fine woman to become a liar, to spread malicious rumors about her husband, to call the police and falsify claims and do the most despicable things, all to "free Agunose." Such people deserve the full censor of the Jewish community, and should be driven back into their snakepits.

It seems, unfortunately, as time goes on, that the pressures in the modern-Orthodox or neo-Orthodox community gets worse all of the time to tear down the sacred structure of marriage. As Rav Yoshe Ber Soloveitchik zt"l said, when he heard about a certain idea to appease the feminists, "Have we reached the 'end of the ends'?" If we appease feminists by tampering with family and the Torah, we have reached the end. It is time to stand up and say, "stop." Copyright © 2001-2002. Alliance for Authentic Judaism

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The Great Agunah Hoax by Menachem Ben David

This article is an attempt to shed light on a widely misunderstood issue in the Jewish community, namely that of the so-called agunah problem. The article also addresses some underlying reasons for the increase in divorce in the Jewish and non-Jewish communities.

Statistics show that the vast majority of divorce lawsuits in the non-Jewish world are filed by the wife as a plaintiff. Why is this so? Because feminist political pressures on the legislatures, along with the anti-male family court system, have created a situation where woman perceive they have everything to gain and almost nothing to lose by divorcing their husbands in civil court. In many cases divorcing woman have succeeded in removing their husband from their house, taking possession of the house and children, and receiving outrageously high alimony and child support payments from their ex-husband, who is reduced to poverty. These woman are then free to pursue relationships with new boyfriends and lovers while being generously supported by their ex-husband. This cruel, unjust, and un-Jewish attitude towards divorce has spread into the Orthodox Jewish world, especially the modern Orthodox community.

It is critical to understand that in authentic Judaism, divorce on demand does not exist. Just because a wife demands to receive a ghet, or her husband demands that she accept a ghet, does not entitle them to enforce their will on their spouse. In the case of a woman demanding a ghet, there are specific conditions which must exist before her husband is obligated to provide a ghet. See Shulchan Aruch, Evan haEzer, Chapter 154. Some examples of situations where the wife might be entitled to a ghet are if her husband was a “mucas scheen” (severe skin blemishes), or “m’laket tsoas kelavim” (collector of dog manure), or “aino rotseh hitacher” (refuses to support his wife due to intentional unemployment), etc. Lacking the conditions specified in the Shulchan Aruch, the wife is not an aguna and the husband is not obligated to provide a ghet if he does not care to do so. Despite the claims of certain pro-feminist rabbis, the fact that a woman sued her husband for divorce in secular family court has no bearing on her entitlement to a ghet, and does not in any way confer on her the status of aguna !

According to various reliable and learned rabbinic experts I have consulted with, an authentic “agunah” is a woman who went to Beis Din, requested a ghet, and was entitled to receive one according to halacha. Due to circumstances beyond her control, such as the disappearance of her husband, she was unable to obtain a ghet.

Rabbinic experts have informed me that many of the woman claiming to be agunos today in fact created their own dilemmas by going to secular family court and not abiding by halacha. Feminist rabbis and organizations have misappropriated the term “agunah” in order to promote the causes of certain woman who have violated halacha. These groups have implemented the Jewish version of what’s known as the “politics of victimization” in the non-Jewish world. By defining themselves as innocent victims, they attempt to generate undeserved sympathy and support for their plight. Opponents of their agenda can then be characterized as unfeeling, cruel exploiters of innocent women.

According to the Shulchan Aruch, a person has the right to have all divorce issues dealt with in Beis Din. Yet certain modern Orthodox and Yeshiva University “rabbis” claim a woman need

only obtain a “preliminary heter” to go to court instead of Beis Din. Chareidi rabbis have informed me that there is no such thing as a heter to go to civil court in order to avoid Beis Din. A man who has been sued in family court has a G-d given right to have all his divorce issues rejudged according to halacha in Beis Din, before he is required to give a ghet. At no time during this whole, long Beis Din process can the woman be considered an aguna.

According to halacha, a ghet unjustly imposed on the husband by a pro-feminist Beis Din is invalid, just as a ghet imposed by a secular court of its own volition on the husband is invalid. The children of a woman who remarries after receiving an invalid ghet are considered mamzerim, ie bastards under Jewish law. In the Orthodox Jewish community, the main obstacle to imposing the pro-feminist family court system on Jewish men has been the inability of female divorce plaintiffs to obtain a valid ghet in family court. Various Jewish organizations have been formed with the goal of helping these so-called “agunos” .LBYI (www.lbyi.org) is one of the largest of the aguna organizations. It is well organized and receives continuous prominent and favorable publicity in the modern Orthodox and secular Jewish media.

LBYI has issued “standards” for Batei Din which they are attempting to have enforced in all Beis Dins in the world. According to my reliable sources, and despite claims to the contrary, LBYI has not succeeded in convincing the Israeli Rabbinit to refuse to recognize any Beis Din not employing LBYI’s standards. These standards appear to contradict the Shulchan Aruch in a number of places, and appear to be seriously undermining the traditional halachic rights of Jewish men. Some examples of the standards: “In all divorce proceedings, the ghet will be given as the first item of business. No Heter Meah Rabbanim will be issued when the wife is prepared to accept a ghet. Litigants shall be represented by no one other than members of the bar.” Woman’s groups like LBYI and their rabbinic supporters are claiming that unethical men are using the ghet **to “extort” concessions from their wives. Rabbinic experts have informed me that these charges are by and large untrue. Most divorcing Orthodox men are only asking for their** legitimate halachic rights to be respected.

Rabbinic experts have informed me that certain modern Orthodox Beis Dins and pro-feminist rabbis, especially certain rabbis connected to Yeshiva University, are allegedly caving into pressure from Jewish feminist groups and not judging divorce cases according to the Shulchan Aruch. By ignoring the legitimate rights of Jewish men, and by performing halachic acrobatics in order to appease women’s groups, they have alienated many Jewish men who now refuse to cooperate with them.

In parallel with the feminist misinformation prevalent in the non-Jewish media, most Jewish media provide very little factual halachic or legal information regarding Jewish divorce issues. Instead they continually regurgitate hysterical feminist claims regarding huge numbers of alleged agunahs and domestic violence victims. Publications such as the Jewish Press supply a continuous diatribe of pro-agunah and anti-male propaganda, and very rarely publish articles dissenting with the agunah party line. Favorable articles about Jewish feminist organizations are continually published, along with names and phone numbers to be contacted. Women are urged to vigilantly defend their rights, and to contact the feminist organizations upon the slightest violation of their “rights” . Women are urged to use secular courts against their husbands. Rabbis affiliated with Yeshiva University write articles requesting women to obtain a “preliminary heter from a rabbi” before going to secular court.

Many well intentioned Orthodox Jews are thus being indoctrinated that traditional Jewish law is unjust and oppressive to woman, and that corrupt Chareidi rabbis and Beis Dins are perpetuating this injustice. Jewish woman are especially vulnerable to the propaganda and are being alienated

from authentic Judaism Present trends in the Orthodox community of scapegoating men, and of G-d given rights will only backfire. The only sure solution to the divorce problems and alleged agunah problems in the Jewish community is a return to Torah law and a rejection of feminism and scapegoating of innocent men. Will the pro-feminist rabbis and agunah sympathizer have the intellectual honesty and courage to recognize the error of their ways?

INTERNATIONAL CHILD CUSTODY DISPUTES

A Summary of Relevant Statutes and Treaties

I. Uniform State Laws

A. Uniform Child Custody Jurisdiction Act (UCCJA), 9(1A) U.L.A. 271 (1999)

1. As of 1997, adopted in all fifty states, Washington D.C., and the Virgin Islands. Replaced in some states by UCCJEA (see B below).

2. Provides basic framework for determining initial jurisdiction to make child custody orders (“home state” and “significant connection” jurisdiction) and provides for recognition of custody orders made consistently with these jurisdictional standards.

3. Most states, but not all, have included Section 23, which extends the general policies of the Act to international cases.

B. Uniform Child Custody Jurisdiction and Enforcement Act, 9(1A) U.L.A. 657 (1999).

1. Adopted in twenty-one states and pending in others.

2. “Home state” jurisdiction to be the exclusive basis of jurisdiction (if a “home state” exists), making it consistent with the federal Parental Kidnapping Prevention Act, 28 U.S.C. §1738A.

3. State that makes a decree has continuing exclusive jurisdiction to modify.

4. Clarifies that jurisdiction and enforcement provisions apply in international cases.

II. Parental Kidnapping Prevention Act, (PKPA) 28 U.S.C. §1 738A, enacted in 1980

A. Requires as a matter of full faith and credit that sister states enforce and not modify any child custody determination made consistently with standards set forth in the statute.

1. Home state of the child (if there is one) has jurisdiction to hear a custody case and retains jurisdiction to modify that order (with limited exceptions).

B. PKPA is a “full faith and credit” provision only, and does not give jurisdiction to the lower federal courts.

C. PKPA does not apply in international cases.

III. International Parental Kidnapping Crime Act, 18 U.S.C. §1204 (“IPKCA”)

A. Federal criminal statute, enacted in December 1993, imposing penalties for removal or retention of child from the U.S. with intent to obstruct lawful exercise of parental rights.

IV. Hague Convention on the Civil Aspects of International Child Abduction (“Hague Abduction Convention”), 19 I.L.M. 1501 (1980)

A. Adopted by unanimous vote of member states of the Hague Conference on October 25, 1980, and entered into force in the U.S. on July 1, 1988, with the enactment of implementing legislation, see International Child Abduction Remedies Act, 42 U.S. C. §~11601-11610 (1989)(“ICARA”).

B. Offers expeditious remedy of return of child to country of habitual residence so that authorities in that State may adjudicate the custody dispute between the parties.

Under ICARA, Hague application may be brought in state or federal court in place where child is located.

C. Convention sets forth limited defenses, on which bases a court can refuse to return a child.

1. Defenses are to be construed narrowly in order to achieve objective of return of child to habitual residence.

D. Convention does not provide for jurisdiction to hear custody matters. If return of the child to another Contracting State is not required by the Convention, then power to hear custody case will be determined under that state’s own jurisdictional rules.

V. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, adopted October 19, 1996 (Hague Convention on the Protection of Minors)

A. Signed by five countries — Monaco, Morocco, the Netherlands, The Czech Republic and Slovakia — but ratified only by Monaco and the Czech Republic, the Convention is not yet in force. The U.S. has expressed interest in becoming party to the Convention, but one can expect that it will take several years before implementing legislation is put together.

B. This Convention is the international corollary to the UCCJA and UCCJEA in that it establishes international standards for the exercise of custody jurisdiction and the enforcement of custody orders.

1. Child's habitual residence to have jurisdiction to take necessary protective measures with respect to a child (Article 5).
2. Additional provisions for transfer of jurisdiction by habitual residence when other states are better placed to act.
3. Special provision for exercise of jurisdiction in connection with divorce and for "urgent measures".
4. Measures and orders of Contracting States will be recognized and enforced if made consistently with the Convention.
5. Provisions for cooperation among authorities of Contracting States are included.

 Information about the Conservative Ketubah with Lieberman Clause text

The Conservative ketubah text includes the complete Traditional Orthodox text. This text originates in Babylon and is written in Aramaic. Originally it incorporated individual stipulations but it became standardized about 200 B.C.E. During the Gaonic period (mid-seventh to eleventh centuries), the Babylonian academies struggled for hegemony over their Palestinian counterparts. One of the results was the eradication of the Palestinian ketubah and the establishment of the standardized Babylonian ketubah in the practices of Jewish communities.

The Conservative ketubah text creates a traditional, halachic Jewish marriage. The contract is not egalitarian. The ketubah text is both a record that the groom proposes marriage and the bride accepts his proposal as well as a document of the promises that the groom makes to the bride. Several legal responsibilities detailed in the talmudic tractates kiddushin and ketubot are assumed but not written in the text. Another subtext is that traditional Jewish marriage is based upon the quality of Hesed, sometimes translated as lovingkindness. Hesed means a total shift of one's concern from oneself to the other, eliminating self-centeredness and replacing it with a genuine concern and identification with the pain and problems of those around us. In marriage, concern becomes focused primarily upon one's spouse and children.

The Conservative text connects the marrying couple to God, Israel and Jewish history through the phrase that the groom says to the bride at the wedding: "Be mine in wifehood according to the laws and traditions of Moses and Israel". Also, the groom's monetary promises are from "the custom of Jewish men" that are "customary for daughters of Israel, according to the ordinances of our Sages, of blessed memory." Finally, when the bride agrees to become his wife, she agrees "to participate together with him in establishing their home in love, harmony, peace, and companionship, according to the practice of Jewish women. This last piece is an addition to the Orthodox text.

The concluding lines of the Conservative ketubah text state that a kinyan is made from the groom to the bride and from the bride to the groom. Both bride and groom are changing their personal status according to this text. This departs from the Orthodox text by creating a more bilateral contract. Feminists claim that kinyan refers to the acquisition of the bride by the groom (and, in this case, of the groom by the bride.) Rachel Adler writes: “kinyan [is] an act by which a subject unilaterally acquires specified rights over an object. Kinyan is essential in commercial transactions.” Traditionalists claim this is a misunderstanding of traditional Jewish marriage. As Moshe Meiselman explains, this contract is a “kinyan issur, a contract whose basic purpose is to effect a change in personal or ritual status— furthermore, the word kinyan has been used metaphorically in biblical and rabbinic writings to indicate the establishment of a close and intimate relationship.”

Divorce can be initiated by both bride and groom according to the Conservative text. The text elaborates the monetary provisions that the groom has made for the bride in case of divorce and/or his death. These provisions are standard and stated in “zuzim” .The amounts are traditional/ historical and do not really signify divorce settlement— that is determined by state law. By elaborating these provisions, however, the marrying couple is reminded that marriage and divorce entail financial consequences. In order for the divorce to be complete, one partner must send a Get and the other must willingly receive it. The Conservative text utilizes the Lieberman Clause as an attempt to solve the “agunah” problem. This clause was added as an addendum to the ketubah text by the Conservative Movement of Judaism in 1953. Saul Lieberman, the premier expert in Conservative Jewish Law at the time, framed the Aramaic formula. The purpose of this clause is to prevent the problem of one partner refusing to offer/ receive a Get in case of civil divorce. The Bet Din of the Rabbinical Assembly and the Jewish Theological Seminary of America is granted the authority to fix and determine the amount of money to be paid by the party refusing to grant a Get. The dispute can then be taken to the civil courts. In order to make this clause legally binding, the bride and groom should both sign the ketubah or a similar letter of intent which the Rabbi keeps in his files and sends to the Rabbinical Assembly to be kept in their files. Finally, the Conservative movement has been using an antenuptial procedure since this was created by the Rabbinical Assembly in 1968. This states that if no Get is sent within six months of the marriage being sundered by the courts of the State, or within six months of one of them leaving their home with the intent of sundering the marriage, then this betrothal and marriage will be null and void from the start.

Conservative Ketubah with Lieberman Clause (English)

We witness that on the ___ day of the week, the ___ day of the month of ____, in the year ____, corresponding to the ___ day of ____, ____, here in ____, the groom, ____, said to the bride, ___:

“Be my wife according to the laws and traditions of Moses and the Jewish people. I will work on your behalf and honor, sustain, and support you according to the practice of Jewish men, who faithfully work on behalf of their wives and honor, sustain and support them. I obligate myself to give you the sum of two hundred zuzim as the money for your ketubah, to which you are entitled according to Torah law. I will provide your food, clothing and necessities, and I will live with you in marital relations according to universal custom.

The bride, _____, agreed to these terms and to become his wife, to participate together with him in establishing their home in love, harmony, peace, and companionship, according to the practices of Jewish women.

The groom, _____, accepted responsibility for the full dowry that she brought from her _b_ house, whether in silver, gold, jewelry, clothes, or furnishings, amounting to the sum of one hundred zuzim and agreed to increase this amount from his own assets with the sum of one hundred zuzim, for a total of two hundred zuzim.

The groom, _____, said: "I take upon myself, and my heirs after me, the obligation of this ketubah, the dowry and the additional sum, to be paid from the best part of all my property, real and personal, that I now possess or may hereafter acquire. From this day forward, all my property, wherever it may be, even the mantle on my back, shall be mortgaged and liened for the payment of this ketubah, dowry, and additional sum, whether during my lifetime or thereafter.

_____, the groom, took upon himself all the obligations and strictures of this ketubah, this dowry, and this additional sum, as is customary with other ketubot made for Jewish women in accordance with the enactment of our sages, may their memory be for a blessing.

_____, the groom and _____ the bride, further agreed that if one or the other should desire to dissolve this marriage, or if this marriage has been dissolved by the civil courts, then either of them shall have the power to summon the other to the Bet Din of the Rabbinical Assembly and of the Jewish Theological Seminary of America, or whoever shall be authorized by the same, and each will obey the binding decision of this court, in order that both of them may live in accordance with the laws of the Torah. This ketubah is not to be regarded as mere rhetoric or as a perfunctory legal form. We have performed the act which in Jewish law makes the obligations of this document legally binding on the part of _____, the groom, to _____, the bride, and on the part of _____, the bride, to _____, the groom, with an instrument fit for that purpose, in order to confirm all that is stated and specified above, which shall be valid and immediately effective.

b. "family's" home if father is not living or not Jewish

Orthodox (English)

On the ___ day of the week, the ___ day of the month of ___ in the year 57___, according to the manner in which we count (dates) here in the community of ___, the bridegroom, _____, said to this virgin, ___: "Be my wife according to the laws and traditions of Moses and Israel. I will work, honor, feed, and support you in the custom of Jewish men, who work, honor, feed, and support their wives faithfully. I will give you the settlement (mohar) of virgins, two hundred silver zuzim, which is due you according to Torah law, as well as your food, clothing, necessities of life, and conjugal needs, according to the universal custom." Miss ___ agreed and became his wife. This dowry that she brought from her father's house, whether in silver, gold, jewelry, clothing, home furnishings, or bedding, Mr. _____, our bridegroom, accepts as being worth one hundred silver pieces (zekukim).

Our bridegroom, Mr. ____ agreed, and of his own accord, added an additional one hundred silver pieces (zekukim) paralleling the above. The entire amount is then two hundred silver pieces (zekukim).

Mr. ____, our bridegroom made this declaration: "The obligation of this marriage contract, this dowry, and this additional amount, I accept upon myself and my heirs after me. It can be paid from the entire best part of the properties and possessions that I own under all the heavens, whether I own (this property) already, or will own it in the future. (It includes) both mortgageable property and non-mortgageable property. All of it shall be mortgaged and bound as security to pay this marriage contract, this dowry, and this additional amount. (It can be taken) from me, even from the shirt on my back, during my lifetime, and after my lifetime, from this day and forever."

The obligation of this marriage contract, this dowry, and this additional amount was accepted by Mr. ____, our bridegroom, according to all the strictest usage of all marriage contracts and additional amounts that are customary for daughters of Israel, according to the ordinances of our sages, of blessed memory. (It shall) not be a mere speculation or a sample document.

We have made a kinyan from Mr.____, our bridegroom, to Miss ____, this virgin, regarding everything written and stated above, with an article that is fit for such a kinyan.

And everything is valid and confirmed.

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Endnotes

ⁱAccording to Asifa Quraishi (,who in 1995 worked as an attorney, as a Death Penalty Law Clerk for the Ninth Circuit U.S. Court of Appeals, in San Francisco,) speaking as a member of the Muslim Women’s League at the 1995 United Nations Fourth World Conference on Women, there were five million Muslims living in North America, which includes the United States, according to 1991 reports.

ⁱⁱThe term “orthodox” should not suggest a monolithic group. Neither Islam nor Judaism is monolithic in how communities believe or practice

ⁱⁱⁱsee appendix for article speaking against the New York GET law by Rabbi Dovid E. Eidensohn, The “Mamzer Factory”

^{iv}from an e-mail Norma Baumel Joseph April 8, 2003

^vThe use of “in” is intentionally ambiguous, as there are several situations that would involve the American courts such as U.S residency of either or both litigants, U.S. citizenship of either or both litigants and the like. The situation can be complicate by international law situations, e.g., the law of Israel is simultaneously secular and religious, and the law of many Arab countries is Shaaria law. If the marriage took place in another country that is another issue.

^{vi}recent decisions: Montreal Gazette, April 3, 2003 e-mail from Norma Joseph/Howard Joseph “Man must pay for refusal to divorce” Quebec Superior Court Justice Israel Mass has ordered a Jewish man who refused to grant his wife a for 15 years despite having signed an agreement to do so pay her damages of \$47,500, plus interest and indemnities.” [the Superior Court Justice] worded his decision carefully, for he had to tread between the

worlds of civil and religious law." Interestingly, the article, no longer available on the regular newspaper site, appears on a Texas family law 'blog' site as well as in Gazette archives.

^{vii}“Defamation suit against US ‘beit din rattles NY Orthodox” Jerusalem Post, Feb 27, 2000

^{viii}ibid.

^{ix}Samuel Heilman, a professor of Jewish Studies at Queens College in New York, “For a beit din to operate, it goes beyond Halacha. It has to deal with community standards. ...not a national [Orthodox] community.’ Orthodoxy in New York is a different animal than Orthodoxy in Memphis, Tennessee, certainly different than Orthodoxy in LA, - and even different than Orthodoxy in places like Baltimore, Washington or Boston or Philadelphia.

I from Broyde: Each individual can choose his own rabbi ...and if he doesn’t like the decisions, he can find another rabbi. If he is unhappy with one beit din, he can look for another around the corner.” Jerusalem Post.

^xAccording to the Gulf News, a Dubai court, setting a precedent, ruled that if four conditions were met, a divorce communicated by text message would be valid. The conditions are “the husband should be the sender of the message and he must also wish to divorce, the phrasing must be unambiguous, and the wife must receive the communication.” zdnet.co.uk/story/ accessed March 22, 2003

^{xi}It [the Internet, media] can certainly have a negative impact in several different ways. e.g., N. Joseph. “...:what has had an effect is the media - that is all the bad press rabbis have gotten because of the inequities of the jewish divorce system has prompted some concern and even change. But there is a down side. All the publicity and internet exposé has made many more cautious and less lenient. If in the past a rabbi was willing to be lenient or liberal because he was the moreh de’atra, that is the legal authority for his community - today he is afraid to be liberal since his colleagues will hear immediately and jump down his throat....” And on the Internet in particular, again quoting Joseph, “ it also disseminates information that men use in their arsenal of blackmail against women.”

^{xii}Certain courts relinquish young boys to their father’s sole custody. This will be discussed in the section on custody.

^{xiii}The Internet is an excellent research tool for examining the contemporary public discourse on religion, secular and religious law, history, and theology in English. While libraries are a source of published materials and some periodicals, many websites make available otherwise unpublished articles which represent points of view, opinions, and facts which might otherwise be inaccessible, such as the ask-the rabbi, imam sites.. Here are two examples of material that did not make it into the mainstream media:

1The Proceedings of the Beit din of America: re September 11, 2003. “Prior to the two Chalitzot performed for the widows from the World Trade Center tragedy, the Beth Din of America had issued formal decisions officially declaring the husbands of these women to be dead according to Jewish law”

2During the month of May 2002, the Beth Din of America completed eighteen Gittin. A get case that had to be coordinated in short time with the London Beth Din as the man lived in New York and the woman, who was engaged to be remarried, lived in London. The Beth Din also arranged for the writing and delivery of a Get at a law firm in Manhattan in conjunction with the signing of final divorce papers.

From another site: a discussion of the “Lieberman Clause”

^{xiv}reprinted in *The Niqabi Paralegal*, a Muslim weblog with Islamic/legal content

^{xv}Ibid.

^{xvi}Ibid.

^{xvii}Ibid.

^{xviii}For example, in *Aziz v. Aziz*, 488 N.Y.S.2d 123 (N.Y. Sup. Ct. 1985) and *Akileh v. Elchahal*, 666 So.2d 246 (Fla. Dist. Ct. App. 1996), the mahr agreement was enforced as a valid Islamic prenuptial agreement that conformed to the requirements of the statute of frauds and state contract jurisprudence.

On the other hand, in *In re Marriage of Dajani*, 204 Cal.App.3d 1387 (Cal. App. 4th dist. 1988), *Habibi-Fahnrich v. Fahnrich*, 1995 WL 507388 (N.Y. Sup. Ct. 1995), *Shaban v. Shaban*, 88 Cal.App.4th 398 (2001) and *Ahmad v. Ahmad*, 2001 WL 1518116, it was held that the mahr agreement was an unenforceable Islamic prenuptial agreement because (1) it did not satisfy the requirements of the statute of frauds in three respects materiality, specificity, and insufficiency, or (2) it failed to satisfy the formalities required for valid prenuptial agreements, such as full financial disclosure and advice of counsel.” *The Niqabi Paralegal*

Dr. Azizah al-Hibri, who participated in a workshop at the 1995 Fourth World Conference on "Women, Challenges and Opportunities Facing American Women" comments further on Aziz and Dajani: Aziz set a precedent for enforcing the secular part of the ketubah, so "things like mahr will be enforced that way in NY," yet in Dajani, three years later, the Orange county court decided against the mahr because of the testimony of the experts on Jordanian law who were brought in — the court's decision was based on it. The court understood Jordanian and Moslem law as requiring her to forgo her dowry regardless of any other pertinent conditions.

Al- Hibri disagrees, citing the Muslim concept of darar (harm), in which case the man is not released from his obligation. She quotes the court, "Public policy considerations are appropriate here." and further, "Pre -nuptial agreements[and it considers a kitab to be a pre-nuptial agreement] which 'facilitate divorce or separation by providing for a settlement only in the event of such an occurrence are void as against public policy.....Jordanian marriage contract must be considered as one designed to facilitate divorce...."

^{xix}“Groundbreaking Ruling Recognizes Islamic Marriage Agreement” Abed Awad, Clifton, NJ 2002 Lawyers Weekly USA, The National Newspaper for Small Law Firms and Jim Edwards of the New Jersey Law Journal , 4-18-02 See appendix.Odatalla v. Odatalla

^{xx} information from New Jersey Law Journal article by Abed Awad in the *Niqabi Paralegal*

^{xxi}The exact origins of the ketubah is unknown—whether biblical (Tobit, a deed of marriage sealed before witnesses, or Talmudic—treatise Ketubot, where it indicates an earlier practice.)

^{xxii}The court's action in *Avitzur v. Avitzur*, a 1983 New York case, later overturned by the New York Court of Appeals, denied the enforceability of the terms of a ketubah, a Jewish marital contract, holding that it was a religious covenant and beyond the jurisdiction of the civil court.

^{xxiii}In many of the later Islamic divorce cases, the Emory study comments that New York courts have relied on the experience with ketubah in providing experience for the mahr/sadaq.

^{xxiv}<http://www.divorcesource.com/research/dl/religion/94feb27.shtml>, Minkin v. Minkin, supra, 434 A.2d at 668

^{xxv}Deuteronomy 24:1 1 When a man taketh a wife, and marrieth her, then it cometh to pass, if she find no favour in his eyes, because he hath found some unseemly thing in her, that he writeth her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house, 2 and she departeth out of his house, and goeth and becometh another man's wife, 3 and the latter husband hateth her, and writeth her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house; or if the latter husband die, who took her to be his wife; 4 her former husband, who sent her away, may not take her again to be his wife, after that she is defiled; for that is abomination before the LORD. <http://jewishdelaware.esmartweb.com/PJewishTexts.htm>TM

^{xxvi}Jewish Get, divorce, Divorce <http://home.arkansasusa.com/bborsodi/gettart1.html>

^{xxvii}Judaism 101 <http://jewfaq.org/divorce.htm>TM 5756-5763 (1995-2002), Tracey R Rich

^{xxviii}Rayner, “*The Gender Issue in Jewish Divorce*,” *Gender Issues in Jewish Law*, ed. Jacob and Zemer, p.38.

^{xxix}*Ibid.* p. 41

^{xxx}The legality of coercion by the courts or rabbis is hotly contested by the Orthodox community.

^{xxxi}Bernard Jackson, co-director, Center for Jewish Studies, University of Manchester. *Agunah and the Problem of Authority*, lecture March 13, 2001

^{xxxii}The Reconstructionist Movement includes women as part of the beit din and allows a woman the right to initiate divorce; “Reform Judaism in the US does not issue a get. UAHC.org/rjmag/300ans.html

^{xxxiii}“*Permanent Marriage*” Chapter I *Temporary Marriage in Islamic Law*

^{xxxiv}Some cases involving Mormons, American Indians, and mixed international marriages are being examined when these Islamic marriage situations arise in American law.

^{xxxv}a question raised in Waterloo, Canada, was addressed to Sehaykh Hamid Mavani through Mustafa Rawji, Moderator. Says the e-text, “According to Ayatullah Khomeini....How long after delivering a baby...what is the Quranic ruling....what are the Ulama saying...What is the ruling if the wife wants to divorce at or around the time of her delivery....” The answer, that she divorce formula may be pronounced any time, but iddah, the waiting period only ends upon delivery. If he dies before she delivers, she receives her share of the inheritance. There is a reference to Quranic verses (65:1) and (65:4). from U<http://al-islam.org/organizations/aalimntework/msg0089.html> entry dated 6 March, 1996

^{xxxvi}from the Atlanta Jewish Times, July 30 1999, an article on “” Jewish Justice.”” The Batei Din of America, the country's largest, handles divorces, sometimes business and real estate disputes, partly because of a large number of lawyer-rabbinic scholars, partly because of an overloaded civil court calendar. “Essentially the beit din operates much like an arbitration panel. Both parties must agree to take their case before a beit din and adhere to its decision.

American law forbids batei din from handling criminal cases or deciding claims of racial discrimination and anti-trust issues. ...Parties in each case can present whatever evidence, testimony or witnesses they think will bolster their position. Lawyers aren't required, but they're not barred. ...The Bet Din charges \$100 per hour per judge and parties have a choice of a single judge or a three -judge panel. Boston's beit din, the Rabbinical Court of Justice of the Commonwealth of Massachusetts, charges the same. By comparison, civil arbiters charge between \$150-250 per hourthe Conservative beit din handles only problematic Jewish divorces, about 100 a year."

^{xxxvii}Jerusalem Post article

^{xxxviii}Ibid.