UNIVERSITY OF COLORADO LAW REVIEW

SYMPOSIUM ISSUE
OVERCOMING FAMILY LAW'S PAROCHIALISM: THE PLACE OF COMPARATIVE FAMILY LAW

ARTICLES

NOTES

Volume 83/Issue 4/Summer 2012

UNIVERSITY OF COLORADO LAW REVIEW (U.S.P.S. 651-080, ISSN 0041-9516)
Published quarterly by the University of Colorado Law Review,
320-D Wolf Law Building, 401 UCB, Boulder, CO 80309-0401.

Periodicals postage paid at Boulder, Colorado,
and at additional mailing offices.

POSTMASTER: Please send address changes to University of Colorado
Law Review, 320-D Wolf Law Building, 401 UCB,
Boulder, CO 80309-0401.

An association of students, sponsored by the
University of Colorado Law School.

Published as the ROCKY MOUNTAIN LAW REVIEW from 1928 to 1962.

Subscriptions

Current subscription prices: domestic and Canada, $37.00 per volume; foreign, $40.00 per volume; single issues, $15.00; symposium issues, $20.00. Colorado subscribers must pay sales tax in addition to the purchase price. Contact the Office Manager for the correct payment information before remitting a check.

Subscriptions are entered for an entire volume only and are payable in advance. A check should accompany an order. All subscriptions must be renewed on a yearly basis. Unless a claim for non-receipt of an issue is made within six months after the mailing date, that issue will not be supplied free of charge. Back issues are available.

All subscription correspondence should be addressed to the University of Colorado Law Review, 320-D Wolf Law Building, 401 UCB, Boulder, CO 80309-0401. We may be reached by telephone, 303-492-6145; fax, 303-735-0169; or email, cololrev@colorado.edu. The *Law Review* web page is located at http://www.colorado.edu/law/lawreview/.

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Cite as: 83 U. COLO. L. REV. __ (2012).

UNIVERSITY OF
COLORADO LAW REVIEW

Volume 83, Issue 4 *2012*

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FOREWORD

The University of Colorado Law School Comparative Family Law Symposium, held in fall 2011, captured provocative, progressive thinking about fractures within families across international boundaries. The Symposium grew from a new comparative family law seminar that focused on women and children in the United States and India. After a research trip to southern India, the students wrote research papers, four of which are highlighted in this Issue.

At its root, the study of comparative family law is about trying to learn and understand different approaches to common problems within the family. While the regulation of families was once seen as solely within the purview of the local community, we are beginning to recognize that global problems—such as domestic violence and sex trafficking—need innovative, and perhaps shared, responses. This openness is grounded in curiosity about other countries and other approaches, not fear of differences or outsiders.

Professor Cyra Choudhury opens this Issue by making an honest and searching feminist critique of the benefits of reformed polygamy in India. By recommending a path for polygamy to progress, Professor Choudhury may be paving a more humane and realistic option for the women in India in polygamous marriages. By focusing on the distribution of property, rights, and obligations within the family, she suggests a new way forward.

Professor Jeffrey Redding provides a critique of legal theorists from both the right and the left who have supported a recent anti-shari'a law mania that has taken root in many parts of the United States. Professor Redding views this as part of American law's reactionary parochialism and argues that American law and legal theory has much less to fear from Islamic law and legal practice than it has to learn.

Sarah French helps us think seriously about how Brahmin women might be granted asylum under U.S. immigration law and policy. By exploring the particular social group requirement, a requirement that has been tightened in recent immigration cases, she flexibly applies it to an unusual category—Brahmin women—to expose the contradictions that have developed in American immigration law.

Emily Harlan ably identifies the barriers to finding and

treating sex trafficking victims in the U.S. and India. As the media begins reporting on the child sex-trafficking industry in the United States, Ms. Harlan's Note is well-timed to help policymakers look at sorely needed rehabilitation efforts. While little is understood about the unique needs of sex-trafficking victims, Ms. Harlan points out what we can learn by having the discussion across international boundaries.

Sarah Hart also takes on the problem of sex trafficking. Ms. Hart argues that the causes of sex trafficking in India and the United States are the same, which suggests the existence of global solutions to sex trafficking despite the social, cultural, and political differences that exist between countries.

This Issue concludes with Jennifer Parker's Note, which exposes the Western media's fascination with, and othering of, India's domestic violence issues—specifically, bride burning and dowry deaths. She argues that by highlighting domestic violence in India, the Western media trivializes our own catastrophic experiences of domestic violence in the United States. Ms. Parker demonstrates that the United States pays a price for desensitizing American audiences to domestic homicide at home by sensationalizing domestic homicide abroad. The price is a blindness us to our own problems and permission to indulge the illusion that women's rights in the United States has been unequivocally achieved. In short, we forget that more work remains to be done.

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BETWEEN TRADITION AND PROGRESS: A COMPARATIVE PERSPECTIVE ON POLYGAMY IN THE UNITED STATES AND INDIA

CYRA AKILA CHOUDHURY*

Both the United States and India have had longstanding experiences with polygamy and its regulation. In the United States, the dominant Protestant majority has sought to abolish Mormon practices of polygamy through criminalization. Moreover, a public policy exception has been used to deny recognition of plural marriages conducted legally elsewhere. India's approach to polygamy regulation and criminalization has been both similar to and different from that of the United States. With a sizable Muslim minority and a legal framework that recognizes religious law as family law, India recognizes polygamy in the Muslim minority community. However, it has criminalized it in the Hindu majority community. Despite the existence of criminal sanctions for Hindus, the incidence of polygamy among the majority community is roughly equivalent to that of Muslims for whom it is permitted. In the United States, despite harsh measures to abolish the practice, it continues and might even be growing in urban communities. This Article takes seriously the feminist critique of traditional polygamy as distributionally unfair to women. However, it also acknowledges that polygamy may be an attractive alternative and an acceptable family form. This is

* Associate Professor of Law, Florida International University College of Law. Many thanks to Professors Clare Huntington and Colene Robinson for the invitation to present this paper at the University of Colorado at Boulder. Thanks also to Aya Gruber for her valuable comments and to the participants of the Symposium on Comparative Family Law at the University of Colorado Law School. Mahira Khan provided invaluable research assistance, and the editors of the Colorado Law Review deserve thanks for excellent work in the production process.

particularly true if it is reformed and made to progress as was monogamous marriage in the mid-twentieth century. This Article argues that rather than focusing on the criminalization of a family form that has been in existence for millennia, a more fruitful approach to regulating polygamy is to focus on the distribution of rights and obligations within the family. This approach accepts that abolition is a goal that is unlikely to be met and that women and men may choose polygamy for rational reasons. As such, feminists are more likely to see gains for women by directing their efforts toward reform and recognition rather than criminalization and abolition.

INTRODUCTION

To the ordinary person on the street of Kolkata or Kalamazoo, a question about the similarities between India and the United States might elicit a blank stare. Indeed, the two countries are geographically separated by half the globe and have distinct histories and cultures. India—with a

population of a billion people, multiple languages, and myriad, distinct ethnic and religious populations—seems to have nothing in common with the United States.[1] India is the land of gurus, temples, and, more recently, call centers and Bollywood dancing. The United States, on the other hand, is a modern, technologically advanced state, comparatively young in its political history, with a common language and a more homogenous discernible majority population (though that majority is changing).

Despite their differences, the two countries share similarities. Both are democracies, both have large minority populations, and both were once British colonies. They have been indelibly influenced by English liberal political philosophy and jurisprudence. The founding fathers of the United States were heirs to familiar thinkers like John Locke, Thomas Hobbes, and Adam Smith.[2] It is from these philosophers that Thomas Jefferson, George Washington, John Adams, and our other founders drew inspiration to rebel against the British crown.[3] And, when the time came, it is from the United States' founding fathers—along with Indian philosophy, tradition, and culture—that India's founding fathers Mahatma Gandhi, Jawaharlal Nehru, and Vallabhai Patel drew inspiration—so much so that the U.S. Constitution served as a model for the Indian Constitution.[4]

Both countries' judicial systems, moreover, are offshoots of British common-law tradition and share much in their approach to adjudication.[5] Indian Supreme Court Justices often reference U.S. case law in their decisions,[6] underscoring both the commonalities and strength of this influence. This Article advances the comparative literature that explores the

1. *See Background Note: India*, U.S. DEPARTMENT ST., http://www.state.gov/r/pa/ei/bgn/3454.htm (last visited Sept. 23, 2011).

2. *See generally* HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1978).

3. *See generally id.*

4. *See* M.K.U. Molla, *The Influence of the U.S. Constitution on the Indian Sub-continent: Pakistan, India and Bangladesh*, *in* THE UNITED STATES CONSTITUTION: ITS BIRTH, GROWTH, AND INFLUENCE IN ASIA 153 (J. Barton Starr ed., 1988).

5. *See generally* JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS (2009); MITHI MUKHERJEE, INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY 1774–1950 (2010).

6. *See, e.g.*, Rekha v. State of Tamil Nadu, (2011) 4 S.C.J. 637 (India) (referencing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)); Narayan Dutt v. State of Punjab, (2011) 3 S.C.J. 845 (India) (referencing *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855)).

challenges that both family law systems face as they progress through the new millennium. While one could write several books comparing[7] India and the United States, the constraints of space in this Article require a much more limited inquiry. As such, I restrict myself to the one overarching tension that pervades both Indian and U.S. family law systems at both federal and state levels: the conflict between traditional religious values and secular law in the practice and regulation of polygamy.

Polygamy has evoked strong reactions in both countries. It is often described as regressive, patriarchal, abusive, and even barbaric.[8] Women's rights groups are opposed to polygamy because they believe it is inherently unequal and subordinates women.[9] Certain religious groups oppose polygamy because it offends their particular view of morality. These groups have made common cause on the issue of polygamy and desire its abolition. They tend to support strict measures that criminalize and punish polygamy.[10] Yet, the demands made by anti-polygamists on behalf of women mask the subordination of religious groups that occurs through this "civilizing" discourse and regulation.[11]

On the other hand, in communities that religiously sanction polygamy, conservatives who support the practice

7. It is important to note here that this Article does not suggest that India and the United States are, in fact, comparable, except perhaps in the most superficial ways and in their positive laws. Society and social facts on the ground and the lived experiences of each population with its diversity and complexity make generalized comparisons nearly impossible. For instance, it is difficult to argue that women are similarly situated in the United States and India given their different cultural, social, and religious milieus. The result is that law also acts differently on them, shaping their lives differently. Polygamy regulation in India, therefore, takes a different shape than it does in the United States. Nevertheless, this does not mean that the two systems cannot glean important lessons from each other. This is the point of this Article.

8. *See, e.g.*, Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1589–93 (1997).

9. Regarding India, see ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY 136 (1992) ("The wives of polygamous unions were given no safeguards, and at the same time polygamy was not made unattractive for men."). Regarding the United States, see Strassberg, *supra* note 8, at 1591–92.

10. In India, the most anti-polygamy religious group has been the Hindu nationalists, not because it offends their morality per se but because it represents an unequal benefit enjoyed by Muslim men and also raises the specter of the ever-increasing Muslim population. *See* FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 193 (1999).

11. *See, e.g.*, PARASHAR, *supra* note 9, at 139–43.

have argued that it is a God-given "right" and that polygamy is morally superior to the unbridled sexual freedoms allowed in most "progressive" countries.[12] These religious traditionalists demand a position of state noninterference in their religious practice. Traditionalist views elevate religious identity and male supremacy over gender equality.[13] Thus, the impasse between traditionalists and anti-polygamists is reflected in the legal debates surrounding the criminalization of polygamy.

I take a different position in this Article, neither calling for the abolition of polygamy on moral or egalitarian grounds nor taking the "free exercise" approach of traditionalists. Rather, I call for an acknowledgement that criminalization of polygamy has not resulted in its eradication and that it will never result in complete abolition; indeed, the practice flourishes in some communities even if driven into the closet by the law, and its incidence in the United States might be increasing.[14] Because polygamy raises real issues for all involved that cannot be adequately addressed through criminal law, we need to manage the practice to incentivize fairness. In other words, rather than focusing on stricter policing or more enforcement of laws banning polygamy, redirecting the state's efforts to the distribution of benefits and burdens within polygamous families is a more fruitful way to change the practice and ultimately make it more equitable (and perhaps less desirable).[15] In this endeavor, the example of the Indian

12. *See* M. Mustafa Ali Khan, *Islamic Polygamy—A Blessing in Disguise*, *in* MODERN INDIAN FAMILY LAW 148, 156–57 (Werner F. Menski ed., 2001). Khan notes:

> Islam permits conditional polygamy. Christiandom forbids but winks at it provided that no legal tie exists with more than one woman. There is pretended monogamy in the West, but in fact there is polygamy without responsibility. The mistress is cast off when the man becomes weary of her and she sinks generally to be the woman of the street, for the lover has no responsibility for her future and she is [a] hundred times worse than the sheltered wife and mother in a polygamous Muslim family.

Id. at 158 (alteration in original).

13. Much of the argument rests on the view that polygamy does not "really" disadvantage women and that Islam is not gender inequitable. *See, e.g.*, Khan, *supra* note 12, at 154–60. *See generally* MOHAMMAD SHABBIR, MUSLIM PERSONAL LAW AND JUDICIARY (1988) (examining the codified Muslim Personal Law and its conservative interpretation by the Indian courts).

14. *See infra* notes 102–14 and accompanying text.

15. A similar approach is taken by Adrienne Davis in her work on polygamy. *See* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2031–32 (2010) (taking an approach that seeks to focus on the rules and regulations that govern polygamous relationships to alter their distributive effects).

judicial approach to polygamy in Hindu communities is instructive. That approach reflects the kind of secularism prevalent in India—accommodative yet also assimilationist, as compared to the predominantly assimilative secularism in the United States where the dominant discourse and regulatory trend is firmly entrenched in abolitionism.

The Article proceeds in three parts: In Part I, I describe the forms of secularism prevalent in the United States and India, underscoring the different approaches taken to address how secularism should interact with religion or tradition in the state. The aim here is to ground the discussion in the legal context within the respective countries in order to show how religion is accommodated. In Part II, I examine the tension between secularism and religion through a selection of polygamy legislation and cases from both the United States and India. These cases present an opportunity to examine the way religious accommodation plays out in the different secular states. This Part draws links between the abolitionist positions taken in both contexts and raises questions about the efficacy of criminalizing polygamy. It also calls attention to the tension between feminist aims of gender equality and religious claims. Finally, in Part III, I conclude that instead of focusing on enforcement of the laws—the appetite for which has been waning in the United States and has never been particularly robust in India—we concentrate instead on reforming the laws that distribute property and obligations within families with a goal of protecting the parties and making them less vulnerable to disinheritance and destitution. As such, laws dealing with support and property distribution will have important economic consequences for polygamous families.

I. DIFFERENT FORMS OF SECULARISM IN TENSION WITH RELIGION

A. The United States' Secular Framework

The question of religious accommodation and the place of tradition has been a perennial question in both U.S. and Indian contexts. When confronted with the question of whether religion should play a formal role in the legal system, the founding fathers of the United States answered in the negative. Having witnessed the detrimental effects of religious intolerance in European society, they decided that, while both

the free practice of religion and reasonable accommodation should be afforded, there should be no established state religion.[16] Courts have interpreted the Establishment Clause as an increasingly stringent bar against state favoritism toward a particular religion.[17] In other words, as is familiar to most American lawyers, there has been a separation of church and state preventing the state from entangling itself in establishing a religion while allowing it to accommodate various religious practices and communities.

In family law, where religious beliefs are frequently implicated, courts have tried to respect religion without entangling themselves in matters of religious doctrine and practice.[18] They have attempted to accommodate religion without becoming enmeshed in pronouncing upon matters of religious doctrine. While the limits in the United States seem fairly clear, the bright line becomes blurry when courts must give force to religious contracts such as *mahr* agreements or decide whether a religious marriage was validly entered into.[19]

The United States' treatment of religion reflects one form of secularism. In Gary Jacobsohn's view, the U.S. model is assimilative in that it attempts to create a national civic and political identity with which all citizens and aspiring citizens must conform.[20] There is room and respect for diversity and particular identities, but when individuals interact in public, religion is, at least theoretically, unimportant.

Another way of describing the U.S. model of secularism is conscriptional secularism. In other words, all those who choose to become citizens of the United States are conscripted into a form of public existence where their religious, racial, ethnic, or other particular identities are subsumed under a national identity: We are Americans first.[21] Yet America's tolerance for

16. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 1–2 (2007).

17. *Id.* at 18–19.

18. PASCALE FOURNIER, MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION 42–44 (2010).

19. *Id.* at 43–44. There are two types of *mahr* or "dower" paid to the bride upon marriage. Prompt *mahr* is payable at the time of marriage, while deferred *mahr* is payable at a later agreed-upon date or at the occurrence of an event such as divorce. *Id.* at 1.

20. GARY JACOBSOHN, THE WHEEL OF THE LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 57–72 (2003).

21. Of course, there are more strictly conscriptional secularist models available. For instance, in France, the importance of "Frenchness" and national identity has led to laws that seek to erase differences from the public space in a

diversity through multiculturalism has given rise to a large number of different ethnic and religious communities, most of which flourish without hindrance as long as they obey the laws of the land.[22]

Despite this separation of church and state that is enshrined in the Constitution, the United States has struggled with the role of religion in the public sphere. Its secularism evolved from a time when Protestant Christianity's public supremacy was unquestioned to the present when all religions, including the socially dominant Protestantism, exist on seemingly equal footing.[23] This evolution occurred, in part, through legal challenges to school prayer, the appearance of the Ten Commandments in public buildings, and accommodation for religious groups in educational institutions.[24]

Challenges to certain social mores have also pushed back the public role of religion. For instance, the right to privacy evolved into its current form through challenges to bars against contraception.[25] In these cases, the judiciary has had to determine the proper role of religion in the law. The Supreme

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rebuke of American multiculturalism. For an interesting perspective on the effects of French *laïcité*, see JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 15–18 (2007). *Laïcité* means the separation of church and state through the state's protection of individuals from the claims of religion. *Id.* at 15.

22. Increasingly, however, several laws have been proposed that seek to limit accommodation and tolerance for cultural and ethnic differences. For instance, a spate of anti-sharia laws have been proposed in several states that have the effect of publicly stigmatizing Muslims. *See* Amy Sullivan, *The Sharia Myth Sweeps America*, USA TODAY (June 12, 2011), http://www.usatoday.com/news/opinion/forum/2011-06-12-Sharia-law-in-the-USA_n.htm. Also, immigration laws continue to be used to pursue Latinos, and Arizona has gone so far as to propose a law that prohibits the teaching of ethnic history that causes divisiveness. *See* H.R. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf.

23. *Compare* Reynolds v. United States, 98 U.S. 145, 164–65 (1878), *and* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 48–49 (1890), *with* Lee v. Weisman, 505 U.S. 577 (1992), *and* State v. Holm, 137 P.3d 726 (Utah 2006). The former cases clearly rely on majoritarian values of Protestant Christianity.

24. *See Lee*, 505 U.S. at 599 ("No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment."); Stone v. Graham, 449 U.S. 39, 39–43 (1980) (discussing the unconstitutionality of displaying the Ten Commandments in public schools); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 209–12 (1948) (holding unconstitutional the use of public school facilities for religious instruction).

25. *See generally* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (discussing the line of privacy cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

Court's Establishment Clause jurisprudence, which has been evolving for the past fifty years, applies the test articulated in *Lemon v. Kurtzman* and then modified in *Agostini v. Felton*.[26] The test comprises three prongs: First, the state action in question must serve a "secular purpose"; second, it must have a secular effect; and third, it must not result in excessive entanglement between church and state.[27] Subsequently, the *Agostini* decision subsumed the entanglement inquiry into the first prong, making it part of the secular purpose inquiry.

The structure of U.S. secularism as it has been understood in the past fifty years—and the jurisprudence supporting it—has made it relatively easy to challenge laws that withhold rights from some segments of the population. Increasingly, the idea that moral repugnance is not enough to sustain certain morals legislation, no matter how traditional, has become common.[28] Much of the activity in changing morals legislation has been in the area of family law. Despite the fact that U.S. family law is entirely civil and secular, tradition and religion continue to play an important role in matters of family privacy, particularly in the area of reproduction and sexual relationships.[29] Moreover, religion continues to play a role in marriage formation.[30] Where there are private agreements informed by religion, the courts are implicated in enforcing these and may be required to engage religion in this context as well. Nevertheless, society's common understanding of family law in the United States is that it is a civil matter that does not require the state to engage religion too deeply.[31]

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26. *See* Agostini v. Felton, 521 U.S. 203, 222–23 (1997); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

27. MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 288–93 (2d ed. 2002).

28. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996). Secularism at the founding of the nation was not understood to be a total separation of church and state. Indeed, "disestablishment" was achieved incrementally, and Jeffersonian secularism was hotly debated at the time. *See generally* EDWIN S. GAUSTAD, SWORN ON THE ALTAR OF GOD: A RELIGIOUS BIOGRAPHY OF THOMAS JEFFERSON (1996) (providing an account of the evolution of Jefferson's religious thought and its place in the religious thought of his time).

29. Justice Scalia's dissent in *Lawrence v. Texas* indicates how much tradition infused with religious values is at the heart of these matters. *See Lawrence*, 539 U.S. at 588–92 (Scalia, J., dissenting).

30. While no *religious* solemnization is required, some sort of ceremony is, and this is often met by the undertaking of religious rites. DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 69 (2d ed. 2009).

31. *Lemon*, 403 U.S. at 614 ("[W]e conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.").

B. India's Secular Framework

Writing from his jail cell in India during the independence struggle, Jawarharlal Nehru, one of the fathers of the modern Indian state, noted: "The United States of America solves its minority problems, more or less, by trying to make every citizen 100 percent American. They make everyone conform to a certain type. Other countries, with a longer and more complicated past, are not so favorably situated."[32]

Indeed, India's long history of religious pluralism made it difficult to create a Uniform Civil Code for family law and to remove religion from the public sphere at independence.[33] Nor was that a shared goal of the founders. The importance of religion to the identity of already existing populations at the time of independence and their respective fear of being subjected to forced assimilation and subordinated status required Indian lawmakers to take a different approach than that of their American counterparts two centuries before.[34] As a result, Indian secularism is accommodative, allowing for all religions to have equal footing in the public sphere as long as the fundamental rights guaranteed by the Indian Constitution are not breached. This idea is reflected in the ancient Indian saying "*sarva dharma sambhava*" (all religions are equal).[35] Rather than attempting to build a complete wall between religion and state, India has enshrined religion into the state while attempting to maintain an overall secular structure.[36]

India's main concession to religious minority communities was the retention of the codified version of their personal laws or family laws. These laws were initially codified by the British colonial administration in an effort to make their adjudication

32. JACOBSOHN, *supra* note 20, at 57 (quoting Jawarharlal Nehru). Nehru's statement reflects his concern with the communal divisions in India, compared to the United States, where race was the primary divider. Moreover, as Jacobsohn points out: "[B]eing an American consists largely of sharing in those constitutive ideas that define membership in the political community. Assimilation in this context relates exclusively to principles, not to ethnically or religiously derived models of ideal behavior working to achieve social conformity." *Id.* at 58.

33. *See id.*

34. *See* Cyra Akila Choudhury, *(Mis)Appropriated Liberty: Identity, Gender Justice, and Muslim Personal Law Reform in India*, 17 COLUM. J. GENDER & L. 45, 52–59 (2008).

35. CHRISTOPHE JAFFRELOT, HINDU NATIONALISM: A READER 327 (2007).

36. *See* JACOBSOHN, *supra* note 20, at 147.

easier.[37] Post-independence, the laws remained in force, and, for some communities, they were reformed and amended.[38] For instance, the Hindu personal law was amended and liberalized to provide greater protections for women.[39] On the other hand, Muslim personal law has stagnated largely because that community has viewed any efforts to formally amend the laws as an attack on their religious identity and a move toward forced assimilation.[40]

The result of the personal law regime in India has meant that the courts have had to interpret religious laws in a majority of family matters.[41] Far from the U.S. prohibition of excessive entanglement, the Indian judiciary has on occasion had to delve into religious doctrine in order to decide cases.[42]

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37. *See* Nadya Haider, Comment, *Islamic Legal Reform: The Case of Pakistan and Family Law*, 12 YALE J.L. & FEMINISM 287, 295 (2000); Purushottam Bilimoria, *Muslim Personal Law in India: Colonial Legacy and Current Debates*, EMORY L., http://www.law.emory.edu/ifl/cases/India.htm (last visited Mar. 9, 2012).

38. *See Uniformity of Laws in India and England*, *in* MODERN INDIAN FAMILY LAW, *supra* note 12, at 360, 367.

39. *See id.* at 366–67.

40. *See* Bilimoria, *supra* note 37.

41. *See generally* K.B. AGRAWAL, FAMILY LAW IN INDIA (2010) (surveying Hindu, Muslim, Christian, and Parsi personal law codes). The Special Marriage Act of 1954 allows parties to opt in to a secular marriage. However, this law leaves much to be desired and tends to favor the majority community. *See* LAW COMM'N OF INDIA, FIFTY-NINTH REPORT ON HINDU MARRIAGE ACT, 1955 AND SPECIAL MARRIAGE ACT, 1954 (1974), *available at* http://lawcommissionofindia.nic.in/51-100/Report59.pdf.

42. *See, e.g.*, Khan v. Begum, (1985) 3 S.C.R. 844 (India). This is the now-famous Shah Bano case in which the Supreme Court of India was asked to decide whether a Muslim wife could receive maintenance past the statutory three-month period pursuant to the Code of Criminal Procedure, Act II (1974). Section 125 of the Code requires husbands to maintain their wives. *Id.* at 852. While deciding the case, the Court gratuitously commented:

> [I]t is alleged that the fatal point in Islam is the degradation of woman. To the Prophet is ascribed the statement, hopefully wrongly, that [w]oman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly. . . . It is too well-known that [a] Mahomedan may have as many as four wives at the same time but not more.

Id. at 849–50, 856 (internal quotation marks omitted). This statement was made by a non-Muslim judge with no religious training while attempting to interpret a Qur'anic passage. It was certainly not necessary to the central issue. Most Muslim intelligentsia agreed that the Court decided correctly that the Code did not conflict with Islamic law. Danial Latifi, *The Shah Bano Hullabaloo in India*, *Foreword* to SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON 7, 9 (Lucy Carroll ed., 1998), *available at* http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/misc/Shah-Bano-eng.pdf. However, the outcry generated by the case among conservative Muslims resulted in the passage of the perversely named

While the Indian courts have used a variety of interpretive moves to reach just outcomes, they nevertheless cannot escape from adjudicating a set of religious family laws. The conflict between the Indian Constitution's protection of individual liberties (much like the U.S. Bill of Rights) and those rights accorded to groups through personal laws creates difficulties for Indian courts attempting to resolve such cases.[43] This tension has become intractable, particularly with regard to women's rights in family law and property.[44]

In the late 1980s and through the 1990s, Indian women's rights activists repeatedly called for the enactment of a Uniform Civil Code to guarantee equal rights for women.[45] Personal laws, they argued, were a byzantine system that afforded each confessional group a separate set of laws, enshrined sexist religious norms, and conflicted with the fundamental liberties guaranteed by the Indian Constitution.[46] With the rise of right-wing Hindu groups, the civil code took on a different valence. For Hindu nationalists, the call for a uniform law was a means of removing the "privileges" given to Muslim men.[47] Of particular vexation was Muslim men's legal right to marry more than one woman. As such, the right-wing Bharatiya Janata Party (BJP) and its affiliated Hindu

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Muslim Women (Protection of Rights on Divorce) Act, which closed that avenue and limited the right of maintenance to the statutory three-month period stated in Muslim personal law. *Id.* at 9–11. For excellent examinations of the impact of the Shah Bano case, see Lucy Carroll, *Divorced Muslim Women in India: Shah Bano, the Muslim Women Act, and the Significance of the Bangladesh Decision*, *in* SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON, *supra*, at 35; Danial Latifi, *Muslim Women Benefited: Shah Bano Revisited*, *in* SHAH BANO AND THE MUSLIM WOMEN ACT A DECADE ON, *supra*, at 143.

43. Choudhury, *supra* note 34, at 65. The Fundamental Rights enshrined in the Indian Constitution are extensive and reflect both a formal and substantive understanding of equality. Part III enumerates articles that cover the right to equality (Article 14), prohibitions against discrimination (Articles 15 and 16), freedom of expression (Article 19), and freedom of religion (Article 25). *See* INDIA CONST. arts. 14–35.

44. Inheritance laws have for the most part maintained male privilege in all of the communities where it has existed. The Hindu inheritance laws were recently amended to put men and women on equal footing, but prior to this, males were preferred, and Muslim inheritance laws clearly favor male heirs. For an interesting analysis of changes in inheritance, see *Modernity and the Family in Indian Law*, *in* MODERN INDIAN FAMILY LAW, *supra* note 12, at 295, 296–98.

45. *See* RAJESWARI SUNDER RAJAN, THE SCANDAL OF THE STATE: WOMEN, LAW AND CITIZENSHIP IN POSTCOLONIAL INDIA 149–50 (2003).

46. *See* Brenda Cossman & Ratna Kapur, *Secularism's Last Sigh?: The Hindu Right, the Courts, and India's Struggle for Democracy*, 38 HARV. INT'L L.J. 113, 169 (1997).

47. *Id.* at 133–34.

nationalist groups saw the abolition of personal laws as a step to assimilating religious minorities and thus pursued it with aggression.[48] Women's groups wanted the Uniform Civil Code to improve women's rights, and the Right wing wanted it to reduce minority men's privileges; together, they made strange bedfellows. Progressive women's groups that had traditionally championed the civil code retreated from their position when it became clear that the issue had largely been co-opted by the Hindu nationalists and made into a weapon against minority communities.[49] Nevertheless, the hope for a gender-just code that replaces personal law still burns, albeit dimly.

Because the realization of a Uniform Civil Code as stated in Article 44 of the Indian Constitution has become a near impossibility,[50] Indian courts are left in the thickets of religious law. In order to preserve reforms to personal law and uphold laws that conflict with religion, the Indian Supreme Court has taken a two-pronged approach. First, under Article 25(2)(b) of the Constitution, social reform takes precedence over religion, and the Supreme Court has deferred to the legislative branch when it enacts reforms for the good of the people.[51] In other words, the Supreme Court can uphold a particular social reform, even when it infringes religious practice, if it is for the common good. The second approach that was adapted from U.S. free exercise jurisprudence is the "essentials of religion" test, in which the Supreme Court may deny constitutional protection to those practices that are not essential to the religion.[52]

These two techniques that allow the Court to uphold social reform regardless of its impact on religion are reflective of the

48. *Id.* at 115–16.

49. *See* Choudhury, *supra* note 34, at 79.

50. I have written about this extensively, arguing that, given the political context of modern India and the symbolic importance of personal law as a marker of both difference and independent identity for Muslims, any move toward a uniform law will be vigorously resisted. However, this does not mean that the personal laws cannot be internally reformed. *See id.*

51. *See* INDIA CONST. art. 25, § 2. The Constitution states:

> Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
>
> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

52. *See* JACOBSOHN, *supra* note 20, at 97.

structure of Indian secularism, which Jacobsohn calls "ameliorative."[53] It is ameliorative because it allows the state to use secularism and secular law as a tool to undo centuries of injustices and inequalities justified through religion.[54] The Indian judiciary, thus, sees its activism on behalf of social reform as entirely within the bounds of the constitutional framework envisioned by the architects of the Indian state. Despite the use of secularism to undo religiously sanctioned injustice, the state and the courts continue to accommodate *difference*, or pluralism, which is both a legal and cultural value in India.

It is important to stress that Jacobsohn's categories are not airtight compartments. Rather, because of the heterogeneous and federal nature of both countries, there are multiple co-present tendencies at play. India certainly has an assimilationist bent when it comes to all Hindus regardless of their caste, language, or location, but India is accommodationist when it comes to Muslims. On the other hand, multiculturalism and the commitment to religious liberty have resulted in the accommodation of religious minorities in the United States.

Jacobsohn's categories, however, are helpful as a framework for understanding the structural differences between India and the United States. India's secularism allows significant "entanglement" between church and state, with the state administering religious law, while a similar role would be beyond the pale of U.S. judicial authority. Parts II and III below elaborate on the divergences and convergences in the legal accommodation of religion through a discussion on the regulation of polygamy.

II. ABOLITION V. ACCOMMODATION: THE CONTINUING CHALLENGE OF PLURAL MARRIAGES

Although secularism in India and the United States takes very different forms, both countries struggle with similar controversies in family law. These debates and conflicts mirror battles in the social sphere. The tension between traditional religious values and secularism can also be viewed as one between communal or group rights and individual rights. In

53. *Id.* at 91.
54. *Id.*

both countries, constitutionally protected individual liberties run up against the long-held traditions of the majority or the group, whether that is a family or religious community.[55] The debate surrounding polygamy exemplifies this tension, and the practice has most often been defended or demanded as part of the right to the free practice of religion in both countries. Religion is deployed as a shield to protect the practice of polygamy, pitting faith against claims of modernity, gender justice, and equality. The polygamy laws in the United States and India provide insight into how each legal system reconciles (or fails to reconcile) religion with personal and communal rights. Moreover, the arguments surrounding polygamy also implicate discourses about race and progress that have long been tributaries of this central debate.

In this Part, I describe the historical regulation of polygamy in both India and the United States. The purpose of this discussion is to illustrate the way in which the assimilationist secular framework in the United States led to a vigorous enforcement of a ban on bigamy. Indeed, the fear of Mormon political power in addition to Mormons' adherence to the practice of polygamy gave rise to the suppression of difference. In the United States, the dominant legal discourse still treats polygamy as a moral offense and takes an

55. For a discussion of India's conflict, see TAHIR MAHMOOD, PERSONAL LAWS IN CRISIS 6 (1986) (discussing the progression from the pre-constitutional era of personal law to the eventual uniform law and finding that, in the interim, "all laws enacted in the area of personal laws must conform to the provisions of Part III of the Constitution dealing with Fundamental Rights"). For a prime example of this conflict in a state court in the United States, see *State v. Green*, 99 P.3d 820 (Utah 2004). The *Green* court noted:

> First, Green is not the first polygamist to launch an attack on the constitutionality of a law burdening the practice of polygamy. In 1878, polygamist George Reynolds challenged the constitutionality of the Morrill Antibigamy Act, which prohibited bigamy in all territories of the United States. Reynolds argued that he could not be found guilty under the law inasmuch as he believed that marrying more than one woman was his religious duty. The Supreme Court held that the law did not violate the Free Exercise Clause of the First Amendment, finding, in part, that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." Otherwise, reasoned the Court, "professed doctrines of religious belief [would be] superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself." The Supreme Court reviewed the practice of polygamy, found it to be socially undesirable, and upheld Reynolds' bigamy conviction.

Id. at 825 (alterations in original) (citations omitted) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

abolitionist/criminalization position, enforcing a singular moral vision uniformly.[56]

In India, in contrast, the courts carefully navigate between honoring secular tendencies to reform religious personal law and accommodating minority religions. There is both an assimilationist *and* an accommodationist tendency. When the Indian courts have confronted constitutional challenges to positive laws that either permit or ban polygamy, they have been deferential to the legislature.[57] However, this deference extends only as far as upholding the statutes governing polygamy. In adjudicating the practice of polygamy, Indian courts are much more sensitive to differences in religious communities, the welfare of women and children, and the impact of criminal sanctions.[58]

A. The United States: Zero Tolerance for Polygamy

It has become axiomatic that there is no "federal" family law in the United States despite the raft of legislation that touches upon the family. The growth in federal regulation in the last three decades in areas such as interstate child support and custody has fueled the perception that the federal government has embarked on the regulation of families. Depending on your perspective, this increased federalization is

56. For instance, those opposing same-sex marriage often couple it with polygamy as equally morally offensive. The argument typically goes that if we allow same-sex marriage, we are on the path to allowing polygamy. *See generally* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997); Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008); Eugene Volokh, *Same Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005). Similarly, Justice Scalia makes this "what next" point in his dissent in *Lawrence*, arguing that we are on a slippery slope toward no regulation of entry into marriage. Lawrence v. Texas, 539 U.S. 558, 588–92 (Scalia, J., dissenting). In the subsequent parts of this Article, when I refer to the abolitionist position, I mean a position that considers polygamy to be a moral evil that ought to be eradicated through the criminal law. Although this term is primarily used in conjunction with slavery, it is interesting to note the twin histories of polygamy and slavery, with the same groups of people historically advocating for the abolition of both, polygamy being described as a "form of slavery." *See infra* notes 183–84 and accompanying text.

57. *See infra* notes 140–57 and accompanying text discussing *Narasu Appa Mali*. In that case, the court noted the legislature's authority to regulate for the social good.

58. *See infra* notes 228–32 and accompanying text.

either a cause for concern or celebration.[59] However, even a cursory familiarity with the history of polygamy in the Mormon community shows that there was a time in the 1800s when the federal government was heavily involved in regulating family form. Of course, there were other motives for the anti-polygamy regulations that I will discuss briefly below;[60] nevertheless, the foray into family law by the federal government is often overlooked in family law texts and by scholars.

From the mid-1800s to the turn of the century, the federal government passed a raft of legislation aimed at curbing the Mormon Church's financial and political power and its practice of polygamy. The first salvo in the war on polygamy was the Morrill Anti-bigamy Act of 1862.[61] The Morrill Act criminalized bigamy and reintroduced mortmain laws restricting the amount of property that the Mormon Church could own in any territory of the Union to a value of $50,000.[62] The Morrill Act went largely unenforced "due to difficulties establishing proof of a second marriage without public or church records, uncooperative Mormon witnesses, and Mormon control of the Utah judiciary."[63] This ineffectual regulation was supplemented by the Poland Act of 1874.[64]

The Poland Act limited the control of the judiciary by the Mormon Church.[65] Utah state courts were deprived of jurisdiction over civil and criminal cases, which were instead tried in federal district courts.[66] After the passage of the Poland Act, the Morrill Act was challenged in the *Reynolds* case discussed below.[67]

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59. *See* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 133–35 (2009).

60. *See infra* notes 80–94, 98–101 and accompanying text.

61. Morrill Anti-bigamy Act of 1862, ch. 126, 12 Stat. 501 (repealed 1910).

62. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 81–82 (2002). "Mortmain" is defined as

> [t]he condition of lands or tenements held in perpetuity by an ecclesiastical or other corporation. Land alienated in mortmain is not inalienable, but it will never escheat or pass by inheritance (and thus no inheritance taxes will ever be paid) because a corporation does not die.

BLACK'S LAW DICTIONARY 1105 (9th ed. 2009).

63. Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 294 n.26 (2010).

64. Poland Act of 1874, ch. 469, 18 Stat. 253.

65. *See* GORDON, *supra* note 62, at 111–13.

66. *See* Poland Act § 3.

67. *See infra* notes 74–86 and accompanying text.

Despite being upheld as constitutional, the Morrill and Poland Acts failed to curb the practice of polygamy. The next piece of legislation that sought to redress that defect was the Edmunds Act of 1882.[68] This law criminalized cohabitation, punishing it with a fine of $300 (a very steep fine equivalent to approximately $6,600 in current terms[69]) or six months in prison. The law also disqualified polygamists and believers in polygamy from serving on juries[70] and barred polygamists from voting or holding public office.[71]

Unfortunately for the federal authorities, the Edmunds Act was just as ineffective at stamping out polygamy as the Morrill and Poland Acts. The final attack on polygamy came with the Edmunds-Tucker Act of 1887.[72] This was the most severe of the laws passed to date, and Martha Ertman summarizes:

> This law eliminated evidentiary obstacles in polygamy prosecutions, allowed the state to compel wives to testify against their polygamous husbands, allowed adultery prosecutions to be instituted by the state rather than the spouse, required registration of every "ceremony of marriage, or in the nature of a marriage ceremony,"

68. *See* GORDON, *supra* note 62, at 152–55. For an interesting article reporting on the Supreme Court decision upholding the Edmunds Act, see *The Anti-polygamy Law—Its Constitutionality Upheld by the Supreme Court*, N.Y. TIMES (Mar. 24, 1885), http://query.nytimes.com/mem/archive-free/pdf?res=9D05E6DC1030E433A25757C2A9659C94649FD7CF.

69. *See* MEASURING WORTH, http://www.measuringworth.com/uscompare (last visited Dec. 7, 2011) (enter 1882 for "Initial Year," $300 for "Initial Amount," and 2010 for "Desired Year").

70. Edmunds Act of 1882, ch. 47, § 5, 22 Stat. 30, 31.

71. *Id.*; *see also* GORDON, *supra* note 62, at 152–55. In *Davis v. Beason*, the U.S. Supreme Court upheld a law passed by Idaho prohibiting polygamists and proponents of polygamy from holding public office. Samuel D. Davis was indicted under the law for attempting to procure himself along with other disqualified parties as electors of the County of Oneida. 133 U.S. 333, 334, 347–48 (1890). The Court, following its prior jurisprudence, made a distinction between free belief and religiously sanctioned practice that conflicts with government criminal laws:

> It is assumed by counsel of the petitioner that, because no mode of worship can be established, or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as "religion."

Id. at 345.

72. *See* GORDON, *supra* note 62, at 196–98.

> federalized the probate courts, disinherited the children of polygamists, re-established dower to assert the power of the first wife in a plural marriage, disenfranchised Utah woman [sic], and placed schools, districting, and the territorial militia known as the Nauvoo Legion under federal control. But most importantly, the Edmund-Tuckers [sic] Act reaffirmed the Morrill Act's revocation of the Mormon Church's corporate status and directed the Attorney General to wind up the corporation's affairs and seize Church property.[73]

While these acts were being legislated, Mormons mounted challenges to their constitutionality. The often-cited, seminal case dealing with polygamy in the United States is *Reynolds v. United States*.[74] The test case was brought after the enactment of the Poland Act and challenged the constitutionality of the Morrill Act.[75]

Reynolds is a familiar case to First Amendment and family-law scholars because the Court was confronted for the first time with the task of reconciling the claim to freedom of religion and the state's disapprobation of polygamy. Mr. Reynolds, a practicing Mormon, was convicted of bigamy for entering into a plural marriage and challenged the criminal law on First Amendment grounds.[76] One of the questions presented in the case was whether the accused should have been "acquitted if he married the second time, because he believed it to be his religious duty."[77] The Court categorically answered negatively.[78]

The Court found that the state may criminalize behavior and action that was subversive of "good order."[79] Monogamy was ideologically linked to the societal structure that the state was meant to preserve.[80] And it was polygamy that threatened

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73. Ertman, *supra* note 63, at 294–95 n.26 (citation omitted) (quoting Edmunds-Tucker Act of 1887, ch. 397, 24 Stat. 635, 636 (repealed 1978)).

74. 98 U.S. 145 (1878).

75. *See* GORDON, *supra* note 62, at 97.

76. *Reynolds*, 98 U.S. at 164–67.

77. *Id.* at 153.

78. *Id.* at 162.

79. *Id.* at 167 ("To permit [a defense of religious belief against criminal conviction] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

80. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1261–63 (2010).

the secular, political institution of democracy, as Alice Ristroph and Melissa Murray note:

> Moreover, if monogamous marriage was the foundation "[u]pon [which] society may be said to be built," children raised in polygamy would be dangerously ignorant of the "social relations and social obligations and duties" associated with monogamy. Their understanding of the "family," that critical unit of society and democracy, would be shaped by the norms and values more familiar to "Asiatic and . . . African people." And perhaps most troubling of all, through the power of reproduction, polygamy would expand with each successive generation of Mormons to the point that polygamous families could eventually disrupt the predominance of the monogamous marital family.[81]

The Court in *Reynolds* made a distinction between sincere belief and action. While the former could be respected as a matter of conscience, action or practice could be circumscribed when there were higher values like democracy and societal order at stake.[82] The Court also added that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."[83] The Court insinuated that this form of family was unjust to women, a thread that was later taken up by abolitionists using the concern for women and children to justify criminalization.[84]

The Court linked the form of marriage to the viability of the state itself. If the state were to refrain from applying criminal sanctions against polygamists because of the defense of religious obligation, "every citizen [would] become a law unto himself."[85] The Court underscored the limits of tolerance by giving the example of human sacrifice, a practice that the Court would not tolerate regardless of whether it was an obligation of a religious group.[86] However, the Court's concern about polygamy's impact on the state hides the Court's real

81. *Id.* at 1262–63 (alterations in original) (footnotes omitted) (quoting *Reynolds*, 98 U.S. at 164–65).
82. *Reynolds*, 98 U.S. at 167.
83. *Id.* at 166.
84. *Compare id.*, *with* State v. Green, 99 P.3d 820 (Utah 2004).
85. *Reynolds*, 98 U.S. at 167.
86. *Id.* at 166.

concern about the Mormon Church and its political and economic power in general.

Tracing the history of the Mormon Church's interaction with the state, David Chambers has shown that Mormons encountered resistance from the Protestant majority well before they began to engage in polygamy.[87] The Protestants saw the Mormons' existence as a political threat, resulting in increasing amounts of regulation and violence.[88] Despite very little evidence supporting the Protestants' stereotypical claims of immorality, violence, and subordination of women and children, Congress continued to pass laws to regulate Mormons. Moreover, in decisions like *Mormon Church v. United States*, the Court routinely upheld the constitutionality of laws which went so far as to allow seizure of church assets and disestablishment.[89]

In the *Mormon Church* decision, the Court made a number of incredible assertions:

> The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world. The question, therefore, is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself, and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore, to the detriment of the true interests of civil society.[90]

Use of terms such as "barbarism" and the overt reference to Christianity as the litmus test of civilization is rare in Supreme Court decisions today.

Further, in *Cleveland v. United States*, the Court held that polygamous practices fall within the purview of the Mann Act's prohibition of the transportation of women and girls across

87. *See* Chambers, *supra* note 56, at 61–74 (detailing the history of governmental regulation of polygamy).

88. *Id.*; *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (holding that the Mormon Church's property could be seized and that the Church could be disincorporated because of its adherence to the practice of polygamy made illegal by federal law).

89. *See Latter-Day Saints*, 136 U.S. at 49; *see also* Chambers, *supra* note 56, at 65.

90. *Latter-Day Saints*, 136 U.S. at 49.

state borders "for the purpose of prostitution or debauchery, or for any other immoral purpose."[91] Similar to prior cases, Justice Douglas opined that a defense of sincere religious belief against the Mann Act "would place beyond the law any act done under claim of religious sanction."[92] He also somewhat gratuitously remarked that polygamous households are a "notorious example of promiscuity."[93] The overt privileging of the dominant religion would obviously not stand now, but, at the time, the Court had no qualms about voicing its prejudice and incorporating the vernacular of civilization.[94]

In the cases that came after the turn of the twentieth century, the sharp distinction between belief and practice somewhat eroded. The Court conceded that state infringement

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91. Cleveland v. United States, 329 U.S. 14, 16 (1946) (quoting White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 826 (1910)).

92. *Id.* at 20. The Court held:

> [I]t has long been held that the fact that polygamy is supported by a religious creed affords no defense in a prosecution for bigamy. Whether an act is immoral within the meaning of the statute is not to be determined by the accused's concepts of morality. Congress has provided the standard. The offense is complete if the accused intended to perform, and did in fact perform, the act which the statute condemns, viz., the transportation of a woman for the purpose of making her his plural wife or cohabiting with her as such.

Id. (citation omitted).

93. *Id.* at 19.

94. It is interesting to note the evolution of "morality" and the deference to Congressional definitions of such concepts in the Court's jurisprudence. While religious belief still provides no shelter from prosecution, morality is no longer an adequate rationale for legislation without some other basis. For instance, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that disapprobation of a particular minority alone would not provide the legislature with a rational basis for carving it out of antidiscrimination laws:

> [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."

Id. at 634 (second and third alterations in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). Further, in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court opined:

> [T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. . . . [But the] issue before us is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."

Lawrence, 539 U.S. at 571 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992)).

on certain practices, regardless of whether it was justified as a necessity to ensure good order or democracy, was a violation of the First Amendment.[95] For instance, in *Wisconsin v. Yoder* and *Pierce v. Society of Sisters*, the Court held that infringing upon parents' rights to not send their children to public school or to choose religious education instead of public education violated the Free Exercise clause of the First Amendment.[96] If one concedes that public education is as important as family form in creating a citizenry with shared values, these cases clearly pulled back from *Reynolds* and revealed the weakness of the *Reynolds* argument. *Cleveland*, decided temporally between *Pierce* and *Yoder*, saw a return of *Reynolds*' reasoning that belief and practice must be differentiated. This culminated in *Employment Division v. Smith*, in which the Court further clarified that any neutral law of general applicability will not fail even if it burdens religious exercise as long as the law is not targeted specifically toward that religious exercise.[97]

Anti-polygamy laws did not ostensibly target Mormons as a group for their religious beliefs, or so the argument went. Rather, historically Congress aimed the laws at the preservation of Protestant Christian morality, the protection of women and children, and the promotion of a shared set of civic values.[98] In more recent times, the Court has upheld laws prohibiting bigamy because it offends "public policy."[99] In

95. For instance, in several cases, the Court held that the state could not infringe on parental rights to educate their children according to religious belief. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925). The fact that public education is a very important means by which a citizenry is trained to share values seems to undercut the rationale put forth in *Reynolds*.

96. *Yoder*, 406 U.S. at 234; *Pierce*, 268 U.S. at 534–35.

97. Emp't Div. v. Smith, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' ") (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

98. *See* Cleveland v. United States, 329 U.S. 14, 19 (1946); Davis v. Beason, 133 U.S. 333, 345 (1890); Reynolds v. United States, 98 U.S. 145, 168 (1878).

99. Any scholarship on the history of federal regulation of polygamy is inevitably indebted to the work of Sarah Barringer Gordon. In her book THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA, she traces the evolution of federal regulation to show how the federal government was indeed very concerned about the growing power of Mormons. The fact that they as a separate community would have control over an entire state was cause for deep anxiety. Polygamy laws were a way to reign in Mormons for a practice that was largely viewed negatively. The court cases that were brought enforcing polygamy say nothing about Mormonism or its political

reality, the history of the legal enactments against the Mormon Church reveals that these laws were primarily targeted at a church that unsettled the dominant religious establishments with its political, economic, and territorial power.[100] The ongoing pressure to discipline the Mormon Church did have some effect. The Church elders officially repudiated "celestial marriage" or polygamy in 1890.[101] The declaration of the end of polygamy as a religious principle or obligation saw only a formal end in doctrine. Yet, this was not the end of the practice or the story.

As the practice continued, so did the pursuit of polygamists. The definitive assault on the Mormon Church came in 1953 when the Governor of Arizona authorized a massive raid on Short Creek, a town on the border between Arizona and Utah, in order to rescue the women and children of a polygamous community.[102] In the prosecution of the Black family, captured in that raid, the government asserted that the children were inadequately fed and clothed; however, the government was unable to prove these charges.[103] Ultimately, the children were removed because the court found the children to have been neglected based on the family's polygamous lifestyle.[104] The Utah Supreme Court upheld the removal, with Justice Worthen asserting that the juvenile court had been "too

power generally. Rather, the cases again and again refer to morality and the civic impact of such practices. *See* GORDON, *supra* note 62, at 3–15, 81–83, 135. Although morality has gone out of fashion in terms of being the basis for what is essentially "morals legislation," the reason that anti-polygamy bans are upheld and that foreign polygamous unions are not given comity is usually public policy. *See, e.g.*, CAL. PENAL CODE §§ 281–284 (West 1872); FLA. STAT. § 826.01 (1868); N.Y. PENAL LAW § 255.15 (McKinney 1965); State v. Holm, 137 P.3d 726, 754–55 (Utah 2006) (Nehring, J., concurring); State v. Green, 99 P.3d 820, 829–30 (Utah 2004).

100. The various federal enactments contain not just criminal sanctions for the practice of polygamy but also measures weakening the Mormon Church and its adherents. For a discussion of federal acts and prohibitions on voting, serving on juries, holding public office, and attempts at curbing property holdings and disestablishment of the Mormon Church, see *supra* notes 61–67 and accompanying text.

101. PATRICK Q. MASON, THE MORMON MENACE: VIOLENCE AND ANTI-MORMONISM IN THE POSTBELLUM SOUTH 18 (2011).

102. Short Creek, Arizona sits on the border of Utah and Arizona and has continued to be a polygamous stronghold. It is now two towns, Colorado City on the Arizona side and Hildale on the Utah side. In the aftermath of the raid, both Arizona and Utah prosecuted the polygamists. *See generally* MARTHA SONNTAG BRADLEY, KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS (1993).

103. *Id.* at 168–74.

104. *In re* Black, 283 P.2d 887, 910–11 (Utah 1955).

lenient" because it had left open the possibility of returning the children to the parents if they reformed, that is to say, eschewed polygamy.[105] As one commentator observed, Justice Worthen "would have preferred to sever parental rights so that the children could be brought up 'as law-abiding citizens in righteous homes.' "[106]

After the disastrous failure of the Short Creek encounter, which produced a societal backlash and raised sympathy for the polygamists, prosecutions subsided.[107] Polygamy prosecutions rose once again in the late 1990s and the 2000s, primarily as a result of the involvement of young girls in child marriages.[108] More recent prosecutions of what are now fringe elements of the Mormon Church are in line with the dominant abolitionist position.[109]

In *State v. Holm*, the Utah Supreme Court upheld the conviction of a polygamist for violating the state law prohibiting people from "purporting to marry" or cohabiting with a woman while being married to another.[110] The case involved a man who had married one woman legally and two others in religious ceremonies. One of the "informal" wives was the sister of his legal wife and was a minor at the time.[111] Certainly, laws sanctioning sex with a minor would have

105. *Id.* at 913.

106. Chambers, *supra* note 56, at 69 (quoting *Black*, 283 P.2d at 913).

107. *See* Neil J. Young, *Short Creek's Long Legacy*, SLATE (Apr. 16, 2008, 1:15 PM), http://www.slate.com/articles/life/faithbased/2008/04/short_creeks_long_legacy.2.html.

108. *Id.* Polygamist sects of the Mormon Church have been in the news more recently with the prosecution of Warren Jeffs, the leader of the Fundamentalist Church of Jesus Christ of the Latter-Day Saints. *See, e.g.*, Lee Benson, *Texas Raid Has Opened Can of Worms*, DESERET NEWS (Apr. 20, 2008, 12:24 AM), http://www.deseretnews.com/article/695272068/Texas-raid-has-opened-can-of-worms.html; *Texas: Polygamist Leader Convicted*, N.Y. TIMES (Aug. 4, 2011), http://www.nytimes.com/2011/08/05/us/05brfs-Texas.html.

109. *See, e.g.*, State v. Jeffs, 243 P.3d 1250 (Utah 2010); State v. Holm, 137 P.3d 726 (Utah 2006); State v. Green, 99 P.3d 820 (Utah 2004).

110. *Holm*, 137 P.3d at 732 ("Holm was convicted pursuant to Utah's bigamy statute, which provides that '[a] person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.' ") (alteration in original) (quoting UTAH CODE ANN. § 76-7-101 (West 2003)).

111. *Id.* at 730. Holm married Suzie Stubbs in a legal ceremony and Wendy Holm in a religious ceremony. He then married Ruthie Stubbs, sister to Suzie, when she was sixteen. He was prosecuted under the bigamy statute and also charged with unlawful sexual conduct with a sixteen- or seventeen-year-old. *Id.*

adequately punished Mr. Holm in this case; however, he was also convicted of violating the polygamy ban.[112]

Mr. Holm's subsequent challenge on constitutional grounds followed the well-traveled arguments based on the right to privacy. The Utah Supreme Court was unsympathetic to claims that informal marriages should not be regulated because they seek no state recognition.[113] The case is particularly important because it punished informal polygamous relationships when there was only one legal marriage. No privacy right was found to protect the consensual, adult relationships in the de facto polygamous household.[114]

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112. *Id.*

113. *Id.* at 732–33. The court was very unsympathetic to a strictly formalist reading of the statute. Holm's contention that no party was under any illusion that the marriages subsequent to the first legal marriage would receive any state recognition did not help him escape the reach of the statute. Rather, the court looked at the reality behind the ceremonies and applied a substantive approach to its analysis of marriage:

> Specifically, Holm argues that he did not "purport to marry" Ruth Stubbs, as that phrase is used in the bigamy statute, because the word "marry" in subsection 76-7-101(1) refers only to legal marriage and neither Holm nor Stubbs contemplated that the religious ceremony solemnizing their relationship would entitle them to any of the legal benefits attendant to state-sanctioned matrimony. Second, Holm argues that his conviction under the bigamy statute was unconstitutional as applied in this case because it unduly infringes upon his right to practice his religion, as guaranteed by our state constitution. Third, Holm argues that his conviction under the bigamy statute was unconstitutional under the federal constitution. Fourth, Holm argues that the trial court improperly excluded expert testimony that was offered to rebut the State's characterization of polygamous culture.
>
> We reject each of these arguments. The "purports to marry" language contained in the bigamy statute is not confined to legal marriage and is, in fact, broad enough to cover the type of religious solemnization engaged in by Holm and Stubbs. We further conclude that the ability to engage in polygamous behavior is expressly excepted from the religious protections afforded by our state constitution. We are also unpersuaded that the federal constitution mandates that the states of this union tolerate polygamous behavior in the name of substantive due process or freedom of association. Additionally, in the face of controlling United States Supreme Court authority, we are constrained to conclude that the federal constitution does not protect Holm from bigamy prosecution on religious freedom grounds. Finally, we conclude that the trial court did not abuse its discretion by excluding Holm's proffered expert testimony because the testimony was not directly related to the questions before the jury and may have confused or distracted the jury.

Id.

114. *Id.* at 743. The Court distinguished Holm's case from *Lawrence v. Texas* in two ways. First, marriage has a public character and as such cannot be considered to be a wholly private consensual act. Second, Holm's case involved a minor,

While the case raises questions about the extent of state power in regulating private, consensual, adult sexual activity—both spatial and decisional privacy rights thought to be safe after *Lawrence v. Texas*—it is fully in line with the troubling history of polygamy abolitionism and the majoritarian disgust for the institution. As I noted above, polygamy was not the sole concern driving the persecution of Mormons; there were also political reasons for the aggressive approach taken by the state that concerned the regional power of the Mormon Church.

Nathan Oman has argued that *Reynolds* should be read as part of an imperial project of building the American empire in the Reconstruction period.[115] By tying the practice of polygamy to Asiatic and African races, the *Reynolds* court was positioning itself as part of a civilizing force and equating the Mormons with the less evolved "barbarians."[116] The Court then went on to reinforce this characterization, asking "if a wife religiously believed it was her duty to burn herself upon the funeral pile [sic] of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?"[117] Oman argues that this was not simply a glib comparison to Hinduism's practice of *sati* or widow immolation but that

> [i]t was a jurisprudential reference with a long history in the anti-polygamy battles. At the heart of this reference was a two-step move. First, the Mormons were conceptualized as a foreign race akin to the inhabitants of the Indian subcontinent, and second, the federal rule in territorial Utah was likened to the British Raj in India, bringing civilization through law to the benighted masses over whom it ruled.[118]

Having equated Mormons with an alien people complete with barbaric practices, odd biological functions, and lascivious

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which immediately placed it in a different category from the conduct at issue in *Lawrence*. *Id.* at 743–44.

115. *See* Nathan B. Oman, *Natural Law and the Rhetoric of Empire:* Reynolds v. United States*, Polygamy, and Imperialism*, 88 WASH. U. L. REV. 661, 666–67 (2011).

116. *See id.* at 698–702.

117. Reynolds v. United States, 98 U.S. 145, 166 (1878); *see also* Oman, *supra* note 115, at 664–67.

118. Oman, *supra* note 115, at 681.

natures, the state put itself in the position of the civilizer and law-bringer.[119]

Indeed, as Martha Ertman argues, the Mormon difference was worse because it was also race-traitorous.[120] While the Asiatic, African, and Islamic practices of polygamy were considered barbaric, they were also considered natural to those races and beliefs.[121] Mormons as white men were acting against their nature and their race. The practice of polygamy placed them on the same footing as Hindus and Muslims, where *sati* and polygamy were normal. Women from those communities were thought to be trained for it, while Mormon women were subjugated into the other "peculiar institution."[122] The anti-polygamists argued that they were in the same position of the Raj in banning *sati*.[123] Oddly, while some in the decriminalization camp argued that the comparison was inapposite because the British Raj did not ban polygamy (*sati* is quite a different practice in its impact on the practitioners) and that it did not consider it a contravention of divine law, that argument had no traction.[124]

While the state was key in pursuing and prosecuting Mormon polygamists, much of the social impetus to support such regulation came from abolitionist women who knew next to nothing about the real lives of polygamous women, and whose information was taken from "refugees" of Mormon polygamy.[125] The rise of the anti-polygamist novel fueled the

119. *See* Ertman, *supra* note 63, at 308 ("Again and again, commentators from high culture (media and legal experts mainly) and popular culture (cartoonists and authors of magazine articles) portray Mormons as barbaric, lascivious, despotic, disorderly, foreign, Black, Asian, and/or childish.").

120. *Id.* at 288–90.

121. *Id.* at 313.

122. *See* GORDON, *supra* note 62, at 55 (discussing the close links between polygamy and slavery abolitionism).

123. *See* Oman, *supra* note 115, at 695–96.

124. *See id.* The Indian Penal Code of 1860 criminalizes polygamy for communities in which it is religiously prohibited. Thus, for Hindus and Muslims whose religious traditions countenance polygamy, there is no sanction. In a peculiar mirroring, Hindus in Bangladesh and Pakistan can marry an unlimited number of wives but Muslims are restricted to no more than four. In India, Hindus can no longer marry more than one wife legally. *See infra* note 132 and accompanying text.

125. *See* GORDON, *supra* note 62, at 30 ("In the 1850s, fiction was a valuable tool for bringing home to readers the fear of betrayal and spiritual desolation that novelists claimed were the consequences of polygamy."). *See generally* Leonard J. Arrington & John Haupt, *Intolerable Zion: The Image of Mormonism in Nineteenth Century American Literature*, 22 W. HUMAN. REV. 243 (1968); Karen

fantasy that women were either being forced into lives of virtual slavery or seduced by notions of sexual freedom into lives of whoredom.[126] The victimization of women was and continues to be a key element to the abolitionist argument.[127] Politicizing victimization, the writers of the nineteenth century also argued that democracy could only flourish in a monogamous household where fidelity to one partner was the norm.[128] They argued that polygamy, akin to adultery, was a faithless institution leading to despotism (as evidenced, according to these writers, by the actions of the Mormon Patriarchs).[129]

In this history of the federal regulation of marriage, we see the kind of conscriptional secularism described above at work. The idea that Mormon difference could be accommodated was met with the fear that the difference would entirely undermine the state, and that the courts had to strictly impose "shared" civic values and punish transgressions through criminal law. American identity is forged through assimilation or the privatization of difference within certain constraints. *Lawrence v. Texas* may have sparked conversations about both spatial and decisional privacy with regard to adult, consensual sexual relationships, but as *State v. Holm* shows, it did not puncture the abolitionist armor when it comes to the public regulation of

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Lynn, *Sensational Virtue: Nineteenth-Century Mormon Fiction and American Popular Taste*, DIALOGUE, Autumn 1981, at 101.

126. *See* GORDON, *supra* note 62, at 29–40. Some examples of anti-polygamist novels are ORVILLA S. BELISLE, THE PROPHETS; OR, MORMONISM UNVEILED (Phila., Wm. White Smith 1855); ALFREDA EVA BELL, BOADICEA; THE MORMON WIFE: LIFE-SCENES IN UTAH (Baltimore, Arthur R. Orton 1855); METTA VICTORIA FULLER, MORMON WIVES; A NARRATIVE OF FACTS STRANGER THAN FICTION (N.Y.C., Derby & Jackson 1856); and MARIA WARD, FEMALE LIFE AMONG THE MORMONS; A NARRATIVE OF MANY YEARS' PERSONAL EXPERIENCE (N.Y.C., J.C. Derby 1855).

127. *See, e.g.*, PARASHAR, *supra* note 9, at 136.

128. *See* sources cited *supra* note 126.

129. As Illinois State Representative Shelby Moore Collum said in 1870:

> Polygamy . . . is regarded by the civilized world as opposed to law and order, decency and Christianity, and the prosperity of the state. Polygamy has gone hand [in] hand with murder, idolatry, and every secret abomination. . . . Instead of being a holy principle, receiving the sanction of Heaven, it is an institution founded in lustful and unbridled passions of men, devised by Satan himself to destroy purity and authorize whoredom.

PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 70 (1994) (quoting 8 M. MILLER, GREAT DEBATES IN AMERICAN HISTORY 443 (1913)).

marriage.[130] Even the privatization of this practice, in which adults consent to enter a polygamous union and where none is harmed, is beyond accommodation when marriage is itself defined in law through the dominant cultural and religious tradition.[131]

B. India: Reform and Accommodation

The tendency toward abolition of polygamy is also present in India. This tendency has existed since the colonial period when the imperial authority attempted to define family law in order to simplify and ease the administration of a complex, heterogeneous population. The British imperial administration formally banned polygamy in the Indian Penal Code of 1860 for those communities in which it was not a traditional practice.[132] The British made an exception for Hindus and Muslims whose personal laws recognized plural marriages as valid.[133] While the British were interested in reforming Hindu law and did so, the Indian Rebellion of 1857 made the British reformers question whether the beneficiaries of these laws would meekly allow their traditions and religious beliefs to be reformed from the outside without protest.[134] Moreover, family form was of lesser concern than more serious social issues like *sati* or widow remarriage.[135] On the other hand, the British considered

130. *See supra* note 110 and accompanying text.

131. Recent polygamy scholarship has pressed this point. The idea that polygamy inevitably results in the perpetuation of gender inequality has been challenged. Moreover, despite complementarity's many critics, even in monogamy, there are proponents of that arrangement between the sexes rather than equality, the idea being that partners in a marriage may arrange the division of labor in the family in a manner that best suits them. However, one must be cautious about such doctrines where they attempt to hide a reversion to stereotypical gender roles and constrain the choice of partners into what is considered "appropriate" roles. *See, e.g.*, Davis, *supra* note 15; *see also* Michele Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN'S L.J. 3, 14, 28 (2007).

132. INDIA PEN. CODE (1860), ch. XX, art. 494; Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India).

133. *See* PEN. ch. XX; *see also* W. MORGAN & A.G. MACPHERSON, THE INDIAN PENAL CODE, (ACT XLV OF 1860,) WITH NOTES 433 (Calcutta, G.C. Hay & Co. 1861) (noting that the Code prohibited polygamy in those religions in which it is not supported by tradition).

134. *See* Choudhury, *supra* note 34, at 54–56.

135. *See* Varsha Chitnis & Danaya Wright, *The Legacy of Colonialism: Law and Women's Rights in India*, 64 WASH & LEE L. REV. 1315, 1323–24 (2007).

Muslim law to be more progressive and did not meddle in quite the same manner with that community.[136]

Werner Menski argues that the modernist factions within Indian society working at the state level before independence were the impetus for reform of polygamy.[137] Indeed, the nascent women's organizations that were starting to work on the advancement of Indian women were a key group that pushed for the legislation at the state level. The principality of Baroda was the first state to formally ban polygamy after receiving support from the Hindu religious establishment.[138] Polygamy abolition then took place in a piecemeal fashion, with other states following. The Bombay Prevention of Hindu Bigamous Marriages Act of 1946 is perhaps the most well-known enactment that preceded the federal legislation post-independence.[139] The case testing that enactment's validity has become a cornerstone of polygamy jurisprudence in India.

In *Narasu Appa Mali*, the High Court of Bombay was faced with a constitutional challenge to the Bombay legislation.[140] In its decision, the court came to a conclusion similar to that of *Reynolds* and *Cleveland* in upholding the criminalization of bigamy for Hindus.[141] However, the court also found that the prohibition did not violate equal protection by treating Hindu males differently from Muslim males.[142] The case is intriguing because the justices had the unenviable task of reconciling support for the ban for the Hindu population—despite ample evidence that polygamy is a religiously sanctioned practice—while arguing that no such ban was required for Muslims.

In *Narasu Appa Mali*, a Hindu man was criminally convicted of violating the Bombay Prevention of Hindu Bigamous Marriages Act 1946.[143] He challenged the law, claiming that it was a violation of his fundamental rights guaranteed by Articles 14, 15, and 25 of the Indian Constitution.[144] The High Court of Bombay, citing the U.S.

136. *See* Flavia Agnes, *Economic Rights of Women in Islamic Law*, 31 ECON. & POL. WKLY. 2832, 2832–33 (1996).

137. *See* WERNER F. MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY 383–89 (2003).

138. *Id.* at 385.

139. State of Bombay v. Narasu Appa Mali, A.I.R. 1952 Bom. 84, ¶ 18 (India).

140. *Id.*

141. *Id.* ¶¶ 11, 15.

142. *Id.* ¶¶ 8–12.

143. *Id.* ¶¶ 1, 16.

144. *Id.* ¶¶ 3–8.

Supreme Court's decision in *Davis v. Beason*,[145] held that a "sharp distinction must be drawn between religious faith and belief and religious practices."[146] The High Court of Bombay held that under Article 25(a)(b), the state is empowered to change the personal laws of Hindus as a measure of social reform.[147] In fact, the Act did not discriminate against Hindus because they were the beneficiaries of a positive reform toward progress and modernity.[148] The counterargument—that if Hindus are given this benefit, then denying Muslims the same would amount to discrimination against Muslims—was unavailing. The Court reasoned that in the Muslim community, "polygamy is recognised as a valid institution,"[149] and that the Indian Constitution recognizes distinct communities and different conceptions of marriage and divorce among religious groups. Whereas a social reform might be advisable for one community, other communities may not be ready for it.[150]

At least in this decision, the formal persistence of polygamy is the only intimation that Muslim difference amounts to a lack of progression into modernity. The High Court of Bombay did not indulge in the kind of disparaging dicta that the U.S. Supreme Court did in its early polygamy cases.[151] Though the characterization of the bigamy law (a benefit to the Hindu community) may seem very convenient and somewhat peculiar, the decision shows an understanding of social facts that the state may take into consideration when devising its reform agenda. The High Court of Bombay

145. *Id.* ¶ 5. In *Davis v. Beason*, the U.S. Supreme Court upheld laws that restricted the ability of polygamists to hold public office. 133 U.S. 333, 345 (1890). In the Indian context, a similar case arose in *Javed v. State of Haryana*, in which a Muslim man challenged a law prohibiting a person with more than two children from running for political office. In the case, the Supreme Court of India held that population control was a key government interest and that even though the law might disparately impact polygamous Muslim men who are likely to have more than two children and also women who might not be able to fully control their reproduction, the law was constitutional. Javed v. State of Haryana, A.I.R. 2003 S.C. 3057, ¶¶ 18, 44, 60 (India).

146. *Narasu Appa Mali*, A.I.R. 1952, ¶ 5.

147. *Id.* ¶ 13.

148. *Id.*

149. *Id.* ¶ 10.

150. *Id.*

151. For instance, in U.S. jurisprudence, ongoing moral condemnation of practitioners of polygamy as "promiscuous" and destructive of the fabric of social life and law and order is common. *See supra* notes 79–85 and accompanying text.

recognized that the incremental approach taken by the state is a result of diversity within the state.[152]

Regarding the claim that polygamy is a form of sex discrimination, Justice Gajendragadkar asserted in his concurrence in *Narasu Appa Mali* that a law permitting polygamy is not sex discrimination within the ambit of Article 15(1) unless the basis for discrimination is sex alone and refers to no other "reasonable ground."[153] Marriage as a social institution is a result of contemporary conditions; it reflects the "natural" differences between sexes, and considerations may legitimately arise from these differences.[154] Unfortunately, the justice did not go on to explain how the differences undergirding polygyny are legitimate in a modern state with a constitutional guarantee of sex equality (should there be polyandry?) without resorting to some sort of biological difference argument.

In contrast to *Reynolds*' dubious concern for women, the Bombay High Court was unconcerned about the claimed unequal treatment of Muslim women as "victims" of polygamy.[155] The Court, however, recognized that Hindu women would not be forthcoming in prosecuting their husbands. As such, the anti-bigamy law had to be crafted to be cognizable and non-compoundable and thereby not reliant on wives' complaints.[156] This would allow the police to enforce the

152. *See Narasu Appa Mali*, A.I.R. 1952, ¶ 10. Chief Justice Chagla noted:

> One community might be prepared to accept and work social reform; another may not yet be prepared for it; and Article 11 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise.

Id.

153. *Id.* ¶ 24 (Gajendragadkar, J., concurring).

154. *Id.*

155. The issue of sex discrimination is cursorily treated in one paragraph at the very end of the majority opinion and is simply dismissed as irrelevant. *See id.* ¶ 14 (majority opinion).

156. *See id.* ¶ 11. A cognizable offense is one in which the police can institute an investigation and file a First Information Report without a court order and arrest without a warrant, typically for serious crimes. A non-compoundable offense is one that cannot be settled privately. INDIA CODE CRIM. PROC. ch. 1, § 2 (1973) (defining different types of offenses). The Bombay Prevention of Hindu Bigamous Marriages Act, No. 25, Acts of Parliament, 1946 (India), was superseded by the Hindu Marriage Act of 1955, No. 25, Acts of Parliament, 1955 (India), and the Indian Code of Criminal Procedure of 1973, section 494 makes the offense bailable (punishable by seven years' imprisonment or fewer), non-cognizable (requiring a warrant issued by the court), and compoundable, except in

bigamy laws without the help of wives. While the succeeding legislative acts have made the nature of the crime less severe by only prosecuting the violation if a wife complains, subsequent cases at the state level have repeatedly upheld the polygamy ban for Hindus while finding it permissible for Muslims.[157] In sum, *Narasu Appa Mali* has become the definitive case upholding the validity of the dual treatment of polygamy in India.

In the years after independence, the Indian federal legislature banned polygamy for the Hindu majority.[158] The Hindu Marriage Act of 1955 (HMA) formally abolished polygamy for the Hindu community throughout the Indian territories.[159] The HMA provides:

> A marriage may be solemnized between any two hindus, if the following conditions are fulfilled, namely:-
>
> (i) neither party has a spouse living at the time of the marriage . . . .[160]

Where a second marriage takes place, the HMA essentially applies the relevant sections of the Indian Penal Code of 1860 on bigamy to Hindus.[161] However, in order for the marriage to

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Andhra Pradesh, where it has been made harsher, CRIM. PROC. § 494; *see also* LAW COMM'N OF INDIA, NO. 227, PREVENTING BIGAMY VIA CONVERSION TO ISLAM—A PROPOSAL FOR GIVING STATUTORY EFFECT TO SUPREME COURT RULINGS 14–15 (2009), *available at* http://lawcommissionofindia.nic.in/reports/report227.pdf.

157. *See, e.g.*, Sambireddy v. Jayamma, A.I.R. 1972 A.P. 156 (India); Aiyer v. Amma, 78 A.I.R. 1952 Mad. 193 (India) (citing Reynolds v. United States, 98 U.S. 145 (1878)).

158. Hindu Marriage Act § 5(i).

159. *Id.*

160. *Id.*

161. Chapter XX, section 494 of the Indian Penal Code of 1860 (titled "Marrying again during lifetime of husband or wife") reads:

> Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
>
> *Exception*—This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such

be legally valid, it must conform to the customary rituals that Hinduism prescribes.[162] Bigamous marriages that do not formally meet these requirements are not recognized as legal marriages under Hindu personal law. Unlike the Utah law, the HMA recognizes only the formal requirements in finding a second marriage. If the formalities have not been met, there is no marriage under a literal reading of the HMA.[163] As a result, a properly solemnized second marriage is void *ab initio* and triggers the criminal sanctions, but a defective marriage that does not meet the legal requirements does not trigger criminal penalties even if the husband cohabits with the second wife.[164]

Both before and after independence, during the formative years of the Indian state, the battle lines between Hindu and Muslim communities were drawn.[165] Muslims were concerned about the majority's power to legislate away their personal laws, which had increasingly become part of an Indian-Muslim identity.[166] Following the British example, the Indian government chose not to undertake a lengthy conflict over family law with its largest minority group.[167] Thus, while Muslims (and tribal peoples) have had the practice of polygamy protected via personal law, this protection has generated a continued countermovement to eradicate polygamy entirely.[168]

The activism against polygamy has been largely focused on Muslims. The anti-polygamy stance has resulted in some strange interest convergences, particularly between secular

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marriage takes place, inform the person with whom such marriage is contracted . . . .

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 7 years and fine—Non-cognizable—Bailable—Triable by Magistrate of the first class—Compoundable by the husband or wife of the person so marrying with the permission of the court.

162. *See* MENSKI, *supra* note 137, at 398 (discussing *Ram v. Himachal Pradesh Administration*, A.I.R. 1966 S.C. 614 (India), where the Supreme Court of India reiterated its stance in *Lokhande v. State of Maharashtra*, A.I.R. 1965 S.C. 1564 (India), that a bigamy conviction could not be sustained in the absence of the performance of essential ceremonies in a Hindu marriage). Compare this to the statute in Utah under attack in *Holm*, where anyone who "purports to marry" would be guilty of bigamy. *See supra* notes 110–14 and accompanying text.

163. *See* Hindu Marriage Act § 5.

164. *See* MENSKI, *supra* note 137, at 398.

165. *See* Choudhury, *supra* note 34, at 56–59.

166. *Id.* at 61.

167. *Id.* at 67.

168. *Id.* at 79 (explaining that both Hindu right-wing groups and feminist groups have found themselves on the same side against Muslim polygamy).

women's rights advocates and right-wing Hindu politicians.[169] In spite of the opposition to Muslim polygamy by some groups, there is also a countervailing position demanding recognition for religious pluralism that prevents the Indian federal government from enacting a blanket criminalization of polygamous marriages across communities.[170] Largely, that position has been adopted by traditional Muslims seeking to retain group autonomy within the state, but it has also found some acceptance within the judiciary and the state. As a result, while Hindu law was reformed, Muslim personal law has been frozen in time, with the clock stopping in 1938.[171]

As discussed above, the issue of polygamy continues to be a bone of contention between some Hindu and Muslim groups and between women's organizations and traditional religious leaders. It is a complex issue. In the 1980s and 1990s, the Hindu Right used the issue to push for a Uniform Civil Code, arguing that the disparate treatment privileged Muslim men.[172] Women's rights groups have long championed the aspirational goal of a uniform family law enshrined as a hortatory provision in Article 44 of the Indian Constitution.[173] They strategically claimed that the Muslim personal law subordinated Muslim women. Both groups, though for markedly different reasons, sought the abolition of personal

169. *Id.* The BJP and feminists agree that polygamy is bad but for entirely different reasons. Whereas the Hindu Right has argued to abolish polygamy because it is a "benefit" that is given to Muslim men but not Hindus, feminists have argued that formal laws allowing for polygamy enshrine the subordination of Muslim women. *Id.* at 69–77.

170. *See* Khan, *supra* note 12, at 160 ("It is, therefore, religiously not permissible to abolish polygamy altogether. And what is not allowed religiously should not be legally done.").

171. The current family law statute for Muslims in India is the Muslim Personal Law (Shariat) Application Act of 1937. While this law has not been codified, it would be misleading to say that no development of the law has taken place. Judicial interpretation and activism has moved some areas of the law to be more responsive to the needs of women in the Muslim community. *See generally* Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631 (2008).

172. *See* Cossman & Kapur, *supra* note 46, at 147.

173. *See* RAJAN, *supra* note 45, at 156–65. Article 44 reads: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." INDIA CONST. art. 44. As a directive principle, it is not law. As Article 37 states, "[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." *Id.* at art. 37.

laws and with it polygamy.[174] However, these factions have not prevailed.

Any attempt to reform Muslim personal law by the state has been met with vigorous and entrenched resistance.[175] That said, internal reforms undertaken by Muslim groups have made some inroads.[176] Much ink has been expended on Muslim polygamy and its effects on women and families.[177] Indeed, it seems one cannot discuss polygamy in India without considering Muslim and Hindu practices as though the two are somehow coupled. While the topic of Muslim polygamy certainly has not been exhausted, the focus of this Section is not on the minority, which continues to "enjoy" the formal right to plural wives. Rather, the salient point here is that the Indian government *was* able to enact a nationwide ban on polygamy for Hindus with relative ease due to the considerable movement toward that end in the states. The prospects for a sweeping reform of Muslim personal law, by comparison, are bleak.

In the Indian context, legal reform has been complicated by the tension between uniformity and the push for a Uniform Civil Code on one hand and the tolerance for legal pluralism that continues to accommodate various religious family law regimes on the other. Despite the ability of the Indian federal government to reform Hindu personal law, it has not resulted in the eradication of polygamy in that community.[178] By contrast, the legal landscape in the United States is far more uniform even after the repeal of the federal laws on polygamy. The states' legislative approach of criminalizing bigamy is comparable to the Hindu Marriage Act of 1955. Yet the uniform criminalization of bigamy in the United States has not led to

174. *See* Choudhury, *supra* note 34, at 77.

175. *Id.* at 78.

176. *See India Muslim Divorce Code Set Out*, BBC NEWS (May 2, 2005, 7:05 AM), http://news.bbc.co.uk/2/hi/south_asia/4504889.stm; Geeta Pandey, *Muslim Women Fight Instant Divorce*, BBC NEWS (Aug. 4, 2004, 6:25 AM), http://news.bbc.co.uk/2/hi/south_asia/3530608.stm; Balraj Puri, *Nikahnama—A Reply to Triple Talaq*, DECCAN HERALD (Aug. 13, 2004), http://archive.deccanherald.com/Deccanherald/aug132004/edst.asp.

177. *See generally* THE DIVERSITY OF MUSLIM WOMEN'S LIVES IN INDIA (Zoya Hasan & Ritu Menon eds., 2005); ZOYA HASAN & RITU MENON, UNEQUAL CITIZENS: A STUDY OF MUSLIM WOMEN IN INDIA (2004); SHAHIDA LATEEF, MUSLIM WOMEN IN INDIA—POLITICAL AND PRIVATE REALITIES: 1890S–1980S (1990); VRINDA NARAIN, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA (2008); Alexandre, *supra* note 131.

178. GOPIKA SOLANKI, ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA 116 (2011).

the end of the practice either. Despite the ambivalent result of family law reform, we are not left bereft of options for regulation. Before I assess these options, I want to explore a few of the more important features of these laws in India and the United States.

III. COMPARATIVE LESSONS: NARRATIVES OF PROGRESS, WOMEN'S EQUALITY, AND RELIGIOUS ASSIMILATION AND ACCOMMODATION

To a large extent, the social and political realities reflected in the secular framework existing in each country help explain their respective legislative approaches to polygamy regulation. In India, an existing, politically powerful, Muslim minority resisted any interference with pre-independence laws that permitted minorities to practice polygamy.[179] As a result, the Indian federal government targeted the majority population rather than the minority. In the United States, the Mormon minority became powerful in the cradle of an already existing dominant social and political context with a markedly Protestant valence.[180] On the heels of the Civil War and during the growth of federal power, the U.S. federal government forced Mormons to assimilate in a way that was improbable in India one hundred years later.

In this Part, I highlight similarities and differences in polygamy regulation beyond the formal laws described above. Three aspects are of particular note: First, in both countries, the justification for polygamy regulation includes a discourse about progress and modernity. In this discourse, polygamy is construed as a backward and uncivilized practice, whereas

179. *See* Choudhury, *supra* note 34, at 93–96.

180. While there were, of course, groups that were entirely different from the dominant group—such as the Native American nations, African-Americans, Chinese-Americans, and Japanese-Americans—none of these groups was able to define the social, political, or legal system. They were all subject to it without franchise. Native Americans were given the right to vote with the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401 (2006)). The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973 (2006)), prohibited discriminatory voting practices that were responsible for the disenfranchisement of African-Americans. These discriminatory practices included literacy tests, poll taxes, grandfather clauses, and Jim Crow laws. *Id.* The Magnuson Act of 1943, ch. 344, 57 Stat. 600, repealed the Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, which had effectively blocked Chinese immigrants from entering the United States and prohibited settled Chinese immigrants from obtaining U.S. citizenship.

monogamy is a mark of modernity. In both contexts, there is an underlying racial discourse at play that constructs polygamy as an inferior choice of family form. Second, in a related discourse, women's groups take up a modernist position claiming that polygamy subordinates women. Thus, as a matter of equality, polygamy must be abolished.[181] Further, women's groups have also adopted the racial construction of polygamy as part of the practices of "inferior" peoples latently, if not overtly.[182] Finally, one area of difference between the two countries' approaches to marriage regulation is the willingness of the state to tolerate some form of polygamy in society under the protection of religious rights. In particular, the Indian judicial approach to enforcing the Hindu polygamy ban is more nuanced than that of the United States. As such, competing visions of modernity coexist. While the social conditions are quite different, the ability of Indian courts to regulate different family forms holds some interest for scholars of U.S. family law struggling with challenges to the dominant conceptions of family.

A. Discourses of Progress: Monogamy = Modernity?

The narratives of progress that surround reform of law in general have also had their corollary in the reform of family law. Despite a long history of the coexistence of monogamy and polygamy in societies stretching from Asia to Europe, monogamy has emerged as the hallmark of a modern family.

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181. *See generally* PARASHAR, *supra* note 9.

182. This sentiment is obvious in other contexts as well. For instance, Geetanjali Gangoli has found that racial and communal bias in women's organizations dominated by the elite majority is rife with assumptions about Muslim women. She quotes a Hindu social worker in domestic violence who expresses the view that Muslim women have a "very low status": "This is because their religion gives more status to men. (Muslim) men can easily give 'talaq' and desert women. Muslim women are more oppressed and vulnerable (than Hindu women). Their oppression is sanctioned by their religion." GEETANJALI GANGOLI, INDIAN FEMINISMS: LAW, PATRIARCHIES AND VIOLENCE IN INDIA 111 (2007) (alterations in original). She further notes:

> [S]uch images of Muslim men as being rapacious, bigamous and violent are based on communal perceptions of Muslim communities, and in cases of feminist intervention, leads [sic] to a belief that Muslim women are fated to suffer. This is apparent in this response of a Hindu social worker to a battered woman who had approached her through a feminist collective in which Muslim women play a significant role, where the worker is reported to suggest that domestic violence was inevitable in a context where men were allowed to be polygamous.

Id.

Moreover, the nuclear monogamous family has moved from communal to individual and from status to contract, thus exemplifying "modernity." In the United States, this construction of "monogamy = modernity" while "polygamy = barbarism" is explicit in the case law and debates surrounding the legislation against the Mormon Church. In the various polygamy judgments discussed above, the idea that a modern, democratic society cannot support polygamy is so self-evident that supporters do not have to defend it except tautologically (i.e., polygamy is not consistent with modernity because it is backwards).

In the United States of the 1800s, polygamy was one of the "twin relics of barbarism" (the other being slavery).[183] As Gordon notes:

> In nineteenth-century American thought barbarism occupied a special, un-Christian place. It constituted the inversion of progress, a Manichean counterweight to its successor, civilization. Native cultures and their "savage" customs made barbarism more than an abstract concept for most Americans. Popular fear of "Indian barbarisms" fed insecurities about the vulnerability of civilization, especially private relations of property and marriage, which were the cornerstones of civilized societies.[184]

Those who practiced polygamy were immediately "othered" into inferior, less civilized groups of people. In the United States, this betrayal was keenly felt because it was race-traitorous.[185] As noted by the *Reynolds* Court, whites were not supposed to act like the "Asiatic" or "African" races.

In India—a decidedly Asiatic place—similar discourses about civilization were circulating, particularly among the educated elites influenced by British Liberalism.[186] In the broader context of the civilizing mission of the colonial authorities, a push to reform the most regressive social customs was undertaken. Legal reform resulted in passing laws banning *sati* and child marriage and allowing remarriage

183. *See* GORDON, *supra* note 62, at 55.

184. *Id.* at 56.

185. *See* Ertman, *supra* note 63, at 308.

186. *See* Rachel Struman, *Marriage and Family in Colonial Hindu Law*, *in* HINDUISM AND LAW: AN INTRODUCTION 89, 89–104 (Timothy Lubin et al. eds., 2010).

of Hindu widows.[187] While the colonial authorities did not directly tackle polygamy, there was a social movement already underway that took up the cause.[188] At the time of independence, the modernists pushed for the wholesale ban on plural marriage backed by Mahatma Gandhi.[189] As a result, the enactments banning Hindu polygamy happened piecemeal on a state-by-state basis before a federal ban was enacted.[190] The modernist position against polygamy was eventually folded into the feminist position by women's groups who subsequently took up the abolitionist cause, advocated for more robust criminal prosecution, and continue to argue that the laws are insufficiency enforced.[191]

In sum, in both the Indian and U.S. contexts, polygamy opponents depicted the practice as premodern and oppressive, one that would be better off as a historical relic. Without an explicit explanation of why monogamy is modern, we are left with the assumption that it is due to its dyadic form, which allows for equality between partners. However, such an assumption both glosses over many of the injustices within monogamous families and deterministically conflates form with substance. It is worth recalling that until recent times, monogamous marriages allowed for much the same kinds of inequalities found in polygamous families. For instance, in the twentieth century, women in monogamous marriages could only divorce if they had fault grounds, husbands still had the right to chastise their wives physically (although not violently), women were unable to contract freely because of coverture, and, because title was dispositive in property settlement, women had little access to marital property.[192] Women shared

187. *See generally* RINA VERMA WILLIAMS, POSTCOLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE (2006).

188. *See generally id.*

189. *Id.* at 385.

190. *See* MENSKI, *supra* note 137, at 103.

191. *Id.* at 410 (quoting VIJAY SHARMA, PROTECTION TO WOMEN IN MATRIMONIAL HOME 95 (1994), on the inefficacy of the judiciary and law enforcement in tackling bigamy).

192. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY 10 (2005); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11–12 (2000). *See generally* KATHLEEN S. SULLIVAN, CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH-CENTURY AMERICA (2007). It should also be noted that domestic violence within monogamous marriages and the challenges to the public/private distinction in family law became a rallying point among feminists in the 1970s and 1980s. Prior to that, the state's willingness to prosecute what was seen as a private matter was minimal. *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 107–10

these burdens regardless of the marital form in which they found themselves. Nevertheless, it is the women and children in plural marriages that are of particular concern. For instance, they are referred to in the *Reynolds* case despite the incongruity of the Court's concern for this group of women in plural marriages, distinguishing them from their monogamous sisters who suffered many of the same harms alleged to be the effects of polygamy.[193]

B. Women's Equality, Race/Religion, and Sex in the Polygamy Debate

In more recent decades, the debate about ongoing practices of polygamy has centered on its negative effects on women and children.[194] While recent feminist positions are much more

(2012). *See generally* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

193. *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring): Justice Bradley noted:

> It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

Id.

194. Even though Emily Duncan calls for legalization of polygamy, she singles out women and children as the subjects of the beneficial regulation when polygamy is brought out of the closet and into the state's regulatory grasp. Emily

nuanced, and include those who suggest that there might be a feminist pro-polygamy argument,[195] there is still a strong anti-polygamy critique that can be linked to the historical antipathy to Mormon polygamy.[196] Sarah Barringer Gordon explored in-depth the historical role that women novelists had on the debates on polygamy in the nineteenth century.[197] The prevalent view then was that monogamous marriage was infused with morality, the self-sacrifice of committed partners versus licentiousness, political stability, uniformity as opposed to chaotic difference, and justice and order over criminality. Women were alternatively described as victims of rapacious Mormon men or whores willing to enter into "free-love" relationships.[198] At stake was the very nature of women and their relationship to sex. Gordon is worth quoting at length. Speaking about second wives, she notes:

> Single women were frequently depicted as complicit in the tragedy. The potential for real moral difference between women was among the most nagging and relentless of the problems that plagued popular fiction. The glorification of the household and its "guardian angel" was undermined by the presence of women whose morals defied the claim that women were by nature monogamous. The infidel Fanny Wright had proved earlier in the century that women could be tempted away from the "home of liberty." Novelist Maria Ward described one aspiring Mormon wife as a "coquette," who was in part culpable "for the continuation of polygamy because [she] *preferred a rich man, with a dozen wives, to a poor one without any . . . .*"[199]

If women in polygamous unions were considered unchaste and wayward, the depiction of Mormon men was nothing short of predatory. Polygamy, then, is portrayed as an institution that permits men to give free rein to their sexual desires and lasciviousness.

J. Duncan, *The Positive Effects of Legalizing Polygamy: "Love Is a Many Splendored Thing*," 15 DUKE J. GENDER L. & POL'Y 315, 316 (2008) ("Thus, if there is to be a rational policy in this area, it should consider the legalization of polygamy, thereby allowing greater regulation of the practice, compelling polygynous communities to emerge from the shadows, and openly assisting the women and children who live in them.").

195. *Id.*; *see also* Alexandre, *supra* note 131, at 5.

196. *See infra* note 200.

197. *See* GORDON, *supra* note 62, at 29–53.

198. *See id.* at 42–43.

199. *Id.* (alteration in original) (emphasis added).

Over one hundred years after *Reynolds*, the regulation and prosecution of polygamy continues to be accompanied by a discourse of protecting women and children.[200] Without a doubt, there are concerns about some polygamist communities that engage in illegal activity, such as sex with minors. However, marriages in such communities do not represent polygamous unions in general, just as abusive monogamous marriages do not define monogamy. Nor are such activities evidence that polygamy *inevitably* leads to abuse. The feminist preoccupation with abuse in polygamous marriages conveniently ignores the reality that women are vulnerable in the home regardless of family form.

Another liberal feminist concern—most often expressed these days in critiques of Muslim polygamy—focuses on equality.[201] The conflation of a dyadic family form with equality, as I have already argued above, is anything but evident. Nevertheless, the idea that women might have equal power and decision-making capabilities within a polygamous family where there is one husband and multiple wives is met with skepticism.[202] The logic behind this view is that the distribution of power must take place strictly along gender lines. For instance, if in a dyadic relationship power is allocated equally, both parties get fifty percent. Yet, in a plural family, the assumption seems to be that the husband gets fifty percent—or sometimes even more—while the wives must share the remaining fifty percent among them. Those who challenge this assumption have suggested a more democratic form in which each member has an equal share (in which case, the single male is outnumbered).[203]

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200. In recent literature discussing polygamy, the focus squarely remains on women; this is true for both scholarly work and case law. *See supra* note 194; *see also* Cynthia T. Cook, *Polygyny: Did the Africans Get It Right?*, 38 J. BLACK STUD. 232, 239–40 (2007) (arguing that polygyny is harmful to the health and well-being of women and children despite its benefits on fertility and population).

201. *See* CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 129 (2006); Rebecca J. Cook, *Structures of Discrimination*, 28 MACALESTER INT'L J. 33, 46–49 (2011); Strassberg, *supra* note 8, at 1535–37, 1586–94. I attended a family law conference in 2008 during which a discussion of current issues in family law took place. At one point, in the plenary session, one of the scholars made a statement to the effect of "we don't want polygamy," indicating a widespread agreement on the undesirability of the practice.

202. *See* sources cited *supra* note 201; *cf.* Davis, *supra* note 15, at 1990–91.

203. Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 177 (2006).

Another equality problem arises with regard to a woman's right to marry multiple men. It is argued that in a legal system that affords equal protection of the laws and prohibits arbitrary gender discrimination, polygamy would have to be equally available for both men and women.[204] Modern ideas of multiple partners make this a real possibility. In some sense, new formations like polyamorous partnerships that supposedly evade the historical gender inequities garner feminist support more easily than does the historically existing polygamous one.[205]

The typical discourse that arranges feminism and multiculturalism in dualistic, oppositional ways, pitting women's rights against cultural rights as though the boundaries are easily definable, is changing.[206] Recent literature suggests an opening up and questioning of the possibility of gender-equitable forms of polygamy, at least in the United States.[207] Part of that opening is the understanding that the deep moral repugnance against having multiple partners has been eroded by an increasingly permissive society that values personal choice and sexual expression.[208] Thus, as long as adults exercise meaningful choice, the law should leave them well enough alone. Certainly, as Elizabeth Emens has argued, plural relationships can be principled rather than simply licentious.[209]

In the Indian context, polygamy reform was similarly bound up in the progress narrative and the demands of modernity. The current discourses pitting Muslims against

204. *See* MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 125 (2008).

205. *See* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 302, 325 (2004).

206. *See generally* SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004); WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE (2006); WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY (1995).

207. Susan Moller Okin's book has become a mainstay of this kind of inquiry. The seeming conflict and attempts to resolve it have been an ongoing preoccupation of feminists. *See generally* SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? (1999); AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001).

208. For example, the laws punishing fornication and adultery are falling by the wayside because of desuetude. And given that there is rarely prosecution of such extramarital relationships, what substantive difference is there between a man who keeps a long-term mistress while being married and polygamy other than, in the latter case, the first wife knows of the existence of the second?

209. *See* Emens, *supra* note 205, at 320–30.

Hindus are often laden with ideas of Muslim backwardness because polygamy remains a legal institution and is equated with the mistreatment of women.[210] Moreover, Muslim traditionalists have issued apology after apology for the practice, claiming that it is morally superior to serial monogamy or infidelity without tackling the real issue of women's roles in polygamy brought up by its feminist critics.[211]

Consequently, Indian feminists' concerns about polygamy center less on sexual fidelity, morality, or sexual expression than on economic and gender subordination.[212] Society has primarily depicted women in polygamous marriages as victims and not freely-choosing agents (which at least the "whores" in the Mormon victim/whore dichotomy were). The attention has been particularly focused on Muslim women and their subordination at the hands of patriarchal Muslim men.[213]

However, Hindu women have also been cast in the victim role.[214] In a relatively recent post about polygamy, Deepali Gaur Singh writes that:

> Multiple marriages have socially and legally punished women rather than men. The Bigamy Law has been under cloud for some time especially since the Supreme Court passed a decision that women in substantially long live-in relationships should be given the same rights as a legally wedded wife. This was to protect the second wife who under the bigamy law loses all rights since the marriage is considered null and void in the absence of the dissolution of the former. Besides, in the event of the death of the spouse the family often disinherited them since the marriage would not be legally recognized. And with uneducated women very often duped into such marriages or unable to get out of them for fear of ostracism, social boycott and stigma

210. *See* GANGOLI, *supra* note 182, at 111.

211. *See* Khan, *supra* note 12, at 156–57; *see also* MAHMOOD, *supra* note 55, at 115–17; M. Fazlul Haq, *Polygamy in Islam: Misrepresented and Ill-judged*, *in* MODERN INDIAN FAMILY LAW, *supra* note 12, at 180, 180–84. There seems to be a common thread that polygamy has a beneficial effect on society by preventing adultery and prostitution. However, no data are presented to support this claim. A point of further study would be to gather data on the incidence of adultery and prostitution in polygamous societies. On another note, the role of women as providers of sexual services in a range of contexts from marriage to prostitution is missing in these analyses.

212. *See generally* PARASHAR, *supra* note 9.

213. *See* GANGOLI, *supra* note 182, at 111.

214. Deepali Gaur Singh, *Bigamy, Conversion and Women's Rights in India*, RH REALITY CHECK (Oct. 5, 2009, 6:00 AM), http://www.rhrealitycheck.org/blog/2009/10/05/bigamy-conversion-and-womens-rights-in-india.

> continuing to live within such a legally tenuous alliance, this was the protection that the courts were offering.[215]

It should be noted here that the economic constraints that might have prompted women to enter bigamous marriages are placed in direct opposition to the interests of the first wife.[216] The result is that the first wife is cast as a double victim, entirely innocent, while the second wife is both a victim and a perpetrator. That victimization can be very real, but this conception is complicated when some degree of choice is involved.[217]

Even in the Mormon context, women activists in the 1800s had a difficult time deploying victimization narratives when women's actual choices and constraints made them less than entirely innocent. A woman's choice to be the second or third wife of a rich man who provided financial support instead of being the sole wife of a pauper immediately cast doubt on her moral integrity if her choice could not be explained through victimization.

Nevertheless, as feminists argue, choices are necessarily constrained by economic and social factors. At the heart of these tensions are questions of identity and politics. What is a defensible feminist position on polygamy? Can women who assert that their religious identity is as important as their gender truly be feminists? Can polygamy be defended as a sex-positive choice, and under what conditions? And even if one is anti-polygamy, does that necessarily translate to support for state regulation through criminal law? These are vexed questions to which no easy answers are available. What can be said while we grapple with these questions is that holding to the construction of polygamy as a backward, necessarily subordinating practice that ought to be abolished prevents feminists from working to "normalize" it and making it more just. As a result, polygamy is pushed into the closet and is allowed to retain its gender subordinating practices without intervention and advancement.

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215. *Id.*

216. *Id.* In any polygamous family with dependent wives and children, the resources that go to support one wife would necessarily diminish the resources available to other wives. As such, wives are in competition with each other over resources.

217. *See* Kumari v. Singh, A.I.R. 1990 H.P. 77 (India) (discussing a woman who petitioned the court to allow her husband to marry a second wife).

C. Religious Accommodation and Abolition

In the United States and India, both the state and elites have consistently looked down on polygamy for moral reasons. As discussed in Part II, in the United States the moral disapprobation coupled with political fears of Mormon strength resulted in an aggressive effort to abolish the practice. As Oman has shown, it was part of an imperial, assimilationist agenda.[218] The types of interventions made by the U.S. government at both the state and federal level are in keeping with the overall structure of secularism (infused at that time with Protestant Christianity). Secularism elevates similarity over difference and seeks to create a more uniform political and social citizenry. Debates about multiculturalism are a late arrival on the scene.

By contrast, India has not dictated a particular family form but has allowed variation across religious and cultural groups.[219] India, too, has undertaken legal reform abolishing polygamy, but not uniformly. The legislature, finding that the practice was not an essential part of Hinduism, abolished it for the Hindu community, thereby assimilating all Hindus under a particular view of Hinduism.[220] However, because it is a family form explicitly recognized in the Qur'an, the Muslim holy book, the legislature could not make a similar claim that it was not an essential part of Islam. Thus, Indian statutory personal laws remain moored to religious laws.[221]

Reynolds and *Narasu Appa Mali* (and the cases that follow these decisions) have obvious commonalities. The Indian courts often comparatively cite U.S. cases, and in *Narasu Appa Mali* the Bombay court borrowed the distinction made between belief and practice and found that the former is protected but not necessarily the latter.[222] The judiciaries both share a legal system rooted in the English tradition and are deeply

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218. *See* Oman, *supra* note 115, at 665–67 and accompanying discussion on federal regulation of polygamy.

219. *See* SOLANKI, *supra* note 178, at 66.

220. *See* State v. Narasu Appa Mali, A.I.R. 1952 Bom. 84, ¶ 4 (India).

221. The *Qur'an* 4:3 (Trans. M.H. Shakir) (alterations in original) (footnotes omitted) states:

> If you fear that you will not deal fairly with orphan girls, you may marry whichever [other] women seem good to you, two, three, or four. If you fear that you cannot be equitable [to them], then marry only one, or your slave(s): that is more likely to make you avoid bias.

222. *Narasu Appa Mali*, A.I.R. 1952, ¶ 5.

influenced by Liberal jurisprudence.[223] The bench and bar in both countries are comprised of the elite and reflect this similarity.[224]

It is not surprising therefore to find a similar disdain for "regressive" practices like polygamy and a view that modernity demands that they be abandoned. At heart, these normative positions comprise a sense of what are "truly" Hindu or American (historically conflated with Protestant Christian) norms. There is also a shared sense that social reform or public policy are both important governmental interests that might override religious practice, particularly when it is the very practice that is the target of reform.

On the other hand, there are important divergences. First, India's polygamy ban binds the majority community, but leaves the minority community's practice untouched. For the Indian courts, moreover, the concern is not preservation of traditional values—the typical inquiry in any fundamental right claim in the United States—but reform.[225] The way that the courts have rationalized the criminalization of bigamy for Hindus is through the explicit conclusion that polygamy is not essential to Hinduism and that marriage is different for Hindus, a sacrament rather than a contract.[226] These are

223. Liberal philosophy has had an impact on the very notions of progress and modernity. As described above, monogamy is part of the progress/modernity narrative, and therefore it is not surprising that polygamy would be treated as a vestige of premodernity. For an excellent discussion of Liberalism and progress narratives, see UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999).

224. *See, e.g.*, V.R. Krishna Iyer, Op-Ed., *Against Abuse of the Contempt Power*, HINDU (July 24, 2010) http://www.thehindu.com/opinion/op-ed/article530271.ece ("Indian judges belong to an elite class like their English counterparts, and can be relieved only by impeachment which is a political operation beyond the pragmatic capabilities of the masses."). Justice Iyer served on the Supreme Court of India from 1973 to 1980. *Hon'ble Mr. Justice V.R. Krishna Iyer*, SUP. CT. INDIA, http://www.supremecourtofindia.nic.in/judges/bio/vrkrishnaiyer.htm (last visited Mar. 11, 2012).

225. *See, e.g.*, *Narasu Appa Mali*, A.I.R. 1952, ¶ 11.

226. *Id.* ¶¶ 5–6. The Chief Justice reluctantly engaged in this analysis:

> It is only with very considerable hesitation that I would like to speak about Hindu religion, but it is rather difficult [to] accept the proposition that polygamy is an integral part of Hindu religion. It is perfectly true that Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. That same religion also recognizes the institution of adoption. Therefore, the Hindu religion provides for the continuation of the line of a Hindu male within the frame work of monogamy.

Id. ¶ 6.

pronouncements on religious doctrine. This kind of religious analysis is absent in U.S. courts. Such religious inquiry now would certainly run afoul of the entanglement prong of the *Lemon* test.[227]

Second, with regard to the minority Muslims, while the High Court of Bombay reasons that the Muslim community may not be ready for such reform, there is an underlying view that the Indian Constitution acknowledges a plural society, not a uniform one.[228] In other words, the Indian Constitution recognizes the reality of legal pluralism and attempts to balance the tension of such pluralism with uniformity. That approach tends to restrain the impulse to discipline and assimilate difference.

Despite the different legal treatment of polygamy for Hindu and Muslim communities, a more detailed study of the on-the-ground realities reveals that family forms overlap between the two communities. This is true in part because of the heterogeneity often missed by those looking purely at the formal legal system.[229] Both the legal tolerance for difference and a sense of inclusiveness have allowed Muslims to retain a group identity in the face of majoritarian pressures, sheltering them from the kind of regulation faced by Mormons. India's

227. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

228. *See Narasu Appa Mali*, A.I.R. 1952, ¶ 22. Justice Gajedragadkar writes:

> Article 41 of the Constitution is, in my opinion very important in dealing with this question. This article says that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. In other words, this article by necessary implication recognises the existence of different codes applicable to the Hindus and Mahomedans in matters of personal law and permits their continuance until the State succeeds in its endeavour to secure for all the citizens a uniform civil code. The personal laws prevailing in this country owe their origin to scriptural texts. In several respects their provisions are mixed up with and are based on considerations of religion and culture; so that the task of evolving a uniform civil code applicable to the different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle that the endeavour [must] hereafter be to secure a uniform civil code throughout [the] territory of India. It is not difficult to imagine that some of the members of the Constituent Assembly may have felt impatient to achieve this ideal immediately; but as Article 44 shows this impatience was tempered by considerations of practical difficulties in the way[.] That is why the Constitution contents itself with laying down the directive principle in this article.

Id.

229. *See* SOLANKI, *supra* note 178, at 66–68.

secularism, which is avowedly accommodationist, is not offended by the existence of different laws for different groups even while aspiring to uniformity. As the Andhra High Court held in *Sambireddy v. Jayamma*:

> Article 14 of the Constitution assures to all persons equality before the law and equal protection of the laws. It is now well settled that while Article 14 forbids class legislation, it does not forbid a reasonable classification for the purposes of legislation, provided that the classification is founded on an intelligible differentia and that differentia has a rational relation to the object of the statute.[230]

Social and religious values differ and may be deeply held, and in India there is room for such difference in the legal framework. The *Reynolds* decision, on the other hand, was part of an impetus to forcibly reform the minority Mormon community. The impetus in the U.S. courts today is to tolerate private difference, but the morality of Protestantism is so infused in the common law that it continues to color our notions of what is truly "normal."[231] Thus, the different approaches adopted by the two countries reflect different secular frameworks.

Among the similarities and differences between the United States and India, there is one factual similarity that is of particular interest. In the United States, between thirty to fifty thousand people live in polygamous households, and that number continues to increase.[232] This increase is in spite of the

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230. *See* Sambireddy v. Jayamma, A.I.R. 1972 A.P. 156, ¶ 3 (India). This is in keeping with India's understanding of positive discrimination or affirmative action, which has on occasion resulted in serious civil unrest. However, the idea that substantive equality is as much a value as formal equality is firmly rooted in India's constitutional framework. *See generally* Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and "Personal Laws*,*"* 4 INT'L J. CONST. L. 181 (2006).

231. It is difficult to clarify the framework of Protestant secularism that has become normalized in the United States. *See generally* TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY (2003).

232. *Polygamy in America*, PUB. RADIO INT'L (Feb. 12, 2010), http://www.pri.org/stories/politics-society/polygamy-in-america1873.html; *see also* Barbara Bradley Hagerty*, Some Muslims in U.S. Quietly Engage in Polygamy*, NAT'L PUB. RADIO (May 27, 2008), http://www.npr.org/templates/story/story.php?storyId=90857818; Barbara Bradley Hagerty, *Philly's Black Muslims Increasingly Turn to Polygamy*, NAT'L PUB. RADIO (May 28, 2008), http://www.npr.org/templates/story/story.php?storyId=90886407&ps=rs. For those who might argue that this is an indicator that the law is working to deter polygamy, it might be noted that this is an unprovable counterfactual. We do not know

criminal ban and the states' appetite for prosecution. In India, the incidence of polygamy is almost the same for both Hindus and Muslims—approximately five to seven percent—in spite of the threat of criminal prosecution for Hindus.[233] The inference is that formal bans are insufficient to abolish the practice and that tolerance for the practice does not necessarily mean an increase in it.

Moreover, it calls into question the deterrent value of the law. If Muslims and Hindus practice polygamy in equal numbers, is there any validity to the claim that the criminalization is having a deterrent effect? In fact, some Hindu communities still consider polygamy licit, while some Muslim communities have prohibited it.[234] In the United States, polygamous communities continue to defy the bans. Further, informal polygamy continues to grow, making the law only a deterrent to formal polygamy. Analogously, in the United States, there are increasing numbers of people in the majority community who are not Mormons with multiple sexual partners and children from those unions, resulting in a sort of de facto polygamy that, because of the lack of enforcement of fornication and adultery laws, goes largely unregulated.[235] Despite legal bans, the actual formation of polygamous families occurs.[236] These local norms are often

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whether polygamy would become socially widespread if it were allowed. Arguably, it was never particularly widespread even in its heyday in the 1800s.

233. 1 FLAVIA AGNES, FAMILY LAW: FAMILY LAWS AND CONSTITUTIONAL CLAIMS 164 n.143 (2011).

234. *See* SOLANKI, *supra* note 178, at 64 n.21.

235. *See* sources cited *supra* note 232; *see also* Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-First Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 857 (2001); Melissa J. Mitchell, Comment, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 EMORY L.J. 1671, 1676 (2005).

236. *See* Wing, *supra* note 235, at 854–62; *see also* Pauline Bartolone, *For These Muslims, Polygamy Is an Option*, S.F. CHRON. (Aug. 5, 2007), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/05/INTBR8OJC1.DTL&ao=all; *Polygamy in America*, *supra* note 232. In contrast to the perception that polygamy is always a burden for women, one of the wives interviewed by Bartolone provides an alternative perception of polygamy:

> "We get our time off, we got a sisterhood thing going on," chuckles Asiila, 50, Ali's wife of 15 years. She crosses her ankles underneath her overhead khimar, a black dress that covers her from head to toe. "To me, polygyny (polygamy) is for the woman. It's really for the woman."

Bartolone, *supra* (alteration in original). Given that one of the reasons forwarded for the limited support for the practice of polygamy in Islam was a shortage of men as marital partners, the following observation is intriguing:

more germane than state, national, or centralized laws.[237] The reality is that polygamy continues to be a part of the family landscape in both countries with or without formal recognition in the law. In the concluding section below, I suggest that feminists and the state take a more nuanced approach to polygamy, one that focuses on the economic power distribution within the family. I briefly examine some ways in which we can redirect our efforts to changing polygamy's effects on women instead of pushing for more enforcement through criminal law.

IV. REDIRECTING OUR EFFORTS AT CHANGING POLYGAMY'S LIVED CONSEQUENCES

At first glance, the treatment of polygamy for Hindu Indians and for Americans would seem quite similar or equivalent. In both countries, a formal criminal prohibition punishes bigamy with prison sentences and a fine. Yet polygamy still continues in India and the United States, and it may be growing.[238] The lessons of both India and the United States should make us skeptical about attempts at formal uniformity and criminalization to achieve the goal of gender justice. A concentration of efforts on elimination through prosecution does little to change the lived experiences of women who are part of polygamous families. The feminist critique of polygamy continues to be important. From a feminist perspective, polygamy as it currently stands is not an optimal choice regardless of its legality.[239] Thus, any proposal that seeks to decriminalize the practice cannot discount the very real gender disparities that exist in polygamous families and the vulnerability of women in such families. Even where women choose to become part of polygamous marriages,

> "Most African American women who are into polygyny do so by choice," says [associate professor and chairwoman of philosophy and religious studies at Beloit College Debra Mubashir] Majeed, adding that their reasons range from their interpretation of the Quran, to desire for independence, to needing a father for their children.
>
> She says that a shortage of marriageable Black Muslim men may be one reason polygamy is embraced.
>
> "With the high number of African American men in prison, on drugs, out of work, or unavailable in some other way . . . the options are limited," Majeed said.

Id. (second alteration in original).

237. *See* SOLANKI, *supra* note 178, at 68.

238. *See supra* notes 232–33 and accompanying text.

239. *See generally* HASAN & MENON, *supra* note 177.

without an adequate understanding of the circumstances, we cannot accept those choices as wholly unconstrained. In this Part, I briefly examine the distributive consequences of polygamy and suggest some reforms of family property laws that might begin to change the internal economy of polygamous families. In turn, I argue that these reforms will improve the lives of women who engage in polygamy. Such reforms would be beneficial even if we remain skeptical about women's choices with regard to entering into plural marriages.

As noted by feminists, polygamy as it has been traditionally practiced in various cultures continues to reflect a stereotypical sexual division of labor (male breadwinner/female bread-maker) that economically disadvantages women.[240] Age disparities between husband and wives tend to exacerbate these gender inequalities.[241] And concerns about consent to enter into a polygamous union in traditional polygamous societies, particularly if marriages are undertaken at young ages, are quite salient.[242] Polygamous marriage, which has perhaps seen less reform because of non-recognition or light regulation, is open to a number of critiques that have driven beneficial reform of monogamous marriage.[243] While feminists have championed criminal responses to the ills of domestic violence, a greater reform effort has focused on the economic distribution of marital property.[244] The result has been more equality in monogamous marriages and an advancement in the status of women.[245]

Regarding the use of state criminal law to end violence in marriage, this approach has yielded some positive results. However, a robust critique of law enforcement's focus on plural

240. *See generally* KATHLEEN GERSON, THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY (2011); ARLIE R. HOCHSCHILD, THE SECOND SHIFT (1997); Theodore N. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322 (2000).

241. *See* ZEITZEN, *supra* note 204, at 125.

242. *See generally* Cheryl Hanna, *Rethinking Consent in a* Big Love *Way*, 17 MICH. J. GENDER & L. 111 (2010).

243. *See* sources cited *supra* note 240.

244. For examples of recent scholarship surveying the criminal justice responses, see GOODMARK, *supra* note 192; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007). For discussions of reform of laws that have an impact on the distribution of property in marriage, see Margaret Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221 (1984); J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419 (2008).

245. *See* Mahoney, *supra* note 244; Oldham, *supra* note 244.

marriage has been underway in the United States for nearly a decade.[246] Such critiques have focused on the fact that stringent criminal enforcement has produced its own dark side by disincentivizing dependent women from seeking state help, which has increased incarceration and had disparate effects on minority communities. It is timely, therefore, to reconsider criminal approaches to plural marriage, which may produce similar problems. Many women in India, for instance, do not support their husbands taking multiple wives, but this does not mean that they are willing to turn their spouses in to the authorities for criminal prosecution.[247] As the High Court of Bombay acknowledged in *Narasu Appa Mali*, most Hindu wives would not come forward to prosecute their husbands.[248] Criminal prosecution does not necessarily translate into the kind of economic and social security that might open up more palatable choices for women. Reform is more likely to be accomplished through social change and changes in the laws affecting women's economic well-being.

In this Part, I explore some alternative legal approaches. Rather than concentrating our efforts on stricter enforcement, we would better serve women by changing property and inheritance laws to be more equitable for partners in marriage regardless of the form of their family. In this regard, the Indian judiciary's nuanced approach to recognition of families regardless of the formalities can be instructive for the United States. Moreover, family law reform in the United States providing for more equitable distributions of marital property may be similarly instructive for India.

The Indian judiciary has come to recognize the gap between formal legal regulation and the substantive reality of the persistence of plural marriages and its attendant problems. As a result, the similarities between India and the United States are only surface deep. While the United States has given no quarter to polygamists, the Indian judiciary has taken a much more nuanced if somewhat inconsistent approach. It tends to categorize polygamy cases into two types, both of which involve husbands disavowing the marriage; in the first type of cases, they do so to try to avoid being jailed or fined, and, in the second, they do so to avoid paying maintenance to wives.

246. *See* sources cited *supra* note 244.
247. *See* State v. Narasu Appa Mali, A.I.R. 1952 Bom. 84 (India).
248. *Id.* ¶ 11.

As Warner Menski opines, with regard to the first type of cases, the judiciary has been very lenient toward polygamous Hindu men when faced with prosecuting them for violating the bigamy ban.[249] This is so even when a first wife is actively attempting to have her husband put behind bars.[250] The prevalent argument is based on the decision by the Indian Supreme Court in *Bhurao Shanker Lokhande v. State of Maharashtra*, in which the Court declined to find a legal marriage because all the requisite ceremonies of a Hindu marriage were not performed.[251]

On the other hand, another trend has emerged in which second wives who are vulnerable to disinheritance have received a measure of protection from the courts. In these cases, second wives have found a much more sympathetic court willing to distribute property to them and their children.[252] While this approach results in inconsistent outcomes at least with regard to the enforcement of polygamy, it also creates some tension between first and second wives. But it does not result in the complete disinheritance of a second wife. Moreover, there is truth to the claim that such a soft approach to enforcement fails to send any kind of message to willful violators who slip through the loophole by neglecting some ceremonies in the marriage formalities.[253] The approach is far from perfect. Yet, it recognizes a reality: Polygamy is a family form that is here to stay.

In the United States, the courts have preferred to deal more consistently with polygamous marriages, even going so far as recognizing and criminalizing substantive but informal marriages.[254] This is so even in the face of decisions that presumably call into question the criminal bans against adult

249. *See* MENSKI, *supra* note 137, at 394.

250. *See, e.g.*, Ghosh v. Ghosh, A.I.R. 1971 S.C. 1153 (India) (finding a second marriage invalid and acquitting the husband, even over the vigorous objection of the wife and her active participation in his prosecution).

251. Lokhande v. State of Maharashtra, A.I.R. 1965 S.C. 1564 (India). The court found that without the ceremonies of *homa* and *saptapadi* involving the circumambulation of the holy fire, there could be no legal marriage. Of course, this ignores the forms of marriage that are normative in India. In other words, there is no singular, orthodox form of marriage. *See e.g.*, *In re* Dolgonti Raghava Reddy, A.I.R. 1968 A.P. 116 (India) (holding that, in the Telengana Reddy community, a marriage without these rituals would still be valid).

252. *See* MENSKI, *supra* note 137, at 402 (citing Devi v. Choudhary, A.I.R. 1985 S.C. 765 (India) (holding that various forms of customary marriages were valid when faced with a complaint by the second wife seeking maintenance)).

253. *Id.* at 410.

254. *See, e.g.*, State v. Holm, 137 P.3d 726 (Utah 2006).

consensual sexual behavior. But a move to formally decriminalize polygamy does not appear on the horizon even after *Lawrence v. Texas*. In other words, the criminal laws prohibiting polygamy are likely here to stay alongside de facto polygamy. So, the question must be how to regulate and where to best make interventions. The choice of intervention is, of course, determined by the position that one takes toward polygamy.

In this Article, I have tried to show how moral disapproval leading to aggressive pursuit of polygamists in U.S. history has had limited success in eradicating the practice. Nevertheless, there is still an appetite for strong criminal prosecution.[255] India's case is far more mixed in reality, with social approval varying, judicial enforcement inconsistent, and formal bans firmly in place.[256] If one takes the view that polygamy is a social evil, it may follow that the most logical intervention is a more aggressive enforcement of criminal laws and harsher punishments. But, I would argue that such a position is inconsistent with the trend of greater choice in family formation and a view that adult polygamous unions, freely and consensually entered into, should not be criminalized by the state. From this position, my primary concern then would be to ensure that parties are treated fairly within the economy of the family and that the law's distributive effects are just.

While different forms of family and sexual freedom challenge the supremacy of heterosexual monogamy, particularly in the United States, polygamy is an ancient form of marriage.[257] It has historically been organized in the breadwinner/bread-maker model, with women being dependent on their husbands, exchanging the duty to obey for support.[258] However, there is no reason to suppose that the effects of the internal hierarchy cannot be influenced in ways beneficial to its constituents. Such intervention would have to take into

255. *See id.*; *see also* State v. Green, 99 P.3d 820 (Utah 2004).

256. *See supra* notes 229–30 and accompanying text.

257. *See* Lewis v. Harris, 875 A.2d 259, 270 (N.J. Super. Ct. App. Div. 2005) ("[T]here is arguably a stronger foundation for challenging statutes prohibiting polygamy than statutes limiting marriage to members of the opposite sex 'because, unlike gay marriage, [polygamy] has been and still is condoned by many religions and societies.' " (quoting George W. Dent., Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 628 (1999)) (second alteration made by the court).

258. *See* Carrie A. Miles, *"What's Love Got to Do With It?": Earthly Experience of Celestial Marriage, Past and Present*, *in* MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL, AND LEGAL ISSUES 185, 187–89 (Cardell K. Jacobson & Lara Burton eds., 2011).

account the legal and social contexts in which decisions to enter a polygamous marriage are made. And they would not cover those marriages in which fraud or deceit procured the consent of partners to enter into the marriage, such as nondisclosure of a prior marriage.[259]

As a general matter, women may be better served with laws that ensure that their *choices*—even when constrained—are valued. Instead of treating women as either morally corrupt for choosing polygamy or victims of it, the law might be morally agnostic.[260] Such a stance would look to protect women's rights to marital property and economic support (it might assume that agency is present, but that is not necessary). Although India's judiciary has protected the rights of the second wife in a plural marriage in the absence of legislation, the marital property regime in general requires reform in order to protect *all* wives from disinheritance. By contrast, in the United States, marital property reform has been successful; however, with regard to polygamous marriages, these reforms exclude second or third wives because of the illegality of the relationship and because the wives

259. Fraud that goes to the essentials in monogamous marriages is grounds for voiding the union, and this should not be changed, as it invalidates consent. *See, e.g.*, ABRAMS ET AL., *supra* note 30, at 152–54; *see also In re* Marriage of Meagher 31 Cal. Rptr. 3d 663 (Ct. App. 2005) (finding that lying about wealth does not amount to fraud as to the essentials of the marriage); Summers v. Renz, No. H024460, 2004 WL 2384845 (Cal. Ct. App. Oct. 26, 2004) (holding that even discovery of a husband's prior attempted murder of his previous wife by shooting her while she slept did not amount to fraud as to the essentials of the marriage).

260. The question of choice is quite vexed. *See generally* KENT GREENFIELD, THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS (2011); ROSEMARY HUNTER & SHARON COWAN, CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY (2007). Feminist differences about what "valid" choices women may make has led to a charge and countercharge of "false consciousness." There is no means by which to judge whether a choice is "good" for a woman without entering into normative judgments about what is a "good life." Liberal feminists have articulated a particular view of womanhood that elevates individuality and equality over dependence, interconnectedness, and complementarity. While I agree that the idea of separate spheres has been used historically to deny women entry into traditionally male spheres and that any claims based on this notion should be vigorously examined, I am reluctant to assert that all women who choose particular forms of existence that are more "traditional" are falsely conscious and "in reality" are actually unhappy or oppressed. This reluctance comes from a recognition that choices that are constrained by external factors (such as a lack of alternative better choices) may nevertheless be rational. Take for instance the choice to partner in a polygamous union and to bear children with a shared father rather than to remain single and childless or to raise children as a single parent. What would be a "good" choice under these circumstances? *See* Bartolone, *supra* note 236.

knowingly enter into the relationship.[261] Knowledge then bars them from using equitable remedies like the putative wife doctrine discussed below.

In either country, a property regime that does not penalize women for consensually entering polygamous marriages and that allows them a fair share of the marital assets would ensure that one wife does not pay because she came second in time regardless of the understanding of the members of the family. To this end, a first step in the Indian context would be to reform the prevalent title theory of property and recognize marital property. The current property regime in India follows the largely discarded title regime in the United States.[262] This has meant that husbands that accumulate property and title it in their own names are deemed the separate owner of the property regardless of whether it was obtained with marital assets.[263] Clearly, this divests many women of a share of the assets even when their own assets were used to purchase the new property.[264] Such a change would preserve rights in marital property to the wives of both Hindu and Muslim polygamous men, disincentivizing them from discarding their first, often older, wives in favor of a second wife.[265] In other words, the state should take the "treat them equally" admonition seriously and make it clear that a man will not escape his financial responsibilities by repudiating a first wife or taking a second wife only to disregard the first. Moreover, it is not enough to force a husband to give alimony to his ex-wife because maintenance is often paltry and contingent on the willingness of a husband to continue to pay.[266] Wives must have a right to a share of marital property at divorce or death, which will give them some measure of security.

As a corollary to reforming marital property law, it is also important to protect the property that women bring into the marriage. The possibility that a wife's assets will be controlled

261. *See* ABRAMS ET AL., *supra* note 30, at 150.

262. *See* Kamala Sankaran, *Family, Work and Matrimonial Property: Implications for Women and Children*, *in* REDEFINING FAMILY LAW IN INDIA 258, 261–75 (Archana Parashar & Amita Dhanda eds., 2008); *see also* ABRAMS ET AL., *supra* note 30, at 469–70.

263. *See* BINA AGARWAL, A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA 199, 292–315 (1994).

264. *Id.*

265. Sankaran, *supra* note 262, at 259–66.

266. *See id.* at 265–66.

by the husband is quite real.[267] As such, it is important to be able to separately protect dower assets unless there is consent to make such property marital. Further, polygamous families may have a division of labor that is quite different from that of monogamous families. The law needs to be sensitive to valuing the contribution of the various members to the family's overall wealth. Work such as childcare and housework must be taken into account. Many of these reforms have already happened in the United States and have benefitted women's autonomy in the family.

Since the 1980s, family courts in the United States have taken the division of labor into consideration and attempted to value marital contributions in monogamous marriages, even if their methods were inadequate.[268] Moreover, they have also had to determine property rights with regard to unmarried cohabitants. Given that the United States is unlikely to pull back from its long-held criminalization stance to recognize plural "marriage," the remedies available to unmarried cohabitants are the most promising in securing rights for plural wives.

These remedies fall into contract and equity. Contractual remedies like those used in *Marvin v. Marvin*, a seminal case in the field of cohabitation, require some form of contract between the parties.[269] However, some courts have required a "marriage-like" relationship to accompany the contract.[270] This requirement is reflected in the American Law Institute's Principles, which define domestic partners as "two persons of the same or opposite sex, not married to one another."[271] Although not widely followed, the principles enshrine the dyadic nature of "marriage-like" relationships even while

267. *See* BIPASHA BARUAH, WOMEN AND PROPERTY IN URBAN INDIA 104–38 (2010). For an example of this in the Muslim community, see Gregory C. Kozlowski, *Muslim Women and the Control of Property in North India*, *in* WOMEN AND SOCIAL REFORM IN MODERN INDIA: A READER 326 (Sumit Sarkar & Tanika Sarkar. eds., 2008).

268. *See, e.g.*, Pratt v. Pratt, 475 S.E.2d 102 (W. Va. 1996). *See generally* Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713 (2000); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004).

269. *See* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); *see also* A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(1) (2002) (defining domestic partners as two people of the same or opposite sex who have shared life as a couple).

270. *See, e.g.*, Devaney v. L'Esperance, 949 A.2d 743 (N.J. 2008).

271. A.L.I., *supra* note 269, § 6.03.

moving toward acceptance of same-sex unions.[272] It is, therefore, likely that contract remedies will be foreclosed unless this definitional hurdle is overcome.

Equitable doctrines are similarly unavailable. The putative spouse doctrine requires proof that the remedy-seeking party did not know of the prior existing marriage.[273] In order to make the doctrine work for plural marital partners, the "innocence" or "knowledge" requirement would need to be removed. Then, courts can recognize the injustice of allowing a spouse to retain all the marital property simply because the partners were aware that a valid marriage already existed and nevertheless chose to enter into a plural family, much in the way they do for monogamous putative spouses. In effect, this change would diminish the distinction between valid and invalid marriages. However, the change is not overly concerning because the bigamy statutes would still punish those who entered into a bigamous marriage while perhaps protecting substantive marriages that are plural. In the absence of decriminalization, this would be an intermediate step.

As is evident, without reform, in both Indian and U.S. contexts, a second marriage is void *ab initio*, leaving second spouses with few rights if they knowingly entered into the marriage.[274] The Indian courts have preserved the rights of second families by recognizing a substantive marriage in cases involving Hindus who marry bigamously, but the courts are not uniform in their application. Further, this is effectively a judicial end run around the statute that voids second marriages.[275] Nevertheless, the formal law prohibiting recognition of bigamous marriages is not a categorical bar to recovery of some property.

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272. *See generally* ROBIN FRETWELL WILSON, RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2006).

273. The "putative spouse doctrine" requires that an "innocent spouse has relied in good faith on a mistaken belief in the validity of the marriage." ABRAMS ET AL., *supra* note 30, at 172.

274. *See* Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955, § 11 (India); *see also* ABRAMS ET AL., *supra* note 30, at 150; SOLANKI, *supra* note 178, at 109–10.

275. *See* MENSKI, *supra* note 137, at 404 ("[D]espite the legislative prohibition of Hindu polygamy, the courts have continued to take a rather lenient approach towards polygamous Hindu men when it comes to protecting them against criminal convictions. But the courts are not lenient when financial claims of women and children are at stake.").

Comparatively, in the United States, a similar acknowledgment that cohabitation may occur in more forms than the dyadic one would bring plural marriages—and other forms of family already existing and growing—under the protection of the law.[276] Already, some scholars have suggested alternative ways to construct marriages that borrow from other areas of the law. New approaches that move away from marriage as status towards marriage as contract, for instance, might consider a consensual polygamous marriage as a multi-party partnership (though this analogy has its limits).[277] The economic distribution of marital assets then would be different than in a status-based construction where marital partners' rights to property are based on different ideas of obligation.[278] Current law that forces plural relationships into the monogamous straitjacket is unlikely to do justice to all members of a polygamous family.[279]

CONCLUSION

Polygamy as a practice is unlikely to vanish. It is a family form that has survived into modernity. Instead of trying to find ways to eradicate it because it is "barbaric" or medieval, a more realistic approach would be to treat polygamy like a modern phenomenon and to use our tools to change it. Criminalization has proved to be a blunt instrument in this regard, and moral disapprobation seems a flimsy rationale for continuing on that path. A jail sentence for a polygamous husband results in the deprivation of the breadwinner in most traditionally structured polygamous families.[280] In the Unites States, perhaps this is less problematic given the existence of a social safety net and the ability of wives to rely upon the state to support their children to some extent. Nevertheless, the negative economic

276. *See* Emens, *supra* note 205, at 361–75.

277. *See* Davis, *supra* note 15, at 2002–24.

278. *See* Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 22–34 (2012).

279. For instance, the legal rule that a second marriage is void *ab initio* regardless of its length makes it difficult for second wives to sue for marital property. *See, e.g.*, ABRAMS ET AL., *supra* note 30, at 141.

280. In India, bigamy is punishable by fine or imprisonment of up to seven years. In the United States, state laws govern the crime, which is usually a felony offense. *See* INDIA PEN. CODE (1860), ch. XX, § 494. In Utah, it may result in a five-year jail term. *See* UTAH CODE ANN. § 76-7-101 (2003); *see also Criminal Penalties*, UTAH ST. CTS., http://www.utcourts.gov/howto/criminallaw/penalties.asp (last modified Aug. 11, 2011).

impact of divorce on women has been well-established,[281] and this would be even worse given that no support would be forthcoming from a jailed spouse. Moreover, incarceration occurs not because the husband poses a threat to his family or to the state but because of moral repugnance for polygamy. We have moved away from prosecuting fornication, adultery, and homosexual sex, yet we continue to criminalize plural marriages. In this Article, I have argued that we ought to be more interested in accommodation and recognition of adult, consensual arrangements of family. The state can continue to regulate the family by making changes to marital rights and obligations of the constituents of any marriage in order to make marriage more just for the partners. In both India and the United States, this form of intervention offers more options for maximizing the liberties of all families while protecting important political and social values.

281. *See* STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES 123 (1998).

WHAT AMERICAN LEGAL THEORY MIGHT LEARN FROM ISLAMIC LAW: SOME LESSONS ABOUT 'THE RULE OF LAW' FROM 'SHARI'A COURT' PRACTICE IN INDIA

JEFFREY A. REDDING*

In 2010, voters in the state of Oklahoma passed a constitutional amendment that prohibits the Oklahoma courts from considering "Sharia Law." A great deal of the support for this amendment and similar (ongoing) legal initiatives appears to be generated by a deep-seated paranoia about Muslims and Islamic law that has taken root in many parts of the post-9/11 United States. This Article contends that the passage of this Oklahoma constitutional amendment should not have been surprising given that it is not only right-wing partisans who have felt the need to strictly demarcate and police the boundaries of the American legal system, but also liberal partisans too. Indeed, this Article argues that certain modes of American liberal legal thought actually facilitate the anti-shari'a mania currently sweeping the United States. As a result, an adequate response to this mania cannot simply rely on traditional,

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American-style, liberal legal theorizing. Indeed, as this Article argues and explains, some extant American liberal understandings of 'law,' 'legal systems,' and 'the rule of law' are eminently inappropriate resources in the struggle against American forms of reactionary parochialism because these liberal understandings are themselves deeply compromised by their own forms of parochialism.

INTRODUCTION

American legal culture, at least in some of its most dominant and most vocal articulations, views the United States as committed to 'the rule of law.' While no two people view the meaning of 'the rule of law' identically, many popular definitions of this indeterminate phrase coalesce around its relation to some combination of 'clear rules,' 'fair rules,' and 'the same set of rules for everyone (rich/poor, black/white, straight/gay, etc.).' In this latter aspect—the same set of rules applying to everyone—'rule of law' ideology has often been invoked to disparage legal pluralism. Raising slogans like 'uniformity,' 'equality,' and 'predictability,' American 'rule of law' partisans have tended to embrace a view of law—and legal institutions—that frowns upon difference, diversity, and context.[1] In the twenty-first century, American concern with

1. *See, e.g.*, Editorial, *Triumph for Equality; Common Decency Wins Out in Votes on Gay Marriage*, WASH. POST, Apr. 8, 2009, at A16 (commending Vermont for coming to the conclusion that "[c]ommon decency and the protections guaranteed to all citizens by *the rule of law* demand that the relationships of gay men and lesbians be respected and recognized" (emphasis added)). Prior to the state legislative vote commended by this editorial, Vermont had recognized "civil unions" for same-sex couples, but not "marriage," reserving this latter status for opposite-sex couples. *Id.* The position in this editorial is emblematic of the uses of 'rule of law' rhetoric and arguments to quash pluralistic arrangements vis-à-vis

'the rule of law' has both deepened and broadened, extending now to systems of private[2] religious law found within the United States.

While private Jewish legal authorities and private Jewish actors operating in the United States have previously experienced some degree of scrutiny, criticism, and regulation,[3] this kind of suspicious treatment is now being extended with special fervor to Islamic legal authorities operating within the United States. American practitioners of Islamic law, for example, have recently had to confront a number of particularly aggressive state legislative and constitutional initiatives aimed at discouraging Islamic legal practices in particular.

For example, in 2010, voters in the state of Oklahoma passed an amendment to that state's constitution insisting that:

> [State of Oklahoma courts], when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. *The courts shall not look to the legal precepts of other nations or cultures. Specifically,*

relationship recognition. For more on the advantages of a legally-pluralistic approach to relationship recognition, see generally Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791 (2010).

2. I use the term 'private' here merely to make a temporary distinction between 'public' systems of law—which overtly depend on the state for their legislation and institutional enforcement—and 'private' systems of law—which neither overtly depend on the state for the legislation of their norms, nor directly rely on the state for the institutional infrastructure (e.g., arbitrators, mediators) whereby these norms are enforced. This all being the case, as I will discuss *infra*, there is no easy line to draw between the 'public' and the 'private' and my momentary use of these terms here is not meant to suggest otherwise.

3. *See generally* Patti A. Scott, Comment, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117, 1132–46 (1996) (discussing New York State courts' various enforcements of (ostensibly) neutral principles of law in ways that strongly 'encourage' Jewish husbands to religiously divorce their divorce-requesting (Jewish) wives even though these husbands may be acting within their religious rights to refuse divorce).

> *the courts shall not consider international law or Sharia Law*.[4]

A great deal of the support for this amendment and similar (ongoing) legal initiatives appears to be generated by a deep-seated paranoia about Muslims and Islamic law that has taken root in many parts of the post-9/11 United States. Moreover, such support seems to be steeped in the view that—to quote the former candidate for the Republican Party presidential nomination, Rick Santorum—"[s]haria law is incompatible with American jurisprudence and [the] Constitution."[5] Presumably, such jurisprudence and constitutional wisdom is viewed as including a commitment to 'the rule of law.'

As puzzling and surprising as this Oklahoma constitutional amendment has been to certain American liberal legal sensibilities, its passage should not have been surprising in light of similar legislative moves elsewhere in the 'liberal West.' For example, in 2007 in Canada, fears and worries over efforts by the Ontario-based Islamic Institute of Civil Justice (IICJ) to offer religion-premised family law arbitration services to Muslims resulted in Ontario legislatively declaring that it would no longer recognize any "[arbitration] process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction."[6] Islamic law, in particular, was presumed—and intended—to fall outside of Canada's legal boundaries.[7] In the United Kingdom as well, the debate over the state's recognition of non-state Islamic practices continues to this day after a controversial talk delivered by the Archbishop of Canterbury on this subject in 2008 suggesting that the British polity could, in some circumstances, tolerate the enforcement of Islamic law.[8] Given the tone of this and

4. H.R.J. Res. 1056, 52nd Leg., 2d Reg. Sess. (Okla. 2010), *available at* https://www.sos.ok.gov/documents/questions/755.pdf (emphasis added).

5. *See* Kendra Marr, *Rick Santorum: Sharia 'Is Evil'*, POLITICO (Mar. 11, 2011, 11:16 PM), http://www.politico.com/news/stories/0311/51166.html.

6. *See* Arbitration Act, S.O. 1991, c. 17, s. 2.2 (1) (Can.), *available at* http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm #BK3 (last visited Feb. 11, 2012).

7. For more discussion of the Islam-centered focus of the Canadian legislative debates, see generally Jeffrey A. Redding, *Institutional v. Liberal Contexts for Contemporary Non-State, Muslim Civil Dispute Resolution Systems*, 6 J. ISLAMIC ST. PRAC. INT'L L. 1 (2010). *See also* Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 584 (2008).

8. *See* Redding, *supra* note 7, at 13–14. *See generally* John R. Bowen, *How Could English Courts Recognize Shariah?*, 7 ST. THOMAS L. REV. 411 (2010).

related debates, one has to be quite worried about the future prospects of legal pluralism in an increasingly conservative and reactionary British polity.

Moreover, the passage of this Oklahoma constitutional amendment should not have been surprising given that it has not only been partisans of an increasingly paranoid and crude nationalistic politics who have felt the need to strictly demarcate and police the boundaries of (liberal) legal systems, but also more 'respectable' voices too. Indeed, this Article contends that certain modes[9] of American liberal legal thought have facilitated the anti-shari'a mania currently sweeping the United States.[10] As a result, an adequate response to this mania cannot simply rely on traditional, American-style liberal legal theorizing. In fact, as this Article argues, some of our extant liberal understandings of 'law,' 'legal systems,' and 'the rule of law' are eminently inappropriate resources in the struggle against reactionary parochialism because they themselves are deeply compromised by their own forms of parochialism.

In this vein, in the process of developing his notion of what is meant by a 'legal system,' Joseph Raz[11] has asserted, "all legal systems are open systems."[12] However, he has also then gone on to describe 'openness' in the following manner: "A normative system is an open system to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it. *The more*

9. I say 'certain modes' here because, obviously, there is disagreement within any community—including the liberal community—about the meaning of community norms. In this respect, a prominent liberal lawyers organization recently filed an amicus brief in a federal lawsuit challenging the Oklahoma state constitutional amendment, *see supra* note 4 and accompanying text, arguing that "the Rule of Law . . . is violated by the 'Save Our State Amendment' to the Oklahoma Constitution." Amicus Curiae Brief in Support of Plaintiff Appellee Submitted by the Association of the Bar of the City of New York and the Islamic Law Committee of the American Branch of the International Law Association at 1, Awad v. Ziriax, No. 10-6273 (10th Cir. 2011).

10. *See* text accompanying *infra* note 21.

11. I characterize Joseph Raz as belonging to an 'American' mode of legal philosophizing because of his long-standing affiliation with Columbia Law School in New York City, and also because Raz's work is popular within the American legal academy. *See* Joseph Raz, *CV*, https://sites.google.com/site/josephnraz/cv (last visited Mar. 26, 2012). However, as is well known, Raz was born and educated in modern-day Israel and, in addition to having taught there, has also been a professor at Oxford University. *See* Martin Lyon Levine, *Foreword to* Symposium*, The Works of Joseph Raz*, 62 S. CAL. L. REV. 731, 736 (1989).

12. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 120 (1979) (footnote omitted).

'alien' norms are 'adopted' by the system the more open it is."[13] What one hand giveth, the other apparently taketh away: in proposing the possibility of systemic permeability, Raz has also allowed for systemic unintelligibility or, in other words, thorough systemic 'alien'ability.

Of course, no single theorist's work is single-handedly responsible for creating the eerie sympathies that exist between a certain liberal kind of legal philosophizing and a certain reactionary and nationalistic kind of legal politics that is increasingly prevalent in the liberal West, including the United States. And, in fact, some of the problems with Raz's older theorizing echo in more recent work by well-known liberal legal theorist, Jeremy Waldron,[14] indicating that the problems associated with American (liberal) legal theorizing about 'the rule of law' run deep and wide. That being the case, this Article can only begin the project of identifying these problems, serving as the opening chapter of a much larger project of mine on "late liberalism"[15] and its Islamophobic tendencies. This larger and longer project aside, the threat posed by Oklahoma's recent amendment of its state constitution is an immediate one. Not only does this amendment and other legal initiatives like it suffer from legal incoherence, these initiatives also contribute to a climate of quickening prejudice and intolerance. This Article then aims to forthrightly (if all-too-briefly) diagnose the surprising (e.g., liberal) roots of this intolerance and discuss the surprisingly ineffective antidote that American-style legal liberalism provides for it.

While the problems of American legal liberalism are manifold, this Article concentrates on this liberalism's nearsightedness. As the above mention of Joseph Raz's work suggests, American legal liberalism is compromised by a kind of parochialism which finds expression when American legal

13. *Id.* at 119 (emphasis added).

14. I characterize Jeremy Waldron as belonging to an 'American' mode of legal philosophizing because of his affiliations with both Columbia University and New York University, and also because Waldron's work is popular within the American legal academy. However, Waldron was born and educated in New Zealand and, like Joseph Raz, also spent significant time at Oxford University. *See* Background Information on Jeremy Waldron: University Professor & Professor of Law, N.Y.U. DEP'T OF PHIL., http://philosophy.fas.nyu.edu/object/jeremywaldron.html (last visited Mar. 26, 2012).

15. To borrow a phrase from anthropologist Elizabeth Povinelli. *See generally* ELIZABETH A. POVINELLI, THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM (2002).

liberalism demonstrates its too-ready willingness to draw national and cultural borders when thinking about 'law,' 'legal systems,' and 'the rule of law.' In addition, American legal liberalism is compromised by another kind of parochialism too, namely a disciplinary parochialism,[16] which, among other things, evinces a profound lack of interest in the discipline of anthropology and its ethnographic methodologies. Both of these parochialisms work together to foreclose lessons about 'law,' 'legal systems,' and 'the rule of law' that can be gleaned not only from jurisdictions outside the borders of the United States, but also outside the official jurisdictional borders of *state/'official'* courts.

This state of theoretical affairs is unfortunate. As a result, in the course of demonstrating some of the theoretical inadequacies of American liberal legalism, this Article also commences an alternative theorization about 'law,' 'legal systems' and, more particularly, 'the rule of law.' This theorization relies heavily on what can be learned about 'the rule of law'—including whatever exists of it in the United States—from the experiences of an Indian Muslim woman, 'Ayesha,'[17] who recently used a non-state 'shari'a court' (specifically, a '*dar ul qaza*'[18]) in Delhi to exercise her Indian Islamic divorce rights. I recently interviewed Ayesha at length as part of my larger project on liberalism and Islamophobia. From Ayesha's recounting of the practices and procedures of the Delhi *dar ul qaza* from which she obtained a divorce from her husband in 2008, it is clear that there are interesting congruencies and discrepancies between this non-American, non-state legal venue's crafting of its procedures and those state-premised legal procedures idealized by American legal theorists. More generally, Ayesha's experience suggests that 'the rule of law' can exist (for better or worse) in both the public and private legal domains, and that both right-leaning Americans and their liberal American friends are mistaken

16. Raz manages to draw together both parochialisms in his well-known volume on law. *See* RAZ, *supra* note 12, at 104, 119. With respect to Raz's disciplinary parochialism, while expounding on "the institutional nature of law," Raz emphasizes his interest in approaching law from a philosophical, and not a socio-legal/anthropological approach. For Raz, the two methodological approaches are distinctly different: "This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal." *Id.* at 104.

17. Not her real name.

18. *Dar ul qaza* means 'place of adjudication' in both Urdu and Arabic.

when they ignore this distinct possibility—all the while articulating ostensibly 'universal' theories about 'law,' 'legal systems,' and 'the rule of law.' As this Article argues, American legal liberalism's neglect of the non-state is particularly egregious given that this neglect paved the way for recent anti-shari'a legislative initiatives, such as that which was recently passed in Oklahoma.

Part I of this Article opens with a brief exposition of 'rule of law' ideology, focusing on recent claims about 'the rule of law' that have been made by prominent liberal legal theorist Jeremy Waldron. The discussion here focuses on two of Waldron's recent contributions to this intellectual tradition, as these build upon, encapsulate, and also react against previous work done within this ideological vein. The aim of this Part is to highlight how state/'official' courts get prioritized in 'the rule of law' tradition, in the process marginalizing non-state—including, often enough, Islamic—legal institutions.

Part I's discussion sets the stage for Part II's troubling of liberal, state-oriented theorizations of law and legal institutions via a presentation of ethnographic evidence concerning an actual non-state Islamic legal venue. Part II thus shifts gears, from legal idealization to legal ethnography, introducing 'Ayesha,' an Indian Muslim woman in her early forties whom I got to know in the course of fieldwork that I conducted in India for eight months over the course of two years, from 2007–2009. Part II explains Ayesha's experiences with a non-state shari'a court (or *dar ul qaza*) in Delhi from which she obtained a divorce decree. Part II will explain the practices and procedures of this non-state legal venue, as experienced and understood by a party who has had sustained personal interaction with it.[19]

Part III brings the previous two Parts into dialogue, exploring what Ayesha's recounting of the operations of a non-state *dar ul qaza* system reveals about 'the rule of law,' both within and without the state and its legal institutions. As this Part discusses, Ayesha's experience does not provide us with easy narratives about 'law,' 'legal systems,' or 'the rule of law.' While Ayesha's story does illustrate that Waldron's state-premised legal proceduralism *can* rule *outside* of the state's

19. For more discussion concerning the reasons why I am using, in particular, Ayesha's portrayal of the *dar ul qaza* to understand how such an institution operates, as well as discussion on some of the (unavoidable) problems and potentials accompanying this methodological 'decision,' see *infra* Part II.

courtrooms quite frequently and adequately, her story also reveals the ambivalent value of that 'rule of law.' Ultimately then, Ayesha's experience with an Islamic legal institution holds many important lessons for liberal legal thought, in the United States and elsewhere.

Oklahoma's amendment was the first American state initiative to label certain Islamic private law practices as "other."[20] However, it has not been nor will it be the last such initiative; similar initiatives have been pursued in more than twenty other states[21] and many more can be expected in the future. As unsophisticated as these anti-shari'a initiatives seem, they share a great deal with seemingly sophisticated American liberal legal theorizing. Both these initiatives and this theorizing espouse a universalistic commitment to 'the rule of law,' yet are also seemingly uncurious about the mechanics and procedures of actual law and actual legal systems, whether inside or outside of the United States. In what follows, I hope to demonstrate that there are better ways to think about 'law,' 'legal systems,' and 'the rule of law,' wherever and however they occur. In this respect, American liberal legal theorizing does not provide an antidote to American legal nationalism. Rather, along with their right-wing American friends, American liberal legal theorists have a tendency to marginalize Islamic legal practices. As this Article suggests, however, American liberal legal theorists could learn from the same Islamic practices which they presently ignore and marginalize.

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20. *See supra* note 4 and accompanying text.

21. The following states, in addition to Oklahoma, either have considered or are considering changes to their statutes or constitutions, aimed at limiting the recognition or enforcement of Islamic law/shari'a within those states: Alaska, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wyoming. *See* Tim Murphy, *Map of the Day: The Anti-Sharia Panic*, MOTHERJONES (Aug. 26, 2011, 6:48 AM), http://motherjones.com/mojo/2011/08/anti-sharia-panic-how-lie-becomes-bill. Arizona's proposed bill is perhaps the most radical and bizarre of all of these, aimed as it is at something it calls "religious sectarian law," which it defines as

> any statute, tenet or body of law evolving within and binding a specific religious sect or tribe. Religious sectarian law includes shari'a law, canon law, halacha and karma but does not include any law of the United States or the individual states based on Anglo-American legal tradition and principles on which the United States was founded.

H.B. 2582, 15th Leg., 1st Reg. Sess. (Ariz. 2011).

I. AMERICAN LEGAL LIBERALISM AND THE RULE OF LAW

In a recent set of articles,[22] legal philosopher Jeremy Waldron has developed a theory of 'the rule of law' that focuses on the "procedural and argumentative"[23] aspects of law, rather than the "determinacy and predictability"[24] aspects of law which other theorists[25] have stressed when thinking about the nature of 'law' and 'the rule of law' alike. In turn, Waldron has also developed an account of the rule of law that focuses on the sites where people often engage in legal *argumentation*. For Waldron, courts are such sites and, in fact, are the sites where 'law,' 'legal systems,' and 'the rule of law' come into being via argumentation. In this respect, Waldron has asserted:

> I do not think we should regard something as a legal system absent the existence and operation of the sort of institutions we call courts. By courts, I mean institutions that apply norms and directives established in the name of the whole society to individual cases, that settle disputes about the application of those norms, and that do so through the medium of hearings—formal events that are tightly structured to enable an impartial body to fairly and effectively determine the rights and responsibilities of particular persons after hearing evidence and argument from both sides.[26]

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22. *See generally* Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008). *See also* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, (N.Y.U. Sch. of Law, Pub. L. Research, Working Paper No. 10-73, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm ?abstract_id=1688491. This latter paper is still only published on SSRN and is labeled a "working paper." While this paper is 'only' a "working paper," I believe my use and citation of it here—for indicating some of the problematic tendencies within liberal legal thought—is justified. Indeed, that a preliminary draft would first gesture so heavily towards the state is quite strong evidence of the state-oriented nature of much liberal legal thought. That is to say, one can see with this working paper where liberal legalism's imagination wanders initially, and also where this imagination tends to linger.

23. Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 5.

24. *Id.*

25. *See, e.g.*, 2 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY 37–38 (1973) ("The chief function of rules of just conduct is . . . *to tell each what he can count upon*, what material objects or services he can use for his purposes, and what is the range of actions open to him" (emphasis added)).

26. *See* Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 20; Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 10.

As central as courts are to Waldron's conception of 'the rule of law,' he has been remarkably vague as to what he means by a 'court.' To be fair, this vagueness is quite consistent with a long history of theoretical and descriptive neglect within 'the rule of law' tradition concerning 'courts' and their role in constituting 'the rule of law.' Waldron, in fact, has highlighted this past neglect in his recent work, viewing it as a lamentable shortcoming of past theorizations about 'law,' 'legal systems,' and 'the rule of law.'[27] At the same time, Waldron has also warned against too specifically defining what is meant by a 'court,' warning that "it would be a mistake to get too concrete [about what is meant by a 'court'] given the variety of court-like institutions in the world."[28]

With this comment, Waldron has gestured towards the importance of legal theorization that is simultaneously transnationally and transculturally cognizant and unconcerned

27. *See* Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 20 ("It is remarkable how little there is about courts in the conceptual accounts of law presented in modern positivist jurisprudence."). In many respects, this neglect can be traced to legal theorist Albert Venn Dicey's influential nineteenth-century work, *Introduction to the Study of the Law of the Constitution*. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1959). The precise terminology that Dicey employs to reference state courts in *Introduction to the Study of the Law of the Constitution* is that of "ordinary courts" or "ordinary tribunals." *Id.* at 250. Dicey tells us very little about what makes a court "ordinary" other than that "the ordinary courts of the country" consist of a "judge and jury." *Id.* As inchoate as his description of them is, Dicey makes "ordinary courts" central to his conceptualization of 'the rule of law' in three different ways. Most importantly, "ordinary courts" are important to Dicey's conception of 'the rule of law,' for these institutions are the actual spaces where legal opinions securing important liberties for posterity are authored. In this respect, Dicey is impressed with the liberties that have accompanied England's 'unwritten,' judicially-crafted constitution. For Dicey, the English system of ('unwritten' constitutional) liberty is incredibly secure because it results from ordinary litigation in ordinary courts. *See id.* at 195–96. As a result, according to Dicey, it is very difficult to suspend a liberty in the English system. Such a suspension would involve far more than an impetuous declaration about the enforcement—or not—of a 'mere' constitutional document. *See id.* at 195–96, 201. Indeed, the declaration would have to extend to suspending the operations of actual institutions (i.e., courts) that the civilian population regularly accesses, uses, and needs: "Where . . . the right to individual freedom is part of the constitutions because it is inherent in the ordinary law of the land, the right is one which can hardly be destroyed without a thorough revolution *in the institutions* and manners of the nation." *Id.* at 201 (emphasis added).

While Dicey's linking of ordinary courts and 'the rule of law' is a somewhat belated one in his work, it is only here where one can see how courts (or comparable institutions)—as institutions and spaces where ordinary disputation occurs, and where the actual infrastructure for the entire legal system is initiated and maintained—become requisite to his theory of 'the rule of law.'

28. Waldron, *The Concept and the Rule of Law*, *supra* note 22, at 23.

with borders in any strict sense. Yet other aspects of Waldron's argument cut against such a generous read of his work. In particular, not only do these other aspects of Waldron's recent theorization of 'law,' 'legal systems,' and 'the rule of law' suggest that his definition of what is meant by a 'court' is over-invested in state-organized forms of institutional legality, but so does his further elaboration of a "procedural"[29] view of 'the rule of law.'

With respect to this procedural view, Waldron has seen the development of this view of 'the rule of law' as a natural (or even necessary) consequence of viewing law as an argumentative enterprise.[30] As a result, Waldron has developed in his recent work a laundry list of legal procedures that he feels a 'court' must adhere to if such an institution is to facilitate and ensure an argument-premised kind of 'law.'[31] Emphasizing the importance of legal procedure to his argumentation-focused theoretical project, Waldron has written:

> In many . . . discussions of the Rule of Law . . . the procedural dimension is simply ignored . . . . I do not mean that judges and courts are ignored. . . . But if one didn't know better, one would infer from these [Rule of Law] discussions that problems were just brought to wise individuals called judges for their decision (with or without the help of sources of law) and the judges . . . proceeded to deploy their interpretive strategies and practical wisdom to address those problems; there is no discussion in [this literature] of the *highly proceduralized* hearings in which problems are presented to a court, let alone the importance of the various procedural rights and powers possessed by individual litigants in relation to these hearings.[32]

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29. See *id.* at 55, for Waldron's use of the word "procedural" to describe his preferred account of 'the rule of law.'

30. *See, e.g.*, *supra* note 26 and accompanying text.

31. *See* Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 12, 17–22.

32. *Id.* at 9–10 (emphasis added). Waldron goes on to remark that in his more robust vision of 'the rule of law,' in which there are 'courts,'

> the operation of a court involves a way of proceeding which offers those who are immediately concerned in the dispute or in the application of the norm with an opportunity to make submissions and present evidence (such evidence being presented in an orderly fashion according to strict rules of relevance oriented to the norms whose application is in question). The mode of presentation may vary; but the existence of such

Thus, seeking to avoid the inattention paid to actual court procedures by his intellectual predecessors,[33] Waldron has outlined in his recent work the following features that he feels a legal proceeding must embody before 'the rule of law' can be said to exist:

> A. a hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, etc.;
>
> B. a legally-trained judicial officer, whose independence of other agencies of government is assured;
>
> C. a right to representation by counsel and to the time and opportunity required to prepare a case;
>
> D. a right to be present at all critical stages of the proceeding;
>
> E. a right to confront witnesses . . . ;
>
> F. a right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;
>
> G. a right to present evidence in one's own behalf;
>
> H. a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;
>
> I. a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it; and

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> an opportunity does not. Once presented, then the evidence is made available to be examined and confronted by the other party in open court.

Id. at 13–14.

33. This includes not only Dicey, but also Joseph Raz, who has written of the importance of something he vaguely calls "norm-applying organs," RAZ, *supra* note 12, at 105, adhering to something he denotes "[t]he principles of natural justice," *id.* at 217.

> J. some right of appeal to a higher tribunal of a similar character.[34]

Waldron has characterized this list of requirements—included in what he characterizes as a "working paper"[35]—as a "preliminary sketch"[36] of a procedural account of 'the rule of law.' However, there are as many reasons to resist that characterization of this account as there are to endorse it.[37] As to resisting this characterization, it is difficult to deem Waldron's list as truly sketch-like if one takes that description to mean something rather open-ended, and an easy starting point for further, more detailed elaboration by a wide variety of interested persons. Instead, there is a heavy and overwhelming—if also unacknowledged—reliance on state institutions in Waldron's procedural-cum-disputation recommendations. For example, in his invocation of "formal[ity]," "legally-trained judicial officer[s]," and "agencies of government," Waldron is clearly concerned with how the rule of law can be advanced by *state* courts or tribunals, and *only* those institutions directly coordinated by the state.[38] Elsewhere as well, Waldron similarly affirms his interest in "open court[s],"[39] "proper legal tribunal[s],"[40] and "public institutions."[41]

While Waldron relies heavily on state institutions and courts in his account of 'the rule of law,' Waldron never tells us why *state* courts, as opposed to *non-state* legal venues, are the privileged site of 'law' in his account. This theoretical shortcoming is significant in light of the significant amount of dispute resolution that occurs around the world outside of state-sponsored legal institutions[42] and the practices and procedures adhered to in such non-state institutions which

34. Waldron, *The Rule of Law and the Importance of Procedure, supra* note 22, at 4.

35. *Id.* at title page.

36. *Id.* at 4.

37. Oddly, in attempting to counter an ideology that veers toward a kind of sparseness and vacuity that describes both everything and nothing, Waldron's suggestions end up suffering from *both* vagueness and cultural specificity—or, in other words, a kind of culturally-specific vagueness—making them both impracticable and undesirable for too many people.

38. *See supra* note 34 and accompanying text.

39. Waldron, *The Rule of Law and the Importance of Procedure*, *supra* note 22, at 14.

40. *Id.*

41. *Id.* at 18.

42. *See generally* Redding, *supra* note 7.

simultaneously confirm both the worth of and problems with state courts' methods of dispute resolution.

In this respect, the next Part closely examines the experiences of an Indian Muslim woman, Ayesha, and her successful initiation of a divorce suit at a Delhi-based *dar ul qaza*[43] in 2006. In the process, it not only explains some of the key practices and procedures of this non-state legal venue but also situates these practices, procedures, and personal experiences within a larger socio-legal context in contemporary India. Part III then takes a step back, analyzing Ayesha's experiences in light of 'the rule of law' ideology outlined and critiqued in this Part, in the process suggesting what might be gained from a future suturing of ethnography to philosophical theorizations of 'the rule of law.'[44] As Part III discusses, Ayesha's experience with the *dar ul qaza* reveals 'rule of law' potentials of non-state venues, as well as rule of law shortcomings in state courts. Indeed, putting Islamophobia aside, Part III finds it difficult to identify strong differences between (idealized) state and (actual) non-state venues—the 'high art'[45] of one, and the presumed lowliness of the other. Whether that is for the better or for the worse, this should not be surprising, given that state and non-state legal venues in any given jurisdiction are both reciprocally dependent on and influential vis-à-vis local socio-political culture.[46]

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43. For a definition of *dar ul qaza*, see *supra* note 18.

44. In this respect, Erin Stiles, in her work on state-run Islamic (or *Kadhi*) courts in Zanzibar, emphasizes the importance of ethnography to understanding how procedural aspects of litigation work out in actual practice. ERIN E. STILES, AN ISLAMIC COURT IN CONTEXT: AN ETHNOGRAPHIC STUDY OF JUDICIAL REASONING 63 (2009) ("It goes without saying that court documents do not tell the whole story. Although a study of documents like the [plaintiff's complaint] and [defendant's response] shows how the clerks present legal issues in a formulaic way, and the [court's judgment] illustrates the way in which a judge writes rulings, court ethnography reveals the legal understandings different parties bring to a case and sheds light on the strategies of representation involved in the creation of court documents.").

In her emphasis on the "strategies of representation" used in the "creation of court documents," Stiles is emphasizing the "discursive" aspects of courtroom procedure, where documents and outcomes are the result of a complex series of negotiations and communications between "parties, litigants, clerks, and *kadhi* [or judge]." *Id.* at 63–64. *See generally* BRINKLEY MESSICK, THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY (1993).

45. I use this expression to reference Waldron's characterization of state court proceedings as "highly proceduralized." *See supra* text accompanying note 32.

46. In another context, Partha Chatterjee has written of the "mutually conditioned historicities" of elite and subaltern domains, and I believe that we see something similarly mutual in the trajectories of state and non-state legal arenas

II. AYESHA AND AN EXTRA/ORDINARY 'COURT'

> [M]y uncle is a lawyer and he put me in a touch with a lawyer too in the beginning. But, you know . . . his first [instinct was] . . . to make us . . . that we'll build a case. "Build a case" means that [] they'll do all kinds of, you know, you make up your stories and you just exaggerate a lot . . . . And . . . it could take time. [My lawyer's] thing was, yeah, it's gonna take time. And I didn't want. I wanted [my divorce]. You know, I said, "I've spent 18 years [and] another five years, you know, coming and going . . . no. I don't have the time. I don't have the money. I don't have the resources, nothing."[47]
>
> —Ayesha

This Part shifts gears, from legal idealization to legal ethnography, introducing Ayesha, an Indian Muslim woman whom I got to know in the course of fieldwork that I conducted in India for eight months during 2007–2009. When I first met her, Ayesha had recently obtained a divorce from a non-state Muslim civil dispute resolution institution in Delhi (a *dar ul qaza*), and her experiences there are relevant to the purposes of this Article in a number of ways. Most notably, Ayesha is someone who has had sustained personal interaction with a *dar ul qaza*, and thus is intimately familiar with many of the procedural aspects of its operation. Moreover, as someone who is not directly or personally invested in the *dar ul qaza*—such as the presiding *qazi* (English: judge)—Ayesha is able to provide an account of *dar ul qaza* procedure that is arguably less inflected by a desire to describe it to an outsider (such as me) in a way which will enhance its prestige or protect it from outside scrutiny.[48]

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discussed in this Article. *See* PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES 12–13 (1993).

47. Interview with 'Ayesha,' in Delhi, India (June 20, 2009) (transcript on file with author).

48. *Dar ul qaza* proceedings are not publicly conducted, and I was not able to secure exceptional permission from the presiding *qazi* to sit in on and observe the proceedings. I am aware of no other scholar who has obtained permission in this respect either, nor am I aware of any literature providing a detailed account of *dar ul qaza* procedure like I am able to provide here, based on my interactions with Ayesha. See Sabiha Hussain, *Male Privilege, Female Anguish: Divorce and Remarriage Among Muslims in Bihar, in* DIVORCE AND REMARRIAGE AMONG MUSLIMS IN INDIA 263, 280–82 (Imtiaz Ahmad ed., 2003), for a relatively cursory discussion of *dar ul qaza* procedure (in Bihar). *See also* Sabiha Hussain, *Shariat Courts and Women's Rights in India* 22–24 (Ctr. for Women's Studies, Occasional

Of course, Ayesha's recounting of her experiences is only one person's story, and there are obvious methodological shortcomings associated with relying on a sample size of one. That being said, there are a number of insights that can only be gained from engaging in a detailed analysis of a single case. Following Kim Lane Scheppele, I believe that it is often the case that "knowing more about fewer cases tends to be more valuable than knowing less about more cases."[49] Moreover, as Elizabeth Povinelli has noted, such "minor encounters," such as Ayesha's experience with a Delhi *qazi*, "constitute[ ] as compelling . . . the theoretical and administrative problems that scholars, government officials, and other state citizens address[ ]."[50] As such, they are important to understand in the detail in which they transpired. Finally, following Joseph Raz, if legal theory and philosophy—including that relating to 'the rule of law'—is concerned with "the necessary and the universal,"[51] a single case study, in all its rich detail, can end up unsettling extant legal theorizing (and sermonizing). As it happens, and as will be discussed further below, Ayesha's account of her experiences in front of a Delhi *dar ul qaza* is on its own able to dismantle many stereotypes about non-state legal spaces, state courts and their procedures, and also Muslim women.

Because Ayesha's story will be so surprising to many readers, this Part will proceed in two Sections. The first Section will introduce Ayesha, providing a great deal of background on her personal situation. The second Section will then discuss the details of her Delhi *dar ul qaza* divorce case. By presenting all of this detail, the goal is to be as transparent as possible, providing the reader with as much information on Ayesha and her experiences—legal and otherwise—as space permits.

Paper, 2006), *available at* http://www.cwds.ac.in/OCPaper/ShariatCourts-Sabiha-ocpaper.pdf. As might be expected, since *dar ul qaza* proceedings are not publicly observable, the decisions which result from these proceedings are also not generally publicly available, and thus it can be a challenge to identify and track down people who have been participants in *dar ul qaza* proceedings. As it happens, and as will be explained below, my meeting Ayesha was quite fortuitous.

49. Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389, 401 (2004).

50. POVINELLI, *supra* note 15, at 74–75.

51. *See* RAZ, *supra* note 12, at 104.

A. Ayesha, Contextualized[52]

When I first met her in a crowded, upscale ice cream parlor in Delhi, India during the summer of 2008, Ayesha had just completed her divorce from her husband, Zeeshan,[53] of eighteen years. Ayesha was married at age twenty-one, after graduating with a B.A. in sociology from Jesus and Mary College in Delhi, and she had spent the past two years pursuing her divorce at a Delhi *dar ul qaza*, one jointly run by the All India Muslim Personal Law Board (AIMPLB) and the Imaarat Shariah. Both of these organizations are well-known non-governmental Indian Muslim organizations that advocate and work on political, legal, and social issues of relevance to India's Muslim communities.[54] Both organizations also work together to run various non-state *dar ul qazas* around India[55]—institutions whose *qazi* services must be distinguished from government-sponsored *qazi* services provided in some Indian states under the explicit authority of government legislation.[56]

I was put in contact with Ayesha through a female relative of hers who worked for the women's wing of a well-known, secular Indian political party. I came into contact with Ayesha's relative as I was just beginning fieldwork; she was one of many people whom acquaintances had suggested I contact upon arriving in Delhi. Ayesha's relative suggested that I call Ayesha, and provided me with her mobile phone number. As a result, our first meeting was organized over the

52. In the remaining Parts, citations to the interview with Ayesha, except for quoted material, will be omitted.

53. Not his real name.

54. For background information on the All India Muslim Personal Law Board, see generally Justin Jones, *'Signs of churning': Muslim Personal Law and Public Contestation in Twenty-first Century India*, 44 MOD. ASIAN STUD. 175, 181–95 (2010). For background information on the Imaarat Shariah, see generally Papiya Ghosh, Muttahidah qaumiyat *in* aqalliat *Bihar: The Imarat i Shariah, 1921–1947*, 34 INDIAN ECON. & SOC. HIST. REV. 1 (1997).

55. For general information on, as well as a critical analysis of, the operation of this system, see generally Hussain, *Male Privilege, Female Anguish, supra* note 48; Hussain, *Shariat Courts and Women's Rights in India*, *supra* note 48.

56. In addition to the Imaarat Shariah and the All India Muslim Personal Law Board, other non-governmental Muslim organizations (e.g., the Jamaat-e-Islami and the Jamiat Ulema-i-Hind) run dispute resolution services of different types and formats around India as well. All of these services should be distinguished from the (state-sponsored) *qazi* services described by Sylvia Vatuk in her work. *See, e.g.*, Sylvia Vatuk, *Divorce at the Wife's Initiative in Muslim Personal Law: What Are the Options and What Are Their Implications for Women's Welfare?*, *in* REDEFINING FAMILY LAW IN INDIA: ESSAYS IN HONOUR OF B. SIVARAMAYYA 200 (Archana Parashar & Amita Dhanda eds., 2008).

phone and I had little sense, other than a voice, of the person I was to meet.

At the upscale, popular hangout spot that we had decided upon for our first meeting, Ayesha fit seamlessly into the crowd. Like the people around us, she was dressed stylishly and had a youthful air to her. We spoke to each other in English, this being the language in which Ayesha seemed to feel most comfortable speaking. While I felt shy and tentative at this first meeting, not feeling comfortable asking a stranger intimate questions about her personal life and marital troubles, I was surprised at how comfortable Ayesha appeared to be in talking about her life and, in particular, the divorce proceeding that she had just concluded. Over this first meeting, I remember thinking that Ayesha seemed remarkably composed for someone who had just recently 'completed' what is often a wrenching emotional and legal experience, i.e., a divorce.

I put the term 'completed' in scare quotes not only because of the lingering legal, social, and psychological side effects that often accompany the end of a marriage, but also because the legal status of the divorce that Ayesha had just obtained from the *qazi* in the Delhi *dar ul qaza* is somewhat unclear. The enforcement of Islamic law in India depends on a complex interaction of non-state and state legal practices, and there is as much history and ordinariness behind this interaction[57] as there is continuing uncertainty over some aspects of it,[58] including the recognition that state courts will afford the divorces obtained by Muslim women in non-state venues.[59] In

57. *See generally* GOPIKA SOLANKI, ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA 267–69 (2011).

58. *See, e.g.*, Narendra Subramanian, *Legal Change and Gender Inequality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631, 653 (2008) (noting that even after a landmark Supreme Court of India opinion limiting the exercise of Muslim men's unilateral 'triple-talaq' divorce rights, "some judges and lawyers in the lower courts were either unaware of or misunderstood this landmark judgment").

59. While the reported case law concerning state recognition of Muslim women's non-state divorces is sparse, there are some indications that India's judiciary views these divorces unfavorably. *See, e.g.*, K.C. Moyin v. Nafeesa, 1 MLJ 754 (1972). Indian Islamic legal scholar Tahir Mahmood has been critical of this decision, arguing that "as long as Muslim husbands are free to pronounce [a unilateral] extra-judicial divorce, Muslim wives' right to do the same cannot, and should not be, taken away." TAHIR MAHMOOD, ISLAMIC LAW IN INDIAN COURTS SINCE INDEPENDENCE: FIFTY YEARS OF JUDICIAL INTERPRETATION 478 (1997). In addition, in another relevant decision issued during the colonial period, the Lahore High Court observed with disparagement that

short, the legitimacy and effect that the Indian state will accord the Delhi *dar ul qaza qazi*'s out-of-state-court decision to grant Ayesha a divorce is unclear. However, after speaking with her, it appears that for Ayesha, for her family and friends, and for the community of Muslims and non-Muslims with whom she is in regular contact, Ayesha is considered divorced, with all the attendant disabilities and opportunities that that status affords.

After this first meeting, Ayesha and I remained in contact, and I met with her again when I returned to Delhi in the summer of 2009. I met her twice during that summer. The first time, she asked me to meet her in a stylish café located just off the lobby of a major five-star hotel in Delhi. This café meeting spot was especially convenient for Ayesha, as she worked in a high-end boutique located in the same five-star hotel. I was surprised to learn of her place of employment, but was also able to better understand both Ayesha's ability to and need to—as part of her job—dress to the nines.

I found speaking with Ayesha to be revelatory, not least because she upset nearly all the preconceptions that many people have about the typical user of a 'Muslim court,' especially in India. Indeed, rather than being poor, illiterate, or otherwise abject, she and her family belonged to India's 'Muslim social elite,' a social categorization she described to me in the following way:

> I come from a family background, that is . . . politically . . . connected and, you know. . . we would, yes, be in the social elite. But . . . we are middle class people, but we're not lower and we're not really upper because I'm not rich. . . . [Y]ou know, you're in the middle, but you're well off. . . . [Y]ou're managing your life very well—and you live well—and . . .

> [b]oth the lower Courts appear to have treated a case of dissolution of marriage like any other case which could be settled by an oath or arbitration and in this both of them were mistaken. They should have taken care . . . that in a case of this kind it is the Court which has to perform the functions of a Qazi and it is the pronouncement of the Court which dissolves the marriage and that function could not be delegated by the Court to anyone else. . . . [The] dissolution of marriage [is] a function which cannot be exercised by any body or tribunal other than the Court and in no other way except on consideration of the evidence led in the case.

Abdul Ghani v. Mt. Sardar Begum, AIR (32) 1945 Lahore 183, 184.

> you're part of this . . . "the Muslim social elite," as such, you know?[60]

And, in fact, Ayesha's extended family did appear to be quite socially connected. As indicated earlier, I learned of Ayesha and her situation through a female relative of hers who is active in national politics. And Ayesha indicated to me that an uncle of hers was also in politics. That being said, she and her family do not appear to be 'rich.' After our first two meetings in public, including the meeting near her workplace, Ayesha invited me to her family's home. The home was located in a solidly upper-middle-class Delhi colony, one which is almost exclusively Muslim. Ayesha kept a separate apartment on the second floor of the family home, where she lived with her teenage son. Both the family home and her individual apartment were certainly comfortable, but not lavish.

In this respect, while Ayesha was—to use her own words again—"managing [her] life very well,"[61] her resources were not unlimited. In fact, money was one of the issues that came up when I asked Ayesha what she had found attractive about her *dar ul qaza* experience. Specifically, Ayesha described the benefits of the *dar ul qaza*, as opposed to the state's courts, in the following manner:

> [The *dar ul qaza*] was faster than the legal courts, um, you know, um, and I think it was, I would say more, um, not say friendly but it was, uh, the legal courts, you know, I mean, from what I hear from this friend of mine, you know you go there and nobody is bothered . . . it's like a process that. . . even though here too it's like a process too but at least you're interacting on a one-to-one with somebody. . . . So, it, it was a bit more personal, I think, so . . . and, and also it was cheaper, much cheaper to do it. I mean, you know, we didn't spend that much money on, on it, this which I might have had to in the legal courts.[62]

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60. Interview with 'Ayesha,' *supra* note 47.

61. *Id.*

62. *Id.* This concern with the costs and delays associated with litigation in the state's courts was echoed elsewhere in Ayesha's comments to me, *see, e.g.*, text accompanying *supra* note 47, and has also featured prominently in responses to the constitutional petition in *Vishwa Lochan Madan v. Union of India*, both by the Indian government (in its responsive counter-affidavit) and by the All India Muslim Personal Law Board (in its responsive counter affidavit). And, indeed, this perception of the problems that plague Indian state courts is a common one in Indian society. For more discussion of this common perception, as well as the

Ultimately, while Ayesha approached a Delhi *dar ul qaza* seeking to avoid the costs and prolonged delays of the state court system—what one might characterize as the 'legal surplus' associated with state courts—what she experienced in front of the *dar ul qaza* was not itself 'law-less.' That being the case, her experiences in front of the *dar ul qaza* demonstrate the uncertain value of 'the rule of law' that she experienced there. I will engage in a deeper analysis of all this in Part III. However, before getting to that analysis, the next Section of this Part takes up the details of Ayesha's experience with getting a divorce from a Delhi *dar ul qaza*. Again, the details that I provide below come from Ayesha's portrayal to me of her experience getting a divorce judgment from this *dar ul qaza*, as well as documents pertaining to her *dar ul qaza* divorce that she provided.

B. Ayesha's Divorce, Contextualized

By Ayesha's own account, she became divorced in 2008. As proof of her divorce, Ayesha provided me with a statement of the decision by the resident *qazi* of the Delhi *dar ul qaza* to dissolve her marital bond, which was inscribed on letterhead, in both English and Urdu, with "Darul Qaza, South Delhi, (All India Muslim Personal Law Board)."[63] She also provided me with a notarized "English Rendering of Original in Urdu,"[64] which she had stapled on top of the original statement of her divorce. Besides the letterhead and address information, this original statement was rendered entirely in Urdu. This English Rendering contained the following "*hukm"* (English: order) issued by the Delhi *qazi*:

> In the light of chasm in relationship, extremely bitter hatred, total detachment and loss of confidence in each other and with a view to avoid and suppress further ill feelings, I hereby annul the bond of Nikah between Plaintiff [Ayesha] and Defendant [Zeeshan]. Now therefore the Plaintiff ceases to remain the wife of the Defendant and

Indian government's and All India Muslim Personal Law Board's arguments in this case, see Redding, *supra* note 7.

63. English Translation of Order and Judgment of Darul Qaza (India) (on file with author) (original in Urdu).

64. *Id.*

> after the period of 'Iddat' she would be free to exercise her own will and choice.[65]

Ayesha had the original *hukm* translated into English because Urdu—or, at least, the formal, legalistic Urdu used by the *qazi*—was neither her nor her immediate family's strongest skill. Indeed, Ayesha explained to me that a female acquaintance, Khalida Auntie,[66] who was familiar with Islamic law, had helped her write out her original divorce application to the *dar ul qaza*. When I asked her why she had not composed this application herself, Ayesha responded:

> Because it has to be done in Urdu. And, I'm sorry, even my mother can't write it in Urdu. And, you know, [Khalida Auntie is] also familiar with language, I suppose. How to write it, and what to write, and, you know, since [Khalida Auntie is] involved in all of this, so, uh, uh, you know, and my mother thought that it was the best that, you know, [Khalida Auntie] writes it.[67]

In addition to this English translation of the *hukm*, Ayesha also shared with me a notarized English translation of a lengthy "*faisla*" (English: decision/judgment) also prepared by the *qazi* in her case, originally in Urdu.[68] This *faisla* ends in the aforementioned *hukm*, but unlike the separate *hukm*-qua-*hukm* document described above, it contains a lengthy statement of Ayesha's testimony to the *qazi*, as well as the testimony of witnesses to the *qazi* on Ayesha's behalf.

According to the testimony of Ayesha quoted (and otherwise paraphrased) in this *faisla*, Ayesha's problems with her husband Zeeshan began to develop very soon after their marriage in 1988. As the *qazi* in this case quoted Ayesha's statement (what the English translation refers to as her "Plaint") of her marital problems:

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65. *Id.* at 7.

66. Not her real name. Ayesha used the term 'Auntie' (in a non-familial sense) when referring to 'Khalida' and so I will follow Ayesha's word usage (and order) in referring to this woman as 'Khalida Auntie.'

67. Interview with 'Ayesha,' *supra* note 47. At another point in our interview, Ayesha told me that her verbal communication with the *qazi* transpired in Urdu, but that was possible because "spoken Urdu is easy to understand" while written communication used a certain "kind of difficult words." *Id*.

68. English Translation of Order and Judgment of Darul Qaza, *supra* note 63.

> The Defendant has been suffering from doubt and suspicion even before our marriage and since our marriage the [D]efendant has been doubting my character as well. In the event of our participating in any party, if I had talked to any of Defendant's friend then the Defendant would interpret that I had more liking for that man. Or if the Defendant had brought home any of his friends, whom we had entertained, then on his departure the Defendant would say that while I was sitting in front of the visitor my hand had touched his hand in such a fashion as if I had more liking for him whereas there never had been anything of this nature in my mind. On my attempts to disprove the allegations he would express his disapproval and anger so much that he would start abusing me and throwing away household goods/articles and breaking them.[69]

The *faisla*, quoting Ayesha, cites a number of instances where Zeeshan's "suspicion and doubt" exploded into violence or other troubling reactions. Indeed, "mutual quarrels had . . . started immediately after our marriage and there were fewer days when there was no quarrel[;] rather every day was a day of fighting."[70]

As a result of this interpersonal tumultuousness, the *faisla*, quoting Ayesha, describes two instances where Ayesha decided to separate from Zeeshan. The first occurred about a year-and-a-half after the birth of their son, and the separation lasted for approximately a month, after which Ayesha "spoke to the Defendant and on certain terms and conditions, set out by either side, we mutually agreed to resume living together."[71] A second separation occurred when Ayesha and Zeeshan's son was four years old. With respect to this second separation, the *faisla* describes how Ayesha "got [her] 'khula' [divorce] papers prepared"[72] and sent them to her husband, but that Zeeshan "did not give his consent."[73] Consequently, "in the interest of keeping the family life intact and with the view that our child may grow under the protection of both the parents I relented, and in consultation with the Defendant, we resumed living together."[74]

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69. *Id.* at 1.
70. *Id.* at 2.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

Home life was far from peaceful after this second separation, however, and Ayesha's happiness and psychological stability deteriorated over the next several years, so much so that Ayesha "had developed a feeling either [that she] would be a victim of some accident or [that she] might commit suicide."[75] Finally, in July 2006, Ayesha again decided to separate from her husband and moved in with her parents. She again tried to get Zeeshan to sign " 'Khula' papers,"[76] yet still failed to convince him to do so.

At that point, according to her testimony presented in the *faisla*, Ayesha decided to approach the *dar ul qaza* to ask for a *khula* divorce. Ayesha's testimony in the *faisla* described this turn of events by simply stating that, following her unsuccessful attempt to convince Zeeshan to sign " 'Khula' papers"[77]: "I applied to 'Darul Qaza' as well for 'Khula' but that too did not materialize."[78]

In my discussions with her, Ayesha provided me with a great deal more background on why her first attempt at getting a *khula* divorce from this Delhi *dar ul qaza* was unsuccessful,[79] and why she ultimately returned to the *dar ul qaza* to—as the English translation of the Urdu *faisla* described it—"annul"[80] her marriage. From my conversations with Ayesha, it is clear that in her second application to the Delhi *dar ul qaza* her request for an annulment was (in technical terms) a request for a *faskh* divorce. A *faskh* divorce is a type of Islamic divorce which is distinguished from *khula* divorce (in many but not all jurisdictions) by the lack of a requirement that the husband

75. *Id.* For more discussion of the ominous implications of this statement, alluding to the potential that suicide in these situations may just masquerade for domestic violence, see PERVEEZ MODY, THE INTIMATE STATE: LOVE-MARRIAGE AND THE LAW IN DELHI 256–57 (2008).

76. English Translation of Order and Judgment of Darul Qaza, *supra* note 63, at 2.

77. *Id.*

78. *Id.*

79. *See* STILES, *supra* note 44, at 63 (discussing the incompleteness of legal documents); Iris Agmon, *Muslim Women in Court According to the* Sijill *of Late Ottoman Jaffa and Haifa: Some Methodological Notes, in* WOMEN, FAMILY AND DIVORCE LAWS IN ISLAMIC SOCIETY 126 (Amira El-Azhary Sonbol ed., 1996) (discussing methodological challenges when interpreting legal records and documents, with their many silences, siftings, and shifts vis-à-vis reality).

80. English Translation of Order and Judgment of Darul Qaza, *supra* note 63, at 3.

consent to the divorce.[81] However, unlike with *khula* divorces, a *faskh* divorce requires a third-party (e.g., a judge, or a *qazi*) to effectuate it.[82]

As to Ayesha's initial application for a *khula* divorce, as indicated earlier, Khalida Auntie had helped Ayesha compose and file this first application to the Delhi *dar ul qaza*. After this first application was filed, and over a period of a year, the Delhi *qazi* interviewed Ayesha approximately half a dozen times about her marriage and the circumstances of its breakdown. Additionally, two men—who Ayesha alternatively referred to as a "jury"[83] and an "investigating party who want to . . . validate all the stuff by themselves to make sure"[84]—visited Ayesha on behalf of the Delhi *dar ul qaza* to speak with her about the circumstances of her marital breakdown. Finally, the Delhi *qazi* also took testimony from three male witnesses provided by Ayesha as to the marriage, its breakdown, and generally speaking, "the story and the situation."[85] Ayesha's husband, Zeeshan, was mostly uncooperative with the *dar ul qaza*'s process and ultimately withdrew from any participation in the proceedings, notwithstanding hiring a lawyer to send threatening messages to the *qazi* who was hearing Ayesha's divorce application.[86]

Indeed, it was Zeeshan's lack of participation and cooperation that finally doomed Ayesha's initial application for a *khula* divorce, since *khula* requires the husband's consent for the divorce to be effectuated.[87] As Ayesha described the day she received the *qazi's* verdict vis-à-vis her first divorce application:

> That was the day the khula was not possible because [Zeeshan] is refusing to sign it. And I remember that when we went to collect that verdict . . . I asked [the *qazi*], I said "So, so why did you not tell [me that my husband's consent was required] from the beginning?"[88]

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81. For a description and discussion of *faskh* divorce and the various (and confusing) terminologies used to refer to it in different jurisdictions, see DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 284–85 (3d ed. 1998).

82. *See* 2 THE ENCYCLOPEDIA OF ISLAM 865 (B. Lewis, Ch. Pellat & J. Schacht eds., 1983) ("faskh" entry).

83. Interview with 'Ayesha,' *supra* note 47.

84. *Id.*

85. *Id.*

86. *See id.*

87. *See supra* text accompanying notes 81–82.

88. Interview with 'Ayesha,' *supra* note 47.

Eventually, Ayesha did learn that there was another alternative type of Islamic divorce available—that of the judicial *faskh*—which would not require Zeeshan's consent. Significantly, Ayesha did not learn of this divorce from the *qazi* himself, or other people directly associated with the *dar ul qaza*. In fact, as Ayesha remarked to me:

> The dar ul qaza, the priest there, the qazi, he doesn't give you advice. He just . . . you know if you ask him also, he'll just tell you point-blank, "No, that's not my job." He, in fact, said, you know, "You have to go and ask around yourself. You know, ask other people who know the law." But, he will never give you the advice as to what you should do, what you shouldn't be doing, in order to speed up the process. Even if he believed it was right, you know, he wouldn't. . . . That's the impression I had of him.[89]

Without the assistance of the *qazi* or other *dar ul qaza* officials, Ayesha's discovery of the possibility of a *faskh* divorce was the product of frustration and fortuity. Still reluctant to go to the state court system to ask for a divorce,[90] Ayesha and Khalida Auntie began to ask other people for help. In Ayesha's words:

> A: Yeah, it took a year to do this whole thing. And, uh, so it was very frustrating and then, then [Khalida Auntie] got into the act of talking to . . . I keep forgetting the . . . there is some, uh, Islamic, uh, school or something?
>
> J: The Islamic Fiqh Academy?
>
> A: Yes! Somebody from there that [Khalida Auntie] knows, she set up a meeting for me with these two gentlemen from there. One was a very young boy; one was a Middle Eastern guy. And, uh, we spent the day at [Khalida Auntie's] house talking about it. I showed him my application. And that gentleman immediately said that, "But you know, you're saying, asking for khula. But it's not possible to get without the consent of the man." And then he took out this book, which, detailed and said how this is how it is. So, [Khalida Auntie] said, that, that you know "We didn't know and what does it mean? And, you know, it was like the Qur'an had says, you can ask for the khula, so who's right?" You know, she was battling . . . she was battling with them on a

89. *Id.*
90. *See id.*

> different level. But at the same time she was concerned that, you know, my, my case should not get jeopardized. She didn't want to antagonize them because we needed their help . . . . So, then this gentleman, I think he's the one who wrote my application out, and said in the end that since khula is not possible, that ask for the nikah-e-faskh, you know, that [Zeeshan] should have everything. And he said that is what . . . he said, in fact, if you had written that in the first application, you would have got the thing in this. But since you didn't . . . so we said "But, you know, we didn't know."[91]

Based on this advice, Ayesha re-filed her claim in the Delhi *dar ul qaza*, this time making sure to ask for a *faskh* divorce. When I asked Ayesha what the *qazi*'s reaction was to her representation of her factual situation, though this time paired with a new kind of remedial request, she characterized his reaction as follows:

> Nothing. In fact, he opened a new file. It's like a, like a, you know . . . like, like a machine . . . he just works, you know. And he's . . . he asked me the same questions. And he did the same process of writing it again.[92]

This similarity in process notwithstanding, Ayesha did notice that, with her *faskh* divorce request, the *qazi* required her to present half-a-dozen witnesses, compared to the three that she presented with her *khula* divorce request.[93] Two of these new witnesses that Ayesha presented were women. Another difference between the *khula* and *faskh* divorce 'trial' that Ayesha noted was that the nature of the factual questions that the *qazi* asked her second set of witnesses were more extensive and specific than the questions he asked of her witnesses previously. This might have been due to the *qazi*'s reluctance to 'annul' a marriage without a husband's participation and consent[94]—Ayesha indicated to me that she felt that "they're not in favor of the women asking for [divorce]"[95]—though it may have also been due to the fact that,

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91. *Id.*

92. *Id.*

93. In his *faisla*, the *qazi* only quotes testimony from Witnesses No. 2, 4, 5, 6, and 7. English Translation of Order and Judgment of Darul Qaza, *supra* note 63 (identifying witnesses only by number and not by name or gender).

94. Zeeshan again refused to participate in the proceedings. *See* Interview with 'Ayesha,' *supra* note 47.

95. *Id.*

according to Ayesha, the *qazi* did not involve a jury/investigative committee in the proceedings this second time around.[96]

In total, the adjudication of Ayesha's second (*faskh*) divorce claim took another year to complete. Ultimately, however, she prevailed and the Delhi *qazi* granted Ayesha her *faskh* divorce, noting that "inspite [sic] of Plaintiff's demand for 'Khula' the Defendant has not 'released the wife with grace' and further more [sic] the Plaintiff continues to be in a suspended state which is cause of her suffering."[97] Additionally, as the "[r]emoval of suffering is part of the duties of 'Qaza,' "[98] by the order of the *qazi*, "the Plaintiff ceases to remain the wife of the Defendant."[99]

III. THE RULE OF NON-STATE LAW?

This Part explores how Ayesha's experience with a Delhi *dar ul qaza* demonstrates inadequacies with American liberal legalism and American legal nationalism,[100] and their shared inability to incorporate ordinary, non-state-premised Islamic legal practices within their worldviews. With respect to American liberal legalism, as universal and relevant as this ideological tradition purports to be, it has not been able to either acknowledge or describe the kind of non-state legal landscape that Ayesha confronted in Delhi, with important theoretical, practical, and political ramifications. These political ramifications—or rather, shortcomings—are especially fraught in the present political moment in the United States and elsewhere, with shari'a anxiety and Islamphobia at perilously high levels. Indeed, because of its myopic approaches and qualities, American-style liberal legalism cannot offer a robust defense of non-state 'shari'a courts' by, for example, providing an account of how they can play an integral role vis-à-vis 'the rule of law.' Nor can this liberal legalism provide a nuanced evaluation of current understandings of 'the rule of law' in the first instance by focusing on how these understandings and practices work (or fail to work) in practice.

96. *See id.*
97. English Translation of Order and Judgment of Darul Qaza, *supra* note 63, at 6.
98. *Id.* at 6.
99. *Id.* at 7.
100. *See id.* at 2–3.

Ultimately then, American legal liberalism becomes largely toothless in the face of attacks launched by American legal nationalists on non-state 'shari'a actors'—attacks which typically deploy highly-stylized and highly-ideological accounts of a state-centered 'rule of law.'

Given this unfortunate state of affairs, a better way to think about 'law,' 'legal systems,' and 'the rule of law' needs to be developed. This Part begins to develop such a better account by demonstrating how the non-state *dar ul qaza* which Ayesha utilized was not a 'lawless' space. Indeed, the *dar ul qaza*'s practices and procedures can be read in a way which demonstrates the *dar ul qaza*'s solicitude for the kind of argumentation-oriented proceduralism that Jeremy Waldron describes in his recent work on 'the rule of law.'[101]

For example, and as the following two Sections will discuss, the *dar ul qaza*'s solicitude for tightly-structured proceduralism[102] can be seen in (1) the manner in which Ayesha had to twice petition the Delhi *dar ul qaza* for her divorce, and (2) the representation and assistance provided to Ayesha by various non-lawyers during the course of Ayesha's two-year effort to secure a divorce from the Delhi *dar ul qaza*. That being the case, these two Sections will also briefly raise the possibility that certain kinds of 'rule of law'-oriented proceduralism are of questionable value, whether found in state or non-state legal spaces. Ultimately, then, I aim to suggest in this Part that 'the rule of law' can be both omnipresent, i.e., present in both the state and non-state domains, but also of ambivalent value. I believe that this more nuanced account of 'the rule of law' and where it both *does* and *should (not)* exist is necessary at the present moment, even if it is largely lacking amongst American legal nationalism and liberalism alike.

A. Pleading, Inside and Outside State Courts

The first requirement on Waldron's list of procedural requirements that a legal proceeding must embody, before 'the rule of law' can be said to exist, is that said legal proceeding must involve "a hearing by an impartial tribunal that is

101. *See supra* Part I.

102. *See* RAZ, *supra* note 12, at 219 (stating that "[t]he one area where the rule of law excludes all forms of arbitrary power is in . . . the judiciary where the courts are . . . to conform to fairly strict procedures").

required to act on the basis of evidence *and argument presented formally before* it in relation to legal norms that govern the imposition of penalty, stigma, loss, etc."[103] One way of interpreting Waldron's requirement here is to read it as requiring courts to have a regularized set of rules by which to take cognizance of (legal) disputes brought to them or, in other words, that courts abiding by 'the rule of law' must enforce 'rules of pleading.'

In this respect, it is clear that Ayesha faced difficulty in pleading her divorce case to the Delhi *dar ul qaza* in a manner such that it felt it could grant her relief. As discussed above, Ayesha first requested a *khula* divorce from the *dar ul qaza*, and, when it was not possible for the *dar ul qaza* to grant her that kind of relief, Ayesha returned to the *dar ul qaza* on the same set of facts but pleading for a different kind of relief—a *faskh* divorce, which she subsequently received.

While it is easy to read Ayesha's frustrating experience of—on the same set of facts—having to twice go to the *dar ul qaza* as evidence of an overly-bureaucratic and obstructionist mindset within the Delhi *dar ul qaza*, there is another more proceduralistic interpretation of this situation available. Indeed, one can view this 'bureaucratic' mindset as a manifestation of a procedural requirement that parties' complaints must be 'well-plead.' In the American federal court system, for example, Rule 8(a) of the Federal Rules of Civil Procedure requires that plaintiffs present their claim via "a short and plain statement . . . *showing that the pleader is entitled to relief*."[104] Rule 8(a) has been interpreted, again and again, to require a plaintiff to state *her* legal claim, *as well as all necessary supporting facts*, at the real risk of facing dismissal of her claim.[105]

Two procedural/legal ideas are at play here. The first is that of 'party autonomy,' or the general idea that parties are in charge of their own cases. This procedural view of litigation is the dominant one in a number of state jurisdictions, and it views the judge's role as that of an umpire: the parties develop their respective arguments on their own, and the judge 'judges'

103. Waldron, *The Rule of Law and the Importance of Procedure, supra* note 22, at 4 (emphasis added).

104. FED. R. CIV. P. 8(a)(2) (emphasis added).

105. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

those arguments of which he is a passive recipient.[106] Something like this, in fact, can be seen in the *qazi*'s behavior in Ayesha's case.[107]

The second is a procedural stance, also adopted in a number of state jurisdictions (such as the U.S. federal judicial system), requiring that a party's initial (written) complaint contain enough information to inform both the court and the opposing party as to the nature of the dispute, and the *prima facie* plausibility of the plaintiff's claim.[108] Accordingly, if a party's claim requires *x*, *y*, and *z* to be established as 'elements' of the claim, the party's (written) complaint must include statements as to *x*, *y*, and *z*, giving the court and opposing party notice as to the gist of the legal complaint, and demonstrating that there is some potential viability of this claim to warrant further litigation of it beyond the initial complaint stage. For example, in a civil suit claiming unlawful job retaliation for cooperation with a criminal investigation of one's employer, in order to succeed on her claim, a plaintiff-employee may[109] be required to state in her complaint that not only were the reasons for her termination of employment illegitimate (e.g., motivated by retaliation), but that she also had the type of employment (e.g., salaried) the loss of which constitutes an actual harm to her person or property.[110]

Again, both procedural ideas are at play in the American federal judiciary, a judiciary that one suspects Waldron would include within his conception of "highly proceduralized"[111] courts adhering to 'the rule of law.' One might also see both of these ideas operating within the Delhi *dar ul qaza*. On this

106. Martin Shapiro describes something similar to this passive judicial role when describing how "[a] striking feature of European and Anglo-American court systems in general is the extent to which the complaining party in civil suits must shoulder the burden of getting the other side into court with relatively little assistance from the court itself." MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 13 (1981).

107. *See supra* text accompanying note 89.

108. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

109. I say 'may' here because it depends on how the relevant jurisdiction defines the particulars of this kind of (job retaliation) offense.

110. See generally the facts involved in *Haddle v. Garrison*, 525 U.S. 121 (1998).

111. *See supra* text accompanying note 34. However, in this respect, it must be emphasized that the Federal Rules of Civil Procedure were part of an attempt to simplify the procedural aspects of litigation in the federal courts, moving these courts away from "high procedure" to something more basic and intuitive. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 336–39 (7th ed. 2008).

view, the Delhi *qazi* treated Ayesha in a manner similar to how an American federal judge would treat an American plaintiff appearing in front of a federal court: It was Ayesha's duty to investigate the different legal claims (for divorce) that she could bring in the *dar ul qaza*, and it was her responsibility to plead (and subsequently prove) sufficient facts to make out her claim.[112]

As understood in many jurisdictions (including this Delhi one), *khula* and *faskh* are different types of divorce, embodying different pre-conditions for their legal effectuation.[113] As the *qazi* might have seen it, Ayesha was the master of her situation and claim, and she initially chose to ask for a *khula* divorce. In other words, it was not the *qazi*'s job to write Ayesha's complaint; his only task was to determine whether the requisite elements had been satisfied such that *khula* would obtain. Since a husband's consent is one requisite element for a *khula* divorce to be effectuated, and since Ayesha had not been able to elicit this consent, the *khula* claim failed.[114] The situation was different with a different legal claim, however. For a *faskh* divorce, a husband's consent is not a requisite 'element' (or, in other words, a relevant factor).[115] Hence, Ayesha's continuing inability to convince her husband to consent to this kind of divorce would be irrelevant, legally speaking. And indeed, despite this lack of consent, the *qazi* in Ayesha's case was able—and did—grant Ayesha this particular kind of divorce once Ayesha actually asked for it in her pleadings.

None of this is to say that the *qazi*'s actions in Ayesha's case were exemplary, or what one would necessarily desire from the operations of a court, whether state or non-state. But it is to say that one can find the rule of procedural law operating in non-state contexts. In other words, we can see that state courts have no necessary monopoly over hearings conducted according to 'high'[116] procedure. However, that being said, it remains an open question as to whether this tightly-structured proceduralism serves either law or justice; both the Delhi *qazi*'s treatment of Ayesha's claim and many examples

112. *See supra* text accompanying note 91.

113. *See generally* PEARL & MENSKI, *supra* note 81.

114. In fact, one might view the *qazi* as actually being quite lenient toward Ayesha's claim, in that he did not immediately 'dismiss' it when it was apparent she did not have her husband's consent to a *khula* divorce.

115. *See generally* PEARL & MENSKI, *supra* note 81.

116. *See supra* text accompanying notes 45–46.

from the American federal context[117] give one pause to wonder about the value of this kind of law ruling the day.

B. Counseling Without 'Counsel'

In Waldron's 'procedural account' of 'the rule of law,' lawyers play a necessary role. Indeed, for Waldron, there must be "a right to representation by counsel,"[118] counsel's presence apparently signifying the existence of court hearings conducted with adequate disputation and, hence, in accordance with the rule of law. However, what Waldron means by "counsel" is left undefined.

Without venturing to attempt my own definition here of who (or what) qualifies as 'counsel' (or a 'lawyer'), it is safe to say that no one with those titles assisted Ayesha in front of the Delhi *dar ul qaza*. In fact, Ayesha's distaste for lawyers was conveyed to me not only in the excerpt from her interview which opened Part II, but also in additional remarks she made when I asked her whether she would recommend the *dar ul qaza* to other people in her situation:

> J: [W]ould you recommend going to the dar ul qaza to other people?
>
> A: I think so, I mean, it's, yeah. I mean, but, with, with my, now not knowing all this would make sure that people should get, you know, little bit more advice before they go in and file the application so you know. Because I think it's an easier process, why not? Because the legal courts [ ] . . . they just . . . the lawyers first of all, you know. And then this whole thing about making cases, you know, against the person . . . I mean, it just gets dirty, messy, so unless, of course, you're wanting some money out of the person and, you know, you know serious kind of issues like that, then I suppose.[119]

As her remarks suggest here (and at the start of Part II), lawyers *qua* lawyers are understood by Ayesha to embody dirtiness, deception, and deceit. This is consistent not only with a joke that has often been made to me during my fieldwork,

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117. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

118. *See supra* text accompanying note 34.

119. Interview with 'Ayesha,' *supra* note 47.

playing on a subtlety in pronunciation which differentiates the word 'lawyer' from that of 'liar' (in English), but also anthropological evidence gathered as far afield as Yemen and, in the Indian context, Rajasthan.[120] On this view of things, lawyers embody the furthest thing from the rule of law in the way that they turn disputation into a game of dramatic lies, tactical court absences, and unrelenting fees. In fact, while Ayesha avoided bringing a 'lawyer' to the Delhi *dar ul qaza*—by her own choice, and not per any rule explicitly expressed by the *qazi*[121]—she suspected that the first adverse decision she received from the *qazi* was partially attributable to threats that a lawyer hired by her ex-husband Zeeshan had made to the *qazi*.[122]

But this is not to say that Ayesha did not seek or want—to use two Waldronian terms[123]—'counsel' or 'representation' of a different sort. Her initial plea to the Delhi *dar ul qaza* was composed for her by Khalida Auntie. When that plea was dismissed by the *qazi* for failing to state a claim upon which the *qazi* could grant Ayesha relief, Ayesha and Khalida Auntie sought advice and assistance from two men associated with another non-state Muslim organization in Delhi, the Islamic Fiqh Academy. One of these men wrote out her second (and ultimately successful) divorce request to the Delhi *dar ul qaza*. Additionally, Ayesha's father accompanied her to meetings with the *qazi* (though, when not giving testimony himself, he was not allowed to sit in the same room as Ayesha).[124]

The behavior of all three of these 'counselors'—Khalida Auntie, the Islamic Fiqh Academy, and Ayesha's father—seem more consistent with law as a contest of wits and argument (if not also compassion), rather than threats and deceit. In this way, then, one can see the active participation by these counselors as contributing more to 'the rule of law' in this case and in this jurisdiction than would the participation of lawyers.

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120. *See generally* MESSICK, *supra* note 44. *See also* Erin P. Moore, *Gender, Power, and Legal Pluralism: Rajasthan, India*, 20 AM. ETHNOLOGIST 522, 531 (1993).

121. *See* Interview with 'Ayesha,' *supra* note 47.

122. *See id.* (describing these threats, Ayesha expressed to me: "[T]his is what we got to know through the insider, the person who's on the board. He gave us, uh, the impression he wouldn't tell us everything in detail, but that [Zeeshan], I think, through his lawyer, sent a letter to the dar ul qaza saying that, uh, if you were to give the khula without Rehaan's consent . . . [t]hen, um, you will be in trouble. Something to that effect. Almost like threatening the qazi.").

123. *See supra* text accompanying note 34.

124. *See* Interview with 'Ayesha,' *supra* note 47.

Indeed, it is far from clear that one should always necessarily attribute representation which is consistent with 'the rule of law' to the state-accredited 'lawyers' seemingly valued by rule of law theorists like Waldron.[125] While the *dar ul qaza* had no explicit procedural rule forbidding the participation of such lawyers,[126] it would seem justified in forbidding them if it chose to do so. Conversely, the Indian state court system's facilitation of such lawyers seems problematic from a (dispute-oriented) rule of law perspective.

Fundamentally then, it remains quite an open question as to what role 'lawyers' should continue to play in 'rule of law' theorizing. Examining Ayesha's experience using a Delhi *dar ul qaza*, questions might be raised as well as to the utility of 'non-lawyer lawyers' or 'counseling without counselors.' Certainly, some of the people who helped Ayesha might have been better able to help her if they had known more about the relevant local (Islamic) law.[127] While there is much more to explore about all of this, for now it is enough to note how yet another phenomenon which liberal rule of law ideology simultaneously under-theorizes and valorizes, while also exclusively associating with state institutions, can be detected in non-state legal venues. However, yet again there remain many questions about the value of this particular procedural manifestation of the rule of law.

CONCLUSION

On the one hand, Oklahoma's recent amendment of its state constitution to ban the use and recognition of "Sharia Law"[128] by Oklahoma state courts was yet another example of the United States' continuing tone-deafness (or purposeful aversion) to global realities and dynamics. On the other hand, Oklahoma proved to be the most cosmopolitan of states, if cosmopolitanism is understood as being in line with global trends: Oklahoma, like Canada and the United Kingdom before it, was expressing a paranoia of shari'a. In this ironic

125. Strictly speaking, Waldron does not explicitly declare that his "counsel" and "representation" must be state-accredited, but his general orientation towards the state in his discussion suggests as much. *See supra* text accompanying notes 29, 38–41.

126. *See supra* text accompanying note 121.

127. *See supra* text accompanying note 91.

128. *See supra* text accompanying note 4.

convergence of Oklahoma, Ontario,[129] and other occidentals, there are many lessons to be learned.

Perhaps first and foremost is that there are emerging—and surprising—friendships developing between seemingly disparate spaces and agendas. This Article has been concerned with one such friendship, namely that between American legal nationalism and American legal liberalism. As this Article has also argued, this surprising alliance is largely the result of American legal liberalism's state-centered imagination about 'the rule of law,' the myopic qualities of which have resulted in a neglect of developing intellectual tools that can effectively counter the hyperbolic anti-*shari'a* initiatives that are sprouting all over the American landscape, from Alaska to Arizona, and from Maine to Mississippi.[130]

These initiatives clearly demonstrate the need for alternative, more curious theorizations of what it means for there to be 'law,' and 'the rule of law'—by both American nationalists and American liberals alike. One way of accomplishing this is to ensure that legal ethnography is sutured to legal philosophy and legal theorization. This Article provides several examples of what one might learn via such a suturing. Indeed, American law and legal practice—liberal and otherwise—has much less to fear from Islamic law and legal practice, than it has to learn.

129. *See supra* text accompanying note 6.
130. *See supra* note 21.

HOMELY, CULTURED BRAHMIN WOMAN SEEKS PARTICULAR SOCIAL GROUP: MUST BE IMMUTABLE, PARTICULAR, AND SOCIALLY VISIBLE

SARAH KATHRYN FRENCH*

This Note examines whether Brahmin women constitute a particular social group under United States asylum law. The domestic violence victims in immigration court—who are predominately Latin American—have thus far failed to establish, in a precedential decision, that they are part of a particular social group or that their perpetrators' violence was on account of their membership in a particular social group. Orthodox Brahmin women in India, however, may be able to meet the elements of asylum where other victims have failed. This Note examines whether Brahmin women can meet the elements of a particular social group, whether the Indian government can protect Brahmin women, and other significant barriers preventing Brahmin women from seeking asylum.

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* I traveled to India for seventeen days in spring 2011 with my Comparative Family Law Seminar class. We had the opportunity to interview people at numerous non-governmental organizations in Karnataka, India. I would like to thank Clare Huntington and Colene Robinson for organizing the trip.

A word is in order about this Note's title. In matrimonial advertisements in India, "homely" can signify a willingness to be in the home. *See* Exhibit A, Matrimonial ads in the SUNDAY TIMES, the Sunday edition of the TIMES OF INDIA.

"It is generally believed in India that the higher the caste, the higher the seclusion for women, and the lower the caste the more freedom for women."[1]

1. SELVY THIRUCHANDRAN, IDEOLOGY, CASTE, CLASS, AND GENDER 91 (1997).

INTRODUCTION

Asha's husband punched her swollen abdomen and left her on the floor bleeding.[2] She miscarried her baby.[3] Her husband abused and raped Asha, who was originally from a wealthy Brahmin[4] family, for years while she was living in her home country of India. Her husband was a powerful government official, and therefore she knew reporting the abuse to the police would be futile. Asha's opportunity to leave her husband came when she and her husband moved to the United States for his new job. In the United States, she fled, obtained a protection order, and then applied for asylum.[5]

There are two ways to seek asylum in the United States: " 'affirmative applications' and 'defensive applications.' "[6] Asylum applicants can apply affirmatively for asylum with United States Citizenship and Immigration Services (USCIS) in front of an asylum officer.[7] Affirmative cases are not published, nor are they precedential.[8]

Applicants may also seek asylum defensively when the government has placed the applicant in removal (deportation) proceedings. An immigration judge (IJ) in the Department of Justice's (DOJ) Executive Office for Immigration Review

2. This account is taken from the case materials of an Indian woman's affirmative asylum case. *Gender Asylum Case Summary: CGRS Case No. 408,* CENTER FOR GENDER & REFUGEE STUD., http://cgrs.uchastings.edu/law/search.php (select "India" in "Nationality" field; select "Domestic Violence" in "Type of Persecution/Case" field; click "search"; select case number 408) (last visited Mar. 10, 2012).

3. *Id.*

4. Brahmins are members of the highest Hindu caste in India. Particularly in smaller Indian villages, Brahmins are generally the dominant social group due to their "ritual status, land ownership, education, occupation, and political prominence." Suneeta Krishnan, *Do Structural Inequalities Contribute to Marital Violence?,* 11 VIOLENCE AGAINST WOMEN 759, 764 (2005).

5. Asylum is a protection the United States offers to people who are persecuted in their home countries and are unable or unwilling to return to their home countries. 8 C.F.R. § 208.13 (2011).

6. RUTH WASEM, CONG. RESEARCH SERV., R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY 6 (2011), http://www.fas.org/sgp/crs/homesec/R41753.pdf.

7. *Id.* If the asylum officer denies the affirmative application, the case is referred to an immigration judge, and the applicant can reapply defensively. *Id.* 6–8.

8. Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, N.Y.L. SCH. L. REV. 185, 192 & n.38 (2008) (citing 8 C.F.R. 1003.1(i)), *available at* http://a.nyls.edu/user_files/1/3/4/17/49/NLRvol52-203.pdf.

(EOIR) hears defensive asylum cases.[9] The Department of Homeland Security (DHS) represents the government's interests in immigration court.[10] Cases in front of an IJ are not precedential; only certain cases appealed from immigration court to the Board of Immigration Appeals (BIA) become precedential decisions.[11]

An asylum officer or immigration judge can only grant Asha's asylum application if Asha can prove she was persecuted on account of one of the following five grounds: race, religion, nationality, political opinion, or membership in a particular social group (PSG).[12] Because domestic violence is not one of these five enumerated grounds for asylum, most domestic violence victims like Asha have no choice but to argue that their persecution is on account of their membership in a PSG.[13] Asha chose to argue that she was abused because she was a member of a PSG: "Hindu women who have suffered extensive persecution [from] their husbands who believe that Hindu women are inferior to men."[14]

This is a risky path; PSG is a complex body of law and there is little precedent on point for domestic violence-based claims.[15] As of spring 2012, there is no binding BIA case or federal regulation acknowledging that victims of domestic violence can constitute a PSG. Yet, Asha has hope. In two non-precedential yet highly publicized cases in 2009, immigration judges granted asylum to two domestic violence victims on the basis of persecution on account of membership in a PSG.[16] In both of these cases, DHS, which represents the government in defensive asylum proceedings, agreed to not oppose the IJ's

9. *Id.* at 192–93.

10. U.S. DEP'T OF JUSTICE, THE BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, § 1.4(f), *available at* www.justice.gov/eoir/vll/qapracmanual/pracmanual/tocfull.pdf (last visited Apr. 3, 2012).

11. 8 C.F.R. § 1003.1(d) (2011) ("[T]he [BIA], through precedent decisions, shall provide clear and uniform guidance to the Service [and] the immigration judges.")

12. Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. §1158(b)(1)(B)(i) (2006).

13. *See, e.g.*, Fatin v. Immigration & Naturlization Serv., 12 F.3d 1233, 1238, 1241 (3d Cir. 1993) (stating that PSG is "almost completely open-ended").

14. *Gender Asylum Case Summary*, *supra* note 2.

15. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) [hereinafter INS Proposed Regulations] (Of the five grounds of asylum, PSG is the "most complex and difficult to understand").

16. Barbara Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, 230 (2011).

grant of asylum.[17] In one of these cases, *Matter of L-R-*,[18] DHS wrote an unusual Supplemental Brief.[19] Acknowledging the government's significant "delay" in producing "either regulations or an authoritative administrative precedent" on domestic violence-based asylum, DHS departed from its "normal practice" in asylum proceedings of "critiquing 'particular social group' formulations" that asylum seekers have advanced.[20] Instead, DHS offered two "alternative formulations of 'particular social group' that could, in appropriate cases, qualify aliens for asylum."[21] This brief is an invaluable resource for asylum practitioners given the lack of legal precedent for domestic violence-based asylum because it details the situations when DHS will not oppose a judge's grant of asylum.[22]

Given the unsettled state of the asylum law, why would Asha take the extraordinary and risky measure of seeking asylum in the United States when India has laws designed to curb domestic violence? Why wouldn't Asha divorce her husband, take her half of the assets, and move to a new house or her parents' house? The answer is troubling. Many Indian women, including Brahmin women, are often unable to seek protection under the law. Divorce is so culturally shameful it is almost unthinkable for many Brahmin women.[23] Furthermore, once many Brahmin parents have paid a substantial dowry for their daughter's marriage, the daughter is no longer welcome in her natal home.[24] Due to these factors and many others that will be discussed *infra* in Sections III and IV, many women in India are left in the untenable situation of being abused but unable to flee.

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17. *See Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.*, CENTER FOR GENDER & REFUGEE STUD., *available at* http://cgrs.uchastings.edu/campaigns/alvarado.php (last visited Apr. 3, 2012); *see also Matter of L-R-*, CENTER FOR GENDER & REFUGEE STUD., *available at* http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php (last visited Apr. 3, 2012).

18. The identity of an asylum applicant is confidential. 8 C.F.R. § 208.6(b) (2011).

19. Supplemental Brief for Dep't of Homeland Sec. at 4–5, *In re* L-R- (2009) [hereinafter DHS Supp. Br.], *available at* http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf.

20. *Id.* at 4 (internal citations omitted).

21. *Id.* at 5.

22. *See id.*

23. *See* discussion *infra* Part II.

24. KARIN KAPADIA, SIVA AND HER SISTERS: GENDER, CASTE, AND CLASS IN RURAL SOUTH INDIA 54–55 (1996).

This Note examines whether female Brahmin victims of domestic violence like Asha can viably seek asylum in the United States as part of a PSG and the struggles they might face during the process. This Note concludes that, in many respects it is easier for a Brahmin woman to meet the elements of proving membership in a PSG than it has been for the women in the leading asylum cases. Brahmin women who live in villages, lack higher education, and are married to orthodox Brahmin men would be more likely to gain asylum because these factors generally decrease a victim's ability to leave her husband.[25] On the other hand, Brahmin wives with higher education, with economic independence, who live in urban areas, and who are less orthodox, would likely fail to win asylum. These women would probably fail because they are more likely to leave their abusers, obtain a divorce, and support themselves in India without their husbands.

Proving membership in a PSG is only the first hurdle for a Brahmin woman seeking asylum. She must also prove the Indian government is unwilling or unable to protect her, and DHS must not meet its burden to prove internal relocation within India is a reasonable alternative.[26] Finally, even a woman who could prove all of the preceding elements of an asylum claim may not have the resources to seek asylum, or desire to seek asylum in the first place.[27]

Part I explains the basic asylum framework, the history of gender-based asylum in the United States, and the difficulties practitioners face constructing a valid PSG for victims of domestic violence. Part II provides background about domestic violence in India, the history of the caste system, what it means to be Brahmin in modern India, and whether Brahmin women can constitute a particular social group. Part III discusses the Indian laws designed to protect domestic violence victims and whether the Indian government is able or willing to protect domestic violence victims. Part IV analyzes whether Brahmin women, after leaving their abusers, are still at risk for persecution or other serious harm; whether they are able to relocate in another part of India; and the practical barriers that Brahmin women seeking asylum may face.

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25. *See* discussion *infra* Part II.

26. 8 C.F.R. § 208.13 (2011).

27. "[M]ost victims of domestic violence abroad would not have the resources or ability to . . . come to the United States" to seek asylum. DHS Supp. Br., *supra* note 19, at 13 n.10.

I. HISTORY OF GENDER AND DOMESTIC VIOLENCE-RELATED ASYLUM CLAIMS IN THE UNITED STATES

Domestic violence-based asylum claims are a new and emerging type of asylum claim. The following four sections will discuss the asylum legal framework, the law of particular social group, the history of gender-based asylum, and difficulties asylum practitioners face proving domestic violence-based asylum claims.

A. The Asylum Legal Framework

Under American asylum law, an applicant can be granted asylum in the United States if she proves that race, religion, nationality, political opinion, or membership in a particular social group was a central reason for persecuting the applicant, and the applicant's country is unable or unwilling to protect the applicant.[28] If the applicant was persecuted in the past, then there is a presumption that the applicant will be persecuted if she returns.[29] DHS can rebut this presumption one of two ways. It can prove there has been a fundamental change in the victim's circumstances such that the victim is no longer in danger of persecution.[30] Or DHS can prove the applicant could relocate to another part of India.[31] If DHS meets its burden, then the burden shifts to the applicant to prove that compelling reasons exist to let the applicant stay or that serious harm will happen to the applicant if she is denied asylum and deported to India.[32]

B. What Constitutes a PSG

In order to prove persecution on account of membership in a PSG, the applicant must show four elements: immutability, particularity, social visibility, and persecution on account of the victim's membership in the PSG. An immutable characteristic is a characteristic such as gender that cannot be changed or be

28. INA §§ 208(b), 101(a)(42)(A). These listed requirements are not exhaustive; there are many others, such as applying within a year of entry and proving the victim is credible, which this Note will not discuss. *Id.* § 208(a).

29. 8 C.F.R. § 208.13(b)(1) (2011).

30. *Id.*

31. *Id.*

32. *Id.* § 208.13(b)(1)(iii)(A)–(B).

expected to change.[33] Second, the social group must be particular, meaning the group has well-defined boundaries, making it clear who is in the group and who is not.[34] Third, the group must be socially visible, meaning the victim's society recognizes that the victim's social group exists in that country.[35] Lastly, the applicant must prove that there is a nexus, or causal connection, between the acts of persecution and the PSG.[36] In other words, the applicant must prove the persecution is on account of the applicant's membership in a PSG.

C. The Door Opens, Shuts, Opens, Shuts, Then Cracks Open a Bit

Gender-based asylum claims—the prerequisite to domestic violence-based claims—were not recognized in the United States until the 1990s.[37] Asylum law is not receptive to gender-based claims, in part because the United States largely incorporated the gender-neutral language of the 1951 Convention Relating to the Status of Refugees (The Convention) and its 1967 Protocol.[38] Because "female-specific violence within most countries was considered part of the private sphere beyond state responsibility" until the 1970s, and "until the mid to late 1990s there was little to no discussion of violence against women as an interstate responsibility," the framers of both The Convention and American asylum laws arguably did not have gender-based persecution in mind.[39]

The United States' stance on gender-based persecution changed in part due to pressure from international organizations and changed perspectives on women's rights.[40] In 1985, the United Nations High Commission for Refugees (UNHCR) recommended that certain women could be part of a PSG and urged countries to create their own guidelines.[41] In

33. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
34. S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).
35. C-A-, 23 I. & N. Dec. 951, 955 (B.I.A. 2006).
36. *Acosta*, 19 I. & N. Dec. at 234–35.
37. Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).
38. GUY S. GOODWIN-GILL, U.N. AUDIOVISUAL LIBRARY OF INT'L LAW, CONVENTION RELATING TO THE STATUS OF REFUGEES AND PROTOCOL RELATED TO THE STATUS OF REFUGEES (2008), *available at* http://untreaty.un.org/cod/avl/ha/prsr/prsr.html.
39. LISA S. ALFREDSON, CREATING HUMAN RIGHTS 85 (2009).
40. *Id.* at 92.
41. *Id.*

response, in 1995 the United States published a comprehensive policy on gender-related persecution.[42] The following year in *Matter of Kasinga*, the BIA granted a Togalese women asylum based on her membership in a PSG comprised of women in a Togalese tribe expected to undergo female genital mutilation.[43]

After *Kasinga*, the BIA began to hear more gender and domestic violence-based cases. The most famous and procedurally complicated case is *Matter of R-A-*. In *Matter of R-A-*, a former member of the Guatemalan military brutally beat and tortured his wife.[44] She begged the Guatemalan police to protect her, yet they would do nothing because of her powerful husband, so she fled to the United States.[45] The immigration judge agreed that she was part of a PSG and granted her asylum. But the BIA overturned the IJ's decision, holding the victim's PSG of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" was not a valid PSG because Guatemalan society did not "recognize" or understand the PSG "to be a societal faction."[46] Furthermore, there was no proof that the persecution was on account of the victim's membership in that PSG.[47]

For the next decade, R-A's case was the object of tug-of-war between Republican and Democratic-led administrations. Following the BIA's ruling, Clinton administration Attorney General Janet Reno proposed regulations to "aid in the assessment of claims made by applicants who have suffered or fear domestic violence."[48] Before leaving office in 2001, she certified *Matter of R-A-*, vacated it, and had it stayed for reconsideration until the proposed regulations were finalized.[49] In 2003, Bush administration Attorney General John Ashcroft lifted the stay, referred the case to his office, and began to modify the proposed regulations.[50] In 2005, he then remanded

42. *Id.*

43. Karen Musalo & Stephen Knight, *Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions*, IMMIGRATION BRIEFINGS, at 2 (Dec. 2003).

44. *Documents and Information on Rody Alvarado's Claim for Asylum in the U.S.*, CENTER FOR GENDER & REFUGEE STUD., *available at* http://cgrs.uchastings.edu/campaigns/alvarado.php.

45. *Id.*

46. R-A-, 22 I. & N. Dec. 906, 918 (B.I.A. 1999).

47. Barreno, *supra* note 16, at 237.

48. INS Proposed Regulations, *supra* note 15.

49. Barreno, *supra* note 16.

50. *Id.*

Matter of R-A- to the BIA for reconsideration until the new regulations were published. Yet, the Bush administration did not publish any regulations before leaving office.[51] In 2008, Republican Attorney General Mukasey lifted the stay to permit the BIA to consider the case notwithstanding the lack of new regulations.[52]

In April 2009, DHS, which represents the government's interest in asylum cases, wrote a Supplemental Brief for a new Mexican asylum case, *Matter of L-R-*, suggesting two new PSG formulations for some victims of domestic violence: "Mexican women in domestic relationships who are unable to leave," and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[53] R-A's attorneys used one of the PSGs DHS suggested for L-R-'s case, and in December 2009, the IJ acknowledged that "[i]nasmuch as there is no binding authority on the legal issues raised in this case," and granted R-A- asylum in a discretionary non-precedential decision.[54] In August 2010, the victim in *Matter of L-R-* received asylum in a non-precedential decision also based on the stipulation of the parties.[55]

While gender-based asylum law has made great strides in the last fifteen years, there is still no precedential case granting asylum to victims of domestic violence.[56] R-A- and L-R- were granted asylum because the respondents' attorneys and DHS stipulated that a grant of asylum was the proper outcome. As such, the IJ did not have to make an "independent determination as to whether [their claims] satisfied the requirements for asylum and the new considerations of social visibility and particularity."[57] While the DHS's brief articulates the agency's new position, the brief is nonbinding on immigration judges and only provides that DHS will not oppose

51. *Id.*

52. *Id.*

53. DHS Supp. Br., *supra* note 19, at 14.

54. *See supra* note 44 and accompanying text.

55. *Matter of L-R-,* CENTER FOR GENDER & REFUGEE STUD., *available at* http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php (last visited Apr. 3, 2012).

56. Officers of affirmative asylum applications in USCIS have granted asylum to some victims of domestic abuse, *see* DHS Supp. Br., *supra* note 19, at 13 n.10, and one IJ has granted victims asylum on account of membership in a PSG in a written opinion, *see* Decision Granting Asylum by IJ Bertha Zuniga (Jan. 18 2011), *available at* http://bibdebb.blogspot.com/2011/01/social-group-victory-in-san-antonio.html.

57. Barreno, *supra* note 16, at 250.

asylum grants if the applicant meets one of two narrow PSG formulations.[58] In the absence of precedential case law or regulations, asylum practitioners have been utilizing DHS's Supplemental Brief as a blueprint for formulating valid PSGs.[59]

D. Challenges Advocates Face Proving Membership in a PSG

Advocates of domestic violence victims from Latin America have trouble meeting all the elements of a PSG. In the absence of new regulations or case law, advocates have difficulty analogizing the social groups of domestic violence victims to PSGs in existing BIA precedent cases. The case most on point for domestic violence-based asylum claims is the *Kasinga* case, which held that Togalese women expected to undergo female genital mutilation can constitute a PSG.[60] In order to comport with this precedent, advocates of domestic violence victims must try to analogize husbands abusing their wives to elders performing female genital mutilation on young tribal women.[61] When the victim is part of a clan or a tribe, it is easier to prove the PSG is particular and socially visible.[62] Yet this is difficult to do, especially for victims in Latin American, because many victims do not come from a definite tribe or clan with specific culture and traditions.[63] Ultimately, most domestic violence-based claims fail for these reasons.

II. BRAHMIN WOMEN AS A PARTICULAR SOCIAL GROUP

This section will provide a general summary of domestic relations and domestic violence in India and the history and culture of Brahmins in India. Then it will analyze whether

58. *See Matter of L-R-*, CENTER FOR GENDER & REFUGEE STUD., *available at* http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php.

59. Interview with Shannon Allen, Law Student in the Civil Practice Clinic, University of Colorado Law School (May 4, 2011).

60. Kasinga, 21 I. & N. Dec. 357, 361, 368 (B.I.A. 1996).

61. *Id.*

62. C-A-, 23 I. & N. Dec. 951, 959 (BIA 2006).

63. Latin American victims constitute a large portion of asylum seekers. *See* Ruth Ellen Wasem, CONG. RESEARCH SERV., RL32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 16 (2005), http://www.au.af.mil/au/awc/awcgate/crs/rl32621.pdf.

Brahmin women can meet the legal definition of a particular social group, including immutability, particularity, social visibility, and nexus, the causal connection between the persecution and the PSG.

A. India: Domestic Violence, Marriage, and Divorce Regardless of Caste

India differs from most other countries because many Indians have a high rate of "arranged" marriages instead of "love" marriages.[64] India also has the highest rate of domestic violence of any country, with thirty-eight percent of males admitting abusing their wives.[65] Wife beating is generally accepted "as an integral part of the patriarchal social structure."[66] Indian women are also victims of a unique form of domestic violence: dowry deaths.[67] In 2001, 163,000 Indian women were killed in fires, mostly reported as "kitchen accidents"; in reality, the cause of many of these accidents is a woman's husband or in-laws throwing kerosene on the wife and lighting her on fire, often in retaliation for the wife not providing sufficient dowry.[68]

It is difficult for most Indian women, regardless of caste, to leave an abusive relationship because divorce is strongly stigmatized.[69] Although the divorce rate is increasing, India still has one of the world's lowest divorce rates, with only about one in every 1,000 marriages ending in divorce.[70] Those

64. Meg Panzer, Note, *Social Media, Social Change: The Influence of Social Media on Views of Dating and Divorce in Bangalore India* (2011) (on file with author).

65. Neha Bhayana, *Indian men lead in sexual violence, worst on gender equality: Study*, THE TIMES OF INDIA (Mar. 7, 2011), http://articles.timesofindia.indiatimes.com/2011-03-07/india/28665246_1_indian-men-international-men-males.

66. Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L. L. REV. 57, 67 (2007) (quoting Subrata Paul, *Combating Domestic Violence Through Positive International Action in the International Community and in the United Kingdom, India, and Africa*, 7 CARDOZO J. INT'L & COMP. L. 227, 236–37 (1999)).

67. Sanghavi P et al., *Fire-related deaths in India in 2001: a retrospective analysis of data*, LANCET (Apr. 11, 2009), http://www.ncbi.nlm.nih.gov/pubmed/19250664.

68. *Id.*

69. Amy Hornbeck et al., *The Protection of Women from Domestic Violence Act: Solution or Mere Paper Tiger?*, 4 LOY. U. CHI. INT'L L. REV. 273, 277 (2007).

70. Mark Dummett, *Not so happily ever after as Indian divorce rate doubles*, BBC NEWS (Dec. 31, 2010), http://www.bbc.co.uk/news/world-south-asia-12094360. Compare the United States, where around two in every five marriages

seeking divorce are usually "members of India's thriving, urban middle class whose lives have been transformed by India's [economic] boom."[71] To many Indians, divorce is a reflection of a woman's poor "character, morals, or child-bearing ability."[72] These cultural factors, as well as others described *infra* in Part III, help explain the high rate of domestic violence in India and the low rate of divorce of couples that experience domestic violence.

B. The Brahmin Caste

Understanding the caste system and how its history has influenced modern Brahmins is key to understanding the susceptibility of Brahmin women to domestic violence. Brahmins are the highest caste in the Hindu social hierarchy.[73] The origins of the caste system date to the Rig Veda, which was written around fifteenth century B.C.,[74] making it the most ancient Hindu scripture in existence. The Rig Veda explains that caste originated from the Hindu god Brahma: the Brahmins (priests and philosophers) came from Brahma's head, the Kshatriyas (warrior and politicians) from his arm, Vaisyas (traders and farmers) from his thighs, and Sudras (servant class) from his feet.[75] Fittingly, Brahmins were the religious intellectual leaders in Indian society.[76] In order to maintain the requisite purity to perform religious tasks, Brahmins observed numerous taboos such as vegetarianism, followed meticulous codes of conduct, and restricted their contact with lower castes.[77] Before 500 B.C., Brahmin women had relative freedom, education, and the ability to participate in social and political life.[78]

Beginning around 500 B.C., the status of Brahmin women deteriorated with the publication of the Smirtis, treatises

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end in divorce. Dan Hurley, *Divorce Rate: It's Not As High As You Think*, N.Y. TIMES (Apr. 9, 2005), http://www.nytimes.com/2005/04/19/health/19divo.html.

71. Dummett, *supra* note 70.

72. *See* Hornbeck et al., *supra* note 69, at 277.

73. G.K. GHOSH & SHUKLA GHOSH, BRAHMIN WOMEN 1 (2003).

74. P.D. MEHTA, ZARATHUSHTRA: THE TRANSCENDENTAL VISION 8 (1985).

75. GHOSH & GHOSH, *supra* note 73, at 2; *see also* EKTA SINGH, CASTE SYSTEM IN INDIA: A HISTORICAL PERSPECTIVE 100 (2009).

76. INDIAN INHERITANCE: ARTS, HISTORY & CULTURE 30 (K.M. Munshi & N. Chandrasekhara Aiyer eds., 1956).

77. *Brahman*, BRITTANICA ENCYCLOPEDIA, *available at* http://www.britannica.com/EBchecked/topic/77093/Brahman (last visited Feb. 13, 2012).

78. GHOSH & GHOSH, *supra* note 73, at 30–31.

which advocated subordinating Brahmin women.[79] The Smirtis advocated that Brahmin women should participate in arranged, pre-pubescent marriages and should not divorce or remarry, if widowed.[80] The Smirtis restricted Brahmin women from working, relegating them to the domestic sphere.[81] The Smirtis emphasized the "Brahmanical ideal" of women as *pativratas*, or husband worshippers whose first duty was to "worship her husband as god, no matter how cruel" he was.[82]

One of the the most influential Smirtis was the Code of Manu written in the first century A.D.[83] Manu advocated for the seclusion and zealous regulation of female behavior, writing that "women should always be guarded" in order to control their sexuality.[84] These texts codify Brahmin social mores and dictate the subordinate status of Brahmin women.[85] Other influential Brahmin works also describe in detail how a Brahmin woman should act in order to maintain purity.[86] The eighteenth-century Stridharmappadati, for example, is of Brahmin authorship and details the duties of a Brahmin wife.[87] Her "main purpose . . . was to bear a son for her husband's family," and her fidelity had to be ensured to preserve the "purity of the family and the caste lineage."[88] The Dharmapaddati states that a good wife "always regards her husband as a god."[89] While these texts are old, a "surprising number" of orthodox Brahmins still adhere to these texts.[90] While scholars have not extensively studied the relationship between caste hierarchy and the subordination of women,

79. JOANNA LIDDLE & RAMA JOSHI, DAUGHTERS OF INDEPENDENCE: GENDER, CASTE AND CLASS IN INDIA 63 (1989).

80. *Id.* at 59.

81. *Id.*

82. *Id.* at 64.

83. *Id.* at 63, 67.

84. *Id.*

85. Julia Leslie, *The Significance of Dress for the Orthodox Hindu Woman*, *in* DRESS AND GENDER: MAKING AND MEANING IN CULTURAL CONTEXTS 198, 198 (Ruth Barnes & Joanne B. Eicher eds., 1997); *see* Uma Chakravarti, *Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State*, 28 ECON. & POL. WKLY. 579, 579 (1993), *available at* http://www.jstor.org/pss/4399556.

86. *See* Chakravarti, *supra* note 85.

87. Jim Masselos, *Sexual Property/Sexual Violence: Wives in Nineteenth-Century Bombay*, 12 S. ASIA RES. 81, 81 (1992).

88. *Id.*

89. Leslie, *supra* note 85, at 199; Hillary Rodrigues, *Women in the Worship of the Great Goddess*, *in* GODDESSES AND WOMEN IN THE INDIC RELIGIOUS TRADITION 72, 91 (Arvind Sharma ed., 2004).

90. Leslie, *supra* note 85, at 198.

historian Uma Chakravarti recognizes the "brahmanical texts of early India" as the origin of the belief in the subordination of women.[91] The caste structure dictated in these early texts has "shaped the ideology of the upper castes and continues to be the underpinning of beliefs and practices extant today."[92]

The economics of caste also caused the position of Brahmin women in Indian society to decline. Around 500 A.D., Brahmins were able to consolidate their land holdings over other castes.[93] Maintaining this elite economic position in society required Brahmin men to effect "tight constraints of female sexuality," including a ban on Brahmin women inheriting land and marrying non-Brahmin men.

These historic practices motivated by cultural and economic considerations resulted in the subordination of Brahmin women.[94]

C. Not All Brahmins Are the Same: Modern Brahmins

Although caste is still an important component of individual and collective identity in modern India, not all Brahmins today follow the norms listed above.[95] Brahmins who are well-educated and urban are less likely to find caste traditions relevant in their lives, whereas Brahmins living in more rural regions of India, particularly in villages, are more likely to follow traditional norms.[96]

The rural/urban divide in India profoundly affects a woman's ability to leave her husband. Brahmin society in rural India is "much more conservative," causing "rural Brahmin women [to] suffer the most."[97] Religious, cultural, and familial restraints, as well as the high levels of illiteracy and social awareness,[98] make leaving an abuser an almost impossible task for rural Brahmin women.[99]

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91. *See* Chakravarti, *supra* note 85.
92. *Id.*
93. LIDDLE & JOSHI, *supra* note 79, at 64.
94. *Id.* at 58, 68.
95. Suneeta Krishnan, *Gender, Caste, and Economic Inequalities and Marital Violence in Rural South India*, 26 HEALTH CARE FOR WOMEN INT'L 87, 89 (2006); GHOSH & GHOSH, *supra* note 73, at 137, 145.
96. GHOSH & GHOSH, *supra* note 73, at 137, 145.
97. *Id.* at 145.
98. *See id.*
99. *See id.*

Divorce is a more viable option for urban, educated Brahmins.[100] Urban Brahmin women are more likely to be literate, educated, and financially independent.[101] Furthermore, conservative values are more likely to be loosened, due to many factors, including globalization.[102] For example, one urban interview subject described how her Brahmin aunt obtained a divorce about a decade ago, which resulted in her family shunning the aunt out of embarrassment.[103] Fortunately the aunt had a college degree and was employed at the time of divorce, so she was able to support herself without the assistance of her family or her ex-husband.[104] Brahmin women who have an education, employment, or a supportive family willing to welcome their victimized daughter back into their family home are more likely to consider divorce or separation a viable option, and therefore may have no need to seek asylum.[105]

Caste endogamy (intermarriage) is still common among all Brahmins regardless of geography.[106] For many Brahmins, marrying outside of the Brahmin community "is clearly disapproved, and often a source of embarrassment."[107] In a study of both rural and urban Brahmins who live in the central state of Karnataka in 2001, the survey found that of one hundred households, there was not a single instance of the head of the household marrying outside of the Brahmin fold.[108] Of the twenty-six people younger than thirty in the study, twenty reported marriages to other Brahmins among their siblings and cousins.[109] Only three reported marriages outside the Brahmin community among themselves, siblings, or

100. Dummett, *supra* note 70.

101. *Id.*

102. *See* GHOSH & GHOSH, *supra* note 73, at 137.

103. Interview with Anjali, Brahmin from the suburbs of New Delhi (Mar. 11, 2011).

104. *Id.*

105. Interview with Stanly K.V., Lawyer and Co-Founder of Odanadi, Mysore, Karnataka, India, (Mar. 21, 2011); *see also* Neeru Sharma, Sumati Vaid, & Akriti Kesar, *Intergenerational Differences in the Concept of Marriage Among Dogra Brahmin Females (Mothers and Daughters)*, 722 ANTHROPOLOGIST 253, 255 (2005).

106. RAMESH BAIRY T.S., BEING BRAHMIN, BEING MODERN 87 (2010).

107. *Id.* at 107.

108. *Id.* at 87. "[E]ven to this day when a family begins to look for a marital alliance, the first and unmistakable preference is for partners from within [their] tradition, and indeed within the particular jati, to which it belongs." *Id.* at 106.

109. *Id.* at 106.

cousins.[110] "Imagine if a Brahmin girl married a Holeya [a Dalit caste] boy and went to live with his family," one survey respondent replied.[111] "Right from eating habits to cleanliness—everything would be so different."[112] Regardless of the rural/urban divide, many Brahmins still want to marry other Brahmins because they follow the same traditions.[113]

D. Brahmin Women as a Particular Social Group

Brahmins are an extremely heterogeneous group that varies based on geography, education, and degree of orthodoxy. Yet the process of analyzing an asylum claim requires immigration lawyers to make broad generalizations about people in certain societal groups. Due to the heterogeneity of Brahmins, this Note will focus on rural Brahmins for purposes of this analysis. Albeit oversimplified, there is a pattern: urban, educated, employed Brahmins tend to be more progressive; rural, less educated Brahmins tend to be more orthodox.[114] Among these more progressive Brahmins there has been a "loosening of caste norms" and ritual practices.[115] Urban, progressive, educated Brahmin women would likely not constitute a particular social group because they probably would not consider marriages to be immutable, the first prong of the PSG standard. Furthermore, they may not meet the other requirements of asylum, such as proving the government is unable to protect them and proving internal relocation is unreasonable.

The following sections will evaluate whether rural, orthodox Brahmin women, using DHS's current formulations, can be a valid PSG.[116] DHS suggests that a valid PSG includes

110. *Id.* at 106–07.
111. *Id.* at 107.
112. *Id.*
113. *Id.*
114. Of course, exceptions exist. In a study of Himachali Brahmins, educated women were *less* likely to divorce. *See generally* Mohan Singh, *Divorce in a Rural North Indian Area: Evidence from Himachali Villages*, 76 MAN IN INDIA 215, 215 (1996); Virendra Kumar, *Burnt Wives: An Epidemiological Review,* 27 INDIA J. CMTY. MED. (2002), http://www.indmedica.com/journals.php?journalid=7&issueid=43&articleid=542&action=article. Interestingly, "91% of the dowry death victims were educated and amongst them 30% were graduates and postgraduates." *Id.*
115. *See* BAIRY, *supra* note 106, at 110.
116. DHS Supp. Br., *supra* note 19, at 10. PSGs cannot include "abusive" or "domestic violence" because it would make the PSG impermissibly circular. A

the reason "why [the abuser] chose the female respondent as his victim and continued to mistreat her."[117] Either of the following formulations could meet the DHS criteria that could result in DHS stipulating to or not opposing an asylum grant in a defensive asylum case: (1) "*Brahmin wives who are unable to leave their orthodox Brahmin husbands*," which mirrors a DHS suggestion that was used successfully by a woman who was granted asylum by an IJ in February 2011,[118] and (2) "*Brahmin women who are viewed as property by virtue of their positions within a domestic relationship*."[119]

1. Immutability

"In a village with orthodox Brahmins divorce is still unthinkable and impossible." – Arjun, Brahmin from Bangalore[120]

An immigration judge would likely consider both PSGs of Brahmin women to be immutable. Under *Matter of Acosta*, the seminal case about social group, members of a PSG must share an immutable characteristic, which may be "an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience, such as former military leadership or land ownership."[121] The characteristic must be "beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed."[122] In *Kasinga*, the seminal gender-based asylum case which granted asylum to a victim of female genital mutilation (FGM), the BIA held that being a "young woman," and a "member of the Tchamba-Kunsuntu Tribe [are characteristics that] cannot be changed," and having intact genitalia should not be changed because it is fundamental to

"particular social group cannot be significantly defined by the persecution suffered or feared." *Id.*

117. *Id.* at 15.

118. Decision Granting Asylum by IJ Bertha Zuniga, *supra* note 56 at 12–15 (explaining PSG of Honduran women who are unable to escape their domestic partner).

119. *See* DHS Supp. Br., *supra* note 19, at 14.

120. Interview with Arjun, Brahmin (Mar. 29, 2011). His family is from Bangalore and is progressive. His family accepted his sister's divorce, but he reports that same divorce would have been unthinkable in an orthodox Brahmin community in a village. *Id.*

121. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

122. *Id.*

identity.[123] The DHS Supplemental Brief and the proposed INS regulations suggest that intimate relationships can be immutable "where economic, social, physical or other constraints make it impossible" for the victim to leave the relationship.[124]

Under *Acosta* and *Kasinga*, being "Brahmin" and being a "woman" are likely immutable characteristics because a person is unable to change or should not be expected to change these characteristics.[125] Under *Acosta*, innate characteristics such as "sex . . . or kinship ties" are immutable.[126] Brahmins as a group have kinship ties because Brahmins have historically practiced endogamous marriage for thousands of years, making them genetically distinct from middle and lower castes.[127] In modern Indian society, caste identity is immutable because it is transmitted to children at birth. Being Brahmin, therefore, is "beyond the power of an individual to change."[128] Moreover, *Matter of Kasinga* dictates that being a woman is fundamental to identity and "cannot be changed."[129]

It is likely that an "orthodox" Brahmin marriage would be considered to be immutable. In order to prove this assertion, the advocate must prove that the victim is unable to leave her husband and therefore that her marriage is unable to be changed. While persuasive sources such as the DHS Supplemental Brief and 2000 INS proposed regulations discuss these points, there is no binding BIA or Circuit precedent precisely on point. Nevertheless, there is strong evidence that both are immutable.

Brahmin women *who are unable to leave their husbands* could be considered an immutable characteristic because a Brahmin woman could not reasonably be expected to divorce

123. Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996).

124. DHS Supp. Br., *supra* note 19, at 16; Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000).

125. *See* Acosta, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

126. *Id.* at 233.

127. Elie Dolgin, *Indian Ancestry Revealed*, NATURE (Sept. 23, 2009), *available at* http://www.nature.com/news/2009/090922/full/news.2009.935.html; *see also* Sangita Roy et al., *Mitochondrial DNA Variation in Ranked Caste Groups of Maharashtra (India) and Its Implication on Genetic Relationships and Origins*, 30 ANNALS HUM. BIOLOGY 443, 443 (2003).

128. *Acosta*, 19 I. & N. Dec. at 233; *see also* V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997) (explaining that being a Filipino of mixed Filipino-Chinese ancestry cannot be changed).

129. Kasinga, 21 I. & N. Dec. 357, 366 (B.I.A. 1996).

because of "economic, social, physical or other constraints."[130] From a religious perspective, Hindu marriages are sacred and indissoluble.[131] Even divorces under the Hindu Marriage Act, while legally binding, are not recognized religiously because marriage is a sacrament that cannot be undone.[132] Although the prohibition of divorce affects all Hindus, Brahmins take it much more seriously. Brahmin marriage has been distinct from all other marriages since before the sixth century B.C.[133] The Rig Veda describes the "prototype of Brahman marriage," venerating it as the "highest, purest and most evolved method of marriage."[134] It is more difficult for Brahmins to leave marriages because Brahmins are the archetypes of the Hindu religion. Society looks to Brahmins to be model Hindus and to maintain purity and adherence to Hindu beliefs.[135] Because marriage is often the most important event in a Brahmin's life, a Brahmin's divorce is particularly "disgraceful."[136] One Brahmin woman from outside Delhi explained that Brahmins believe that it is the wife's responsibility "to make it work no matter what."[137] It follows that, for many, a Brahmin woman cannot leave her husband because that means she has not tried to make it work.

From a practical perspective, some Brahmin women who want to leave a marriage have no place to go because it is "shameful for Brahmin parents to have a married daughter living with them."[138] In the view of some, maltreated non-Brahmin women have "the right to come home," whereas "the Brahmin woman has no such right."[139] Havik Brahmin women in the state of Karnataka often lack the resources to leave their husbands.[140] Culturally they are not permitted to inherit land,

130. DHS Supp. Br., *supra* note 19, at 16 (tracking INS proposed regulations).

131. SRIKANTA MISHRA, ANCIENT HINDU MARRIAGE LAW AND PRACTICE 10 (1994).

132. *Id.* at 10–11.

133. *Id.* at 70.

134. *Id.* In modern times, other castes imitate the Brahmin form of marriage. *Id.*

135. *See Brahman*, BRITTANICA ENCYCLOPEDIA, *available at* http://www.britannica.com/EBchecked/topic/77093/Brahman (last visited Mar. 19, 2012).

136. Dennis McGilvray, Professor of Anthropology, University of Colorado at Boulder, Class Presentation (Jan. 31, 2011).

137. Interview with Anjali, Brahmin from outside Delhi (Mar. 11, 2011).

138. KAPADIA, *supra* note 24, at 55.

139. *Id.* at 54–55.

140. HELEN E. ULLRICH, *Caste Differences Between Brahmin & Non-Brahmin Women in a South Indian Village*, *in* SEXUAL STRATIFICATION: A CROSS-CULTURAL VIEW 94, 107 (Alice Schlegel ed., 1977).

and all of a Havik Brahmin women's property and possessions are transferred to her husband upon marriage.[141] Of course there are exceptions. Some married Brahmin women have families who would welcome them back; others may be financially independent enough leave their husbands. But overall, these Brahmin-specific characteristics, combined with the stigma that all Indian women face when trying to leave a marriage, make it nearly impossible for orthodox Brahmin women in a village to leave their husbands.

The PSG of Brahmin women *who are viewed as property by virtue of their position within the domestic relationship* is likely immutable because a Brahmin woman's husband who holds this view is unlikely to change his belief that his wife is property. In Tamil-Nadu in southern India, when a Brahmin daughter marries, she belongs "entirely to her husband's family"; her natal family relinquishes all rights and obligations.[142] Because Brahmin women "belong" to their husbands' families, Brahmin women tend to live with their in-laws, who wield extreme power over the Brahmin women.[143] A study of Havik Brahmins in Karnataka noted that a Brahmin woman must be submissive and "subordinate to all desires, the whims, and the angers of her husband."[144] Brahmin husbands literally command every aspect of their wives' lives, including when they can leave the house, what they should cook, and how they should act.[145] The Brahmin women "ha[ve] to obey" their in-laws and husbands, whereas lower caste women have "more freedom."[146] While not all Brahmins in all rural areas adhere to these traditions, these traditions are common. These studies suggest Brahmin husbands believe that Brahmin women are property, which is a belief reinforced by society, and is unlikely to change. For these reasons, an immigration judge would likely consider that an abuser's belief in the subordination of his wife is immutable.

Therefore, both PSGs, *Brahmin women who are unable to leave their husbands,* and *Brahmin women who are viewed as property by virtue of their position within the domestic*

141. *Id.* Non-Brahmin Divaru women in the same village are permitted to hold property, and have more independence and "economic power." *Id.*

142. KAPADIA, *supra* note 24, at 56.

143. *See* THIRUCHANDRAN, *supra* note 1, at 80.

144. ULLRICH, *supra* note 140, at 107.

145. *See* THIRUCHANDRAN, *supra* note 1, at 92.

146. *Id.* at 91–93.

relationship, could meet the immutability requirement of a PSG.

2. Particularity

Brahmin women using the two DHS-proposed social groups could likely prove their PSG meets the particularity requirement. A PSG must have "particular and well-defined boundaries."[147] The essence of the particularity requirement is to ensure that the "proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[148] If people's idea of who is in the PSG varies, the group is not particular.[149] For example, a PSG comprised of "wealthy" Guatemalans is too subjective to be a cognizable social group because one person's conception of who is wealthy may differ from that of another.[150] In a similar vein, a PSG that includes the phrase "family members" is too amorphous to meet the particularity requirement because "family members" could mean nuclear family to some or extended family to others.[151] The group does not have to be homogenous nor does there need to be a voluntary associational relationship among group members.[152] The DHS argues that the two PSG formulations proposed in its brief[153] could be valid PSGs because the PSG formulations permit the IJ to "determine with clarity whether an applicant is or is not a member of the group."[154]

Both of the suggested DHS PSG formulations could be delineated enough to meet the particularity requirement. An advocate, however, would struggle to find enough information to make that conclusion without the testimony of an expert witness. A PSG is particular if the group has "well-defined boundaries" and people's idea of who is in the group does not

147. S-E-G-, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).

148. *Id.* at 584.

149. A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007).

150. *Id.* at 74 ("Because the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.").

151. *See S-E-G-*, 24 I. & N. Dec. at 585.

152. C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006).

153. "Mexican women in domestic relationships who are unable to leave," and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship." DHS Supp. Br., *supra* note 19, at 14.

154. *Id.* at 19.

vary.[155] In essence, if Indians were asked who in Indian society was a member of the PSG, and if Indians generally agreed which people in their society were in that social group, then the group would be particular.

In order to determine whether either of these proposed PSGs is particular, the asylum judge must determine if there are words or phrases in the PSG that would make it difficult to delineate who is in the group. "Brahmins" are undoubtedly a discrete class of persons of India and would be considered particular under asylum law. On the other hand, people's opinions of what constitutes an "orthodox" Brahmin may differ, just as people's idea of "wealth" varies.[156] Orthodox is defined as "conforming to established doctrine," or "relating to . . . conservative religious . . . groups" and is commonly used to refer to conservative Brahmins.[157] People who live in cities and have an education are less likely to be orthodox, whereas people in rural areas are more likely to be orthodox.[158] To truly determine whether "orthodox" can be particular, a broader survey of Indians would need to be performed, or an expert witness would need to testify in immigration court.

Indian society could probably delineate who is in the groups *Brahmin women who are unable to leave their orthodox husbands* and *Brahmin women viewed as property by virtue of their position within the domestic relationship*, but an expert would be needed to testify to this point. While orthodox families generally believe that women are unable to leave or that they are property, some orthodox families may not. Educated interviewees in Bangalore insisted that they have the freedom to do whatever they want, but emphasized that it is still a different world in rural India.[159] Anthropological literature supports this proposition of an urban/rural divide in India.[160] These interviews and anthropological studies indicate that the two PSGs have relatively defined boundaries: urban

155. *S-E-G-*, 24 I. & N. Dec. at 582, 584–85.

156. *Id.* at 584–85 (holding that "wealth" was too subjective and, thus, was not sufficiently particular to be the defining characteristic of a PSG, because people's opinions of what constitutes wealth may vary).

157. MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/orthodox (last visited Mar. 19, 2012) (defining "orthodox").

158. *See* GHOSH & GHOSH, *supra* note 73, at 137, 145.

159. Interview with Arjun, *supra* note 120; Interview with Niyati and Sipa, Second and Third Year Law Students, respectively, Bangalore University Law School, in Bangalore, India (Mar. 23, 2011).

160. *See* ULLRICH, *supra* note 140, at 107.

Brahmins probably would not be in the group, but rural Brahmins probably would.[161] Fortunately, the BIA does not require the PSG to be perfectly homogenous, merely recognizable.[162]

While at first glance including the phrase "in villages" as part of the PSG would make it easier to define who is in the group with particularity, it could complicate the nexus analysis, because the advocate would have to prove the abuser persecuted her because she was in a village.[163]

DHS states that the language in its two PSG formulations, which are nearly identical to the two Brahmin formulations, would meet the particularity standard. Because these issues have never been studied before, there is no research directly on point examining whether Indians would think these groups are particular. While interviews and anthropological research indicate this group could be particular, an expert would be needed to provide testimony.

3. Social Visibility

The two PSGs are socially visible if the victim can prove that her PSG is recognizable by others in her home country. The BIA holds that a group is socially visible if the PSG is "generally recognizable by others" in the applicant's community.[164] Social groups based on "innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups."[165] Clans or tribes are socially visible if the group is recognizable to others in the country.[166] Furthermore, the PSG's relevant conduct must be in "the public view."[167] The "context of the country of concern and the persecution feared" are important factors in determining whether a PSG is socially visible.[168] The DHS Supplemental Brief elaborates on these

161. *See* GHOSH & GHOSH, *supra* note 73, at 137, 145.

162. C-A-, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006).

163. DHS Supp. Br., *supra* note 19, at 15. A valid PSG will include the "specific characteristics that the persecutor targets in choosing his victim." *Id.*

164. S-E-G-, 24 I. & N. Dec. 579, 586 (B.I.A. 2008).

165. *C-A-*, 23 I. & N. Dec. at 959.

166. *See id.*

167. *See id.* at 960. "Confidential informants" against the Cali cartel are by their nature not visible because informants try to stay unknown or unrecognized. *Id.*

168. A-M-E-, 24 I. & N. Dec. 69, 74–75 (B.I.A. 2007).

factors, noting a domestic violence victim's PSG could be socially visible if there is a "societal view . . . that the status of a woman in a domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner."[169] Therefore, both the group of victims and their persecution must be familiar to the victim's society.

Before proceeding to the analysis of the social visibility of the two Brahmin PSGs, it is important to understand the distinction between the particularity and social visibility prongs of the PSG requirement. The particularity prong inquires whether the PSG has well-defined boundaries; the social visibility prong analyzes whether society actually perceives the well-cabined PSG to be a group.[170] If a group is too small, for example, "daughters of the Martinez family," the group is particular but not socially visible, because Guatemalan society does not perceive two daughters of a man in a small Guatemalan village to be a societal group.[171] If a group is very large, society is more likely to consider it a PSG, but the social group is much less likely to be considered particular.[172]

It is possible that an advocate could prove that the two Brahmin PSGs are particular. Undoubtedly, Brahmin women are highly visible in Indian society, but an advocate must prove the *entire* PSG is socially visible.[173] A Brahmin woman using one of the two suggested PSGs would have to prove that in India there is a societal view that Brahmin wives are unable to leave their orthodox husbands or that Brahmin women are viewed as property by virtue of being in an orthodox Brahmin marriage.

Indian society perceives that domestic violence is widespread in India.[174] The Indian Parliament passed the Protection of Women Against Domestic Violence Act in 2005 to address this widespread problem.[175] There is a plethora of

169. DHS Supp. Br., *supra* note 19, at 18.

170. *See* S-E-G-, 24 I. & N. Dec. 579, 582, 587 (B.I.A. 2008).

171. Interview with Shannon Allen, Law Student in the Civil Practice Clinic, University of Colorado Law School, in Boulder, CO (May 4, 2011).

172. *S-E-G-*, 24 I. & N. Dec. at 585–86.

173. *See* Ngengwe v. Mukasey, 543 F.3d 1029, 1034 (8th Cir. 2008); *see also* C-A-, 23 I. & N. Dec. 951, 960 (BIA 2006).

174. *See supra* Part II.A.

175. *See* The Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005).

news articles and ad campaigns in India decrying the high rate of domestic violence.[176] While anthropological literature indicates that Brahmins are particularly susceptible to domestic violence, it is less clear whether Indian society as a whole perceives intra-Brahmin domestic violence to be a problem; the fact that Brahmin women are less likely to discuss marital problems to protect their social standing may contribute to society's lack of awareness of intra-Brahmin violence.[177]

While Indian society is aware of the pervasive domestic violence, the fact that domestic violence is generally hidden within the home could cut against a finding of social visibility. In *Matter of C-A-*, the BIA held that confidential informants of a cartel were not socially visible because the work they did was by definition clandestine and therefore was not socially visible.[178] Domestic violence often, but not always, occurs in the home, away from the public eye. While the analysis in *Matter of C-A-* indicates that actions done in secret cut against a finding of social visibility, the case emphasizes the informant's intent to remain secret.[179] While it is often taboo to discuss domestic violence in India, it is unclear whether the abuser or the victim actually intends for the abuse to remain secret. Domestic violence is common and accepted in many areas of India, so it is unclear whether this precedent would bar Brahmin women from proving social visibility.

Despite the lack of statistics in the popular media, evidence of Brahmin women's susceptibility to domestic violence is well documented in anthropological, sociological, and medical journals. Anthropological literature indicates that "[i]t is generally believed in India that the higher the caste, the higher the seclusion for women and the lower the caste, the

176. *See e.g.,* Neha Bhayana, *Indian Men Lead in Sexual Violence, Worst on Gender Equality: Study,* TIMES OF INDIA (Mar. 7, 2011), http://articles.timesofindia.indiatimes.com/2011-03-07/india/28665246_1_indian-men-international-men-males; *see also infra* Part III.B.2 (discussing the "Ring the Bell" ad campaign, which urges people to interrupt domestic violence by ringing their neighbors' door bells if and when they hear signs of violence coming from inside those neighbors' homes).

177. Suneeta Krishnan, *Do Structural Inequalities Contribute to Marital Violence?,* 11 VIOLENCE AGAINST WOMEN 759, 767 (2005); *see also* THIRUCHANDRAN, *supra* note 1, at 95–96.

178. *See C-A-*, 23 I. & N. Dec. at 960.

179. *See id.*

more freedom for women."[180] In South Indian villages in Tamil Nadu, a non-Brahmin woman can easily leave an abusive husband's house and have a right to return to her parent's home, whereas a Brahmin woman has no such right.[181] The Brahmin woman lacks this right because her parents likely impoverished themselves to provide their daughter sufficient dowry to get married, which truncates any rights a Brahmin daughter has in her parent's house.[182] Dowry has "traditionally been the common marriage transaction of the highest (Brahmin) caste,"[183] which has resulted in Brahmin women suffering a disproportionate risk of murder at the hands of their husbands and in-laws.[184] The India Journal of Medicine reports that Brahmin women constitute an "overwhelming majority" of dowry deaths by burning, about 60%, even though Brahmins constitute only about 9% of the Indian population.[185] Among Brahmin women in villages in Tamil Nadu, divorce is unthinkable because a divorced woman is "a castaway item . . . a social disgrace, an evil omen," and a failure.[186] The thirty-two Brahmin women who were interviewed for the study were unanimous that women should tolerate marital violence instead of enduring the societal shame of leaving their husbands.[187] Despite the lack of media coverage, it is likely a Brahmin applicant could use the numerous scientific studies to prove these two PSGs are socially visible.

180. THIRUCHANDRAN, *supra* note 1, at 91; *see also* Dennis McGilvray, Professor of Anthropology, University of Colorado at Boulder, Class Presentation (Jan. 31, 2011) (explaining that India's "elite" culture is the country's most restrictive).

181. KAPADIA, *supra* note 24, at 54–55.

182. *See id.* at 55 (providing a Telugu Brahmin woman's account of why Brahmin women have no right to leave their husbands and return to their natal homes).

183. Vijayendra Rao, *Dowry 'Inflation' in Rural India: A Statistical Investigation*, 47 POPULATION STUD. 283, 283 (1993). Brahmins are more likely to exchange dowry, which is originally a Brahmin tradition, but many other castes practice it through Sankritization (imitation and veneration of Brahmin culture). *Id.*

184. *See* Virendra Kumar, *Burnt Wives: An Epidemiological Review,* 27 INDIAN J. CMTY. MED. (2002), *available at* http://www.indmedica.com/journals.php?journalid=7&issueid=43&articleid= 542&action=article.

185. *Id.*

186. THIRUCHANDRAN, *supra* note 1, at 80.

187. *See id.*

4. The Nexus Requirement

Brahmin women have a strong argument that the domestic violence they experience meets the nexus requirement. The nexus requirement is met if the abuse is "on account of" the Brahmin woman's membership in a PSG.[188] In order to prove that a nexus exists, the asylum applicant must establish by direct or circumstantial evidence that the applicant's membership in the PSG is one central reason or motive for persecuting the applicant.[189] An asylum applicant can prove the persecutor's motive through direct or circumstantial evidence, "from which it is reasonable to believe that the harm was motivated" in part by the victim's membership in a PSG.[190] In *Kasinga*, the BIA found that tribal elders intended to perform FGM on the applicant because she was a member of the PSG "young women of the Tchamba-Kunsuntu Tribe who have not had" female genital mutilation.[191] Because she was a young woman who had not undergone FGM, the tribe believed it was necessary to perform FGM to control her sexuality.[192] Had Kasinga's gender and tribal membership not been central factors driving tribal elders to perform FGM on her, the nexus requirement would not have been met. DHS argued nexus could be proven in the *L-R-* case if L-R- could demonstrate her husband hit her because of "his perception of the subordinate status she occupies within that domestic relationship."[193]

Many orthodox Brahmin men commit domestic violence against their wives due to the fact their wives are Brahmin. Like the tribal members in *Kasinga* who sought to "control [Kasinga's] sexuality," some Brahmin men abuse their wives in order to control their wives' sexuality.[194] Historian Uma Chakravarti concluded that a "central factor for the subordination of the upper caste women [is] the need for effective sexual control over such women to maintain not only patrilineal succession . . . but also caste purity" and land

188. J-B-N-, 24 I. & N. Dec. 208, 211 (B.I.A. 2007).
189. *Id.*
190. S-P-, 21 I. & N. Dec. 486, 490 (B.I.A. 1996).
191. Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).
192. *Id.* at 367.
193. DHS Supp. Br., *supra* note 19, at 15.
194. *Kasinga*, 21 I. & N. Dec. at 366; *see also* Saibaba Rajesh, *Women in India: Abysmal Protection, Peripheral Rights and Subservient Citizenship*, 16 NEW ENG. J. INT'L & COMP. L. 111, 112 (2010) ("Often, violence against women is considered a vital component in many cultures necessarily to 'discipline' them.").

ownership.[195] The way for a low-caste man to penetrate the Brahmin caste was through the "sexual access" to Brahmin women.[196] To maintain caste purity, Brahmins "highly restricted [the] movement of women," keeping them inside the house to prevent lower caste men from polluting the women and therefore their whole families.[197] Because of this belief, many Brahmin women in villages are tightly controlled and punished for seemingly meaningless infractions. Tamil Brahmin women in villages are "punished by being beaten or by other kinds of ill-treatment" for "going out alone or [being] seen on the street alone after six."[198] The Tamil Brahmin women were beaten because they were not permitted to go out late, and they were not permitted to go out late because they were Brahmin.[199] Even more striking is that one survey found that seventy percent of Indian women believe their physical abuse was justified, demonstrating broad societal acceptance of beatings as a corrective act.[200] Domestic violence and asserted control is thought to ensure that the Brahmin wife is subordinated and that her sexuality will not be a threat to Brahmin sexual purity.

Lack of a male heir may also be a reason Brahmin men hit their wives. The *dharmasastra*, the "system the Brahmin class founded upon religious perceptions of righteousness,"[201] states that the purpose of marriage is to procreate a son, who is necessary for the salvation of the husband's soul.[202] Although there are no Brahmin-specific statistics, Indian men are more likely to beat their wives if their wives have not produced sons.[203]

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195. Chakravarti, *supra* note 85. Also, women's sexuality was controlled to maintain property rights. *Id.*

196. *See id.* at 579.

197. *Id.*

198. THIRUCHANDRAN, *supra* note 1, at 92 ("[Going out late] is not socially approved within our circle (high class Brahmin). My husband or father-in-law [sic] will ask, why have you gone out? . . . We have been expected to behave . . . The husband is our god. He is our world.").

199. *See id.*

200. Hornbeck et al., *supra* note 69, at 274.

201. Sampak P. Garg, *Law and Religion: The Divorce Systems in India*, 6 TULSA J. COMP. & INT'L L. 1, 5 (1998).

202. *See* MISHRA, *supra* note 131, at 15.

203. Vijayendra Rao, *Domestic Violence and Intra-Household Resource Allocation in Rural India: An Exercise in Participatory Econometrics*, *in* GENDER, POPULATION, & DEV. 18 (Maithreyi Krishna Raj et al. eds., 1998), *available at* http://siteresources.worldbank.org/INTPOVRES/Resources/477227-1142020443961/2311843-1197996479165/DomesticViolence.pdf.

While evidence of the abuser's culture can help prove nexus, proving nexus also depends on testimony from the victim recounting why the abuser hit her. Due to rigid orthodox Brahmin traditions that are still observed in India, many Brahmin women, particularly those in villages, would likely be able to prove nexus because Brahmin women are subordinated on account of being Brahmin.

III. WHETHER THE INDIAN GOVERNMENT IS UNABLE OR UNWILLING TO PROTECT BRAHMIN WOMEN FROM DOMESTIC VIOLENCE

Even if the asylum applicant can successfully prove that she is a member of a PSG, she must also prove that the Indian government is unable or unwilling to control the persecutor.[204] A successful domestic violence-based claim must demonstrate that the victim's society and legal norms tolerate and accept violence against women.[205] The following sections will analyze how Indian laws, culture, and corruption affect the government's ability to protect victims of domestic violence.

A. Protection for Indian Women Who Are Victims of Domestic Violence

The Indian government has made efforts to protect victims of domestic violence. In order to determine the efficacy of a country's laws in protecting asylum applicants, immigration judges and officers look to the Department of State (DOS) Country Reports for the most accurate description of country conditions.[206] The 2009 DOS report on India states that domestic violence is a "serious problem"[207] in India, but paints a rosy picture of the laws protecting women.[208] The law protects women from "all forms of abuse"; recognizes the victim's right to stay in the household or to have other accommodations provided at the government's expense;

204. O-Z-, 22 I. & N. Dec. 23, 26 (B.I.A. 1998).

205. DHS Supp. Br., *supra* note 19, at 14.

206. Memorandum from Michael J. Creppy, Chief Immigration Judge, U.S. Dep't of Justice Exec. Office for Immigration Review, 10–11 (Aug. 4, 2000), *available at* http://www.justice.gov/eoir/efoia/ocij/oppm00/OPPM00-01Revised.pdf.

207. U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: INDIA (2010) [hereinafter 2009 HUMAN RIGHTS REPORT: INDIA], http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136087.htm.

208. *See id.*

provides women with the "right to police assistance, legal aid, shelter"; and "empower[s] magistrates to issue protection orders."[209]

Much of DOS's assertion is indeed accurate that, at least on its face, the Indian Constitution and laws provide generous protection of women. Article 51(a) lists the ten "fundamental duties" of each Indian citizen, including "renounc[ing] practices derogatory to the dignity of women."[210] Indian Penal Code Section 319 criminalizes causing another physical pain.[211] The Indian government has also specifically proscribed domestic violence and dowry harassment. Section 498a of the Indian Penal Code, passed in 1983, criminalizes cruelty against women at the hands of her husband or in-laws.[212] The Dowry Prohibition Act of 1986 creates a presumption of murder when a woman's death is caused by "burns or bodily injury," or within seven years of marriage, and it is shown that "soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry."[213]

The Hindu Marriage Act of 1955[214] lists marital cruelty as a ground for divorce and provides for interim maintenance during divorce proceedings and financial maintenance of wives after divorce.[215] Under Section 18(2) of the Hindu Marriage Act, a married woman has a right to claim maintenance in a separate residence if her husband has been cruel to her and the wife reasonably believes it would be unsafe to live with the husband, unless she has been "unchaste" or has become "non-Hindu."[216]

209. *Id.*

210. INDIA CONST. art. 25, *available at* http://india.gov.in/govt/documents/english/coi_part_full.pdf.

211. INDIA PEN. CODE, § 319 (1860).

212. *Id.* § 498A.

213. *Id.*; D.N Sandasnshiv & Jolly Mathew, *Legal Reform in Dowry Laws*, *in* KALI'S YUG 79, 81–83 (Rani Jethmalani ed., 1995).

214. In India, laws related to marriage, divorce, child custody and inheritance are governed by personal law, which is determined by the religious community to which the particular citizen belongs. Hornbeck et al., *supra* note 69, at 276. While personal law protects "pluralism and the religious rights of minority groups, they have been criticized as a mere means of reinforcing patriarchy and preventing gender equality." *Id.*

215. VIJAY SHARMA, PROTECTION TO WOMEN IN THE MATRIMONIAL HOME 247 (1994).

216. *Id.*

The most recent legislation is a civil act, the Protection of Women from Domestic Violence Act of 2005 (PWDVA).[217] Under the PWDVA, women can seek protection orders against their abusers, residence orders to prevent being ejected from their houses, and monetary relief.[218] If a woman calls the police to report domestic violence, the woman is assigned a protection officer who can help the woman file a domestic incident report, apply for protection orders, and make sure the victim understands her options.[219] Some jurisdictions have All Women Police Units (AWPUs) to make women feel more comfortable reporting domestic violence.[220]

There are also many NGOs that provide shelters and resources for victims of domestic violence. Odenadi, an NGO located in Mysore, Karnataka, protects domestic violence victims but also strives to keep the families together.[221] If the wife decides to stay in her house with her abuser, Odenadi will follow up to ensure the relationship is still safe for the victim.[222] Only when Odenadi cannot help the couple resolve their domestic violence situation does Odenadi contact the police.[223] The federal government also funds a hotline located at Odenadi, which provides counseling for women in "difficult circumstances."[224] Odenadi runs the phone line for the Mysore district, and an operator is on staff twenty-four hours a day to answer calls and provide counseling.[225] Vimochana, an NGO in Bangalore, approaches domestic violence from a different perspective. Vimochana brings the abuser into the NGO and chastises him for hitting his wife.[226] Shaming is a fairly common practice in smaller Indian villages, and often embarrassing an abuser is enough to curtail domestic

217. The Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005).

218. *Catching Up with DV in the News*, 15 NAT'L BULLETIN ON DOMESTIC VIOLENCE PREVENTION 2, 4 (2009) [hereinafter *DV in the News*].

219. *See* Hornbeck et. al., *supra* note 69, at 277, 283–84; *see also* Interview with Stanly K.V., *supra* note 105.

220. Hornbeck et. al., *supra* note 69, at 293–94.

221. Interview with Stanly K.V., *supra* note 105.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Interview with Lacksmi, Vimochana NGO, in Bangalore, India (Mar. 25, 2011).

violence.[227] These laws and NGO programs are working to end domestic violence in India.

B. In Practice, the Indian Government is Often Unwilling and Unable to Protect Some Victims of Domestic Violence

The DOS report lists the laws that protect women, but does not evaluate their efficacy, whether they deter domestic violence, or whether women actually take advantage of the protection of the laws.[228] The DOS report notes that "underreporting [of domestic violence] was likely," and notes that laws banning dowry have not noticeably reduced the incidence of such crimes.[229] While the laws seem strong on their face, a law professor at the National Law School in Bangalore explained that laws intended to fight deep-rooted Indian culture have been a "huge failure."[230]

1. The Ostensibly Protective but Essentially Inadequate Indian Laws

While there are laws in place to protect victims of domestic violence, in reality it is difficult for women to invoke the laws designed to protect them. While Section 319 criminalizes the act of causing physical harm to another, in practice the police rarely enforce this law when the harm is between husband and wife because many policemen still do not recognize domestic violence as a crime.[231] Section 498A of the Indian Penal Code, which specifically criminalizes domestic violence, was passed to close this loophole.[232] However, it only criminalizes domestic violence that "results in punishment where the violence or harassment is likely to drive the woman to commit suicide or to cause grave danger."[233] Section 498A is therefore inadequate

227. *Id.*
228. *See* 2009 HUMAN RIGHTS REPORT: INDIA, *supra* note 207.
229. *Id.*
230. Dr. Elizabeth V.S., Lecture at the National Law School in Bangalore, India (March 24, 2011).
231. *See* Geethadevi, Meghana, Raghunandan, Renuka & Shobha, *Getting Away with Murder: How Law Courts and Police Fail Victims of Domestic Violence*, 120 KAMLESHWAR SINGH 31, 32, 35 (2000), *available at* http://www.manushi.in/docs/728.%20Getting%20Away%20with%20Murder.pdf.
232. *See id.* at 31.
233. Hornbeck et al., *supra* note 69, at 277.

because a great deal of domestic violence consists of mental cruelty or violence that does not rise to the level of causing grave danger and thus does not fall under 498A.[234] Vimochana observes that police rarely intervene or press charges in cases of battering, regardless of the severity.[235] When women try to bring their own 498A claims, police "heavily scrutinize" such claims because of a perceived high incidence of claim fabrication.[236]

While the text of the 2005 PWDVA provides women more protections, in practice few women have been able to take advantage of the Act's benefits.[237] Many states have not appointed enough protection officers, and some have not appointed any.[238] That means women living in villages far from the concentration of governmental and nongovernmental resources cannot obtain a protection order or use an NGO or protection officer as a springboard to obtain victims' resources. Stanley, the Director/Founder of Odenadi, explained that even in Mysore, the government services are so poor that police rely on NGOs to perform work that the police are unable to do.[239] Protection orders, while available to women subjected to domestic violence, are not always enforced.[240] The magistrate judges charged with protection orders are often uninformed about the PWDVA and hesitant to issue protection orders.[241] The PWDVA requires the government to "take all measures" to publicize the law, but the "average Indian citizen is likely unaware of the law and the protection it offers."[242] Moreover, while the PWDVA gives a woman the right to reside in her husband's home during a dispute so that the woman does not become homeless or "destitute," it does not give a wife who lives with her in-laws after marriage, a common practice in India,

234. Roland D. Maiuro, *Sticks and Stones May Break My Bones, but Names Will Also Hurt Me: Psychological Abuse in Domestically Violent Relationships*, *in* PSYCHOLOGICAL ABUSE IN VIOLENT DOMESTIC RELATIONS, at ix-x (K. Daniel O'Leary & Roland D. Maiuro eds., 2001).

235. *See* Geethadevi et al., *supra* note 231, at 31–32.

236. Hornbeck et al., *supra* note 69, at 278. Some commentators suggest, however, that some women are being "forced to overstate the violence they are experiencing" because they have no other options for recourse. *Id.*

237. Interview with Stanly K.V., *supra* note 105.

238. *Id.*

239. *Id.*

240. Lecture by Dr. Elizabeth V.S., *supra* note 230.

241. Flavia Agnes, *Looking Beyond*, 1 COMBAT L. 64, 64–65 (2010).

242. Hornbeck et. al., *supra* note 69, at 286–87.

the right to continue live with her in-laws during a dispute with the husband.[243]

All Women Police Units (AWPUs) have good intentions, but many victim's advocates criticize the AWPUs for being inaccessible, encouraging women to remain with their abusers, and returning women to abusive homes.[244] AWPUs are generally in big cities, not rural areas.[245] While the government does provide shelters, these shelters are poorly run, have a very limited capacity, and do not address the mental and emotional needs of victims.[246]

The Hindu Marriage Act of 1955[247] and the Hindu Succession Act of 1956[248] often prevent women from having the financial resources needed to leave their husbands. No provision exists to give Hindu women a share of their husbands' property acquired during marriage, and because most married Hindu women do not work, they have little opportunity to acquire assets under their own name.[249] Determining ownership based on financial contribution works inequitably against women because many women stay at home to assume "all domestic responsibilities, and thus, free[] the husband" to work outside the home.[250] Furthermore, traditional Hindu law did not permit married women to inherent their fathers' property.[251] Despite changes in the Hindu code in 1947 giving sons and daughters equal inheritance rights, "the change in the law has not resulted in a change in practice for most families; sons continue to inherit their fathers' property to the exclusion of daughters."[252] Moreover, in an attempt to encourage reconciliation, The Hindu Marriage Act prevents judges from hearing divorce

243. Rajesh, *supra* note 194, at 120. The case *Batra v. Batra* held that the PWDVA does not give victims the right to reside in their in-laws' matrimonial homes. *Id.* at 128.

244. *See* Hornbeck et al., *supra* note 69, at 293–94.

245. *See* INT'L CTR. FOR RES. ON WOMEN, DOMESTIC VIOLENCE IN INDIA: A SUMMARY REPORT OF THREE STUDIES 18 (1999), *available at* http://www.womenstudies.in/elib/dv/dv_domestic_violence_in_India_a_summary.pdf.

246. Interview with Stanly K.V., *supra* note 105.

247. Hindu Marriage Act, INDIAN CODE (1955), *available at* http://punjabrevenue.nic.in/hmrgact(1).htm.

248. Hindu Succession Act, INDIAN CODE (1956), *available at* http://indiacode.nic.in/fullact1.asp?tfnm=195630.

249. SHARMA, *supra* note 215, at 376.

250. *Id.*

251. *Id.*

252. Hornbeck et al., *supra* note 69, at 276.

cases for one year after the marriage has elapsed except for circumstances of extreme depravity.[253]

While women can continue to live in their marital homes and receive maintenance, Stanley from Odenadi explained that husbands in private employment can easily hide their earnings to ensure that their wives receive only the 500 rupees a month statutory minimum in maintenance (about U.S. $11).[254] Yet if the husband goes to jail for committing "cruelty" and has no other assets, the wife may lose her maintenance because the husband is no longer able to earn income.[255] This serves as a disincentive to report offenses to the police. The wife also may not be able to obtain partial ownership of her husband's house because of ancestral property claims by her husband's family.[256]

Laws have done little to prevent the exchange of dowry and the murder of women as a result of dowry harassment.[257] Furthermore, only thirty percent of dowry death prosecutions result in convictions because of evidentiary issues.[258] For example, it is difficult to prove that an abuser subjected a woman to cruelty before death unless she wrote it down or told someone.[259] Most importantly, in practice, the Act does not protect women from dowry harassment because the Act only "catches dowry demands after the death of a woman."[260]

Indian NGOs like Vimochana and Odenadi do great work, but their resources are limited and can help only a very small percentage of the population. Although the greater Mysore area that Odenadi serves had a population of over 2,600,000 in 2001,[261] Odenadi has space for only forty-six women, with most spaces reserved for victims of human trafficking.[262] Furthermore, the state delegates the management of state-run services to Odenadi, but does not provide enough funding to do so, so Odenadi must supplement

253. *See* Garg, *supra* note 201, at 16.

254. Interview with Stanly K.V., *supra* note 105. But if the husband has a government job, ten percent of his salary is automatically garnished and sent to his wife. *Id.*

255. *Id.*

256. *Id.*

257. Lecture by Dr. Elizabeth V.S., *supra* note 230.

258. *Id.*

259. *Id.*

260. *Id.* However, it could be argued that prosecution might be a deterrent.

261. *Know India: Karnataka*, GOVERNMENT OF INDIA (2010), http://india.gov.in/knowindia/districts/andhra1.php?stateid=KA.

262. Interview with Stanly K.V., *supra* note 105.

the twenty-four-hour hotline and counseling services program with its own money.[263] While laws are in place to protect women, in practice the laws fail to do so, and NGOs have only limited resources.

2. The Culture

The main reason the laws do not adequately protect women is because laws designed to fight deep-rooted culture in India have been failures.[264] Despite the numerous laws protecting women, culturally, Indians still view domestic violence as a private problem; neighbors, extended family members, police, and even judges are often reluctant to interfere.[265] In an anti-domestic violence ad campaign called "Ring the Bell,"[266] a man hears his neighbor hitting his wife. She screams and pleads. The man walks next door and rings the doorbell. The screaming stops, the neighbor answers the door, and the man asks to borrow a cup of milk. The campaign is designed to create awareness, yet reveals how domestic violence is still a private problem; the "solution" the ad encourages is not calling the police or an NGO, confronting the neighbor about the error of his actions, or offering the wife a safe place to stay, but rather passive-aggressively asking for milk to interrupt the violence.[267] The public service announcement reveals that even addressing domestic violence passive-aggressively is still a big cultural step for many Indians.

Many Indians are hesitant to intervene when domestic violence occurs.[268] Domestic violence is rarely a "hidden . . . private activity" in villages because people in adjacent houses can easily hear the screaming and fighting.[269] Yet in a study of three rural villages in Karnataka, other villagers usually

263. *Id.* Each hotline must have a counselor and three field social workers, but the government gives Odenadi only 3000 rupees per month (U.S. $66) for each social worker, and 6000 rupees per month (U.S. $128) for the counselor. It is "impossible," according to Stanly, to get qualified workers at such a low price. *Id.* Both times I visited Odenadi, the twenty-four-hour hotline operator was not present and no one was manning the line.

264. Lecture by Dr. Elizabeth V.S., *supra* note 230.

265. Interview with Lacksmi, *supra* note 226.

266. Bell Bajao Campaign, YOUTUBE, http://www.youtube.com/watch?v=9t3BPv8tBP4 (last visited Mar. 20, 2012).

267. *Id.*

268. Rao, *supra* note 203, at 9.

269. *Id.* at 9.

intervene only when the "community views the violence as extremely severe or 'meaningless.' "[270]

Even victims of domestic violence go to the police only "as a matter of last resort."[271] Statistics show that two percent of victims seek intervention from police and only one third of abused Indian women seek help from non-law enforcement sources, such as village councils, elders, or NGOs.[272] Discussing marital relations and domestic violence openly in an office, court, or society is a "daunting task" for women.[273] Rapes in police custody are also common, which may discourage women from entering a police station to report a crime.[274] Women may also be reluctant to report cruelty because their marriage—which may have been difficult to obtain in the first place because her family paid an expensive dowry to give her the opportunity to marry—may dissolve.[275] The lack of sensitivity and domestic violence training for police, protection officers, and judges exacerbates this problem.[276] If public servants are not trained how to appropriately deal with the nuances of domestic violence cases, they will perpetuate the culture of condoning domestic violence that the laws intend to counteract.[277] For all of these reasons, women are unlikely to report abuse to the police.

3. The Corruption: Rich People Can Buy "Whatever They Want"

Corruption in India is widespread and often prevents victims from seeking justice. It is generally accepted in India that both "police and courts consciously choose not to enforce laws designed to protect women."[278] A study by 2005 Transparency India found that more than ten percent of Indian households reported paying bribes to the police in order to obtain services.[279] Transparency International scored India as

270. *Id.* at 9–10.
271. Interview with Stanly K.V., *supra* note 105.
272. *DV in the News*, *supra* note 218.
273. Rajesh, *supra* note 194, at 140.
274. Hornbeck et al., *supra* note 69, at 288.
275. Interview with Lacksmi, *supra* note 226.
276. No gender-sensitization training had been provided for protection officers and magistrate judges as of 2007. *See* Hornbeck et al., *supra* note 69, at 287.
277. *See id.*
278. *Id.* at 288.
279. *Country Advice: India*, THE UN REFUGEE AGENCY, http://www.unhcr.org/refworld/country,,AUS_RRT,,IND,,4d9992052,0.html (last visited Mar. 20, 2012).

a 3.1 on a scale of one to ten, zero being highly corrupt and ten being clean.[280] Stanley from Odenadi explained that supervisors tell police officers to collect a certain number of bribes per month.[281] Even if the abuser himself is not working for the government, police are known to extort bribes from women reporting domestic violence, threatening not to investigate the case without under-the-table payment.[282] Stanley noted that when Odenadi is involved in the legal process, its presence serves as a check on corruption and women usually receive the protection they need.[283] Yet NGOs lack the resources to combat a country-wide culture of corruption. As Arjun, a young Brahmin, told me, "If you have money, you can get away with murder."[284] The widespread corruption paired with the numerous disincentives women have to report domestic violence make seeking protection of the laws an almost insurmountable task for victims.

4. Can Brahmin Women Prove that the Government Is Unable or Unwilling to Protect Them?

Under the law, Brahmin women receive the same government protection as other women, which means they face the same barriers all Indian women face who are seeking the protection of the government. Yet the predominance of Brahmins in civil service and politics may further hinder a victim's ability to stay safely in India.[285] The Center for Gender and Refugee Studies' database, which gathers information about asylum applicants, shows two grants of asylum for victims (one a Brahmin) who were unable to invoke the government's protection because one of their abusers was a "powerful government official"[286] and the other a "security

280. *Corruption Perceptions Index 2011*, TRANSPARENCY INTERNATIONAL (2011), http://cpi.transparency.org/cpi2011/results/.

281. Interview with Stanly K.V., *supra* note 105.

282. *INDIA: Police extort money from a victim of domestic violence in Assam*, ASIAN HUMAN RIGHT COMM'N (Jun. 2, 2010), http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-075-2010.

283. Interview with Stanly K.V., *supra* note 105.

284. Interview with Arjun, *supra* note 120.

285. LIDDLE & JOSHI, *supra* note 79, at 245.

286. CENTER FOR GENDER & REFUGEE STUD., *supra* note 2 (search the database with "India" selected for Nationality and "domestic violence" selected for Type of Persecution/Case; follow "408" hyperlink).

forces employee."[287] As these cases illustrate, Brahmin husbands who abuse their wives may be able to use their connections to avoid prosecution. On the other hand, urban Brahmin women are more likely to be educated, and many come from middle- to upper-class families.[288] These Brahmin women may have the resources to connect with an NGO or a lawyer to ensure that their husbands are prosecuted and that the protection orders are enforced. They may also come from progressive families, which may take their daughter back into their home. Overall Indian society tolerates domestic violence, making it difficult for victims to seek protection.[289]

While India has laws to protect victims of domestic violence, these laws do not adequately address the problem of widespread underreporting of violence or the pervasive corruption, fight the cultural norms that still perpetuate domestic violence, or provide meaningful aid to women in rural areas.[290] Therefore, it is likely a rural Brahmin woman could prove the Indian government is unable or unwilling to protect her.

IV. WHETHER BRAHMIN WOMEN CAN MEET THE OTHER STATUTORY REQUIREMENTS FOR ASYLUM OR OVERCOME NON-LEGAL BARRIERS

Once an asylum applicant demonstrates she has been persecuted in the past, the burden shifts to the DHS attorney to prove that (1) the applicant's circumstances have *fundamentally changed*, that (2) she could *relocate to another part of India*, or that (3) *some other serious harm would not occur* if she returns to India.[291] If DHS cannot meet its burden, the applicant is granted asylum.[292] If DHS does meet its burden, then the applicant can still obtain asylum if she can show that there are compelling circumstances to grant asylum, or that she would fall victim to other serious harm if she returns to India.[293] Even if a Brahmin woman does meet all of

287. *Id.* (search the database with "India" selected for Nationality and "domestic violence" selected for Type of Persecution/Case; follow "198" hyperlink).

288. *See supra* Part II.B.

289. Geethadevi et al., *supra* note 231.

290. *See* Hornbeck, *supra* note 69, at 273.

291. 8 C.F.R. § 208.13(b) (2012).

292. *See id.* Of course the applicant must meet other requirements not discussed in this Note, such as the commission of no serious crimes.

293. *Id.* § 208.13(b)(1)(iii).

these requirements, there are numerous non-legal barriers to obtaining asylum.

A. Changed Circumstances

If DHS, the entity representing the government in defensive asylum cases, can prove the original threat of persecution against the victim no longer exists, the government will have met its burden to prove changed circumstances.[294] Changed circumstances could include the death of the victim's abuser, proof the government would now be able to protect the victim, or proof that he would not abuse her further if she returned to India.[295] The DHS Supplemental Brief argues that a claim of fear of future persecution is bolstered if "the abuser would not recognize a divorce or separation as ending the abuser's right to abuse the victim."[296] The Brief notes that the record in *Matter of L-R-* has many "instances of repeated abuse even after [L-R-] left," including her husband pursuing her from Mexico to the United States.[297] The persistence of Latin American men in pursuing their partners is well-documented.[298] Yet Indian men tend not to pursue their fleeing wives, according to Lacksmi at the NGO Vimochana.[299] There are always exceptions. In one affirmative asylum case, USCIS granted asylum to an Indian woman whose husband threatened to kill her and her family unless she returned to him.[300] In another Indian asylum case that was eventually granted, the husband threatened to take away the victim's child if she did not return, and his in-laws "vow[ed] to avenge the 'dishonor' she has brought on them" for leaving her son.[301] Each asylum case is a fact-specific inquiry, but evidence that

294. N-M-A-, 22 I. & N. Dec. 312, 318 (BIA 1998).
295. *Cf.* S-A-, 22 I. & N. Dec. 1328, 1335. (BIA 2000).
296. DHS Supp. Br., *supra* note 19, at 16.
297. *Id.*
298. *Background: Ms. L-R-'s Story*, CENTER FOR GENDER & REFUGEE STUD., *available at* http://cgrs.uchastings.edu/campaigns/Matter%20of%20LR.php (last visited Mar. 20, 2012).
299. Interview with Lacksmi, *supra* note 226.
300. CENTER FOR GENDER & REFUGEE STUD., *supra* note 2. (search the database with "India" selected for Nationality and "domestic violence" selected for Type of Persecution/Case; follow "408" hyperlink). "Eventually, fearful that her refusal to go back to her husband would endanger her family, she returned to her husband." *Id.*
301. CENTER FOR GENDER & REFUGEE STUD., *supra* note 2 (search the database with "India" selected for Nationality and "domestic violence" selected for Type of Persecution/Case; follow "77" hyperlink).

Indian men tend not to pursue or attack their wives after the woman chooses to leave the domestic relationship could help DHS meet its burden to prove that a fundamental change has occurred.[302]

B. Relocation Within India

If the government can prove the victim can safely relocate to another part of the country, the victim will not be able to obtain asylum.[303] When an immigration judge is determining whether internal relocation is reasonable, he considers the following factors: whether the applicant would face other serious harm, whether there is ongoing civil strife, whether the country has good infrastructure, and whether there are geographical limitations or social and cultural constraints such as gender, health, social, and familial ties.[304] Although not all of the factors fall in favor of Brahmin women, there are many barriers that would make it difficult to relocate within India.

The fact that India is a very large country that is not in a state of pervasive civil strife indicates that Brahmin women could relocate in-country. Relocation is generally unreasonable in smaller countries such as Togo because it is easier for the abuser to find the victim, but India is the seventh largest country in the world.[305]

While India is a large country and lacks pervasive civil strife, it is nevertheless a difficult place to relocate due to language barriers, social and cultural ties, and lack of housing, education, and money.[306] While English and Hindi are the official languages of India, there are numerous regional languages, and often Indians will speak the regional language

302. Interview with Lacksmi, *supra* note 226. This is contrasted to American culture, where women attempting to leave their husbands are most susceptible to violence. *See* NAT'L COUNCIL ON CHILD ABUSE AND FAMILY VIOLENCE, SPOUSE/PARTNER ABUSE INFORMATION, http://www.nccafv.org/spouse.htm (last visited Mar. 20, 2012).

303. 8 C.F.R. § 208.13(b)(1)(i) (2012).

304. *Id.* § 208.13(b)(3).

305. *See* Kasinga, 21 I. & N. Dec. 357, 367 (BIA 1996). *Countries of the World by Area*, ONE WORLD NATIONS ONLINE, http://www.nationsonline.org/oneworld/countries_by_area.htm (last visited Feb. 18, 2012).

306. *Background Note: India*, U.S. DEPARTMENT OF STATE (Nov. 8, 2011), http://www.state.gov/r/pa/ei/bgn/3454.htm.

but not speak English or Hindi.[307] Women who seek to relocate in a different region of India may have difficulty communicating or obtaining a job because of similar language barriers.[308]

Lack of housing presents a major problem for women fleeing domestic violence.[309] As described in Section III.B.1, there are pitifully few government shelters, and those that exist are poorly managed and funded.[310] Often shelters will limit the age and number of children a fleeing victim can bring with her, which discourages victims with children from leaving their abusers.[311] From his experience, Stanley from Odenadi observed that public resources are easily abused if an NGO is not overseeing the process. Many NGOs such as Odenadi run domestic violence shelters, but their scope is limited; Odenadi can only house eight domestic violence victims, and some regions do not even have an NGO like Odenadi.[312] Single women searching for apartments are often subject to housing discrimination—landlords are often skeptical to rent to a single woman, believing that she is "loose" sexually.[313]

Women often lack the economic, educational, or familial resources to survive on their own. Female Havik Brahmins in Karnataka usually do not contribute to the family income.[314] As mentioned in Section III.B.1, most women do not inherit money or property from their parents, and abusers with non-government jobs usually pay the statutory minimum 500 rupees a month.[315] Wives can feel pressured to stay with their husbands because it is difficult for divorced women with children to find a second husband.[316]

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307. *Indian Languages*, ENCYCLOPEDIA BRITANNICA, *available at* http://www.britannica.com/EBchecked/topic/285754/Indian-languages (last visited Mar. 21, 2012).

308. *See id.*

309. Judith G. Greenberg, *Criminalizing Dowry Deaths: The Indian Experience*, 11 AM. U. J. GENDER SOC. POL'Y & L. 801, 838 (2003).

310. *Id.* (describing how Madhya Pradesh allocated 0.03% of its budget for women's shelters); *see* Nishi Mitra, *Best Practices Among Responses to Domestic Violence in Maharashtra and Madhya Pradesh*, TATA INST. SOC. SCI., Sept. 1999, at 7, *available at* http://www.cwds.ac.in/library/collection/elib/dv/dv_best_practices.pdf, at 7; *see also* Interview with Stanly K.V., *supra* note 105.

311. Mitra, *supra* note 310, at 8.

312. Interview with Stanly K.V., *supra* note 105.

313. Dummett, *supra* note 70.

314. ULLRICH, *supra*, note 140, at 98.

315. Interview with Stanly K.V., *supra* note 105.

316. Greenberg, *supra* note 309, at 838. However, this is not impossible. A dating website called Second Shandi is for divorced Indians and is gaining

While Brahmin women are statistically more educated than their non-Brahmin counterparts, Brahmin women are still less employed than their male counterparts, in part due to Brahmin families often prioritizing the education of their sons rather than their daughters.[317] Seventy-eight percent of Indian women are unemployed, and those that are employed earn 40-60% less than their male counterparts.[318] Orthodox Brahmin women are further limited in the types of jobs they can perform because "Brahmin prohibitions prevent Brahmin women from mixing too much with other castes."[319] Brahmin women are less able to return to their natal home than women of other castes.[320]

Brahmin families give their daughters' husbands a huge dowry, often impoverishing themselves in the process.[321] With this dowry their responsibility ends: "their door closes on their daughter . . . she no longer has any rights in her father's house."[322] The mothers of Dogra Brahmins in Northern India would not accept their daughters' divorces, but their educated daughters believe they would nevertheless proceed to get a divorce if they were unhappy.[323] Educated, working Brahmin women can probably relocate and support themselves without the assistance of their parents, but internal relocation would be daunting for a Brahmin woman who has no means of supporting herself when her family will not take her back.

C. Compelling Reasons or Other Serious Harm

If DHS is able to meet its burden to prove that the victim's circumstances have changed or the victim can relocate within India, the victim cannot be granted asylum except in two narrow circumstances. The burden shifts to the victim to demonstrate *compelling reasons* for being unwilling or unable to return to India arising out of the severity of the past

popularity. *See* SECOND SHANDI, www.secondshandi.com (last visited Mar. 21, 2012).

317. *See* KAPADIA, *supra,* note 24, at 57.

318. Greenberg, *supra* note 309, at 838–39.

319. KAPADIA, *supra* note 24, at 55–56. Kapadia interviewed a Brahmin woman who is now an astrologer who must mix with many castes as part of her job, which results in her being a social outcast among her fellow Brahmins. *See id.*

320. *Id.* at 55.

321. *Id.*

322. *Id.* at 55 (comparing the plight of the Brahmin women to that of middle caste Tamils, most of whom continue to retain rights in their father's home).

323. *See* Sharma et al., *supra* note 105, at 253.

persecution.[324] Or, the victim must prove there is a reasonable possibility that she may suffer *other serious harm* upon deportation from the United States.[325]

A compelling reason not to deport an applicant who no longer has a well-founded fear would be if the severity of the persecution rose to the level of torture and the victim retained permanent scars.[326] In the seminal case on humanitarian asylum, *Matter of Chen*, a Chinese Christian who was brutally tortured and permanently disfigured received humanitarian asylum because it would have been inhumane to return him to China.[327] It is certainly possible that severe domestic violence resulting in disfigurement or permanent injuries, especially a successful attempt to burn a wife with kitchen oil, could meet that standard.

A Brahmin woman may be able to meet the "other serious harm" requirement. "Other serious harm" is defined as "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but equals the severity of persecution."[328] The BIA defines physical persecution as the "infliction of harm or suffering by a government."[329] Economic conditions "so severe as to deprive applicant of all means of earning living" can also rise to the necessary level of persecution.[330] For example, if the victim has fled her husband, she has abandoned her communal property, so she may have few resources or lack a place to live.[331] Further, her family may not be willing to take her because they consider it her duty to "adjust" to her husband.[332] If she is not

324. Belishta v. Ashcroft, 378 F.3d 1078, 1081 (9th Cir. 2004).

325. *Id.*

326. 8 C.F.R. § 208.13(b)(1)(iii)(A)–(B). In *Nazaraghaie v. INS,* 102 F.3d 460, 463 (10th Cir. 1996), the court held that an applicant can receive humanitarian asylum if return would "sear a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of future persecution."

327. Chen, 20 I. & N. Dec. 16, 20–21 (BIA 1989).

328. Krastev v. INS, 292 F.3d 1268, 1271 (10th Cir. 2002) (quoting 65 Fed.Reg. 76121, 76127 (2000)).

329. Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985).

330. Borca v. INS, 77 F.3d 210, 215 (7th Cir. 1996) (describing how a Romanian doctor who was forced to do farm labor was denied asylum because forced farm work did not deprive her of all means of making a living.).

331. *See* Sharma, *supra* note 105, at 247 ("Married women in most cases do not have any independent source of income and are economically dependent on their husbands.").

332. *Id.* ("In some cases parents are also unwilling to take the responsibility of their married daughters, with or without children.").

educated and lacks social support, she may have no way of making a living. If she is living in a smaller village, she may be ostracized from and stigmatized by the community. Poverty and social isolation make women more vulnerable to trafficking,[333] or vulnerable to abuse by another man. All of these factors could deprive the victim of all means of earning a living and make her vulnerable to a level of harm, such as human trafficking, kidnapping or rape, that equals the severity of persecution. Demonstrating compelling reasons or other serious harm are fact-specific inquiries, but it is certainly possible for Indian Brahmin women to meet either scenario.

D. Other Practical Considerations that May Prevent Indian Women from Seeking Asylum in the United States

Even if an orthodox Brahmin woman can be a member of a PSG, there are many other barriers that may prevent her from seeking asylum in the United States. The United States is far and travel is expensive.[334] Furthermore, a Brahmin woman may lack motivation to go to the United States if she does not already have family members or friends there. Moreover, Indian governmental, nongovernmental, and familial resources, while insufficient resources for most Indian victims, may be sufficient resources for some victims of domestic violence.

For the same reason most women across the world do not report domestic violence—economic dependency, shame, fear of retaliation, among others—it is possible that most Indian women would likely not seek asylum.[335] Post Traumatic Stress Disorder frequently can cause victims of domestic violence to avoid anything that reminds them of their trauma and renders them unable to participate in activities unrelated to immediate

333. Interview with Stanly K.V., *supra* note 105.

334. On Travelocity, a one-way flight from Bangalore, India to New York City in April 2012 was $780 with tax. An asylum seeker would also have other expenses, including food, shelter, and other transportation. TRAVELOCITY, www.travelocity.com (last visited Mar. 21, 2012).

335. Enrique Gracia, *Unreported Cases of Domestic Violence Against Women: Towards an Epidemiology of Social Silence, Tolerance, and Inhibition,* 58 J. EPIDEMIOLOGY & CMTY. HEALTH 536, 536–37 (2004), *available at* http://jech.highwire.org/content/58/7/536.full.

survival, such as the process of seeking asylum.[336] Even if an Indian woman arrives in the United States, winning an asylum case requires numerous experts, submission of extensive country condition evidence and legal memoranda, and the victim's countless retelling of the persecution to attorneys, officers, or judges.[337]

These non-legal barriers make winning an asylum claim difficult for most Indian women, but not impossible, particularly for Brahmin women. This conclusion is rooted in generalizations that Brahmins are generally wealthier,[338] more educated,[339] and therefore may have easier access to the United States than other castes. Brahmin women may be able to borrow money from a relative to travel to the United States, and, because of their higher education levels, they may have a higher likelihood than other castes of getting international jobs. Asha, the Brahmin woman discussed in the introduction, came to the United States because her husband had an employment visa.[340] On the other hand, while some Brahmins are well educated and cosmopolitan, many live in rural villages and have less education and resources to pursue an asylum claim.[341] The Brahmin women in villages who may be best able to be a PSG and meet the other requirements of asylum may be the Brahmins who have the least exposure to the United States or higher education. Brahmin women's education, socio-economic status, and connections to the United States impact which kinds of Brahmins can seek asylum.

CONCLUSION

Orthodox Brahmin women who are unemployed or uneducated live in rural villages and do not have a supportive

336. Victims of domestic violence often meet the criteria for PTSD. MARGARET J. HUGHES & LORING JONES, SAN DIEGO STATE UNIV., WOMEN, DOMESTIC VIOLENCE, AND POSTTRAUMATIC STRESS DISORDER (PTSD) 57 (2000), http://www.csus.edu/calst/government_affairs/reports/ffp32.pdf.

337. John P. Wilson & Boris Drožđek, *Uncovering: Trauma-Focused Treatment Techniques with Asylum Seekers*, *in* BROKEN SPIRITS: THE TREATMENT OF TRAUMATIZED ASYLUM SEEKERS, REFUGEES, WAR AND TORTURE SURVIVORS 243, 244 (John P. Wilson & Boris Drožđek eds., 2004).

338. RAJESH SHUKLA ET. AL., CASTE IN A DIFFERENT MOULD 47 (2010).

339. *See* BAIRY, *supra* note 106, at 104.

340. CENTER FOR GENDER & REFUGEE STUD., *supra* note 2 (search the database with "India" selected for Nationality and "domestic violence" selected for Type of Persecution/Case; follow "408" hyperlink).

341. GHOSH & GHOSH, *supra* note 73, at 137, 145.

natal family could constitute a PSG. They could also show that the Indian government is unable to protect them, since few resources are available to women in rural areas. Brahmin women with education or those living in bigger cities, such as Bangalore, would probably not qualify for asylum nor need to seek asylum. This is because they tend to have more progressive families who may take the victim back into their home, a progressive social support system, or the Brahmin woman may be able to leave and find a job to support herself and her children economically.[342] While only about nine percent of the Indian population is Brahmin, the grand total of women who could be members of this PSG could be upwards of around 3.78 million given that seventy percent of India's 1.2 billion people live in rural areas where abuse is largely condoned.[343]

There would be broad implications if the BIA, in a precedent-making decision, granted a Brahmin woman asylum based on her membership in a PSG. Some asylum advocates might celebrate the fact that the BIA finally affirmed that victims of domestic violence should obtain asylum. Other advocates might worry that it could hinder the cause of non-Brahmin women who want to obtain asylum. Brahmin women can constitute a PSG because they come from a distinct culture with specific, documented traditions, and Indian society is aware of their group and their traditions. Other battered women may not be able to meet the precedent the Brahmin women have set.

Asha, the abused Brahmin wife, applied affirmatively for asylum as part of a PSG of "Hindu women who have suffered extensive persecution form their husbands who believe that Hindu women are inferior to men."[344] An asylum officer granted her case without a decision or explanation.[345] While decisions made by asylum officers are not precedential or published,[346] her case lends credence to the assertion that some Brahmin women can constitute a valid particular social group.

342. *See* discussion *supra*, Part II.

343. OFF. OF THE REGISTRAR GEN. & CENSUS COMM'R, INDIA, RURAL-URBAN DISTRIBUTION, 2001 CENSUS, http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/rural.aspx.

344. CENTER FOR GENDER & REFUGEE STUD., *supra* note 2 (search the database with "India" selected for Nationality and "domestic violence" selected for Type of Persecution/Case; follow "408" hyperlink).

345. *Id.*

346. O'Dwyer, *supra* note 8, at 192 n.38.

IT HAPPENS IN THE DARK: EXAMINING CURRENT OBSTACLES TO IDENTIFYING AND REHABILITATING CHILD SEX-TRAFFICKING VICTIMS IN INDIA AND THE UNITED STATES

EMILY K. HARLAN*

The governments of India and the United States have been struggling for years to eradicate child sex trafficking within their borders. Nevertheless, many Indian and American child sex-trafficking victims have yet to be identified as victims or provided with rehabilitation services. Both countries need to make additional legal and policy reforms to ensure their legal systems correctly identify child sex-trafficking victims and provide them with meaningful opportunities for rehabilitation. This Note identifies police corruption in India and the disparate treatment of foreign and domestic victims in the United States as the major obstacles to correctly identifying child sex-trafficking victims, and argues that each country can learn from the other's successes to improve identification efforts in both countries. In addition, the governments of India and the United States should provide for the rehabilitation of child sex-trafficking victims by incorporating specialized safe homes for the victims within the existing juvenile legal systems of both countries.

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Lost in Dark Depression
Lost in dark depression,
Not knowing where to run.
I opened the windows to my soul
To see what I could learn.
I swept up depression,
Scrubbed the sadness and the hurt,
I put it all in trash bags
And set them by the curb.
I found, stashed in a corner
Tucked high upon a shelf,
A treasure chest of knowledge
That I could love myself.
And wherever my future takes me
I know that I will win,
Because I opened the
windows to my soul,
And let the light shine in.[1]
- Calesha, age 19
Sex Trafficking Survivor

1. *Empowering Survivors*, GIRLS EDUC. & MENTORING SERV., http://www.gems-girls.org/what-we-do/survivor-voices (last visited Mar. 12, 2012).

INTRODUCTION

On a sunny March afternoon in India, fifteen American law students sat in children's desks in a small classroom, eager to learn from two experts on child sex trafficking in India. Stanly K. V. (Stanly) and Parashurama M. L. (Parashu) are the founders of Odanadi, a safe house for child sex-trafficking victims and a home base for community outreach and rescue operations. With the patience and wisdom that comes with over twenty years of experience, Stanly and Parashu generously donated a day from their busy schedules to answer our many questions. How is it, we wondered, that the sex-trafficking industry can flourish in a country like India where traditional religious values place such a negative stigma on sexuality? Simple, Stanly replied: "It happens in the dark."[2] There is a powerful metaphorical message beyond the literal meaning of Stanly's words. In both India and the United States, child victims of sex trafficking are too often lost in the darkness of legal systems that do not recognize them. If they are discovered, the darkness of their suffering requires specialized rehabilitation efforts to give these children a meaningful chance for a brighter future.

Child sex trafficking is a problem that spans national and cultural boundaries.[3] Trafficked children can be found not only in the dark corners of Indian brothels,[4] but also in the dark alleys of major American cities.[5] Both countries currently face major obstacles to identifying and rehabilitating child sex-trafficking victims. In India, police corruption is the main obstacle.[6] When corrupt officers discover child sex-trafficking victims in an Indian brothel, they solicit bribes from the brothel owners rather than rescuing the victims. In the United States, the major obstacle to identifying child victims is the legal system's disparate treatment of foreign and domestic

2. Interview with Stanly K.V. & Parashu M.L., Founders, Odanadi, in Mysore, India (Mar. 21, 2011).

3. SILVA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY 22–26 (2008).

4. HUMAN RIGHTS WATCH/ASIA, RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS 1 (1995), *available at* http://www.hrw.org/sites/default/files/reports/india957.pdf.

5. *See Selling the Girl Next Door* (CNN television broadcast Jan. 23, 2011), *transcript available at* http://transcripts.cnn.com/TRANSCRIPTS/1101/23/cp.01.html.

6. Interview with Stanly & Parashu, *supra* note 2.

victims. Instead of being treated equally as victims of the same abhorrent crime, foreign child victims are branded as illegal immigrants facing deportation, while domestic child victims are dismissed or punished as prostitutes. Thus, both types of victims are receiving inequitable treatment, albeit for different reasons.

In addition to failing to identify child victims of sex trafficking, India and the United States also fail to provide these children with meaningful opportunities for rehabilitation. The juvenile legal systems in both countries are currently not structured to accommodate the particular needs of child sex-trafficking victims. Both countries have a juvenile legal system for children who commit crimes and a juvenile legal system for children who are abused or neglected by their parents or guardians. Neither of these systems is currently structured to accommodate the rehabilitation of children who are severely and repeatedly sexually abused for the profit of their traffickers.

To better serve child sex-trafficking victims in the future, the Indian justice system must take active measures to combat internal corruption so that the police, or a specialized police unit, can be relied upon to enforce existing anti-trafficking laws. Meanwhile, the United States should amend its laws to benefit all children instead of differentiating between foreign and domestic victims. Foreign and domestic child victims of sex trafficking suffer the same evils and deserve rehabilitative services regardless of their place of birth.

Both countries can improve access to appropriate rehabilitation for child sex-trafficking victims by reforming their juvenile legal systems to recognize child sex-trafficking victims as a unique and distinct population of children in need of protection. Children who have been trafficked for sex should not be placed in the juvenile delinquency system,[7] and their unique needs are not likely to be met within the current structure of the juvenile dependency system in either country.[8]

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7. *See infra* Parts II.B, II.D. The delinquency system is designed for children who commit crimes to receive age-appropriate punishment and rehabilitation. A child perpetrator's sentence could include incarceration in a juvenile detention facility. In the United States, delinquent children may also be monitored for a period of time by a juvenile probation department. Note that the delinquency system in India is called "Juveniles in Conflict with the Law." *See infra* Parts II.B, II.D.

8. *See infra* Parts II.B, II.D. The dependency system is designed for children who are abused and/or neglected by their parents or guardians. In the United

Instead, child sex-trafficking victims need access to specialized safe homes with services to help them overcome months or years of sexual and physical abuse, isolation, and loss of identity. Because these children have suffered the worst kinds of harm, India and the United States must take action, legally and socially, to shed light on the unmet needs of child sex-trafficking victims.

Part I of this Note begins by describing the typical characteristics and vulnerabilities of child sex-trafficking victims in India and the United States. Part I also examines the major obstacles to identifying and rescuing child victims of sex trafficking in India and the United States. Part II focuses on current structural barriers to providing effective rehabilitative services to child sex-trafficking victims within the Indian and American juvenile legal systems. Part III presents my argument for how to improve the existing legal systems of both countries to better identify and rehabilitate child sex-trafficking victims. India and the United States are two very different countries, but each has an important lesson to teach the other on the issue of child sex trafficking.

SCOPE AND INTENT

This Note is intended to compare and analyze child sex trafficking in India and the United States with particular emphasis on the laws, juvenile legal systems, and rehabilitation options of both countries. This Note is not intended to be a comprehensive survey of all state laws and policies applicable to sex-trafficking victims. Instead, it focuses on the federal or national laws of both countries and on the typical structure of the juvenile legal system at the state or local level.

Additionally, this Note provides general suggestions for restructuring the current juvenile legal systems of both countries to improve identification of child sex-trafficking victims and to accommodate specialized rehabilitation facilities for these children. In the United States, the actual

States, local health and human services agencies are typically in charge of identifying and bringing these families to court. The agencies are also responsible for providing services to the families to facilitate the safe return of the children to their parents or guardians. If safe return is not an option, other placement options for dependent children include foster care, group homes, guardianship, and adoption. The dependency system in India is called "Children in Need of Care and Protection." *See infra* Parts II.B, II.D.

implementation of these general suggestions will require additional state-by-state analysis because American juvenile legal systems are structured through state legislation. Nevertheless, the juvenile legal systems of both countries share sufficiently similar structural trends to support this Note's argument for improvement.

Finally, this Note argues that specialized rehabilitation facilities are a desirable placement option for child victims of sex trafficking and should be incorporated into the juvenile legal systems of both countries. This argument is based in large part on my experiences at Odanadi, a specialized rehabilitation facility in India, and on my research of specialized sex-trafficking programs and homes in the United States, such as Girls Educational and Mentoring Services (GEMS) in New York. The argument for the creation and funding of more of these specialized rehabilitation homes will be strengthened if and when scientific research is conducted to establish their effectiveness. In the meantime, the anecdotal evidence is highly positive.

I. THE HIDDEN CHILDREN

Child sex trafficking is a serious problem in India and the United States, and yet it is difficult to obtain consistent, reliable estimates of the number of child sex-trafficking victims in these countries and across the world.[9] As the United Nations Educational, Scientific, and Cultural Organization (UNESCO) explains:

> When it comes to statistics, trafficking of girls and women is one of several highly emotive issues which seem to overwhelm critical faculties. Numbers take on a life of their own, gaining acceptance through repetition, often with little inquiry into their derivations. Journalists, bowing to the pressures of editors, demand numbers, any number. Organizations feel compelled to supply them, lending false precisions and spurious authority to many reports.[10]

To address this problem, UNESCO is conducting the Trafficking Statistics Project—a literature review and meta-

9. *Trafficking Statistics Project*, UNESCO BANGKOK, http://www.unescobkk.org/index.php?id=1022 (last visited Mar. 12, 2012).

10. *Id.*

analysis of existing statements on trafficking.[11] The project will compile the numbers cited by various sources, examine the methodology by which these numbers were calculated, and evaluate their validity.[12] The goal of the project is to "separate trafficking myths from trafficking realities."[13] In the meantime, the statistics cited in this Note are intended only to provide a general sense of the scope of the problem. The limitations of these statistics demonstrate one way in which the child victims of sex trafficking remain hidden children.

A. Defining "Child Sex-Trafficking Victim"[14]

In addition to problems with data collection, child sex-trafficking research is also plagued by definitional problems.[15] What is "sex trafficking," and who is a "child victim?" Law enforcement agencies in India and the United States cannot be expected to correctly identify child sex-trafficking victims without clear, consistent answers to these questions reflected in the laws and law enforcement policies. Unfortunately, definitional ambiguity persists in the laws of both countries.

The Indian Constitution grants citizens a fundamental right against exploitation.[16] Part III, Article 23(1) declares that "[t]raffic in human beings and *begar* [from the Hindi word for forced labor] and other similar forms of forced labour are prohibited and any contravention of this provision shall be an

11. *Id.*
12. *Id.*
13. *Id.*
14. Some feminists and activists take offense to the term "victim" and prefer "survivor," as survivor retains a sense of agency for sex-trafficked women. Because this Note is focused on the sex trafficking of children, I use "victim." Children are afforded a protected status in the United States precisely because their powers of agency, self-determination, and self-sufficiency are not yet fully developed. As our rape laws reflect, a child cannot consent to sex in the same manner as an adult, and use of the term "victim" helps underscore this principle. Nevertheless, I recognize that "survivor" may be more appropriate in practice for those involved in the rehabilitation process. For more information on the rehabilitation process, see Rachel Lloyd, *From Victim to Survivor, From Survivor to Leader*, GIRLS EDUC. & MENTORING SERV., *available at* http://www.gems-girls.org/from-victim-to-survivor-from-survivor-to-leader (last visited Apr. 30, 2012).
15. *See* Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1656 (2010).
16. INDIA CONST. art. III, § 23, *available at* http://www.cgsird.gov.in/constitution.pdf and http://lawmin.nic.in/coi/coiason29july08.pdf.

offence punishable in accordance with law."[17] Interestingly, "traffic in human beings" is not defined in the Indian Constitution. For purposes of Odanadi's work, Stanly has adopted the following definition of human trafficking:

> All acts involved in the recruitment, transportation, forced movement, and/or selling and buying of women and children within and/or across borders by fraudulent means, deception, coercion, direct and/or indirect threats, abuse of authority, for the purpose of placing a woman and/or child against her will or without her consent in exploitative and abusive situations such as forced prostitution, marriage, bonded labour, begging, organ trade, etc.[18]

A troubling aspect of this definition is that it implies that a child who consents to be a prostitute is not a victim of trafficking. Section 366A of the Indian Penal Code states, however, that any person who:

> by any means whatsoever, induces any minor girl under the age of 18 years to go from one place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.[19]

Section 366A implies that the minor's consent is irrelevant because her "seduction" is still cause for criminal punishment, the opposite of Stanly's definition. In practice, Stanly and Parashu overlook this definitional conflict.[20] They conduct rescue operations under the assumption that children cannot consent to living and working in a brothel.[21] Furthermore, they do not distinguish between children who are being sexually abused in the brothels and those who are present in the

17. *Id.* § 23, cl. 1.

18. ODANADI, HUMAN TRAFFICKING (2011). Stanly says that this definition was developed by the member states of the South Asian Association for Regional Cooperation (SAARC), but this definition is more expansive than that of SAARC. *See* S. ASIAN ASS'N FOR REG'L COOPERATION, SAARC CONVENTION ON PREVENTING AND COMBATING TRAFFICKING IN WOMEN AND CHILDREN FOR PROSTITUTION (2002), *available at* http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking___Prostitution.pdf.

19. PEN. CODE § 366A.

20. Interview with Stanly & Parashu, *supra* note 2.

21. *Id.*

brothels because they are the children of prostitutes.[22] All are vulnerable to witnessing and suffering sexual exploitation.[23]

Additional definitional ambiguities exist in India with respect to the gender of a child sex-trafficking victim. A "child" is defined under modern law in India as a person under eighteen years of age.[24] Nevertheless, Section 366A of the Indian Penal Code explicitly discriminates by gender, imposing punishment for the sexual exploitation of minor girls only.[25] Stanly's definition of trafficking could also be interpreted to apply only to female children since it speaks of "her will."[26] Once again, Stanly and Parashu pay no heed to this definitional ambiguity in practice.[27] During their rescue operations, Stanly and Parashu rescue all children present in the brothel, regardless of their gender.[28] Furthermore, Odanadi operates two separate safe homes on its property, one for boys and one for girls.[29] By glossing over the issue of who is legally a child sex-trafficking victim in India, Stanly and Parashu have been able to provide a safe home over the years for 450 abused children of both sexes.[30] Their gender-blind approach is the appropriate strategy for a non-governmental organization (NGO) engaged in counter-trafficking efforts in a country where actions sometimes speak louder than the laws.[31] Stanly and Parashu are acknowledging the realities of sexual exploitation in India by broadening the definition of child sex-trafficking victim in this manner.

The United States also struggles to provide clear, comprehensive legal definitions for identifying child sex-

22. *Id.*
23. *Id.*
24. Juvenile Justice Care and Protection of Children Act of 2000, ch. 1, § 2(k) (" 'juvenile' or 'child' means a person who has not completed eighteenth year of age"); *see also* U.N. Convention on the Rights of the Child, Part I, art. I, ratified by the government of India on Dec. 11, 1992 ("For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.").
25. *See* PEN. CODE § 366A.
26. ODANADI, *supra* note 18.
27. Interview with Stanly & Parashu, *supra* note 2.
28. *Id.*
29. *Id.*
30. *Id.*
31. India has many laws and constitutional provisions espousing democratic ideals like equality, but underenforcement remains a huge problem. For an overview of underenforcement of the laws in India as explained by the persistence of the caste system, see Smita Narula, *Equal by Law, Unequal by Caste: The 'Untouchable' Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255 (2008), *available at* http://idsn.org/uploads/media/Unequal_by_law_12.pdf.

trafficking victims. The United States' principal federal law on sex trafficking, the Victims of Trafficking and Violence Protection Act (TVPA), does not include a basic definition of human trafficking.[32] The Congressional Research Service's Trafficking in Persons (TIP) report of 2010 declares that the United States and the United Nations "generally characterize human trafficking in similar terms."[33] The United Nations defines human trafficking as follows:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation . . . .[34]

The United Nations has defined child trafficking in even broader terms, stating that "[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in [the general definition quoted above]."[35] For purposes of the United Nations protocol, a "child" is any person under eighteen years of age.[36] Joost Kooijmans and Hans van de Glind, two experts in the field of child slavery, explain that the strength of the United Nations definition of child trafficking lies in its simplicity:

> [Under the U.N. definition], children are considered to be victims of trafficking even where this took place without them being deceived or coerced. Not only does this take into

32. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

33. ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 1 (2010), *available at* http://fpc.state.gov/documents/organization/147256.pdf.

34. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3(a), Dec. 25, 2003, 2237 U.N.T.S. 319 [hereinafter U.N. Trafficking Protocol], *available at* http://treaties.un.org/doc/publication/UNTS/Volume%202237/v2237.pdf.

35. *Id.* at art. 3(c).

36. *Id.* at art. 3(d).

> account their special vulnerability, but it also makes it easier for law enforcement agencies and prosecutors to provide evidence to ensure that child traffickers are duly punished.[37]

If the United States officially adopted the United Nations definition, law enforcement could clearly identify all children exploited as prostitutes as victims of child sex trafficking.

Instead, the U.S. Congress chose to include more restrictive definitions in the TVPA, distinguishing between "sex trafficking" and "severe forms of trafficking in persons."[38] In the TVPA, the term "sex trafficking" means the "recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,"[39] while the term "severe forms of trafficking in persons" refers to "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."[40] The distinction is a matter of consent: A person who engages in sex trafficking has impliedly consented to performing commercial sex acts, while a victim of severe trafficking has been forced or coerced into performing commercial sex acts. Although the end result is the same as under the United Nations definition—sexually exploited children under eighteen automatically qualify as victims of severe sex trafficking irrespective of force or consent[41]—the definitional dichotomy between sex trafficking and "severe" sex trafficking encourages law enforcement to ask the wrong initial question: Did this person consent? Instead, law enforcement's initial investigation should focus on the age of the victim because when the victim is a minor the issue of consent is irrelevant. The U.S. Congress should revise its definitions of sex trafficking to clarify that law enforcement need not interrogate child victims about whether they consented to sell their bodies for sex.

India and the United States have both failed to adopt clear, comprehensive legal definitions of human trafficking, sex trafficking, and child sex trafficking. This Note adopts the

37. Joost Kooijmans & Hans van de Glind, *Child Slavery Today*, *in* CHILD SLAVERY NOW 21, 27 (Gary Craig ed., 2010).

38. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103(8)–(9), 114 Stat. 1464, 1470.

39. *Id.* § 103(9).

40. *Id.* § 103(8).

41. *Id.* § 103(8)(A).

United Nations framework that the trafficking of children requires only two elements: (1) the existence of a trafficker or pimp[42] and (2) that trafficker or pimp's exploitation of a child.[43] The United Nations framework is a proper definitional scheme not only for its simplicity but also because it encourages law enforcement to ask the appropriate initial question: "Is this person a child?" as opposed to, "Did this person consent?"

Armed with a healthy skepticism of the current statistics and an understanding of the need for a clear, inclusive definition of child sex trafficking, it is now appropriate to explore the characteristics of the hidden children waiting to be identified in India and the United States.

B. Child Sex-Trafficking Victims in India

With an estimated twenty million slaves, India has more human trafficking victims than any other country in the world.[44] Of these human trafficking victims, between 70,000 and 1,000,000 are women and children who have been trafficked into sex work.[45] This estimate is broad because the stigma attached to prostitution in India and the secretive nature of trafficking operations makes it "doubly difficult to arrive at authentic numbers."[46] Nearly 15% of these victims began sex work when they were less than fifteen years old, and an additional 25% were first trafficked between the ages of fifteen and eighteen.[47] In Mumbai, an area notorious for its

42. The word "pimp" has become accepted and even celebrated in the United States despite the reality that many pimps are in fact traffickers of underaged girls. For a good discussion of the glorification of pimps in American culture, see KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 87–90 (2009).

43. U.N. Trafficking Protocol, *supra* note 34, at art. 3(c).

44. To put this number in perspective, the country with the second-highest number of slaves is Pakistan with three million. SHELDON X. ZHANG, SMUGGLING AND TRAFFICKING IN HUMAN BEINGS: ALL ROADS LEAD TO AMERICA 108 (2007).

45. NATIONAL HUMAN RIGHTS COMMISSION, A REPORT ON TRAFFICKING IN WOMEN AND CHILDREN IN INDIA 2002–2003, at 21 (2004), http://nhrc.nic.in/Documents/ReportonTrafficking.pdf. Although these estimates are outdated, more recent estimates are not available. *See e.g.*, OFFICE ON DRUGS AND CRIME, UNITED NATIONS, GLOBAL REPORT ON TRAFFICKING IN PERSONS (2009), http://www.unodc.org/documents/Global_Report_on_TIP.pdf.

46. NATIONAL HUMAN RIGHTS COMMISSION, A REPORT ON TRAFFICKING IN WOMEN AND CHILDREN IN INDIA 2002–2003, at 21 (2004), http://nhrc.nic.in/Documents/ReportonTrafficking.pdf.

47. *Id.*

red-light districts,[48] a descriptive study of the case histories of 160 sex trafficking victims revealed that a majority (51.9%) had been trafficked as minors.[49]

Poverty is a shared characteristic of many victims of sex trafficking in India.[50] The caste system[51] is still alive and well in India,[52] and girls from poorer castes are particularly vulnerable to sex trafficking.[53] The following story, from an article in *The Telegraph UK*, is illustrative:

> Tonight, [near Bharatpur in Rajasthan] one girl in particular is attracting attention as she sits on a stool by a fire so that she can be seen by passing vehicles. Her heavily made-up, striking face and beautiful pink sari make her look as if she were on her way to a party. But the truth is different. Suli, 14, is a virgin and a bidding war is being held for the right to be the first to sleep with her.
>
> The collection of shelters where she lives houses 59 families, all members of the Bedia tribe, which has a long tradition of caste-based prostitution. Girls born here become prostitutes in a rite of passage into "adulthood" as routine as marriage is to the rest of Indian society.
>
> The "first time" is a valued commodity for which the middle-

48. *Interview with Raney Aronson: Red Light Reporting?*, FRONTLINE WORLD (June 2004), http://www.pbs.org/frontlineworld/stories/india304/aronson.html.

49. J.G. Silverman et al., *Experiences of Sex Trafficking Victims in Mumbai, India*, 97 INT'L J. GYNECOLOGY & OBSTETRICS 221, 221 (2007), *available at* http://cat.inist.fr/?aModele=afficheN&cpsidt=18791463.

50. Rani Hong, *The Human Face of Poverty in Rural India*, HUFFINGTON POST, June 16, 2010, http://www.huffingtonpost.com/rani-hong/human-trafficking-the-hum_b_613735.html.

51. The caste system is a form of social stratification in India with deep historical roots in Indian Hindu culture. There are five castes: Brahman, Kshatriyas, Vaishyas, Shudras, and the "untouchables" or Dalit. Each caste is associated with different occupations, levels of wealth, and prestige in society. "Many lower-caste people live in conditions of great poverty and social disadvantage." INDIA: A COUNTRY STUDY: CASTE & CLASS (James Heitzman & Robert L. Worden, eds., 1995), *available at* http://countrystudies.us/india/89.htm. The lowest caste is the "untouchables" or Dalit people. *Id.* In past decades, "untouchables" were not permitted to enter temples or schools, and the lowest-ranking were required to jingle a bell to warn high-status Indians of their "polluting approach." *Id.*

52. *See* Smita Narula, *Equal by Law, Unequal by Caste: The 'Untouchable' Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255 (2008), http://idsn.org/uploads/media/Unequal_by_law_12.pdf.

53. Sue Ryan, *For Sale: 13-Year-Old Virgin*, THE TELEGRAPH (Apr. 13, 2008), http://www.telegraph.co.uk/news/worldnews/1584988/For-sale-13-year-old-virgin.html.

> class businessmen who pass this way are prepared to pay a premium.
>
> The normal rate is 100 rupees (£1.30 or US $2.24) but a virgin is sold to the highest bidder for anything over 20,000 rupees (US $448.53). If she is very pretty, the community would hope to get up to 40,000 rupees [$897.06]. For this, the man can have access to the girl for as long as he likes—several hours, days, or even weeks. When he tires of her, there is a celebration. Because it is considered unlucky for a girl to keep the money from her first time, it is spent instead on an extravagant party.[54]

The Bedia tribe's cultural acceptance and the passing drivers' and middle-class johns' complacency toward the exploitation of girls like Suli are shocking. It is not entirely surprising, however, given that 25% of India's population lives below the nation's poverty line, as compared with 12% in the United States.[55] Indeed, abject poverty is highly visible in India, but instead of sharing widespread feelings of concern for their poor countrymen, more affluent Indians have historically referred to these poor people as the "untouchables,"[56] treating them as less than human.[57] Even after the Indian Constitution of 1950 banned official use of the term "untouchables," these people (now known as Dalits) continue to suffer significant discrimination and violence.[58]

Although children from poor castes are particularly susceptible to sex trafficking as a means to financial gain for their families, children from all backgrounds are sexually exploited in India. When we asked Stanly to describe the typical sex trafficking victim in India, he told us that, in his sixty-two brothel rescue operations, he has encountered women and children from all castes and religions.[59] He hesitated for a moment, absorbed in thought, and then joked that brothels are "the one place you can find secularism in India."[60]

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54. *Id.*

55. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, POPULATION BELOW POVERTY LINE, https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html#in (last visited Mar. 13, 2012).

56. *See supra* note 51 and accompanying text.

57. Hillary Mayell, *India's "Untouchables" Face Violence, Discrimination*, NAT'L GEOGRAPHIC NEWS (June 2, 2003), http://news.nationalgeographic.com/news/2003/06/0602_030602_untouchables.html.

58. *Id.*

59. Interview with Stanly & Parashu, *supra* note 2.

60. *Id.*

Sex trafficking in India spans national boundaries in addition to those of caste and religion. The majority of sex trafficking victims in India are domestic citizens, but there are also a substantial number of girls and women trafficked into India from Nepal.[61] It is estimated that each year 5,000 to 10,000 Nepali women and girls are coerced into sex trafficking in India.[62] Estimates of the total number of Nepalese in the Indian sex industry range from 40,000 to 200,000.[63] Many of these Nepali women and children are from remote villages and poor border communities and are lured by recruiters, relatives, or neighbors who promise jobs or marriage.[64] They are sold to brokers for as little as 200 rupees ($4) who then sell them to brothel owners in India for 15,000 to 40,000 rupees ($336 to $897).[65] The demand for Nepali women and girls is due in part to a cultural construction of beauty; in India, fair skin is considered beautiful and exotic.[66] One has only to open the personal ads in an Indian newspaper to observe the cultural obsession with fair skin: "Brahmin Kannada Boy . . . Seeks Fair Complexioned Girl," "extremely fair slim MTech," "Nair Girl . . . looks younger, slim, fair."[67]

C. Police Corruption as an Obstacle to Identifying Child Victims in India

Police corruption is the main obstacle to identifying child sex-trafficking victims in India.[68] Stanly and Parashu have experienced the effects of police corruption first-hand; they have each spent time in jail over the years for attempting to rescue children from brothels that were bribing the local police force.[69] Stanly and Parashu now conduct their rescue

61. HUMAN RIGHTS WATCH/ASIA, RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS 1 (1995).

62. GUNJAN KINNU, NAT'L HUM. RTS. COMM'N, FROM BONDAGE TO FREEDOM: AN ANALYSIS OF INTERNATIONAL LEGAL REGIME ON HUMAN TRAFFICKING 5 (2006), *available at* http://nhrc.nic.in/publications/analhumantrafficing.pdf.

63. *Id.*

64. HUMAN RIGHTS WATCH/ASIA, *supra* note 4, at 1–2 (1995).

65. *Id.*

66. SUSAN DEWEY, HOLLOW BODIES: INSTITUTIONAL RESPONSES TO SEX TRAFFICKING IN ARMENIA, BOSNIA AND INDIA 22–23 (2008).

67. *Classifieds—Matrimony*, DECCAN HERALD (Mysore, India), Mar. 20, 2011 (on file with author).

68. Interview with Stanly & Parashu, *supra* note 2; *see also* CHILD SLAVERY NOW 167–68, 170–71 (Gary Craig ed., 2010).

69. Interview with Stanly & Parashu, *supra* note 2.

operations with the help of officers they know are not corrupt.[70] After two decades of hard work by its founders, Odanadi has developed a positive reputation among honest law enforcement officers.[71] Consequently, low-level police officers with corrupt supervisors will sometimes use Odanadi's domestic violence hotline to tip off Stanly and Parashu to trafficking operations that the officers feel powerless to stop themselves.[72]

Prostitutes also suffer at the hands of corrupt officers. Savita, a sex worker in Bombay, was waiting for a train home when three police officers dragged her off the platform, kicked and slapped her for distributing condoms to other sex workers.[73] Sonia Faleiro, the author who interviewed Savita, notes that this type of incident is not uncommon; twice a week, Savita is physically assaulted by the police. Sometimes these assaults are sexual: "[w]hat most women would consider rape is, for her, 'free sex'—the price she pays to avoid arrest or further harassment."[74]

Child sex-trafficking victims are particularly vulnerable to police corruption in India. Instead of identifying child sex-trafficking victims as a population greatly in need of help, corrupt police officers use the children as tools to extort larger bribes.[75] For example, police officers who visit brothels as clients will sometimes ask for underage girls and then threaten to arrest the girls later unless the brothel owner pays a larger bribe.[76] Similarly, corrupt border police officers demand bribes from the traffickers of Nepali girls.[77] When this police corruption combines with the Indian and Nepalese governments' apathy toward sex trafficking, there is "virtual impunity for traffickers."[78]

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70. *Id.*
71. *Id.*
72. *Id.*
73. Sonia Faleiro, *Maarne Ka, Bhagane Ka (Beat Them, Kick Them Out), in* AIDS SUTRA: UNTOLD STORIES FROM INDIA (2008), *available at* http://www.npr.org/templates/story/story.php?storyId=96315765.
74. *Id.*
75. HUMAN RIGHTS WATCH/ASIA, RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS 2 (1995).
76. *Id.*
77. *Id.*
78. *Id.* at 4.

D. Child Sex-Trafficking Victims in the United States

In the United States, statistics on sex trafficking have been gathered separately for foreign and domestic victims, perhaps as a result of the two groups' current separation under federal law. In 2004, the United States government estimated that between 14,500 and 17,500 foreign victims are trafficked into the United States each year.[79] About half of these foreign victims are forced into prostitution and the sex industry.[80] These are the most recent government statistics on the number of foreign sex-trafficking victims within U.S. borders,[81] and they do not include an estimate of the number of foreign victims who are children.

With respect to domestic victims in the United States, misidentification of domestic children as prostitutes rather than as trafficking victims complicates data collection efforts. The 2010 TIP report to Congress declared that the lack of a clear definition of "what it means to be a U.S. citizen trafficked within the United States" leads to inconsistent estimates, but the report goes on to acknowledge that there could be as many as 300,000 domestic child victims of sex trafficking in the United States.[82]

Runaways are at a particularly high risk of being sex-trafficked in the United States. Approximately 450,000 children run away from home in the United States each year.[83] It is estimated that one in three of these children will be lured into prostitution within her first 48 hours on the street.[84] A Las Vegas study determined that 59% of children arrested for prostitution in Las Vegas from 1994 to 2005 had been victims of sexual abuse within their families, and 74% had run away

79. LIANA SUN WYLER & ALISON SISKIN, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 22 (2010), *available at* http://fpc.state.gov/documents/organization/147256.pdf.

80. FRANCIS T. MIKO, CONG. RESEARCH SERV., RL 30545, TRAFFICKING IN PERSONS: THE U.S. AND INTERNATIONAL RESPONSE 7–8 (2006), *available at* http://www.ilw.com/immigrationdaily/news/2007,0912-crs.pdf.

81. WYLER & SISKIN, *supra* note 79.

82. *Id.* at 22 n.54.

83. *Domestic Minor Sex Trafficking: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010), *available at* http://judiciary.house.gov/hearings/printers/111th/111-146_58250.PDF.

84. *Id.*

from home prior to their arrest.[85] Domestic victims come from all racial, religious, and socioeconomic groups.[86]

It is important to recognize, however, that not all domestic victims are runaways. Many American girls are lured into trafficking by older boys or men who claim to be their boyfriends but who quickly become their pimps:

> Jane, not her real name, was just 14 when her life was taken over in Seattle by a 36-year-old man who said he loved her and promised to give her a better life. It was an easy sell: She was the product of a troubled home, where she was sexually molested by her father's roommate. The abuse began when she was 4 years old. She was also molested at the day care center where she was taken every day. "My mom was a junkie," Jane, now 17, said in an interview. "I lived with my dad. He was up and down with his moods. He had a marijuana addiction. . . . I can't remember much of my childhood. I block it out."[87]

Some pimps are bold enough to snatch girls off the streets, leaving "heartbroken parents to search websites . . . that advertise sex for sale and walk the 'tracks' to try to find their daughters."[88]

The rise of the Internet has also contributed to the rise of domestic sex trafficking. Johns can choose and "order" a girl from the privacy of their own homes.[89] Rod Rosenstein, U.S. Attorney for the District of Maryland, says that combating child sex trafficking is a top priority for his office, but it has become increasingly difficult to convict traffickers in recent years.[90] The traffickers' use of the Internet keeps the victims hidden; "the girls and young women are no longer on the street or at truck stops where law enforcement can see them."[91]

The U.S. sex-trafficking trade, particularly internet sex trafficking, does not discriminate between foreign- and

85. *Id.*

86. *Id.*

87. Chuck Neubauer, *Sex Trafficking in the U.S. Called 'Epidemic'*, THE WASHINGTON TIMES (Apr. 23, 2011), http://www.washingtontimes.com/news/2011/apr/23/sex-trafficking-us-called-epidemic/?page=all#pagebreak.

88. Malika Saada Saar, *U.S. Should Stop Criminalizing Sex Trafficking Victims,* CNN (Feb. 25, 2011), http://articles.cnn.com/2011-02-05/opinion/saar.ending.girl.slavery_1_bad-girls-trafficking-victims-prostitution?_s=PM:OPINION.

89. *Selling the Girl Next Door* (CNN television broadcast Jan. 23, 2011), http://transcripts.cnn.com/TRANSCRIPTS/1101/23/cp.01.html.

90. Neubauer, *supra* note 87.

91. *Id.*

domestic-born girls. Instead, it is the looming presence of the U.S. immigration system that distinguishes between foreign and domestic child sex-trafficking victims. Although special visas known as T-visas and U-visas can be provided to foreign victims of trafficking under American law,[92] the immigration process has not been particularly kind to child victims of sex trafficking. Instead, foreign child sex-trafficking victims are frequently held in Immigration and Customs Enforcement (ICE) detention facilities for months or even years.[93] For example, Diana O. was seventeen when she was trafficked from Honduras to Mexico to the United States by the Zetas drug cartel.[94] She was raped repeatedly by her traffickers' customers and forced to carry drugs.[95] After Diana turned eighteen, U.S. Border Patrol discovered her abandoned in a trailer in Texas.[96] She told the authorities that she was still a minor because she was afraid of being detained in an adult facility.[97] Diana spent one month in juvenile detention before her birth certificate was verified, and she was moved to an adult facility that lacked appropriate mental health services.[98] Diana's attorney reported that the ICE facility was particularly traumatizing for Diana compared to other detainees who were not victims of sex trafficking.[99] Approximately six months after her original detention, Diana was granted a U-visa.[100] Diana's experience

92. Under the TVPA, victims of severe trafficking can apply for a non-immigrant status T-visa (for victims who agree to cooperate with law enforcement to prosecute traffickers, a requirement that is waived for child victims) or a non-immigrant status U-visa (for victims who suffered substantial physical or mental abuse as a result of having been a victim of a specified criminal activity). *See* 8 U.S.C.A. §1101 (2011); *see also Questions and Answers: Victims of Human Trafficking, T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a53dc7f5ab548210VgnVCM100000082ca60aRCRD&vgnextchannel=02ed3e4d77d73210VgnVCM100000082ca60aRCRD (last visited Mar. 15, 2012).

93. Letter from Human Rights Watch to Mark Taylor, Senior Coordinator, Office to Monitor and Combat Trafficking in Persons, U.S. Dept. of State (Apr. 19, 2010), http://www.hrw.org/en/news/2010/04/19/us-victims-trafficking-held-ice-detention.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Illegal aliens who have suffered substantial physical or mental abuse as a result of having been a victim of a specified criminal activity are eligible for a nonimmigrant status U-visa under the TVPA. *See* 8 U.S.C.A. §1101 (2011); *see also Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP AND

as a sex-trafficking victim in the U.S. immigration system demonstrates why foreign child victims are so effectively discouraged from identifying themselves to law enforcement. Pimps and captors threaten their foreign child sex-trafficking victims with indefinite detention or deportation by federal immigration authorities to deter the children from fleeing or reporting the traffickers to the authorities.

E. Disparate Treatment of Foreign and Domestic Victims as an Obstacle to Identifying Child Victims in the United States

Ironically, while federal immigration authorities have largely ignored the plight of foreign child sex-trafficking victims in ICE detention, federal legislators have emphasized the plight of foreign child sex-trafficking victims in federal trafficking laws, largely ignoring domestic victims. Indeed, Congress's purposes and findings for the flagship federal trafficking law, the TVPA, focus primarily on the international sex-trafficking problem and not on sex trafficking within the United States. The following five findings are particularly illustrative:

> (17) Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.
>
> (18) Additionally, adequate services and facilities do not exist to meet victims' needs regarding health care, housing, education, and legal assistance, which safely reintegrate trafficking victims into their home countries.
>
> (19) Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.

IMMIGR. SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ee1e3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=ee1e3e4d77d73210VgnVCM100000082ca60aRCRD (last visited Apr. 15, 2012).

> (20) Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.
>
> (21) Trafficking of persons is an evil requiring concerted and vigorous action by countries of origin, transit or destination, and by international organizations.[101]

Most of these findings could apply equally to domestic victims. Domestic victims are repeatedly punished more harshly than their traffickers (Finding 17); they lack adequate services and facilities to help them reintegrate into American society (Finding 18); and they should not be punished for unlawful acts committed as a direct result of being trafficked (Finding 19). Congress should have considered domestic victims in its findings for the TVPA, or it should have drafted a companion act for domestic victims to emphasize that the United States recognizes that sex trafficking is not just an international evil.

The TVPA's failure to adequately acknowledge domestic sex-trafficking victims is also reflected in funding disparities under the TVPA. Although the TVPA provides for grants to states, Indian tribes, units of local government, and nonprofit victims' services NGOs,[102] "[n]ot one cent of that money has been put towards domestic victims," says Malika Saada Saar of the Rebecca Project, a Washington-based human rights organization.[103] Bradley Myles, CEO of the Polaris Project—an anti-trafficking organization that runs the National Human Trafficking Resource Center Hotline—has also witnessed the disparity in practice and suggests that the United States needs "to reach a new paradigm where grants, policies, organizations, and task forces can address both U.S. citizen and noncitizen

101. 22 U.S.C. § 7101 (2011).

102. 22 U.S.C. § 7105(f)(3)(A) (2011).

103. Steve Turnham and Amber Lyon, *Judge Finds Hurdles to Helping Young Victims of Sex Trafficking,* CNN (Jan. 23, 2011), http://articles.cnn.com/2011-01-23/justice/siu.selling.girl.next.door.judge_1_trafficking-victims-protection-act-underage-girls-american-girls?_s=PM:CRIME.

victims without divisiveness and with the freedom to serve and protect all victims."[104]

The United States' annual TIP reports also maintain a foreign versus domestic approach to sex trafficking.[105] These reports place countries into a tier system, and placement depends on the U.S. government's assessment of a particular country's anti-trafficking efforts.[106] The United States categorizes itself as Tier 1 among the countries that fully comply with the minimum standards for the elimination of trafficking.[107] Nevertheless, the 2010 TIP Report acknowledges the problem of disparate treatment of foreign and domestic child sex-trafficking victims in the United States:

> The U.S. government saw improvement in the protection of trafficked foreign children due to new procedures to grant benefits and services more promptly upon identification. However, government services for trafficked U.S. citizen children were not well coordinated; they were dispersed through existing child protection and juvenile justice structures.[108]

Interestingly, there is no mention in the 2011 TIP report of the treatment of foreign versus domestic child victims, suggesting that the U.S. government no longer perceives this as a problem.[109] However, the 2011 TIP report encourages the United States to "offer comprehensive services to identified, eligible victims regardless of type of immigration relief sought,

104. KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 103 (2009).

105. *See supra* Part I.A.

106. The U.S. Department of State places countries into one of three tiers based upon the country's efforts to comply with the "minimum standard for the elimination of trafficking" in the TVPA. Tier 1 countries rank the highest, but a Tier 1 ranking does not mean the country has no human trafficking problem. A Tier 1 ranking indicates that a country's government "has acknowledged the existence of human trafficking, made efforts to address the problem, and complies with the TVPA's minimum standards." To maintain a Tier 1 ranking, each year these countries must show "appreciable progress in combating trafficking." U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT, http://www.state.gov/g/tip/rls/tiprpt/ (last visited Apr. 15, 2012).

107. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2011: COUNTRY NARRATIVES: T-Z AND SPECIAL CASES 372, [hereinafter TRAFFICKING IN PERSONS REPORT 2011] http://www.state.gov/documents/organization/164458.pdf (last visited Mar. 15, 2012).

108. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2010: COUNTRY NARRATIVES: T-Z AND SPECIAL CASES 338, http://www.state.gov/documents/organization/142984.pdf (last visited Mar. 15, 2012).

109. *See* TRAFFICKING IN PERSONS REPORT 2011, *supra* note 107, at 372.

if any."[110] Evidently, there is still work to be done in the United States to identify and provide services to all child victims of sex trafficking within American borders.

Rachel Lloyd, Executive Director and Founder of Girls Educational & Mentoring Services (GEMS),[111] recently spoke of the drawbacks of the TIP report process before the U.S. Senate.[112] Suggesting that the United States' focus on sex trafficking in other countries is hypocritical, Ms. Lloyd declared:

> As a Nation [sic], we have graded and rated other countries on how they address trafficking within their borders and yet have effectively ignored the sale of our own children within our own borders. We have created a dichotomy of acceptable and unacceptable victims, wherein Katya from the Ukraine will be seen as a real victim and provided with services and support, but Keshia from the Bronx will be seen as a "willing participant," someone who is out there because she "likes it" and who is criminalized and thrown in detention or jail.[113]

Although the drafters and amenders of the TVPA failed to consider a companion act for domestic victims, the current Congress (the 112th Congress) may be considering just such a measure. The Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2011 was referred to the Committee on the Judiciary on March 16, 2011.[114] If enacted in its current form, this bill will address many of the important issues surrounding domestic sex trafficking consistent with the following goals:

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110. *Id.*

111. Girls Educational & Mentoring Service (GEMS) is one of the largest organizations in the United States—and the only organization in New York State—specifically designed to help girls and young women who have been victims of sex trafficking. *Mission & History*, GIRLS EDUC. & MENTORING SERVS., http://www.gems-girls.org/about/mission-history (last visited Feb. 18, 2012).

112. *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcommittee on Human Rights and the Law of the Senate Committee on the Judiciary*, 111th Cong. 14–17 (2010) (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services), *available at* http://www.gpo.gov/fdsys/pkg/CHRG111shrg58003/pdf/CHRG-111shrg58003.pdf.

113. *Id.* at 14–15.

114. Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2011, S. 596, 112th Cong. (2011).

> the Attorney General should implement changes to the National Crime Information Center (NCIC) database to ensure that a child will be automatically designated as an endangered juvenile if the child has been reported missing three times in a year and that the database will cross-reference newly entered reports with historical records and include a visual cue on the record of a child designated as an endangered juvenile;
>
> funds awarded under the Edward Byrne Memorial Justice Assistance Grant Program should be used to provide education, training, deterrence, and prevention programs related to sex trafficking of minors;
>
> states should treat minor victims of sex trafficking as crime victims rather than as criminal defendants or juvenile delinquents and make such minors eligible for compensation; and
>
> demand for commercial sex with minors must be deterred through consistent law enforcement.[115]

The bill would also revise the existing grant program to combat trafficking in persons to authorize the Assistant Attorney General for the Office of Justice Programs to award block grants to up to six state or local governments to combat child sex trafficking.[116] Permissible uses of the grant money would include providing child sex-trafficking victims with shelter, case management services, mental health counseling, legal services, and outreach and education programs.[117] In addition, the bill would amend the Trafficking Victims Reauthorization Act of 2008 to require the inclusion of safe-harbor provisions for children exploited through prostitution in model state anti-trafficking statutes.[118] Title IV of the Social Security Act ("Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services") would be amended to require states to adopt procedures for reporting information on missing or abducted children for entry into the NCIC database.[119]

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115. CONG. RES. SERV., *S. 596: Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2011, Summary*, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00596:@@@D&summ2=m& (last visited Mar. 28, 2012).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

The bill would also amend the Crime Control Act of 1990 to require the Attorney General's annual statistical summary to include the total number of missing child reports received and the total number of entries made to the NCIC database.[120] State law enforcement agencies would be required to update the record of a missing child with a photograph taken within the previous 180 days.[121] These agencies would also be required to notify the National Center for Missing and Exploited Children of each report of a child missing from a foster care family home or childcare institution.[122] The federal criminal code would be amended to (1) expand protection of minor victims and witnesses from harassment or intimidation, (2) impose a minimum one-year prison term for possession of certain child pornography, and (3) allow the issuance of an administrative subpoena for the investigation of unregistered sex offenders by the U.S. Marshals Service.[123] Consistent with the bill's goal of deterring demand, the U.S. Sentencing Commission would be directed to review and amend federal sentencing guidelines and policy statements to ensure that such guidelines provide an additional penalty for sex trafficking of children and other child abuse crimes.[124]

Importantly, the bill refers to "minor victims of sex trafficking," with no additional qualification of citizenship.[125] Although the bill addresses domestic sex trafficking, there is currently no requirement that the victims themselves be domestic.[126] Consequently, the Domestic Minor Sex Trafficking Deterrence and Victims Support Act could do what the TVPA has failed to do: facilitate efforts to identify and rehabilitate *all* victims of sex trafficking. Although foreign victims of sex trafficking may have additional immigration needs, this is no reason to discriminate at the outset between the two groups of victims. In support of this point, the U.S. Supreme Court has recognized that minor children who are in the United States illegally through no fault of their own must be entitled to a free K-12 education.[127] Only time will tell whether Congress will

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *See* Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2011, S. 596, 112th Cong. § 4(a) (2011).
126. *Id.*
127. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982).

rectify the shortcomings of the TVPA with a supplemental sex-trafficking act like the Domestic Minor Sex Trafficking Deterrence and Victims Support Act. Two previous bills by the same title died in committee in 2010.[128]

II. THE FORGOTTEN CHILDREN

With all the time and energy spent on identifying child sex-trafficking victims and their traffickers, India and the United States have forgotten to make a place for rehabilitating child sex-trafficking victims in their existing juvenile legal systems. Although India and the United States are very different countries in many ways, their juvenile legal systems are actually quite analogous. Consequently, both countries currently face similar obstacles to effectively rehabilitating child sex-trafficking victims. Section A of this Part describes the structure of the juvenile legal system in India. Section B explores obstacles to rehabilitating child sex-trafficking victims within the existing Indian system. Section C describes the structure of the juvenile legal system in the United States, and Part D explores obstacles to rehabilitating child sex-trafficking victims within the existing American system.

A. The Structure of the Juvenile Legal System in India

India's juvenile legal system is designed to serve two different populations of children: juveniles in conflict with the law and children in need of care and protection.[129] Juveniles in conflict with the law appear before a Juvenile Justice Board (JJB) made up of a magistrate and two social workers, one of whom must be a woman.[130] All members of a JJB must have training or experience in child psychology or child welfare.[131] As part of the child's sentence, the JJB may send a juvenile in conflict with the law to a government observation home, a special home, or back into the child's parents' home.[132]

128. *Related Legislation*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s112-596&tab=related (last visited Apr. 15, 2012).

129. National Law School, Juvenile Law Lecture, Bangalore, India (Mar. 24, 2011).

130. The Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, THE GAZETTE OF INDIA, Ch. 3, *available at* http://wcd.nic.in/childprot/jjact2000.pdf.

131. *Id.*

132. *Id.* at 5–6.

Children in need of care and protection appear before a Child Welfare Committee (CWC) made up of a chairperson and four members, which must include an expert on matters concerning children and at least one woman.[133] The CWC can place a child in need of protection in a state-run children's home, a state-sanctioned shelter home, or back into the child's parents' home.[134]

B. Obstacles to Rehabilitating Child Sex-Trafficking Victims in the Juvenile Legal System of India

In India, the government-run homes in the juvenile legal system are not suitable places for rehabilitating child sex-trafficking victims.[135] These homes are like jails, with twenty-foot-high exterior walls and barbed wire.[136] The staff is not trained in appropriate levels of sensitivity, and the children often try to escape.[137] Recently, a mentally ill child died after jumping from the second story of a government home.[138] Unfortunately, there is currently a lack of other shelter and special home options like Odanadi to take in child sex-trafficking victims from the government homes.[139] This situation is likely to persist unless the Indian government commits either to better funding of shelters and special homes or to reforming the existing government homes. Odanadi receives minimal government funding and has become successful through its own outreach efforts over many years to private and international donors.[140]

Going back to a parent's home is also not an option for many child victims of sex trafficking in India. Like the girls from the Bedia tribe mentioned above, parents often have sold their children as prostitutes in the first place. Furthermore, even if the family was not involved in trafficking, a family in a small village often cannot take its daughter back for cultural reasons. As Stanly explains, a boy in India can return home after an extended absence and he will be welcomed with "open

133. *Id.* at 8.
134. *Id.* at 9–10.
135. Interview with Stanly & Parashu, *supra* note 2.
136. *Id.*
137. National Law School, Human Trafficking Lecture, Bangalore, India, (Mar. 24, 2011).
138. *Id.*
139. Interview with Stanly & Parashu, *supra* note 2.
140. *Id.*

arms and gladness."[141] By contrast, a girl who is missing for only three days will be subject to "third-degree questioning" by the village leaders upon her return, questioning that is likely to expose her to public shame.[142] For this reason, the parents of female victims often ask Odanadi to keep their daughters, or Odanadi helps them develop plausible stories to satisfy the officious village elders so their daughters may return home with their local reputations intact.[143]

C. The Structure of the Juvenile Legal System in the United States

The juvenile legal system in the United States is structurally similar to the juvenile legal system in India. The United States' juvenile legal system also has two distinct tracks: juvenile delinquency and juvenile dependency.[144] Juvenile delinquency is analogous to juveniles in conflict with the law in India. This track is reserved for children who have committed an act, which if committed by an adult would constitute a crime, or who have committed a status offense, such as a curfew violation, underage drinking, or truancy from school.[145] Juvenile dependency, on the other hand, targets children who are victims of abuse and neglect, much like the process for children in need of protection in India. A child who has been adjudicated delinquent will receive a sentence from a judge, including possible confinement in a juvenile detention facility. On the other hand, a child who has been declared a dependent may be removed from his or her home and placed in foster care, in a group home, or with a relative or family friend. If the court decides that the child's health and safety are not in danger, the court may also allow a dependent child to remain at home with his or her parents or guardians. Whether the dependent child stays at home or is removed, the case will

141. *Id.*
142. *Id.*
143. *Id.*
144. Juvenile legal terminology varies according to the laws of a particular state. For example, a "dependent child" in one state may be referred to as an "abused and neglected child" in another state. There are, however, sufficient trends across all states' juvenile legal systems to support the general overview information in this section without a comprehensive review of the specific provisions of all fifty states.
145. *See* COLO. REV. STAT. §§ 19-2-104, 22-33-108 (2011); *see also* CAL. WELF. & INST. CODE § 601-603 (2011).

continue to be monitored by the court until the parties and the court are satisfied that the child is in a place where he or she is no longer suffering abuse or neglect.

D. Obstacles to Rehabilitating Child Sex-Trafficking Victims in the Juvenile Legal System of the United States

Like the juvenile legal system of India, the juvenile legal system of the United States currently lacks appropriate placement and rehabilitation options for child victims of sex trafficking. The U.S. government is aware of the problem: The 2010 TIP report states that the "prostitution of children has traditionally been handled by some state governments as a vice crime or a juvenile justice issue and the anti-trafficking approach of the TVPA has been slow to fully permeate the state child protection and juvenile justice systems."[146] State governments are also lagging in providing rehabilitative services to trafficked children.[147] Only nine states and the District of Columbia offer state-funded public benefits to trafficking victims.[148] This may explain the absence of specialized shelters for child sex-trafficking victims in a majority of the states.[149] The GEMS website lists other sex-trafficking service providers by state, and only twenty-two states and the District of Columbia have at least one service provider for child sex-trafficking victims.[150] "Lack of appropriate shelters often force law enforcement to send victims to juvenile detention facilities, where there is no access to appropriate services, or releasing [sic] them, knowing that they will end up back in the hands of their pimps."[151] Indeed, the danger of pimps looking to reclaim their girls is very real:

> Janine F., a legal permanent resident, ran away from an abusive family situation in New York when she was 17. An

146. TRAFFICKING IN PERSONS REPORT 2011, *supra* note 107, at 376.
147. *Id.*
148. *Id.*
149. GIRLS EDUC. & MENTORING SERV, http://www.gems-girls.org/what-we-do/service-providers-by-state (last visited Apr. 30, 2012).
150. *Id.*
151. *Domestic Minor Sex Trafficking*: *Hearing on H.R. 5575 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2010) (statement of Carolyn B. Maloney, Rep. of Cal.), *available at* http://judiciary.house.gov/hearings/printers/111th/111-146_58250.PDF.

> acquaintance invited her to California and paid for her bus ticket. On arriving in California, she was forced into prostitution. After six months she was arrested and held in the custody of child protective services for a week before being sent back to New York on a bus. However, not wanting to return home, Janine F. got off the bus when it stopped in Phoenix. She was at the bus station when the same person who had trafficked her to California pulled up in a car. He said, "You should have known better than to try to get away from me." In Phoenix, he again forced her into prostitution.[152]

Judge William Voy of the Clark County Juvenile Court in Las Vegas, Nevada, also knows the danger that pimps pose to their victims.[153] Judge Voy has been working for five years to bring a specialized residential facility to Clark County for the child victims of sex trafficking.[154] He has secured private funding for the building and the land, but Clark County has not yet agreed to pay the additional $750,000 necessary to staff the facility with uniformed officers.[155] Meanwhile, Judge Voy keeps an old case on his desk to remind him of the dangers these child victims face when they are released back onto the streets.[156] The girl in that case was released on February 7, 2009. On February 10, she was found murdered with her throat cut.[157] The danger is real, but appropriate facilities for these children are not yet a reality. It is a sad commentary on the state of the American child welfare system when a judge works for five years to make a place for child sex-trafficking victims but the government is unable or unwilling to provide funding for the security staff necessary to keep these children safe. The welfare and progress of child sex-trafficking victims can be monitored in *existing* courtrooms by *existing* juvenile court judges, but we cannot expect these children to heal while we treat them like criminals or release them back onto the streets.

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152. Letter from Alison Parker & Meghan Rhoad, Human Rights Watch, to Mark Taylor, Senior Coordinator, Office to Monitor and Combat Trafficking in Persons, U.S. Dep't. of State (April 19, 2010), http://www.hrw.org/en/news/2010/04/19/us-victims-trafficking-held-ice-detention.

153. Steve Turnham & Amber Lyon, *Judge Finds Hurdles to Helping Young Victims of Sex Trafficking,* CNN (Jan. 23, 2011), http://articles.cnn.com/2011-01-23/justice/siu.selling.girl.next.door.judge_1_trafficking-victims-protection-act-underage-girls-american-girls?_s=PM:CRIME.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

Returning domestic victims home to their parents is also not an option in many cases. As discussed in Part I.D, many domestic victims are runaways or sufferers of intrafamilial sexual abuse. The first priority of states acting *in loco parentis* should be to provide abused children with a safe place to live. Child sex-trafficking victims have suffered some of the worst forms of abuse, and their plight must not be ignored simply because their rehabilitative needs are not easily met by existing facilities.

III. MOVING FORWARD: EQUALITY AND SPECIALIZED SERVICES FOR ALL CHILD SEX-TRAFFICKING VICTIMS

Sometimes it takes a trip across the world to truly understand why the strategies for combating an international problem should be developed internationally. I do not intend to argue that the United States must develop all its child sex-trafficking laws with direct input from the international community—this would be an unrealistic position given the United States' demonstrated reluctance to commit to collective international legal efforts.[158] Instead, I advocate for more informal international cooperation. Child sex trafficking is an international problem, and it is vital that each nation look to the successes of other countries as empirical evidence for improving its own laws. The United States can learn a great deal from India on the issue of child sex trafficking, just as India can learn a great deal from the United States.

The United States should follow India's example of identifying and rehabilitating child victims of sex trafficking without regard to their citizenship. An ICE detention facility is not an appropriate placement for a traumatized child sex-trafficking victim, particularly if the government would like the child to assist law enforcement in prosecuting his or her traffickers. Indeed, why have U-visas and T-visas if not to facilitate the prosecution of traffickers and rectify the harm suffered by these children within our borders?

158. *E.g.*, the United States and Somalia are the only countries that have not ratified the UN Convention on the Rights of the Child, http://www.unicef.org/crc/index_30229.html. Consider, also, the United States' dealings with respect to the Kyoto protocol. *See* Tony Karon, *When it Comes to Kyoto, the U.S. is the "Rogue Nation*," TIME (July 24, 2001), http://www.time.com/time/world/article/0,8599,168701,00.html.

Janine F., the seventeen-year-old mentioned above who was recaptured by her pimp, ended up in removal proceedings after two convictions for prostitution.[159] Although her prostitution convictions were a direct result of being repeatedly sex trafficked as a minor, she found herself in ICE detention as an adult.[160] Janine was held in an immigration facility in Arizona for over a year, and a letter from her attorney for humanitarian parole went unanswered.[161] Finally, at the age of twenty-two, Janine was released from ICE detention and awarded cancellation of removal under the Violence Against Women Act.[162]

Imagine if Janine had been properly identified as a child sex-trafficking victim and then sent to a specialized rehabilitation facility instead of back into the clutches of her trafficker. Instead of spending five years of her young life as a prostitute and detainee, she could have spent time recovering from her ordeal and preparing for a new and better life. Placing foreign child sex-trafficking victims like Janine in specialized rehabilitation facilities during the pendency of their immigration status would do justice to the congressional findings of the TVPA.

India has recognized that child sex trafficking does not discriminate between foreign and domestic girls, and neither should the government or service providers. In the United States, however, convoluted sex-trafficking laws based on even more convoluted immigration laws frustrate law enforcement efforts to quickly and properly identify child sex-trafficking victims. Under current laws, foreign child victims too often end up in ICE detention where it can take years to sort out their status, while domestic child victims are too often ignored or arrested as prostitutes. All of these children deserve to be rescued from a life of sexual exploitation. Current definitions of sex trafficking in the TVPA and related laws should be amended to ensure that law enforcement agencies investigate the age of the victim first, before the issue of consent or the victim's immigration status. Moreover, child victims of domestic sex trafficking suffer severe abuse and exploitation

159. Letter from Alison Parker & Meghan Rhoad, to Mark Taylor, *supra* note 152; *see supra* Part II.D.

160. *Id.*

161. *Id.*

162. *Id.*

irrespective of their citizenship. Future laws must address this reality.

India can also improve internal efforts to combat sex trafficking with examples from abroad. India should look to the United States for government-level strategies to combat police corruption. One such strategy is the implementation of special sex-trafficking police units. Specialized units in Brooklyn,[163] Maryland,[164] and Dallas[165] have been successful in arresting traffickers and identifying and rescuing victims. In Dallas, the Child Exploitation/High-Risk Victims Trafficking Unit (Dallas Unit) works to change the community perception of sexually-trafficked children:

> If a 45-year-old-man had sex with a 14-year-old-girl and no money changed hands . . . he was likely to get jail time for statutory rape . . . . If the same man left $80 on the table after having sex with her, she would probably be locked up for prostitution and he would probably go home with a fine as a john.[166]

To increase recognition that this girl is a victim in both scenarios, the Dallas Unit developed a database to track high-risk children, including repeat runaways and repeat victims of sexual abuse and sexual exploitation.[167] The Dallas Unit then established a protocol requiring county police agencies to refer all high-risk victims, known as HRVs, and juveniles suspected of involvement in prostitution to the Dallas Unit.[168] The Dallas Unit provides training to county law enforcement on the identification of HRVs and distributes a card to frontline officers and investigators with the Dallas Unit's contact information.[169] The Dallas Unit detectives are available twenty-four hours per day, seven days per week.[170] In addition,

163. William Sherman, *District Attorney Targets Brooklyn's Growing Sex Trade with New Elite Unit*, NEW YORK DAILY NEWS (June 3, 2010), http://articles.nydailynews.com/2010-06-03/local/29438538_1_attorney-targets-pimps-prostitution.

164. *Maryland Man Sentenced on Federal Sex Trafficking, Drug and Firearm Charges*, U.S. DEP'T OF JUSTICE (July 19, 2010), http://www.justice.gov/opa/pr/2010/July/10-crt-830.html.

165. RAMI S. BADAWY, NAT'L DIST. ATTORNEYS ASS'N, SHIFTING THE PARADIGM FROM PROSECUTION TO PROTECTION OF CHILD VICTIMS OF PROSTITUTION 1–3 (2010), http://www.ndaa.org/pdf/Update_V22N8.pdf.

166. *Id.* at 1.

167. *Id.* at 1–2.

168. *Id.* at 2.

169. *Id.*

170. *Id.*

the detectives almost always conduct the interviews of the children using an interviewing model designed for adolescents who do not trust law enforcement and have been instructed by their pimp or trafficker to lie.[171]

In addition to increasing the effectiveness of antitrafficking efforts, the small and insular nature of specialized units makes it easier for the government to monitor and investigate complaints of corruption. The Indian government could also reduce the relative appeal of bribes by making a concerted effort to increase the wages of police officers. "While many policemen take hafta [(bribes)] because they can, some will say they have no option. A constable earns Rs 3500 (about $86) a month, excluding benefits."[172]

In addition to improving the identification of child sex-trafficking victims in India and the United States, there are lessons to be learned for improving the rehabilitation of sex-trafficked children in both countries. Odanadi's success in India stands for the argument that there should be more specialized safe homes in the United States and India.

My fellow law students and I had the pleasure of meeting the children at Odanadi after their day at school. They were happy, friendly, and playful, as children should be. One of the older girls, Aaina,[173] came to greet us immediately, but it soon became clear to us that she was different from the other children. Another resident remarked casually, "Oh, she does not speak." Aaina shook all of our hands at least three times that day with a wide smile on her face. Later, we were informed in conversation with the Odanadi staff that she is one of the most severely abused children of all those currently living at Odanadi. They estimated that she had spent ten years of her life being abused in a brothel before arriving at their safe home.

It was not clear to me during our short visit whether Aaina's developmental disabilities are congenital or the result of years of suffering and loss of childhood, but one thing was clear: She is now surrounded by people who understand and accept her just as she is. It is also clear to me that it is time to

171. *Id.*

172. Sonia Faleiro, *Maarne Ka, Bhagane Ka (Beat Them, Kick Them Out), in* AIDS SUTRA: UNTOLD STORIES FROM INDIA (2008).

173. Not her real name. The name "Aaina" means "mirror," and to me, this child's silence and her smile reflected simultaneously the depths of her suffering and the resiliency of her spirit.

improve the legal systems of India and the United States to make it easier to help girls like Aaina. Once we finally discover the hidden and forgotten children, we owe it to them to give them a safe and caring home, perhaps for the first time in their lives.

CONCLUSION

It is easy to get lost in the literature of the multitude of problems and possible approaches to combating child sex trafficking in the United States, India, and the rest of the world. In the end, though, it all boils down to the victims. The victims are the reason people care so much about trafficking—the thought of children being sexually exploited by adults for financial gain shocks the conscience. Instead of getting caught up in the drama of the issue, however, the United States and India must focus on improving efforts to identify and rehabilitate as many victims as possible. To do this, both countries need clear legal definitions, dedicated and honest police officers, equality for domestic and foreign child victims under the laws, and specialized safe homes. When the governments of India and the United States take action toward these ends, they will brighten the futures of some very strong and resilient children.

DESTINATIONS: A COMPARISON OF SEX TRAFFICKING IN INDIA AND THE UNITED STATES

SARAH MONTANA HART*

This Note examines the similarities and differences between sex trafficking in India and the United States. It highlights three similarities between the countries. First, the basic sexual demands of the johns are not being met by the local population of women despite that population's vulnerabilities. Second, sex trafficking is usually more profitable than legal alternatives for the pimps. Third, the victims are lured by the dreams of a better life that the traffickers supposedly can provide and will therefore often consent to travel with them until it is too late. This Note argues that if these three truths apply in India and the United States, despite the differences between the two countries, then they illustrate three global issues that the international community should address.

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INTRODUCTION

One would not expect sex trafficking in India and the United States to have much in common. If anything, one might assume that the poverty and gender inequality in India would create a source for women and girls who could be trafficked to a wealthy destination country like the United States. On closer examination, however, India is as much a destination country as the United States.[1] The terms "destination country" and "source country" come from the State Department Trafficking in Persons (TIPS) report.[2] Destination countries are those *into* which victims are trafficked, while source countries are those *out of* which victims are trafficked.[3] The United States and India are both examples of destination countries, while Nepal and Bangladesh are examples of source countries.[4]

This Note examines why the United States and India are destination countries. The two countries differ in several significant respects: majority religion, poverty levels, social structure, gender equality, and global prominence.[5] Despite these differences, however, similarities between the demand for

1. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 171, 339 (10th ed. 2010) [hereinafter TIPS], *available at* http://www.state.gov/documents/organization/142979.pdf.

2. *Id.* at 10. I use the terms "supply" and "demand" in their common economic meaning. *See, e.g.*, ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 316–26 (Prometheus Books, 8th ed. 1997) (1920).

3. TIPS, *supra* note 1, at 171, 339.

4. *Id.* at 171.

5. *See infra* Part IV.

trafficked victims in the United States and India still exist. Three root causes drive demand in both countries. First, the women and children who are already in the local sex industry are not meeting the sexual demands of "johns."[6] Second, sex trafficking is a very profitable business, usually more so than legal alternatives. Third, the victims of sex trafficking are vulnerable to promises made by traffickers and thus often consent to travel willingly—at least in the beginning. Such similarities found amid such differing countries indicate that these three causes might be universal.

This Note begins with a definition of trafficking and then explores the general scope of the problem. Parts II and III examine the factors making the United States and India, respectively, destination countries. The two parts specifically focus on the pimps, johns, victims, and law enforcement in each country. Part IV compares and contrasts the two countries. The final section explores conclusions, along with some suggestions for where the realization of these similarities might lead.

I. BACKGROUND

A. The Definition of Sex Trafficking

The United Nations Convention Against Transnational Organized Crime defines sex trafficking as follows:

> (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation . . . ;
> (b) The consent of a victim of trafficking in persons . . . shall be irrelevant . . . ;
> (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not

6. "A prostitute's client." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 674 (11th ed. 2004).

> involve any of the means set forth in subparagraph (a) of this article;
> (d) "Child" shall mean any person under eighteen years of age.[7]

Sex trafficking is thus a global problem of transnational crime. It includes any movement of people—for recruiting, transporting, transferring, harboring, or receiving—through coercion.[8] This coercion can include threats, violence, deceit, or an abuse of power that is used to exploit people for prostitution or sexual slavery.[9] Although broad enough to include different forms of exploitation and methods of coercion, the definition of sex trafficking is also narrow enough to focus on trafficking by and for sexual predators.[10]

B. The Size and Complexity of the Sex Trafficking Problem

Between eight hundred thousand and two million people are trafficked globally every year.[11] International human trafficking is estimated to yield $31.6 billion in profit to organized crime operations per year.[12] The exact numbers are not known, however, because of a lack of data and unreliable estimates.[13] The vagueness of the data is due mainly to the illegality of the practice and a lack of trustworthy law enforcement data.[14]

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7. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, art. 3, Dec. 25, 2003, 2237 U.N.T.S. 319, *available at* http://treaties.un.org/doc/publication/UNTS/Volume%202237/v2237.pdf.

8. *Id.*

9. *See* SILVIA SCARPA, TRAFFICKING IN HUMAN BEINGS: MODERN SLAVERY 5 (2008).

10. *See id.*

11. *Id.* at 8; Trafficking Project, *Trafficking in Person Worldwide Estimates 1997–2009*, UNESCO BANGKOK, http://www.unescobkk.org/fileadmin/user_upload/culture/Trafficking/project/abc/Selected_Articles_and_Publications/Graph_VT_Trafficking_in_Person_01.pdf (last visited Mar. 28, 2012).

12. SCARPA, *supra* note 9, at 16.

13. "Such data, as exist, are often contaminated with ideological and moral bias." Bebe Loff & Jyoti Sanghera, *Distortions and Difficulties in Data for Trafficking*, 363 LANCET 566, 566 (2004); *see also Trafficking Statistics Project*, UNESCO BANGKOK, http://www.unescobkk.org/culture/cultural-diversity/trafficking-and-hivaids-project/projects/trafficking-statistics-project (last visited Mar. 28, 2012).

14. SCARPA, *supra* note 9, at 8–10.

Eliminating human trafficking is a complicated problem. There are three stages of human trafficking: before, during, and after. Each must be examined separately because each stage requires different analysis, demands different solutions, and has a different victim impact. There are different causes and effects for each stage. For example, what causes people to enter sexual exploitation might be different from what causes them to continue being exploited. And a victim who is in the early stages of trafficking—being abducted or deceived—will be affected differently, and have different needs, than a victim who has engaged in forced prostitution for years.

Sex trafficking also differs depending on its location. Professor Mary Crawford maintains that sex trafficking is not a single, global problem but a multitude of local problems:

> Sex trafficking is not uniform across social, cultural, and political contexts, but rather highly situation-specific. To begin with, the girls and women who are vulnerable are not all alike. . . .
>
> The perpetrators differ . . . .
>
> . . . [T]here are also enormous differences in root causes, modes of trafficking, victim characteristics, and perpetrator characteristics . . . .
>
> . . . .
>
> . . . I contend that attempts to understand sex trafficking as a unitary, global phenomenon are misplaced and likely to be ineffective. Instead, I hope to demonstrate that trafficking in girls and women is a product of the social construction of gender and other dimensions of power and status within a particular culture and at a particular historical moment.[15]

If we accept Crawford's thesis, then no two systems of sex trafficking are alike, and each path that a woman follows to exploitation must be examined separately. But there are some similarities, even in sex trafficking systems that seem different, in countries that have very disparate "social construction[s] of gender" and "dimensions of power and status."[16] This Note argues that similarities can exist between sex trafficking systems despite significant cultural, political, and sociological differences.

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15. MARY CRAWFORD, SEX TRAFFICKING IN SOUTH ASIA: TELLING MAYA'S STORY 8–9 (2010).

16. *Id.* at 9.

II. FACTORS THAT MAKE THE UNITED STATES A DESTINATION COUNTRY

A. Some Basic Facts

The U.S. State Department issues the Trafficking in Persons (TIPS) report annually as a tool for evaluating trafficking activity in different countries.[17] In 2010, the TIPS report classified the United States as a "Tier 1" country.[18] This means that the U.S. government fully complies with the minimum standards of the Trafficking Victims Protection Act (TVPA), which was established by the United States in 2000.[19] Despite this high rating, however, State Department officials still estimate that between 17,500 and 50,000 women and children are trafficked into the United States annually.[20]

The TIPS report explains that "[t]he United States is a . . . destination country for men, women, and children subjected to trafficking in persons, specifically forced labor, debt bondage, and forced prostitution."[21] Although "[m]ore foreign victims are found in labor trafficking than sex trafficking" in the United States, the TIPS report found that around fifteen percent of the

17. TIPS, *supra* note 1, at 8.

18. *Id.* at 22, 338. The report defines Tier 1 as follows: "*Tier 1*: Countries whose governments fully comply with the TVPA's minimum standards for the elimination of trafficking." *Id.* at 22.

19. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464. The U.S. legislature enacted this law for the purpose of combating trafficking both in the United States and abroad. Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating The Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 417–18 (2011). Although it is a U.S. law, it expressly provides a standard by which the State Department can evaluate the progress of anti-sex trafficking efforts in other countries through the TIPS report. *Id.* at 418.

20. LIANA SUN WYLER & ALISON SISKIN, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 8–9 (2010), *available at* http://fpc.state.gov/documents/organization/147256.pdf. It should be noted that there also are a number of victims trafficked *within* the United States. *See* KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 102 (2009). *See generally* Emily Harlan, *It Happens in the Dark: Comparing Current Obstacles to Aid for Child Sex Trafficking Victims in India and the United States*, 83 U. COLO. L. REV. (forthcoming May 2012) (describing internal trafficking of child victims within the United States).

21. TIPS, *supra* note 1, at 338. It should be noted that, in TIPS and elsewhere, the United States is referred to as more than a destination country. It can also be a source country and a country that has internal trafficking. *Id.* By discussing it as a destination country, I do not mean to argue that it is *only* a destination country—that is simply the focus of this Note.

adults trafficked into the United States, and a disturbing thirty-eight percent of the children, were imported to the United States for sexual exploitation.[22] When combined with the estimate that as many as fifty thousand women and children are trafficked into the United States, this indicates that, despite the U.S. government's efforts to curtail the problem and its compliance with the TVPA standards, sex trafficking in the United States is still an enormous problem.

People are thus trafficked into the United States despite a readily available supply of vulnerable individuals within the country itself. The TIPS report noted that, of those trafficked within the United States, "[m]ore U.S. citizens, both adult[s] and children, are found in sex trafficking than labor trafficking; U.S. citizen child victims are often runaway and homeless youth."[23] If there is already a vulnerable population of homeless and runaway youth, why would traffickers need to bring anyone into the United States from outside? The TIPS report indicates that the primary countries of origin for foreign victims were Thailand, Mexico, the Philippines, Haiti, India, Guatemala, and the Dominican Republic.[24] What is it about the sex trade in the United States that demands that victims from these countries be imported? There may not be one single answer, but by looking at several different factors—the johns who purchase sex from trafficking victims, the pimps who sell it, the profiles of the victims themselves, and the law enforcement responses—some answers emerge.

B. The Johns

The first reality of sex trafficking is that the basic, sexual desires of the consumers must be met. As Kevin Bales and Ron Soodalter explain: "It is obvious that without the demand for the sexual services of women and young girls there would be no need to write this . . . . Yet the demand exists, and it is vast."[25] And, Bales and Soodalter ask, "[w]ho are the men who pay for sex, often with enslaved women and children? They go by several euphemistic names, but for the sake of this discussion we'll call them 'johns.' They are ubiquitous and have been for

22. *Id.* at 341.
23. *Id.* at 338.
24. *Id.*
25. BALES & SOODALTER, *supra* note 20, at 85.

thousands of years."[26] In general, research on the customers of sex trafficking "cautions against sweeping characterizations and generalizations. Customers vary in their background characteristics, motivation, and behavior, and they buy sex for different reasons."[27]

There are, however, some common characteristics among the men who buy sex from victims of trafficking. According to one study, "the typical john is around thirty years old, married, and employed full-time with no previous criminal record."[28] Interviews with prostitutes in the United States and abroad also revealed that "[d]espite their diverse backgrounds, johns tend to share similar perceptions about prostitution."[29] A study of 1342 men arrested for soliciting prostitutes found that johns shared misconceptions about prostitutes—for example, believing that "prostitution is not harmful and that prostitutes enjoy and choose their work."[30] Johns also often "feel entitled to any sexual service they desire because they dehumanize the prostitutes, and instead view them as cheap sex objects."[31] Numerous studies have concluded that "a subgroup of hard-core, habitual users account for a disproportionate share of the demand for prostitution."[32] In the United States, one study found "that 11% of men who had ever purchased sexual acts did so more than 100 times."[33]

In addition to the demand for prostitution, "[m]ale demand also plays a pivotal role in determining the characteristics of the trafficked victims" and the sex trafficking industry.[34]

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26. *Id.*

27. *Id.* at 86 (quoting sociologist Ronald Weitzer).

28. Iris Yen, Comment, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislation*, 98 J. CRIM. L. & CRIMINOLOGY 653, 670 (2008).

29. *Id.* at 671 (citing Noël Bridget Busch et al., *Male Customers of Prostituted Women: Exploring Perceptions of Entitlement to Power and Control and Implications for Violent Behavior Toward Women*, 8 VIOLENCE AGAINST WOMEN 1093, 1101–04 (2002)).

30. *Id.* at 671 n.126.

31. *Id.*

32. *Id.* at 672 (citing DONNA M. HUGHES, BEST PRACTICES TO ADDRESS THE DEMAND SIDE OF TRAFFICKING 13 (2004)).

33. *Id.* "In the same study, 22% of men had purchased sex up to four times . . . ." *Id.* at 672 n.139. It is also interesting to note that using the services of a prostitute does not necessarily diminish a man's image in the United States. Perhaps the best-known example from the present age is Hugh Grant, who has remained a romantic-comedy icon and movie super-star heartthrob despite his well-published history of being a john. *See* 1 ENCYCLOPEDIA OF PROSTITUTION AND SEX WORK 261 (Melissa Hope Ditmore ed., 2006).

34. Yen, *supra* note 28, at 666.

Throughout history, abundant male demand has combined with an insufficient supply of local prostitutes to create a booming sex trafficking industry.[35] As the demand exceeds the supply, sex traffickers must "kidnap women and girls from various countries in the region and force them into the commercial sex industry" in order to satisfy their customer base.[36] But why does the demand exceed the supply if there are vulnerable women and children in America?

One answer seems to be a matter of taste among male consumers. One study explains that "[j]ohns typically do not explicitly ask for trafficked women, but they often demand 'something different,' meaning they desire 'exotic' foreign women."[37] Globally, johns currently seem to have a "preference for Eastern and Central European women," which has meant that "these women now comprise almost 25% of the global sex trade."[38] Additionally, the demand for virginal girls who are (relatively) "clean" has caused child prostitution to increase at an alarming rate.[39] Because a younger victim is more likely to be "clean," or virginal, sex trafficking victims are increasingly younger, making it more common to find girls who are thirteen years old or younger among trafficked victims.[40] The demand for "novelty and variety" has also prompted the sex industry to create "circuits" in which victims are rotated within a country or region after they are imported, increasing the appearance of difference.[41]

Thus, there is a demand for novel, exotic, and foreign women among the johns in the United States. This explains the need for imported women, as no amount of internally trafficked U.S. citizens could fulfill that specific demand. The particular tastes of the American johns, therefore, account for one cause of the United States' status as a destination country.

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35. *Id.*

36. *Id.*

37. *Id.*; *see also* Michelle R. Adelman, Comment, *International Sex Trafficking: Dismantling the Demand*, 13 S. CAL. REV. L. & WOMEN'S STUD. 387, 402 (2004).

38. Yen, *supra* note 28, at 666 (citing VICTOR MALAREK, THE NATASHAS 4–6 (2003)).

39. *Id.* at 666–67.

40. *Id.* at 667 & n.88 ("In a five-country study, 22% of the interviewed men preferred girls aged eighteen or under.") (citing BRIDGET ANDERSON & JULIA O'CONNELL DAVIDSON, INT'L ORG. FOR MIGRATION, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN?: A MULTI-COUNTRY PILOT STUDY 19 (2003)).

41. *Id.* at 667 (citing MORRISON TORREY & SARA DUBIN, DEMAND DYNAMICS: THE FORCES OF DEMAND IN GLOBAL SEX TRAFFICKING 13 (2004)).

C. The Pimps

It is also important to consider the pimps—the people who sell the sex. Sex trafficking is a profitable business.[42] Aside from the demand of the johns, "the relatively low risks of detection, prosecution and arrest attached to trafficking compared to other activities of organized crime" also contribute to the success of the sex trafficking business.[43] International trafficking is "estimated to generate profits upwards of $7 billion annually."[44] The United Nations Educational, Scientific and Cultural Organization (UNESCO) has collected estimates that place annual earnings at over $250,000 per trafficker.[45] This makes sex trafficking "the third most profitable illicit business, behind drugs and arms dealings."[46] The chances of getting caught and the relative punishments for sex trafficking are also low enough to make the cost-benefit analysis more favorable than that of drugs or arms dealing.[47] With such a vast amount of money to be made and relatively little risk, criminal organizations and individuals are bound to be drawn into the trade of sex slavery as a means of making easy money.

In addition to the monetary gain available, some segments of popular culture in the United States have accepted "pimping" as a glamorous job that is worthy of envy and emulation.[48] The 2005 Academy Award for Best Original Song went to "It's Hard Out Here for a Pimp," from the movie *Hustle*

42. *See* Trafficking Project, *Profit from Trafficking Industry 2010*, UNESCO BANGKOK (2011), http://www.unescobkk.org/fileadmin/user_upload/culture/News/Profit_from_Trafficking_Industry__2010_.pdf; *see also* Hanh Diep, Comment, *We Pay—The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT'L L. REV. 309, 311 (2005).

43. Diep, *supra* note 42, at 311 (quoting ANDREAS SCHLOENHARDT, AUSTL. INST. OF CRIMINOLOGY, ORGANISED CRIME AND THE BUSINESS OF MIGRANT TRAFFICKING: AN ECONOMIC ANALYSIS 11 (1999)).

44. *Id.*

45. Trafficking Project, *Trafficker Earning per Person*, UNESCO BANGKOK (2011), http://www.unescobkk.org/fileadmin/user_upload/culture/News/Trafficker_Earning_per_Person.pdf.

46. Diep, *supra* note 42, at 313 (citing Kathryn E. Nelson, Comment, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches*, 24 HOUS. J. INT'L L. 551 (2002)). UNESCO estimates that it is the third most profitable business after illegal drugs and media piracy. Trafficking Project, *Illegal Business*, UNESCO BANGKOK, http://www.unescobkk.org/fileadmin/user_upload/culture/Trafficking/project/abc/Selected_Articles_and_Publications/Graph_VI_Illegal_Business.pdf (last visited Mar. 28, 2012).

47. Diep, *supra* note 42, at 313.

48. *See* BALES & SOODALTER, *supra* note 20, at 87–88.

& Flow.[49] The film, about a pimp with dreams of becoming a rapper, also earned a Sundance Film Festival award.[50]

Additionally, every year pimps hold a "Players' Ball" in a different city in the United States.[51] At the event, pimps show off their fancy cars, clothes, and jewelry and vie for awards such as "No. 1 International Pimp of the Year" and "No. 1 Super Player."[52] These events are often high-profile, drawing the attention of the national media and sometimes even the endorsement of the city's mayor.[53] One club owner described the Players' Ball as "strictly a dress-up costume party," but it is important to remember that "the pimps who attend are often facing indictments for sex trafficking, involuntary servitude, sexual abuse of a minor, kidnapping, assault with a deadly weapon, and racketeering."[54] These men are often responsible for damage inflicted by drugs, alcohol, physical abuse, PTSD, depression, suicide attempts, AIDS and other STDs, forced or coerced abortions, and many other brutalities against women and children.[55]

Pimps choose the vocation for a number of reasons, both personal and professional. Perhaps overseeing prostitutes and trafficking victims allows these men to control women (which can satisfy an abusive personality), perhaps they are in it for the glory and the fame, or perhaps they are just in it for the money. Whatever the reason, it is clear that the pimps—the salesmen and day-to-day perpetuators of the sex business—are directly responsible for making sure that the demand for sex is met, and that they profit from that demand. Where there is demand, there is usually supply, and that is the job of the traffickers. The money to be made trafficking women and children into the United States, the cultural reverence of pimping, and the power of the position make sex trafficking an attractive option for some Americans and are reasons that the

49. *Id.* at 87.

50. *Id.* It is also interesting to note the romantic notion of prostitution that is portrayed in movies such as *Pretty Woman*. *See Pretty Woman (1990)*, IMDB, http://www.imdb.com/title/tt0100405 (last visited Feb. 18, 2012) ("A man in a legal but hurtful business needs an escort for some social events, and hires a beautiful prostitute he meets . . . only to fall in love.").

51. BALES & SOODALTER, *supra* note 20, at 88.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.*

United States has become a destination country for sex traffickers.

D. The Victims

Victims are often brought to the United States under false pretenses such as the promise of a good income, an education, or a better life.[56] In its handbook on sex trafficking for lawyers, the American Bar Association (ABA) offers a striking case study of one such a victim:

> Neelam came to the U.S. when she was sixteen to live with her aunt and uncle in Boston. Her aunt had promised Neelam's parents she would send Neelam to school. However, Neelam's aunt told her that she would be pulled out of school and shamefully sent back to India if she didn't cook and clean for the family from the time she got home from school until well past midnight. Neelam obeyed her aunt for awhile, but she was so tired she eventually asked to go back to India. Neelam's uncle then raped her and sold her to a co-worker for sex. He told Neelam that she could never return to India now that she was a "street woman" and would have to stay in the U.S. and work for them.[57]

Neelam's story is a good example of the vulnerability, especially of children, to trafficking into America.

One author has cited "the growing demand for international migration" and "the restrictions on legal immigration imposed by industrialized countries" as "creat[ing] the demand for alternative, illegal avenues of migration."[58] Sex traffickers provide one such illegal avenue of migration.[59] Because, for many, the United States offers a vast improvement in quality of life from their country of origin, many women and children are eager to immigrate, legally or illegally, to the United States.[60] This makes the immigrants easy targets for traffickers who promise a better life in America

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56. *See, e.g.*, EVA KLAIN ET AL., A.B.A., MEETING THE LEGAL NEEDS OF CHILD TRAFFICKING VICTIMS: AN INTRODUCTION FOR CHILDREN'S ATTORNEYS & ADVOCATES 10 (2008).

57. *Id.* (footnote omitted).

58. Diep, *supra* note 42, at 311 (quoting SCHLOENHARDT, *supra* note 43, at 11).

59. *Id.*

60. *Id.* at 317; *see also infra* Part IV.A.

and arrange for transportation into the country.[61] It is only once the victims reach the United States that reality sets in and the real purpose of their travel becomes clear. Once in the country, the victims are forced into prostitution or private sex slavery, as Neelam was.[62] The special situation of the United States—a wealthy country with many employment and educational opportunities—makes it a particularly attractive destination for individuals from less affluent or powerful countries.[63] Thus, the victims who are trafficked into the United States are often particularly susceptible to deception or coercion.

E. Law Enforcement

Law enforcement against sex trafficking is making progress in the United States. According to TIPS, the U.S. government "sustained strong law enforcement efforts and continued to encourage a victim-centered approach among local, state, and federal law enforcement."[64] The evaluation specifically noted that the U.S. government "saw improvement in the protection of trafficked foreign children due to new procedures to grant benefits and services more promptly upon identification."[65] In general, America has received a positive review from TIPS for its law enforcement efforts, although there were many suggestions for improvement.[66]

In the United States, "[p]enalties for sex trafficking range up to life imprisonment with a mandatory minimum penalty of 10 years for sex trafficking of minors and 15 years for sex trafficking by force, fraud, or coercion or sex trafficking of minors under age 14."[67] This indicates that the U.S. justice system takes sex trafficking crimes seriously and punishes perpetrators severely. According to the TIPS review,

> TVPA trafficking offenses are investigated by federal law enforcement agencies and prosecuted by the U.S. Department of Justice (DOJ). The federal government tracks its activities . . . [and in Fiscal Year] 2009, the

61. *See* KLAIN ET AL., *supra* note 56, at 10.
62. *Id.*
63. *See infra* Part IV.A.
64. TIPS, *supra* note 1, at 338.
65. *Id.*
66. *Id.* at 338–44.
67. *Id.* at 339.

> Human Trafficking Prosecution Unit, a specialized anti-trafficking unit . . . , charged 114 individuals, and obtained 47 convictions in 43 human trafficking prosecutions . . . .[68]

In addition to those federal prosecutions, "[t]raffickers were also prosecuted under a myriad of state laws, but no comprehensive data [are] available on state prosecutions and convictions."[69] The data that are available, however, indicate that even more prosecutions for sex trafficking happen at the state level than at the federal level.[70]

Even beyond the local and federal prosecutions, "DOJ funds 38 anti-trafficking task forces nationwide comprised of federal, state, and local law enforcement investigators and prosecutors, labor enforcement, and a nongovernmental victim service provider."[71] This means that there is a significant amount of training for law enforcement available in the United States, specifically on human trafficking. In fact, "[t]he DOJ task forces trained over 13,000 law enforcement officers and other persons likely to come into contact with human trafficking victims" in the 2009 fiscal year.[72]

Although there is always more to be done, the state and federal governments in the United States are successfully criminalizing, prosecuting, and punishing sex traffickers. This means that, even though some sex traffickers will evade justice, the United States continues to send a clear message that trafficking is a crime and will be punished. The TIPS report makes no mention of corruption among police and prosecutors in the United States, and therefore it seems that failings on the part of law enforcement are a result of limited resources (monetary and temporal) rather than something more sinister. This is not the case in India, however, as is discussed in the next Part.

68. *Id.*
69. *Id.*
70. *Id.* at 340.
71. *Id.*
72. *Id.*

III. WHY INDIA HAS A DEMAND FOR TRAFFICKED WOMEN

A. Some Basic Facts

According to the 2010 TIPS report, India is a "Tier 2 Watch List" country.[73] This means that, in the eyes of the U.S. State Department, India's government does not fully comply with the TVPA's minimum standards but is making significant efforts to bring itself into compliance with those standards.[74] In Tier 2 "Watch List" countries:

> (a) the *absolute number of victims* of severe forms of trafficking is very significant or is significantly increasing;
> (b) there is a *failure to provide evidence of increasing efforts* to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecution, and convictions of trafficking crimes, increased assistance to victims, and *decreasing evidence of complicity* in severe forms of trafficking by government officials; or,
> (c) the determination that a country is making significant efforts to bring themselves [sic] into compliance with minimum standards was based on *commitments by the country to take additional steps over the next year*.[75]

This means not only that the Indian government fails to comply with the standards set out by TIPS and the U.S. State Department but also that India is sliding backwards in its enforcement of sex trafficking, despite its alleged efforts.[76]

The TIPS report also indicates that "India is a . . . destination . . . country for men, women, and children subjected to trafficking in persons, specifically forced labor and commercial sexual exploitation."[77] Thus, India, like the United States, is a country into which people are trafficked. As in the United States, this occurs despite a readily available population of vulnerable women and children within India.[78]

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73. *Id.* at 171.
74. *See id.* at 22.
75. *Id.*
76. *See id.*
77. *Id.* at 171. Like the United States, India is more than a destination country. It is also a source country and a country in which internal trafficking takes place. *Id.* Although I only focus on one of those aspects, I do not argue that it is *only* a destination country.
78. *See supra* Part II.A.

The TIPS report explains that "[w]omen and girls are trafficked within the country for the purposes of commercial sexual exploitation."[79] This is done partially because "[m]ajor cities and towns with tourist attractions continue to be hubs of child sex tourism, and this phenomenon also takes place in religious pilgrim centers" due to "Indian nationals engag[ing] in child sex tourism within the country."[80] While "[n]inety percent of trafficking in India is internal,"[81] a large number of international girls "from Nepal and Bangladesh are also subjected to forced prostitution in India."[82] This means that, despite the poverty, overpopulation, lack of education, and many other factors that contribute to the vulnerability of Indian women,[83] the supply of Indian women does not satisfy the demand, and women must be brought in from Nepal and Bangladesh.

There are no reliable estimates of the number of women and children trafficked into India each year. Some state that there are as few as 10,000 women and children trafficked into India from Nepal and Bangladesh each year.[84] Other statistics show, however, that Bangladeshi women (presumably trafficked, as discussed above) make up about seventy percent of the brothel population in Kolkata alone.[85] Whatever the exact numbers may be, there is a large population of women and children trafficked into India. This occurs despite the availability of vulnerable Indian women. Why?

B. The Johns

One of the reasons that women and children must be brought into India involves the demands of the men purchasing sex within India—the Indian johns. Stanly K.V., co-founder of Odanadi (a non-governmental organization in Mysore, India, dedicated to human trafficking victims) believes the demand

79. TIPS, *supra* note 1, at 171.
80. *Id.*
81. *Id.*
82. *Id.*
83. *See infra* Part IV.A.
84. P.M. NAIR & SANKAR SEN, INDIA NAT'L HUMAN RIGHTS COMM'N, TRAFFICKING IN WOMEN AND CHILDREN IN INDIA 17 (2005).
85. *Id.*; *see also Traffickers Turn to Northeast India to Supply the Sex Trade*, HUMANTRAFFICKING.ORG (Nov. 5, 2006), http://www.humantrafficking.org/updates/449 ("Police say at least 700 girls from the region have been reported missing over the last five years, 300 of whom disappeared in 2005 alone. But activists estimate thousands of northeastern girls disappear every year . . . .").

for non-Indian women and children goes to the root of male psychology and social ideals of beauty.[86] He explains that, in India, fair skin is considered attractive, and the fairer a woman is, the better.[87] Nepali women and children usually have lighter skin than Indian women and are therefore seen as more attractive than their Indian counterparts.[88] This observation is corroborated by research done for Human Rights Watch Asia.[89] That research also found that Indian johns prefer Nepali girls for their faces and body shapes, as well as the color of their skin.[90]

This preference for light-skinned victims also explains why "NGO reports indicate that an increasing number of girls from the northeast—including those with education—are . . . forced into prostitution."[91] Indian johns thus prefer women from Northern India, who are generally lighter-skinned than those from the South.[92] Stanly K.V. offers another interesting insight. He explains that, due to a large number of transplanted Southern Indians settling in the North hoping for better job prospects, women in the South are now also being trafficked to Northern India.[93] This is not because of a preference for their skin color but because of the desire for a woman who is somehow familiar (i.e., similarly South Indian) but not a member of the john's own community.[94]

Stanly explains that men are more likely to hire a prostitute—and more likely to abuse her—if she is not seen as a member of their own social circle but somehow as an "other" or "outside" their own community.[95] For South Indian women, this means that they are favored not only by North Indian men, who see them as outsiders, but also by displaced South Indian men, who believe that these South Indian women, while they may look similar, are not members of their home communities.[96] Indian johns are thus able to view South Indian

86. Interview with Stanly K.V., co-founder, Odanadi, in Mysore, India (Mar. 21–22, 2011).
87. *Id.*
88. *Id.*
89. HUMAN RIGHTS WATCH/ASIA, RAPE FOR PROFIT: TRAFFICKING OF NEPALI GIRLS AND WOMEN TO INDIA'S BROTHELS 16 (1995).
90. *See id.* at 41.
91. TIPS, *supra* note 1, at 171.
92. Interview with Stanly K.V., *supra* note 86.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*

women as castaways who have come north and therefore no longer deserve the same respect as a woman "back home."

Whether it is internal difference (i.e., Southern versus Northern Indian) or international difference (i.e., Indian versus Nepalese), the Indian johns certainly prefer women who fit a certain "outsider" demographic. Whether familiar or exotic, the johns demand a woman they can identify as an other.[97] As in the United States, this desire on the part of the johns will never be satisfied by even an endless supply of Indian women who are familiar to them. Thus, there will always be a demand for women from outside, which must be met by human trafficking.

C. The Pimps

Sex trafficking in India is a very profitable business, just as it is in the United States. By one estimate, "[a]t least one million Indian girls and women work in India's sex industry which is estimated to be worth around 400 billion rupees [Rs.] ($9 billion) annually."[98] The profit margin is especially large for trafficking from Nepal to India.[99] Traffickers can purchase girls from the rural hill villages in Nepal, usually from the girls' relatives or local recruiters, for "amounts as small as Nepali Rs.200 [$4.00]."[100] These women are then delivered and sold to "brothel owners in India for anywhere from Rs.15,000 to Rs.40,000 [$500–$1,333]."[101] Thus, a trafficker stands to make somewhere between $450 and $1300 on each girl trafficked from Nepal to India. The annual per-capita income in Nepal is around $490.[102] The sale of one girl can net more than what the average Nepalese makes in an entire year. With this kind of monetary incentive, sex trafficking from Nepal to India is bound to continue.

97. *Id.*

98. *Traffickers Turn to Northeast India to Supply the Sex Trade*, *supra* note 85.

99. HUMAN RIGHTS WATCH/ASIA, *supra* note 89, at 1.

100. *Id.* at 1–2 (conversion in original).

101. *Id.* at 2 (conversion in original).

102. World Bank Group, *Ease of Doing Business in Nepal*, DOING BUSINESS, http://www.doingbusiness.org/data/exploreeconomies/nepal (last visited Mar. 23, 2012).

D. The Victims

In addition to the incentives for the traffickers, there are also economic incentives for the victims of sex trafficking in India and their families, who often live in poverty.[103] Svati P. Shah, who did field work in Mumbai on sex trafficking and prostitution, argues that poverty and sex trafficking are inextricably linked.[104] She explains that there are "growing links between migration and economic sustainability for poor communities in India."[105] This migration, according to Shah, "is occurring against the rural context of depleted water tables, more arable land becoming drought-prone, and areas that have experienced massive rural displacement after receiving few of the benefits of industrial growth and economic prosperity."[106] Originally, agricultural work was "the main mode of survival in these areas, but, as food security decreases with the increased consolidation of food production, seed patenting, and greater areas of cultivated land being devoted to the production of cash crops (e.g., sugar cane), seasonal farm work has become less and less sustainable."[107] This means that, rather than sustaining and maintaining their original inhabitants, "[s]uch regions now supply the lion's share of migrant laborers to the world's urban economies."[108] In India and Nepal, this means that historically rural, agricultural communities are no longer able to survive off the land, and people are increasingly moving to cities like New Delhi and Mumbai to look for work.[109]

For many women, this means working in the illegal sex trade. And working in the illegal sex trade in India's brothels makes for a hard life:

> Trafficking victims in India are subjected to conditions tantamount to slavery and to serious physical abuse. Held in debt bondage for years at a time, they are raped and subjected to other forms of torture, to severe beatings, exposure to AIDS, and arbitrary imprisonment. Many are young women from remote hill villages and poor border

103. *See infra* Part IV.A.
104. Svati P. Shah, *Distinguishing Poverty and Trafficking: Lessons from Field Research in Mumbai*, 14 GEO. J. ON POVERTY L. & POL'Y 441, 442–43, 451–54 (2007).
105. *Id.* at 453.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

> communities of Nepal who are lured from their villages by local recruiters, relatives or neighbors promising jobs or marriage, and sold . . . to brothel owners in India . . . . This purchase price, plus interest (reported to be ten percent of the total), becomes the "debt" that the women must work to pay off—a process that can stretch on indefinitely. Only the brothel owner knows the terms of the debt, and most women have no idea how much they owe or the terms for repayment. Brothels are tightly controlled, and the girls are under constant surveillance. Escape is virtually impossible. Owners use threats and severe beatings to keep inmates in line. In addition, women fear capture by other brothel agents and arrest by the police . . . . Many of the girls and women are brought to India as virgins; many return to Nepal with the HIV virus.[110]

Despite this grim reality, the promise of work in India and the desperate situation at home are enough to make victims willing targets to traffickers.[111] Coercion and physical force bring them the rest of the way.[112] Like the United States, India is a destination country for victims because it holds the promise of a better life.

E. Law Enforcement

According to the TIPS report for India, "[s]ome public officials' complicity in trafficking remained a major problem" in the 2010 reporting period.[113] According to Odanadi's director Stanly, however, police corruption is not just *a* major problem but *the* major obstacle to eliminating sex trafficking in India.[114] According to Stanly, police officers often are customers in the Indian brothels, take bribes to allow the brothels to function, or cooperate in the trafficking of girls.[115] He spoke of one specific instance when Odanadi rescued fifteen women and girls from a brothel in Mysore:

> We knew there were a lot of girls in there because we had undercover agents go in and pretend to be customers to make sure they were there. Then we had citizen volunteers standing in a perimeter around the place to make sure no

110. HUMAN RIGHTS WATCH/ASIA, *supra* note 89, at 1–2.
111. Interview with Stanly K.V., *supra* note 86.
112. *See supra* Part III.C.
113. TIPS, *supra* note 1, at 172.
114. Interview with Stanly K.V., *supra* note 86.
115. *Id.*

> one ran off between when the undercover went in and the police came. When the police got there, we searched the place but couldn't find any of the girls. The police wanted to give up, and we said no, because we knew they were in there. We started looking for trap doors and false ceilings, floors, or walls. When we found a place in the wall that sounded like it was hollow, we told the police and asked them to break it open. They refused, and they told us that if we did it and destroyed property, we would be arrested. We did it anyway. We found fifteen girls stuck inside this tiny little place. They were piled on top of each other, with sacks over them to hide them, and they had to lock the door from the inside. But there wasn't enough oxygen in there to keep them alive for much longer. If we hadn't gotten there when we did, the girls would have literally locked themselves in to die. When we pulled them out, some of them had already passed out. They were all covered in sweat. It was awful.[116]

In Stanly's experience, when the police were not actively complicit, they at least passively accepted the terrible predicament of the women in the brothel.[117]

Human Rights Watch Asia has also found a pattern of "police corruption and complicity" in India and Nepal.[118] In its report, Human Rights Watch Asia reiterated portions of a letter from an NGO to the Home Minister of India.[119] The letter "charged that police regularly extorted large sums of money in red-light areas in the name of protection—up to Rs.26,000

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116. *Id.* I am paraphrasing Stanly's story, as I could not transcribe it verbatim while he was telling it. For another account of this story, see Sarah Harris, *My First Brothel Raid*, VICE, http://www.vice.com/read/my-first-brothal-raid (last visited Feb. 29, 2012). Harris writes:

> We came to a disused room with a small trapdoor set into the wall at knee-height. Outside a tangle of clothes lay amongst dirty plates, high-heeled shoes, and discarded condom boxes. We had just enough time to stick our heads into the dank six by four foot hole. It stank of human bodies, piss, and old food. Dark stains splashed up one wall and the odd, sad item of clothing lay on the floor. There would not have been enough room for more then [sic] one of them to lie down and sleep.
>
> . . . .
>
> As the situation stands, the five Indian girls have had counseling and are being transferred to another rehabilitation center in Bangalore. Odanadi is still working for the release of eight Bangladeshi girls from jail, where they are currently being held by police for not having passports or the relevant immigration documents.

Id.

117. Interview with Stanly K.V., *supra* note 86.

118. HUMAN RIGHTS WATCH/ASIA, *supra* note 89, at 44–51.

119. *Id.* at 53.

[$866] per day in Delhi alone."[120] The president of that same NGO reported that "out of the Rs.55 [$1.83] paid by the customer in one of the city's better brothels, Rs.10 [.33] went to the police."[121] This sum varied according to the officer's rank, with a head constable receiving more per head than the sub-inspector.[122]

Additionally, the organization charged that "[i]n the case of recently trafficked girls and women . . . police were involved in the staged process called 'registering' the victims."[123] During this process, the brothel owner "would notify the police of the arrival of a new victim in her establishment and pay a bribe for their silence . . . between Rs.5000 and Rs.25,000 [$166–$833]."[124] In the case of a minor, the police "kept the girl for a day in lock-up, and produced her in court the next day along with a falsified First Information Report (FIR) attesting to her adult status, thereby protecting the brothel owner from any future charges related to the prostitution of a minor."[125] The police were paid between Rs.500 and Rs.1000 ($16–$33) for this service.[126]

In addition to the issue of police corruption, there are also problems with the Indian Supreme Court. According to Kumar Regmi, a professor at the Kathmandu School of Law in Nepal, the "Indian Supreme Court, known throughout the world for its judicial activism, could address this problem more effectively by adopting a less biased attitude than it has shown to date."[127] As an example of this bias, Regmi quotes from Justice Broome's opinion in *Kauchailiya v. State*, holding that "[i]f the magistrate finds that [the defendant] has worked as a prostitute in the past, he can expel her from the area controlled by him without further ado. Moreover, she may not only be removed from one town to another, but may be expelled from the whole district."[128] Regmi insists that "the legally untenable and insensitive approach of the Indian Supreme Court has

120. *Id.* (conversion in original).
121. *Id.* (conversions in original).
122. *Id.*
123. *Id.* at 54.
124. *Id.* (conversion in original).
125. *Id.*
126. *Id.*
127. Kumar Regmi, *Trafficking into Prostitution in India and the Indian Judiciary*, 1 INTERCULTURAL HUM. RTS. L. REV. 373, 374–75 (2006) (footnote omitted).
128. *Id.* at 383 (quoting Kaushailiya v. State, A.I.R. 1963 All. 71).

contributed to the marginalization of the problem of trafficking in women and girls."[129] She also argues that this "prejudicial attitude toward the victims of prostitution[ ] and the discriminatory interpretation and application of existing laws needs to be changed."[130]After discussing many of the trafficking and prostitution cases that have come before the Indian Supreme Court, Regmi explains a theme among them:

> From the early 1960s, the highest court has worked quite discriminatorily, and has been overly protective of all people participating in prostitution except for the victims. This comes at a heavy price to the real victims of prostitution, and has considerably hampered the possibility of appropriate justice for this marginalized group of women.[131]

It is not only the police who must adjust their present practices if there is to be a successful campaign against sex trafficking in India. The country's highest court must also change its attitude, analysis, and conclusions.

IV. DIFFERENCES AND SIMILARITIES BETWEEN THE UNITED STATES AND INDIA AS "DESTINATIONS"

A. Differences

There are several obvious differences between the United States and India that one would expect to affect the sex trafficking industry. First, the United States' population is just over 300 million,[132] while India's population is slightly over one billion.[133] In addition, the United States has a Gross Domestic Product (GDP) of $15.1 trillion,[134] with a per-capita income of about $48,100,[135] whereas India's GDP hovers around $1.8

129. *Id.* at 375.
130. *Id.*
131. *Id.* at 405.
132. U.S. CENSUS BUREAU, http://www.census.gov (last visited May 2, 2011).
133. 2 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 693 (Herbert M. Kritzer ed., 2002).
134. U.S. DEP'T OF COMMERCE, NEWS RELEASE: GROSS DOMESTIC PRODUCT, BUREAU ECON. ANALYSIS, http://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm (last visited Feb. 29, 2012).
135. *The World Factbook: United States*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (click on "Economy") (last visited Feb. 29, 2012).

trillion,[136] with a per-capita income of about $3700.[137] Indians therefore live on about one-thirteenth the amount of money as Americans. The poverty in India is widespread and highly visible, whereas in the United States it is localized and less visible. Walking down the street in India, one can expect to regularly see someone relieving him/herself in public,[138] but such a thing is criminal (and actually punished) in America.[139] In addition to basic economic facts, India and the United States differ in their majority religions—Christianity in the United States[140] versus Hinduism in India.[141] India maintains a caste system that "place[s] people into a social and professional hierarchy on the basis of familial lineage,"[142] whereas in America "[w]e hold these truths to be self-evident—that all men are created equal."[143] Finally, women in India are so undervalued that sex-selective abortions are a widespread problem,[144] while in the United States, women actually outnumber men.[145] All of these generalized and superficial differences between the two countries might lead one to conclude that there must be a correspondingly radical difference in the sex trade for each country.

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136. *The World Factbook: India*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/in.html (click on "Economy") (last visited Feb. 29, 2012).

137. *Id.*

138. My travel companions and I witnessed this often on our research trip to India.

139. *See, e.g.*, N.Y.C. ADMIN. CODE § 116-18(6) (2011).

140. *The World Factbook: United States*, *supra* note 135 (click on "People and Society") (illustrating that the religious composition of U.S. citizens includes 51.3% Protestant, 23.9% Roman Catholic, 1.7% Mormon, and 1.6% other Christian).

141. LEGAL SYSTEMS OF THE WORLD, *supra* note 133, at 693 (illustrating that 82% of Indian citizens are Hindus).

142. *Id.*

143. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). I acknowledge that there are obviously problems with the idea of social mobility in America. *See, e.g.*, David Brooks, Op-Ed., *The Sticky Ladder*, N.Y. TIMES, Jan. 25, 2005, at A19; Alan B. Krueger, *The Apple Falls Close to the Tree, Even in the Land of Opportunity*, N.Y. TIMES, Nov. 14, 2002, at C2; Paul Krugman, Op-Ed., *The Sons Also Rise*, N.Y. TIMES, Nov. 22, 2002, at A27. I mean only to cite the principles at work, not all of the problems with their practical applications.

144. *See, e.g.*, Mallika Kaur Sarkaria, *Lessons from Punjab's "Missing Girls": Toward a Global Feminist Perspective on "Choice" in Abortion*, 97 CALIF. L. REV. 905, 906 (2009).

145. *See* Am. FactFinder, *Age Groups and Sex: 2010*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_QTP1&prodType=table (last visited Feb. 29, 2012).

First, there is the obvious difference that the United States is a "Tier One" country, complying with the standards set out by the TIPS report, whereas India is a "Tier Two, Watch List" country that is not in compliance.[146] Second, there are differences in the source countries. The international trafficking victims who end up in India are almost all from Nepal.[147] The international trafficking victims who wind up in the United States, however, are mostly from Thailand, Mexico, the Philippines, Haiti, India, Guatemala, and the Dominican Republic.[148] Third, there are differences in the number of women trafficked to each country. In India, estimates of the women and children trafficked per year range wildly—between 10,000 total[149] and over 700,000 to Kolkata alone.[150] In the United States, the estimates are between 17,500 and 50,000 women and children annually.[151] This means that the number of women trafficked into India is, potentially, much larger than the number of women trafficked into the United States. Finally, and perhaps most importantly, the biggest difference between the two countries appears to be law enforcement practices. In India, corruption is the primary barrier to the fight against sex trafficking.[152] The corruption runs across all levels of society—political, social, and economic—but it is felt most acutely at the law enforcement level.[153] As discussed above, police in India are often not only tacit observers or passive participants in sex trafficking but very active members, receiving bribes, providing protection to the brothel owners or traffickers, and even purchasing the services of the victims.[154]

In the United States, there are certainly a myriad of problems with law enforcement,[155] and the arrest and prosecution process is not without its faults.[156] It is clear,

146. TIPS, *supra* note 1, at 48.
147. HUMAN RIGHTS WATCH/ASIA, *supra* note 89, at 1.
148. TIPS, *supra* note 1, at 338.
149. NAIR & SEN, *supra* note 84, at 17.
150. *Id.*; *Traffickers Turn to Northeast India to Supply the Sex Trade*, *supra* note 85.
151. WYLER & SISKIN, *supra* note 20, at 24, 26.
152. Interview with Stanly K.V., *supra* note 86.
153. *Id.*
154. *Id.*; *see also* TIPS, *supra* note 1, at 174; HUMAN RIGHTS WATCH/ASIA, *supra* note 89, at 50–51.
155. One such example involves the so-called "blue wall of silence." *See* Christopher Cooper, *Yes Virginia, There Is a Police Code of Silence: Prosecuting Police Officers and the Police Subculture*, 45 CRIM. L. BULL. 277, 280 (2009).
156. *See, e.g.*, PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 1–41 (2009).

however, that corruption in the United States does not compare to that of India.[157] The TIPS report for the United States[158] does recognize areas that need improvement, namely in training on a nationwide scale, but it also recognizes that, in general, arrests and prosecutions are proceeding adequately.[159] While there will always be more that can be done, the level of corruption and police complicity in sex trafficking is still the largest difference in the industry between the two countries.

B. Similarities

Far more striking is the degree of similarity between the sex trafficking industry in India and in the United States. India and America may differ in their law enforcement responses to sex trafficking, but in every other subset of the problem explored in this Note—the johns, the pimps, and the victims—there are marked similarities.

The johns in both the United States and India share tastes. Although the exact demographic might be different—light-skinned versus dark-skinned, round face versus oval, etc.—the overall characteristics are the same: Johns want something new and other.[160] On the one hand, the johns in both India and the United States want women who look like their regional ideal of beauty, perhaps fostered by their own community and upbringing.[161] On the other hand, these women must be distant and other and therefore deserving of the abuse that sex workers endure from the johns.[162] The johns in both countries have an insatiable taste for " 'exotic' foreign women."[163] This desire, as long as it exists, will never be satisfied by even the largest population of vulnerable women in either country. As long as the johns' demand for the exotic "other woman" exists, sex trafficking will exist to meet that need.[164] Thus, although the physical manifestations of what is

157. Interview with Stanly K.V., *supra* note 86.

158. Problematically, the TIPS report is produced by the United States, so there is certainly cause for skepticism as to its self-aggrandizement.

159. TIPS, *supra* note 1, at 339.

160. *See* Yen, *supra* note 28, at 666.

161. Interview with Stanly K.V., *supra* note 86.

162. *Id.*

163. Yen, *supra* note 28, at 666.

164. For a fascinating discussion of what can and should be done to educate johns and change their behavior—and desires—and thus curb the demand for sex trafficking, see Adam Grush, Just "Boys Being Boys": Transforming the Social

"exotic" may be different in each country, the desire for an other is there for both and cannot be satisfied by anything other than sex trafficking.

Pimps and brothel owners in both countries also share many of the same core characteristics, incentives, and tacit community approval. In both the United States and India, prostitution is illegal but prevalent, and in both countries there is a culture of complacency.[165] In America, this complacency manifests itself in the "Players' Ball" and songs and videos sympathetic to the pimps.[166] In India, this manifests itself in a brothel culture with over one million sex workers[167] and open police corruption.[168] Most importantly, there is a lot of money to be made in both countries for someone who sells the sex of others. The sex trafficking industry generates around $7 billion annually in the United States[169] and roughly 400 billion Rs. ($9 billion) annually in India.[170] This is the most profitable criminal industry after guns and drugs,[171] offering those who traffic the chance to earn more with one victim than what they might otherwise earn in a year.[172] As long as there is this much money to be made, neither country is going to be able to stop the illegal trafficking of women.

Finally, and perhaps most importantly, there are the victims. Again, while by definition the physical locations and descriptions of the victims may differ for each country, they share some important characteristics. Both the victims who reach India and those who come to the United States are often brought under false pretenses, with the promise of a better life.[173] India and the United States both offer beacons of hope for a better future (when compared with most source countries), which allows traffickers to lure victims. Once these women become willing travelers, it is easy to victimize them—

Norms That Fuel Sex Trafficking and Other Forms of Violence Against Women (May 4, 2011) (unpublished manuscript) (on file with the author).

165. *See 100 Countries and Their Prostitution Policies*, PROCON.ORG, http://prostitution.procon.org/view.resource.php?resourceID=000772 (last visited Mar. 23, 2012).

166. *See supra* notes 48–55 and accompanying text.

167. *See* NAIR & SEN, *supra* note 84, at 17.

168. *See supra* Part IV.A.

169. Diep, *supra* note 42, at 311.

170. *Traffickers Turn to Northeast India to Supply the Sex Trade*, *supra* note 85.

171. *See supra* note 46 and accompanying text.

172. *See supra* notes 98–102 and accompanying text.

173. *See supra* Parts II.D, III.D.

away from all their friends, family, and connections, in a new place, where they are usually illegal immigrants. The victims in both countries are then kept in similarly miserable conditions until they are no longer useful to the brothel owner or pimp.[174] These victims all feel shame and lack the tools to make a dependable wage in other ways, often causing them to turn back to the sex trade even after they have been arrested by the police, "rescued" by an NGO, or pushed out by a brothel owner.[175] These women are thus similarly vulnerable, despite their different situations and countries of origin.

CONCLUSIONS AND RECOMMENDATIONS

One of the most disturbing things about comparing sex trafficking in India and the United States is that, despite the differences between the two countries, both have very high levels of sex trafficking.[176] This is true despite the very great differences in the law enforcement of both countries,[177] which seems to negate the argument that stepping up law enforcement alone would be enough to solve (or at least mitigate) the problem. The United States already has better law enforcement than India, yet the problem is still rampant in America.[178] The United States also has a higher standard of living, a larger female population, and a number of other differences that a developing country—like India—might see as potential solutions.[179] If these basic differences cannot change the fact that sex trafficking exists and thrives, then what will change it?

Mary Crawford maintains that sex trafficking is not uniform across social, cultural, and political contexts but is instead highly situation-specific.[180] If correct, she adds another layer to the problem of solving sex trafficking globally. Rather than striving for a global solution, we would have to look to local governments—especially those in developing countries that are already struggling with strained resources—to solve the problem for themselves. Should we not try to combat this problem as a global community?

174. *See supra* Parts II.D, III.D.
175. Interview with Stanly K.V., *supra* note 86.
176. *See supra* Part III.A.
177. *See supra* Parts III.D, III.E.
178. *See supra* Parts III.D, III.E.
179. *See supra* Part III.A.
180. CRAWFORD, *supra* note 15, at 8–9.

In comparing India with the United States, at least a few answers emerge. While it is true that there are differences between the sex trafficking industries in India and the United States, there are also some very important similarities. Certain universal causes of sex trafficking may present themselves.[181] There are similarities between the johns, the pimps, and the victims in both of these countries.[182] These similarities exist despite vast social, political, economic, and religious differences.[183] This highlights some of the root causes of sex trafficking: First, the basic sexual demands of the johns are not being met by the local population of women, however vulnerable they may be. Second, sex trafficking is good business and is usually more profitable than legal alternatives. Third, the victims, wherever they come from, are vulnerable to the dream of a better life offered by these traffickers and therefore often consent to trade with them until it is too late. If these three truths apply in these two countries, despite their differences, perhaps they apply in other countries as well. This undercuts Crawford's thesis that sex trafficking is a local and not a global problem.[184] If these three basic truths about sex trafficking exist across national, cultural, and ethnic boundaries, then perhaps they point to some global issues we should address as an international community.

How should we do this? For the johns, there are educational programs, known as "john schools," that have been shown to address some of the more fundamental psychological and cultural causes of men's demand for prostitutes.[185] Given the similar needs of the johns for the exotic other, despite their variant definitions of what that other might look like, the global community could certainly benefit from a closer look at the psyche of johns and what causes the sexual deviations that are fed by sex trafficking. If these exist universally, then perhaps there is some universal problem, or symptom, that needs to be addressed in order to satiate or eliminate the johns' need for a certain type of victim. Despite cultural differences, the overarching desire for the other could be addressed through

181. *See supra* Part IV.B.
182. *See supra* Part IV.B
183. *See supra* Part IV.A
184. CRAWFORD, *supra* note 15, at 8–9.
185. Moira Heiges, *From the Inside-Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 461 (2009); *see also* Grush, *supra* note 164.

international education and awareness campaigns targeted specifically at the johns across the world.

For the pimps, the global community certainly needs to address the profitability of sex trafficking. It must be made cost-prohibitive to traffic humans. To do this, all aspects of the business must be targeted, from the consumers to the providers (although not the victims) of the service. International financial institutions must freeze any available assets of those found to be trafficking and connect anti-trafficking organizations with organized crime units, financial crime units, banks, and government organizations. If the flow of money stops and the business becomes impractical, then we can stop sex trafficking. But that alone is not enough. We must also work globally to offer men and women other, more legitimate employment that can provide equal salaries. This is obviously a much larger effort that would benefit much more than anti-sex trafficking movements, but it would certainly have a direct effect on the number of men and women who are incentivized to enter the trafficking trade.

For both the pimps and the johns, a comprehensive tracking system might ensure both treatment and prevention.[186] Professor Geneva Brown of Valparaiso University of Law argues that those convicted of trafficking offenses should be required to register through an international database, much like the U.S. Sex Offender Registry.[187] She asserts that creating an international registry of traffickers would increase awareness of the problem and "create a social stigma for traffickers and trafficking crimes that will lead to increased public desire to combat trafficking."[188] She also maintains that restricting the travel and occupations of former traffickers would help reduce recidivism.[189]

Finally, for the victims, we must work internationally to educate women on the dangers of traveling with strangers with nothing more than a promise. This is not to say that we need to "fright[en] women into staying home"[190] but rather that we need to adequately inform them and their families so that they

186. *See, e.g.*, Geneva Brown, *Women and Children Last: The Prosecution of Sex Traffickers as Sex Offenders and the Need for a Sex Trafficker Registry*, 31 B.C. THIRD WORLD L.J. 1 (2011).

187. *Id.* at 3–4.

188. *Id.* at 39–40.

189. *Id.* at 2–4.

190. CRAWFORD, *supra* note 15, at 144.

can make informed choices without being easy prey. We also must make an international effort to offer vulnerable women legal immigration alternatives into destination countries. Because many women are lured into these countries under the pretense of a better life, and because we can identify the countries from which these women are drawn, we can specifically target immigration rules toward vulnerable women in those areas. Until there are legal immigration alternatives into countries like America and India, which feature a different standard of living from the source countries (like Thailand and Nepal), women will be vulnerable to traffickers with an alluring ruse. There also must be efforts to raise the economic independence of women in the source countries, so that their value—to themselves and their families—can be realized at home, doing safe, legal work rather than being prostituted in a brothel abroad.[191]

Although none of these ideas is easily implemented, they are all imperative. And, while it may seem daunting, it is at least somewhat reassuring that something can be done on a global level. There are similarities that transcend national borders, and by focusing on those, we can pool our resources as an international community and target those areas that are universal. Local governments can do wonderful work, tailoring every program to their specific area, but there are at least a few commonalities that the global community can focus on to develop programs that can successfully travel from one area to another, with equal impact. Despite the vast amount of negative information that comes out of studying sex trafficking, this is an uplifting thought, for working together we can do more than working alone.

191. For a very good example of one such effort by ABC/Nepal, see *id.* at 60–61; *see also* LITTLE SISTERS FUND, http://www.littlesistersfund.org (last visited May 5, 2012).

DIFFERENT NAMES FOR THE SAME THING: DOMESTIC HOMICIDES AND DOWRY DEATHS IN THE WESTERN MEDIA

JENNIFER PARKER*

Domestic violence is a global phenomenon that knows no geographic or cultural bounds. Whether they are shot, poisoned, stabbed, or burned, women across the world are dying at the hands of their male partners. Nevertheless, the Western media's portrayal of dowry deaths in India illustrates American society's failure to, or refusal to, connect dowry deaths to the parallel domestic homicides committed in the United States every day. From a postcolonial feminist standpoint, this Note argues that this disjunction is neither accidental nor inconsequential but rather reinforces the United States' hegemonic self-perception as a society in which women's liberation has been unequivocally achieved. By overemphasizing and sensationalizing the injustices against women in India, the Western media diverts attention from the same injustices against women in the United States. This Note proposes a reframing of the issue by the Western media and American society. To enable the United States' continued progress in the realm of women's rights, American society must abandon the "us–them" dichotomy; it must accurately place both domestic homicides in the United States and dowry deaths in India within the framework of domestic violence.

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> [D]eath by domestic violence in the United States is numerically as significant a social problem as dowry murders in India. But only one is used as a signifier of cultural backwardness: "They burn their women there." As opposed to: "We shoot our women here."
>
> —Leti Volpp[1]

INTRODUCTION

In southeast Texas, a college student murders his ex-girlfriend and then attempts to barbeque her body on his backyard grill.[2] In New Delhi, India, a husband fatally poisons his pregnant wife.[3] In Sacramento, California, a man with three prior domestic violence convictions rapes and repeatedly stabs his ex-girlfriend to death.[4] In southwest India, a woman is set afire by her husband and his parents.[5] In Boulder,

1. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1187 (2001) (footnote omitted).

2. ANGELA J. HATTERY, INTIMATE PARTNER VIOLENCE 2 (2009).

3. Sahim Salim, *Pregnant Woman Poisoned, Dowry Death Case Filed*, EXPRESS INDIA (Feb. 28, 2008), http://www.expressindia.com/latest-news/pregnant-woman-poisoned-dowry-death-case-filed/277903/.

4. *Rhinehar Convicted of Murder, Rape; Faces Possible Life Sentence*, SACRAMENTO METRO NEWS & REV. (Feb. 18, 2011), http://www.sacmetronews.com/2011/02/rhinehar-convicted-of-murder-rape-faces.html.

5. *Four Held for Dowry Harassment After Woman's Death*, TIMES OF INDIA (Apr. 5, 2011), http://articles.timesofindia.indiatimes.com/2011-04-05/mysore/29383776_1_dowry-harassment-tarikere-bride-burning-case.

Colorado, a man fatally shoots his ex-wife, the mother of his two children, in their marital home before turning the gun on himself.[6] Whether they are shot, poisoned, stabbed, or burned, women across the world are dying at the hands of their male partners.[7]

In an hour-long special on dowry deaths, talk show host Oprah Winfrey told her mostly-female audience that the "horror of bride burning in India" is "right out of the Dark Ages."[8] Indeed, the burning of women by their husbands and boyfriends is horrific—but is it any worse than, or fundamentally different from, each of the other tragic, brutal murders described above? That Oprah spoke so confidently about how "lucky"[9] American women are within the context of domestic violence is presumptive and naive. This is especially poignant when one considers that up to a quarter of Oprah's audience likely had, themselves, experienced intimate partner abuse.[10] Domestic violence is a global phenomenon that knows no geographic or cultural bounds: Between twenty and fifty

6. Vanessa Miller, *2009 Deadliest Year in More than a Decade for Boulder County*, DAILYCAMERA, http://www.dailycamera.com/boulder-county-news/ci_14111375 (last updated Jan. 2, 2010, 11:17 PM).

7. See *infra* Parts I and II for statistics concerning the prevalence of domestic homicides and dowry deaths. *See also* Sushma Kapoor, *Domestic Violence Against Women and Girls*, INNOCENTI DIG., June 2000, at 2, http://www.unicef-irc.org/publications/pdf/digest6e.pdf (stating that, across the globe, "between 20 and 50 [percent] of women have experienced physical violence at the hands of an intimate partner or family member" (footnote omitted)).

8. Sharmila Lodhia, *Selective Storytelling: A Critique of U.S. Media Coverage Regarding Violence Against Indian Women*, *in* SHOUT OUT: WOMEN OF COLOR RESPOND TO VIOLENCE 110, 111 (María Ochoa & Barbara K. Ige eds., 2007) (quoting *The Oprah Winfrey Show: Lisa Ling Investigates Dowry Deaths* (ABC television broadcast Jan. 16, 2004) (transcript on file with author)).

9. After discussing dowry deaths and the practice of dowry giving, Oprah stated: "That's why you're a lucky girl if you're born [in the United States]." She also stated:

> I always say this, that if you are a woman born in the United States, you are one of the luckiest women in the world. Did you know that? Well, if you didn't know that, you're really going to believe me after this show. Imagine a place where it's not out of the ordinary for a husband to set his wife on fire.

The Oprah Winfrey Show, *supra* note 8. That same statement could easily be made about the United States: Imagine a place where it is not out of the ordinary for a husband to shoot his wife.

10. *See* PATRICIA TJADEN & NANCY THOENNES, DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, at iii–iv (2000), http://www.ncjrs.gov/pdffiles1/nij/181867.pdf (stating that approximately twenty-five percent of women in the United States report being victims of intimate partner violence at some point in their lives).

percent of women worldwide have suffered domestic violence.[11] Despite the universality of this problem, the Western media[12] continues to distinguish domestic homicides in developing countries—specifically, dowry deaths in India—from domestic homicides in the United States.

Dowry is defined as the "clothes, jewelry, household goods, cash, and property that a bride brings to a marriage."[13] In ancient India, the dowry tradition enabled parents to provide for their daughters despite a system of patrilineal inheritance.[14] Over time, however, dowry has become something that a groom demands of the bride's family, and it now serves as a channel through which men control and abuse women.[15] The cycle of abuse culminates when a woman is unable to comply with these demands, at which point some men murder their wives, a form of domestic homicide referred to as "dowry death" or "bride-burning."[16] The Oprah special detailed above represents just one example of the Western media's dramatic coverage of dowry deaths in India as well as its paradoxical refusal to recognize the parallel domestic homicides committed in the United States every day. American society fails to place dowry deaths appropriately within the larger category of domestic violence.[17]

This Note argues that both domestic homicides in the United States and dowry deaths in India belong in the same category: domestic violence. Although the apparent causes of domestic homicides may differ—for example, a woman's inability to meet dowry demands, or a woman's infidelity—the ultimate causes are fundamentally the same. An identical,

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11. *See* Kapoor, *supra* note 7, at 1.

12. Throughout this Note, I use "Western media" to mean primarily the media in the United States.

13. VEENA TALWAR OLDENBURG, DOWRY MURDER: THE IMPERIAL ORIGINS OF A CULTURAL CRIME 3 (2002).

14. Sanjay S. Jain, *Taking Women Seriously: An Introspection on Law's Engagement with the Evil of Dowry*, *in* FAMILY VIOLENCE IN INDIA: HUMAN RIGHTS, ISSUES, ACTIONS AND INTERNATIONAL COMPARISONS 114 (Swati Shirwadkar ed., 2009); *see also* D.N. Sandanshiv & Jolly Mathew, *Legal Reform in Dowry Laws*, *in* DOWRY AND INHERITANCE 73, 74 (Srimati Basu ed., 2005).

15. Molly Moore, *Consumerism Fuels Dowry-Death Wave; Bride Burnings on the Increase in India*, WASH. POST, Mar. 17, 1995, at A35.

16. See *infra* Part II for a detailed explanation of the dowry tradition as it has evolved over time.

17. Uma Narayan, *Cross-Cultural Connections, Border-Crossings, and "Death by Culture": Thinking About Dowry-Murders in India and Domestic-Violence Murders in the United States*, *in* DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD-WORLD FEMINISM 81, 86 (1997).

complex panoply of factors—sexist ideology, objectification of women, and deeply entrenched patriarchy—underlies and enables both domestic homicides in the United States and dowry deaths in India. In the context of murder, the method of killing is of minimal moral import. Domestic homicides in the United States and dowry deaths in India are qualitatively indistinguishable.

The Western media's sensationalist portrayal of bride-burning in India[18] is the product of a (perhaps subconscious) desire to distinguish the United States from developing countries, reinforcing its hegemonic self-image as a world leader in women's rights. The media assists in crafting this image of the "Other" or outsider. As stated by legal scholar Leti Volpp:

> The negative image of "other" [Indian] women is used as a mirror of progress, so comparisons between women, as opposed to comparisons with men, become the relevant frame of reference for the discussion of human rights. By accepting the contention that their lives are superior to the lives of women from "other" cultures, the attention of many women is diverted from the fact that they continue to be subordinate to men within their own culture.[19]

Essentially, this portrayal of Indian women as the "Other"[20] enables the United States to leave its hegemonic worldview untouched. This Note argues that in order to continue improving women's rights in the United States, we must acknowledge that domestic violence is not unique to the developing world. Postcolonial feminist theory[21] helps illuminate the far-reaching ramifications of "Othering" domestic homicides in India. The United States must abandon this dialogue of the "Other" and recognize the tragic reality

18. When contrasted with media coverage of domestic homicides in the United States, the media uses fanatical and sensational language in its coverage of dowry deaths in India. See *infra* Part IV.A for a discussion of the enormous differences between Western media coverage of the two very similar phenomena.

19. Volpp, *supra* note 1, at 1214 (footnotes omitted).

20. *See generally* Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, *in* THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 51, 74 (Chandra Talpade Mohanty et al. eds., 1991).

21. See *infra* Part IV.B for an explanation of postcolonial feminism and "Othering."

that male partners murder thousands of women across the globe, both in the United States and in India, every year.[22]

Part I provides an overview of domestic homicides in the United States. After presenting a brief history of the dowry tradition, Part II analyzes fatal domestic violence in India. Part III investigates the universal social factors that enable domestic violence across the globe. Part IV uses postcolonial feminist theory to explain the far-reaching ramifications of the Western media's failure to associate Indian dowry deaths with the parallel domestic homicides committed in the United States.

22. There are several caveats and limitations to this Note. First, this Note is not intended to imply that dowry deaths are somehow worse or more noteworthy than other sorts of violent crimes in India. Certainly, there are many domestic homicides in India each day that are not connected with dowry demands, as well as many other sorts of violent and fatal crime. These, too, represent a significant social problem. Dowry deaths are only one small aspect of the larger phenomenon of domestic violence, which knows no geographic bounds.

Further, this Note focuses on research regarding domestic homicides committed only by men against women. Certainly, there is same-sex violence, as well as intimate partner violence committed by women against men. I do not intend to imply that these cases are unimportant or nonexistent. However, statistically speaking, an overwhelming majority of cases are male-perpetrated violence against female victims. *See* CALLIE MARIE RENNISON, DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2001 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf (stating that approximately eighty-five percent of domestic violence victims in the United States are women). Women are eight times more likely than men to be killed by an intimate partner. *See id.* While thirty-three percent of female murders were committed by intimate partners, only four percent of male murder victims were killed by intimate partners. *Id.* Additionally, in 2000, 1247 women were killed by an intimate partner compared with 440 men. *Id.* Admittedly, these statistics reflect studies conducted only in the United States; I have been unable to find directly comparable statistics for domestic violence in India. However, studies have shown that domestic violence statistics are comparable worldwide. *See generally* Kapoor, *supra* note 7, at 3 (stating that the majority of domestic violence is perpetrated by men against women, and that violence committed by women against men constitutes only a small percentage of domestic violence as a whole). Thus, this Note reflects the statistical majority and focuses on male-perpetrated intimate partner homicides with female victims. Domestic homicides committed by women against men, by men against other men, and by women against other women are beyond the scope of this Note.

Finally, the particular practice of dowry in India has been linked to female infanticide, which is itself an enormous problem. Some scholars have proposed that the two practices of dowry and infanticide are so closely related that the two should be studied in conjunction with each other. See OLDENBURG, *supra* note 13, at 5–18 for a discussion of the link between dowry and female infanticide.

I. DOMESTIC HOMICIDES IN THE UNITED STATES

Domestic homicides account for up to one third of all female murders committed in the United States today.[23] Between 1000 and 1500 American women are killed by male partners each year—approximately four women every day.[24] Nearly seventy-five percent of such intimate homicides result from relationships long plagued by ever-escalating domestic violence.[25] Domestic violence is a grave social problem in the United States that impacts women disproportionately.[26]

In the 1960s and 1970s, domestic violence arrests were infrequent, and, of the cases that were reported to prosecutors, many were dismissed.[27] In some jurisdictions, prosecutors dropped charges in up to eighty percent of domestic abuse cases.[28] This lack of enforcement left women without reliable legal remedies, thereby ensuring the continued subordination of females as a class.[29] The battered women's movement then began to increase public recognition of intimate partner violence and to place it, so to speak, on the "political radar screen."[30] Due to the justice system's historical reluctance to combat domestic violence, activists in the battered women's movement advocated for stronger policies that limited

23. RENNISON, *supra* note 22.

24. *See id.*

25. *See* Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 525 (2010) ("For women murdered by current or former intimate partners, two-thirds to three-quarters of them were previously subjected to domestic violence by their murderer."(footnote omitted)).

26. *See* RENNISON, *supra* note 22.

27. *See, e.g.*, Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 116–19 (1991) (describing a study of forty-three criminal cases involving domestic abuse in Louisville, Kentucky, where seventy-nine percent resulted in dismissals).

28. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 857 (1994) (explaining that, in many jurisdictions, if the victim recants, refuses to testify, or fails to cooperate, prosecutors will drop charges against the alleged perpetrator; in contrast, jurisdictions with no-drop policies have much lower early attrition rates); Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 942 (1999).

29. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 753–55 (2007).

30. G. Kristian Miccio, *If Not Now, When? Individual and Collective Responsibility for Male Intimate Violence*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 405, 407 (2009).

prosecutorial discretion.[31] Lobbying and social activism successfully produced reform, and the justice system thereafter shifted toward a more aggressive approach to domestic violence prosecution.[32] Mandatory or no-drop prosecution policies began gaining momentum in many jurisdictions.[33] These policies reduce prosecutorial discretion by requiring prosecutors to at least attempt to pursue domestic violence charges and by implementing barriers to thoughtless dismissal.[34] As a result of these policies, police response has improved, recidivism has been reduced,[35] and the number of domestic violence prosecutions has skyrocketed.[36]

However, the legal protections for women in the United States still have major shortcomings. Legal scholar Sara Benson conducted a study of police response to domestic violence and found that even carefully-worded mandatory arrest laws often fail to trump customary police discretion.[37] In other jurisdictions, intimate homicides are often charged as voluntary manslaughter rather than murder, which can have the result of lessening a perpetrator's sentence.[38] Additionally, despite its benefits, even a well-implemented aggressive prosecution system is problematic. Mandatory policies like no-drop prosecution usurp victim autonomy, arguably revictimizing women as they move through a system in which they have no control.[39] Studies further reveal a modern trend toward dual arrest—the arrest of both parties rather than solely of the batterer—despite the fact that very few domestic

31. O'Connor, *supra* note 28, at 942.

32. Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 196 (2008).

33. O'Connor, *supra* note 28, at 943.

34. *Id.*

35. *See* Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CALIF. L. REV. 643, 655–61 (1997) (examining the effects of mandatory arrest laws as implemented in Minneapolis and other cities).

36. O'Connor, *supra* note 28, at 943.

37. *See* Sara R. Benson, *Failure to Arrest: A Pilot Study of Police Response to Domestic Violence in Rural Illinois*, 17 AM. U. J. GENDER SOC. POL'Y & L. 685, 693 (2009).

38. *See generally* Emily L. Miller, Note, *(Wo)Manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001) (discussing the doctrine of voluntary manslaughter as it relates to intimate homicides, arguing that "men who kill women in the heat of passion should no longer find any shelter in the harbor of voluntary manslaughter").

39. *See* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 551 (1999).

violence incidences involve mutual abuse.[40] The system remains deeply flawed and warrants legislative attention and reform.

II. DOWRY DEATHS IN INDIA

The literal definition of dowry is the "clothes, jewelry, household goods, cash, and property that a bride brings to a marriage."[41] Although this fundamental definition of the word has remained static, the social practices surrounding it have changed dramatically—and gravely—over time. Historically, dowry was designed to support daughters who were not legally entitled to inheritances; now, it serves as a channel through which men extort money from their wives' families through threats and abuse.[42] Section A discusses the practice of dowry and its remarkable transformation over time. Section B examines the legal construction of, and response to, dowry deaths in the Indian legal system. Section C discusses the disjunction between the aggressive anti-dowry laws and the disheartening statistics surrounding dowry deaths.

A. Dowry Trends in Contemporary India

Dowry was not always the harmful, oppressive practice it has become today. In ancient India, dowry enabled families to provide for their daughters despite a custom of patrilineal inheritance.[43] It was never demanded or expected by the groom but was merely an offering by the bride's family.[44] In a culture that did not legally entitle female children to inheritances of any kind, dowry was a rare tool for female empowerment.[45]

Despite its original purpose, dowry today has become a profoundly oppressive practice affecting women across India. Although the dowry tradition has existed for centuries in many cultures, the phenomenon of dowry deaths is "thoroughly

40. *See* Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 229 (2003).

41. OLDENBURG, *supra* note 13, at 3.

42. Molly Moore, *Consumerism Fuels Dowry-Death Wave; Bride Burnings on the Increase in India*, WASH. POST, Mar. 17, 1995, at A35.

43. *See* sources cited *supra* note 14.

44. *See* Jain, *supra* note 14, at 115.

45. *See* Moore, *supra* note 42.

modern."[46] Over time, dowry has become something a groom demands of the bride's family, often through threats or acts of violence. Many attribute this change to modern consumerism;[47] as one journalist explains, "[m]arriage today seems to be a pile of valuable items with a bride on the side."[48]

Demanding dowry has become a tool for men to control their wives, and, in some cases, it leads to a form of fatal domestic violence dubbed "dowry deaths" or "bride-burning." In contemporary India, dowry deaths are becoming increasingly common.[49] In 2008 alone, over 8000 dowry deaths were reported to Indian law enforcement.[50] Currently, an average of seventeen Indian women are murdered in dowry-related incidents every day.[51]

B. The Legal Construction of, and Response to, Dowry Deaths

In India, three fundamental provisions form the body of law designed to combat and prevent dowry deaths. The Dowry Prohibition Act (DPA),[52] in effect since 1961, provided the foundation for subsequent anti-dowry legislation; however, it is rarely enforced. Section 498A, commonly referred to as the "Anti-Cruelty Statute,"[53] broadened and clarified the definition of dowry-related crimes. Finally, section 304B,[54] likely the most powerful anti-dowry provision in Indian law, prescribes criminal punishment for those involved in dowry-related crimes. Even this legal framework, however, does not provide adequate protection.

Although the DPA, which prohibits both the giving and taking of dowries, is rarely enforced, it created the framework

46. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 13 (2002).

47. *See* Sandanshiv & Mathew, *supra* note 14.

48. Mohammad Yusha, *The Curse of Dowry*, OYE! TIMES (Mar. 28, 2011), http://www.oyetimes.com/news/india/10335-the-curse-of-dowry.

49. Vijayendra Rao, *Dowry "Inflation" in Rural India: A Statistical Investigation*, 47 POPULATION STUD. 283, 284 (1993).

50. Yusha, *supra* note 48 (stating that 8172 dowry deaths were registered with law enforcement in 2008).

51. Moore, *supra* note 42.

52. Dowry Prohibition Act, No. 28 of 1961, *avaialable at* http://wcd.nic.in/dowryprohibitionact.htm.

53. INDIA PEN. CODE ch. XXA, § 498A (1987).

54. INDIA PEN. CODE ch. XVI, § 304B (1986).

for more effective subsequent provisions that eventually provided greater protections for women.[55] Although later laws, described below, undoubtedly have more teeth than the DPA, the DPA continues to serve basic functions, such as providing the legal definition of dowry to which all subsequent laws refer.[56] Although the DPA was intended to completely abolish the practice of dowry, it has been, by and large, disregarded by all communities and socioeconomic groups.[57] It is largely lip service and is rarely enforced.[58]

The second law pertaining to dowry deaths is section 498A of the Indian Penal Code,[59] often colloquially referred to as "the Anti-Cruelty Statute."[60] This law makes it a crime for a husband, or a member of the husband's family, to partake in "any willful conduct . . . likely to drive the woman to commit suicide or . . . to cause grave injury . . . to the woman" or "harassment of the woman where such harassment" is due to a demand of dowry.[61] This statute broadens the prohibitions laid out in the DPA and expands coverage to other acts of cruelty, threats, or violence related to dowry demands.[62]

The third law, section 304B of the Indian Penal Code, prescribes criminal punishment for men involved in dowry deaths.[63] Section 304B states:

> Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry,

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55. *See* Jain, *supra* note 14, at 115–16.

56. *Id.*

57. Edward A. Gargan, *Bangalore Journal; For Many Brides in India, a Dowry Buys Death,* N.Y. TIMES (Dec. 30, 1993), http://www.nytimes.com/1993/12/30/world/bangalore-journal-for-many-brides-in-india-a-dowry-buys-death.html?src=pm.

58. Amelia Gentleman, *Indian Brides Pay a High Price*, N.Y. TIMES (Oct. 22, 2006), http://www.nytimes.com/2006/10/22/world/asia/22iht-dowry.3246644.html?pagewanted=1.

59. INDIA PEN. CODE ch. XXA, § 498A (1987).

60. Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177, 178 (2006).

61. *See id.* at 187 (citing The Criminal Law (Amendment) Act, No. 46 of 1983; INDIA PEN. CODE ch. XXA, § 498A(a)–(b)).

62. *See* INDIA PEN. CODE ch. XXA, § 498A; Sandanshiv & Mathew, *supra* note 14, at 73.

63. INDIA PEN. CODE ch. XVI, § 304B (1986).

> such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.[64]

Thus, if a woman dies of unnatural causes within seven years of marriage, and if she was harassed for dowry by her husband or his family shortly before her death, there arises a rebuttable presumption that the death was caused by her husband.[65] This provision further expands protection for women. It is important to note, however, that even under this statute, dowry deaths result in punishment that is distinct from, and less severe than, that for murder.[66] Sentences for dowry deaths range from seven years to life imprisonment, but punishment for murder ranges from life imprisonment to death.[67]

C. The Social Response to Dowry Deaths

Despite the enactment of numerous laws that purport to protect women from dowry deaths and domestic violence, these laws are characterized by a colossal lack of enforcement. All three of the dowry-related provisions described above have largely failed to deter the commission of dowry murders.[68] Indian legislators have achieved material changes in the law in an effort to combat dowry-related crimes, but these laws have been largely unsuccessful;[69] even the most protective laws will be ineffective without adequate enforcement.

After all, law enforcement mirrors the values and social mores of the community from which the laws were developed.[70] Police departments are not designed in a manner that enables them to adapt to the evolving legal structure; as a result, police officers often continue in their old ways despite changes to the law.[71] Studies have shown that police prefer to avoid

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64. *Id.*

65. Judith G. Greenberg, *Criminalizing Dowry Deaths: The Indian Experience*, 11 AM. U. J. GENDER SOC. POL'Y & L. 801, 808 (2003).

66. *See generally* Sharmistha Choudhury, *Dowry Killing Is Not as Bad as Murder*, LEGAL NEWS & VIEWS, Sept. 2001, at 5.

67. *See id.*

68. Interview with Dr. V.S. Elizabeth, Assoc. Professor, Nat'l Law Sch. of India Univ., in Bangalore, India (Mar. 24, 2011).

69. Purna Manchandia, *Practical Steps Towards Eliminating Dowry and Bride-Burning in India*, 13 TUL. J. INT'L & COMP. L. 305, 319 (2005).

70. *See* Parvathi Menon, *"Dowry Deaths" in Bangalore*, FRONTLINE, Aug. 14–27, 1999, *available at* http://www.hindu.com/fline/fl1617/16170640.htm.

71. *See id.*

involvement in intrafamilial crimes like domestic violence.[72] In India, wealth and power add a further level of complexity, as law enforcement officials and judicial officers remain vulnerable to such influence.[73] Furthermore, due to the caste-like Indian social structure, women generally marry into more affluent or powerful families, leaving dowry-related victims at a disadvantage.[74] Thus, although the Indian legislature has made significant progress, women remain largely unprotected from dowry-related crimes and fatal domestic violence.

Just like feminist activists in the United States, many Indian women refuse to stand by idly. A strong anti-dowry movement in India has existed for over twenty years.[75] In the late 1990s, Vimochana, a women's organization located in Bangalore, spent nearly a decade compiling data on female burn victims admitted to Victoria Hospital, infamous for the high volume of dowry victims treated in its burn unit.[76] On average, seven women are admitted to the burn unit each day at Victoria Hospital alone—sometimes as many as ten.[77] Vimochana's research reveals that an alarmingly high number of young married women are dying unnatural and suspicious deaths, usually involving "stove-bursts" or "kitchen accidents."[78] Many of these so-called kitchen accidents occur not around mealtimes but rather in the middle of the night;[79] others occur in the bathroom or living room, far from any stove or kitchen appliance. The police, unable or unwilling to investigate, write off many of these burn-related deaths as accidental.[80] Vimochana successfully advocated for a post-mortem investigatory process; however, the organization continues to advocate for improved police attitude and enforcement.[81]

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72. Ursula Sharma, *Dowry in North India: Its Consequences for Women*, *in* DOWRY AND INHERITANCE 23, 23–24 (Srimati Basu ed., 2005).

73. *See id.*

74. *See id.*

75. *See generally* Rajni Palriwala, *Reaffirming the Anti-Dowry Struggle*, ECON. & POL. WKLY., Apr. 29, 1989, at 942 (providing a brief overview of the anti-dowry movement in the 1980s).

76. *See* Celia W. Dugger, *Kerosene, Weapon of Choice for Attacks on Wives in India*, N.Y. TIMES, Dec. 26, 2000, at A1; *Activities*, VIMOCHANA, http://www.vimochana.in/activities.html (last visited Jan. 22, 2012).

77. *See* Menon, *supra* note 70.

78. *Id.*

79. *Id.*

80. *See id.*

81. *See id.*

Indian women are fighting the dowry tradition individually as well. One young woman named Nisha Sharma refused to comply with an outrageous dowry demand, even though it ended her engagement and could have ended her life.[82] Even a substantial dowry—consisting of two televisions, two refrigerators, two home theater systems, two air conditioners, and a luxury car—was not enough for Nisha's groom, who demanded an additional 25,000 rupees in cash on the day of the wedding.[83] Nisha called off the wedding and reported the matter to the police, who arrested the groom under the rarely enforced DPA.[84] Nisha has become an Indian national idol, inspiring young women across the country to refuse to comply with dowry demands.[85]

III. A ROSE, BY ANY OTHER NAME . . .

Regardless of what we call these horrific acts, domestic homicides in the United States and domestic homicides in India are fundamentally the same. The monikers we bestow on them are irrelevant. Fatal domestic violence is the same thing whether it occurs in the United States or in India, through burning, stabbing, or shooting. The fact that, in one country, domestic homicides are committed with a gun rather than kerosene in no way indicates a more socially advanced society with regard to gender equality. Section A examines the facial differences between domestic homicides in the United States and in India. Section B explores the enabling and motivating forces for domestic violence generally—in particular, power and control, patriarchy, and objectification and devaluation of women—and shows that these factors are globally applicable.

82. *See* Soma Wadhwa, *Rising Daughters Inc*, OUTLOOKINDIA.COM (June 2, 2003), http://www.outlookindia.com/article.aspx?220304.

83. *See* James Brooke, *Dowry Too High. Lose Bride and Go to Jail.*, N.Y. TIMES (May 17, 2003), http://www.nytimes.com/2003/05/17/world/dowry-too-high-lose-bride-and-go-to-jail.html?pagewanted=all&src=pm; Wadhwa, *supra* note 82.

84. *See* Wadhwa, *supra* note 82.

85. *See id.*; *Say No to Dowry, Yes to Nisha*, TIMES OF INDIA (May 17, 2003), http://articles.timesofindia.indiatimes.com/2003-05-17/edit-page/27276237_1_nisha-sharma-dowry-girl (describing the "stupendous response" and "rush of admiration" following Nisha's refusal to comply with her fiancé's dowry demands).

A. Deconstructing the Methodological Differences

There is, of course, one clear difference between domestic homicide in the United States and dowry deaths in India: the method of killing. In India, women are usually burned or, sometimes, drowned; in the United States, women are generally shot.[86] Although the American public appears to have latched onto this difference as salient with regard to social progress, it is in fact inconsequential.

Indian men use fire and American men use guns because that is what is available to them. Just as firearms are readily available in the United States,[87] kerosene is readily available in India.[88] One journalist explained, "[t]he use of fire as a weapon, which seems so exotic, is simply expedient: kerosene, a ubiquitous cooking fuel [in India], is a cheap, handy weapon, much like a gun or a baseball bat in an American home."[89] Neither method of killing invokes a higher morality than the other.

The American media and the Western population at large react to bride-burning in India with greater shock and abhorrence than they do in reaction to domestic homicides committed with a firearm. The point, however, is that women *are* murdered, not *how* they are murdered. Legal scholar Leti Volpp explains that although domestic homicides occur with similar frequency in both the United States and in India, the Western world hones in on dowry murders as a "signifier of cultural backwardness"; yet the only veritable difference is the method of killing.[90] Regardless of the weapon of choice, women across the globe are more likely to be killed by their intimate partners than by strangers.[91] By contradistinguishing dowry deaths from other domestic homicides, the Western world deliberately turns a blind eye to the dire realities of domestic violence.[92]

86. *See* Interview with Dr. V.S. Elizabeth, *supra* note 68.
87. *Id.*
88. *See* Lodhia, *supra* note 8, at 113–14.
89. Dugger, *supra* note 76.
90. Volpp, *supra* note 1, at 1187 (footnotes omitted).
91. *See* Lodhia, *supra* note 8, at 112.
92. *See id.*

B. Motivating Forces

Although there may appear to be different motivating forces on the surface—for example, in India, killings are motivated by a woman's failure to provide sufficient dowry, and in the United States, it is, say, a woman's alleged infidelity—in essence, the motives behind the crimes are the same. A number of "complex and interconnected institutionalized social and cultural factors" account for domestic violence.[93] Violence against women is a multifaceted, byzantine problem, deeply intertwined with the status of women, society's inherently patriarchal structure, a batterer's need for power and control, and the devaluation and commoditization of women in society. This same complex panoply of factors underlies both domestic homicides in the United States and dowry deaths in India.

1. Power and Control

In the United States, the most dangerous period in an abusive partnership is when the woman leaves or threatens to leave.[94] In India, the most dangerous period is when she is no longer willing or able to meet dowry demands.[95] Both of these situations critically revolve around a dominant male's loss of power and control in the relationship.

Power and control are defining characteristics of most, if not all, abusive relationships.[96] A tool aptly titled the "Power and Control Wheel" is often used by victim advocates to identify the telltale signs of abusive relationships—for instance, coercion, threats, isolation, or economic abuse.[97] Studies have shown that a batterer's desire to control his partner often underlies domestic violence.[98] When a man feels

93. Kapoor, *supra* note 7, at 7.

94. Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 334 (1992) (stating that domestic homicides usually occur when the woman ends the relationship); *see also* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 869 (2009) (stating that the "majority of domestic violence homicides" occur when a victim decides to leave her abusive partner).

95. *See* Interview with Dr. V.S. Elizabeth, *supra* note 68.

96. *See* Mary E. Asmus et al., *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115, 115 (1992).

97. KATHERINE VAN WORMER & ALBERT R. ROBERTS, DEATH BY DOMESTIC VIOLENCE: PREVENTING THE MURDERS AND MURDER-SUICIDES 67 (2009).

98. Lininger, *supra* note 94, at 867–68.

that he is losing control in an abusive relationship, he crafts each move to reestablish and strengthen his command of his female partner.[99] Indeed, male power underlies all of these tragic stories.[100] A man's perceived loss of power and control in an abusive relationship often leads to increased violence and, in some instances, can even be fatal. When New York man Muzzammil Hassan beheaded his wife in February 2009, one commentator explained, "[h]e wanted to show that even though his business venture may have been failing, that he was in control of his wife."[101]

2. Patriarchy

The patriarchal patterns and attitudes that permeate society form an arena in which intimate partner violence is not only possible, but also is propagated. Domestic violence occurs both within and as a result of, repressive patriarchal social structures.[102] Domestic violence is essentially a "manifestation of historically unequal power relations between men and women."[103]

Research has shown that the most common motivations for domestic violence worldwide are a woman's "perceived failures to perform household duties" or other "wifely shortcomings."[104] Typical patterns of domestic violence reveal a batterer's apparent "belief that he is entitled to use violence if his partner is not sufficiently solicitous, obedient, loyal, or compliant."[105] This belief arises from a patriarchal worldview, reinforcing the theory that no matter where it occurs, domestic violence is closely correlated with the overall status of women in society, as well as each woman's individual compliance with, or defiance of, prescribed gender roles. Feminist legal scholar Donna Coker explains that batterers act within a system;

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99. MARGI LAIRD MCCUE, DOMESTIC VIOLENCE: A REFERENCE HANDBOOK 89 (2008).

100. Katharine Viner, *A Year of Killing*, THE GUARDIAN (Dec. 10, 2005), http://www.guardian.co.uk/uk/2005/dec/10/ukcrime.prisonsandprobation.

101. *Beheading in New York Appears To Be Honor Killing, Experts Say*, FOXNEWS.COM (Feb. 17, 2009), http://www.foxnews.com/story/0,2933,494785,00.html (quoting Dr. Phyllis Chesler).

102. *See* Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Domestic Murder in the Post*-Furman *Era*, 49 SMU L. REV. 1507, 1510 (1996) (describing feminist analyses of domestic violence).

103. Kapoor, *supra* note 7, at 7.

104. Dugger, *supra* note 76.

105. Buel, *supra* note 40, at 230.

widespread, deeply-seated gender inequalities both enable and foster domestic violence.[106] Social factors—including society's willful blindness to domestic violence, patriarchal economic structures that disadvantage women, and sexist gender roles—make domestic violence possible.[107]

Additionally, in many communities, domestic violence is actually explained by the woman's actions.[108] This is why the problem of men killing women is often framed as a women's issue.[109] Violence against women "arise[s] as [a] women's issue[ ] in the minds of academics, reporters, and advocates."[110] Feminist scholar Martha Minow admonishes that we must not disregard "the inextricable connection between so-called women's issues and men's behavior."[111] The fact that society frames domestic violence as a predominantly (or, in some cases, exclusively) female problem, especially when it is *men* who are doing the killing, further illuminates the far reaches of patriarchy. Violence against women should not be a 'women's issue' but rather should be of concern for all members of society alike.[112]

3. Devaluation and Objectification of Women

In both the United States and India, women are objectified to an extraordinary degree. Feminist philosopher Martha Nussbaum explains, in Kantian terms, the concept of instrumentality: "Objectification is treating as a mere thing what is really not a thing. . . . The objectification of women is primarily a denial that women are ends in themselves."[113]

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106. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 39 (1999).

107. *Id.* at 39–40.

108. Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 26.

109. *See* Martha Minow, *About Women, About Culture: About Them, About Us*, *in* ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 252, 252 (Richard A. Shweder et al. eds., 2002).

110. *Id.*

111. *Id.*

112. Thomas Hammarberg, *Why Domestic Violence Is Not Only a Women's Issue*, COUNCIL OF EUR. (Nov. 24, 2006), http://www.coe.int/t/commissioner/Viewpoints/061124_en.asp.

113. Martha C. Nussbaum, *Body of the Nation: Why Women Were Mutilated in Gujarat*, BOS. REV., Summer 2004, *available at* http://www.bostonreview.net/BR29.3/nussbaum.html.

In the United States, widespread sexualization of young girls illustrates the severity of the problem.[114] In spring 2011, Abercrombie & Fitch introduced a line of padded bikini tops for pre-pubescent girls—originally marketed for girls as young as eight years old.[115] Some argue that even the breast cancer awareness campaign runs the risk of objectifying and sexualizing women—with slogans "simultaneously pathologizing and fetishizing women's breasts at the expense of the bodies, hearts and minds attached to them."[116] Many other aspects of American society devalue women as individuals, transforming a woman's social identity into a sexual commodity, a "mere symbol."[117] Objectification and commoditization of women provides the foundation for domestic abuse. As Martha Nussbaum explains, "[t]he road from that point to violation is short and relatively direct."[118]

In India, too, women are objectified and commoditized—though differently than in the United States. Any casual observer walking down the street in Mysore or Bangalore would notice women covered from head to toe—Muslim women in burqas, Hindu and Christian women in traditional Indian

114. *See, e.g.*, LZ Granderson, *Parents, Don't Dress Your Girls Like Tramps*, CNN (Apr. 19, 2011, 8:52 AM), http://www.cnn.com/2011/OPINION/04/19/granderson.children.dress/?hpt=T2.

115. Tamara Abraham, *Parents' Fury as Abercrombie & Fitch Unveils Padded Bikinis for Girls as Young as Eight*, MAILONLINE.COM, http://www.dailymail.co.uk/femail/article-1369949/Parents-fury-Abercrombie--Fitch-unveils-padded-bikinis-girls-young-eight.html (last updated Mar. 25, 2011, 9:02 PM). Abercrombie & Fitch later changed its marketing strategy, recategorizing the top from "push-up" to "padded" and making an announcement on its Facebook page that the company "agree[d] with those who say it is best 'suited' for girls age 12 and older." *See Abercrombie & Fitch Removes "Push-Up" From Girls' Bikini Description Following Outcry*, FOXNEWS.COM (Mar. 30, 2011), http://www.foxnews.com/entertainment/2011/03/30/abercrombie-fitch-removes-push-girls-bikini-description-following-outcry/ (quoting Abercrombie & Fitch's Facebook page).

116. Peggy Orenstein, Op-Ed, *The Trouble with Those Boobies Bracelets*, L.A. TIMES (Apr. 19, 2011), http://www.latimes.com/news/opinion/commentary/la-oe-orenstein-boobies-20110419,0,7726424.story (discussing the new "sexy" trends propagated in the name of breast cancer awareness, like bracelets bearing the phrase "I ♥ Boobies"; Ms. Orenstein, herself a cancer survivor, argues that a more appropriate slogan would be "Save the Woman" rather than "Save the Ta-Tas," redirecting the focus from the body part to the person); *see also* Peggy Orenstein, *Think About Pink*, N.Y. TIMES (Nov. 12, 2010), http://www.nytimes.com/2010/11/14/magazine/14FOB-wwln-t.html.

117. *Cf.* Nussbaum, *supra* note 113 (explaining the instrumentalization phenomenon within the context of 'kingly rule' in Gujarat; there, certain aspects or characteristics of society made women into a symbol, "a tool of male ends;" the same argument can be made in other contexts as well).

118. *Id.*

saris—and the paradoxical juxtaposition of this reality against sexually explicit billboards, music videos, and television commercials. The need to cover is itself an acknowledgement of sexuality, creating a double standard for women. One scholar explains that the deep-seated patriarchal norms and social mores of Indian society have morphed female identity into nothing more than a sexual commodity and "child-producing machine."[119]

The commoditization of women manifests in different ways, from "sexualized societies" to "repressive regimes."[120] Women in both India and the United States are all too often objectified, treated as a means rather than an end in themselves.[121] Martha Nussbaum explains the dangerous implications of this attitude:

> What is relevant here is that the logic of instrumentality also leads powerfully in the direction of seeing women as violable. What you have already conceived of as a mere tool of your own ends, not an end in herself, can so easily be understood as something that you may beat, abuse, burn, even break up at will: it is yours to use, and to abuse.[122]

In this way, the objectification of women allows for and, arguably, invites violence against women. Devaluation and objectification of women play a pivotal role in enabling intimate partner violence both in the United States and in India.

IV. WESTERN MEDIA

Media plays a crucial role in creating social norms and mores. The media is capable of dramatically impacting and shaping how an issue is framed and addressed by the general public. In the case of domestic violence, information that could be used as a tool for increasing awareness and inciting change is instead employed to downplay certain issues and to deflect negative attention to developing countries. Section A explains the Western media's incongruous portrayal of fatal domestic

119. MOHD. UMAR, BRIDE BURNING IN INDIA: A SOCIO LEGAL STUDY 4 (1998) (footnote omitted).

120. Ruth Limkin, *Women Are Not Objects To Be Used*, BREADANDJUSTICE (Apr. 1, 2011), http://breadandjustice.wordpress.com/2011/04/01/women-are-not-objects-to-be-used/.

121. *See* Nussbaum, *supra* note 113.

122. *See id.*

violence in India and in the United States. Section B explores this disconnect through a postcolonial feminist lens, showing why it exists and explaining why it must change.

A. The Western Media's Binary Construction of Fatal Domestic Violence in the United States and India

There exists in Western media a shocking incongruity "between the 'disappearing dead women' in U.S. accounts of domestic violence and the 'spectacular visibility' of women murdered over dowry in India."[123] In the United States, a man's murder of his wife is a routine crime, reported impassively and methodically; a woman killed by her husband in India, on the other hand, is a stimulating headliner.

Western media coverage of domestic homicides in America is characterized by an unsympathetic, systematic discourse. Domestic homicides are often reported not within the context of domestic violence but framed as routine criminal activity. Often, a short paragraph entitled "Man Killed Wife" will suffice, including little to no information about a couple's domestic violence history or any details of the events leading up to the crime.[124] At most, articles may casually mention "problems"[125] or "marital discord"[126] but generally skirt the issue of domestic violence as such. Media coverage of intimate homicides tends to shroud the domestic violence infrastructure in which these crimes occur.[127] Western reports of domestic violence homicides generally avoid reference to a pattern or history of domestic violence, instead presenting the crime as an

123. *See* Narayan, *supra* note 17, at 89.

124. *See, e.g.*, Brian R. Ballou, *Wakeman Man Killed Wife, Say Authorities; Retired Accountant Is Held Without Bail*, BOS. GLOBE, Mar. 29, 2011, at B1; Elizabeth Gibson & Holly Zachariah, *Man Killed Wife, Then Himself in Home, Police Say*, COLUMBUS DISPATCH, May 1, 2011, at 1B; Kyle Glazier, *Coroner: Aurora Man Killed Wife, Self*, DENVER POST, Jan. 19, 2011, at B2; Carla Rivera & Andrew Blankstein, *Man Kills Wife, Daughter, Self*, L.A. TIMES, Jan. 10, 2011, at AA6. These articles illustrate the straightforward dialogue that shapes these crimes as routine, avoiding mention of any potential patterns or instances of domestic violence.

125. Travis Andersen, *Waltham Man Kills Wife and Self, Police Say; Neighbors Voice Surprise, Say They Saw No Trouble*, BOS. GLOBE, Nov. 13, 2010, at B3.

126. Ballou, *supra* note 124.

127. Charlotte Ryan et al., *Changing Coverage of Domestic Violence Murders*, 21 J. INTERPERSONAL VIOLENCE 209, 212 (2006).

"isolated event."[128] In this way, the media's approach to domestic homicides falsely extricates the crime from the context of domestic violence. This has the result of "undermin[ing] efforts to change public policy and consciousness" relating to intimate partner violence,[129] creating a loss of crucial opportunities for understanding, social recognition, and increased awareness of the problem.[130]

This unemotional, routine reporting of domestic homicides in the United States contrasts starkly with the elaborate and sensationalized coverage of dowry deaths in India. For the past decade or two, "sensationalized discussions of [dowry-related] violence within the Indian community have remained a staple subject for talk shows and news programs" in the United States.[131] Stories about bride-burning as depicted via mainstream Western media "illuminate otherness," focusing on how unusual and foreign the violence feels—or is *supposed* to feel.[132] Histrionic language characterizes dowry murders, described by the Western media as a "ghastly tableau,"[133] a problem of "epidemic proportions,"[134] its victims "grotesquely disfigured."[135] Sentences like, "[t]hey lie in rows, wrapped like mummies in white bandages, their moans quieted by the pain-obliterating drip of morphine"[136] spark interest and fuel the imagination. The language employed by the Western media in covering dowry deaths is theatrical and sensational—especially when juxtaposed against the straightforward, routine coverage of domestic homicides in the United States.

A second crucial difference in the Western media's portrayal of domestic homicides in the United States and in India is that "culture" is only referenced as a cause in one of the two. Unfamiliar forms of fatal violence against women that

128. Elizabeth L. MacDowell, *When Reading Between the Lines Is Not Enough: Lessons from Media Coverage of a Domestic Violence Homicide-Suicide*, 17 AM. U. J. GENDER SOC. POL'Y & L. 269, 270 (2009).

129. Ryan et al., *supra* note 127, at 213.

130. *See id.*

131. *See* Lodhia, *supra* note 8, at 112.

132. *See* Minow, *supra* note 109, at 254.

133. William Claiborne, *Dowry Killings Show Social Stress in India*, WASH. POST, Sep. 22, 1984, at A1.

134. Edward A. Gargan, *Bangalore Journal; For Many Brides in India, a Dowry Buys Death*, N.Y. TIMES (Dec. 30, 1993), http://www.nytimes.com/1993/12/30/world/bangalore-journal-for-many-brides-in-india-a-dowry-buys-death.html?src=pm.

135. *See* Dugger, *supra* note 76.

136. *See id.*

westerners perceive as unusual are labeled as instances of "death by culture."[137] Uma Narayan pioneered this argument, stating that

> when . . . "cultural explanations" are given for *fatal* forms of violence against Third-World women, the effect is to suggest that Third-World women suffer "death by culture" . . . [and] fatal forms of violence against mainstream Western women seem interestingly resistant to such "cultural explanations," leaving Western women seemingly more immune to "death by culture."[138]

By over-emphasizing dowry deaths as a product of Indian culture, the Western media necessarily implies that it is *not* a part of American culture. Despite the marriage of "culture" and "bride-burning" in the Western media, cultural explanations do not similarly accompany media coverage of domestic homicides in the United States. Developing countries' populations are often essentialized into cultural and ethnic identities, but "Americanness" is never characterized as such;[139] in this way, Indian women "are portrayed as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West."[140]

B. Exploring the Disconnect: Lessons from Postcolonial Feminism

If these two crimes are fundamentally the same, why does the media portray them as so different? Why are Americans so appalled and captivated by the burning of brides in India but scarcely so much as blink when a husband shoots his wife in the United States? This inconsistency is neither inexplicable nor inconsequential. The framing of Indian dowry deaths in the Western media is central to our understanding of domestic violence in our own country.

The primary explanation for the Western media's polarizing coverage of dowry deaths in India is what is referred

137. *See* Narayan, *supra* note 17, at 85.

138. *Id.* at 84–85.

139. LEELA GANDHI, POSTCOLONIAL THEORY: A CRITICAL INTRODUCTION 126 (1998).

140. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Postcolonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002).

to in postcolonial feminist theory as "Othering." Essentially, India's identity comes into existence in the Western media as a result of the "principle of identification through separation."[141] The Western media posits dowry deaths in India as wholly different, entirely Other from domestic homicides in the United States. This Othering serves several functions:

> [T]he excessive focus on the cultural devaluing of "other" women obviates the fact of sexism among majority communities or in Western states. The negative image of "other" women is used as a mirror of progress, so comparisons between women, as opposed to comparisons with men, become the relevant frame of reference for the discussion of human rights. By accepting the contention that their lives are superior to the lives of women from "other" cultures, the attention of many women is diverted from the fact that they continue to be subordinate to men within their own culture.[142]

In this way, American women typically contribute to Othering by "locat[ing] Indian women firmly within an oppressive framework and distanc[ing] their experiences from [our] own by viewing them as much more oppressed than women like [us] who live in the 'progressive' Western world."[143] This mislaid attention to domestic violence in other cultures shrouds domestic violence in the United States;[144] it enables and reinforces the West's hegemonic self-perception as a society in which women's liberation has been achieved.

The import of this comparison lies in the impact it has on the United States' approach to domestic violence. Othering facilitates denial and resistance to acknowledging the presence of domestic violence in our own country. On the metaphorical list of social problems to address, the United States checked the box, so to speak, for women's rights. As a result, the American public exerts little to no political and legal energy on women's rights. Acknowledging the Othering that pervades the Western media and American social cognizance will allow the United States to begin to reevaluate the social realities of

141. GAYATRI CHAKRAVORTY SPIVAK, OUTSIDE IN THE TEACHING MACHINE 55 (1993).

142. *See* Volpp, *supra* note 1, at 1214 (footnotes omitted).

143. Radhika Parameswaran, *Coverage of "Bride Burning" in the* Dallas Observer*: A Cultural Analysis of the "Other,"* 16 FRONTIERS, no. 2/3, 1996, at 69, 69.

144. *See* Volpp, *supra* note 1, at 1212.

women's status and will reinvigorate the debate surrounding women's rights reform.

CONCLUSION

When the Western media sensationalizes the status of women in developing countries, it reinforces the United States' hegemonic self-perception as a society in which women's liberation has been unequivocally achieved.[145] The cultural explanations proffered by Western media outlets for dowry deaths obscure its inexorable connection to the greater category of domestic violence.[146] Without concomitant comparisons to women's (lesser) status in India, the Western façade of women's radical liberation in the United States would fall.[147]

A country in which women are murdered in mass numbers by their male partners is neither a triumph of women's liberation nor a model for women's rights. By overemphasizing and sensationalizing the injustices against women in India, the Western media diverts attention from the *same* injustices against women in the United States. This Othering of Indian women, along with the concomitant cultural explanations for dowry deaths, inhibits American society from developing strategies to effectively combat domestic violence.[148] Acknowledging and abandoning the Othering that pervades the Western media and the American social cognizance will enable us to approach the realities of gender inequality in the United States; it will reinvigorate the debate surrounding women's rights and provide us with the tools necessary to continue our progress in women's rights reform.

145. Again, I acknowledge the leaps and bounds of progress that the women's liberation movement has achieved in the United States, and I am very grateful for its work and dedication. But I argue that there is still work to be done.

146. Kapur, *supra* note 140, at 17.

147. *See* Mohanty, *supra* note 20.

148. *See generally* Kapur, *supra* note 140.