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Behavioral Economic Issues in American & Islamic Marriage & Divorce Law

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Behavioral Economic Issues in American and Islamic Marriage & Divorce Law

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Introduction:

This paper will outline some of the behavioral economic issues found within marriage and divorce law. Using the modern American Marriage and Divorce System (“AMDS”) as a starting point, this paper will discuss how the Islamic Marriage and Divorce System (“IMDS”) can be seen as responding to and addressing a number of these behavioral economic issues within marriage and divorce law. However, before either system can be discussed in detail, some of the basic concepts and terms found within the IMDS need to first be explained.

Under the IMDS, men are allowed to have up to four wives. From an economic perspective, polygamy increases the scarcity of available women relative to the male demand for them. Therefore, in a highly polygamous society, the value of an available woman is increased and women will generally hold a superior bargaining position when it comes to negotiating the initial marriage contract. In the Muslim world, part of this increase in value and bargaining position expresses itself as a dower that is paid by men to their prospective wives. When polygamy is especially high, dowers can represent a significant portion of the husband's wealth.¹ The dower is the wife's separate property.² The wife may also have rights in property accumulated by the marital unit; however, this

¹ At some points in history, and amongst some classes, the dower could represent more than a husband's total available wealth. See discussions by the classical Jurists on the issues of receiving loans for dower payments in the classic Shafi'i text by Naqib Misri, *RELIANCE OF THE TRAVELLER* (trans. Shaykh Nuh Keller, 1997) also; *THE DISTINGUISHED JURIST'S PRIMER: VOLUME II* 71-120 (trans. Imran Ahsan Kahn Nyazee, 1996,) also; *CHAPTERS ON MARRIAGE AND DIVORCE; RESPONSES OF IBN HANBAL AND IBN RAHWAYH* 27-37 (trans. Susan A. Spector sky 1993).

² While it is relatively unimportant for the purposes of this paper, it should be noted that the separate property nature of the dower system obviously creates a possible incentive for opportunistic behavior for women to marry and divorce men as frequently as possible in order to enrich themselves. See *In re Marriage of Noghrey*, 169 Cal. App. 3d 326, 215 Cal. Rptr. 153 (1985)

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right is not necessarily a default right and may be an issue that the parties will negotiate as a part of their formal marriage contract.

Marriage contracts are extensive under the IMDS. Under a number of the Islamic schools of jurisprudence (or “Schools of *Fiqh*,” hereafter “SOF”) an assortment of legal traditions ensured that the expectations of the parties in regard to both the financial and non-financial aspects of marriage would be written into the formal marriage contract.³ Under these traditions, any additional activities (outside of the bare expectation of sexual gratification) that husbands would want or expect from wives (e.g. procreation, household work etc.) that could cause women to incur any type of additional cost (e.g. time and opportunity costs) during marriage, would have to be specifically negotiated for as part of the formal marital contract. In short, the early classical traditions ensured that men would have to formally bargain with prospective wives if they desired any activity from them beyond recreational sex. For instance, if a man wished to have his prospective wife spend her time producing and raising children, while his prospective wife would prefer to spend her time developing her business or market-based skills instead, then he would predictably have to compensate his prospective wife in some way (e.g. by offering her a higher dower) in order to convince her to marry him.⁴

³ Dawoud S. El Alami, *The Marriage Contract in Islamic Law* at 101 (1992); See also, David Pearl and Werner Menski, *MUSLIM FAMILY LAW* at 176 (1998)

⁴ Obviously, these traditions provided benefits to women by allowing them to garner specific compensation for activities that have traditionally been financially unrewarded and costly for women in both the Muslim world and in the West. As pointed out by a number of scholars, the opportunity, time and financial sacrifices made by women who engaged in activities such as household work, child-rearing and procreation were traditionally unrewarded at divorce in the American Common law system. This occurred despite the fact that these sacrifices would be expected to generate significant financial and economic gains for husbands by allowing them to specialize further in their own market-based skills. See Lloyd Cohen, *I Gave Him the Best Years of My Life*, 16 J. LEGAL STUD. 267, 278 (1987); Mincer & Polachek, *Family Investments in Human Capital: Earnings of Women*, *ECONOMICS OF THE FAMILY* (T. Shultz ed. 1974); Gary Becker, *A TREATISE ON THE FAMILY* (1981).

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The right of divorce ("*talaq*") is in the hands of the husband. Each time the husband issues a *talaq*, he is required to provide his wife separate housing and maintenance equal to his own (i.e. sufficient to maintain her standard of living) for a three to four month period called the "*idda*". Sex before the end of the *idda* causes the marriage to resume as normal. However, should the *idda* run its full course, the husband is provided the option to continue on with the marriage, or otherwise permanently divorce his wife.⁵ The husband may use this power up to three times. Upon the third-instance of *talaq*, the divorce becomes final.⁶

As an economic tool, the *talaq-idda* had two distinct uses during the early and classical period of Islamic law. The first use involves *idda* as a negotiation tool that the husband may use to renegotiate the marriage contract which, as previously discussed, is likely to initially advantage the wife. Through this use of *idda*, the husband is able to prevent the wife from accumulating her proportional interest in earnings of the marital unit. For instance, a farmer sends his wife, whose dower includes half of his wheat farm, on an *idda* during harvesting season three years in a row. As a result, the wife is prevented from claiming half of the profits from the farm's sales of wheat while the husband significantly increases his own separate financial wealth.

The second use of the *talaq-idda* involves the use of the *idda* as a financial shelter from creditors. For instance, a husband sends a wife into *idda* along with half of their

⁵ "Permanence" is relative though, as he can remarry her, but only if she's been married and divorced by someone else in the meantime.

⁶ It should be noted that there are a number of different forms of divorce of which "*talaq*" is just one. Additionally, there is an "instant" form of divorce as well, called "*zihar*", but that's generally frowned upon in the Quran. Also, in both practice and in the Quran, women can divorce men (generally by disgorging the value of their dower). However, these other forms of divorce are extremely complicated and relatively irrelevant to the specific issues of this paper.

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property (for the sake of simplicity, we'll assume that most of the property had previously been his separate property). During that time, the husband defaults on a loan. The creditor can't touch the property in the wife's possession as that property is the wife's separate property. Obviously though, this strategy also generates a benefit for the wife as, if the husband does use one of his *talaqs* as a shelter, then he will have to negotiate with the wife in the future in order to regain any property he may have given her. This ultimately reduces the efficacy of the *talaq* as a tool for renegotiating the marriage contract, as any husband who has used a *talaq* as a shelter would—on top of renegotiating the marriage contract—also have to renegotiate getting his property back.

These are but a few of the important features of the IMDS. I will discuss these and others in much greater depth in my behavioral economic discussion of the IMDS. However, in order to more fully understand the behavioral economic implications of these features, it is important to examine a few of the behavioral economic issues currently facing the modern AMDS.

American Marriage and Divorce System: Rational Choice and the Family as Firm

The modern AMDS is based in neo-classical economic theory. One of the chief principles in neo-classical economics is “Rational Choice Theory” (“RCT”). The core assertion of RCT is that individuals will act rationally to maximize their own utility. Therefore, society’s overall utility is optimized when individuals are allowed to formally contract with one another as freely as possible and should only be infringed when individuals are incapable of acting rationally (e.g. due to age, mental status etc.) or when barriers to efficient contracts already exist (e.g. high transaction cost etc.).

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As an empirical theory, RCT has been extremely accurate at predicting individual behavior, especially when that behavior is viewed in the aggregate.⁷ Given the success of RCT as an empirical theory, it is unsurprising to find that much of modern American law has increasingly incorporated the normative aspect of RCT in shaping its legal rules. In the AMDS, the influence of RCT in the modern era has led to an increase in the degree of autonomy potential spouses are given to contract the terms of their marriage.

Previously, the AMDS dictated a number of areas that spouses were given little individual autonomy in controlling, including; spousal support obligations (alimony) and certain causes for divorce. Under the current system (and with a few exceptions such as sexual relations, etc.) potential spouses are now allowed to enter into formal contract negotiations over many of the legal facets of marriage, so long as those negotiations occur prior to the marriage and are written down in the form of a prenuptial agreement. Therefore, the rules surrounding marriage are typically default rules which exist to provide the parties an easy, quick, automatic means of forming their marriage contract. However, it should be noted that the majority of American default rules regarding marriage generally only occur at divorce as, with the advent of “No Fault” divorce, the formal marriage contract itself has little to do with conduct occurring during marriage and generally pertains only to the post-divorce division of financial and/or property interests. Under RCT, the existence of default rules encourages efficiency by helping couples to avoid long and protracted negotiations over issues where most individuals hold the same preferences. This lowers transaction costs. As pointed out by the distinguished

⁷ Examples include: predicting responses to changes in price, voting behavior, criminal activity etc. See, Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STANFORD L. REV. 1551 (1998).

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rational choice scholar Ronald Coase, if a couple holds preferences that vary significantly from the default rules, then they will simply contract around them.⁸ Therefore, under RCT, the fact that most couples do not engage in lengthy prenuptial contracting is merely evidence that the default rules accurately represent the preferences of most couples.

Despite the relative success and influence of RCT on other areas of law (such as Commercial Law), increasing data from the realm of behavioral economics and neuroeconomics has suggested a number of problems with the use of RCT in developing the AMDS. In particular, a number of Behavioral Economics & Law studies have suggested significant problems about the ease with which the default rules can be contracted around and therefore whether the default rules do in fact represent the preferences of most couples.

For instance, a number of behavioral science studies strongly indicate that most couples do not take enough precaution when it comes to the possibility of divorce and therefore are not acting rationally to protect their interests. It should come as no surprise that most marriages do not begin with the signing of a prenuptial agreement. Under RCT, this simply indicates that the default rules accurately represent the preferences of most couples when it comes to issues of marriage and divorce. However, recent studies suggest that most couples are both unaware of the default rules and may suffer from a behavioral phenomenon known as the “overconfidence bias” that prevents them from being able to rationally act in their own interest.

In their study “Perceptions and Expectations of Divorce at the Time of Marriage,” Lynn A. Baker and Robert E. Emery asked randomly select marriage license applicants in

⁸ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)

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Virginia to guess the proportion of marriages ending in divorce. Most were surprisingly accurate and guessed approximately 50 percent. However, when asked to judge that the chances that their own marriage would end in divorce, the median response was zero.

A possible reason for why the majority of the respondents would hold onto the irrational belief that there is no chance that their marriage will fail, despite have relative accurate cognitive knowledge of the failure rates of others, may be due to an “overconfidence” or “optimism” bias that has been found to exist in many other fields and types of studies.⁹ The basis of these biases is the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us.¹⁰ There are many possible rational reasons for these biases. In the case of marriage, it may be that—by generating an expectancy that your marriage will fail at all—you increase the likelihood of that failure occurring (i.e. you generate a type of self-fulfilling prophecy).¹¹ However, regardless of the benefits of overconfidence, its existence still suggests that most individuals may not take an adequate level of precaution when it comes to negotiating their marital contract—and therefore may not be negotiating around the default rules as a result. In other words, the fact that most marriages do not begin with the signing of a prenuptial agreement does not indicate that the default rules represent the preferences of most individuals, but only that most individuals do not

⁹ Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAN. L. REV. 1653, 1659 & N.22 (1998) (almost two hundred studies support the existence of overconfidence bias in a variety of contexts).

¹⁰ Russell B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CA L. REV. 1091 (2000).

¹¹ See Flyvbjerg and Bent, *Delusions of Success: Comment on Dan Lovallo and Daniel Kahneman*, HARVARD BUSINESS REVIEW 121-122 (December Issue, 2003,) also; Rosenthal and Jacobson, *Teacher's Expectancies: Determinates of Pupils IQ gains*, 19 PSYCH. REP. 115-118 (1966).

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expect that the default rules will ever apply to them. To quote distinguished scholar Ira Ellman in describing the results of Baker and Emery's study:

*This result suggests it may be pointless to ask about the parties expectations at the time of their marriage as to the disposition of their property should they divorce, for they probably have no expectation at all because they do not expect to divorce. The data suggests that economic decisions made during marriage are largely premised on the assumption that the marriage will continue.*¹²

Moreover, Baker and Emery's study found that, not only were most respondents irrational in regards to the probability that their marriage would fail, but that they were also highly unaware of the terms of their marriage contract and the probable economic effects facing them in the event of a divorce. This suggests that not only are parties not contracting around the default rules because of overconfidence in regards to their marriage, but they may not even be aware of default rules and economic risks they face to begin with.¹³

Another behavioral economic issue with the assumptions of RCT and its effect on the American Marriage and Divorce System (AMDS) involves the nature of trust. As pointed out by Lynn Stout's brilliant work on closely held corporations, at least in the short term, trust is crucial in developing efficient working relationships.¹⁴ As Professor Stout notes, in a relationship where both parties involved are trustworthy and accurately

¹² American Law Institute, *Reporter's Note to Comment a*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 4.12.

¹³ There are a number of possible reasons to explain this ignorance towards the nature of the default rules. Under traditional economics, this behavior would be attributed to the presence of high information costs (i.e. the cost of discovering the nature of these, frequently complex, legal rules for most couples) and a rational choice amongst most individuals to avoid them. Some behavioral economics and law scholars have proposed that this ignorance is yet another example of the overconfidence bias and that individuals do not learn about the rules, as pointed out by Ira Ellman; "because they do not expect to divorce." However, a third possibility may be that individuals do not learn about the default rules out of a rational desire to establish trust in their relationship; see footnote 19 infra.

¹⁴ Lynn A. Stout and Margaret M. Blair, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 UNIV. PENN. L. REV. 1735 (2001).

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perceive each other as trustworthy (i.e. where “trust” exists between the two), each party’s need for costly negotiations and extensive contracts is significantly lessened. Parties simply will not need to constantly guard against exploitation and opportunism by one another if a high degree of trust characterizes the relationship. Thus, a relationship between individuals built on trust will generally have higher overall levels of utility and productivity than one that is not. We can probably safely assume that the same applies to marriage and that many individuals would therefore wish to have a marriage characterized by trust. This then raises the obvious question of how most individuals establish trust.

Recent behavioral science and neuroeconomic studies have strongly demonstrated that “trust” between individuals is mostly established through the exchange of behavioral “signals” indicating the willingness each party has to trust the other and the existence of a trustworthy character (e.g. communication of a good reputation, an absence of shifty eyes etc.).¹⁵ Additional studies indicate that some people are more trustworthy than others and some individuals may be inherently, or biologically, predisposed to “untrustworthy” or “exploitive” behavior.¹⁶ Perhaps more importantly, extensive empirical data indicates that while trustworthy people presume others are trustworthy, untrustworthy individuals distrust others.¹⁷

¹⁵ Colin Camerer et al, *Getting to Know You: Reputation and Trust in a Two-Party Economic Exchange*, 308 SCIENCE MAGAZINE 78 (2005,) also; Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 768-795 (1998).

¹⁶ Paul J. Zak, Robert Kurzban, and William T. Matzner, *The Neurobiology of Trust*, 1032 ANN. N.Y. ACAD. SCI. 224-227 (2004).

¹⁷ Lynn A. Stout and Margaret M. Blair, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 UNIV. PENN. L. REV. 1735 (2001).

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Given these studies, suppose a potential husband responds to the possibility of marriage by showing up the next day armed with a lawyer and fifty-page prenuptial contract for his potential spouse to sign.¹⁸ What signal is this behavior likely to send? What character would his potential spouse logically presume the husband has? The answer to these questions is not likely to be particularly good if either party wishes for a relationship characterized by trust. Moreover, despite RCT's assertion to the contrary, these studies in areas of signaling and trust suggest that the lack of prenuptial contracts in the AMDS does not mean that its current default rules reflect the preferences of most individuals but, instead, may only indicate that most individuals do not wish to signal an untrustworthy character to their potential spouse and undermine their future relationship. In short, individuals may not contract around the default rules because the cost of such contracting is simply too high. In other words, the default rules have a "stickiness" to them that is far greater than RCT would typically expect.¹⁹

Beyond the issues of signaling trustworthiness, or judging the character of a potential mate, there may be a larger self-selection issue with RCT's presumption about

¹⁸ Id. (This hypothetical first appeared in Prof. Stout's paper on close corporations, but in a slightly different form.)

¹⁹ Moreover, trustworthy individuals may also even actively avoid learning about the default rules to further signal the existence of a trustworthy character to potential partners. This is noteworthy since it may help to explain Baker and Emery's datum that most individuals are unlikely to be aware of the nature or content of the default rules regarding marriage. If two individuals wished to signal to each other the existence of a trustworthy character, they may attempt to avoid learning about the default rules to demonstrate their willingness to place themselves in a relative position of vulnerability. This suggests that the default rules surrounding marriage would be even more difficult for trustworthy individuals to contract around since even being aware of these rules would deprive them of a possible signaling strategy. This is separate from the issue of the overconfidence bias; individuals may very well realize that there is a good chance that they will divorce, but they simply may not choose to engage in the superficially rational behavior of learning about the default rules as to do so would signal the existence of an untrustworthy character and potentially deprive them of a trustworthy mate. This idea, that individuals may rationally place themselves in a position of vulnerability as a means of establishing trust, is extremely similar to Carl Bergstrom's theory of "time-wasting" seen in the mating behavior amongst birds, see; Carl Bergstrom et al, *Building Trust by Wasting Time*, WORKING PAPER (2007).

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the nature of default rules. As Professor Stout also points out in her work on closely held corporations, people who are trustworthy are more likely to enter into potentially rewarding relationships that require a great deal of vulnerability since they are more likely to view others as trustworthy.²⁰ Conversely, untrustworthy individuals are more likely to pass up the same opportunities since they are likely to view others as untrustworthy.²¹ As Professor Stout points out, this suggests that the individuals involved with closely held corporations may have a more trustworthy character than those individuals involved with publicly held corporations.²² To wit, because most closely held corporations are formed without a great deal of formal contracting, untrustworthy individuals are less likely to join them as doing so involves exposing oneself to more vulnerability than most untrustworthy individuals would be willing to accept.²³

If we view marriages in America as being of two-types—those formed with prenuptial contracting and those formed without—then the same concept of self-selection is likely to apply to marriage formation as well. In short, untrustworthy partners are less likely to enter into marriages without significant and formal prenuptial contracting (as doing so would expose them to possible exploitation), while trustworthy parties are more likely to enter into marriage without any degree of prenuptial contracting whatsoever. This is problematic since it means that trustworthy individuals face higher costs than untrustworthy individuals when it comes to maximizing their utility, as engaging in

²⁰ Lynn A. Stout and Margaret M. Blair, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 UNIV. PENN. L. REV. 1735 (2001).

²¹ *Id.*

²² *Id.*

²³ *Id.*

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prenuptial contracting may deprive them of the opportunity to pair with an equally trustworthy mate.

For instance, person A (who is trustworthy) and person B (who is untrustworthy) both have the same preference in regards to a particular marital issue (e.g. both want their earnings to be separate from their spouses' during marriage) which is contrary to their State's default rules. This isn't a problem for B, since he was going to engage in extensive premarital contracting regardless of this particular marital issue. However, A must now forgo his preference on this particular issue if he wishes to have an equally trustworthy mate. Or, conversely, A must now deprive himself of a trustworthy mate if he wishes to protect this particular preference. In short, the nature of the default rules force A to incur a cost he otherwise would not have faced. This is a problem since it means that the AMDS may impose higher costs on trustworthy individuals than it does on untrustworthy individuals when it comes to protecting their preferences.

However, even if most individuals do not suffer from the biases and partner selection issues already brought up, another problem with the AMDS involves the issue of information costs and whether couples will be able to maximize their utility through the opportunities that the AMDS currently provides them.

In America, the prenuptial agreement represents the sole opportunity couples have to engage in formal negotiations over the marital contract and to contract around the default legal rules. This is a problem since, as previously pointed out, most people are unlikely to have developed strong, if any, preferences in regards to a marriage that hasn't even begun yet. Most of the preferences regarding marriage are established *during the marriage*. Moreover, perhaps due to the increasing influence of RCT on the current

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marital legal system, some scholars have noted that the AMDS has begun to highly resemble American commercial law (where the influence of RCT is the strongest).²⁴ As a result, the formal marriage contract in America typically only includes the distribution and control of financial interests. Other issues that affect spousal utility; sex, household work, number of children, time spent with family, child-rearing, certain guarantees regarding a potential spouse's quality of life, and old-age care²⁵; are culturally—if not legally—considered “outside” the realm of the formal marital contract. Thus, the parties are left to “discover” these preferences about each other during marriage, at which time they may also be legally powerless to formally negotiate around them.²⁶

To understand why this latter issue is a problem, the informational advantages created by formal negotiations and contracting need to be understood. To once again borrow an example from Professor Stout's work on Closely-Held Corporations;

[N]egotiating and drafting a contract encourages would be joint venturers to communicate more clearly what each wants to get out of their relationship. This makes it easier to take account of each other's preferences because those preferences are better known. It can also help avoid the sort of nasty surprises that undermine trust in a long-running relationship. (If your partner does something you do not like, it can be difficult to tell if this happened because she was mistaken about what you wanted or because she knew what you wanted but was indifferent to your welfare.)²⁷

²⁴ Jana Singer, *The Privatization of Family Law*, 1443 WIS. L. REV. 1557 (1992).

²⁵ See *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 16 Cal. Rptr. 2d (1993). (Husband was gravely ill and wished to avoid going to a nursing home. He and his wife agreed that, in exchange for 24-hour nursing care, he would leave her a specified property at his death. The court of appeal found that the wife had a pre-existing duty to care for the husband and that a “spouse is not entitled to compensation for support, aside from rights to community property and the like that arise from the marital relation itself).

²⁶ *Id.*

²⁷ Lynn A. Stout and Margaret M. Blair, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 UNIV. PENN. L. REV. 1735 (2001).

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The AMDS recognizes these advantages of formal contracting in regards to conditions that most individual are unaware of (i.e. the default rules) or do not expect to occur (i.e. divorce). In other words, despite the fact that most individuals seem incapable of acting rationally by making use of the advantages of formal contracting—the AMDS expects them to do so anyway. From the perspective of Prof. Richard Posner, this is because we want individuals to act rationally and a system that relies on the premise that people act rationally encourages such behavior.²⁸

Prof. Posner’s argument may have merit.²⁹ However, under the AMDS, individuals are denied the advantages of formal contract negotiations in regards to half of the activities of marriage (e.g. sex, household work, etc.). The result is a hybrid system that expects parties to be capable of rationally maximizing their utility in regards to marriage, but then denies them the opportunity to do so. In short, even from a traditional economics perspective, the AMDS is still a poorly designed system so long as it provides obstacles to the ability of individuals to formally contract around all the relevant areas of marriage.

The Islamic Marriage and Divorce System: A Bounded Version of RCT

For the most part, the IMDS allows for more, not less, contractual autonomy than the American system. As noted by Werner Menski and David Pearl in their book on Islamic Marriage and Divorce law, both the Quran and the classical jurists can be perceived as setting up a marriage-and-divorce system that deliberately encourages

²⁸ Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STANFORD L. REV. 1551 (1998).

²⁹ Though, as previously discussed, failure to take the trustworthy-untrustworthy aspect of human nature into the rationality assumption may lead to incentives benefiting untrustworthy individuals.

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negotiations between parties and seeks to reduce the need for government interference or judicial intervention.³⁰ Issues affecting utility within the marriage that are considered outside the realm of the formal marital contract in America (sexual relations, household work, quality of life issues, etc.) are allowed in the IMDS (in addition to the typical financial and divorce considerations present in America marriage contracts). This indicates an approach to Marriage and Divorce Law that is based in RCT, but is unlikely to suffer from the same issues of “hybridization” as the AMDS.³¹ Moreover, unlike the AMDS, which has failed to address a number of the behavioral economic issues previously brought forth, we can see a number of features of the IMDS as approaching possible solutions.

Unlike the AMDS, the IMDS allows for more than one opportunity for formal contract renegotiation. It allows for four, with three of those opportunities (in form of the *talaq*) occurring during marriage. This significantly reduces the behavioral-economic

³⁰ David Pearl and Werner Menski, *MUSLIM FAMILY LAW* at 176 (1998).

³¹ Additional evidence that the IMDS is based in a form of RCT can be ascertained from other areas of Islamic jurisprudence that indicate a heavy influence of RCT in the development of Islamic law in general. General canons of Islamic Law dictate that the majority of rules in Islamic Law are default rules, not immutable ones. And, even then, the number of default rules should be heavily limited in favor of individual contractual autonomy. This idea was furthered during the classical period when most of the classical jurists were in a struggle with the Ummayid dynasty. For instance, the authoritative Shafi’I text “Reliance of the Traveler” contains particularly scathing passages about the authority of central government (particularly in regards to taxes). Even the Quran initially refers to itself as an “Umma,” or “Guidebook,” suggesting that the majority of its text should be viewed as default rules and not immutable ones. Moreover, as pointed out by Islamic law scholar, Ali Khan, the constitution at Medina (the first state governed by Mohammed), was not based in a concept of “sovereignty” surrounding an individual King, or a natural law concept involving the “general will” of the people, but was a pure social contract between the different groups of people living there. This trend was continued even past the classical period when, despite the emergence of monarchy as the dominant form of governance in the Muslim world, the monarchs would still begin every reign with an issuance of a formal contract signed by the different tribal leaders in the state. In short, the ability of individuals to contract with one another was not just seen by early Muslims as being an important component of an orderly society, it was seen as the basis for the state itself. This ideology is heavily reflected in the IMDS.

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issues in the AMDS which expects individuals to engage in formal contracting regarding their marital preferences when they haven't even started their marriage yet.

The fact that the power of *talaq* is unilaterally held by the husband is less of an issue than one may initially think. As stated in the beginning of this article, by increasing the scarcity of available wives, polygamy places women in an advantageous initial bargaining position in regard to their marital contract. Moreover, the use of the *talaq-idda* as a shelter for property can also improve the economic bargaining position of wives.

For instance, if a husband uses his first *talaq* for debt purposes by giving half of his property to his wife during *idda*, his bargaining position would be significantly compromised during any following *talaq* used for renegotiating his marital contract (since, on top renegotiating the formal marital contract, he'd also have to negotiate getting his former property back). These dueling purposes of the *talaq* (as a renegotiation tool and as a financial shelter) are of significant importance and will be addressed later in my conclusion. Suffice to say that placing the power of *talaq* in the hands of both parties would further exacerbate the inferior bargaining position held by most husbands under the initial marriage contract.

Of course, placing the right of formal contract renegotiation solely in the hands of the husband only makes sense if the initial marriage contract actually does place the wife in a superior bargaining position. In order for this to be possible, the wife must be willing to protect her potential interests by engaging in extensive premarital contracting. However, as pointed out in my behavioral economic discussion of the AMDS, this is a

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problem as requiring individuals to engage in extensive premarital negotiations raises significant issues in regards to trust, partner selection and the overconfidence bias.

One response to these issues is the IMDS's use of the *wali* (guardian) to negotiate the initial marriage contract. The role of the *wali* is purely one of contract negotiation. Partner selection is still based upon the consent and choice of the potential spouses. According to Islamic law, no one can be forced to marry someone they do not want to. In regard to women, the appointment of a *wali* is expected by the Quran for a woman's first marriage. Under a number a SOF, a competent *wali* is required for a marriage to be valid. The *wali* is normally an older family member (typically the father). However, most SOF allow the woman to appoint a *wali* of her choice if she considers the default *wali* to be unsuitable. None of the SOF require a *wali* for men (barring issues of capacity such as age or mental handicap), however, men may appoint a *wali* to negotiate on their behalf.

The use of the *wali* provides a way of navigating around some of the behavioral economic issues previously brought up in my discussion of the AMDS. The overconfidence bias only applies to the potential spouses themselves. When the respondents in the Virginia study were asked to guess the probability of divorce regarding the marriages of others, they were incredibly accurate. Given this analogy, we can assume that outside parties, such as the *wali*, would be extremely capable of

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predicting the probability of divorce – which was fairly common during the early Islamic period and remains common in many Muslim countries today.³²

Therefore, a situation where the marital contract is typically being written by the wife's *wali*, the initial marital contract is likely to heavily advantage the wife, especially if the husband is likely to still suffer from an overconfidence or optimism bias of his own. Moreover, ignorance towards the default rules that becomes such an issue in the AMDS is less likely to be an issue for the wife, since her *wali* (typically her father or an elder with prior marital experience) is likely to be aware of those rules and the potential issues that arise during marriage. Simply put, individuals who have been married (typically long enough to have grown children) are more likely to be able to predict the typical issues and future preferences likely to occur during marriage than individuals with no such experience.

Compared to men, the relatively strong expectation that women require a *wali* for their first marriage makes sense, since the bargaining position of women during the marriage is so heavily based upon the initial marital contract. Men, who are given the sole power of *talaq* with which to renegotiate the contract following the marriage, have less of a need to protect their interests through the use of premarital contracting.

One of the implications of the *wali* system is an increase in the likelihood that the parties will draft more complete marriage contracts on their own. This reduces the

³² While precise details regarding marriage and divorce during the Early and Classical Islamic period are difficult to determine precisely, it is probably telling that, of the Prophet's 11 or 13 wives, only A'isha had not been married previously. See also Leila Ahmed, *WOMEN AND GENDER IN ISLAM* (1992) (citing the extremely high frequency of remarriage and divorce for women in Mamluk society in addition to the presence of a relatively high-degree of female affluence compared to other societies at the time). Additionally, contemporary evidence also seems to indicate a high rate of divorce in many Muslim societies - one study of the divorce rate in Djibouti in the 1960's found divorces to be 50% as common as marriages. See Abdullahi A. An-Na'im, *ISLAMIC FAMILY LAW IN A CHANGING WORLD* 70-73 (1992).

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reliance on, and need to create, extensive default rules and subsequently reduces the need for judicial intervention. As stated previously, this is clearly one of the goals of both Islamic Law in general and the IMDS in particular. Moreover, as previously pointed out in my discussion of the marriage contract, the classical jurists were remiss to develop a clear set of default duties, obligations or positive rights (other than sexual gratification) emerging during the marriage that were not stated within the four-corners of the marital contract. One possible reason for this is that the classical jurists were a great deal more aware of the inherent “stickiness” of default rules when it comes to the issue of marriage and so were hesitant to establish a clear, or lengthy, set of default rules that created positive rights or duties on either party. The idea being that, without a clear set of default rules that the parties could rely upon or use to their strategic advantage, individuals would be forced to draft more complete marriage contracts and engage in more extensive premarital negotiations. Empirical evidence indicates that this may be the case. Though, that said, encouraging parties to draft more extensive marriage contracts may also have some dramatic costs.³³

³³ While the IMDS seeks to encourage parties to draft more complete contracts by refusing to provide a set of clear default rules—some SOF do so more than others. The subsequent lack of clear default rules would mean that parties would take much longer to negotiate and form a marital contract, since they would be unable to rely on an automatic list of defaults. Empirical evidence demonstrates that this may be the case. Saudi Arabia—which relies on the Hanbali system where the parties are given the most amount of autonomy in drafting their contracts—has the fourth lowest marriage rate in the world (“The Pocket World in Figures,” *The Economist Magazine*, 2006 edition). Though admittedly, it is likely that this is only one of several contributing factors. For instance, Saudi law also prohibits women from condition-by-condition negotiation of their marital contract (i.e. the Saudi Arabian marriage-contract is a “take-it-or-leave-it” contract of adhesion). This would also contribute to Saudi Arabia’s low marriage rates since it would make contractual negotiation much more difficult than it would be otherwise. Additionally, the relative inability of most Saudi women to pursue a divorce (Saudi Arabia is one of the more difficult countries for women to obtain a divorce in) may also play a role in Saudi Arabia’s low marriage rates as women would be less inclined to leap into a marriage that they would be unable to escape if it turned out poorly. Other obstacles to marriage, such as extensive veiling (covering a woman from head to toe) and seclusion practices, may also make it a great deal more difficult for women to pursue potential mates and vice versa. Obviously, all

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In addition to enabling parties to draft more complete marriage contracts, the use of the *wali* helps to reduce some of the issues of trust and partner selection previously brought up. As pointed out previously, trust is based on the signaling and the selection of inherently trustworthy partners. Through the use of standard intermediaries (*walis*) the parties themselves are able to protect their interests, without signaling a lack of trust in the relationship or an untrustworthy character. Moreover, the traditional standard where one party, typically wives, are automatically provided a *wali* increases the costs on untrustworthy husbands when it comes to the issue of partner selection.

To illustrate this latter point, imagine the following; a potential husband engages in premarital negotiations with the wife's *wali*. If the husband is untrustworthy, it is likely that he will be unwilling to open himself to vulnerability. As a result, it is likely that the husband will engage in extensive premarital negotiations and will attempt to maximize his own interests over his wife's. This is likely to signal the existence of the untrustworthy character to the *wali*, who may now engage in strategic behavior of his own to prevent the marriage from occurring or, at the very least, will negotiate more extensively on the wife's behalf. Regardless of the actual strategies used by the *wali*, it is likely that length and cost of the premarital negotiations will be increased. This increases the average transaction costs of marriage faced by untrustworthy husbands. Granted, the husband may avoid directly signaling his untrustworthy behavior by appointing a *wali* to protect his interests, but since the provision of a *wali* is not automatic for men, he'd still

of these factors may contribute to low marriage rates in varying degrees. However, it seems probable that a lack of default rules regarding marriage in the Hanbali system itself may also play a partial role.

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face higher transaction costs when it comes to marriage (e.g. by having to pay the *wali* for his services).

From the partner selection standpoint, one issue of the norm of providing women *walis* instead of men is that—while it does weed out untrustworthy husbands—it does not weed out untrustworthy wives. In short, the transaction cost of obtaining a marriage contract is the same for both trustworthy and untrustworthy wives. This is a problem since it means that the marital contract could heavily favor an untrustworthy wife, which she could then utilize extensively to exploit her husband. However, from the husband's perspective, this is less of a problem as husbands also hold the unilateral power of *talaq*, which they can use during the marriage to renegotiate the marital contract. Moreover, if we see the State as having an interest in reducing the number of opportunities untrustworthy individuals have to engage in exploitive behavior, then (because only men can have multiple spouses) it is a great deal more important to have a *wali*-system that weeds out untrustworthy husbands than untrustworthy wives. Simply put, because men can marry up to four wives at a time, an untrustworthy husband would have up to four more opportunities to engage in spousal exploitation than an untrustworthy wife (who could only exploit a single husband at a time). In short, the unilateral nature of polygamy in the IMDS increases the need for the *wali*-system as a protection for women against the possibility of exploitation by men. Or, from a different perspective, the cost that men must pay for having the opportunity to marry multiple women is an increased risk of economic exploitation.

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Conclusion:

This paper is intended as a partial examination of some of the behavioral and economic issues within the AMDS and how the IMDS can be seen as attempting to deal with some of those issues. That is not to say that the IMDS is a better system. Rather, as misled as the attempts to incorporate Ronald Coase's theories into the AMDS may have been (particularly regarding the ease with which the default rules can be negotiated around by two potential spouses), Coase's basic thesis still makes a valid point: One cannot determine the effect of a group of laws by simply looking at the conduct those laws require, instead, one must determine how people will respond to those laws in the real world and outside the law itself.

As alluded to at the end of my discussion of the IMDS and the *Wali*-system, the IMDS leaves open a significant opportunity for the exploitation of men by untrustworthy women. That men will not respond to the possibility of this exploitation is extremely unlikely. Individuals may not always be rational, they may not always be selfish—but generally they will take whatever precautions they can when they perceive themselves as facing a risk of exploitation by a less trustworthy individual. When the law provides little protection, individuals will inevitably look outside the law for possible precautions they can take. While these precautions could theoretically come in a variety of forms, in the case of the IMDS, these precautions may frequently come in the form of violent and oppressive cultural customs used against women.³⁴

³⁴ Ryan M. Riegg, *Clitoridectomy and the Economics of Islamic Marriage and Divorce Law*, UCLA JOURNAL OF ISLAMIC AND NEAR EASTERN LAW (2007). (The frequency and severity of customs used against women in certain Muslim societies—including; clitoridectomies, seclusion practices, veiling and consanguineous marriage—strongly correlates with the degree of economic risk men face under the IMDS

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As has been pointed out by a nearly every renowned American scholar on the subject, men and women face inherently different and unequal risks in regards to marriage and divorce.³⁵ In a number of ways, the IMDS can be seen as attempting to balance these risks by treating men and women differently. Unfortunately, in creating legal differences based on gender, the IMDS may ultimately end up generating the very result it was attempting to eliminate. However, that is a question for another article.

and the influence of the IMDS in that society, suggesting that men use these customs in reaction to their perceived risk of exploitation by women.)

³⁵ Rachel Ganz Blumberg, *COMMUNITY PROPERTY IN CALIFORNIA* 26-43 (4th Ed., 2003).