המרכז לחקר האשה ביהדות
ע"ש פניה גוטספלד הלר

האשה ביהדות

סדרת דיונים

מס' 5-4

נישואין, חירות ושוויון: הילכו שלושתם יחדיו?

עורכת: טובה כהן

אוניברסיטת בר-אילן

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המרכז הבין-תחומי לחקר האשה ביהדות פועל כיחידה עצמאית בפקולטה ליהדות באוניברסיטת בר-אילן. הנחת העבודה של המרכז היא כי המחקר אקדמי המנתח את השורשים של מקום האשה ביהדות יתרום לא רק להשלמת התמונה החסרה של האשה בעבר, אלא גם לזהותה ולמקומה בחברה בהווה. מטרות המרכז הן מחקריות וחינוכיות-ציבוריות.

המרכז מעודד **מחקר** שנועד להעשיר את הידע שלנו על ההיסטוריה של האשה היהודיה ועל מקומה בחיי החברה, הדת, המשפט והיצירה היהודיים. המרכז יוזם לשם כך תכנית פרסומים, מקיים כנסים אקדמיים וכן תומך במחקרים ספציפיים.
המרכז רואה חשיבות בהשפעה על התחום החינוכי-ציבורי ויוזם פעולות המכוונות להשפעה על המודעות הציבורית באשר למקומה של האשה ביהדות. לשם כך לוקח המרכז חלק בפעולות המיועדות לשינוי המודעות הנשית הדתית וכן פונה אל הציבור הרחב בפורומים ציבוריים שונים. מתוך מטרה להוות גורם משפיע בתחום החינוך יוזם המרכז השתלמויות מורים והכנת תכניות לימודים בתחומים המבטאים את ייחודה של האשה היהודית.

תוכן העניינים

המרצים לפי סדר הופעתם

פרופ' סוזן אוקין, המחלקה למדעי המדינה, אוניברסיטת סטנפורד. יו"ר תוכנית לאתיקה וחברה באוניברסיטת סטנפורד.

פרופ' פנחס שיפמן, פרופ' לדיני משפחה וירושה בפקולטה למשפטים באוניברסיטה העברית, דיקן המכללה למשפטים ברמת-גן.

פרופ' סוזן ארנוף, המחלקה לכלכלה, אוניברסיטת ניו-יורק. יו"ר ארגון "עגונה" - מן המרכזיים שבארגוני השטח הפועלים לסיוע לעגונות, ארגון העובד בקשר עם ביה"ד של הרב רקמן.

ד"ר רות הלפרין-קדרי, הפקולטה למשפטים, אוניברסיטת בר-אילן. מתמחה בדיני משפחה, ביו-אתיקה ותיאוריות פמיניסטיות של המשפט. חברה בצוות משפטי של ארגון "עיקר" - קואליציה בינלאומית לעגונות.

עו"ד אסתר סיוון, יועצת משפטית, שדולת הנשים בישראל. מתמחה בדיני עבודה ומשפט חוקתי, דיני אישות ובנושא מעמד האשה. מרכזת קואליציית "עיקר".

הרב פרופ' דוד גולינקין, דיקן בית הספר לרבנות של מכון שכטר ללימודי היהדות בירושלים ויושב ראש ועד ההלכה של כנסת הרבנים בישראל (ארגון הרבנים של התנועה המסורתית).

הרב פרופ' מאיר פלדבלום, המחלקה לתלמוד, אוניברסיטת בר-אילן. מתמחה בספרות תנאית ואמוראית, כתב ספר בנושא מסכת גיטין ומחקרים בנושא אישות.

הרב פרופ' עמנואל רקמן, נגיד אוניברסיטת בר-אילן, חבר בבית-דין צדק לבעיות עגונות.

הרב ד"ר דניאל טרופר, בעל תואר בהיסטוריה יהודית וכן בעל סמיכה לרבנות מאת הרב י.ד. סולובייציק. מייסד ומנכ"ל תנועת "גשר" לעידוד סובלנות וזיקה לתרבות יהודית.

הרב ד"ר נעם זהר, המחלקה לפילוסופיה אוניברסיטת בר-אילן, מתמחה בפילוסופיה של ההלכה, פילוסופיה מוסרית ומדינית ומחשבת ישראל.

הקדמה

אחת הבעיות המרכזיות העומדות כיום על הפרק בעולם היהודי בכלל ובעולם האורתודוכסי בפרט היא בעיית העגונות ומסורבות הגט. בעיה זאת היא הביטוי החריף ביותר לאי-השוויון בין גברים ונשים בדיני הנישואין והגירושין בהלכה היהודית והיא יוצרת מצוקה רבה בקרב היהדות האורתודוכסית. בעיית העגונות ומסורבות הגט עומדת זה מכבר בראש מעייניהם של ארגוני נשים יהודיות בארץ ובעולם ודומה כי באחרונה היא זוכה להכרה והתייחסות גם בקרב גופים שאינם מזוהים דווקא עם קידום נשים.

התפתחות חשובה בקשר לנושא זה התחוללה עם תחילת פעולתו של "בית הדין להתרת עגונות בניו-יורק" שמטרתו היא התרת כבלי העגינות בדרך הלכתית. דרך פעולתו של בית-דין זה שנויה במחלוקת ואינה מקובלת על רוב הפוסקים האורתודוכסים כיום. דרכים אחרות לפתרון הבעיה במסגרת ההלכה אינן מיושמות בדרך כלל, לא בארץ ולא מחוץ לה. עם זאת מועלים ונידונים אמצעים להקלת המצב ולמניעת מקרי עגינות בעתיד.

לאור חומרת הבעיה קיים צורך בדיון בנושא שישלב את היבטיו השונים ויסקור את דרכי הפתרון האפשריות, כשלב מכין לפתרונות הלכתיים שיתקבלו על-ידי הממסד האורתודוכסי. זאת הייתה מטרתו של **הכנס נישואין, חירות ושוויון: הילכו שלושתם יחדיו!** שהיה הכנס האוניברסיטאי הראשון בנושא בעולם כולו. הכנס שהתקיים בז'-ח' תמוז תשנ"ט (21-22.6.99) הוקדש לזכרו של פרופ' אריאל רוזן-צבי ז"ל ואורגן על-יד "המרכז לחקר האשה ביהדות על שם פניה גוטספלד הלר". ההרצאות שנשאו בכנס זה עובדו ונאספו בקובץ זה.

הכנס, ובעקבותיו המאמרים בקובץ זה, נחלק לארבעה מדורים עיקריים. הראשון – העמדת בעית העגונות בהקשר הכללי של מוסד הנישואין האנושי והיחסים בין השותפים בו. החלק השני עוסק בהבניית היחסים בין המינים במשפחה היהודית על ידי חוקי הנישואין והגירושין בהלכה. חלקו השלישי, המרכזי, של הכנס הוקדש לדרכים שונות לפתרון בעיית העגונות והחלק הרביעי הוקדש לדיון ספציפי ב"בית הדין להתרת עגונות בניו-יורק".

תקוותנו כי הכנס והקובץ שבעקבותיו יוסיפו חוליה חשובה לדיון בפתרונות לבעיית העגונות ומסורבות הגט המעיקה על החברה היהודית ועל החינוך לקדושת הנישואין. כדבריו של הרב פרופ' רקמן: "כאשר הנישואין חדלים מלתרום לקדושה – נישואים אלה גוועו, ובלתי-מוסרי להשאיר אז את מסגרת הנישואין על כנה שכן בכך מביאים את הבריות לידי חטא".

ד"ר נעם זהר
ד"ר רות הלפרין - קדרי
פרופ' טובה כהן

לזכרו של אריאל רוזן-צבי

רות הלפרין-קדרי

אין מתאים יותר מאשר להקדיש כנס זה לזכרו של אריאל.

אריאל היה הראשון שפעל באקדמיה ומתוכה, כדי להציב את מצוקת מעוכבות ומסורבות הגט, על סדר-יומה של הציבוריות הישראלית, וזאת בתקופה שבה עיסוק בנושאים אלה, רחוק היה מלהיחשב עיסוק ראוי, המכבד את בעליו. אריאל לא חשש מסטיגמה, מפחיתות-כבוד. במקום שבו ראה עוול קשה מנשוא, התגייס למאבק. וכך לדוגמה, הכין ב-1986, עבור ארגון נעמת, את חיבורו "פתרונות לבעיות אישות". לא היה זה פרסום אקדמי, לא חיבור שהיה אמור לקדם אותו, אבל חיבור, שללא ספק קידם את מה שהאמין בו. נאמן לאמונתו, הוסיף וכתב שנתיים לאחר מכן על "מעמדה של האשה בדין העברי", מאמר ביקורתי ואמיץ, שתחושת הכאב שבו כלפי המסורת שעליה הוא אמון, ניכרת לכל אורכו. וכך כמובן, גם בגולת הכותרת של מפעלו בדיני המשפחה, ספרו "דיני המשפחה בישראל - בין קודש לחול".

אין מתאים יותר מאשר להקדיש לאריאל כנס זה, שנערך דווקא בבר-אילן, האוניברסיטה שבה למד, ובה גם לימד.

זכיתי להימנות עם המחזור האחרון שאותו לימד בבר-אילן, ולהיות תלמידתו של אריאל. לתלמידיו שלי אני נוהגת לומר, בסיום השנה, בעת העלאת דמותו ופועלו - "שלי ושלכם, שלו הוא".

אריאל גילם בתפישת עולמו ובמאבקיו, את המסר העקרוני והכל-כך מורכב: אמונה שלמה, שמותירה מקום גם להעלאת שאלות; מחויבות דתית עמוקה, שאינה חוששת מפני התמודדויות; ושיכנוע פנימי אמיתי וכן, ...ששש...ש... אלי אתגר, נאמן לאופי "הג'ינג'י" הבסיסי, שהיה בו מאז ומתמיד.

דומתני שהביטוי המזוקק ביותר למורכבות הזו מצוי במוטו שאותו בחר ליצירתו המרכזית, ציטוט מתוך ספרו של גבריאל גרסיה מארקס, "אהבה בימי כולרה":

"כל ימיהם הכריזו בגאווה על מוצאם, על מעלותיה ההטוריות של העיר, על ערכם של שרידיה, על גבורתה ועל יופיה, אבל טחו עיניהם מלראות את החורבן שעושה הזמן. חי א', לעומת זה, אהב אותה במידה מספקת בשביל לראותה בעיני האמת."

אני רוצה להאמין שבפועלנו שלנו, נוכל לשאת עמנו את השלמות שנוצרה מתוך המורכבות הזאת. אני רוצה לקוות שזהו מסר שאוניברסיטה זו תוסיף לקדם.

לא חולף שבוע מבלי שאשאל את עצמי: מה אריאל היה אומר על זה? כיצד היה מגיב?

המציאות הישראלית ההולכת ונעשית קשה ושסועה משנה לשנה, משוועת לדמות כאריאל רוזן-צבי. בחיבור המושלם בין הניגודים באישיותו ובהווייתו, יכול היה, אילו רק היה ,להקהות במשהו את המתחים, ואולי אף לאחות קרעים.

ומה היה אומר על הנושא של הכנס? מה היה אומר על ההתפתחויות בעולם ההלכה בעניין זה? מה היה אומר על בית-הדין של הרב רקמן?

בדבר אחד אנו יכולים להיות בטוחים. הוא לא היה שותק ולא היה עומד מנגד.

גם אנו איננו שותקים ואיננו עומדים מנגד. אנחנו, מארגני הכנס, משוכנעים שזוהי נקודת מבחן. אנחנו עומדים כעת בעיצומה של התרחשות סוערת בעולם ההלכה, סביב פעילותו של הרב רקמן. כמעט שלושים שנים לאחר שכתב על כך והתווה דרך לפתרון מתוך ההלכה, קם ועשה מעשה, בבחינת "אם לא עכשיו - אימתי". כמעט בודד במערכה, קורא תיגר על הממסד הרבני, מתוכו פנימה. למרות שכאן בישראל אין חשים בכך, וזו אכן אחת הסיבות לכנס עצמו, אין ספק שמדובר בצומת דרכים.

אם נאמץ לרגע תפישה היסטורית, ניתן למקם את המאבק הנוכחי בתוך רצף של נסיונות שנעשו ע"י יחידים, שפעלו מתוך ובתוך האורתודוקסיה, להציע פתרונות שיתקבלו על דעת פוסקי הדור. הנסיונות האלה היו כולם דרמטיים ומלווים במאבקים קשים ביותר. רובם ככולם נכשלו.

כך למשל, הניסיון האחרון, המקיף והמשמעותי ביותר התרחש ממש לפני מאה שנה, בעקבות הנהגתם של הנישואין האזרחיים בצרפת ב-1884, שכתוצאה מהם החלה תופעת הזוגות שהתגרשו גירושין אזרחיים מבלי לסדר גט כדת משה וישראל, וכמובן, כחלק מאותה תופעה התרבו מקרי עיכובי גט וסחיטה ע"י גברים שנישאו מחדש נישואין אזרחיים ומנעו מנשותיהן הקודמות את הגט לפי ההלכה. לנוכח מצוקה זו, ביקשו רבני צרפת פתרונות הלכתיים. משהתגבש פתרון מסוים, תחילה ע"י הרב וייל ולאחר מכן ע"י הרב אליהו חזן מאלכסנדריה שהציע הנהגת תנאי בנישואין, התחוללה סערה בעולם האורתודוקסי וגדולי הרבנים "איימו על רבני צרפת שיגזרו איסור חיתון עם יהודי צרפת, אם יוציאו החלטתם זו אל הפועל" (מתוך ספרו של הרב פריימן). שיאה של מתקפת-הנגד היה פירסום הקונטרס ההלכתי "אין תנאי בנישואין", שבו לוקטו כל חוות-הדעת השליליות והכרוזים נגד ההצעות לתיקון.

הנסיון ההוא נכשל.

בחיבורו המונומנטלי של הרב פרופ' פריימן, משנת 1945, יש סקירה מפורטת של כל הנסיונות וההצעות לפתרון שהועלו לכל אורך המאה ה-20, הצעות שהועלו כולן מתוך היהדות האורתודוקסית, ע"י רבנים מוכרים ובעלי עמדה, החל בקריאה לחידוש סמכות הפקעת קידושין, בשילוב של תנאי בקידושין - הצעה שהועלתה גם ע"י הרב טולדנו, שהיה רבה הראשי הספרדי של תל-אביב (ולאחר מכן שר הדתות); דרך

מתן הרשאה לכתיבת גט מראש בטקס הנישואין עצמו - הצעה שהועלתה גם ע"י הרב קלאצ'קין "העילוי משקלוב", וגם ע"י הרב הענקין ב-1925, מראשי אגודת הרבנים החרדים באמריקה; וכלה בוויתור גמור על אישות כדמו"י.

קיים מכניזם משותף לכל ההצעות הללו, והדינמיקה של דחייתן ושל כשלונן היא אחידה. ההתחקות אחר הדינמיקה הזאת היא נושא למחקר בפני עצמו.

נסיון העבר, אם כן, משדר פסימיות. אני מעדיפה לכנות זאת - זהירות.

ודווקא מתוך הפרספקטיבה ההיסטורית הזאת, זוהי חובתנו, זוהי שליחותנו, לתת במה ליוזמה הנוכחית, בפורום המתאים לכך יותר מכל. "אם אין אני לי מי לי, ואם לא עכשיו - אימתי, ולא עליך המלאכה לגמור". אכן, לקיים דיון אמיתי, מעמיק ונוקב בנושא. כפי שאריאל היה עושה.

אילו רק יכולנו לשמוע גם אותו בכנס הזה.

חבל על דאבדין ולא משתכחין. מי יתן לנו תמורתו.

מושב ראשון

הפוליטיקה
של חיי משפחה

MARRIAGE, DIVORCE AND THE POLITICS OF FAMILY LIFE*

Susan Moller Okin

Israel is one of the many countries that has both signed and ratified the United Nations' Convention on the Elimination of all Forms of Discrimination against Women. However, as a number of signatory countries have done, Israel registered two substantive reservations. One of them has to do with the Convention's proclamation that men and women should be equals in entering marriage, within marriage, and at such time as a marriage is dissolved. The Israeli reservation is made on the grounds that "the laws of personal status binding on the several religious communities do not conform" with such equality.[1] Orthodox Judaism–both within Israel, where it has an extraordinary amount of authority, and in other parts of the world–is, of course, one of the "religious communities" to which the authors of the reservation were referring. Its Halakhic laws of marriage and divorce, originating in the Torah, by no means treat men and women as equals.

Equalizing the terms of marriage and divorce is absolutely crucial to ending discrimination against women. If women and men are not equal within marriage, they cannot be equal in any other important aspect of their lives either. Thus, to sign a human rights document the central aim of which is to end discrimination against women, but to exempt one's country from its clauses about equality within marriage, is not very different from not signing it at all. This is even more the case for a country like Israel, in which civil marriage is unavailable and persons intending to marry cannot choose (other than by going abroad) to obtain a civil marriage, but must marry under the auspices and according to the rules of the religion to which they are deemed to belong–regardless of whether they hold any religious beliefs or not. Unfortunately, many of the countries that have signed or ratified the various Women's Human Rights documents of the last two decades have done so with similar types of reservation regarding marriage and divorce. However, to both sign and ratify an international document aimed at women's equality but to exclude the institutions of marriage and divorce, as Israel, India, and a number of Muslim countries have done, is to give with one hand only to take back with the other. Thus, it is crucial to Israel's commitment to women's human rights that the inequalities of Halakhic marriage and divorce be reformed.

In the first section of this paper I shall point out that this problem is by no means unique to Orthodox Judaism. It has been, and in many cases still is, a problem faced by many of the world's cultures and religions, because most of them were founded on the principle and the practice of hierarchy between the sexes, or patriarchy. I shall give some examples of how the problem has been addressed and redressed, in the course of struggles to bring such customs and legal systems more in line with

the equality between men and women that has now been widely recognized as the only way for us to live together humanely in the modern world. In the second section of the paper, I shall argue that the terms of marriage and divorce are crucial because they affect deeply the ongoing nature of the marital relationship and therefore of the family built on it. I shall conclude by giving some of the reasons that I think equality and fairness within marriage are both necessary and extremely important.

As I make my arguments, I shall pay attention to and respond to some of the arguments I have heard or read on the other side of the debate. I shall address, in particular, the following four, which I list here in order of what I consider to be their importance, rather than the order in which I address them. First, it is sometimes claimed that there is nothing wrong with the Halakhic law of divorce in itself, and that the problem lies with the few recalcitrant husbands who misuse their legal power, by unreasonably withholding divorces from their wives. I shall argue, to the contrary, that the unequal power of husbands–to give divorces to or to withhold them from their wives, in cases of marital breakdown–is itself a real problem, since it is likely to affect all marriages, not only those that end in divorce. Unless and until a way is found to change this, Halakhic marriage remains a distinctly unequal, and therefore unjust institution. Second, it is sometimes claimed that some of the proposed solutions to the problem of the **get** should be rejected since they weaken or undermine marital commitment.[2] I shall suggest that the type of conditional "retroactive nullification" of a marriage that could solve the problem of the **get** is no more likely to weaken marital commitment than some of the existing aspects of Halakhic law concerning marriage. Third, it is sometimes asked: since Orthodox Jewish women themselves enter into Halakhic marriages, in which wives are bound to their husbands as their husbands are not bound to them, what grounds do they have for complaint if, in the case of a failed marriage, the husband refuses to "unbind" them? Here, after setting aside some related issues, I shall address the question of how freely an Orthodox woman can be said to choose to enter into an Halakhic marriage, and to what extent she could thereby be said to have freely consented to its constraints on her in the event of marital breakdown. And, fourth, I shall address the arguments of those who worry that divorcing husbands are likely to have to submit to unfair property settlements from the civil courts if they do not have the potential to refuse the **get** to their wives in order to rectify such alleged injustices. Here I shall argue that the equal division of marital property that is required by many civil courts (in Israel, England, and the United States, at least) is much more fair to divorcing wives than the temporary maintenance required by Halakhic divorce law, though it still leaves the husband alone in possession of what is frequently the primary asset of the marriage–his human capital or earning power. While occasionally men may be treated unfairly by civil divorce courts, women and children are far more likely to be treated unfairly by them. Thus it is<u>their</u> position, not that of divorcing men, that more often needs to be strengthened.

WOMEN'S EQUALITY AND PATRIARCHAL CULTURE AS A UNIVERSAL PROBLEM:

All of the world's major and most of its minor cultures are based on patriarchal assumptions. In most cultures and religions, until relatively recent times, a wife was acquired by her husband, in many cases in exchange for money or goods (bride price), and in some cases along with money or goods (dowry). Wives were, more or less, the property of and very much under the control of their husbands. This was certainly the case in ancient Rome; it was so under the English Common Law; it is still the case in many places where Islamic law prevails. In many cultures and religions, including much of contemporary Islam, many African non-Islamic cultures, segments of Mormonism (though illegally) in the United States, and ancient Judaism (up until the time of Rabbi Gershom), a man could acquire more than one wife. Thus polygyny was and in some cultures still is permitted. (In most cases, there are limits to the number of wives a man may "acquire," and in some cases he is supposed to get the consent of his existing wives.) Very few cultures, on the other hand, have permitted polyandry–one woman, several husbands–and where they do, it generally appears in the form of several brothers' marrying one woman, rather than a woman's being permitted to choose several unrelated husbands, as polygynous men are permitted to choose their wives.

Halakhic law regarding marriage and divorce clearly has patriarchal origins, and some of the extant problems of this law originate from the ancient asymmetry of Jewish polygyny.[3] While explicit discussions of marriage and divorce in the Torah are rare, one short passage , Deuteronomy XXIV, 1-4, is very explicit:

> *A man takes a wife and possesses her. She fails to please him because he finds some indecency about her; and he writes her a bill of divorcement, hands it to her, and sends her away from his house; she leaves his household and becomes the wife of another man, then the second man rejects her, writes her a bill of divorcement, hands it to her, and sends her away from his house?.*

While there has been much disagreement among Talmudic scholars about what "indecencies" on the part of women constitute adequate reasons for their husbands to divorce them, several things are made very clear in this passage.[4] The wife was considered a passive party in both marriage and divorce at this stage of Jewish history. She is "taken" and "possessed" by her first husband; she is "sent away" from his house on account of some failing, only to be "rejected" and "sent away" from the house of her second husband. There is no suggestion that she has any say in the matter of divorce. This short passage is the basis of most of Halakhic law concerning marriage and divorce. But its conception of the respective places of men and women in marriage is clearly unacceptable

in the modern world. As long ago as the eleventh century, the extent of inequality it represented was recognized to be unacceptable, and two central parts of Halakhic marriage and divorce were substantially altered. Rabbi Gershom established both that Jewish men were no longer to be polygynous, and that a Jewish husband could not divorce his wife without her consent. This substantially changed the nature of Halakhic marriage; yet there is still one vast inequality of the sexes that remains from the original text –the requirement that a husband give his wife a bill of divorce in order to release his wife from the marriage so that she may remarry or have children who are not to suffer the stigma and the serious limitations incurred by being "bastards" or **mamzerin**. The obvious inequality results from the fact that, if a wife does not consent to a divorce, she has no such power over her husband. He can not only manacle his wife, but can at the same time continue with his own life, father children who are regarded as legitimate, and, in certain circumstances, even marry again (with the permission of a Rabbinical Court), due to the residues of polygyny that still exist from premedieval Jewish law. Thus, significant relics of a highly patriarchal religious past still remain very real and problematic in the lives of the Jewish **agunot**, or "chained women," who are stuck interminably in marriages that were long since dead, and frequently subjected to extortion by their husbands.

Since virtually all of the world's cultures and religions have had to come to terms with recognizing, after not just centuries, but millennia, of patriarchal beliefs and practices, the equality of women with men, it is possible to gain insights from their reforms. Let us look briefly at two examples. Under the English Common Law, until the mid nineteenth century, a woman lost her legal personhood upon marriage, entering into a state of "coverture," in which she could not sign a contract, make a will, sue or be sued, or own property in her own name. Even the wages earned by a married woman could legally be taken from her by her husband, whether or not he was living with her, and spent as he wished. Divorce was impossible to obtain except through the passage of a special Act of Parliament, which, of course, restricted its access to the extremely rich. In the course of three centuries only four women had been able to obtain such divorces. When the 1857 Divorce Reform Act made divorce more accessible, it was still vastly more accessible to men than to women. A husband could divorce his wife on the grounds of a single instance of adultery; but a wife could divorce her husband only if he had committed adultery in addition to bigamy, incest, or extreme cruelty. So a woman had no way of legally exiting a marriage in which her husband was habitually unfaithful to her, treated her disdainfully, and even beat her–so long as the stick he used was no thicker than his thumb. Moreover, if such beatings, or even sexual assault, occurred within a marriage,[5] a wife was still not entitled to leave her husband. If she tried to leave he could legally restrain her, even if that meant imprisoning her in his house.

How, then, did English married women, who were not so very long ago under the jurisdiction of such unjust common law, attain the legally equal status they have today? Only through a long series of reforms, struggled for mostly by feminist men and women, starting with the Divorce Act of 1857 and the Married Women's Property Act of 1882 and concluding with the recognition of rape within marriage and further divorce reforms of the 1970s and 1980s. Many of these reforms were strongly resisted, and attained only after numerous hard-fought attempts. While some nineteenth century Members of Parliament were convinced that the common law was "unjust in principle and grevious (sic) in operation, and ought to be altered,"[6] others claimed that making the law of divorce more equal or allowing married women to own their own property would undermine the institution of marriage, which, they claimed, was necessarily hierarchical. As Mary Lyndon Shanley relates, discussing the contentious debate over the proposed Married Women's Property Act of 1857:

> *[V]ery few members of Parliament believed that two independent wills could exist in a household without inviting disaster. Lord Campbell advised that the bill "would lead to perpetual discord. It was a proposal shocking to the habits of all the people of the country." A. J. Beresford Hope feared that the feminists' efforts, if not stoutly resisted, would lead to the "breakdown of the distinguishing characteristic of Englishmen–the love of home, the purity of husband and wife, and the union of one family." J. D. Fitzgerald asserted that the bill would "effect a complete revolution in the law, which would disturb all the relations of husband and wife." To listen to the Members of Parliament, one would have thought that never again would parents and children sit around the dining table or the family gather about the hearth, if wives were to possess the right to control their own property.*[7]

In the contexts of both the issue of whether married women should be permitted to own their own property and divorce reform, such sayings as "If two ride on a horse, one must ride behind" were frequently cited, without explanation as to why horseback riding had any relevance to marriage at all.[8] In spite of a great deal of such opposition in Parliament (which of course during this time was elected only by property-owning men), divorce was made more accessible, though as noted above it was still extremely unequal and long remained so. It was not until after several further attempts that the Married Women's Act was finally passed in 1882, and the law of child custody was altered in 1886 so as to give more rights over their children to widows and divorced wives. And, as I mentioned earlier, it was not until the last two decades of the twentieth century, in the context of the Second Wave of feminism, that English women attained complete legal equality in marriage and divorce.[9] Old prejudices and misconceptions about what constituted flourishing and just family relationships took almost a century and a half to be overcome. What can be learned

from the English example? Surely, that ways of thinking about marriage that are rooted in long-held tradition not only need to change over time, but can do so. This can happen if people are able to reconceptualize what was a hierarchical institution, to come to think of it as a relationship of equals, and to adapt their laws accordingly.

Another specifically religious culture (besides Judaism) that has, in some countries, been struggling with a long history of extremely unequal marriage and divorce law is Islam. According to Muslim law, or **Shari'a**, a man may have up to four wives at one time, whereas a woman can have only one husband. A Muslim man may marry a Jewish or Christian woman, whereas a Muslim woman may not marry a Jewish or a Christian man. A Muslim husband may divorce his wife unilaterally, without having to give any justification, and must support her economically only in a temporary and minimal way, whereas a Muslim wife can divorce her husband only with her husband's consent or by judicial decree and for limited and particular reasons, such as his not supporting her economically during the marriage.[10] Muslim feminists have been working for change in these laws, with varying amounts of success. For example, Abdullahi Abdul An-Na'im writes: "[D]iscrimination on grounds of gender under **Shari'a** violates established human rights. [It] is morally repugnant and politically untenable today."[11] In several Muslim countries, divorce laws have been reformed so as to significantly depart from . In Tunisia, women's and men's rights to divorce are equivalent and, as I write this paper, Egypt has just adopted similar reforms. These are, so far, the only two Muslim countries with equal rights in divorce for women and men.

In other Muslim countries, such as Iran, there have been movements towards equality followed by regression towards inequality. Unfortunately, under Reza Shah's rule some reforms, such as the unveiling of 1935, were forced on women, which created a backlash. Marriage and divorce were reformed considerably later, and in an atmosphere much friendlier to the changes. Under Shah Pahlavi (Muhammad Reza Shahn), the reform of marriage and divorce law was passed in 1965, in the form of the Family Protection Act, which gave women the right to initiate divorce and to gain custody of their children, and freed them from being unilaterally divorced by their husbands by placing the right to finalize divorce in the hands of a court. It also gave women power to refuse to allow their husbands to take additional wives. All of this progress for women, however, was eradicated within two weeks of the takeover of Iran by the Ayatollah Khomeini in 1979. One of the first acts of the Islamic leaders' campaign of Islamization was to abrogate the Family Protection Law. Gender relations as a whole were one of the Revolution's primary targets. "Two years after the Revolution, **hejab** was in full force; women had lost the right to initiate divorce and have child custody; they had been barred from becoming a judge or a president; they could not attend school

if they were married; they could not study and work in a large range of subjects and jobs; and they had been totally subjugated to male power."[12] Now, twenty years later, if the current, more reform-minded government is able to stand up to the resistance of powerful conservative clerics, women's lives in Iran are likely to improve. However, due to the oppressive rule of the Taliban, women in Afghanistan have taken their place as those most oppressed within Islam.

Muslim feminists in many countries have to struggle, just as Jewish feminists do, with the unequal terms of marriage in traditional Muslim law, according to which a husband has the unilateral right to divorce his wife, but she has no parallel right to divorce him. Both Maliki and Hanafi Muslims, however, recognize a wife's right to divorce her husband, by permitting the validity of such a right if it is agreed to by the husband as part of the marriage contract. But such agreement is currently rare since, as one commentator puts it, "social pressures make it almost impossible for a proud patriarchal male to accept this condition in his marriage contract." Without such prior agreement, a Muslim wife who wants a divorce from an unwilling husband "has to resort to courts or to the method of **khul'** to exit her marriage." That is to say, she "obtains the consent of the husband to the divorce by paying him a sum of money. The husband may refuse to grant his consent at any price or demand a very high price for his consent. As a result, a wife may be unable to regain her liberty even through **khul'**." Thus demands for money far in excess of the amount of the dowry given by the husband to his wife upon marriage, amounting to blackmail, result directly from "the fact that jurists made the husband's consent necessary to the **khul'** process."[13] This is remarkably similar to the problem of the **get**, and Muslim and Jewish feminists and reformers have suggested some similar ways of resolving the problem. These include either general revision of the laws of marriage and divorce so as to equalize the rights and obligations of the partners or, alternatively, more frequent use of the insertion of the woman's right to a divorce, in some form or other, in the original marriage contract.

What can be learned from the Muslim example is that patriarchal religious laws concerning marriage and divorce that are rigidly interpreted and fail to be reformed are likely, eventually at least, to be overridden by reforms in civil law, and that the best way for religions with patriarchal pasts to retain influence over family life is to adapt to the realities of the modern world–including the equality of women. The solution used by some Muslims to the problem of the **khul'** can, perhaps, also allay the fear of the undermining of marriage that worries those who oppose the solution to the **get** problem that consists of the insertion of a retroactive nullification clause into the marriage contract. As I mentioned earlier, it is sometimes claimed by such opponents of reform that to give a woman what is in effect the right of divorce in her marriage contract, or **ketubah**, is to undermine

the institution of marriage. However, for at least three reasons, this argument is unconvincing. First, men entering into Orthodox Jewish marriages for centuries have known that they possessed the right of divorce in a fairly wide range of circumstances.[14] Yet this has not been seen as a threat to the strength of the institution of marriage. Second, the **ketubah** provides for some support of a wife and children in the event of her husband's death or divorce. Thus, that divorce is a possible outcome of marriage is already prepared for at the time of any Halakhic marriage, so that giving the bride what amounts to the right of divorce should she need it seems unlikely to undermine the institution of marriage. Third, perhaps those who reject such a solution to the problem of the **get** should consider the words of the Muslim feminist quoted above, and question whether it is not the "proud patriarchal male," rather than the institution of marriage, that is threatened by the notion that his wife should have the same rights as he does regarding marriage and divorce. What is feared may be more the undermining of patriarchy than the undermining of marriage.

THE EFFECTS ON MARRIAGE OF INEQUALITIES IN DIVORCE:

Even when the formal, legal terms of both marriage and divorce are equal, their actual practical effects tend to make women more vulnerable than men. This is not inevitably the case, for very little of it flows from the biology of male/female differences. It is very largely due to currently common divisions of labor between the sexes. The more traditional the division of labor is within a marriage–the more a woman assumes responsibility for all or the vast majority of the unpaid family work and the more a man assumes responsibility for all or the vast majority of the paid work–the more **economically** dependent the woman is likely to become. Of course, women are not, on average, any more dependent in general within marriage than are men. But the dependence of men on their wives, especially in traditional marriages–for the care of their children, meals, a clean and cared-for home, clean clothes, special meals for the celebration of holidays–is very rarely recognized as dependence. Even when women share the income earning by engaging in full time wage work, studies done in the United States show that they are still likely to do at least twice as much of the unpaid family work (which is often not even thought of as "work") as their husbands.[15] In general, even with equal legal terms of marriage and divorce, women are likely to change their lives more because of marriage and parenthood than are men. In doing so, they are likely to render themselves economically dependent.

However, the terms and customs of marriage and divorce can seriously exacerbate this tendency towards inequality. If the terms of marriage, for example, designate husbands as the economic supporters of their wives and wives as the primary child rearers and homemakers, as traditional Halakhic law does, they will tend to undermine the capacity of a couple to share, equally, both

of these important family roles and to maintain their economic independence.[16] If customs permit the marriage of women at very young ages, especially if to older men, this will reinforce gender inequalities within marriage.[17] If laws or customs designate the male as the head of the household, this too obviously detracts from the couple's potential to relate to each other as equals. And if the terms of divorce are biased toward either party–as Halakhic law presently gives more power to husbands than to wives–this too is likely to have an impact on their relationship within marriage.

Thus, one of the very most significant reasons that the terms of divorce need to be equal is that they affect the nature of the entire marital relationship, and therefore of the entire family. To some extent, this could be said to be a simple matter of common sense. Imagine either a group or a dyadic relationship from which one person can withdraw or exit relatively easily, but the other persons, or person in the case of a marriage, cannot exit without considerable damage or risk of damage to his or her well-being and life opportunities. Surely this is likely to affect considerably the way each will act within the relationship. As it happens, we do not have to rely on common sense, because the idea that the mutuality or asymmetry of a relationship is considerably affected by the respective capacities of its members to withdraw from it is now accepted as a principle of social science. Albert O. Hirschman first made a convincing connection in 1970 between the influence that members of an institution or group are able to exert by voicing their views and concerns, and the feasibility of their exit from the group.[18] There is a complex relation, Hirschman argues, between voice and exit. On the one hand, if the exit option is readily available, it will "tend *to atrophy the development of the art of voice.*" Thus, if divorce were very easy and costless–legally, economically, socially, and emotionally–married persons would not exert much effort in discussing or trying to work out problems in their marriages. On the other hand, the nonexistence or very low feasibility of the exit option can also impede the effectiveness of voice, since the *threat* of exit–whether explicit or implicit, is an important means of making one's voice influential. Thus, as Hirschman summarizes these points, "voice is not only handicapped when exit is possible, but also, though in a quite different way, when it is not." Because of this, in order for the members of groups to have the most effective influence, he concludes that "there should be the possibility of exit, but exit should not be too easy or too attractive." In the case of marriage, then, the most effective way to ensure that the members of a couple try to work out difficulties that arise in their relationship is to make divorce possible but not easy to acquire.

This sociological theory certainly gives us some insights that we can use to think about marriage, divorce, and the influence of voice within families. But we need also to consider the special dynamics of a two-party relationship, especially the fact that one partner's ability to exit does not just weaken

the institution, but dissolves it. Thus whether or not the other partner wishes to exit, he or she is effectively deprived of the relationship by the decision of the other to exit. Because of this, the relative feasibility of the exit option for the two parties is crucial for the power dynamics of the relationship.[19] As I have noted, in many religions and legal systems, past and present, a husband can unilaterally divorce his wife, without her consent and for little or no cause. This gives husbands vast power over their wives, which is presumably one of the reasons that, in the early 11th century, rabbinical judges revised Halakhic law, modifying a husband's unilateral right of divorce by requiring his wife's consent.[20] However, as I have argued elsewhere, other inequalities in divorce, too, can have considerable impact on the ongoing relationship of marriage.[21] Anything in the terms of divorce that makes it an easier or more attractive prospect for one partner in the marriage than it is for the other contributes inequality to the ongoing relationship. Why? Because the partner who has greater potential for exiting unharmed from the relationship thereby gains power or influence that can be used within the relationship (through explicit or implicit threat of withdrawal) to make the more dependent partner comply with his wishes. In such circumstances, the asymmetric dependency is very likely to increase in the course of the relationship.

Clearly, marriage involves, in some respects, especially emotionally, mutual vulnerability and interdependence. It is, clearly, also a relationship in which some aspects of unequal vulnerability are not determined along sex lines. For example, spouses may vary in the extent of their love for and emotional dependence on each other; it is certainly not always the case that wives love their husbands more than they are loved by them, or vice versa. Nevertheless, as I have argued at greater length elsewhere than I have space to do here, in crucial respects marriage structured along traditional lines involves women in a cycle of socially caused and distinctly asymmetric vulnerability.[22] Part of the reason that many social theorists have failed to recognize the patterns of maritally-caused vulnerability is that they confuse the socially caused–and therefore alterable–vulnerability of women with the largely natural–and therefore largely unavoidable–vulnerability of young children. This confusion goes along with the usually unargued and surely unfounded assumption that women are inevitably the primary caretakers of children.[23] Women are **made** vulnerable, both economically and socially, by the interconnected traditions of female responsibility for young children and female subordination and dependence, of which both the history and the contemporary practices of marriage form a significant part.

All of these problems exist even when marriage and divorce laws are formally equal, for they have as much to do with ingrained personal and social expectations as they do with law. Marriage–all the more when the division of labor between the sexes is very traditional within it–enhances

the human capital and earning power of men as it detracts from that of women. Thus most husbands' power in the world and in the relationship tends to grow with time, just as that of most wives decreases. If a couple divorces, especially either while there are still young children or after many years of traditional division of labor between husband and wife, the wife is far more likely to be harmed, economically and socially, than is the husband. Typically, any financial support awarded to the wife is insufficient. Moreover, in about one-half of divorces, in the United States at least, the ex-husband soon stops paying it. Studies comparing the living standards of ex-wives with those of ex-husbands a few years after divorce show that those of the former (including, usually, the children) have fallen considerably while those of the latter have risen. Thus, even when the terms of divorce are equal, the substantive results are not equal, and the differential in dependency and in feasibility of exit affects ongoing relations between married couples. As I have suggested, this very important point responds to the fear of some in the debate over the **get** that the civil courts are liable to treat men unfairly, and that they therefore need the bargaining power that comes with being able to refuse to give their wives a **get**. In fact, civil courts in both Israel and the U.S. are far more likely to treat wives unfairly at the time of divorce, given their typically at-least-equal contributions to the marriage. Thus, if indeed a potential bargaining chip should be retained on behalf of either party, to offset the chance of unfair treatment, it should be to women, not men, that the potential power of refusing their former spouses a divorce is reserved.

Typical traditional or quasi-traditional marriage is indeed an excellent example of socially created vulnerability, largely because the asymmetric dependency of wives on husbands affects their potential for satisfactory exit, and thereby diminishes the effectiveness of their voice within the marriage. The few sociologists who have paid attention to the effect of exit potential on voice or influence within marriage agree that not only power to make decisions, but also power to prevent issues from even becoming objects of decision, are related to the spouses' differential opportunities to exit satisfactorily from the marriage.[24]

However, all of these actual bad effects of divorce on marriage are likely to be considerably exacerbated for women if the very terms or even the availability of divorce are not equal for husbands and wives, as is still the case in many places, cultures, and religions. If the law is such that an ex-husband is unlikely to have to support his wife and children for more than a short period, even if she has virtually no wage work skills or the children are still young, both his and his wife's awareness of this fact is likely to render an already asymmetric relationship even moreso–opening the way to exploitation and abuse. Fear of impoverishment is likely to be such a disincentive to divorce that most women's potential to voice their views and to make claims within the relationship

will be much diminished by it. And if the law enables a man to divorce a woman in such a way that he is able to go on with his life, remarry, and have further children–but she is not permitted to do any of these things–this shadow hanging over their marriage is definitely likely to affect day-to-day, year-to-year relations between them. When the formal rules of marriage and divorce are unequal for husbands and wives, they are likely to live their lives together with the constant presence of inequality (whether always conscious or not) and the continual potential for exploitation and abuse. Thus those who contend that the problem of the **get** is not a problem in Halakhic marriage, but simply a problem in the case of the occasional recalcitrant husband who will not free his wife, are completely missing the point. As the foregoing argument about exit and power has shown, the problem of the get is a problem at the very heart of Orthodox Jewish marriage. Its shadow hangs over all such marriages. The problem is most obvious in the case of those that end in divorce, most of all where the husband either refuses to give the get or exploits his right to refuse it in some way. But it is a looming presence in any difficult Halakhic marriage and is likely to affect the distribution of power even between spouses in harmonious and happy marriages.

WHY INEQUALITIES IN MARRIAGE AND DIVORCE MATTER SO MUCH:

It is clear from the above argument that the asymmetric provisions of Halakhic law regarding divorce and remarriage are problems with the law as presently interpreted; they are not simply a problem in the case of the unfortunate **agunot** whose unreasonable husbands refuse to release them. The asymmetry of Halakhic law regarding the giving of the **get** reaches into every marriage and family, by exacerbating the already greater socioeconomic power of men in traditional marriages. Of course, some people might respond, at this point: "So what? Marriage is supposed to be a hierarchical relationship; families are supposed to be patriarchal." To this, I present three responses. The first is that men and women are equally human beings and, as such, are surely deserving of equal concern, respect, and freedom to live their lives as they deem best. No argument I have ever heard has dissuaded me of this. The burden, surely, is on whomever does not believe it to prove the case.

The second is that what harms and disadvantages women usually harms and disadvantages children too. I can't summarize here all the ways in which this is so, and surely it is one of those matters of which the details differ greatly from one part of the world to another, and from one culture to another. Studies in various parts of the world have shown that among relatively poor people, the mother's income is far more closely related than the father's income to the nutritional intake of children. Other studies show that the education of young women is more closely related than any other factor to their ability to space their children as they wish to, which also bears on the children's health and general well-being. As I have explained above, divorce usually harms women and

children quite a bit more, financially, than it harms men. When the unpaid family work that is still mostly done by women is not valued, such that they are considered unilaterally dependent on their husbands, children suffer. Unfortunately, the crucial work that women do in keeping house and raising children, and therefore a crucial aspect of the well-being of children themselves, seems to count less and less as we hurtle further and further into the vortex of capitalism.

The third reason that inequality between husbands and wives is detrimental is that marriage and the family are extremely important for not only the physical, but also the moral nurturance of the next generation. The relationship between their parents is children's first example of how adults behave with each other. Moreover, it is children's first example of how two people treat each other who are different in ways that, it turns out, are socially salient. What do we want them to learn from this powerful example? Fairness and empathy with each other's points of view, with discussion and compromise in cases of disagreement? Or the presumption of superiority and entitlement on the part of one, and the sense of subordination and obsequiousness on the part of the other, with unilateral decisions, tyranny, and perhaps abuse in cases of disagreement? Need I answer?

Interestingly enough, while many of the great Western political philosophers thought that family life was an extremely important part of children's development, very few of them questioned the patriarchal hierarchy of the families around them. Even Aristotle, Rousseau, Hegel, and de Tocqueville, all of whom leaned in the direction of political equality, in contrast to their contemporaries or the societies in which they lived, did not consider either including women within that political equality or making them equals with men within their families. Yet each of these spoke at some length about the importance of families as moral learning places for young citizens. Some relied upon love and altruism, but those who did revealed, both in their writings and in their own lives, that these are **not** always reliable.[25] They never confronted the paradox involved in their apparent belief that one can learn to relate to others as equals when one's very first and most important experiences of human relations are of those between persons who treat each other as distinctly unequal. Until twentieth century feminism placed this issue squarely back onto the agenda of political theory, one of the very few notable thinkers to address it was John Stuart Mill, who wrote at a time when the legal terms of marriage and divorce were still extremely unequal in England, and from whom we can still learn. Mill, in his courageous essay The Subjection of Women, takes an impassioned stand that justice within families is essential for the development of just citizens. He argues that the inequality of women within the family is deeply subversive of justice in the wider social world, because it subverts the moral potential of both men and women. Confronting an audience he knew would be unfriendly to the idea of women's equality, he felt compelled to muster strong arguments

for it. The first argument he gives is that such equality "will have the advantage of having the most universal and pervading of all human relations regulated by justice rather than injustice." Making marriage a relationship between equals, he argues, would transform this central part of daily life from "a school of despotism" into "a school of moral cultivation."[26] He goes on to describe, in the strongest of terms, the noxious effect of growing up in a family not regulated by justice. Consider, he says, "the self-worship, the unjust self-preference," that is nourished in a boy who grows up in a household in which "by the mere fact of being born a male he is by right the superior of all and every one of an entire half of the human race." Mill concludes that keeping the terms and conditions of marriage "contradictory to the first principles of social justice" must have such "a perverting influence" on the young that it is difficult even to imagine all the good effects of changing it. He claims that all other attempts to educate the young to respect and practise justice would be superficial "as long as the citadel of the enemy is not attacked." Mill felt as much hope for what the family might be as despair at what it was not: "[J]ustly constituted, [it] would be the real school of the virtues of freedom," primary among which was "justice,?grounded as before on equal, but now also on sympathetic association."[27] Mill not only saw clearly, but had the courage to address, what so many other political philosophers only half saw, or turned away from.

WHY WOMEN ENTER INTO A FORM OF MARRIAGE WHOSE TERMS OF DIVORCE CAN AFFECT THEM SO HARSHLY:

This is the last of the points raised against reform of the **get** by traditionalists that I said I would address. It is sometimes argued that women who have freely entered into an Halakhic marriage, wherein the husband "takes" the wife, and thence must "release" her by granting her a **get**, have no grounds for complaint if and when, in the event of marital breakdown, the husband refuses to grant the **get**. First, I must point out that this argument does not apply to a great many religious Jewish women in Israel who, if they want their marriage to be a Jewish marriage at all, have no alternative but to enter into the very unequal marital arrangement we have been discussing. Because of the historically pivotal political power of the Orthodox and Ultra-Orthodox population, the more egalitarian Reform and Conservative forms of Jewish marriage are not recognized. Neither does it apply to all the secular Jewish women in Israel, who are denied the option of a civil marriage, unless they go abroad–typically to Cyprus–to marry. Thus the argument does not apply to most Jewish women in Israel. The remaining question is whether it could be said to apply to Orthodox Jewish women, whether in Israel or the diaspora. To what extent can they be said to have "freely chosen" all the terms of Halakhic marriage, and therefore to have meaningfully consented to be in the position of the wretched **agunot** if their marriage should fail and their husbands should turn out to be the kind of unreasonable, extortionist, or vengeful men who would make use of such a

device as withholding the **get**? The first assumption of such an argument is that Orthodox Jewish women freely choose to marry at all. But even this is questionable. While it is not their religious duty to marry, as it is the duty of Orthodox men, they have few other viable life choices. They certainly cannot, even if their sexual orientation is strongly homosexual, choose a lesbian partner without violating the laws of their religion. Nor can they choose not to marry, in most cases, without experiencing strong pressure from their families and community. Marriage and having children are not simply choices, but central aspects of Jewish life, especially for the Orthodox and Ultra-Orthodox, and it is very difficult to be part of such a religious community without being married.

The second, equally questionable, assumption of the argument is that a religious woman can "freely choose" to marry in a non-religious ceremony and without the blessing of her religion. For religious people–the moreso the strength of their belief and commitment–their very identity is usually largely constituted by their religion. It is therefore unthinkable for them not to marry in accordance with its laws, tenets, and rituals. Many religious people would not even consider themselves truly married if they did not marry in accordance with their religion, but were married only according to civil law. Thus, having entered into an Halakhic marriage does not mean, in the case of many women, that they have freely consented to, much less endorsed, all or any of its patriarchal terms–from its gendered division of labor to its highly unequal terms of divorce. For many women in such marriages, whether born into or converted to Jewish Orthodoxy, the strength and tenacity of their religious beliefs may exist **despite**, rather than because of the patriarchal aspects of their religion, including its laws of marriage and divorce. Indeed, the number of **agunot** who adhere to their religion, who refrain from a second, civil marriage, and who remain childless because of the impossible situation their religion has placed them in, is strong testimony to the strength of religious belief. It only adds insult to injury to argue that these women freely consented to the terms of their marriage, and thus are in some sense willing accomplices in a marriage system that has left them, in terms of family and intimate life, non-persons for the rest of their lives.

CONCLUSION:

Virtually all of the world's cultures and religions, relatively recently, have had to come to terms with recognizing, after centuries or even millennia of patriarchal beliefs and practices, the equality of women. Some still have a long way to go. But in those that have changed greatly, the struggle was often hard fought, and changes in the laws of marriage and divorce have often been the most strenuously resisted. As I pointed out earlier, even legal equality in marriage and divorce does not always bring actual equality or fairness for women, especially when they have lost earning power during marriages while men have gained it (partly by having wives at home to take care of their children and the rest

of their lives). There is still much work to be done.

The most important thing to recognize is that the problems of how to treat women as full, free, and equal human beings have been experienced by many cultures and religions. There have been many successes. But there are also many failures and regressions occurring for women around the world, partly in reaction to past or present, political or economic, Westernization or imperialism. Each culture or religion has to work out its own way of bringing its laws and customs in line with the equality between the sexes that is an inevitable part of the new century and the new millenium. Within each culture or religion, there are former precedents for change. There were, after all, very significant changes in women's rights achieved within Orthodox Judaism about a thousand years ago, when Rabbi Gershom revised Halakhic law so as to ban polygyny and disallow divorce without the consent of the wife. Surely now it is time to make the much needed and significant changes that will complete Rabbi Gershom's reforms. Halakhic marriage is far more likely to be strengthened than to be undermined by becoming a partnership of equals.

Notes:

* I am very grateful to Noam Zohar for his helpful comments on an earlier draft of this paper.

1 The United Nations and the Advancement of Women 1945-1966 (New York: United Nations, revised edition 1996), pp.248, 801. The other reservation registered by Israel is also connected with marriage and divorce, though less directly. It is that women's roles in public life cannot be entirely equal with men's, since certain of Israel's religious communities prohibit women from becoming judges on their courts. This is the case with the Orthodox Jewish courts, with the result that all matters having to do with Halakhic marriage and divorce in Israel (and for Orthodox Jews in other places) are decided by male judges.

2. See, for example, the discussions in Rachel Biale, Women and Jewish Law: An Exploration of Women's Issues in Halakhic Sources (New York: Schocken Books, 1984), pp.109-110, and Shlomo Riskin, "A Modern Orthodox Perspective," in Jack Nusan Porter (ed.), Women in Chains: A Sourcebook on the *Agunah* (Northvale, N.J.: Jason Aronson, Inc., 1995), pp.189-92. This was the solution adopted by the Conservative Rabbinate, in 1968. (See Sidney H. Schwartz, "Conservative Judaism and the Agunah," in Porter (ed.) Women in Chains, p.210.

3. See Biale, Women and Jewish Law, pp.82-83 for a brief discussion of this connection.

4. For an account and discussion of such disagreements, see Biale, Women and Jewish Law, pp.73-79.

5. It was considered logically impossible to rape one's wife, since "rape" was defined as "nonconsensual sexual intercourse with a person who is not one's wife." Fortunately, Halakhic law has never held that rape is not really rape within marriage. To the contrary, it is considered one of a husband's obligations to ensure his wife's sexual satisfaction.

6. Mary Lyndon Shanley, Feminism, Marriage, and the Law in Victorian England 1850-1895 (Princeton: Princeton University Press, 1989) for an exhaustive discussion of the struggles behind the crucial legal changes in the status of wives that took place during this period. See especially Chapter 1; the quotation is from p.46, quoting 3 Hansard 145 (14 May 1857) 267, and the speaker was Sir Erskine Perry, one of the proponents in the House of Commons of the Married Women's Property Act of 1857, which failed to pass.

7. Shanley, Feminism, Marriage, and the Law, quoting from 3 Hansard 144 (13 February 1857), 619, 3 Hansard 145 (14 May, 1857), 280, and 3 Hansard 146 (15 July 1857), 1521.

8. Shanley, Feminism, Marriage, and the Law, quoting from "Women's Law: Mrs. Norton's letter to the Queen," Law Review 25 (1855-1856), 340.

9. As I shall explain below, legal equality in marriage and divorce does not by any means guarantee substantive equality of outcome.

10. Abdullahi Ahmed An-Na'im, Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Syracuse, N.Y.: Syracuse University Press, 1990), p.177.

11. An Na'im, Toward an Islamic Reformation, p.177. See also Mahnaz Afkhami (ed.), Faith and Freedom: Women's Human Rights in the Muslim World (Syracuse, N.Y.: Syracuse University Press, 1995); Fatima Mernissi, The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam (New York: Addison-Wesley, 1987).

12. Jaqueline Touba, in Fathi (ed.) Women and the Family in Iran

13. Azizah al-Hibri, "Islam, Law and Custom: Redefining Muslim Women's Rights," American University Journal of International Law and Policy 12,1 (1997), pp.1-44, esp. pp.13-14, 21-25. All quotations in this paragraph are from this source.

14. Michael Kaufman, The Woman in Jewish Law and Tradition (Northvale, N.J.: Jason Aronson Inc., 1993), p.193.

15. See Susan Moller Okin, Justice, Gender, and the Family (Princeton: Princeton University Press, 1989), Ch.7, for a fuller argument for this claim.

16. See for example, Kaufman, The Woman in Jewish Law and Tradition, pp.13-29.

17. See the discussion of ages at marriage in the "Torah" and in talmudic law, in the history of various Jewish communities, in Biale, 'Women and Jewish Law', pp.63-68. Though the Talmud states that marriage should occur in very young adulthood, in many such communities, in practice, marriages occurred around the time of puberty or even earlier, but for both spouses–not only brides.

18. Albert O. Hirschman, Exit, Voice and Loyalty: Responses to Decline in Firms, Organisations, and States (Cambridge: Harvard University Press, 1970), pp.43, 55, 83.

19. Hirschman had made this argument twenty-five years earlier, in the context of international trade. See National Power and the Structure of Foreign Trade (Berkeley: University of California Press, 1945; expanded edition 1980), pp.vi-viii, for a summary of the argument. See also Susan Moller Okin, Justice, Gender, and the Family (Princeton: Princeton University Press, 1989), pp.137-37, for a more thorough application of Hirschman's ideas to the institutions of marriage and divorce than is possible here.

20. Biale, Women and Jewish Law, Chapter 2, esp. pp.81-82.

21. Okin, Justice, Gender, and the Family (New York: Basic Books, 1989), Ch.7, esp. pp.136-41 and 156-69.

22. Okin, Justice, Gender, and the Family, Ch.7.

23 Apart from breast-feeding, what part of raising children are men incapable of?

24. See Okin, Justice, Gender, and the Family, pp.156-169, for arguments to this effect.

25. Hegel had an illegitimate child, whom he abandoned, and Rousseau, for all his writings about education and moral development, sent away all of his and his wife, Therese le Vasseur's children to orphanages, soon after their birth and against his wife's wishes.

26. John Stuart Mill, The Subjection of Women (1869) in J. M. Robson (ed.) Collected Works Volume 21 (Toronto: University of Toronto Press, 1984), pp. 294-295.

27. Ibid., pp.324-25.