It’s Gender, Stupid: Towards A Multifaceted Response to Forced Marriage in the United States

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I. INTRODUCTION

What is forced marriage? The labeling of social phenomena is rarely unambiguous. Labels are produced in and produce social contexts that function as framing mechanisms to ascribe meaning, structure experience, and organize reality. Asking the question, “what is forced marriage?” may appear to be a straightforward inquiry; however, a more fruitful question may be, “what are the relations of power implicated in forced marriage?” Numerous foreign jurisdictions have acknowledged forced marriage since the 1990s when legislation was put in place to respond to the problem, but the United States has remained quiet on the subject. This note posits that there is a correspondingly similar presence of forced marriage in the US and the victimized go quietly unprotected in the absence of any legal response. In addition to excavating the intimate and social relations of power sustaining forced marriage, this note maps out a trajectory for a comprehensive policy response to forced marriage in the US by looking to the construction and implementation of civil and criminal remedies aimed at forced marriage in foreign jurisdictions, as well as the US’s own response to domestic violence with its particular concern for gender inequality.

Though very little is known about this phenomenon in the US, forced marriage has been identified as a problem in foreign jurisdictions that share overwhelming similarities with the US. Parallels in basic political structure and rights of citizenship, demographics, urban migration patterns, economic and social stratification, the ghettoization of first- and second-generation

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1 A crucial, landmark survey of forced marriage in the United States was conducted by the Tahirih Justice Center in 2011. The Survey found that forced marriage in the US mirrored the statistical findings of earlier studies done in the UK. Though the survey was limited by the lack of infrastructure specific to forced marriage research within key social and professional fields that would serve as initial contact points for intercourse with victims of forced marriage, the survey must certainly be lauded as the starting point from which to launch a comprehensive research, analysis, and policy construction effort. Survey available at http://www.tahirih.org.
immigrants, as well as similar domestic violence statistics are indications that the subterranean practice of forced marriage is in effect in the US in much the same way as in foreign jurisdictions. There seems to be no reason why these significant parallels would produce radically divergent results in the US.

Why is so little known, or said, of forced marriage in the US? Secrecy appears to be a necessary component of forced marriage when it is embedded in societies where marriage is a *de facto* and *de jure* matter of choice. Moreover, very little research into forced marriage has been conducted in the US, albeit such investigation as there has been demonstrates that the phenomenon is present here. The lack of domestic legal, social and policy discourse may appear to present an insurmountable *tabula rasa*, seemingly leaving us with hardly any data, very little infrastructure, and even less of a solution; but this note suggests there are two viable models that can be used to inform future domestic responses, at the very least to begin the project of confronting forced marriage in the US.

The first model consists of an amalgam of research, policy creation, implementation, and reflective critique already done by foreign governments, social services, and women’s groups in other countries. It is wise to explore what those jurisdictions have found in their own research, and to critically analyze their methods, the resultant policy, as well as enforcement. Although those jurisdictions are not dispositive, they yield examples of failures and successes that can be

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4 *Id.* at 3, 5. (2011). The US does not have a working definition, much less a statutory definition of forced marriage to guide social welfare agencies and professionals who may come into contact with victims: “Less than 10% of respondents [to the 2011 Tahirih Survey] said they had a working definition of forced marriage at their agency, and less than a quarter of respondents (22%) said their agency’s screening and referral process enabled them to identify cases where forced marriage may be of concern.” “Less than one in five respondents (16%) said that their agency was properly equipped to help individuals facing forced marriage.” *Id.*

5 CLIVE HEATON QC, LOUISE MCCALLUM, RAZIA JOGI, FORCED MARRIAGE: A SPECIAL BULLETIN (Jordan Publishing Limited 2009).
incorporated into a unique and specialized domestic response to forced marriage tailored to the particular needs of the United States.

The US, itself, provides the second model. Research methods, domestic violence legislation and community involvement in the US provide a paradigm that has proven to be a fairly successful response to the gendered natured of power relations at the base of domestic violence—power relations that are also at the base of forced marriage.\textsuperscript{6} Due to coordinated community and professional commitment, the social climate has changed dramatically since the first nationwide concerted efforts to take on domestic violence in the 1970s.\textsuperscript{7} The development of responsive, interactive institutions in addition to the introduction of civil and criminal remedies,\textsuperscript{8} efforts to standardize the once idiosyncratic professional responses to domestic violence scenarios, and efforts to raise awareness as to the systemic power relations that undergird acts of domestic violence have changed the administrative and legal culture in which domestic violence cases were handled as well as the social climate that often protected abusers and shamed victims.\textsuperscript{9} Thus, the unique and exemplary response to domestic violence that was developed in the US may prove to be a valuable model for the development of a social and legal remedy matrix designed to respond to the domestic forced marriage problem.

This note begins with the development of policy in the United Kingdom as it compares with other jurisdictions. Foreign jurisdictions have tested three basic remedy types: preventative civil remedies with the option for a criminal breach as represented best by the UK; reactive criminal remedies as utilized in Norway; and a combined approach utilizing coterminous civil

\begin{footnotesize}
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  \item \textsuperscript{6} See MELANIE F. SHEPARD AND ELLEN L. PENCE, Introduction to COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND (1999).
  \item \textsuperscript{7} Id. at 5–6.
  \item \textsuperscript{8} Id. at 7–11.
  \item \textsuperscript{9} Id. at 3–13.
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and criminal remedies as evidenced by Scotland’s unique scheme which may in fact be gaining jurisdictional ground as the UK seeks to modify its remedial response.

A critical assessment of what other jurisdictions have attempted and accomplished is necessary to successful policy creation in the US. This note asserts that the relatively low success rate of applied remedies in other jurisdictions\(^\text{10}\) is not solely due to the inherent secrecy of forced marriage or the insular communities that seek to protect the practice. The lack of success lies in framing the issue as a cultural relic of backwards and passive people. This approach supports a position of cultural superiority, ultimately identifying and centralizing the white European as rational and protective of autonomy and self-determination. In this discursive frame, the dominant center doles out rights in a patronizingly protective move to passive victims trapped by their cultural heritage. Not only does this stance reduce the issue to one of culture at the expense of the gender, this position polarizes communities into false dichotomies where the other is a second-class citizen who refuses to integrate into the rational and enlightened dominant culture. Searching for solutions in this construction is likely to be unsuccessful or dangerous and risks promoting racist and Eurocentric tendencies. Much more success will be met by framing forced marriage as a gender issue in much the same way that domestic violence has been predominantly recognized and formulated as a gender issue.

II. POLICY RESPONSE TO FORCED MARRIAGE IN FOREIGN JURISDICTIONS

The World Scene

\(^{10}\) FORCED MARRIAGE CONSULTATION, Home Office (2011), http://www.ForcedMarriageConsultation@homeoffice.gsi.gov.uk.
The 1948 Universal Declaration of Human Rights (UDHR)\textsuperscript{11} contained two articles particularly relevant to the issue of marital consent. Article 16 (1) entitled men and women to marital equity at inception, during the course of, and at dissolution.\textsuperscript{12} The second section of the article focused narrowly on actual consent, noting that a credited marriage should be constituted on “free and full consent.” Furthermore, consent may not be assumed if one of the parties falls under 18 years of age.

UDHR Art. 16 (2): Marriage should be ‘entered only with free and full consent of the intending spouses.’ Where one of the parties getting married is under 18, consent cannot always be assumed to be free and full.

In 1964, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriage (CCM) set out several articles establishing in international law what has constituted the foundational principles underlying marriage in the modern era for many jurisdictions.\textsuperscript{13} The central tenets of the CCM consist of the actual consent of each party, minimum age and registration requirements, and a general right to marriage and family formation.\textsuperscript{14} “This indicates that marriages entered into where there is no free or full consent are considered an

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  \item Article 1: No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person as prescribed by law.
  \item Article 2: States Parties to the present Convention shall specify a minimum age for marriage (“not less than 15 years” according to the nonbinding recommendation accompanying this Convention). No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses
  \item Article 3: All marriages shall be registered by the competent authority
  \item Article 12: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of that right.
\end{itemize}

\textsuperscript{12} UDHR Art. 16 (1): Men and Women of full age have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.
\textsuperscript{13} Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriage, 521 U.N.T.S 231 (1964)
\textsuperscript{14} Id.
abuse of human rights.”

Moreover, the UN has defined violence against women as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.’

The broad sweeping arc of this definition applies to violence at the level of the family, the level of the community, and the level of the state.

**The United Kingdom**

These combined international covenants provided a basis of response in the 1990s when the UK experienced several high profile cases of forced marriage. The young age of the victims as well as the severity of their situations provided sensational copy for media outlets and brought the issue to the fore.

In the high profile case of KR, a 16-year-old girl left home to live with her older sister in order to escape a forced marriage. KR was eventually forced to return home by law enforcement despite her repeated assertions that she was at risk for imprisonment and

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16 U.N. GAOR 85th plen. mtg. at 1, 2 A/RES/48/104 (Sept. 20, 1993).

17 At 13, her father forced Nazia Haq to marry her 40-year-old cousin in Pakistan shocking the British public by the tender age of Nazia. (Sandra Barwick, *Girl of 14 Tells of “Dreadful” Forced Marriage*, *The Telegraph*, 2 April 1996.) The story of a second 13 year old girl, Zena, captured the public’s attention in a sensational novel based on her experience of running away with her boyfriend to escape a forced marriage, threats of death, and bounty hunters. (John McCarthy, *Runaways* (Orion, 1999). Several other biographies penned by young women subjected to forced marriage were released around the same time. *Sold: The Story of Modern Day Slavery* told the story of two British sisters who were tricked into taking a vacation with a family friend after their father had sold them into forced marriages. After seven years of struggle and losing custody of her son only one of the sisters, Zana, was ever repatriated. At the time of publication and following several reprints, Zana’s sister had not been able to escape. Zana Muhson and Andrew Crofts*SOLD: THE STORY OF MODERN DAY SLAVERY* (Time Warner Paperbacks, 1991). In *Shame*, Jasvinder Sanghera narrated the story of her escape from a forced marriage and the subsequent total rejection of her by her family and her community as well as the suicide of her sister who had no other escape from her violent forced marriage than self-immolation. *Jasvinder Sanghere, Shame* (Hodder and Stoughton Ltd., 2007). A few years later, 15 year old Rushkana Naz was taken to Pakistan for a forced marriage. On return to the UK, Rushkana had an affair and became pregnant. She refused to terminate the pregnancy and her mother and older brother strangled her to death. (Sarah Hall, *Life for ‘Honor Killing’ of Pregnant Teenager by Mother and Brother*, *The Guardian*, 26 May 1999.)

18 See [1999] 2 FLR 542.
forced marriage. Her sister sought help from various professionals to prevent her parents from removing KR to India for the forced marriage. Notice of a pending protective order was given to KR’s parents and they immediately took KR to India, where she was left in a village in the Punjab until her sister was able to institute wardship proceedings, eventually leading to her repatriation. Following the proceedings, the court authorized the publication of the judgment in order to raise awareness of the difficulties that arose in forced marriage situations.

Sensitivity to these traditional and/or religious influences is however likely...to give way to the integrity of the individual child or young person concerned. In the courts of this country the voice of the young person will be heard and, in so personal a context as opposition to an arranged or forced marriage, will prevail. The courts will not permit...the exploitation of the individual...[or] trafficking for financial prospects.

The House of Commons responded with debate on women’s human rights and forced marriage.

Individuals’ human rights should be respected by everyone. All British citizens should have equal rights and responsibilities, and respect for women’s rights is central to that. It is incumbent on men and women in every community in this country to respect their partners, sisters, daughters, and wives, and support them in making choices that will lead to fulfilling lives. Respect for the choices of others is important.

The Under-Secretary of State at the time, Mike O’Brien MP, affirmed that England would acknowledge and respect different beliefs and traditions but not when doing so contravened the fundamental rights of individuals or the laws of the country. He further stated that multicultural sensitivity would not excuse “official silence” and “moral blindness” to the treatment of women as chattels.

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19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
25 Id.
26 Id.
In response to the debate in the House of Commons, the Working Group on Forced Marriage (WG) was established. The goals of the group were primarily to understand the extent of the problem including the related issues of immigration, housing, access to legal services, and organizational support. The WG wanted to take the debate that had filled the House of Commons into the public forum and initiate a public debate to raise awareness but also to seek solutions that would primarily come from the affected communities themselves. By identifying and engaging the relevant agencies, professionals, and directly affected communities, the WG hoped to devise a comprehensive strategy of preemption. The guiding principles that were crafted from those early efforts were based on a commitment to producing a sensitive solution to forced marriage that would respect cultural difference, engage the affected communities, and maintain the safety of the victims. Underlying these principles was the desire to promote the awareness of rights and, once created, the availability of social and legal services.

Other important goals the WG embraced were of a more administrative nature: comprehensive multi-agency interaction, monitoring and critical analysis of inter- and intra-agency relations as well as training to understand forced marriage as real incidents in the lives of particular victims and as a larger manifestation of problems endemic to society.

Before any policy could be put in place, forced marriage was to be defined. Section 63A(4) of the 1996 Family Law Act (FLA) was amended by the Forced Marriage (Civil Protection) Act in 2007 to articulate that “a person is forced into marriage if another person

28 Id. at 15.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
forces them to enter into a marriage without their free will and full consent.”

Coercion could be aimed at the victim or at third parties such as a boyfriend, sibling, or parent. It included psychological and physical threats, actual abuse, emotional pressure, abduction, imprisonment, rape, disfigurement, and murder. “Forced marriage is also part of the UK government’s definition of domestic violence, which states that abuse (psychological, physical, sexual, financial or emotional) can be between adults who are or have been intimate partners, or family members, regardless of gender or sexuality.”

**Arranged Marriage**

The Forced Marriage Act (FMA) drew a problematic line between forced marriage and arranged marriage stipulating a distinction between the two based on the right and ability to choose to agree to the arrangement. An arranged marriage was one in which “the families of both spouses [took] a leading role in arranging the marriage but the choice whether or not to accept the arrangement [remained] with the prospective spouses.” Forced marriage was further distinguished from arranged marriage by noting that it occurred when “one or both spouses [did] not (or in the case of vulnerable adults [and minors] [could not]) consent to the marriage and duress [was] involved.”

Because arranged marriages have long been accepted as a mode of organizing the choice of marriage partners within the context of a collectivist social order, it is generally regarded as a

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35 Id.
36 Id.
37 GANGOLI ET AL., supra note 26 at 34. See also Home Office ‘Crime and Victims.’
38 THE RIGHT TO CHOOSE: MULTI-AGENCY STATUTORY GUIDANCE FOR DEALING WITH FORCED MARRIAGE (FCO and others, November 2008), Part 1, Context 1, Chapter 1.
39 Id.
culturally valid, if ‘foreign,’ option.\textsuperscript{40} However, since the essential distinction between forced and arranged marriage is that an arranged marriage may be entered into voluntarily or involuntarily, perhaps it is better to view the relation between forced and arranged marriages in terms of a continuum.\textsuperscript{41} Illustrating the relation between the two as such means that we are no longer concerned with the difference between forced and arranged marriage, but rather we have turned our focus to the continuum of coercion and consent.

Women’s ability to give consent can be mediated by many factors and quasi-consent can be manifested by subtle psychological coercion that can be difficult to detect by third parties as well as by the victim. However, there has been a “definite shift in the legal rhetoric from a restrictive definition of duress centered upon threats of physical violence to one in which the key issue is ‘whether the mind of the applicant (the victim) has in fact been overborne, howsoever that was caused.’”\textsuperscript{42} What does the right to choose mean in a context in which women are second-class citizens and consent originates out of economic necessity, community disapproval, community approval, and forced marriage?

\textsuperscript{40} Some academics have argued that, “blurring the line between the question of who arranges the marriage and the question of consent…is typical of a discourse that bases the assessment of volition in arranged marriages on highly individualized notions of personhood. These notions would in fact seem arbitrary in most contexts since individual agency is always embedded in social relations and structures, but they are particularly problematic in relation to agency which is exercised within collectivist norms.” Anja Bredal, \textit{Border Control to Prevent Forced Marriages: Choosing Between Protecting Women and Protecting the Nation}, in \textit{FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVE} 93 (Aisha K. Gill and Sundari Anitha, eds., 2011). On the contrary, some academics have argued that arranged marriages are an “example of using women as objects in male transactions.” \textsc{Gangoli et al.}, \textit{supra} note 26, at 29.

\textsuperscript{41} The concept of a continuum to understand gender violence has been accepted by the U.N. \textsc{Secretary General’s Report on Violence Against Women} 36 (2006) which states that gender-violence is a “continuum of multiple interrelated and sometimes recurring forms…physical, sexual and psychological/emotional violence and economic abuse and exploitation, experienced in a range of settings, from private to public, and in today’s globalised world, transcending national boundaries.”

or ostracism by parents? It seems that the problems that arise out of arranged marriage might have something valuable to say about forced marriage, and the gendered social milieu which gives way to one, gives way to the other.

The Role of the Family and Community

The WG was concerned with the role of parents, close relatives, extended family, and the community, especially since those groups form the support structure of children in need of protection. The courts reasoned that the failure of these support structures required response.

The court’s protective jurisdiction is also particularly important in this context because, sadly, it is precisely from those who ought to be their natural protectors—parents and close relatives—that all too typically victims of forced marriages need to be protected. The law must always be astute to protect the weal and the helpless, not least in circumstances where, as often happens in such circumstances, the very people they need to be protected from are their own relatives. 43

In her study on forced marriage, Dr. Nazia Khanum, identified several prevalent reasons why support for forced marriage reigned in qualified communities. 44

...[A]ttempts to force marriage often receive support from a wider circle of relatives, friends, and acquaintances within the community...not usually because they consciously support the use of force in marriage...Moreover, people seldom know what goes on behind closed doors, even among their near relations. They do not see for themselves the beating and the bullying. Consequently, it is the victims of forced marriage who tend to be blamed by the community at large rather than the perpetrators. 45

There were several reasons support remained strong within families themselves: to control unwanted sexual behavior of teenagers particularly girls perceived as potentially promiscuous; 46 to enforce heteronormative control of behavior; 47 to curb ‘westernized behavior’; to curtail friendships that fell outside the acceptable ethnic, religious, cultural or caste

43 Mr. Justice Munby, in NS v. MI [2006] EWHC 1646 (Fam), [2007] 1 FLR 444.
44 Dr. Nazia Khanum OBE FORCED MARRIAGE, FAMILY COHESION AND COMMUNITY ENGAGEMENT: NATIONAL LEARNING THROUGH A CASE STUDY OF LUTON para. 17, p. 10 (EQUALITY IN DIVERSITY, 2008)
45 Id.
46 Key motives identified by professionals working with victims of forced marriage, summarized by the Multi-agency Statutory Guidance, THE RIGHT TO CHOOSE: MULTI-Agency STATUTORY GUIDANCE FOR DEALING WITH FORCED MARRIAGE para. 36, p 9. (FCO and others, November 2008)
47 Id.
boundaries;\textsuperscript{48} to protect family honor; assist in claims for home country residence and citizenship; to strengthen family ties and maintain resources such as land, property, and other forms of wealth to increase family financial gain.\textsuperscript{49}

**Victims**

The estimated number of cases of forced marriage in 2009 in the UK ranged from 5000–8000.\textsuperscript{50} However, this number does not account for the victims who never came to the attention of agencies or professionals. The Association of the Chief of Police Officers claims the current estimates of the numbers of victims to be the “tip of the iceberg.”\textsuperscript{51} In 2008, the Crown Prosecution Service published a report showing that the majority of the victims in honor-related crimes and forced marriage were of Asian ethnicity, particularly Pakistani, Bangladeshi, and Indian.\textsuperscript{52} However, the issue was not solely a South Asian problem since communities from the Middle East, Europe and Africa were also represented in known cases.\textsuperscript{53} The Forced Marriage Unit (FMU) also noted a modicum of British Romani cases.\textsuperscript{54} There are no established and reliable statistics for the US regarding ethnicity prevalence in forced marriage at this time. However, professional respondents in the 2011 Tahirih Survey identified incidents of forced marriage involving 56 different countries.\textsuperscript{55}

\textsuperscript{48} Id.

\textsuperscript{49} Id.


\textsuperscript{52} CPS PILOT ON FORCED MARRIAGE AND SO CALLED ‘HONOR’ CRIME – FINDINGS (CPS, December 2008).

\textsuperscript{53} Supra note 54, at para. 4 ‘Part 1 Context 1, Chapter 1’.


\textsuperscript{55} Supra note 13 at 2.
As is the situation in the UK, the US itself noted a few cases of home grown forced marriage.\textsuperscript{56} The majority of these cases involved fundamentalist religious sects who practice arranged and forced marriage, as well as underage, incestuous, and polygamous marriage.\textsuperscript{57} While those issues cause concern, they are beyond the scope of this note which is focused on immigrant families in the US. The religious backgrounds of known victims in the UK and the US are widely represented by Muslim, Christian, Hindu, Buddhist and other orthodox sects.\textsuperscript{58}

But we must be careful; to focus on cultural differences between mainstream Western culture and minority, immigrant communities creates an atmosphere within which racist policies and initiatives can be enacted and normalized while the gender basis of forced marriage is obscured.\textsuperscript{59} The result is anti-immigration rhetoric.

We must continue to welcome, cherish and have respect for other traditions and cultures in our communities. However, when cultures and traditions impinge on human rights of the most vulnerable in our community then it is our responsibility to stop those abuses. This could be achieved through tighter immigration controls.\textsuperscript{60}

The FMU’s contextualization of forced marriage as a cultural artifact can best be seen in its flyers and posters which publicized the government’s initiatives against forced marriage as ‘Challenging the Culture,’\textsuperscript{61}

Forced marriage is treated very differently when it is contextualized as a refugee problem. In those cases, women and young girls who lack citizenship status are precluded from

\begin{itemize}
\item \textsuperscript{56} http://childbrides.org/action.html for a compilation of news items and documented cases of FLDS forced marriage in the US and Canada
\item \textsuperscript{57} Id.
\item \textsuperscript{58} Supra note 13 at 2.
\end{itemize}
the protections of forced marriage legislation in the UK and most other similar jurisdictions.\textsuperscript{62} The specific refugee issues that occur in concert with forced marriage, while disconcerting, are also outside of the scope of this note.\textsuperscript{63}

**Culture vs. Gender**

Framing an issue consists of discursive selection, signification and the designation of salience. Framing determines how content is shaped, how it is contextualized, its points of reference, and its latent structures of meaning. Moreover, this meaning never arises naturally, but is ordered and manipulated through the association of social, economic, and institutional configurations. Social norms, values, ideologies and ‘situatedness’ are influencing factors.

The socio-cultural context plays a major role in determining not only the types of violence against women that are most common in different communities, but also shapes victims’ experience of violence against women and the measures that are most likely to be effective in addressing these abuses.\textsuperscript{64}

Framing has consequences for policy, including initial awareness, subsequent discourse, analysis and the reflective critique that should follow implementation. When focus is placed on the cultural component of forced marriage, and the gendered component is almost entirely effaced, the policies that issue from that articulation have no load bearing capacity and may result in

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\textsuperscript{64} Id.
occasional success, but will have very little effect on dismantling the gendered power differential that provides fertile ground for forced marriage.

Forced marriage exists as the manifestation of extreme gender inequality. Most of the victims are underage girls and young women between the ages of 13 and 30, though there are some cases of girls as young as 5 being forced to marry.65 Existing data on forced marriage suggests that this is a gender issue with 85 percent of cases reported involving women and girls.66 Professionals who work with male victims note that males are less likely to come forward for help because there may exist a greater stigma for males and fewer support services.67 While the prevalence of gender representation among victims may fluctuate from year to year, the disparity of experience between males and females remains constant and highlights gender inequality even when both parties are victimized. Research shows a significant number of women experience abuse, neglect, and lack of self-determination in relationships where the husband has been forced or coerced into marriage.68 In these marriages, men are allowed to maintain outside relationships while they continue to benefit from domestic or wage work, dowry, and sexual access provided by their wives.69 A policy response to forced marriage must address gender inequality. Gender-neutral methodologies that focus on cultural differences have not been sufficient.

66 A 2009 study conducted in ten local authorities in the UK revealed that 96 percent of cases reported involved women and girls and only 4 percent involved men and boys. See Kazimirski, A., Keogh, P., Kumari, V., Smith, R., Gowland, S., and Khanum, N. (2009) FORCED MARRIAGE: PREVALENCE AND SERVICE RESPONSE, NATIONAL CENTER FOR SOCIAL RESEARCH. RESEARCH REPORT FOR DCSF – RR128. Between January and December of 2011, the FMU dealt with 1,468 cases, 22% of which involved males. See http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/forced-marriage. These statistics do not account for the numbers of victims who go unnoted. Forced marriage is generally underreported by female victims and it is safe to assume the same is true of male victims, and perhaps at even higher rates since males tend to self report less than females.
67 HEATON QC ET AL., supra note 42 at para. 1.34, p 7.
69 Id.
Criminal and Civil Remedies

Following intensive research and debate, the WG published its findings in a report entitled ‘A Choice By Right’ in which marriage lacking consent was declared wrong. The WG announced that the government was in the process of developing a broad strategy to respond to the issue of forced marriage.70 The WG weighed criminal remedies against civil remedies and concluded that a civil remedy would be the best option, but stipulated a review would be necessary.71 It began with the premise that existing criminal law could address the violent and coercive aspect of forced marriage while the creation of a new civil response would operate more as a preventative. “The [WG] noted that the criminal law provides protection from the crimes that can be committed when forcing a person into marriage; it did not support the creation of a specific offense of forcing a person to marry.”72 Moreover, the concern was that the creation of a specific criminal offense might in fact work against the desired aim of such legislation.73 Some professionals and service providers worried that a criminal remedy might prevent adolescents from reporting, particularly if a parent would be incarcerated.74 Other arguments in opposition to a new criminal offense included concerns that a criminal remedy would not function as an effective deterrent, thereby rendering the remedy toothless.75 The WG stated that a criminal remedy would not provide adequate protection for victims, and may in fact fragment or add little to the existing laws drawn to address the various offenses against persons that may be implicated.

71 HEATON QC ET AL, supra note 42 at 2.13, p14.
72 Id.
73 Id.
74 Id.
in forced marriage. An evidentiary concern was also raised: it would be more difficult to satisfy the burden of proof necessary in a criminal conviction, than that required to initiate a civil remedy. Finally, there was concern that victims may be hesitant to involve police because women often perceive police intervention as counter-productive in cases of domestic violence, especially in immigrant communities.

In 2007, the Forced Marriage (Civil Protection) Act came into force (FMA). The basis of the Act was a protection order, or injunction, made by the court prohibiting certain acts that may result in forced marriage. Light criminal sanctions were available following a breach of the civil injunction. In addition to the injunction, a provision was included which allowed courts to declare a forced marriage a nullity rather than force a victim to institute proceedings for divorce. The benefit of a declaration of nullity was that it signified the end of a marriage that was illegitimate, whereas divorce recognizes a marriage as legitimate if over.

One year following the enactment of the FMA, and then again several years after that, the Home Affairs Committee revisited the issue of forced marriage and the success rate of the civil

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76 Id.
77 Id.
78 Id.
80 HEATON QC ET AL., supra note 42 at 2.19, p. 15.
81 Id.
82 See NS v. MI [2006] EWHC 1646 (Fam) [2007] 1 FLR 444 (Nullity).
83 Id.
remedies which had been implemented in 2007.\textsuperscript{84} The conclusion was that the government should criminalize forced marriage.\textsuperscript{85} “The Prime Minister [stated] in October 2011 that the Government would criminalize breach of FMPOs (as has been done in Scotland) and that it would consult on criminalizing forced marriage itself.”\textsuperscript{86} In June 2012, the Prime Minister announced the government’s commitment to make forced marriage a criminal offense, not following the breach of a civil order, but as a first remedy.\textsuperscript{87}

It had been hoped that “using civil, rather than criminal law provisions [would] encourage victims to seek protection because it would not involve reporting family members to the police.”\textsuperscript{88} However, several inconsistencies in the professional approach to forced marriage undermined the civil remedy policy and the response was plagued by a lack of commitment within agencies to address the issue, an inconsistent approach to the training of staff, a disparity in the way cases were monitored at different intra- and inter-agency levels, and an inconsistent response within police departments, schools, health services agencies, as well as local authority housing departments.\textsuperscript{89} The Affairs Section did not speculate on the systemic failure of the civil remedy but instead recommended following the model that Scotland had constructed,\textsuperscript{90} despite the fact that Scotland, as of the date the Affairs Section released their findings, had not made use of their criminal remedy in a single case of forced marriage. Without any speculation on the general failure of the civil remedy, but with a slight suggestion that the failure of the Act could

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\textsuperscript{84} Pat Strickland, \textit{Forced Marriage}, 1, HOME AFFAIRS SECTION SN/HA/1003, JUNE 8, 2012, HOUSE OF COMMONS LIBRARY.

\textsuperscript{85} Id.

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} Id. at 6.

\textsuperscript{89} FORCED MARRIAGE UNIT, \textit{REPORT ON THE IMPLEMENTATION OF THE MULTI-AGENCY STATUTORY GUIDANCE FOR DEALING WITH FORCED MARRIAGE} 4 (2008), (2012).

\textsuperscript{90} http://www.scotland.gov.uk/Topics/People/Equality/violence-women/forcedmarriage; and a background is in the Scottish Parliament Information centre’s SPIC Briefing 11/21 on the bill when it was going through the Scottish Parliament at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22075.aspx
be traced to its being a civil remedy, the Home Affairs Select Committee “urged the government to criminalize forced marriage:

It is not at all clear that the Act is wholly effective as a tool in protecting individuals from forced marriage and from repercussions from family members. While the measures in the Act should continue to be used, we believe that it would send out a very clear and positive message to communities within the UK and internationally if it becomes a criminal act to force—or to participate in forcing—an individual to enter into marriage against their will. The lack of criminal sanction also sends a message, and currently that is a weaker message than we believe is needed.\textsuperscript{91}

Common themes which emerged in reaction to the Committee’s report included a more comprehensive response to victims’ needs, more effective training for professionals in the field, clarification on the parameters of forced marriage, more funding, more support services, better awareness raising campaigns, and a \textit{continued focus on culture}.\textsuperscript{92} However, there remained a glaring, chasmic void; gender remained absent from all discussion.

III. DOMESTIC VIOLENCE POLICY AS A MODEL

The consent that is central to marriage exists as a performative utterance—a communicative act that transforms the moral relationship between two parties. If consent is absent, the relation between A and B changes in innumerable examples that may come to mind. In marriage, consent normalizes the physical and emotional binding between two people that would not be permissible absent consent. It is a sanction, but not neutrally so, because it functions as a descriptive content of a morally transformative act. Its core consists of a particular state of mind comprised of an act of will (a subjective mental state with a legally significant \textit{mens rea}) and an expressive dimension (a performative act of conventional signification of agreement to a request or proposal). However, an act of consent exceeds the bare notion of

\textsuperscript{92} HOME OFFICE, FORCED MARRIAGE CONSULTATION – SUMMARY OF RESPONSES (2012), p 6.
agreement. Consent is not agreeing to or with, but is a transformative act that requires
signification and a wary eye to the numerous parasitical variants of consent that, in effect, result
in a gutted concept. Imputed, tacit, future, implied, constructive, hypothetical and forced consent
fail the meaning of consent.

At the intersection of consent and coercion, we are confronted with a sense of entitlement
endemic to forced marriage—a sense of entitlement to use intimidation and/or violence. In no
other social relationship would this be permissible. Domestic violence theory has long
understood this entitlement as a desire for power that reflects a “violence that is rooted in how
social relationships, and the rights people feel entitled to within them, are socially not privately
constructed.”93 This perspective conceptualizes gendered violence as a logical outcome of
relationships imbued with dominance and inequality, but it is a mistake to focus merely on the
personal choices of individuals to dominate their spouses when those decisions manifest within
larger social and economic constructs of inequality. It is crucial in the case of forced marriage,
as it has been with the issue of domestic violence, to understand how our response to violence
and inequality creates a society of intolerance and an acceptance of force and coercion used in
intimate relationships.

Domestic violence theory has rejected the comparison of gendered assault between
intimates and general assault. “Assaulting your wife is not like assaulting someone in a bar or at
a party or in a social setting where the victim and offender have no familial or economic or
emotional ties to each other.”94 The very specific nature of the relationship between the victim
and the offender in the case of domestic violence, or forced marriage, means that the offender
retains control over the victim even once the state has intervened. The complexity of this

93 Ellen Pence, Some Thoughts on Philosophy, COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE:
LESSONS FROM DULUTH AND BEYOND 29 (Melanie Shepard and Ellen Pence eds., 1999).
94 Id. at 31.
situation presents a philosophical dilemma for the advocate, police responder, or social services agent. Most battered women have good reasons for not pursuing hostile criminal proceedings against their partners, yet professionals push prosecution as a means of holding the offender responsible as well as for the long term protection of the victim; but “the system is too slow, too adversarial, too inconsistent, too incident focused, and too unwilling to follow through on its own orders to be of predictable help to victims of battering.”\textsuperscript{95} This list of insufficiencies recalls the findings on the policy response to forced marriage of the Home Affairs Section, which ultimately concluded that the scheme the UK had installed to address forced marriage was too unpredictable, too unwilling to follow through, too disorganized for a victim to rely upon.\textsuperscript{96} The two-fold result is that this unpredictability means a victim gambles at her own risk by inviting institutional intervention, while the state inadvertently reinforces the behavior of offenders by a general failure to respond to the crime seriously.\textsuperscript{97} In this way, “the private lives of women are shaped not by the men they marry or live with as much as by the institutions in our society that define and shape intimate relationships.”\textsuperscript{98}

Criminal proceedings on domestic violence cases, in and of themselves, are insufficient; and the same is true of forced marriage. Moreover, the low rate of success of the FMA in the UK indicates that a sole reliance on civil remedies in cases of coercion and violence are insufficient to address the harms of forced marriage, even when those civil remedies are backed by criminal remedies for breach of protective orders.\textsuperscript{99} Civil remedies are faster, easier to attain, less adversarial, and perhaps most importantly result “in practical court-ordered reliefs relevant to the needs of victims, housing, child support, enhanced police protection and, [in some

\textsuperscript{95} \textit{Id.} at 32. \\
\textsuperscript{96} STRICKLAND, supra note 111. \\
\textsuperscript{97} PENCE, supra note 122 at 32. \\
\textsuperscript{98} \textit{Id.} \\
\textsuperscript{99} STRICKLAND, supra note 111.
jurisdictions] rehabilitation services for abusers.”

But to address the inadequacies of civil remedies, domestic violence policy “pursued a criminalization path to change the climate of tolerance and create a general deterrence to battering and a civil process to address the immediate needs of victims.” Responding to domestic violence in both criminal and civil terms still left the question of the hesitant victim who refused to cooperate with a criminalization agenda. Domestic violence could not remain a purely civil issue without ultimately undermining its own intent, thus the solution was to “pursue cases even when a victim [did] not want it,” stopping short of endangerment or penalization for noncooperation. The answer was to adopt the policies of mandatory arrest and no-drop prosecutions, but that dual approach required serious reconsideration of the institutions involved in such a policy.

[W]e had to identify what was it about this crime and this type of offender that made it difficult to successfully place controls on the offender. We had this idea that a primary objective should be to shift the burden of the confrontation of abusers from the victim onto the system. This meant police could no longer ask the victim whether she wanted him arrested, thus our mandatory arrest policy. We had to neutralize the offender’s ability to control the process by getting the victim to ask to have the charged dropped; thus the no-drop policy. We wanted judges to sentence offenders either to jail or rehabilitation groups or both and immediately revoke probation when the offender failed to complete rehabilitation groups or reoffended. We needed an arrest policy that based the decision to arrest on the presence of probable cause and the presence of danger to the victim. We needed a quick civil process that overcame the gaps in divorce action and a criminal action.

This institutional shift was accompanied by a necessary critique of “work practices (i.e. forms, rules, regulations, documentary practices, communication networks, technology limitations, insurance rules, etc.), and the ways in which those practices reinforced and even utilized force, coercion, and violence at the institutional level.” Often the first point of contact a victim has with the process follows from the dialing of 911 at which point she enters into a series of

100 Pence, supra note 122 at 32.
101 Id. at 33.
102 Id.
103 Id. at 36.
104 Id. at 36–37.
105 Id. at 38.
exchanges that ultimately reduce her experience to a “case,” codifying it into a series of paperwork forms that are not neutral, but will screen, select, define, classify, characterize, prioritize, arrange, underline, direct, mask, and contour her real experience for the consumption of the courts, social services, advocates, women’s groups, the police, etc. The text, like the professional in charge of her case, is active, and much of the ideological work of the system is buried between the two. Due to the force of language, and in order to reapportion priority to victim safety and support, the infrastructure of the system needed to change, beginning with the texts, the forms, and the reporting-writing formats—the administrative ideological bases.

When a woman who has been beaten by her intimate partner dials 911 for help, she activates a complex system of agencies and legal proceedings that constitute the state’s legal apparatus of ruling. It is, in turn, linked to other systems of ruling, particularly mental health and social service systems. These agencies of social control are themselves coordinated and controlled through administrative processes and regulating texts increasingly present in the mundane but vital processes that manage our daily lives. Most activities that occur in the processing of a case are linked to texts. Texts are the primary instruments of implementation and action in this system; therefore, changing the text can change the outcome.106

The institution’s representation of the incident reflects the institution’s concerns.107 “Battered women’s lives are twisted into preformulated categories created not in the lived experience but in the professional discourse.”108 Key to organizing a coordinated response to forced marriage, in the footfalls of domestic violence policy, is an understanding of how discursive power functions through conceptual practices immured in a textually mediated legal system.109 Expanding this focus to what may seem to be minutia, in the shape of forms and rules, to the larger theoretical, but nonetheless textual formulation of forced marriage as an issue of gender inequality, is the

106 Id.
107 “Professionals are trained to translate what they see and hear and gather from the everyday world into professional discourses about the world. The professional discourse in reports and documents appears to be the objective work of an individual responding to a specific set of circumstances, yet this far from what actually happens.” Id. at 39.
108 Id. at 39–40.
first step in formulating a policy scheme to address forced marriage in the US. But it is only the first step.

IV. THE WAY AHEAD

Rather than focus on cultural delineations, “[p]olicy responses need to be framed within an understanding of the diverse and interconnected influences on women’s agency, and their experiences of coercion, if they are to address the problem of forced marriage effectively.”

Civil and criminal remedies designed to respond to forced marriage, must like domestic violence policies, incorporate community intervention projects that focus on institutional reform while seeking to create and maintain supportive infrastructure that promotes collaborative efforts among many community agencies with mutual and clear goals.

A supportive infrastructure is a network of community services that are designed to assist battered women in meeting their needs. The essential services that must be in place before or as part of an interagency effort to address domestic violence are emergency housing, confidential victim-directed court advocacy, support and education groups, and financial assistance to enable women to live separate from their abusers. Without these essential services, battered women may be placed in greater danger when the criminal justice system responds to the offender’s violence.

Domestic violence policy provides an excellent model for a forced marriage policy. In both cases, emergency housing is a necessity. If a woman cannot escape her situation, but must proceed with civil or criminal remedies while living with her abuser, or the family that is forcing her into marriage, she will not be likely to come forward and she will suffer in silence because she has been given no other option. Moreover, a comprehensive system of support should be put in place that exceeds basic housing needs, because “women are more likely not to return to

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110 Gill and Anitha, supra note 95 at 139.
112 Id.
the batterer if they have child care, transportation, and income available and have obtained a variety of shelter services.”\textsuperscript{113}

Court advocates should be available to victims of forced marriage to assist in the filling out of forms and obtaining temporary restraining orders as well as being present in hearings. “On-call advocates have become a part of the institutionalized response to domestic violence by routinely initiating contact with battered women and by providing information to the criminal justice system when the women give permission to do so.”\textsuperscript{114} In addition to an advocate who focuses on the particular needs of the woman, culturally specific groups are a vital community resource where women in similar situations can share their experiences, exchange valuable information, and assist each other through the legal process as well as the emotional and social issues that are common to their experiences.\textsuperscript{115} And finally, in order to ensure that women can break free of the power relation that binds them, assistance with child care, medical care and transitional housing as well as financial resources must be available including a variety of community services to assist them as they maneuver through the social welfare system, with the goal of achieving economic independence through education and employment opportunities.\textsuperscript{116} These types of community based remedies and responses have met with fair success in the context of domestic violence and would offer the same sort of success for women suffering under forced marriages and young girls who live with the threat of forced marriage. Some jurisdictions also utilize batterer-rehabilitation programs that could form a model for education and intervention programs designed to address the familial gendered issues involved in forced

\textsuperscript{113} E. GONDOLF, E., AND R. FISHER. BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO LEARNED HELPLESSNESS, 93 (Toronto: D. C. Heath, 1988).

\textsuperscript{114} SHEPARD, supra note 155 at 117.

\textsuperscript{115} Id. 117–118.

\textsuperscript{116} Id. 118.
And finally, any response to forced marriage, as with domestic violence, will require periodic reflection and critique to ensure that the means and methods utilized do indeed result in the desired outcomes, and that those desired outcomes themselves are appropriate and ultimately concerned with gender equality. Much more legislative, economic and social support is needed in response to domestic violence in the US; and foreign jurisdictions that have neglected gender in the formulation of civil and criminal remedies have yielded spotty success in the face of forced marriage; but we have before us a good point from which to start. These are the hopeful beginnings of a coordinated and multifaceted response to forced marriage in the United States.

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