THE ERASURE OF ISLAMIC DIFFERENCE IN CANADIAN AND AMERICAN FAMILY LAW ADJUDICATION

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In Canada, I don't think we've really explored how immigration experience changes people, when they move from one country to another. It's easier just to comment on different foods and folkloric dances than to really understand what people go through when they emigrate. . . . In Canada, there has been a tendency to trivialize.[1]

INTRODUCTION

Canada and the United States are multicultural societies in which cultural differences abound. Yet their dominant cultures often control these differences by assimilating them into

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[1] Nino Ricci, *Profiles*, *quoted in* NEIL BISSOONDATH, SELLING ILLUSIONS: THE CULT OF MULTICULTURALISM IN CANADA 78 (Penguin Books 1994).

mainstream norms. This tendency manifests itself in family law when judges, while administering complex but vague legal notions, apply their own perspectives to individuals who belong to culturally-defined minority communities. When courts define "the Other"[2] by its differences from majoritarian values and overlook the experiences of "different" people themselves, they rely on and reproduce cultural stereotypes. In this article, I expose judicial marginalization of cultural differences in family law decisions addressing features of Islamic marriage.

One must view differences as relational rather than intrinsic. They are inventions, not discoveries. Nitya Iyer notes that "difference is necessarily a comparative concept. It does not inhere in people or things; it expresses a *relationship*. A thing cannot be different in isolation."[3] As adjudicators, judges determine who is different and who is normal. In so doing, they impose unstated norms against which difference is classified. Martha Minow explains the source of these benchmarks: "Unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others."[4] Judicially-administered normalcy, however, subjects

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[2] I am transposing this term into domestic legal contexts from its classic use by Edward Said to describe "the binary typology of advanced and backward (or subject) races, cultures, and societies." EDWARD W. SAID, ORIENTALISM 206 (Vintage Books 1978).

[3] Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 QUEEN'S L.J. 179, 182 (1993) (emphasis added).

[4] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 51 (Cornell University Press 1990). Professor Minow adds the following observation:

> "Different" traits are regarded as intrinsic to the "different" person, and the norm used to identify difference is assumed to be obvious, needing neither statement nor exposure to challenge. Differences are presumed identified through an unsituated perspective that makes other perspectives irrelevant and sees prevailing social arrangements as natural, good, and uncoerced. The chief effect of these assumptions is to deposit the problem of difference on the person identified by the others as different. Screened out by these assumptions are the possibilities that difference expresses patterns of

minority cultures to unfavorable comparisons with mainstream society, as it is defined by the courts. Jurists need to dislocate and displace themselves from such traditional frameworks of legal analysis. Only then can they reconceptualize the legal stories told in their courtrooms and thus achieve more nuanced constructions of cultural minority identities.[5]

This article chronicles Canadian and American courts' ignorance of Muslim people's cultures. I explore the judicial discretion to name or refuse to name "Others." Case law demonstrates that judges frequently perceive Muslim cultural differences as too drastic to fit within existing legal categories. Embedded in these family law decisions are assumptions about what constitutes "proper" conduct, values, and practices, that is who *we* are and, by way of opposition, who *they* are. Unstated norms prevail, norms that contribute to the process of racialization.[6]

In Part I, I examine a 1998 Ontario decision, *Kaddoura v. Hammoud*,[7] which renders the particular experiences and perspectives of Muslim people invisible at the same time as it marks them as the Other. In that case the court refused to require payment of the *Mahr*,[8] a Muslim marriage custom, because the contract had a religious purpose and thus could not be enforced.[9] I compare this Canadian decision with several American cases

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> relationships, social perceptions, and the design of institutions made by some without others in mind.

Id. at 79.

[5] *See* Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 744 (1994). The author argues for a conception of the subject as multiplicitous and contingent, one that can be developed by disrupting the unity and certainty of modern categories and paradigms. *Id.*

[6] *See generally* John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 429 (2000) (elaborating on how an "unstated norm through most of our history has been the norm of Whiteness and maleness.")

[7] [1999] 168 D.L.R. (4th) 503 (Ont. Gen. Div.).

[8] The *Mahr* is a gift from a husband to his wife. It is not a price paid for an Islamic marriage, but rather an effect of the contract.

[9] *See infra* notes 19-46 and accompanying text (providing further discussion of this decision).

involving the *Mahr* to assess the implications for multicultural societies of different models of judicial attention to culture in family law.

In Part II, I discuss another Islamic religious practice that has posed a challenge to Canadian family law, namely the *muta*,[10] a temporary institution of marriage found in the Shia Muslim tradition. In *Y.J. v. N.J.*,[11] a 1994 child custody dispute over a five-year-old girl born in the context of polygamy, an Ontario court imposed "traditional" notions of the family instead of recognizing the implications of the *muta*. I explicate the dangers inherent in applying majoritarian social norms to a cultural minority's different traditions. More specifically, I analyze the case's legal interpretations of notions such as "best interests of the child" and "harm" in light of dominant cultural constructs about what is a family in Canadian society. Again, I will compare American case law and propose an improved method of adjudication.

The mode of analysis employed in the *Mahr* and *muta* cases constructs and reifies the Muslim identity that is prevalent in Canadian and American courtrooms. It is a product of Orientalism,[12] a geopolitical mindset that has long conceived a

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[10] In the Shia sect of Islam, *muta* is a temporary marriage that is initiated by a man. It lasts for a specific period of time and includes a specific amount of money or property given to the woman. *See* Sachiko Murata, *Temporary Marriage in Islamic Law*, *available at* http://www.al-islam.org/al-serat/muta (last visited Nov. 30, 2001).

[11] (1994) O.J. No. 2359. *See infra* Part II (providing a discussion of the court's treatment of the *muta* tradition).

[12] For a more in-depth definition of Orientalism as a discourse and a system of knowledge and power, *see* SAID, *supra* note 2, at 41:

> Orientalism was a library or archive of information commonly, and in some of its aspects, unanimously held. What bound the archive together was a family of ideas and a unifying set of values proven in various ways to be effective. These ideas explained the behaviour of Orientals; they supplied Orientals with a mentality, a genealogy, an atmosphere; most important, they allowed Europeans to deal with and even see Orientals as a phenomenon possessing regular characteristics. But like any set of durable ideas, Orientalist notions influenced the people who were called Orientals as well as those

wide gap between the West and the Orient, the latter characterized by its "sensuality, tendency to despotism, aberrant mentality, habits of inaccuracy, [and] backwardness."[13] Orientals live in that world, while Westerners live in one that is industrialized, rational, progressive, and fair.[14] This division expresses a hostility and lack of similarity between the colonial binaries of Us and Them, here and there, West and non-West, colonizer and colonized.[15] While mainstream society speaks,

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> called Occidentals, European or Western. . . . If the essence of Orientalism is the ineradicable distinction between Western supremacy and Oriental inferiority, then we must be prepared to note how in its development and subsequent history Orientalism deepened and even hardened the distinction.

SAID, *supra* note 2, at 41.

[13] SAID, *supra* note 2, at 205.

[14] *See* Uma Narayan, *Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism*, 13 HYPATIA 2, 4 (1998). The author focuses on Western accounts of other cultures as contingent fictions in arguing the following:

> The frequently reiterated contrast between "Western" and "Non-Western" cultures was a politically motivated colonial construction. The self-proclaimed "superiority" of "Western culture" had, however, only a faint resemblance to the moral, political, and cultural values that actually pervaded life in Western societies. Thus liberty and equality could be represented as paradigmatic "Western values," hallmarks of its civilizational superiority, at the very moment when Western nations were engaged in slavery, colonization, expropriation, and the denial of liberty and equality not only to the colonized but to large segments of Western subjects, including women. Profound similarities between Western culture and many of its Others, such as hierarchical social systems, huge economic disparities between members, and the mistreatment and inequality of women, were systematically ignored in this construction of "Western culture."

Id.

[15] *See* SAID, *supra* note 2, at 45. Professor Said makes the following observation:

> When one uses categories like Oriental and Western as both the starting and the end points of analysis, research, public policy, the result is usually to polarize the distinction—the Oriental becomes more Oriental, the Westerner more Western—and limit the human encounter between different cultures, traditions, and societies. In

writes, and reifies Oriental cultural identity, the subject of attention, the "Oriental" man or woman created, is viewed and judged as the exotic Other.

This identity imposition fails because the Other, who appears in and exists through her difference, who is the object and fascination of the West, can hardly be reduced to something recognizable or familiar to the observer's eyes. As a result, the "logic of identity" denies or represses difference. As Iris Marion Young argues, "reducing the heterogeneity of sensuous particulars to the unity of thought" leads to "a relentless logic of identity [that] seeks to reduce the plurality of particular subjects, their bodily, perspectival experience, to a unity, by measuring them against the unvarying standard of universal reason."[16] Ironically, by attempting to contain differences within a unified rubric, courts turn the different subject into the absolute Other. Universalism collapses into dualism.

The decisions I analyze in this article promote a judicial ideal of impartiality and universality by treating each person as an unencumbered individual, ignoring religion and culture as constitutive traits. Muslim women become monumentalized objects, frozen and fixed eternally through the colonial gaze[17] of

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> short, from its earliest modern history to the present, Orientalism as a form of thought for dealing with the foreign has typically shown the altogether regrettable tendency of any knowledge based on such hard-and-fast distinctions as "East" and "West": to channel thought into a West or an East compartment. Because this tendency is right at the center of Orientalist theory, practice, and values found in the West, the sense of Western power over the Orient is taken for granted as having the status of scientific truth.

SAID, *supra* note 2, at 45. Western thought has produced many mutually exclusive oppositions: subject/object, mind/body, good/bad, pure/impure. The first side of this dichotomy, considered the unified and the self-identical, is elevated over the second, which designates the chaotic and the unformed. *See* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 99 (Princeton University Press 1990).

[16] Young, *supra* note 15, at 99.

[17] I borrow this term from Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525, 525 (1997).

judges without any account of *their own* perspective of what it means to be Muslim, "Oriental," and different. These female litigants' personhood disappears during the majoritarian legal decision-making process. In denying their claims, judges display an impoverished understanding of what culture and religion are, how they differ, and why they matter.

I. *KADDOURA V. HAMMOUD* AND THE ENFORCEMENT OF ISLAMIC MARRIAGE CONTRACTS: *DANGEROUS CROSSING!*

> *"Dangerous Crossing"; it's painted on signboards all over the world!*[18]

A. The Canadian Religious Thicket

In *Kaddoura v. Hammoud*,[19] religion played a pivotal role in the Ontario Court of Justice's decision not to enforce the obligation to pay a *Mahr*, an amount of $30,000 due to the wife under an Islamic marriage contract. In so holding, the court participated in a cultural encounter,[20] but found that people from minority groups should resolve their religious conflicts among themselves and with the advice of *their* God, not *our* judicial system.

This case is the story of Sam and Manira.[21] They were

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[18] *See* WILLA CATHER, THE PROFESSOR'S HOUSE 247 (Knopf 1925), *available at* http://www.hti.umich.edu/cgi/p/pd-modeng/pd-modeng-idx?type=header&byte=8337423.

[19] [1999] 168 D.L.R. (4th) 503 (Ont. Gen. Div.).

[20] Following release of his judgment, Judge Rutherford acknowledged the significance of the case for the Muslim community. In *Kaddoura v. Hammoud*, (1999) O.J. No. 172, a judgment concerning costs, he stated:

> The issue of the Mahr obligation was an interesting one and said by counsel on both sides to be of importance broadly within the Muslim communities in this country. I would estimate that about 75% of the trial itself related to the issue. It was an important issue to litigate, going beyond the interests of the parties themselves.

Id.

[21] *Kaddoura*, [1999] 168 D.L.R. (4th) 503 (Ont. Gen. Div.)

nineteen and twenty years old respectively when they became engaged.[22] They had been dating, secretly, because this is not permitted for young Muslim men and women.[23] At the wedding, Sam, Manira and their official witnesses signed both the documents necessary pursuant to the province of Ontario's requirements[24] and a Muslim marriage certificate, written in Arabic.[25] The parties were married only eighteen months. Their relationship was stormy, and Manira moved back to her parents' home several times.[26] Shortly after the last incident, Sam served her with a divorce petition. Judgment for divorce was granted.[27] In Manira's counter-petition, she sought damages of $30,000 to which she claimed she was entitled as payment of the *Mahr*.[28] Sam had paid $5,000 before the marriage and deferred payment of an additional $30,000.[29] In his testimony, Sam said he knew that $30,000 was the amount of the deferred portion of the *Mahr*, but he said he never understood that he would be compelled to pay it.[30] Sam testified that his sister had divorced and that she was unable to collect the deferred portion of the *Mahr* that was due to her.[31]

According to Section 52(1) of Ontario's Family Law Act, a man and a woman who are married to each other or intend to marry may enter into an agreement on their respective rights and obligations during the marriage or on separation.[32] For an agreement to be enforced, the first issue to be determined by a court is whether there is an agreement of a binding nature

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[22] *Id.* at ¶ 11.

[23] *Id.*

[24] Family Law Act, R.S.O., ch. F-3 § 28(1) (2) (1990) (Can.).

[25] *Kaddoura*, [1999] 168 D.L.R. (4th) 503, at ¶ 18.

[26] *Id.* at ¶¶ 1-5.

[27] *Id.* at ¶ 6.

[28] *Id.*

[29] *Id.* at ¶15.

[30] *Id.* at ¶ 16.

[31] *Id.*

[32] Family Law Act, R.S.O., ch. F-3 (1990), amended by ch. 32, § 12, 1992 S.O.; ch. 27, sched., 1993 S.O.; ch. 25, sched. E, § 1, 1997 S.O.; ch. 26, § 102 1997 S.O.; ch. 6, § 25, 1999 S.O (Can.).

between the parties. A court will consider whether they freely and willingly entered into the agreement.[33] In *Kaddoura v. Hammoud*, both Sam and Manira acknowledged the agreement as to the *Mahr*.[34] Further, no evidence showed that the provision requiring the payment of $30,000 was vague or that the agreement was signed under circumstances suggestive of inequality, improvidence, or duress. Despite the obligatory nature of the *Mahr* under Islamic principles, however, the judge held that the agreement was not enforceable by Canadian courts.

In resolving the issue, the judge considered cultural evidence in order to define the content of Muslim marriages solemnized in Canada.[35] Two experts, the imam of a mosque[36] in Ottawa, and the director of the Institute of Islamic Learning in Ajax, Ontario, also an imam and scholar of Islam, expounded in their testimony on the nature of the *Mahr*.[37] According to evidence relied upon by the court, the *Mahr* consists of "a gift or contribution made by the husband-to-be to his wife-to-be, for her exclusive property. It is not, however, a gift in the sense that a gift is given by the grace of the giver, *but in fact* 'Mahr' *is obligatory and the wife-to-be receives it as of right.*"[38] David Pearl and Werner Menski, in *Muslim Family Law*, confirm that the *Mahr* is a right of the wife: "More commonly some of the dower (*Mahr*), if not the entire amount, will be deferred. It is then payable on the dissolution of the marriage by divorce or death, or on the happening of a specified event."[39] Pearl and Menski agree that

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[33] *See generally* Belanger v. Belanger, (1995) O.J. No. 1195; Griffioen v. Bickley (1993) O.J. No. 3027.

[34] *Kaddoura*, [1999] 168 D.L.R. (4th) 503, at ¶¶ 16, 20.

[35] *Id.* at ¶14.

[36] The "imam" is the leader of congregational prayer performed in the mosque. *See generally Encyclopaedia of the Orient*, *at* http://www.lexicorient.com/e.o/index.htm. Any Muslim trained in the prayer can be the imam. *Id.* In general, the honor is given to the most respected person in the assembly. *Id.* In modern times, mosques have elevated the imam into an employed leader, religious adviser and spokesperson for the congregation. *Id.*

[37] *Kaddoura*, [1999] 168 D.L.R. (4th) 503, at ¶ 14.

[38] *Id.* at ¶13 (emphasis added).

[39] DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 180

only in two situations will the wife lose her entitlement to the *Mahr*—"[f]irst, if the marriage is dissolved by the husband before consummation, in various situations akin to annulment [and,] [s]econdly, if the marriage is dissolved by an action of the wife before consummation. . . ."[40]

Instead of considering this context, however, the court kept its distance from any doctrinal investigation of the *Mahr*:

> Both experts said that while *Mahr* was in the nature of a right held by a Muslim wife, she could, by certain conduct or in certain circumstances, disentitle herself to it. While Dr. Gamal was less emphatic on the point than was Mufti Khan, the latter advised that any dispute over the obligation of the *Mahr* was a matter to be determined by religious authorities. In any event, both experts agreed that any such dispute was to be resolved according to Islamic religious principles.[41]

At the same time, the Ontario Court of Justice specifically found the *Mahr* to be obligatory, that it is a right granted to the wife and a component of Islamic marriage. On the evidence put before it, the court was satisfied that the agreement was freely made. The judge's reasoning reveals that it is the religious dimension of the *Mahr* that rendered the agreement unenforceable:

> While not, perhaps, an ideal comparison, I cannot help but think that the obligation of the *Mahr* is as unsuitable for adjudication in the civil courts as is an obligation in a

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(London: Sweet & Maxwell, 1998). Jamal J. Nasir, in his book THE ISLAMIC LAW OF PERSONAL STATUS 98 (London: Graham & Trotman, 1990), is of the same opinion.

[40] Pearl & Menski, *supra* note 39, at 180. I note in addition that a *khul* divorce is one in which a wife sues for divorce even though the husband has not misbehaved. If a wife simply wishes to end the marriage, the husband may agree to grant her the divorce if she returns all or part of the *Mahr*. *See* Azizah Y. al-Hibri, *Muslim Marriage Contract in American Courts*, Paper presented to the Minaret of Freedom Banquet (May 20, 2000), *available at* http://www.minaret.org/azizah.htm [hereinafter al-Hibri, *Muslim Marriage Contract*].

[41] *Kaddoura*, [1999] 168 D.L.R. (4th) 503, at ¶14.

> Christian religious marriage, such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live, or to raise children according to specified religious doctrine. Many such promises go well beyond the basic legal commitment to marriage required by our civil law, and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.[42]

Tellingly, and erroneously, the judge imports a Christian, majoritarian comparison with the Islamic institution of the *Mahr*. He overlooks the fact that, whereas Christian vows constitute moral obligations that are indefinite insofar as they can only bind the conscience, the *Mahr* is a financial obligation. The court's message is that a valid agreement between two Muslim parties is unenforceable, not for vagueness like the Christian examples deemed analogous, but because of the agreement's religious *purpose*.

Closer scrutiny demonstrates that the "morality" objection is of scant substance. Exclusion of Muslim marriage contracts from the scope of judicial power is, according to the subtext of the decision, based on apparent cultural anxiety. The judge felt that he had no authority, as a non-Islamic adjudicator, to speak or write about the Other:

> I don't think, even if I had received clear and complete Islamic doctrine from these experts, that I could, as if applying foreign law, apply such religious doctrine to a civil resolution of this dispute. . . . Mufti Khan in particular, said that only an Islamic religious authority could resolve such a dispute.[43]

Moreover, the court feared that venturing down a path of religious doctrine would involve untold dangers:

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[42] *Id.* at ¶ 25.

[43] *Id.* at ¶¶ 27, 28.

> In my view, to determine what the rights and obligations of Sam and Manira are in relation to the undertaking of *Mahr* in their Islamic marriage ceremony would necessarily lead the Court *into the "religious thicket," a place that the courts cannot safely and should not go.*[44]

By holding a valid agreement made between Muslim people unenforceable because it is based on Islamic rules, the court valued and enforced homogeneity. Some people are allowed to participate in the construction of Canadian identity; some are not. Some cultures' institutions are identified with universality; some are not. Iris Marion Young has powerfully argued this point:

> The dominant group reinforces its position by bringing the other groups under the measure of the dominant norms. . . . Since only the dominant group's cultural expressions receive wide dissemination, their [sic] cultural expressions become the normal, or the universal, and thereby the unremarkable. Given the normality of its own cultural expressions and identity, the dominant group constructs the differences which some groups exhibit as lack and negation.[45]

In the colonial gaze of the court, Manira sees a reflection of herself as a Muslim woman who is limited to beseeching her own people for recognition. The distinctive character of the Muslim community is threatening to the court. The judge refused to endorse difference, for to do so would lead him into the "religious thicket" where majoritarian norms are unknown and without currency, where familiar rules do not function as usual, and where law has to step outside its comfortable doctrinal reference points. Not safe, said the court; therefore, not good and not enforceable. By abstaining from the use of its powers to compel enforcement in this case, the court compels minorities to conform to the power structure of the culturally-privileged majority. The norm is vindicated.

Had Manira and Sam made the same agreement in the absence of the disturbing Muslim ethos, the court would likely

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[44] *Id.* at ¶ 28 (emphasis added).

[45] Young, *supra* note 15, at 59.

have confirmed the will of the parties. Indeed, in his judgment for costs of the action, Judge Rutherford acknowledged the unfairness of such legal reasoning, that is *his* legal reasoning:

> While I drew a boundary between a debt enforceable in civil law and the obligation of the *Mahr*, *it nonetheless seems to me somewhat offensive and dishonourable* on the part of Mr. Kaddoura, to knowingly participate in the wedding customs and practices of his Muslim community, including the *Mahr* which he clearly knew included a "written" or deferred amount of $30,000, and then eschew those customs and practices when they worked to his financial detriment.[46]

These equities, however, did not affect the legal outcome; thus, in Canada payment of the *Mahr* lacks backing from the courts.

B. Gazing Across the Border: The American Experience with the Mahr

The judge in *Kaddoura v. Hammoud* treated the legal question of enforcing the *Mahr* as one of first impression. Had he looked at American case law, however, precedents would have presented themselves. Indeed, one trial court decision in New York reached the opposite result in precisely the same circumstances, using an identical universalist approach. In *Aziz v. Aziz*, a 1985 decision, the Supreme Court of New York held that "[t]he document at issue conforms to the requirements of the General Obligations Law . . . and its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony."[47] Although the *Mahr* debt was paid to the Muslim wife in this case, by using the word "conforms" the court failed to be culturally sensitive. It asked from a majoritarian perspective whether the Islamic

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[46] *Kaddoura*, (1999) O.J. No. 172, at ¶ 6 (emphasis added) (regarding costs, $1,500 was awarded to Sam).

[47] 488 N.Y.S.2d 123, 124 (N.Y. Sup. Ct. 1985); *see also* N.Y. GEN. OBLIG. LAW § 5-701(a)(3) (requiring that agreements in consideration of marriage be made in writing).

marriage contract fit into a legal category. The judge made no attempt to gain an internal appreciation of the role of the *Mahr* in a Muslim couple's wedding and subsequent relationship. Interestingly, the judgment in *Aziz* was based on a 1983 decision of the Court of Appeals, the highest state court of New York, concerning a Jewish marriage contract, or *ketubah*.[48] In this case, *Avitzur v. Avitzur*, four of seven judges applied what they called "*neutral* principles of contract law"[49] to avoid the religious thicket feared by the three dissenters, who refused to engage questions that, in their view, implicated "Jewish religious law and tradition."[50]

The insular perspective of the New York courts can just as easily lead to a different conclusion, as was the case in 1988 when a California appellate court decided *In re Marriage of Dajani*.[51] This decision attempted to fit the *Mahr* into the legal category of prenuptial agreements and found those that "facilitate divorce or separation by providing for a settlement only in the event of such an occurrence . . . void as against public policy."[52]

Whereas the classification approach used by the *Kaddoura* and *Aziz* courts to refer to a Muslim practice using North American legal categories was fundamentally universalist, other courts have demonstrated a strong cultural relativist tendency. This relativist method is based on the idea that there is a single truth to be found in Islamic law; the approach mirrors the universalists' quest for absolute verities in Western legal doctrine. For instance, the trial judge in *Dajani* heard expert testimony and, in finding against the woman's claim, held that "the law in existence would be that of the Jordanian or Moslem law, and . . . if the wife initiates a termination of the

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[48] *Aziz*, 488 N.Y.S.2d at 124. It is noteworthy that the California case that I discuss next, *In re* Dajani, 251 Cal. Rptr. 871 (Cal. Ct. App. 1988), also drew on a precedent addressing a *ketubah* dispute. *See In re* Marriage of Noghrey, 215 Cal. Rptr. 153, 155 n.2 (Cal. Ct. App. 1985).

[49] 58 N.Y.2d 108, 115 (1983) (emphasis added).

[50] *Id.* at 119.

[51] 251 Cal. Rptr. 871 (Cal. Ct. App. 1988).

[52] *Id.* at 872 (quoting *In re* Marriage of Higgason, 516 P.2d 289, 295 (Cal. 1973)).

relationship, she forgoes the dowry and common sense and wisdom of Mohamed would dictate that she forgo the dowry."[53]

Another example of a court adopting the relativist approach can be found in *Akileh v. Elchahal*, a Florida case in which the judge, as noted on appeal, found that the *sadaq* (equivalent to a *Mahr*) "was meant to protect the wife from an unwanted divorce. As such, the trial court would not order the husband to pay the wife the postponed *sadaq* since the wife was 'the one who chose to pursue the divorce.'"[54] This line of reasoning comports with the *khul* form of divorce, in which "the wife tells the husband 'I want to leave you; take your *mahr* and go.'"[55] But the judge ignored the principle of *darar* (meaning cruelty or harm):

> There is an exception to the rule; a woman can seek judicial divorce for harm . . . without losing her delayed *mahr*. The husband need not physically torture her; under Jordanian law, under Kuwaiti law, just verbal abuse is sufficient. . . . In this case the husband transmitted venereal disease to the woman, and therefore the harm was clearly established.[56]

Even though the Florida Court of Appeal reversed the trial judgment awarding the female claimant $50,000, the court's reasoning contained a misleading blend of universalism and cultural relativism. Ostensibly relying on *Aziz* and neutral contract law principles (but omitting the fact that in *Aziz* the wife was awarded a divorce decree based on constructive abandonment), the court nonetheless strayed from the universalist course and ventured into the interpretation of Islamic law. It was presented with the following contradictory evidence:

> At trial four witnesses testified as to the meaning of the Islamic [sic] word "sadaq." The wife's Islamic expert, Mazi Najjar, testified that generally a *sadaq* is similar to the concept of a dowry. He stated that only the wife could waive her right to receive the postponed portion of the

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[53] *Id.*

[54] 666 So. 2d 246, 248 (Fla. Dist. Ct. App. 1996).

[55] *See* al-Hibri, *Muslim Marriage Contract*, *supra* note 40, at para. 20.

[56] Al-Hibri, *Muslim Marriage Contract*, *supra* note 40, at para. 14.

sadaq. Najjar said that the wife's right to receive the *sadaq* was not negated if the wife filed for divorce.

The wife testified that a wife's right to receive the postponed portion of the *sadaq* was absolute and not affected by the cause of a divorce. The wife stated that the exception was that a wife would forfeit the dowry if she cheated on her husband. The wife was unaware of any other instances in which the *sadaq* would be forfeited. Raju Akileh, the wife's father, also testified that the postponed portion of the *sadaq* is an absolute right of a wife to request from the husband whenever she wished and especially in the event of divorce.

The husband testified that he believed the postponed portion of the *sadaq* was forfeited if the wife chose to divorce her husband. The husband's understanding of the *sadaq* stemmed from his sister's experience. His sister had previously sought a divorce and then pursued the postponed *sadaq*. An Islamic court ruled that she was not entitled to receive the *sadaq* since she had wanted the divorce. However, the husband testified that a woman seeking a divorce is entitled to her *sadaq* if she is abused. The husband admitted that he had never discussed the meaning of *sadaq* with the wife or her father.[57]

The court, while basing its decision on principles of contract law, showed a disposition to believe the testimony of Ms. Akileh's side, stating that "[a]t no time did the husband make known his *unique* understanding of a *sadaq* either during his negotiations with the wife's father or prior to signing the certificate of marriage."[58] Ironically, even the husband's definition contained the very principle of *darar* that could have decided the case against him.

The various incompatible interpretations of the *sadaq* in this

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[57] *Akileh*, 666 So. 2d at 247-48 (emphasis added). I note a parallel to *Kaddoura*, where Sam testified that his sister had been divorced and was unable to collect the deferred portion of the *Mahr* that was due to her. *See Kaddoura*, [1999] 168 D.L.R. (4th) 503, at ¶16.

[58] *Akileh*, 666 So. 2d at 249 (emphasis added).

Florida dispute demonstrate the dangers involved when courts attempt to establish conclusive tenets of Islamic law. Regarding a case in Virginia, Azizah al-Hibri of the University of Richmond School of Law reported that:

> On one occasion a well-known Islamic scholar said to me, "*Mahr* is the bride price." This is abhorrent. It is my suspicion that it is such testimony that [a Virginia judge] heard in his court that led him to say "slavery is over in the U.S., if Islamic marriage law says women are sold into marriage, then we will not enforce it in this country."[59]

Professor al-Hibri is wary of expert testimony, which was also present in the Ontario judgment in *Kaddoura*:

> Many Muslim men, whether imams of mosques or professors of religion, are not sufficiently familiar with Islamic law. Often, they confuse their cultural beliefs and practices with Islam itself. An American judge has no way of discerning the difference in the absence of more reliable sources of information. If I am a non-Muslim American judge and a Muslim expert witness, a Muslim professor of Islam (how more reliable can an expert witness be?) or the imam of a masjid [mosque] walks into my court, then I am inclined to believe that I am going to get the real story. But that is not always the case.[60]

A California court recently added the following caution:

> [E]ven the term "Islamic law" is relatively uncertain. There are at least four schools of interpretation of Islamic law: the Shafi'i, Hanafi, Maliki, and Hanbali. . . . The legal system in various Islamic countries will often be influenced by one school or the other. . . . Egypt, for example, has been influenced by both the Hanafi and Maliki schools. . . . Indeed, one commentator has observed that England has rejected any attempt to give effect to Islamic "personal law" because of the varieties

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[59] Al-Hibri, *Muslim Marriage Contract*, *supra* note 40, at para. 17.

[60] Al-Hibri, *Muslim Marriage Contract*, *supra* note 40, at para. 17.

of competing schools within Islam.[61]

The monolithic vision of Islamic law that most judges reveal is part of the Orientalist fallacy. As Edward Said has aptly stated: "'We' are this, 'they' are that. Which Arab, which Islam, when, how, according to what test: these appear to be irrelevant distinctions."[62]

Both universalist and cultural relativist approaches engage in an overly narrow exercise of the judicial role. The universalist makes no effort to go beyond the familiar legal categories of contract or divorce law. The cultural relativist abdicates the responsibility of arbitrating legal disputes, substituting the opinion of a male imam or a probably male professor. Irony lies in relativism's application of a single perspective, which is elevated uncritically and given universal application. Dianne Otto has appositely described a dual task to expose "the cultural allegiances and imperialist potential of the universalist arguments, [and to bring] to light the narrowness of the diversity promoted by the cultural relativist position."[63]

I propose a third method, what I call the functional approach to minority cultures' interactions with the majoritarian legal system. This approach aims to transcend the impasse between universalism and cultural relativism, a struggle that can disempower those who are intersectionally marginalized in both hierarchies:

> In turning away from the discourse and images of self as the stereotyped Muslim woman, individual women turn toward either the colonizer/West or Islam for affirmation. Instead of affirmation, however, they find devaluations and apprehension in the former (Orientalism) and mechanisms for their control in the latter (Islamism).[64]

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[61] *In re* Marriage of Shaban, 105 Cal. Rptr. 2d 863, 869 n.4 (2001). I am much obliged to Ann Laquer Estin for pointing out this case.

[62] SAID, *supra* note 2, at 237.

[63] Dianne Otto, *Rethinking the Universality of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 38 (1997).

[64] SHAHNAZ KHAN, MUSLIM WOMEN: CRAFTING A NORTH AMERICAN IDENTITY 3 (University Press of Florida 2000). For a discussion of "the

Functionalism has its origins in legal anthropology, particularly in the work of Bronislaw Malinowski.[65] As described by Annelise Riles:

> Malinowski's empiricism, defined in opposition to what Malinowski saw as an earlier generation's conjecture about historical evolutionary processes, emphasized a kind of relational reasoning: "The explanations here given consisted in an analysis of certain facts into simpler elements and of tracing the relations between these elements." The subject matter of Malinowski's discovery, then, was the cultural context of law rather than a set of rules. . . .[66]

In the spirit of the functional approach, we should encourage cultural repositioning and enlightened engagement in courtrooms. After they find threshold conformity to legally recognized contractual forms (the absence of problems such as vagueness and duress), judges confronted with the issue of *Mahr* enforcement should address the central question of the *Mahr*'s role in a Muslim marriage. This involves a more complex inquiry than simply asking what the result of a dispute would be under Islamic law.[67]

Functionalist judges should take notice of social context and cultural diversity, "realiz[ing] that they can only discharge their democratic responsibilities to a nation that is culturally rich and

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paradox of multicultural vulnerability" describing the effect of law on intragroup power relations for groups such as Muslim women, *see* Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 386 (2000).

[65] *See generally* ADAM KUPER, ANTHROPOLOGY AND ANTHROPOLOGISTS: THE MODERN BRITISH SCHOOL 1-35 (Routledge & Kegan Paul 1983) (devoting a chapter to the works of Malinowski).

[66] Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597, 603 (1994) (quoting BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 127-28 (1926)).

[67] We have seen the fallacy of a unitary concept of Islamic law due to the fact that different Islamic countries follow distinct interpretations of legal issues such as *Mahr* payment. *See supra* note 61 and accompanying text.

ideologically diverse by demonstrating that they have considered a full range of perspectives and resources in arriving at their results."[68] This mode of dispute resolution is an extremely promising candidate to be a guiding principle for adjudication in multicultural societies. Professor Riles notes the following:

> The legal text, rule, or decision . . . cannot be understood without considering the totality of cultural factors that give it meaning. . . . "The various official discourses of law deal primarily with rules whose application transcends, at least in theory, differences in personal and social status. In striking contrast to this focus on legal rules, lay litigants speak often about personal values, social relations, and broad conceptions of fairness and equity in seeking resolution of their difficulties through legal channels."[69]

Functionalism prevents the privileging of legal form over cultural context.

A judge could look behind the religious nature of the *Mahr* to ask what its purpose is in a marriage, and what values, such as

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[68] Shalin M. Sugunasiri, *Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability*, 22 DALHOUSIE L.J. 126, 174 (1999).

[69] Riles, *supra* note 66, at 636 (quoting JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 1 (1990)); *see also* Charles R. Lawrence, *The Word and the River: Pedagogy as Scholarship and Struggle*, 65 S. CAL. L. REV. 2231, 2278-79 (1992):

> Litigation is highly formalized storytelling. . . . But the law's tradition of storytelling is very different from the African tradition. Where our tradition values rich contextual detail, the law excludes large parts of the story as irrelevant. Where we seek to convey the full range and depth of feeling, the law asks us to disregard emotions. Where we celebrate the specific and the personal, the law tells stories about disembodied "reasonable men." . . . We remain invisible and unheard in the literature that is the evidentiary database for legal discourse, and when we are seen, in stories told by others, our images are severely distorted by the lenses of fear, bias, and misunderstanding.

Id.

trust, respect, and financial independence are promoted by its enforcement.[70] This would shed considerable light on the question of enforceability as a matter of public policy. Islamic law experts could be helpful in describing the institution and its traditions, but the voice of the Muslim woman would become indispensable, rather than silenced. Only she can contextualize the role of the *Mahr* from a female perspective and make vivid the benefits and burdens of her Islamic marriage. The functional approach has the advantage of taking an internal vantage point on cultural practices and investigating their contours, rather than focusing on their difference and lack of familiarity. This type of analysis invites resistance to the imposition of majoritarian norms.

Part II will continue my examination of the dangers inherent in applying the dominant society's values to a cultural minority's traditions. In this case study of Islamic temporary marriage or *muta*, law constructs and reinforces notions of the "normal family."[71]

II. *Y.J. v. N.J.*: THE BEST INTERESTS OF WHOSE CHILD?

> *White norms prevail, but in an unspoken form. Instead, they are characterized as positive social norms thereby legitimising hegemony.*[72]

The "best interests of the child" is the standard for awarding

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[70] *See* al-Hibri, *Muslim Marriage Contract*, *supra* note 40, at para. 28 (describing "two basic Islamic legal concepts[:] a married Muslim woman is legally entitled to her financial independence [and] the husband is obligated to support his wife."). There will be some components of Islamic law that courts are reluctant to enforce based on public policy concerns. *See* Amin v. Bakhaty, 798 So. 2d 75, 83-85 (La. 2001) (reviewing American cases that have refused on public policy grounds to recognize Islamic family law rulings on child custody).

[71] For elaboration of this concept, *see* Lori G. Beaman, *Sexual Orientation and Legal Discourse: Legal Constructions of the "Normal" Family*, 14 CAN. J.L. & SOC'Y 173 (1999).

[72] Carlos Villarreal, *Culture in Lawmaking: A Chicago Perspective*, 24 U.C. DAVIS L. REV. 1193, 1222 (1991).

custody in Canada[73] and the United States. In an attempt to repair the world of children in custody determinations, courts have judicial discretion to predict and to determine what would be *the* best possible arrangement for a child. Yet because of the broad discretion inherent in the standard, the very use of the best interests test sometimes produces results that ignore notions of identity, religion, belonging, and group affiliation. These incomplete decisions beg the question of whose perspective is taken when we attempt to ascertain the best interests to be served.

Y.J. v. N.J.[74] was a Canadian decision determining the custody of S, a five-year old Muslim girl. The case demonstrates the problems inherent in the deployment of the purportedly objective best interests test. By insisting on the stability of the custodial family, the court refused to engage the unusual circumstances that gave rise to the dispute: the fact that a Canadian child was born as the result of a Muslim man's simultaneous second marriage. By emphasizing the best interests of the child without giving sufficient attention to the religious and cultural context in which she was born, the Ontario Court of Justice failed to incorporate significant elements in determining the "harm" at issue.

A. Muta: *Her Story*

Y.J. ("Y") was born in Uganda and came to Canada when she was five years old.[75] She was raised in the Shia Muslim tradition in Edmonton, Alberta.[76] In 1985, when she was eighteen, she fell in love with N.J. ("N"), who was then thirty-five years old and had been married to S.J. since 1979.[77] N, also

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[73] *See* Children's Law Reform Act, R.S.O., ch. C-12, § 24 (1990) (Can.).

[74] (1994) O.J. No. 2359.

[75] *Id.* at ¶ 3.

[76] *Id.*

[77] *Id.* at ¶¶ 1, 3.

a Shia Muslim, was born in Zaire and came to Canada in 1974.[78] He and Y entered into several temporary marriages, called *muta*[79] in the Islamic law recognized by the Shia tradition.[80] During this time they lived and traveled together.[81] S.J. was aware of her husband's first temporary marriage to Y in 1985.[82] At the time of the second temporary marriage in 1988, while Y was pregnant with their child, N put an end to the *muta*.[83] Within two weeks of S's birth, Y was ordered out of her uncle's home because she had disgraced her relatives.[84] This was the first time that a child had been born of a temporary marriage into Y's family.[85]

On July 21, 1989, Y signed an agreement transferring custody of S to her father, and on July 24, 1989, Mr. Justice Roslak in the Court of Queens Bench of Alberta issued an order granting N exclusive custody of the child.[86] Y and N, however, had entered into a secret collateral oral agreement, providing that he would have custody of S for a period of only three years and that S would then be returned to her mother.[87] In his testimony, N acknowledged this arrangement.[88] Meanwhile, S became part of N's family and was raised as one of their own.[89] She was unaware that S.J. was not her biological mother or that N's other children were her half brothers.[90] Even though Y did not see her

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[78] *Id.* at ¶ 11.

[79] *Muta* is a Shia institution of temporary marriage allowing a Muslim man to marry a woman for a fixed term. Sunni Muslims consider *muta* to be irregular. The essential characteristics of the *muta* marriage are specification of a dower and a finite term of cohabitation. The husband retains the option to cancel at any time by "making a gift of the term." *See* Murata, *supra* note 10.

[80] *Y.J.*, (1994) O.J. No. 2359, at ¶ 2.

[81] *Id.* at ¶ 3

[82] *Id.* at ¶ 13.

[83] *Id.* at ¶ 3.

[84] *Id.* at ¶ 5.

[85] *Id.*

[86] *Id.* at ¶¶ 6, 17.

[87] *Id.* at ¶ 6.

[88] *Id.* at ¶ 7.

[89] *Id.* at ¶¶ 1, 7.

[90] *Id.* at ¶ 1.

daughter during this time, she obtained a private mailbox and N forwarded her video and audio tapes of S.[91] Also, when his wife was not at home, he would let Y talk to S on the telephone as if she were her aunt.[92]

On June 3, 1993, Y obtained an *ex parte* order in the Court of Queens Bench of Alberta granting her reasonable access to S subject to a trial in the province of Ontario.[93] In the late summer of 1993, she came to Toronto and entered into a third temporary marriage with N.[94] She also requested a visit with her daughter, but when N, with S.J. present in the next room, told her that it was only possible for one day, she protested.[95] Because N and S.J. threatened to take the child to Tanzania, their home country, Y brought an application for custody under the Children's Law Reform Act[96] on September 20, 1993.[97] In her testimony, Y specified that she was only asking for access to S as her biological mother and did not want to interfere with N and S.J.'s parenting.[98] If she were to claim custody, it would be because N and S.J. wanted to take S to Africa, circumstances under which Y would perhaps never see her daughter again.[99]

In the fall of 1993, consideration was given to returning S to her mother.[100] The respondents arranged for S.J., her sister and S to visit Edmonton for this purpose.[101] During their stay, Y visited with S on seven to nine different occasions, some in S.J.'s presence, others not. Y stated that S had no hesitation in going with her and enjoyed her visits, particularly the five hours she was with her while they watched a New Year's parade.[102] S.J.,

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[91] *Id.* at ¶ 7.
[92] *Id.*
[93] *Id.*
[94] *Id.* at ¶ 8.
[95] *Id.*
[96] R.S.O., ch. C-12, § 24 (1990) (Can.).
[97] *Y.J.*, (1994) O.J. No. 2359, at ¶ 8.
[98] *Id.* at ¶ 10.
[99] *Id.*
[100] *Id.* at ¶ 9.
[101] *Id.*
[102] *Id.*

according to Y's testimony, was very hostile towards her and told her that sharing S was not an option.[103] S.J. announced that either Y could take S or else she and N would return to Africa with S.[104] The custodial transfer never took place since N testified that he and his wife could not part with S.[105]

On July 11, 1994, the Ontario Court of Justice dismissed Y's application for custody. It held that the respondents were very competent parents and that any intrusion, particularly the introduction of access into a stable family, would create a potential for harm to S.[106] In the official text of the decision, the court stated that the situation at bar was rarely encountered in custody and access cases because Y and S had not developed any relationship.[107] The subtext, however, has a different flavor. My following analysis illustrates the underlying assumptions upon which the *Y.J. v. N.J.* decision was framed, examined and resolved. Moreover, I scrutinize legal notions such as "best interests of the child" and "harm" as they were applied in the unfamiliar context of a *muta* marriage.

B. The Best Interests of the Child: The Nuclear Family as Unstated Norm

Best Interests *employs a particular, narrow and static image of the child.*[108]

Section 24(1) of the Children's Law Reform Act[109] requires that the merits of an application for custody of a child be

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[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at ¶ 14.

[107] *Id.* at ¶ 16.

[108] Michael Freeman, *Is* The Best Interests of the Child *in the Best Interest of the Child?*, 11 INT'L J.L. POL'Y & FAM. 360, 366 (1997).

[109] R.S.O., ch. C-12, § 24(1) (1990) (Can.). "The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child." *Id.*

determined on the basis of the best interests of the child. In a given case, a court analyzes what best promotes the integrity of the child and what constitutes harm for the purposes of limiting or denying custody or access. In so doing, the court considers all the child's needs and circumstances according to Section 24(2) of the Children's Law Reform Act,[110] including such matters as blood relationships, stability of the family unit, parental abilities, and the child's views. The approach is one of case-by-case decision-making, which has the advantage of acknowledging the uniqueness of each child,[111] but has the disadvantage of being

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[110] *Id.* at § 24(2):

> In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including,
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> (a) the love, affection and emotional ties between the child and,
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons involved in the care and upbringing of the child;
>
> (b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;
>
> (c) the length of time the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
>
> (e) any plans proposed for the care and upbringing of the child;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
>
> (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Id.

[111] In the Supreme Court of Canada's *Young v. Young* decision, [1993] 4 S.C.R. 3, 117, Madam Justice McLachlin (now Chief Justice) stated:

> It has been left to the judge to decide what is in the "best interests of the child," by reference to the "condition, means, needs and other

vague:

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic productivity of the child when he [or she] grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? These questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that should inform the choice of what is best for the child?[112]

While in theory the best interests test offers flexibility to include a child's cultural and religious background, its application in judicial decisions reflects and perpetuates stereotypes of the "normal" family. Moreover, the indeterminate nature of the best interests standard has been criticized for hiding more than it reveals. Judges have so much discretion that they make decisions based on personal biases and unsupported assumptions, thereby imposing mainstream cultural norms and values that may be inconsistent with those of a minority group.[113]

> circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what she or he ought to do.

Id.

[112] Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 L. & CONTEMP. PROBS. 226, 260 (1975).

[113] For a discussion of the best interests of the child principle, *see* Nicholas Bala, *The Best Interests of the Child in the Post-Modern Era: A Central but Paradoxical Concept*, 6(2) SUP. CT. L. REV. 453 (1995);

John T. Syrtash has pointedly asked:

> Is the protean nature of the "best interest of the child" test an invitation for racism or is its vagueness a good thing, a means to invite creative responses to intractable cultural conflicts? Most importantly, to what extent does a judge impose his [or her] own cultural values when assessing the best interest of a child in any custody or child protection proceeding that appears before him [or her]?[114]

A survey of jurisprudence by Nicholas Bala and Susan Miklas revealed that the biases and values of individual judges play a crucial role in determining the "best interests of the child" in custody and access disputes.[115] As Nicholas Bala remarks:

> Even if reliable prediction were possible, the outcome chosen inevitably is a reflection of the personal values, judgements and biases of decision makers, and of the social class, culture, and institution of which they are members. Given the absence of professional and societal consensus on what is "best" for a particular child, best interests means ultimately accepting the decision-maker's personal philosophy, beliefs, and opinions about children, families and child rearing.[116]

Further, other scholars argue that this test has been implemented in a discriminatory fashion; individuals who depart from a white, middle-class, heterosexual normative model have been treated as

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Freeman, *supra* note 108; Mnookin, *supra* note 112; Bernd Walter et al., *"Best Interests" in Child Protection Proceedings: Implications and Alternatives*, 12 CAN. J. FAM. L. 367 (1995). For a critique of the appropriateness of the test, *see* Karen M. Munro, *The Incapability of Rights Analysis in Post-Divorce Child Custody Decision Making,* 30 ALTA. L. REV. 852 (1992); Stephen J. Toope, *Riding the Fences: Courts, Charter of Rights and Family Law*, 9 CAN. J. FAM. L. 55, 67 (1991).

[114] JOHN T. SYRTASH, RELIGION AND CULTURE IN CANADIAN FAMILY LAW 2-3 (Butterworths, 1992).

[115] Nicholas Bala & Susan Miklas, *Re-thinking Decisions about Children: Is the "Best Interests" of the Child Approach Really in the Best Interests of Children?*, Paper presented at the National Family Law Program in Charlottetown, Canada, June 5, 1992.

[116] Walter et al., *supra* note 113, at 380.

"deviant" by legal decision-makers.[117]

Y.J. v. N.J. perpetuates notions of the "normal" family that have become legitimized through biased legal discourse. In resolving the application for custody, the Ontario Court of Justice relied entirely on an assessment report, prepared pursuant to Section 30 of the Children's Law Reform Act,[118] by Dr. Graham Berman, a child psychiatrist at the Hospital for Sick Children in Toronto.[119] In his decision, the judge chose to rely on some aspects of the assessment report rather than others. The chosen excerpts defined and constructed notions of normalcy and the child's best interests.[120] In these excerpts, Dr. Berman did not take into account or even mention that he was describing a Muslim girl born in the particular context of an extended family.[121] The significance of cultural and religious differences

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[117] *See* Katherine Arnup, *Mothers Just Like Others: Lesbians, Divorce and Child Custody in Canada*, 3(1) CAN. J. WOMEN & L. 18 (1989); Marlee Kline, *Child Welfare Law, "Best Interests of the Child" Ideology and First Nations*, 30 OSGOODE HALL L.J. 375 (1992); Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women*, 18 QUEEN'S L.J. 306 (1993); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Costs of Discretion*, 29 J. FAM. L. 51 (1990-91). One jurist came to the conclusion that the application of the best interests of the child test has led to the cultural genocide of Manitoba's aboriginal population. *See* Associate Chief Judge E.C. Kimelman, No Quiet Place, Report of the Review Committee on Indian and Metis Adoptions and Placements, Manitoba Community Service (1985).

[118] Children's Law Reform Act, R.S.O., ch. C-12, § 30(1) (1990) (Can.) (stating that "[th]e court before which an application is brought in respect to custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child").

[119] Y.J. v. N.J., (1994) O.J. No. 2359, at ¶ 14.

[120] *Id.* (praising the custodial family as providing the "love and support of parents and brothers"). Drawing on the work of Carol Smart, Professor Beaman has noted: "Experts construct notions of the normal, and medical and 'psy' discourses work to cure the abnormal. Law colludes with these discourses through the use of expert testimony." Beaman, *supra* note 71, at 180.

[121] *See Y.J.*, (1994) O.J. No. 2359, at ¶ 14.

was not addressed. The best interests of the child were identified using a partial, limited lens, one suited to a gaze that illuminates some aspects of the picture while obscuring others. Only part of S's history was told.

Underpinned by the idea that the nuclear family is the *only* normative value system, Dr. Berman stated that "[p]reservation of the continuity of this family and its successful function must be the first consideration in supporting the child's interests."[122] The family in the Canadian and American collective and selective imagination is defined as the nuclear family, which is deemed a site of stability, happiness, love, and support.[123] "[I]ts power," Susan Boyd has argued, "has been, and is, very strong as a model held up to us as ideal."[124] The mythical image of the nuclear family was so strong in *Y.J. v. N.J.* that it went unmentioned—it was assumed as the unstated norm. And the norm is found unequivocally to serve the best interests of the Muslim girl, even though this specific child was *not* born in the traditional family model accepted in Canadian society and law.[125]

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[122] *Id.*

[123] For a feminist analysis of the dominant image of the heterosexual, middle class "nuclear family" in modern western societies, *see* MICHÈLE BARRETT & MARY MCINTOSH, THE ANTI-SOCIAL FAMILY (Verso 1982); Shelley A.M. Gavigan, *Law, Gender and Ideology*, *in* LEGAL THEORY MEETS LEGAL PRACTICE (A. Bayefsky ed., 1988); Shelley A.M. Gavigan, *Paradise Lost, Paradise Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement with Law*, 31 OSGOODE HALL L.J. 589 (1993). For an analysis of the ways in which the law of marriage perpetuates women's economic dependence within the family, *see* CAROL SMART, THE TIES THAT BIND: LAW, MARRIAGE AND THE REPRODUCTION OF PATRIARCHAL RELATIONS (Routledge 1984).

[124] Susan Boyd, *Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law*, 10 CAN. J. FAM. L. 79, 91 (1991).

[125] *Y.J.*, (1994) O.J. No. 2359, at ¶ 12. The court draws a distinction between "our" conception of marriage and the Islamic conception involved in the case in the following manner:

> Under Islamic law, there are said to be two types of permissive marriage: The first being a permanent marriage, as exists between the respondents, *which is the legal and traditional marriage recognized in Canadian society*. The second being a temporary marriage. A

In *Y.J. v. N.J.*, the concept of "family" contained an assumption that there is such a thing as a "true," "real," "normal" model of relationships, namely the nuclear family, rendering marginal or deviant any other family model. Thus, the importance of "the continuity of this family" in Dr. Berman's report became crucial and self-evident as a reference to the "natural/normal" way of bringing up children.[126] The young, single biological mother who is a temporary wife has no role to fulfill. In the eyes of the court, Y's intrusion would have led to the stepmother's hostility and would have caused familial instability: "The emotional meaning of such an intrusion for Mrs. J. and, perhaps, the risk to the family should there be a resurgence of the relationship between Mr. J. and Ms. J. would put the welfare of S. at risk."[127]

The court's message is that, in spite of the *different* context, or indeed because of it, the construction of the family and the determination of the best interests of the child shall remain *universal*. The decision in *Y.J. v. N.J.* represents the power of law to ignore differences and to render invisible the cultural Other. By characterizing the custody and access issue in a manner that minimizes the nature of the extended and bigamous family, the court's legal method maintained, operationalized, and serviced order. The intersection of law with purportedly objective knowledge that produces Western views of the family, denies autonomy to Muslim people in general and to Muslim women in particular, whose experiences and perspectives on the notion of family may differ.

> temporary marriage or Mutah [sic] is an oral agreement time limited and resolvable on such terms as the parties thereto themselves decide upon.

Id. (emphasis added).

[126] *Id.* at ¶ 14.

[127] *Id.*

C. Denial of Access Under Special Circumstances: The Muslim Mother as a Sexual Threat

> *Il y a nulle parité entre les deux sexes quant à la conséquence du sexe. Le mâle n'est mâle qu'en certains instants, la femelle est femelle toute sa vie ou du moins toute sa jeunesse; tout la rappelle sans cesse à son sexe.*[128]

The court's reasoning behind its conclusion that the biological mother in *Y.J. v. N.J.* should be denied access to her daughter belies the true basis of its holding. Generally, it is assumed that access[129] to the non-custodial parent is in the best interests of the child. As stated by the Supreme Court of Canada, "[a] child should be with someone who fosters the relationship between him or her and the non-custodial parent."[130] Access gives the child an opportunity to maintain or establish a full and meaningful relationship with both parents, so the rule is to allow access unless there is evidence of harm or absolutely no benefit from contact.

Increasingly, courts are willing to reintroduce a parent into a child's life after an extended absence if the parent has a genuine desire for a relationship with the child.[131] Lack of contact, in itself, is not a reason to deny access unless evidence shows that the parent would have a bad influence on the child or that he or she repudiated the relationship with the child.[132] Yet the Ontario Court of Justice in *Y.J. v. N.J.* did not even state S's right to develop a relationship with her biological mother, who had a genuine desire to contribute to the child's well-being. Rather, the

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[128] This quote, from Jean-Jacques Rousseau's *Émile, ou l'education* (1762), book 5, translates into English as follows: "There is no parity between the two sexes as to the consequence of sex. The male is only male in certain instances; the female is female all her life or at least all her youth; everything constantly reminds her of her sex."

[129] Children's Law Reform Act, R.S.O., ch. C-12, § 20 (1990) (Can.) (defining access as the right to visit with and be visited by the children).

[130] Van de Perre v. Edwards, [2001] S.C.C. 60, at ¶ 23.

[131] *See* F.(S.M.) v. M.(J.), [1997] W.D.F.L. 760 (Ont. Gen. Div.).

[132] *See* Keeping v. Pacey, [1996] W.D.F.L. 896 (Ont. Gen. Div.).

court said that because the child did not know her biological mother, no access should be granted:

> Most of the authorities counsel cited to me were cases where the child knows and has an established relationship with each parent. The court then is required to weigh and balance the competing factors or, if you will, choose between the lesser of two evils or the least detrimental of two alternatives. That is not the situation here where the child does not know and has no relationship whatsoever with her biological mother and where the granting of any access creates a real risk for the child.[133]

The judge failed to mention, however, that S had already been introduced to her biological mother on seven to nine different occasions, and that, according to Y's testimony, S highly enjoyed the time they spent together.[134] In the assessment quoted by the court, Dr. Berman acknowledged how terrible it would be for Y to have no access to her daughter: "Under most circumstances I would consider it *reasonable* to introduce a relationship with the birth mother since S's secure attachment and emotional resilience could easily accommodate it. Not to have such a relationship would also represent a tragic loss for Ms. J., who certainly deserves sympathetic consideration."[135] But for Dr. Berman, denial of access was justifiable on the basis of unreasonable *special circumstances*:

> There are, however, special circumstances which compel much caution in this case. First, the emotional security of the custodial family may be jeopardized by the presence in their lives of Ms. J. And secondly, to mandate a relationship which would interfere with the migration plans of the J. family would represent a potentially destructive impingement on their autonomy.
>
> The emotional meaning of such an intrusion for Mrs. J. and, perhaps, the risk to the family should there be a

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[133] Y.J. v. N.J., (1994) O.J. No. 2359, at ¶ 16.

[134] *Id.* at ¶ 9.

[135] *Id.* at ¶ 14.

> resurgence of the relationship between Mr. J. and Ms. J. would put the welfare of S. at risk. On the other hand, to require a relationship between Ms. J. and S., while it would be the humane decision for Ms. J., would not bring any easily predictable benefit for S., notwithstanding the goodwill and excellent personal characteristics of Ms. J., it would be putting S. at risk in the interests of Ms. J.[136]

Adopting these findings, the court ruled on the basis of Islamic difference. Justice Walsh underscored in his judgment that "this is not the usual situation encountered in most custody and access cases of separated parents."[137] His underlying argument appeared to be that a potential resurgence of the relationship between Y and N would emotionally hurt N's wife. Thus, denial of access rested not so much on the best interests of the child S, but rather on the best interests of S.J. One section of the decision in particular illustrates this point:

> [N] freely admitted that the move to Africa would result in an ocean being placed between the applicant and S. but felt this would maintain the stability of his family by giving his wife peace of mind by knowing that the applicant, whose presence in their lives highly disturbs her, was a continent away.
>
> She does not feel that the applicant should have access to S. as there is no goodwill or good faith left between them and this would cause confusion and problems for all three children and jeopardize the stability of their family which is presently very healthy and robust. She also feels access may well result in a resumption of the relationship between her husband and the applicant. *With good cause, she trusts neither her husband nor the applicant in this regard.*[138]

One is struck by the ways in which the court portrayed the Muslim biological mother. She is assumed to be a sexual

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[136] *Id.* (emphasis added).

[137] *Id.* at ¶ 15.

[138] *Id.* at ¶¶ 12-13 (emphasis added).

temptation putting the stability of the custodial family at risk. Instead of focusing on the man, who made the offers of three temporary Islamic marriages, the court presupposed that if Y were to develop a relationship with her daughter, Y's mere presence would lure and irresistibly attract N. By denying the mother-child bond, the stability of the custodial family is ensured. In other words, once *she* is out, *their* world is saved.

The judge chose not to emphasize that N, as Y's Sunday school teacher, was the one who initiated their relationship. He told his student that he was unhappy in his marriage and was getting divorced. He showed her books on *muta* and presented the institution as a form of dating within an Islamic framework. He entered into the first temporary marriage in 1985, when he was thirty-five years old and Y was eighteen years old.[139] He contracted his second temporary marriage three years later, and ended it while Y was pregnant.[140] As to the third temporary marriage, it occurred in the summer of 1993 when Y came to Toronto and asked to visit her daughter.[141]

In *Y.J. v. N.J.*, the court held that no order for access should be made because the introduction of her biological mother would create a potential for harm to S's best interests.[142] Yet, inspection of the judge's reasoning reveals his true unstated anxiety: that the Muslim woman would sexually threaten the rightful wife and tear apart the custodial family. The decision is questionable even in traditional legal terms since the prominence it gives to S.J.'s concerns about her husband's sexual discipline is excessive. As stated subsequently by the Supreme Court of Canada in a less "unusual" case involving an extramarital affair, "[a] trial judge cannot give custody to a father merely because his wife is a good mother. Her presence is a factor but, overall, the court must consider if the applicant would make a good father in her

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[139] *Id.* at ¶ 3.

[140] *Id.*

[141] *Id.* at ¶ 8. For a presentation of the facts from Y's point of view, *see* Shahnaz Khan, *Race, Gender, and Orientalism:* Muta *and the Canadian Legal System*, 8 CAN. J. WOMEN & L. 249, 254 (1995) [hereinafter Khan, *Race, Gender, and Orientalism*].

[142] *Y.J.*, (1994) O.J. No. 2359, at ¶ 17.

absence."[143] N was not adequately abstracted from his family. The error is all the more egregious when applied to an issue of access, which can always be supervised to minimize conflict.

More fundamentally, the faulty legal approach that denied Y all contact with her child can be traced to the judge's lack of appreciation of the cultural context. Instead of avoiding the significance of Shia Islam, the court should have explored the meaning of this religion for all parties to the dispute using a functional rather than an unstated norm-based analysis. Context must replace subtext. Had the judge brought a functional approach to bear on the matter, S's best interests would not have been defined to exclude time with her mother. Y was punished for participating in a cultural practice that empowers men, but not women, to have sexual relationships outside their primary marriage.

The judge could have taken an internal perspective on the institution of *muta* and achieved a more nuanced understanding of a relationship far more complex than Western "adultery." The "traditional" concept of infidelity is not applicable, nor is "normal" monogamy.[144] For one thing, as the court noted, children born out of a *muta* marriage are considered legitimate in Shia Islamic law. This indicates that different considerations should apply to ascribing responsibility for the tension that results between principal and temporary wives. The court's ruling goes against the best interests of S by depriving her of a relationship with her mother in order to protect her father. The real harm it addresses is not prospective resumption of N's offers to Y of *muta* marriage (propositions that could still happen with other women), but rather the existence of the dangerous liaison in the first place. It should never have happened. The judge negates Y's personhood by obliterating her presence in S's life and by

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[143] Van de Perre v. Edwards, [2001] S.C.C. 60, at ¶ 30.

[144] I note that polygamy is exceptional within the Islamic faith: "[I]n Muslim countries the vast majority of marriages are monogamous." *See* Patrick Parkinson, *Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities*, 16 SYDNEY L. REV. 473, 497 (1994) (quoting a submission by the Australian Federation of Islamic Councils to the Australian Law Reform Commission).

substituting the illusion of a normal family. The little girl will never know her difference.

D. Protection Against Harm: What is Harm Anyway?

> *The issue of racism is fundamentally about the power of the mass and the shared belief system; the power to shape reality in accordance with one's values; the power to give voice to or to silence the diversity of others. . . . Judges must be certain that their ethnocentrism is not the filter being used to evaluate another community's cultural norm.*[145]

In the preceding section, I challenged the court's depiction of the potential harm to S. Harm as a legal notion in family law deserves further scrutiny. Is the potential harm derived from S's birth into a different and unfamiliar culturally-defined community? Should the harm-based best interests test be adapted to the particular context of an extended family?

According to the best interests test, the well-being of children is assured by the absence of harm. The best interests test does not define what "harm" means. It merely suggests that "harm" is opposed to the best interests of the child. Shauna Van Praagh has written that it "is evident . . . that 'best interests' and 'harm' are both terms with open-ended definitions and, further, that they operate as sides of the same coin, both used to justify a judge's decision as to the scope of the custody and access."[146] Again, ideological assumptions concerning what is best for children, and in this case who the *better* mother is, are bound up in idealized family models. Susan Boyd reminds us that "[m]others who depart from the norm—whether sexually or in terms of work or lifestyle—often have trouble persuading the judge that it is in the

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[145] Joanne St. Lewis, *Racism in the Judicial Decision-making Process*, *in* 8:2 CURRENT READINGS IN RACE RELATIONS 15, 17 (1994).

[146] Shauna Van Praagh, *Religion, Custody, and a Child's Identities*, 35 OSGOODE HALL L.J. 309, 335 (1997).

best interests of their children to be with them."[147] In *Y.J. v. N.J.*, refusal to grant Y any visitation rights was based on the harm associated with her presence within a so-called stable family, but the court was vague about what harms Y would cause. Justice Walsh's analysis went as follows: "The J.'s are very competent parents and any intrusion, particularly, such as the introduction of access into their well-functioning family, creates a potential for harm to S. which otherwise does not exist."[148]

As in *Kaddoura v. Hammoud*,[149] the characterization of issues in *Y.J. v. N.J.*[150] was embedded in numerous underlying but unstated assumptions. Even though he did not incorporate religious evidence, Justice Walsh nevertheless attempted to examine the legitimacy of children born during a *muta* marriage:

> While any children born out of temporary marriages are not considered illegitimate by Islamic law, the evidence of S.K. would indicate that such marriages are not looked upon with favor within the Moslem community generally and *there is often a stigma attached to such marriages and the children of such marriages*.[151]

He invoked stigma based on testimony by an expert witness, Canadian sociologist Shahnaz Khan.[152]

To what extent did the notion of social stigma for S influence the denial of custody and access to the biological mother? And was the stigma really one imposed by the "Muslim community" or one translated from the majoritarian definition of legitimacy? Tellingly, Khan struck a very different note when later critiquing the case for its Orientalist assumptions:

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[147] Susan Boyd, *Employed Mothers, Lifestyles, and Child Custody Law*, *in* CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY 265 (Susan Boyd, ed., 1998).

[148] Y.J. v. N.J., (1994) O.J. No. 2359, at ¶ 17.

[149] [1998] D.L.R. (4th) 503.

[150] (1994) O.J. No. 2359.

[151] *Id.* at ¶ 2 (emphasis added).

[152] For concerns about the role of expert witnesses in the context of culturally-based legal disputes, see *supra* note 60 and accompanying text.

> Normative Canadian traditions contain Orientalist stereotypes about the Muslim community as "Other" and as homogeneous. In making his decision based on the likelihood of Y.J.'s ostracism from the community, it appears the judge wished to secure a place for S. within a single-visioned Muslim community. In a sense, this notion of community, a creation of racist stereotypes, was that of an unchanging community with no internal contradictions and challenges.[153]

In referring to a potential social stigma imposed by the "Muslim community" on both the biological mother and the child, but not on the father, for having been involved in an Islamic temporary marriage, the judge equates cultural difference with harm. *Muta* becomes the decisive factor. Vague evidence[154] about Muslim people's beliefs supported the denial of custody and access as a way of rendering S "normal," that is, "not stigmatized." In other words, the best interests of the child could only be secured by silencing the role of the *muta* in the lives of Y

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[153] Khan, *Race, Gender, and Orientalism*, *supra* note 141, at 259; *see also supra* note 62 and accompanying text.

[154] Khan, *Race, Gender, and Orientalism*, *supra* note 141, at 258. Khan mentions that the Court did not let her comment on the issue of the applicant's access to her child:

> As a Muslim social scientist, I do not draw my expertise from a religious base alone, nor do I fit the stereotypes of one who adheres to religious prescriptions. In allowing me to testify the judge, I assume, was trying to be culturally sensitive. Yet despite my qualifications and experience in psychological assessment, he did not allow me to comment on the main issue, [Y]'s access to the child. Instead, he marginalized my comments to the cultural aspect or the topic of *Muta*. It is significant that when [Y]'s lawyers approached me they wanted me to do an assessment. But it was clear from their comments that they wanted a woman who would talk about the sexism of Muslim culture/religion and how it continues to oppress women. I countered that to take such a position would lead to more racism against Muslims and would provide only a partial picture, which would leave out the devaluation and marginalization of Muslims within Canadian society.

Khan, *Race, Gender, and Orientalism*, *supra* note 141, at 259.

and her daughter. Khan points out that such reasoning is misguided:

> The judge and others within the Canadian legal system involved in this case did not understand *muta* and it appears that they did not wish to do so either. The implications of *muta* in [Y]'s case were largely ignored and the dispute was treated as if *muta* had not occurred and did not exist. Thus for [Y] her dispute became a multi-sided struggle—not only against community and family pressures, but also against the ethnocentrism of a legal system that considered the institution of *muta* and its implications to be inconsequential.[155]

I partly disagree, since in my view *muta* was supremely consequential in this case. Without it the judge could not have used his notion of stigma to define potential harm to S. Mainstream "illegitimacy" arising out of an extramarital affair would not have been legally acceptable as a bar to maternal access. As the legal anthropologist Max Gluckman observed, "[legal] [c]oncepts are absorbent in that they can draw into themselves a variety of raw facts of very different kind. They are also permeable, in the sense that they are at any one time permeated by certain principles, presumptions, prejudices and postulates, which the judges hold to be beyond question."[156]

A powerful myth of law is that it stands outside the social context and operates in a neutral, universal, and objective manner. We can no longer negatively compare minority groups' religious beliefs and behaviors to the "norm" of mainstream society without stating and questioning the content of this norm. Once we disrupt assumptions embedded in legal discourse, we can escape the constriction of norms. Judges will then be free to multiply the frames of reference and perspectives through which legal method is constructed and applied.

In *Y.J. v. N.J.*, production of legal knowledge about the racialized Other was inscribed within a specific majoritarian

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[155] Khan, *Race, Gender, and Orientalism*, *supra* note 141, at 257.

[156] MAX GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 24 (1965), *quoted in* Riles, *supra* note 66, at 639.

milieu. The decision was based on unstated norms shared by dominant society, making assertions of universality little more than a mirage. Throughout the judgment, the Muslim woman Y was depicted as abnormal because of her difference. She symbolized *muta*, polygamy, and instability. In the Othering process, the court polarized her position from that of the opposing parties. They, although Muslims, were portrayed as having assimilated into the mainstream of Canadian society, as part of a monogamous, stable, and nuclear family. Marked as the Other, Y was pushed out of the prevalent notion of "what is a family." When the universalization of the dominant group's experience and perspective is established as the norm, as in this case, whoever falls outside its borders risks losing her claim by definition. As long as this norm is not stated and challenged, the active marginalization and disempowerment of minority people will remain invisible yet pervasive.

E. Muta *in California: The Objective Fallacy Allows Bad Faith to Triumph*

As with the *Mahr*, the courts of the United States have also confronted the institution of *muta*. An appellate court in California adopted a universalist approach in its 1988 decision, *In re Vryonis*.[157] The appellant, Speros Vryonis, a non-practicing member of the Greek Orthodox Church, was the director of the Center for Near Eastern Studies at the University of California, Los Angeles.[158] The respondent, Fereshteh Vryonis, a Shia Muslim and a citizen of Iran, met Speros when she was a visiting professor at the Center in 1979.[159] In 1982, the couple began to date, but Fereshteh repeatedly expressed her concern that under the tenets of her religion she needed marriage or commitment in order to see Speros.[160] On March 17, 1982, she conducted a private marriage ceremony for the two of them that conformed to

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[157] 248 Cal. Rptr. 807 (Cal. Ct. App. 1988).

[158] *Id.* at 809.

[159] *Id.*

[160] *Id.*

the requirements of *muta*.[161] According to the court, "Fereshteh was unfamiliar with the requirements of American or California marriage law. However, she believed the ceremony created a valid and binding marriage, and Speros so assured her."[162] The court noted that the relationship was kept secret, that all "usual indicia" of marriage were lacking,[163] and that the bond subsequently deteriorated to the point that the couple spent no nights together in 1984.

In July of that year, Speros, who had not stopped dating other women, informed Fereshteh that he was going to marry someone else, which he did in September.[164] As a result, Fereshteh began telling others about the marriage ceremony she had performed two years earlier, and, in October 1984, she went to court seeking spousal support and a determination of property rights.[165] The trial court found in Fereshteh's favor under the "putative spouse doctrine," "based upon the reasonable expectations of the parties to an alleged marriage entered into in good faith."[166]

This judgment was overturned on appeal because Fereshteh's belief was held to be objectively unreasonable.[167] The appellate court effectively defined Fereshteh's perspective as too irrational—too Oriental—for Western legal relief to be granted:

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[161] *Id.*

[162] *Id.* The court added: "On frequent occasions, Fereshteh requested Speros to solemnize their marriage in a mosque or other religious setting, which Speros refused." *Id.*

[163] The couple "did not cohabit, or hold themselves out as husband and wife, and in no way approximated the conduct of a married couple." *Id.* at 814. Azizah al-Hibri points out that some putatively objective indicia of Western marriage are in fact based on assumptions incompatible with Islamic marriages. For example, the concepts of merged bank accounts and a common surname, mentioned by the court to be lacking in *Vryonis*, are opposed to widespread Muslim practice. *See* Azizah al-Hibri, *Issues Regarding Family Law Affecting American Muslims*, Paper presented to the NGO Forum, United Nations Fourth World Conference on Women, Huairou, China, Sept. 7, 1995, *available at* http://www.zawaj.com/articles/challenges_women_4.html.

[164] *Vryonis*, 248 Cal. Rptr. at 809.

[165] *Id.* at 809-10.

[166] *Id.* at 810.

[167] *Id.* at 813-14.

> Because the parties made no colorable attempt at compliance [with the procedural requirements], Fereshteh could not reasonably believe a valid California marriage came into being. Fereshteh's ignorance of the law does not compel a contrary conclusion. Further, her reliance on Speros's assurances is unavailing.[168]

The court, making no attempt to dispel its own ignorance of the Islamic law of *muta*, reified a majoritarian legal category, as did the courts in the *Mahr* cases that evaluated claims based on contract or prenuptial agreement principles. Its simple holding was that "[a] belief [that] one's marriage conforms to the precepts of one's faith is insufficient to come within the [putative spouse] doctrine."[169] Because "the facts were at odds with the formation and existence of a valid marriage pursuant to California law, Fereshteh could not reasonably rely on Speros's statements to believe she was married. Notwithstanding Fereshteh's sincerity, her belief was unreasonable and therefore not in good faith."[170] The irony of the court's dual use of the word "faith" to represent both Fereshteh's religion and her belief in marriage is striking, since the judgment essentially ruled that her Islamic beliefs were "not in good faith." This implies an unstated norm that the Muslim faith is not a "good" or accepted one.

The universality and neutrality of the law has no patience for "unsolemnized, unlicensed and unrecorded" marriages, regardless of the relative equities presented by the parties. Although Speros lied in bad faith, he was saved by the dominant faith, the secular religion of California law and majoritarian society, which trumped Fereshteh's quaint, but patently foreign "sincerity."[171] Her claim was not only rejected, but also belittled

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[168] *Id.* at 813.

[169] *Id.* at 815. For the analogous *Mahr* decisions, *see supra* note 47 and accompanying text.

[170] *Vryonis*, 248 Cal. Rptr. at 814.

[171] This brings to mind the *Mahr* case of *Kaddoura v. Hammoud*, [1999] 168 D.L.R. (4th) 503 (Ont. Gen. Div.), in which the court found the husband's actions "somewhat offensive and dishonourable." *See supra* note 46.

as being objectively unreasonable and irrational. Again, the legal process silences the Muslim woman, with no functional effort made by the court to appreciate her perspective and that of her cultural community.

CONCLUSION

The cases discussed in this article reveal the process of constructing Muslim identity in Canadian and American courtrooms and the resulting connotations of Islam in the judicial arena. Judges have used majoritarian values to interpret the family law issues at stake, thereby projecting the dominant society's experience onto all communities' members. When claims to universality go unchallenged, minority people's cultures are measured against unstated norms and become the abnormal, the Other.

Kaddoura v. Hammoud demonstrates how cultural anxiety operates to exclude those perceived as different. Selected people are identified with the power to make enforceable contracts; the Others are not. Universalist reasoning produces an exclusionary result. Muslim culture is treated as an outsider whose specific traditions are translated into Otherness. Careful reading of *Y.J. v. N.J.* similarly makes this process apparent. In the eyes of the court, N.J., his wife, and their children form a family that is "natural and normal" as defined through the lens of Canadian identity. Although Muslim, they are almost "Canadian," but Y.J. is not. Y.J. is essentialized as a Muslim woman whose child is the result of a marriage with an already married man. Her application for custody and access was dismissed because, in relation to the "normal" family, she was viewed as deviant and different.

Canadian and American courts operating in our multicultural societies often face dilemmas like that of *Mahr* enforcement or *muta* assessment.[172] Unsophisticated approaches in family law to

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[172] Other jurisdictions are also confronting these issues. See, for example, the South African Constitutional Court's ruling in *Amod v. Multilateral Motor Vehicle Accidents Fund*, 1998 (10) SA 753; 1998 (10) BCLR 1207 (CC)

Muslim differences are deeply troubling. These decisions create a category of "Others," whose claims and experiences are denied and excluded through legal discourse. Legal method is deemed objective, but universalist and cultural relativist approaches preserve only the illusion that law produces "truth."

The coercive power of law resides precisely in its ability to appear neutral when in reality it shapes society in the mold of dominant values. Both Canadian and American judicial discourse are tainted by Orientalism that is at once horrified and fascinated by Muslim women. The *Mahr* and *muta* cases demonstrate the existence of multicultural challenges to family law, quandaries for which I have proposed a contextual remedy, the functional approach. Judges need to become more perspicacious when they decide culturally complex disputes in this most agonizingly personal of legal domains.

(considering but not deciding an underlying dispute concerning a claim for loss of support by a widow married according to Islamic law). Regarding the new South Africa's changed attitude toward Muslim marriages, see the concurring opinion of Justice Sachs in *S. v. Solberg*, 1997 (10) BCLR 1348 (CC), at ¶ 152:

> The marginalisation of communities of Hindu and Muslim persuasion flowed from and reinforced a tendency for the norms of "Christian civilization" to be regarded as points of departure, and for Hindu and Muslim norms to be relegated to the space of the deviant "Other." Any echo today of the superior status in public law once enjoyed by Christianity must therefore be understood as a reminder of the subordinate position to which followers of other faiths were formerly subjected.

Id.