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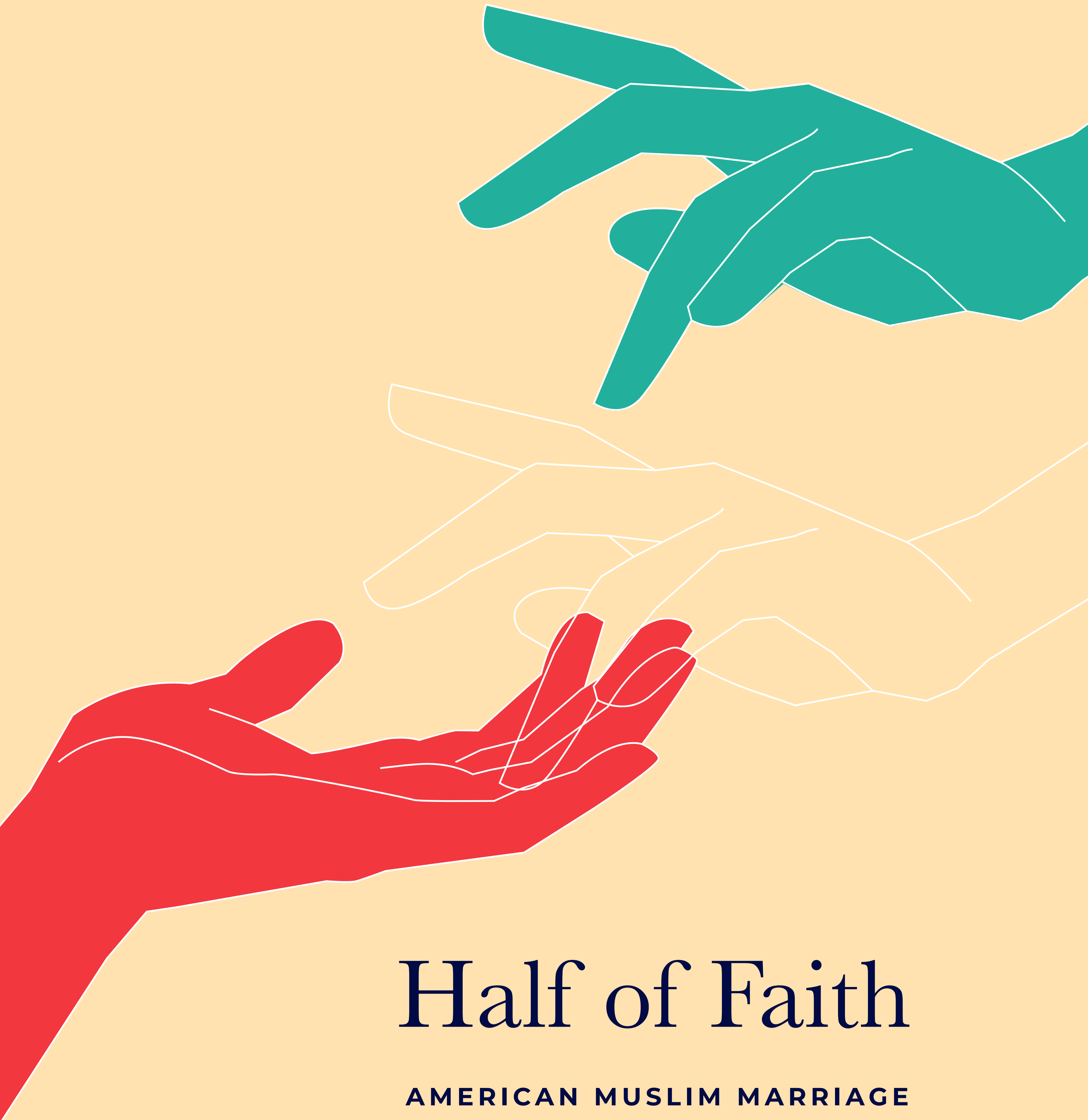

Half of Faith

AMERICAN MUSLIM MARRIAGE AND DIVORCE IN THE TWENTY-FIRST CENTURY

A READER

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BISMILLAHI AL-RAHMAN AL-RAHIM

Introduction

Half of Faith gathers a selection of resources on, and reflections and analyses of, Muslim marriage and divorce in twenty-first century America. In the United States as elsewhere, marriage is central to ongoing Muslim conversations about belonging, identity, and the good life. The articles collected here, written over the course of two decades, provide a window onto moments in American Muslim life and thought. They help us think about women's varied experiences with getting married, being married, and leaving marriages.

A few things are published here for the first time, but most of these pieces have appeared elsewhere: in *Azizah* magazine, in professional or policy newsletters, and in edited volumes or academic journals. They range considerably in length and tone, which makes sense considering the variety of audiences they originally addressed. They cover a broad range of topics, including diversity in Islamic legal thought, marriage contracts, wedding customs, dower norms, divorce practices, and experiences of polygyny. But this reader is neither comprehensive (it omits both interreligious and same-sex marriage, for example) nor programmatic. Contributors do not speak with a single voice. Some of us argue with our past selves in addition to each other. Because the contributions go back twenty years, some statistics are dated and some norms have shifted. By bringing together and making more widely available existing publications alongside a few purpose-written essays, this reader aims to enrich current conversations. It also helps document decades of scholarly debates and community activism, though of course there remains much to do.

This reader is a pandemic project. It came together as we entered the second year of the global COVID-19 crisis, which has magnified and exacerbated existing inequalities. Marginalized and impoverished people have suffered disproportionately, both around the world and inside the United States. Alongside and intersecting with deadly racist disparities in virus exposure, illness, and care, there have been strongly gendered impacts. Even as it has shifted how Muslim communities observe weddings and other lifecycle events, the pandemic has wreaked havoc on women's professional lives. This is especially true for those whose care duties include parenting small and school-aged children. Putting together a collection of all-new chapters was simply not feasible. But one lesson of this extended crisis is that we can adapt. This reader is an exercise in taking what we have—in this case, a body of existing but difficult to find research and writing—and making it more accessible. I'm mindful, still, of its exclusions and distortions. For every piece and author included, numerous others are excluded. It's meant to be a contribution to, and an entry point into, an ongoing conversation, not the last word.

Figuring out how to present these articles posed challenges. They don't separate easily into "tying" and "untying" the knot. Discussions of contract provisions like dower are tangled up with divorce settlements. Several of these essays address, at least in passing, the issue of unregistered marriages, whether monogamous or polygynous. Indeed, alignment or conflict between civil and religious law is a persistent theme. (Of course, that concern isn't unique to the United States context or to places where Muslims are minorities. Even in places where national law is ostensibly Islamic,

issues abound about how private extrajudicial acts—whether contracting marriage or pronouncing divorce—affect civil status. But that's a whole other reader.) Because so many lines of connection emerged among these pieces, I considered chronological order and even debated presenting them alphabetically by author name.

Ultimately, I opted for three sections: Weddings, Marriage, and Divorce. Each piece is preceded by an author's note that reflects on its original context or current implications. In several cases, these notes illuminate an ongoing dialogue among the scholars and work in this reader. This dialogue is always smart and vibrant, by turns loving and contentious, and occasionally downright messy, just like community life.

This is a project defined by constraints—limited time, limited budget, limited energy—yet marked by tremendous enthusiasm, generosity, and good will. The contributors, who Gisela Webb would classify as "scholar-activists," are members of my academic network; despite pandemic exhaustion, each responded positively to my initial invitation within hours and met deadlines with alacrity. Editors of journals and anthologies replied to emails about republication rights quickly; numerous presses and publishers granted permissions. Designer Komal Zehrah skillfully did the creative and technical work to produce the reader on time and on budget. At Boston University, the project was supported by Associate Dean Karl Kirchwey through grants from the Humanities Research Fund and the Associate Dean's Discretionary Fund. Department of Religion administrator Wendy Czik handled the necessary paperwork with her customary expertise and good cheer. OpenBU librarian Eleni Castro advised on matters of access and copyright. Boston University doctoral student research assistant Sandry Matondo and University of Wisconsin librarian Jay Tucker helped obtain digital files. I am grateful to everyone.

Bringing these materials on marriage and divorce together, and making them freely available online for Muslim community members, students, and scholars, has reminded me both how much important work already exists and how much remains to do, on the page, and in our homes and mosques, and in our community spaces, both physical and virtual. This reader is an offering, highlighting women's scholarship, centering women's lives, and trusting in God's justice.

Kecia Ali

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Weddings

Weddings: Love and Mercy in Marriage Ceremonies

JULIANE HAMMER (2017)

This chapter appears in a volume on the practice of Islam in the United States and I wrote it in 2016 after having attended a significant number of Muslim weddings over the course of the previous year. Our charge as contributors to the volume was to write without jargon and in such a way that the reader could imagine being in attendance at the respective religious practices we were writing about. My goal was to show that every Muslim American wedding is unique and different from the next one; that Muslim couples and families negotiate their ideas about religion, gender norms, culture, and family in their preparations for and celebration of a couple's nuptials; and that Muslim wedding practices are embedded both in Muslim traditions (very much in the plural) and in the US context that they take place in. In and through their weddings, Muslims navigate changing gender and sexual norms while also defining them through their choices. They have to account for a wide range of ideas about gender norms and practices as they exist in their family and community networks, and weddings most often in my experience end up being a compromise based on the smallest common denominator. What the chapter could not make visible is that the common focus on the couple to be wed actually distracts from the fact that wedding preparations not only involve extended families but are most often driven by family members other than the couple itself. I had originally planned to write a book on American Muslim weddings but rethought the idea when I experienced the stress and tension surrounding wedding planning and the day(s) of – it turned out to be a very difficult situation for my interlocutors to both be in and reflect on as I was observing, asking questions, and conducting interviews. The couples were also surprisingly reluctant to meet with me again a few weeks after their weddings, as if reflecting then would somehow put the events in a different and not always positive perspective. I found that last research result, namely that Muslim couples want their wedding to have been perfect even if it was not, to be unexpected and reflective of the fact that Muslims, not unlike other Americans, see a direct connection between the character of the wedding and the nature of the marriage/relationship despite much evidence and advice to the contrary.

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Oh Humanity! Be conscious of your Lord who created you from a single soul, and created from it its mate, and out of the two spread a multitude of men and women. And remain conscious of God in whose name you demand your rights from one another, and of the ties of kinship. Verily, God ever watches over you.

Qur'an 4:1

*And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility (**sakinah**) with them, and He has put love (**mawaddah**) and mercy (**rahmah**) between you: verily in that are Signs for those who reflect.*

Qur'an 30:21

Every wedding is its own story. We might think that once we have attended a few weddings, we know the basics: a ceremony, a celebration, the bride in a dress, food, and music. Watching American weddings in movies and on television deepens the feeling that once we have seen a few we know what they are all about and we know what to expect. American Muslim weddings are a combination of religious and cultural practices and norms and as such, they might or might not conform to our expectations. It is equally flawed to try to judge the Americanness of American Muslims or their Islamic authenticity by their wedding practices. Both assume a standard or a norm against which we measure human practices and actions. After attending quite a few American.

Muslim weddings I have chosen here to tell three of the wedding stories I encountered in my research. They are each unique and specific to the couple, and they are also part of the communal fabric of Muslim religious practices in the United States. My three stories are held together by two things: references to two verses from the Qur'an on marriage which were referenced at each of them, and the creation of an American Muslim family through marriage.

A Muslim wedding is many things: a celebration, a legal contract, a ritual, a ceremony, and an announcement to families and communities. The basic requirements for a *nikah*, the Muslim marriage ceremony, to be Islamically legal are simple: the consent of both parties, a *mahr* (an agreed upon gift from the groom to the bride), and the presence of two witnesses at the ceremony. It is possible and recommended to also agree upon a marriage contract that stipulates ethical as well as practical terms for the marriage. This contract does not have to be in writing but most often is these days, and it is signed either before or at the ceremony. Many American Muslim couples are married by a person who has both Islamic legal authority and state authority to perform a marriage ceremony, which in turn makes the ceremony legal according to the laws of a particular U.S. state and Islamic law. The former requires a certification process and the latter basic knowledge of the form and function of Islamic legal requirements for a marriage— but not extensive legal training or recognition as a general religious authority for Muslims.

I have found that a wedding is not always one event but rather that many Muslims, for many reasons, divide the different components of ritual, ceremony, and celebration along different lines into more than one event. Weddings are sites for discussing and embodying gender roles, and they are spaces for American Muslims to negotiate what they consider American culture, other cultural backgrounds, and religious norms. In what follows we will see these negotiations play out in a variety of ways.

The *Nikah* at the Mosque: Patricia and Collin

On a rainy day in October, I am on my way to a mosque in the Northeast of the United States. I arrive at the specified location before anyone else does. A few minutes later, two African American men arrive, one,

as I find out, the father of the bride, the other the imam (here this means he is a religious authority figure) who will conduct the *nikah* ceremony. We are welcomed by a man present at the mosque and shown into the *musallah*, the main prayer space of this small mosque. As more guests arrive, a spatial division by gender becomes apparent. There is no one telling women to go to one side and men to the other, but a side-by-side arrangement emerges. This is likely due to the fact that most Muslims are familiar with and used to such arrangements in their own mosques. I realize at this point that there is a separate entrance for women at the side of the mosque, which I did not see when I first arrived.

About half an hour later, the bride, Patricia, arrives, out of breath, in a white, sequined wedding dress and a wrapped scarf turban covering her hair. She was stuck in traffic and feared she would not make it, and she worried that the thunderstorm we all encountered on our way here was a bad omen. She clearly is the one responsible for organizing this event and quickly recovers her wits as more people arrive.

Patricia and Collin met at their workplace, a social service agency. Patricia is part of an African American family and grew up as a Muslim. Her parents joined the community of Warith Deen Mohammed[1] in the 1980s and raised their children within that community. Collin is the son of white Methodists and converted to Islam about six months ago. He is committed to his new religion but apprehensive about knowing all that is required in terms of ritual practice and other rules. Collin and Patricia have met for coffee, then later for dinner, and have talked, but they have not dated and have certainly not consummated their relationship or lived together. Rather, they have spent time talking about their values, histories, families, and expectations. Collin proposed to Patricia by coming to her parents' house for dinner and asking her father for her hand in marriage.

Closer to the scheduled time of the ceremony, a group of folks arrive in fancy dresses and suits. Many are dressed for a party— these are Collin's family members. They are looking a bit perturbed by the need to take off their shoes at the entrance and the suggestion that they join the women's and men's sides respectively and sit on the floor. Chairs appear from somewhere and some of them sit at the back of the prayer space, at least a little more comfortable than they would have been on the floor. After the Muslims in the room perform their *maghrib*, or sunset, prayers, they rearrange themselves side by side for the imam to perform the ceremony. The bride is sitting on a chair at the front of the women's section and several men, the groom, the imam, and the father of the bride are sitting on the floor at the front of the room, facing the audience. Then the imam begins to speak.

It is perhaps unusual but perfect for the audience that he begins his speech by welcoming the coming together of families, expressing his gratitude to Allah, and explaining that an Islamic wedding is perhaps a little different from what non-Muslim Americans are used to. He addresses Collin's family directly when he begins with the fact that there are negative ideas about Islam in public discourse and then presents a picture of God as the Creator and the human need to obey God. He points to a history of revelation and a succession of prophets sent to what he calls mankind/womankind and thus to the connection of Islam to other faith traditions. He appeals to them to respect and support Collin in his journey in the faith, and prays that more people will join the fold of Islam.

He begins the "official part" of the wedding ceremony with a *du'a*, a supplication in Arabic, appealing to God and his messenger, honoring the prophets, and emphasizing the importance of family for Muslims. Next he recites the first verse of chapter 4 in the Qur'an, also in Arabic, pertaining to God's creation of spouses and the significance of kinship, both signs of God's omnipotence and infinite wisdom. Then he recites Qur'an 30:21, the verse about spouses having been made to live in tranquility, love, and mercy, and paraphrases the supplication and Qur'anic verses in English. Then he continues:

> We want to concentrate on what is really important, which is the coming together of families. We are grateful to Allah, our Creator and Lord, for bringing us together in this moment. The marriage really starts with people seeking a mate. . . . What matters is character, the right kind of person, looking for the right kind of character that will bring about a wholesome family and develop well-adjusted children who are ready to be a productive member of the society. They learn what their responsibilities are. Both Collin and Patricia have studied, have sat and listened, and then decided on an

> agreement. They have a contract. There were no such written contracts in the Prophet's time but now we have the paper to print them. But what is more important is that they understand the contract that is in their hearts. . . . For married people the first obligation is to the Creator. They need to know that the purpose of their coming together is to please the Lord. Marriage is about others, not ourselves. . . . You were "I" for a long time, in the womb, then mama's me, your teenage me, but in marriage it becomes "we." You are still individuals but looking for reward from Him.

The imam mentions that the bride and groom have met with him for premarital counseling and to agree on the marriage contract. They have fulfilled the three conditions: they consent to the marriage, they have provided a bridal gift which has been accepted, and witnesses are present. Then he explains that the actual ceremony will go as follows: the wali, or representative/guardian of the bride, which in Patricia's case is her father, is the agent for the woman. He is looking out for her interest and needs her approval for the marriage to be valid. He will make an offer to the groom and then Collin will accept. "That is really the marriage: no aisle to walk down, no flower girl, no ring boy, no big kiss at the end. These things are reserved for their privacy."

The father gets the microphone and says in English: "I offer you, Collin, my daughter, Patricia, in marriage." Collin takes the mic and says, clearly nervous: "Yes, I take her." When people snigger a little, he corrects himself: "Yes, I accept her." The imam speaks one more time: "Alhamdulillah, this concludes the wedding. You are now one family and we ask the Creator to bless these two people, and to bless their families, and to give them the strength really, in these times, to put Him first, to please Him, and in doing so they will please each other and they will make their children happy and they will be good to their parents. We are all here for both of you, the community, and the family." He closes with another supplication, this time in English, for God to bless the marriage and the children coming from it.

The women walk over to Patricia, offering hugs, kisses on both cheeks, and congratulations. The men do the same with Collin. The imam approaches first Collin and then Patricia to sign the required documents for the marriage to be legal in their state. People are milling about the mosque for a few more minutes. From the imam's first sentence to the supplication at the end, this event has lasted less than twenty-five minutes.

Patricia and Collin have invited their families, friends, and coworkers for a reception at a nearby library and community center and everyone files out to drive there. The room is set up with ten tables, eight chairs each. Each table is covered with a purple tablecloth and decorated with candles, books, and fresh flowers. Each place setting is marked by a metal plate and a napkin with cutlery. The invitation called it a reception with refreshments but the buffet actually consists of catered dishes constituting a dinner menu, including baked fish, mashed potatoes, salad, and cheesecake. The drinks table contains a variety of sodas in cans and water in bottles. Several of the women are helping in the small kitchen and serve the food when the guests line up at the buffet table. Collin's family congregates around two of the tables while many of the Muslim guests, family, friends, and coworkers fill the other tables, most of them divided into men and women. Patricia and Collin are seated at the same table but seem to be spending their time directing the buffet, talking to their guests, and receiving more congratulations and hugs. There is no music but the low hum of friendly conversation and the occasional shrieks and giggles of the younger children roaming the space between mouthfuls of food from their mothers. I spend most of the reception at a table with female friends of Patricia asking about my research and in turn telling me their stories of marriage, finding spouses, and having children.

Collin and Patricia are planning an official wedding party in a few months and Patricia protests when I say that this was already like a wedding. She admits that they are trying to find enough funds for a more elaborate celebration of their marriage but she hopes that this will resolve itself sooner rather than later. The couple will move in together after today, so they consider this ceremony and celebration their legal and Islamic wedding and a first public announcement of their union.

Interlude I: Marriage and Islamic Law in the United States

Marriage is often taken for granted as a timeless societal institution and it is only on closer inspection that its historical embeddedness in religious discourses on sexuality and gender is discovered. Islam is no exception

in this regard. Muslim marriage norms regulate sexual access and practice and provide Muslims with guidelines for sexual and gender norms. Like other religious norms and practices, marriage, divorce, custody of children, and sexual access are regulated by Islamic law, itself an institutional framework for the legal interpretation of sacred sources, including the Qur'an and Sunna of the Prophet Muhammad.[2]

Because American Muslims live as a religious minority community, the application of Islamic law to their lives, including marriage, is limited and increasingly combined with, if not replaced by, direct references to the Qur'an and the prophetic example. American Muslim scholars and leaders have contributed to the development of Islamic legal frameworks for minorities (*fiqh al-aqalliyyat*) and have tended to emphasize the obligation of Muslims to follow the laws of the countries they are citizens of and/or live in, which is especially relevant for family and personal status law. Muslims with the requisite Islamic legal training can act as legal advisors and decision makers for other Muslims. Many efforts have been underway to develop organizational structures which offer American Muslims legal advice, fatwas on issues raised in their specific context, and recommendations for how to address the challenges of contemporary life.

There are specific challenges to navigating the application of Islamic law— because it is a set of interpretations and not an immutable legal code— to the particular life cycle rituals and practices related to marriage. If and when weddings are recognized as regulated by Islamic law, couples and their families approach religious scholars and leaders for more specific knowledge and/or they search for information available in other forms such as online resources and marriage advice literature.[3]

American Muslim organizations, leaders, and activists have recognized the significance of marriage for the preservation of Muslim communities and Muslim identity. There are initiatives and programs that have helped produce guidance materials in two specific areas: premarital counseling to ensure compatibility between the prospective spouses in their values and expectations, and templates for the Islamic marriage contract that recognize mutual rights and responsibilities and at least attempt to be legally enforceable in U.S. courts. The issue of Islamic marriage contracts as legally valid in U.S. family courts is a significant one. The Islamic marriage ceremony is only recognized in U.S. courts if it has been carried out by a certified civil celebrant— this certification can be acquired through an application, and many imams in American mosques are qualified to perform a marriage ceremony recognized in state courts.[4] The marriage contract as a legally enforceable contract becomes relevant in case of a divorce, which needs to be channeled through the U.S. court system. Provisions made in the marriage contract such as alimony and spousal support can only be enforced if the contract abides by the standards of U.S. law.

In addition to offering sample marriage contracts, Islamic marriage advice literature relies heavily on anecdotes and stories like the ones told here to illustrate challenges and solutions to Muslim matrimonial issues and trends that are specific to U.S. Muslim communities.

The *Nikah* at the Hotel

As I get out of my car on this unseasonably warm December morning, I wonder whether my outfit is fancy enough (long black skirt, teal tunic, and colorful pashmina scarf around my shoulders) for this South Asian American Muslim wedding. It is the fourth such wedding I am attending for my research and I am always hardpressed to come up with anything to wear that can compete with the splendor of South Asian wedding outfits. Women and girls wear *shalwar kameez* and *saris* in all the colors of the rainbow which sparkle even more with beads, sequins, and tiny mirrors. Gold jewelry, elaborately braided hair, and especially glamorous scarves covering the hair of some women complete the picture. Men appear in shalwar kameez as well, in more muted colors, or wearing formal suits.

As I enter the hotel lobby I am directed by a sign toward the ballroom. This wedding is both the official *nikah* ceremony and a celebration/reception, in one evening. There is a lobby area outside the ballroom where people are beginning to arrive. The parents of the bride are standing in the front, welcoming guests as they enter the space. It is a widely practiced custom for American Muslim weddings, though not a requirement, to have two separate wedding events: First, the *nikah*, sometimes with a reception built in, and at other times later in the same day, often in a different location. The parents of the bride often organize (and finance) this part of the wedding. There is then a second event,

the *walima*, which is a celebration to announce the wedding of a couple to the community and society. The *walima* is organized and paid for by the groom's family. It also usually takes place in a different location. This practice helps accommodate geographically distant families and friends: some will come for both the *nikah* and the walima, and some will only attend one or the other. Nor is it uncommon for the walima or *nikah* to take place in another country— often the place from which the family or one of the spouses originated. Both the walima and *nikah* are also a reflection of economic ability and thus class.

Rabia and Mohsin are both of Pakistani American background and Rabia made sure to tell me that their union was not arranged by their parents or families. Instead, they met at a matrimonial banquet at an Islamic Society of North America (ISNA) convention. Such matrimonial banquets have taken place for several decades and ISNA is not the only organization that organizes them in conjunction with its annual convention. Muslims interested in matrimony can sign up for these events in advance and meet potential spouses in a banquet hall over food and in a completely chaperoned environment. Mohsin is a graduate student in public health and Rabia is completing her residency program to become a pediatrician. She told me in an interview that she was not sure how she felt about Mohsin at first and that it was only thanks to his insistence that they continue talking on the phone that they stayed in touch and eventually decided there was a future for them. Rabia had tried an online matrimonial site for Muslims— I suspect Mohsin did as well but would not admit it— and had found the experience frustrating. She said that the matrimonial banquet allowed for a first impression of the person that online exchanges preclude. She was worried, as was Mohsin, that both online matchmaking and the banquet would make people think they were desperate to get married. They weren't but there was pressure, especially from Rabia's family for her to get serious about getting married as she approached thirty.

When things started getting serious, both sets of parents got involved. Informal checks on the respective families did not uncover anything worrisome and the families even found common friends and connections in Pakistan, a plus in their quest to make sure that their children would marry into "good families." Mohsin's older sister is divorced and Mohsin had been worried about what he called "making a mistake" in choosing his future wife. Divorce, while legally possible, is still considered a stigma in many South Asian Muslim families and communities.

In interviews it often becomes clear that young Muslims consider their marriage and family histories carefully and that the experiences of family members inform their own matrimonial choices. Rabia was adamant that for her the most important consideration was that she and Mohsin had similar levels of religious commitment and practice. It did not hurt that they were both of Pakistani heritage— there would have been family debate otherwise— but she had been open to marrying a Muslim man from a different background, at least in principle. Muslim families have long expected that their children continue to practice endogamy, marrying within one's community, the argument being that cultural compatibility and the preservation of cultural norms and identities are an important part of marriage.

Mohsin suggested the person who is performing the *nikah* ceremony. Walid is a friend of his and well-known in the local Muslim community for his efforts to work within the mosque setting to attract more young Muslims to lectures, workshops, and community activities. Rabia and Mohsin both met with him, separately, and then together, for what I would call premarital counseling even though they did not use that term. They discussed expectations and the possibility of a marriage contract. Rabia wanted the contract to include several stipulations in her interest: that she would be able to work as a physician if she wanted to, that she would not have to share a house or apartment with her in-laws, and that she could initiate a divorce, a right that in Islamic legal terms is the husband's alone unless otherwise spelled out in the marriage contract. All these conditions are common in such contracts but also reflect the specific concerns of individual couples and spouses. Perhaps the hardest for Rabia, she said, was to discuss divorce stipulations before getting married.

A buffet with appetizers is arranged in the center of the lobby and about fifty guests are already milling about. Conversations are a mix of Urdu, the national language of Pakistan, and English. Guests and family hug, shake hands, and greet each other as they move around the room. Servers offer appetizers on trays and along a wall guests can pick up water, soft drinks, and chai. The appetizers are distinctly South Asian: vegetable

pakoras, small chicken kebabs, and vegetable samosas, complemented by spicy, tangy, and yogurt-based sauces.

The ballroom is set up with a stage in the front that contains a white and gold couch and chairs, draped red curtains, and flowers on the sides. A three-level wedding cake, decorated in white and red, adorns the right side of the stage. Guests will be seated at round tables for ten people each. They are covered in white and gold tablecloths and decorated with flowers as well. There is a table on the side with wedding favors: small red boxes containing chocolates and small bags of fennel seeds and candies. There is also a table for the wedding gifts: as is customary at many South Asian Muslim weddings, guests are asked to offer cash gifts (the invitation said: "no boxed gifts"), so the table contains a large box to deposit the envelopes in. There is also a wedding register where guests can sign in and write out congratulatory messages to the couple.

As the guests file in they arrange themselves at the various tables. I see the wedding photographer and her assistant, two Muslim women in hijab, who specialize in Muslim wedding photography. They start taking pictures in the ballroom and then call select family members for more staged photos in the adjacent rock garden. When everyone seems to have settled in, the bride's uncle announces the beginning of the ceremony. As the guests stand up and congregate around the door of the ballroom, a Sikh man wearing the traditional Sikh turban and beating a drum appears at the door. To the sound of the drum, the bride and groom enter the ballroom followed by parents, siblings, and their children. Smart phones and cameras capture the moment and two small girls throw rose petals before the couple's feet. Rabia is wearing an elaborately decorated dark red South Asian silk dress with long white sleeves, heavy gold embroidery, and sequins. Her hair is partially covered with a similarly decorated scarf, which is very heavy and large, and she wears a gold ornament on part of her forehead. Her hands are covered in the complicated lines of henna flowers and ornaments.[5] She wears a large amount of gold jewelry, including bracelets and several necklaces. Mohsin's outfit consists of white shalwar pants and a black knee-length kameez shirt with gold embroidery on the collar and sleeves as well as a white flower pin on his chest. He also wears pointy black leather slippers and a red and gold turban. The couple walks toward the stage and settles on the white and golden couch, their parents in the chairs on both sides. By now there are at least three hundred adults and quite a few children in attendance.

Walid walks up to the stage and takes the microphone. He outlines the structure of the ceremony as follows: he will read some verses from the Qur'an and some hadith, or sayings of the Prophet Muhammad, then he will offer the wedding *khutba* or sermon, followed by the official wedding ceremony. The couple will then exchange rings, followed by a supplication which will mark the end of the ceremony.

In a melodious voice and beautiful *tajweed* (qur'anic recitation) style he proceeds to intone several verses from the Qur'an in Arabic. As he begins his recitation, many of the women in the room who are not wearing a *hijab* pull their *dupattas* to cover their hair in a sign of respect for the Qur'an and its recitation. The first verse is from Sura al-Imran, the third chapter of the Qur'an, verse 102. It tells Muslims to be conscious of God. Walid will later translate this God-consciousness (*taqwah*) as fear of God. The second verse is the already familiar Q 4:1 which we encountered in Patricia and Collin's ceremony. It speaks of God's creation of a single soul, then of a pair from that one soul, which becomes a multitude of men and women. Muslims are called to be conscious of their Creator and honor the bonds of kinship. The third verse is Q 33:70, another verse imploring Muslims to speak out for justice and truth. Together these verses establish the connection of the ceremony to God and to faith and the God-given institution of marriage as a natural pairing of men and women. Walid translates all three verses into English and explains that these three verses are part of the traditional wedding khutba. He expounds the significance of God-consciousness as the single most important dimension of a marriage: the responsibility for one's actions in the eyes of God and thus accountability in worldly affairs such as marriage.

The qur'anic verses and explanations are followed by three hadith in which the Prophet Muhammad emphasizes the significance of marriage as part of Muslim practice, as important as prayer, fasting, and giving charity; represents himself as the example of a Muslim husband to his community; and— ironically, given the setting— describes the best wedding as one that is modest and within the family's means. As Walid explains, this *nikah* ceremony is the wedding, and what needs to be stripped away is the layers of South Asian cultural practice of six-day wedding proceedings

and the excesses of consumer culture. I read it as his simultaneous critique of both Pakistani culture and American capitalism in one sentence.

From there he moves on to a story of Mullah Nasreddin, a figure in Muslim lore famous for his wise as well as funny actions and rebuttals in which Nasreddin begs for money to buy an elephant and, as he is questioned by a passerby about the stupidity of his plan, says that he is asking for money, not advice. So here is Walid, sharing his wedding khutba and there will be some advice! People chuckle here and on several other occasions. Later I will hear comments about this being the most "modern" and entertaining wedding khutba ever.

Walid's advice comes in three stories and revolves around three central values: gratitude, selflessness, and simplicity. Gratitude to God is connected to companionship in the story of Adam and Eve, whose Arabic name, Hawwa, means "the living being." Walid explains that Adam was not really living until God created Eve to be his companion. After the fall from paradise for transgressing God's command to not eat from the tree of knowledge, Adam and Eve were separated for two hundred years, finding each other again at Mount Arafat in Arabia, a place that Muslims visit during the hajj season. It is thus innate to human beings to yearn for companionship and to only be fully human through the family. At the same time God is due eternal gratitude for creating humans with that yearning and giving them the possibility to fulfill it through marriage.

Selflessness is exemplified in relationships like a mother's care for her child or love between siblings that do not involve selfish gain. Walid mentions Richard Dawkins's book The Selfish Gene, only to disagree with Dawkins that all human acts are ultimately selfish. According to Walid, true faith and truly faithful acts come from true selflessness. He quotes a famous saying by a Sufi, or spiritual master, claiming that every spiritual seeker is a product of his time. Walid takes this saying to mean that in our time the more trying life is the more the true Muslim needs patience and grace, in daily interactions as well as in relationships with people. He suggests that each of us should surprise people, perhaps buy someone coffee, and that Muslims in the room lead the charge in interpersonal relations. This reference to the political climate in the United States and the particular challenges to Muslims, as much as the earlier stories, is clearly addressed to all the people in the room, not just the bride and groom: "And this is very true for marriage: don't always worry about your rights. Be consumed by your responsibilities. Just as Adam was the caretaker of this planet, we are by extension caretakers of this planet. So be simple, be consistent, be filled with empathy and compassion. Be filled with mercy and draw strength from your daily prayer."

Walid's third message is to embrace simplicity. Islam is not complicated. Perhaps if one is looking at it from the exterior it looks very complicated, but it is not. What matters is being mindful, honoring one's elders, not cheating, being grateful for all blessings— this is what Islam is teaching us. "The Prophet, Peace Be Upon Him, ate very little meat and he looked at everyone he met as a potential friend." While God instilled in people a thirst for knowledge, he also gave us a yearning for order and simplicity, which is the only way to find meaning and guidance in a world that seems like total chaos at times. "The little things in life are truly the big things in life. . . . We focus so much on our brain and on logic that we forget to listen to our hearts. Listen to your heart, this is also the message of Islam."

Walid then turns to the bride and groom and recites this poem attributed to the well-known Sufi woman, Rabia al-Adawiyya, the bride's namesake:

> In love nothing exists between heart and heart,
>
> Speech is born out of longing
>
> True description comes from taste
>
> The one who tastes knows
>
> The one who explains lies
>
> How can you describe the true form of something
>
> In whose presence you are completely blotted
>
> out And in whose being you still exist
>
> And who lives as a sign for your journey.

This is followed by another poem, this one about the internal and external beauty of the Prophet Muhammad. Walid recites the poem in Arabic and then translates it into English. He wishes for the couple that they may always be a gift to each other, to live in companionship, and to recognize the possibility of miracles. He turns to the families and recites an Urdu

saying about the possibility of miracles and who can see them— the audience murmurs in affirmation. "A family from one coast is connected to a family from the other coast through a city in the Midwest and here we are acting like that is completely rational and not a miracle!" Everyone laughs as he continues to speak of marriage as a journey, as a connecting of souls and families, as gaining sons and daughters, and as he explains that each person in the room is a veil to God and a door to God. With this he concludes the khutba and moves on to what he calls the formal ceremony.

According to Walid, five things need to occur in the ceremony. The first is the establishment of guardianship for the bride— Walid asks the father of the bride for permission to proceed, which is granted verbally. The second condition is the presence of witnesses. Only two are needed, but as Walid points out, there is a roomful present at this ceremony, so the condition is more than met. God is the greatest of witnesses. In addition, there is a list of three official male witnesses, whose names he reads aloud for confirmation. The third condition is the *mahr*, a gift agreed upon between the families or the parties which can be paid upon the wedding or delayed, but it has to be honored for the marriage to be valid. Walid mentions that it has been agreed upon, so the condition is met. The fourth condition is the marriage contract which the parties have agreed upon and which has already been signed by the groom. Rabia will sign the contract which lists the witnesses, the mahr, and the conditions, as part of the ceremony. The fifth and final condition is the ceremony itself, which he describes as the offer and acceptance of the offer of marriage.

Walid recites the basmallah, a phrase that prefaces every action of a Muslim to be carried out in the name and under the blessing of God. He continues: "Here is how we are going to do this. I will offer Mohsin to you and you accept. I will ask you three times and you have to accept three times." And now Walid sets up the crowd for a joke. "But because you can say, 'I do'— he skips a beat and whispers unders his breath— 'not,' I want you to [also] say in Arabic, 'qabaltu,' which means I accept you wholeheartedly, and no fingers crossed, okay?" People begin to snicker halfway through Walid's instruction and at the end they are laughing out loud. "And then after the third one I will ask you to sign the paper." After clearing his throat, he proceeds in a serious voice: "I ask you Rabia, daughter of Afzal and Ambreen, in accordance with Islamic law and according to the tradition of our noble Prophet, Peace Be Upon Him, and according to the contract and the *mahr* agreed to, do you accept Mohsin, son of Faisal and Zahra, as your husband?" Rabia answers "qabaltu" in a quiet voice. He repeats the question two more times and she answers the same way two more times. He then thanks her and asks her to sign several papers. Some shuffling of papers occurs and he again recites the basmallah as she signs the papers.

Walid then turns to the groom's side and asks whether he accepts Rabia as his wife. He answers in the affirmative, also in Arabic, and the question and answer are repeated two more times. Mohsin also signs the papers, followed by the signatures of the three official witnesses. Walid then prays for their union to be blessed. He asks Mohsin to place a ring on Rabia's hand and he does, followed by applause from those present and murmurs of "mashallah," which literally means "what God wills," an expression of acknowledging God's power over everything that happens but also an expression of amazement at something beautiful, which in turn always comes from God. The final du'a, or supplication, recited by Walid in Arabic, asks for God's blessing, honors the prophets from Adam to Muhammad and their families, and expresses gratitude for all the blessings already bestowed. As is the custom, after every specific blessing those in attendance murmur "ameen" to support the supplication. The ceremony ends with Walid translating parts of the supplication into English.

Both bride and groom are then hugged by their parents and new parents in-law. Family and friends file onto the stage to congratulate them. Hugs and kisses are followed by picture taking, official and amateur. And then there is the food! The buffet consists of more excellent South Asian food including haleem, tandoori chicken, beef biryani, chicken curry, basmati rice and naan, complemented by green salad. As guests line up and get their food, waiters bring soft drinks and juices as well as chai, South Asian tea with milk and spices, and coffee. After about half an hour, they cut the wedding cake and lay out pieces of it on the dessert table.

This could be the end of the evening, but we have not yet encountered our verse from the beginning of this chapter. After dinner and dessert, there is a speech by an older bearded man who turns out to be Rabia's former Sunday school teacher.[6] He begins his speech by quoting Q 30:21 and takes its focus on tranquility,

love, and mercy as the central points in his reminder to the couple of what matters most in a marriage. He explains the love meant in the Qur'an as more than the romantic English notion of infatuation and describes it as a lifelong commitment that comes from wanting to serve God through the family just created through this wedding. He emphasizes the wife's need to be obedient to the husband and that of the husband to protect his wife.

After his speech, the father of the groom tells me that he did not like this speech and that he does not understand why it was necessary to bring up obedience in it. He would have preferred a more traditional and "less religious" after-dinner entertainment. Some of this does happen in the form of male family members producing stand-up poetry in Urdu, some serious and some humorous. This is a wedding tradition in some parts of Pakistan and people seem to enjoy it. It becomes quite apparent which guests and family members understand enough Urdu to get the jokes—this time there is no one translating into English. I do not understand Urdu so am not in on the poetic prowess of the men; instead I observe the reactions of the audience. The bride and groom have managed to eat something and are back on the couch on the stage. They look tired but content and seem to enjoy the poetic performances and short speeches.

The evening ends with the bride and groom being walked to a waiting stretch limousine outside. The bride's family can be seen hugging, kissing, and crying because she is now moving to the husband's family. After more tearful goodbyes, blessings, and good wishes Rabia and Mohsin disappear into the back seat of the car and drive off into their new life as a married couple. After a breakfast with family members— with at least some innuendo about the wedding night—they will move in together. Their walima is already scheduled to take place in the city in the Midwest they both live in and will take place about a month after the *nikah*, followed by a two-week honeymoon.

Interlude II: Muslim Communities, Cultures, and the American in American Muslims

American Muslim communities are diverse in terms of their ethnic and national background, their religious affiliation and levels of practice, their economic status, education, and locations within the social fabric and geography of the United States. Not surprisingly, this diversity is reflected, at least to some degree, in matrimonial selections and practices, and in American Muslim weddings.

For much of the twentieth century, communities of Muslim immigrants and their descendants favored endogamy, the practice of marrying within one's ethnic or cultural community, often on the grounds that cultural and linguistic compatibility were a precondition for marital success and contributed to the preservation of the communities in question. Other American Muslims, including African Americans from Muslim families, and white and Latina converts, have intermarried across community lines. Consequently, it is safe to assert that American Muslims have always married from within their communities and other Muslims from very different backgrounds. It is worth mentioning that there have always been marriages between Muslims and non-Muslims as well.[7]

While the idea of marrying for love is a relatively recent ideal, for Europeans and Americans as much as Muslims, American Muslims find their partners on their own and expect compatibility as much as mutual affection turning into romantic as well as lasting love. In attending weddings, discussing them with guests at the events, and interviewing couples, I have perhaps been most fascinated with the public nature of private life. Something as personal as who one wants to share one's life with has turned out to be embedded in the larger contexts of family, community, and society. As a result, the weddings I have studied and written about are all continuous sites of negotiation; they display the diverse ideas American Muslims have about their religion, their culture(s), and perhaps equally important, gender roles and sexuality. Rather than defining and categorizing the couples I work with and their families, I expect them to tell me how they conceive of their own weddings and marriages. This makes for a lot of fluidity, which is a better reflection of their experiences than the insistence on clear labels and boxes to put them in.

It is quite common, even in academic literature, to create a distinction between the Muslimness of American Muslims and their Americanness. Being part of the fabric of American society means both shaping and being shaped by attitudes, values, and practices identified as "American." In the process, dimensions of culture and religion are also continuously shaped and negotiated. In a small way, the complications of these

identity descriptions become apparent in the story of Noura and Abdullah.

The Walima at the Wedding Hall

The entrance to the wedding hall is surrounded by lovely flowering bushes and two lion statues. It feels a little like walking into the palace for Cinderella's ball. The spacious foyer leads into a large room which is set up with large round tables and chairs around a circle of open space in the middle. The tables are covered in lavender tablecloths and feature chandeliers and floral arrangements in matching tones. There is a buffet waiting to open on the left and a table for gifts and cards on the right.

Noura and Abdullah met and fell in love with each other while in college. They were both active in the Muslim Students Association on campus and through many shared activities got to spend time together. They discovered their shared political commitments and academic interests. After college they both enrolled in graduate programs, in different cities, but managed to maintain contact. They refuse to say that they were dating in college and insist that their romance was rekindled when they spent time together at a friend's wedding almost a year ago. From talking all night on Skype to meeting each other's parents, their relationship accelerated to the point where they decided to get married. Noura is Palestinian American and comes from a family of proud activists on behalf of Palestine. Abdullah's parents are from Egypt and his father came to study in the United States. He stayed and brought his wife from Egypt and they grew their family to include four children.

Noura and Abdullah's *nikah* ceremony was a small affair at the house of Noura's uncle. Only twenty of their closest family members attend. They did not call it a *nikah* either, but rather used the Arabic term katb al kitab, literally the writing of the book or contract. It involved the same conditions we have seen in the *nikah* ceremonies earlier: agreement, mahr, and witnesses. Their families considered the kitab closer to an engagement ceremony even though it legally married them. There was mansaf at the kitab, a traditional dish with rice, thin bread, and lamb in yogurt sauce, popular in Palestine and Jordan.

The walima for them is the big public announcement of their marriage and they are expecting at least four hundred guests. They arrive in smaller groups and settle around the tables. Noura's family seems to be settling on the left side of the room and Abdullah's on the right. There are tables with families and others with only women and children or only men. Some guests are friends, classmates, and colleagues of the couple. Many of the women are wearing party dresses, jewelry, and heels, while others, both older and younger, are attending the wedding in long traditional embroidered Palestinian dresses of a black or beige fabric, covered in mostly red, some gold, and blue embroidery. The patterns are intricate and hand-embroidered and represent an important part of and pride in Palestinian national culture. Some women have their hair covered and others do not.

People stand up and applaud as the bride and groom are carried into the room on chairs which are carried by four young men each. They are settled at the edge of the open space and the festivities begin. Noura is wearing an elaborate white wedding dress and a tiara in her beautifully styled hair. Abdullah is wearing a light grey suit and matching tie. The arrival of the couple is accompanied by the women in the room ululating, a familiar sound of celebration in Arab cultures. People talk in Arabic and English and children run around the room.

Noura's uncle, a leader in his Muslim community, takes the mic to give a short speech. He welcomes the couple and guests, in Arabic and English, and talks about how Noura and Abdullah met— this is the official version. He speaks on behalf of both families when he says that they are very happy about their union and that they wish them the best for their new life together. He then beautifully recites our now familiar two verses from the Qur'an and reminds the couple of the significance of God consciousness in all they do, especially in their marriage, and of the centrality of building a relationship based on tranquility, love, and mercy. In a nod to Egyptian wedding traditions, he then offers the bride and groom a glass of hibiscus tea, and servers around the room carry trays with the same tea for the guests.

When he puts down the mic, music begins to play over the speakers and the bride and groom are urged into the circle for the first dance. They have hired a professional dabkeh dance group to accompany them and perform this traditional Arab/Middle Eastern dance. Abdullah was at first reluctant to include dabkeh in the walima,

as it involves men and women dancing together, but he has been practicing with Palestinian friends and manages quite well. Noura has performed as part of a dabkeh group since high school and presents a flawless performance despite the unwieldy wedding dress. Surrounded by the dance troupe, the two are joined by others who feel comfortable participating. Many of the guests have gotten up to line the circular space and clap along to the traditional rhythm of the music. Some of the Egyptian family members of the groom seem a bit scandalized by the gender-mixed dance and stay at their tables.

The music and dancing are interrupted by the dinner buffet being opened and attended to. The food is Middle Eastern, with chicken kebabs; minced meat skewers; tabbouleh, a parsley and semolina salad; mujaddara, a rice and lentil dish; succulent pieces of lamb on a bed of rice; fattoush, a green salad topped with fried pita bread and sumac; and large baskets with pita bread. There are overloaded trays of baklava and other sweets. Later, the couple will cut the three-layer white wedding cake and feed each other the first piece. It is a joyous occasion and the icing around Abdullah's mouth elicits lots of laughter from all involved. The celebration, which started around 6 o'clock, does not wind down until almost midnight.

Conclusion

These three stories are my recollections of the wedding events, and additional information from interviews and conversations. They narrate the particular and tell us how these three couples found each other and created their families. Hundreds if not thousands of American Muslim weddings take place every year, and they are as diverse as the couples that celebrate and mark their marriages through rituals, ceremonies, and feasts. These weddings, including our three, share basic features such as a religious ceremony, the *nikah* or kitab, the presence of witnesses, and the agreement on a mahr, as well as the announcement of the marriage through a celebration or feast. Specific features such as dress, food, guests, music or not, and venue vary widely and reflect the many facets of American Muslim communities and families, from ethnic and racial background to class and gender norms.

Not all American Muslim weddings take place in the United States and not all weddings involve two people who are both Muslim or who identify as a man and a woman. And it is hard to believe from our three stories that not all American Muslims who get married are young or have never been married before. I wish there were room here for the story of the Muslim-Hindu wedding, or the Pakistani-Syrian wedding, or that of a Sudanese American man and his Indian Muslim wife, not to mention the older woman convert who was getting married for the fourth time, or the gay Pakistani couple's wedding a friend told me about.[8]

There are stories of complicated paths to even having a wedding, the heartbreak of canceled weddings and broken promises, and the supportive and unsupportive reactions of families and communities. At times, weddings bring a foreboding of future troubles; at other times they set the tone for new and challenged gender relations and family norms. There are debts to be paid for expensive weddings and relationships to be mended when things did not go according to plan or everyone's expectation. And although the marriage is more important than the wedding, an analysis of the who, where, when, and how of a wedding provides a fascinating framework for understanding the marriage it creates.

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1 Warith Deen Mohammed (1933–2008) was the leader of the African American Muslim community organization that emerged from the Nation of Islam after the death of its leader, Elijah Muhammed (1897–1975). The organization had various names over the years, including American Society of Muslims and The Mosque Cares.

2 See Debra Majeed, "Sexual Identity, Marriage, and Family," in J. Hammer and O. Safi, eds., *The Cambridge Companion to American Islam* (Cambridge: Cambridge University Press, 2013), 312–329; Juliane Hammer, "Marriage in American Muslim Communities," *Religion Compass* 9, 2 (2015): 35–44.

3 See, for example, Salma Abugideiri and Mohamed Hag Magid, *Before You Tie the Knot: A Guide for Couples* (No Place, 2013); Munira Lekovic Ezzeldine, *Before the Wedding: Questions to Ask for Muslims before Getting Married* (Irvine: Izza Publishing, 2009); Ruqaiyyah Waris Maqsood, *The Muslim Marriage Guide* (Hicksville: Goodword, 2014).

4 There is a book that contains sample contracts: Hedaya Hartford and Ashraf Muneeb, *Your Islamic Marriage Contract* (Amman: Al-Fath, 2007), as well as online resources for marriage contracts, such as iman-wa.org, hijabman.com. For an example of premarital counseling materials, see this questionnaire developed by the ADAMS Center in Virginia and widely used in other mosques: www.adamscenter.org.

5 The mehndi or henna party is technically also part of wedding practices among many Muslims. It revolves around the application of henna paste, in intricate designs, to the hands and feet of the bride and women present at the celebration. Henna parties are usually gender segregated and men have a party as well but usually do not apply henna. The application of the henna designs is part of the preparation and beautification of the bride for the wedding and wedding night.

6 Many American Muslim children attend classes, usually on Sunday, to learn about their religion.

7 A specific dimension of marital selection and discussions of it in Muslim communities are explored in Zareena Grewal, "Marriage in Colour: Race, Religion and Spouse Selection in Four American Mosques," *Ethnic and Racial Studies* 32, 2 (2009): 323– 345.

8 See also two wonderful collections of first-person narratives about love and marriage: Ayesha Mattu and Nura Maznavi, eds., *Love, Inshallah: The Secret Love Lives of American Muslim Women* (Berkeley: Soft Skull, 2012); Ayesha Mattu and Nura Maznavi, eds., *Salaam, Love: American Muslim Men on Love, Sex, and Intimacy* (Boston: Beacon Press, 2014).

Acting on a Frontier of Religious Ceremony

KECIA ALI (2004)

This essay originally appeared in the *Harvard Divinity Bulletin*, then a print-only periodical, and was republished on the long-defunct Muslim WakeUp! website. Today, I cringe at some of what's included (a problematic assertion of firstness; a racist conflation of Americanness with whiteness) and sigh at some of what's excluded (that wedding where the imam declared that it was the wife's Islamic right not to be hit in the face by her husband? I was the bride). Still, I think it's useful for what it says about the cultural and religio-legal elements of weddings as well as how it depicts a pivotal moment in American Muslim gender politics. (For more on the latter, see contributor Juliane Hammer's *American Muslim Women, Religious Authority, and Activism: More Than a Prayer* [2012]). Since the wedding chronicled here, I've married other couples in Florida and in Massachusetts, sometimes with a notary doing the legal bit and sometimes as a formally registered officiant, a.k.a., an agent of the state. Because I get invitations to officiate that I can't accept—including several during the pandemic—I hope at some point to produce a DIY guide to officiating a Muslim marriage.

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It hit me the moment I hung up the phone: I had nothing to wear. In retrospect, it seems an awfully *girly* thing to have focused on, given the substance of the conversation. I had just agreed to become the first woman, to my knowledge, to officiate at a Muslim marriage, giving the wedding sermon and administering the vows to the bride and groom in front of 350 assembled guests. Most would be Pakistani and all, undoubtedly, would be dressed to the nines. And I had nothing to wear.

Tayyibah Taylor, editor of *Azizah* magazine, had called me the previous week with an intriguing request. A friend of a friend was seeking a woman to preside at her *nikah* ceremony, to be held in six weeks' time in Tampa, Florida. She had been looking for months and wasn't having any luck. A few of the academics and activists she had contacted were unavailable on the appointed day. But most were simply uncomfortable with the idea. None had ever seen or heard of a woman performing a wedding, and while, in theory, there was nothing to prohibit it, no one wanted to be the one to actually break the unspoken barrier. Although she didn't say so in so many words, the bride-to-be was getting frustrated: it was time for Muslim feminists to put up or shut up. Would I do it?

I knew, from my academic specialization in Islamic marriage law, that there was no legal obstacle to my officiating at the marriage. The role of *imam* at a wedding is ceremonial rather than sacerdotal; as in Judaism, it is the words of bride and groom (or their representatives) that make the marriage. The presence of an officiant, while recommended and customary, is not religiously necessary for the marriage to be valid. And, as there is no formal ordination of clergy in Sunni Islam, any learned person can deliver the wedding sermon and oversee the vows.

In the United States, more often than not, it is the *imam* of a local mosque who officiates. But many of my male Muslim colleagues are regularly called upon to perform marriages; having a professor rather than a *shaykh* lead the ceremony would not be unusual. Still, a number of these colleagues have, in addition to academic credentials, some semblance of traditional Islamic learning. Having never had the benefit of such study, I have always been very careful to give analytical, rather than normative, opinions when asked about controversial issues pertaining to women, marriage, and the family. But here I was, being asked to step into the role of *imam* precisely in order to reshape the paradigm of Islamic religious authority, for this was the bride-to-be's expressed intention in seeking a woman to officiate. Quite honestly, the idea was terrifying. So I agreed to consider it.

I was not alone in considering new things; the summer of 2004 was a crucial moment for shifting religio-cultural norms about gender boundaries and female authority in Muslim communal life in the United States. Hadia Mubarak was elected the first female president of the national Muslim Students' Association, after years in which numerous campus chapters have had female leaders. Shareda Hosein, a Muslim woman and army officer, was seeking appointment as a military chaplain, raising issues of who is qualified to wield religious authority as well as who is authorized to bestow it. Sex-segregation within mosques was being debated everywhere (with the vast majority of critics of the status quo accepting the separation of men and women for prayer, but objecting to the inferiority and inadequacy of the spaces allocated to women). And, only a few days after my phone conversation, a group of Muslim women calling themselves Daughters of Hajar held a woman-led, mixed-gender prayer be fore joining the communal Friday service at the local mosque in Morgantown, West Virginia.

In each of these instances, something important was being negotiated. How much can or should historical practice shift to reflect contemporary realities? What is essential and what can be modified to suit new sensibilities? And, always, who has the legitimacy to determine the answers to these questions?

In considering whether or not to officiate, I tried to set aside this larger context and confront the question of whether I was willing to step, no matter how temporarily, into the role of religious authority. My growing inclination to accept the invitation was less about effecting a transformation in gender norms than about providing the couple with a wedding ceremony that would not make them cringe when remembering it. Unlike, for example, the wedding where the well-meaning Saudi-trained Trinidadian *imam* told the guests, including the bride's entire extended, non-Muslim family, that it was the wife's Islamic right not to be hit in the face by her husband. Or the one where, in an effort to convey the contractual nature of Muslim marriage, the South Asian officiant explained that the husband pays his wife a dower as if he were "buying a cow from the market."

Kecia Ali, left, officiating at a wedding ceremony in Tampa, Florida, earlier this year.

Although these examples are extreme in their offensiveness, and do not reflect the majority of Muslim weddings, lesser slights are commonplace. At one family wedding I attended, the *shaykh* recited, in Arabic, the lovely verse that begins Chapter 4 of the Qur'an, which commands people to "revere your Sustainer who created you from a single soul, and from it created its mate." The spell woven by his melodious recitation of these uplifting words was abruptly shattered when he declared: "And the English translation of this is: God created Adam, and out of Adam created Eve." I was certain that, despite my lack of formal training, I could do better. Therefore, I agreed to discuss matters with the bride-to-be.

When we spoke, she informed me that the couple would not be producing a written Islamic contract, relying instead on prenuptial agreements and a civil marriage. Thus, the public religious ceremony was really about the sermon and the exchange of vows in front of the guests. The couple and their families wanted, as is customary, a brief Arabic sermon, containing the usual blessings and Qur'anic verses; a longer English speech on marriage; and an exchange of vows between the bride and groom. As is permissible in the Hanafi school of law followed by the families, neither party would use a guardian. The bride intended, and I agreed, not to make a big deal out of the fact that a woman was officiating, but to let my presence speak for itself.

One issue did present a bit more of a problem: witnesses. Most schools of law require two male witnesses to a wedding, but Hanafi doctrine allows two women and one man. I know that some have attempted to set male and female witnesses on an equal footing by appointing two men and two women, an option that I suggested but the bride rejected, rightly noting that it attempts to create the illusion of parity where it does not exist; the female witnesses are, in such a case, redundant. The bride suggested instead appointing one woman and one man. This would, indeed, have made a dramatic statement, but one I was not comfortable with. It would require not only challenging the consensus of the legal schools, but also going against a famous tradition from an early authority that a marriage witnessed by only one man and one woman was tantamount to adultery. We left the question for further reflection; after consulting colleagues, I decided to simply invite the entire audience to witness the vows.

With most matters settled, I agreed to officiate. We made plans to speak again, to discuss the elements of the ceremony further, as well as the logistics of my travel to Tampa. I ended the conversation with the sense of having taken on a weighty task, a bit concerned about potentially scandalized community reaction and somewhat apprehensive about living up to the trust placed in me. These concerns, however, were promptly replaced by a more urgent worry: what on earth was I going to wear?

Any wedding is part performance. This was going to be one hell of a show, not a small, intimate backyard ceremony or a contract signing in the mosque after Friday prayers, but a hotel ballroom filled to capacity with immigrant professionals in wedding finery. I needed to look the part. A beard and turban, the usual symbols of Islamic religious authority, were out of the question for obvious reasons. My usual professional clothes, while appropriately modest, were not nearly fancy enough; no-wrinkle synthetic fabrics in black and charcoal wouldn't cut it. Whatever I wore had to not only convey authority but also be culturally appropriate; a business suit also would not do. The clear choice was to wear what most of the female guests would be wearing: *shalwar kameez*, a long tunic top over baggy trousers with a long matching shawl or scarf that can be draped over the head as necessary. Since I married someone of Indian ancestry 10 years ago, this has become my preferred dress for ceremonial and religious occasions. Nonetheless, as *imams* do not, as a rule, wear purple adorned with gold sequins and beading, and since every outfit I owned was similarly colorful and ornate, I would have to find a more suitable ensemble.

A shopping expedition in Jackson Heights, Queens, made clear the unprecedented nature of my task. In each store I visited, I attempted to explain my unusual requirements to the Indian women assisting me. It was easy enough to convey why the tunic needed to have long sleeves. All I had to say was "for a Muslim wedding," and there was no attempt to talk me into anything else, which immediately narrowed my range of possible choices by quite a bit. My need for a neutral color, matte fabric, and restrained ornamentation, however, was not easily accepted, as it seemed to conflict with my statement that the outfit was for a wedding.

At one shop, I attempted to explain to the Muslim proprietress that I was going to be performing the ceremony, not attending as a guest. I was met with only incomprehending insistence that I needed something fancier than the plain outfits I had selected to try on. (My intransigence, I suppose, was merely chalked up to the fact that I am American and, therefore, ignorant about important matters such as weddings.) As she proposed one satiny confection after another, I gazed longingly at the simple, tasteful cream-colored men's tunic-and-pants outfits lining the walls. Luckily, however, I found an appropriate garment in the next shop. Made of gray crepe, it was rich enough to be suitably fancy. With a pattern of gold and silver wire embroidery diamonds down the front of the tunic, it was restrained enough to look official. Best of all, the two parallel lines of gold embroidery down the front of the tunic made it look more like a jacket than a dress. It was the closest I could possibly come to masculine clothing without going in drag.

With the issue of clothing resolved, I was left to concentrate on the ceremony itself. Muslim marriage vows are traditionally simple, and in this case, we simplified them to almost the bare minimum to suit the spouses. The sermon took more work. In most American Muslim weddings, the sermon is divided into two parts: a brief Arabic introduction, praising God, invoking God's blessings, and reciting a few appropriate Qur'anic verses, and a longer sermon in English that discusses marriage, especially the rights and duties of the spouses. While I could handle the second part with some effort, I was not equipped to tackle the first alone. I emailed my doctoral adviser, himself a *madrasa* graduate, explaining my situation and asking for guidance. Really, what I wanted to know from him was: have I gotten myself in way over my head?

His support and encouragement were vastly reassuring. Since he knew a standard wedding sermon by heart, he didn't have a "cheat sheet" to provide for me, instead referring me to a colleague at another university who had worked as an *imam* in their native South Africa. This man responded to my emailed plea, sending me photocopies of a long *khutbah* from which I cut and pasted the Arabic text to suit my needs: the introductory formulae and three verses from the Qur'an. I chose to stick closely to the text, well within the range of minor variations in wedding sermons.

Over the next few weeks leading up to the ceremony, I practiced repeatedly, knowing that the tone for the entire event would be set by how authoritatively I could deliver a two-minute speech in Arabic. While most of the attendees would not understand the content, and therefore the English sermon would be more important in conveying ideas, the perceived religious legitimacy of the ceremony would be contingent upon my conveying linguistic competence.

The English sermon required a different type of attention, and a delicate touch. I didn't want to play false to the scripture and proclaim the exact equality and sameness of male and female in every detail of marriage, nor did I want to engage in a detailed critique of Muslim conventional wisdom on gender roles in marriage. Instead, I chose to stress certain crucial principles, drawing on the verses used in the Arabic sermon, which, in addition to the one about the creation of the first human being and its mate from a single soul, focus on the human obligation to revere God.

I attempted to convey how individual moral responsibility and accountability are not extinguished by marriage but rather expanded to encompass duties to a spouse as well. I noted that marriage is a contract in which it is important to outline expectations at the outset, but that it is not merely a business arrangement consisting of dower payment and cohabitation. I pointed out that there is an emotional and spiritual dimension to marriage, an intimacy distinct from its social function in organizing human life. Above all, I stressed that God must remain paramount for the spouses, individually and collectively.

The event itself went without a hitch. Few guests knew in advance that there would be a woman officiating, but no one stood up and attempted to stop the ceremony, which had been a niggling fear of mine.

Only one person approached me afterward with a very diplomatically worded query about the validity of a ceremony performed by a woman; he seemed satisfied by my answer. Apparently, though, there was significant controversy in the local community in the wake of the wedding—I heard about it from an acquaintance in Chicago, who was contacted by someone from Tampa to find out if what I had done was "legal." Most of the reaction I got at the reception, from men as well as women, was positive. The most frequent sentiment seemed to be that, quite simply, times have changed and it is a good thing for Muslims to change with them, so long as the fundamentals of Islam are upheld.

I have no grand conclusions to draw from this event, merely a few small lessons. It reaffirmed for me that stretching oneself, professionally and personally, is rewarding. It suggested to me that sometimes the way to best make change is not to debate endlessly whether or not such change is permissible but, after giving the matter due consideration, simply to act.

It taught me that scriptural learning and a solid command of Arabic are essential to the exercise of religious authority—and that having a smashing outfit can never hurt.

A Wedding Khutbah

KECIA ALI (2004)

This sermon was delivered at the wedding discussed in “Acting on a Frontier of Religious Ceremony,” also included in this reader. When it was published in *Azizah*, it was as part of a whole section on marriage. (*Azizah* publisher and editor-in-chief Tayyibah Taylor, may God show mercy to her, was the person who initially reached out to me about officiating.) I’ve officiated another half-dozen wedding since, and have tailored my remarks to the couple getting married, but the basic beats remain: the spouses in relation to themselves and each other, the extended family and community as a source of support (and maybe also friction), and the privilege and predicament of humanity as a whole as part of God’s creation, with all that entails.

This piece first appeared in *Azizah*, 3:4, Dec 2004/Jan 2005, pp. 29-31 and is republished here in accordance with the terms of the original contract.

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When Tania and Zan were making their wedding plans, they decided to do something different for themselves and hundreds of their guests; they decided to have a woman officiate their marriage. Thus, they made a statement about the spiritual equality of women and men and about marriage as a spiritual partnership. Knowing of no religious reason women cannot officiate marriages, they invited Dr. Kecia Ali, the Mellon Postdoctoral Fellow in Islamic Studies and Women's Studies at Brandeis University, to officiate. She accepted, noting that in Islam 'since a wedding officiator is basically witnessing the contract agreement, there is no legal reason why females can't officiate.' Here is the wedding khutbah delivered by an officiating Muslim American woman. All citations are from the Holy Qur'an.

We praise God, we seek God's help, and we beg God's forgiveness. We seek refuge with God from the mischief of our souls and from the evil of our deeds. Whoever God guides cannot be led astray by anyone, and whoever refuses God's guidance, none will be able to guide. I bear witness that there is no god but God, who is One and has no partners, and I bear witness that Muhammad is God's servant and messenger.

We are blessed to be here this evening for the joyful and solemn occasion of joining Zan and Tania in marriage. Marriage in Islam is of vital importance. The Prophet Muhammad, Salla Allahu 'Alayhi Wa Sallam, said that those who marry have completed half of their religion. Anyone who doubts the significance of marriage need only turn to the Qur'an for a reminder as to its place in the divine plan for humanity. God says in the Qur'an: "Oh people, revere your Sustainer who created you from a single soul, and from it created its mate, and brought forth from them both many men and women. Revere God, through whom you ask [of one another], and [be reverent toward] the wombs that bore you. Indeed God is watchful over you" (4:1).

The brevity of this verse from the beginning of Surat Al Nisa is deceptive. It encapsulates in a few short lines essential truths about the nature of humanity's relationship to God and the nature of relationships among human beings.

God, as the Qur'an makes clear in this and numerous other verses, is the Creator of humankind. Humanity, as God's creation, is ordered to revere God. The proper attitude of human beings to God is one of *taqwa*: reverence, piety, fear, everpresent consciousness of our Creator. We are reminded that even with regard to earthly matters, such as marriage, God comes first. Human beings are obligated to our Creator not only for our existence, but also for the opportunity to share our lives with a spouse whom God also created at that first moment of humanity's existence.

According to God's words in these verses, the first human being and its mate were created out of a single nafs–soul, or self, or substance. This tells us something fundamental about humanity: the equal status of all human beings as God's creatures. This lesson is reinforced elsewhere in the Qur'an, where God describes the division of humanity into nations and tribes (49:13) and notes the variations in the colors of our skins and the languages we speak (30:22). These differences exist, God tells us, so that we "may know one another." They do not establish superiority or inferiority. Rather, we are told quite clearly, that *taqwa* is the criterion by which God judges, *taqwa*, which is the focus of the verses that I quoted a moment ago (49:13).

This verse in fact commands people to have *taqwa* toward God twice: once as 'your Sustainer, who created you' and once as the one 'through whom you ask [of one another].' The two identities are intimately interconnected. God created the human being and its spouse, and 'brought forth from them both many men and women.' (4:1) As we are told in another verse (25:54), God populates the earth through the creation of lineage and marriage relationships, all tracing back ultimately to the first human pair. It is these relationships that the Qur'an refers to when it highlights God's role as the one through whom we ask of one another. The affiliations created by marriage are part of the divine plan for humanity, just as it is part of the plan for the differences among humanity to lead to interaction and knowledge. Our obligation to cherish the ties of kinship and mutual obligation has significance beyond the purely human level. We must remember that our obligations to other people—especially our spouses and families—are part

and parcel of our obligations to God; God created humanity with the aim of establishing society based on human interaction.

While their vows tonight will create a new set of marital duties, Tania and Zan will continue to belong to their own kin; they will not cease to be daughter and son, sister and brother, cousin, grandchild. They will continue to have rights and obligations to the members of their own families, and they will have new bonds with their kin-by-marriage. Thus, as Zan and Tania marry this evening, not only is it important that they be aware of their obligations to one another—and their families, old and new—but it is also important that their families and the larger community of Muslims be aware of the claims that this new couple has to support and guidance. God is not unaware of the possible strains and difficulties of married life, and suggests in the Qur'an ways of involving family members in the negotiation and settlement of disputes (4:35). (It goes without saying that assistance and advice when needed and requested are, of course, distinct from meddling.)

It is unrealistic to imagine marriage without any conflict; what matters is that when conflict does arise, it is settled in a respectful, appropriate, and thoroughly God-conscious way. Even the Prophet Muhammad, *Salla Allahu 'Alayhi Wa Sallam*, had difficulties in his personal life on occasion. His resolution of them with compassion, discretion, and restraint demonstrates God's assertion that the Prophet is indeed 'a beautiful example' for Muslims (33:21)—especially Muslim husbands.

In modern American culture, weddings are often thought of as being purely about romance, and it is admittedly not very romantic of me to discuss the less glamorous elements of interpersonal relationships on an occasion such as this. But Islamic marriage is a contract and, as with any contract, full disclosure is required. It is important that those entering into marriage do so with their informed consent, aware of their own expectations for the relationship as well as the expectations of their spouse-to-be.

In marriage, two independent individuals are joining in a partnership of sorts. Each remains a sovereign person, fully accountable to God for his or her behavior. There can be no doubt of God's commands in this regard; God tells us repeatedly that no soul can bear the burdens of another (6:164, 17:15, 35:18, 39:7). However, so long as the marriage endures, and we hope and expect that it will be for a lifetime, each spouse carries responsibilities to the other. Zan and Tania bring different strengths and capabilities to this marriage, molded by their own experiences and innate qualities. They will share the burdens and the blessings of establishing a Muslim household and, if God wills, eventually nurturing and raising children who will grow up as faithful worshippers of God and productive members of their community and society.

Over the course of what will, God willing, be a long marriage, Tania and Zan will share beautiful, momentous occasions: the birth of a first child (and, many years from now, perhaps a grandchild); professional triumphs; anniversaries; moments of sheer passion; and sentiments of overwhelming love and tenderness. It is a fact of life, however, that these moments will be dwarfed in number, if not in significance, by the activities of daily living. They will have many moments of shared labor, quiet companionship, and ordinary conversation. I will not pretend that marital bliss is to be found through mundane chores, such as folding the laundry together. But part of a happy marriage will be finding the satisfaction and appreciation for one another inherent in these everyday activities and the closeness found there.

Having spoken, perhaps too much, about practical matters, I want to turn for a moment to more abstract and lofty considerations. Just as it is false to think of marriage as only a matter for the heart, it is equally false to think of it as a dry business arrangement. While it is possible to have a marriage that meets the bare minimum requirements of the contract, this is not what God intends for humanity. There is an emotional and spiritual dimension to marriage that must not be denied. The Qur'an tells us that God 'created for you mates from among yourself that you may dwell in tranquility with them' and that God 'placed love and mercy between you' (30:21). These purposes for marriage—tranquility, mercy, love—are distinct from the broader role that marriage plays in organizing society. They pertain to the intimate life of a couple, that which transpires between two persons sharing a home and a life.

God uses the metaphor of garments to describe the relationship of spouses to each other (2:187), and it is a particularly apt one. A garment stands between one

and the world, protecting one from hostile elements. It is, indeed, the closest thing to one's own self, just outside the skin. Tania and Zan, when they make their vows in a few minutes, will become each other's closest family.

Nonetheless, and this seems a good place to bring my remarks to a close, one must remember that however close a husband and wife can be, the Qur'an also tells us that God is closer to the human being than the jugular vein (50:16). This is a reminder to us that even within the confines of marriage, God is, and must be, paramount. By keeping God first and foremost, and remembering God's purposes in creating for us mates from among ourselves, marriage takes on the importance it deserves as an integral part of God's plan for humanity from the very moment of our creation.

Rethinking Marriage Guardianship: Lessons from the Role of the *Wali* of American Muslim Women

AMINAH BEVERLY AL-DEEN (2021)

This short article was written for this volume to address a series of questions about the push for marriage on those new to Islam, why the guardian—generally an unknown person—is appointed, and what happens after marriage when a guardian is needed. While this article does not fully answer all the questions, it hopefully opens lines of inquiry.

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Life stories, even in a partial telling, are always hard to narrate. Experiences have many beginnings, and it can be hard to distinguish a new start from the ending of what came before. What happens to American women who begin the transition to Islam is a wonderful story of the newness of a different spiritual life, meeting new people from different cultures; on the other hand, it is also scary: white, black and Latino women alike feel a loss of identity. Women coming to Islam arrive with different statuses – some are already married, some are widowed, and some are unmarried. All enter cultural spaces where there is gender separation, efforts at gender surveillance and control, and speculation about their previous lives. Culture shock can be especially acute when a community is primarily comprised of women from other cultural backgrounds with little experience with women transitioning to Islam, or women who have been Muslim for a while who want to forget their initial struggles, who bring lots of presumptions about women in American life. These presumptions affect how they receive newly Muslim Americans who come into Muslim spaces. They may assume that American women are aggressive, sexually active, and have loose familial ties. All of this colors how the woman who is coming to Islam is perceived and builds apprehension about what she will bring to the community.

In this article, I want to tell a general story of what happens to American women transitioning to Islam regarding how they are welcomed, surveilled, and generally not protected regarding marriage. I use the word *transition* because a person is choosing to become Muslim. The transition is in many ways the ending of one personal life and the beginning of a new journey. Just as Qur'ān talks about stages of belief from being a legal Muslim to a believer to one who embodies Islam, the person beginning is moving away from much of a former life to a new set of stages. The Christian term *conversion* obscures this gradual shift while *transition* gives the sense of a process. For thirty years, I have researched the health and well-being of African American Muslim women. There has been little examination of transitioning women's lives, even though a significant number face challenging domestic situations. In this brief reflection, my focus is on that fact that women who become Muslim are effectively orphaned and put into the hands of strangers.

Transitioning to Islam is a series of dislocations for many if not most women. At some level, temporarily or permanently, women leave family and friends, habits, and social haunts to come to dwell with strangers and foreigners in unfamiliar places with people of diverse socio-economic classes and ethnic groups. The focus is often on what to wear rather than spiritual welfare or at least, many find it hard to discern what has priority. While these shifts happen to both males and females who transition, what happens to women is often more traumatic, just because they are women. Women give up their ideals of femininity for ideals espoused by others, who encourage them to wear one-piece cloaks in black or dark gray, discourage them from wearing make-up, and challenge their existing employment and leisure time activities. (Never mind that the rules they aim to impose on transitioning American women may be flouted by younger women born into the community.)

Beginning a transition to an unfamiliar worldview is an awesome process in and of itself. American women transitioning to Islam encounter unfamiliar cultural traditions including gender separation, positioning them in a liminal world between Americanness and otherness. They are taught that the world of their families is the *dunya*, a world of evil licentiousness that they must leave. In some communities, women are prevented from family contact while in others, that contact is allowed but limited. They are given Qur'āns with King James English translations which they can't easily read making getting their own comprehension of the faith difficult and their reliance on someone else's interpretation great. Thus, very little is learned about Islam beyond prayer and washing before prayer. Yet, all who transition have expectations of the community they choose to learn in. They anticipate warmth, camaraderie, orientation classes that include learning prayers first in English (so they know what they are saying), understanding the theological underpinnings of Islam, and prayer positions, and so on. Many know that there is gender separation during prayer time, but it is generally unknown that there is gender separation in access to knowledge.

Islam is presented by both males and females in the community, in available texts, in Friday talks, and as common knowledge to all who inquire as a color-blind, class-blind liberation for women, as an equalizer of gender relations, and ultimately as a faith tradition where believers embark on a path to God as the priority. In reality, however, issues of gender and dress take priority over faith. What American women often see is gender and language segregation. Women are

in the back or upstairs or in another building. New Muslims hear little of the Friday talk as many women congregants use the time to socialize—sometimes in other languages—and tend their children. Women in the masjid surveil any unfamiliar women for her dress and scrutinize her for any obvious signs of ethnicity. Immediately, one sees that the Oneness of God and the spirit of community are less important than what one wears and which language one speaks. Most women who transition find themselves quietly questioning everything while being scared to question anything as they may find themselves seeming to question God. The disconnect between what is told to the transitioning woman and what she sees in the social space does indeed raise questions but if asked, the responses are often those of blaming lack of faith or knowledge or even in some cases being labeled a troublemaker. Many women who I interviewed were confused as to how Arab or South Asian dress made women closer to God. For African American women, the road is full of unspoken presumptions and assumptions and there is little focus on faith.

Unmarried women are a danger in all communities. Husbands may look at them as potential additional wives, while unmarried men look as though they are in a meat market. Transitioning women are perceived as having too much freedom of movement that is not surveilled. Many African American women transitioning to Islam have heard of the "Islamic" permission to have more than one wife, but don't think that they are a potential additional wife. That men are on the "lookout" for additional wives pushes any spiritual yearning to the margin and images of a "harem" dominate. I found several problems in all of this. First, adult women continue to be treated as children who are surveilled by other women and married and unmarried men. They are pushed in prayer lines to the "right" position, cautioned in bathrooms about the "correct" way to wash by other women and sometimes their daughters. Control comes from the recitation of hadith materials that the new Muslim has little information about. Second, they are given little guidance by those considered formal authorities beyond how women are to act and when they must show deference. Third, the separation from family engenders lack of self-esteem and completely renders the woman unable to make reasoned choices. Again, there's the excitement and power of what's new: a transition moves us toward an exciting new self; a rupture is of course the breaking of old ties and a moment of danger, but it's also a moment of freedom. The novelty, strangeness, and opportunity for spiritual fulfillment cloud the mind.

For American women in transition who are married to non-Muslim men, an extraordinary amount of psychological and spiritual pressure is applied on them to immediately obtain a divorce. This is done whether these are long standing marriages with children or whether the husband is considering Islam as his spiritual home. For those who are unmarried, pressure is applied as "marriage is half of faith." Too often, women go headlong into marriage with strange men as this is perceived as an essential part of this new beginning and an opportunity to replace the family sometimes lost in the transition. How is the dramatic step of marriage to take place in a community of strangers? A guardian (*wali*) is appointed, usually either the imam or a respected man in the community.

The *wali* doesn't know the woman, generally makes no effort to meet her family. This woman is essentially an orphan in Islam though she has family. The Qur'ān commands the protection of orphans and gives instructions for their care (IV: 2-10). In the case of a woman transitioning to Islam, she is not abandoned or left bereft because of war or death necessarily nor is she a child but she is orphaned because of the new world she is entering without the guidance of parents or other relatives. Her person is to be protected from those who might prey on her wealth or possessions. She should not be married off to men who have not been vetted. The Islamic understanding of the role of *wali* is not merely a legalistic requirement to enable a hasty marriage. Generally speaking, the *wali* is a woman's father or grandfather or brother or uncle or even her mother or other female relative. The assignment of a stranger to take over these duties is unheard of in most Muslim countries. In the U.S., it is common and begins an often-devastating series of events.

In practice, the appointed guardian for a newly Muslim woman looks around or asks the community about unmarried or married men eligible for marriage. Investigations of the potential husband's character, sources of income, educational level, Islamic learning are often minimal if present at all. The guardian strongly suggests someone for the woman to marry very quickly after she begins her transition and before she "gets her feet under her" Islamically. Obviously, there is little time to get to know the prospective mate

since community norms dictate that third parties must supervise any conversations. Many women are not advised to make a contract, and some who decide to do so are even told that it should be short, not giving them guidance to think about how their married life should proceed. If they do make a contract, there is no place to register it. Again, the encouragement and pressure is to get married.

The *imam* or *wali* is usually uncertified by the municipality in which he operates because this is considered a regulation of the *dunya*, so there is no need. If those who preside are not registered, the contract is hence unenforceable. Weddings are not announced with time for family or friends to attend. Few attend, the normal wedding feast is absent, presents are sparse and the celebratory environment is dampened. Many of the women I interviewed were married in almost clandestine circumstances – in homes, in markets, quickly after Friday prayers and so on. The *wali* then disappears, having performed his perfunctory duties without care. How is he a protector when there is a problem, or need for consultation?

The role of the guardian is especially important and if assumed, it should be understood as an awesome responsibility. Every effort should be made to engage the woman's family. Engagement of family is important. I prefer female guardians specifically because of the aspect of understanding care. Women are more likely to take needed steps to get necessary certification and registration, to find out about their charges and their families, to make marriage contracts that protect women, and to remain confidants for the transitioning woman. Female guardianship is necessary and critical in this process.

What I would like to see is an acceptance on the part of women of a female *wali* who they feel comfortable with and the time to get to know her before being pressured or pressuring themselves into marriage. I would also like to see a reconsideration of the *mahr* and its current use by husbands to keep women in marriage disasters or the demand for its return, a way to leave women destitute. A registered contract, guided by a knowledgeable female *wali*, could safeguard a newly Muslim bride's welfare in this and other ways. Many of the terms surrounding marriage need to have an ethical analysis for the 21st century and reimagining and strengthening the role of the *wali* for transitioning women is one place to begin.

Marriage

Sharia and Diversity: Why Some Americans are Missing the Point

ASIFA QURAISHI-LANDES (2013)

Islamophobia now puts the average American Muslim in the position of answering all sorts of questions about sharia, at a level that is really achievable only by experts in the field. As they try to rise to this impossible demand, I have noticed one trap that my fellow Muslims seem to constantly fall into: answering what is "the" Islamic rule on something. If you know anything about sharia, you know that there rarely is just "one" answer on anything. I wrote this policy report for my friends at the ISPU (Institute for Social Policy and Understanding) so that, if nothing else, American Muslims could be able to explain the diversity of thought inherent in sharia - and why that is a very good thing.

The executive summary republished here with permission is from the report "Sharia and Diversity: Why Some Americans are Missing the Point," initially published in January 2013 and available in full at ispu.org.

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The lens of state power is not the only way to see law. Jewish halakha is one example. The scholar created doctrines of Islamic law are another. Both are complete systems of law that do not need state power in order to govern individual behavior. This is why, when American Muslims say that they live according to sharia, this does not mean that they want government enactment of Islamic law. Their request that American law recognize their choice of religious rules in their lives is not a demand that American law legislate Islamic law for everyone. To think so is to fundamentally misunderstand what Islamic law is, the fact that it differentiates between God's Law and the human interpretations thereof, and how Islamic law operates in practice. Much of the confusion in the United States regarding sharia would be untangled if Americans could appreciate these realities, however unfamiliar.

Sharia is, for Muslims, Divine Law—the Law of God. But it takes human scholarly study of scripture to articulate and elaborate that Divine Law in the form of legal rules. Those legal rules are called "*fiqh*," crafted by religious legal scholars with a self-conscious awareness of their own human fallibility. As a result, there are many *fiqh* schools of law. According to Islamic legal theory, no *fiqh* rule can demand obedience because every such rule is the product of human (and thus fallible) interpretation. This pluralism allows the divine sharia "recipe" to be tangible enough for everyday Muslim use, yet flexible enough to accommodate personal choice.

Pluralism in *fiqh* (human articulation of Divine Law) illustrates the dynamic interactive engagement that sharia (Divine Law) has had with many different human environments. In other words, Muslim religious scholars have always treated sharia (Divine Law) as a recipe that is meant to be made (with all the natural diversity that results from that process), not one frozen in pristine condition decorating a kitchen bookshelf.

The enactment of so-called "sharia laws" in Muslim-majority countries is a modern mutation. Pre-modern Muslim governments formally recognized *fiqh*, but not by legislating it as the uniform law of the land. Instead, there was a separation of legal authority between the realms of *fiqh* (human articulation of Divine Law) and ruler-made laws for public order (siyasa). This separation enabled pre-modern Muslim legal systems to preserve the pluralism of *fiqh* and the principle of individual personal choice between *fiqh* schools, while still enabling Muslim rulers to make laws in order to serve the public good (siyasa). In stark contrast to this history, most Muslim-majority countries today have a very different constitutional framework, inherited or borrowed from the European nation-state model in which all law is controlled by the government. Modern Muslim legal systems no longer formally separate the realms of *fiqh* (human articulation of Divine Law) and state-made law (siyasa). Instead, the only formally recognized law in most of these countries is the law made by the government. Thus, the phenomenon of "sharia legislation" exists not because sharia (Divine Law) demands it, but rather, because of a complicated series of political events in these countries.

From the perspective of Islamic legal theory and history, there are two major problems with the idea that a Muslim government must enact "sharia legislation." First, enacting a collection of (often politically) selected rules of *fiqh* (human articulation of Divine Law) as the uniform law of the land undermines the legal pluralism that religious communities (Muslim and non-Muslim) used to enjoy in pre-modern Muslim legal systems. That is, before the legal monism of the nation-state, Muslim governments often accommodated a "to each his own" approach to religious law that included not just the many Muslim *fiqh* legal schools, but also the religious law of Christians, Jews, and others. Second, the idea of government codification of sharia (Divine Law) contradicts the core epistemology of Islamic jurisprudence: that no human can claim to know God's Law with certainty. Thus, when Muslim governments enact "sharia legislation" today, they not only reject the humility exhibited by centuries of *fiqh* scholars, but also the historical practice of centuries of Muslim rulers finding ways to enforce sharia while still respecting *fiqh* pluralism.

Here in the United States, there is no threat to American law presented by American Muslims seeking to live by sharia. There is also nothing particularly novel about some Americans wanting to follow religious laws that differ from the law of the land. American Muslims are merely the latest of many religious groups in the United States whose religious practices have presented continuing opportunities for American law to define the contours of what religious freedom means in our constitutional system that protects the free exercise of religion. American courts have never automatically dismissed individual requests for legal accommodation of religious law. On the other hand, religious freedom

in the United States, like all constitutionally protected rights, is not absolute. It is weighed against other constitutional values and social policies. The main tools used by American courts in these cases are comity, public policy, and unconscionability. As a result, as with the religious practices of all American religious groups, American Muslims' *fiqh*-based legal arguments are sometimes honored by American courts, and are sometimes rejected. Simply put, the American legal system honors the desire of many American Muslims to organize their legal lives according to their understanding of sharia (Divine Law), within the limits of American public policy. To see this as a threat is to mistake religious freedom for religious invasion.

It is important to realize that one of the themes of the anti-sharia campaign in the United States is that "creeping sharia" proves the dangerousness of multiculturalism. More specifically, the argument is that multiculturalism is flawed because it causes us to compromise our American values in order to accommodate Muslim desires to follow (allegedly oppressive and offensive) sharia. In this way, the anti-sharia controversy is part of a larger conservative-liberal political debate over the role of multiculturalism in America. Appreciating this context is important to engaging the topic of sharia in America.

In doing so, it is important for Americans (both Muslim and non-Muslim) to stop talking about sharia in a way that supports the rhetoric of those who manipulate the concept of sharia for political gain. Both within and outside of the United States, it is common to see the term "sharia" used interchangeably for not just the Islamic ideal of Divine Law, but also to refer to the fallible rules of *fiqh* (human articulation of Divine Law). Confusing sharia with *fiqh* is dangerous and misleading because it blurs the line between the divine and human voice, hiding the self-consciously human process that created the *fiqh* rules and the pluralistic schools of *fiqh* doctrine.

Conflating *fiqh* (human articulation of Divine Law) with sharia (Divine Law) causes people to assume that each fallible *fiqh* rule represents uncontestable Divine Law for Muslims, and that Muslims believe that these *fiqh* rules must be legislated as the law of the land. In Muslim circles, this sets the stage for political actors to push through their preferred *fiqh* rule with little or no opposition because the Muslim public assumes that the rule is divinely-directed, rather than being just one of many equally legitimate *fiqh* choices. This is often the technique used to support "sharia legislation" in Muslim majority countries today. It is also similar to a strategy used by anti-sharia activists in the United States whereby a few objectionable *fiqh* rules are selected to argue that sharia itself is offensive. In both cases, linguistic sleight of hand is being used to manipulate an unknowing public.

As this report explains, one (or even more than one) *fiqh* rule (human articulation of Divine Law) does not define sharia (Divine Law). It suggests the following three guidelines to avoid the most common pitfalls and misunderstandings that occur in public discourses about sharia.

(1) Use the word "sharia" only to refer to the concept of perfect, divine Law of God in Islam; use the word "*fiqh*" when referring to the humanly-created doctrinal rules created by Muslim religious legal scholars as the result of their efforts to understand and articulate[1] sharia;

(2) Remember that *fiqh* (human articulation of Divine Law) is pluralistic, made up of multiple variations of equally-legitimate schools of law and their respective doctrines, all of which are available to individual Muslims to choose from as they seek to live by sharia (Divine Law);

(3) Do not refer to the laws in Muslim-majority countries (even those claiming to be "Islamic states") as "sharia." They are merely a legislated selection of humanly-created *fiqh* rules; they cannot be said to be conclusively dictated by sharia itself.

1 The work of the *fiqh* scholars to understand and articulate sharia should not be described as merely "applying" the sharia. *Fiqh* literature is largely written in an academic and abstract form, based on theoretical analysis and hypotheticals. While those hypotheticals are based on a reflection of how this would work in real life (hence "applying" the scripture to real life), to say that religious scholars "apply" sharia would confuse the role of judge and *fiqh* scholar too much. Properly construed, the application of sharia is the job of judges who apply the (scholar-created) *fiqh* in individual cases. These roles are largely the same in a common law system like the United States, where the judges' opinions actually are the law, but things are very different in a *fiqh* context.

Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law

KECIA ALI (2003)

This essay, initially published in the *Progressive Muslims* anthology (2003), represents the first academic fruits of my doctoral dissertation (2002) on early Islamic marriage law. It's a polemical engagement with what I term feminist apologetics around provisions of Muslim jurisprudence framed as liberating for women: dower, freedom from housework, and conditions in marriage contracts. More sophisticated versions of its arguments about contemporary Muslim discourses appear in *Sexual Ethics and Islam* (2006, rev. ed. 2016) and the fuller account of the formative-era jurisprudence on which I based my arguments can be found in M*arriage and Slavery in Early Islam* (2010). Though I stand by its arguments, I regret that my sharpest attacks here target others invested in gender justice when upholders of patriarchy deserve our harshest criticism. Nearly twenty years later, I'm also struck by my naïve focus on logical coherence rather than practical impact. I remain unconvinced that isolated Islamic legal doctrines divorced from their broader context are a viable solution, yet I think it's vanishingly unlikely that a new, internally consistent jurisprudence will develop. For constructive proposal that's deeply critical of my argument, see Asifa Quraishi-Landes' essay "A Meditation on Mahr" in this reader; for a broader egalitarian reimagining of Islamic law, see also the work and wisdom of scholars associated with the transnational collective Musawah (musawah.org).

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Progressive Muslims have a difficult relationship with Islamic law. Many progressive Muslims have undertaken alternative close readings of the Qur'an, or have delved deeply into ethical and mystical aspects of Islam to find teachings that can be used as a cornerstone of a progressive Islamic interpretation. But we have been reluctant to enter into serious conversations about Islamic law, which is generally seen as the realm of more conservative scholars. Partially as a result of this hesitancy, discussions of Islamic law today tend to reflect only different degrees of conservatism and fundamentalism. Debates over implementing *Shari'ah* revolve around issues like the stoning of adulterers or amputating the hands of thieves. For those living in the Muslim world, negotiations with Islamic law as it is enforced through personal status codes are a practical necessity. Muslims who live in the West, however, encounter Islamic law only to the extent that we choose to apply it in our personal dealings. For many, that means most especially in matters of family. Paradoxically for progressive Muslims, this is the arena where traditional Islamic law is thought to be most conservative.

Despite the fact that Muslim marriage is not generally thought of as a progressive institution, even progressive Muslims generally want to get married. We do not want our relationships to be bound, however, by the strictly hierarchical rules that we assume to be enshrined in Islamic law. A few Muslims in the West simply leave aside Islamic law in personal matters, choosing to abide exclusively by secular laws, which tend to be more egalitarian. These couples work to keep the spirit of Qur'anic proclamations on the nature of marriage alive in their relationships, but do not consider its legal pronouncements literally applicable. Other progressive Muslims, perhaps most, follow the key elements of classical marriage in the wedding, but may reduce the dower to a symbolic amount due to discomfort with its "commercial" connotations. There is an implicit understanding, in these unions, that traditional legal rules – such as those allowing the husband to take additional wives or to forbid his wife from leaving the marital home without permission – will not govern the spouses. Both of these approaches are based on an understanding of Islamic marriage law as inherently biased against women; therefore, it is avoided or observed primarily in the breach. Islamic law, in this view, does not accurately embody the ideals of Islam regarding relations between spouses, which are mutuality, respect, and kindness. A third stance, however, calls for selective appropriation of provisions of classical law, allowing for the spouses to customize their marriage contract through the inclusion of numerous conditions, generally favoring the wife, that modify traditionally accepted rules for spouses' marital rights.

Proponents of this approach argue that, in fact, women are guaranteed numerous marital rights by Islamic law, some of which surpass rights granted by secular Western laws; women simply need to learn how to protect themselves by invoking them. The lawyer Azizah al-Hibri is the most prominent, though by no means the only, advocate for this view, which has gained widespread attention in recent years and has been adopted by many Muslim women's organizations. It is also quickly becoming conventional wisdom among some non-Muslim feminists concerned about avoiding orientalist stereotypes surrounding "women's status" in Islam.[2]

Al-Hibri was recently featured in "Talk of the Town" in *The New Yorker*. There she explained that women have rights in Islamic law that are often unknown and unutilized, with the right to make stipulations in marriage contracts primary among them. According to the article,

> A woman can secure her right to work outside the home at any job she likes; she can reassert her right to have her husband support her financially, even if she has a job or is independently wealthy; she can keep her finances separate from his and invest them wherever she wishes; she can specify the sum of money she expects to receive should the marriage end in divorce or should she be widowed; she can negotiate the right to divorce her husband at will, should he, for example, take another wife; [and] she can reserve the right not to cook, to clean, or to nurse her own children.[3]

This picture does not resemble at all the laws governing most Muslim women's marriages today. If implemented, however, such rights would seem to guarantee women a life of ease and comfort. Further, to the extent that these rights can be supported by opinions from texts of classical jurisprudence, they are more likely to achieve acceptance than attempts to rework marriage law entirely, since they can claim an "authentic" Islamic pedigree.

In this essay, I will argue that this approach misses the forest for the trees. While its adherents may or may not be right about any particular contractual stipulation[4] (and often they significantly overstate the extent to which specific conditions are enforceable), they fail to address the basic parameters of the marriage contract itself and the assumptions it is based on. By focusing on isolated rights without paying attention to how they are embedded in a system of interdependent spousal obligations, al-Hibri and other advocates for women's legal rights implicitly accept the basic structure of the marriage contract as understood by Muslim jurists to be the divinely sanctioned norm for Islamic marriage. However, this framework is not God-given but rather was developed by men working at a particular time and place, governed by certain assumptions. Before we simply accept the traditional legal understanding of marriage and move to modify its practice with conditions attached to marriage contracts, its basic premises must be subjected to sustained analysis and careful critique.

One purpose of this essay is to present such an analysis of the traditional jurisprudential understanding of marriage. I will demonstrate, through an exposition of the views of early Sunni jurists, that the overall framework of the marriage contract is predicated on a type of ownership (*milk*) granted to the husband over the wife in exchange for dower payment, which makes sexual intercourse between them lawful. Further, the major spousal right established by the contract is the wife's sexual availability in exchange for which she is supported by her husband. This basic claim, which would have been accepted without controversy as an accurate portrayal of the legal dimensions of marriage by virtually any pre-modern Muslim jurist, is unthinkable today for the majority of Muslims, including those who write about Islamic law. This portrait of how traditional jurists conceived of marriage is a necessary precursor to the evaluation of contemporary discourses on marriage in Islamic law that I undertake in the second half of this essay.

I will address two types of modern discourses on Islamic law: neo-conservative and feminist-apologist. Both attempt to appropriate the authority of traditional Islamic law through various means, in each case upholding some of its substantive doctrines while setting others aside. Neo-conservative authors suggest that the rationale for men's and women's differing marital rights and duties is the natural difference between husbands and wives that results from a divinely ordained "complementarity" of males and females. Though presenting their views as simply restatements of traditional law, these authorities allow some rights previously granted to women to lapse, since they do not make sense as part of the new framework.

Feminist and reformist approaches that take women's rights and needs as their main concern make different interpretive moves from those of the neo-conservatives. In some cases, they reject juristic interpretations and turn instead to the Qur'an and, to a lesser extent, the *hadith* collections as source of legal guidance. In this essay, though, I am concerned with the way these discourses focus on particular substantive rules of jurisprudence. Claiming back rights that have recently gone unnoticed or even been denied outright, those working from this perspective attempt to promote and defend wives' rights by appeal to traditional legal authority. In doing so, however, they provide new justifications and interpretations for these rights that do not accurately reflect their original place in a system of spousal rights and obligations.

In my view, neither contemporary approach profiled here accurately or thoroughly engages with traditional jurisprudence. To do so would be to acknowledge that traditional Islamic legal understandings of marriage and divorce are unacceptable from a modern perspective. A serious analysis of traditional jurisprudential logic leads me to the conclusion that a new jurisprudence is required. It cannot be achieved piecemeal, or through strategies of patching together acceptable rules from different schools. Nor can it be sidestepped by an exclusive focus on scripture. There is no getting around law; we must understand it, then work to replace it. This essay is a preliminary step in the direction of comprehension.

A significant amount has been written in the last decades on Muslim men's and women's marital rights and duties, from a variety of perspectives. Despite the diversity of views, there is a trait common to most of this literature: little attempt is made to distinguish between types of norms and sources of authority. When authors make claims about what rights "Islamic law" (or sometimes simply "Islam") grants to spouses, they might mean Qur'an, or prophetic tradition, or the classical jurisprudence of one or more legal schools, or even the modern, codified laws of a particular

Muslim country.[5] If it is traditional jurisprudence that is meant, seldom is it specified whether the text is from the fourth/tenth century or from the fourteenth/twentieth century, or whether the view presented is the majority view or a minority one, perhaps held by only few jurists. Claims that "some jurists" or "many jurists" held a particular view are especially difficult to investigate. This collapsing of different discourses into the category "Islamic law" allows one to claim a broad authority for one's own view without needing to specify the source for that authority. By remaining so vague, it also prevents others from critiquing the claims and being able to weigh independently how authoritative they wish to consider a particular doctrine to be. And shifting from one set of sources to another – taking a majority view from classical Sunni jurisprudence when it suits, turning to the Qur'an when it doesn't, and drawing from modern statutory reforms when necessary – leaves one open to charges of inconsistency.

This essay will use Sunni[6] legal texts from the third century *hijri* / ninth century CE to illuminate how marriage was understood contractually in traditional Islamic jurisprudence.[7] My choice of this period requires a note of explanation. While the following centuries produced important texts – the classical works from the fourth/tenth to the sixth/twelfth century are particularly significant[8] – the literature from the formative period of the third/ninth century is a manageable body of work, making it possible to adequately survey the primary texts themselves. Given the importance of the issues under consideration, I think it is important to have a solid, thorough comparative approach, rather than using selected passages from a variety of texts from different centuries and different schools, or relying on modern summaries of earlier doctrine which may misrepresent crucial positions. That said, I think my general characterization of the marriage contract and its associated rights and duties applies to later Sunni texts as well, though in a few minor respects later classical doctrines may differ in their particulars from those described here.

I want to be absolutely clear to avoid any misunderstandings: I am not making any argument as to what Islamic marriage ideally should be or what the Qur'an or *Sunnah* says about spouses' rights. Nor should my portrait of legal doctrine be taken as a description of Muslim women's lives, either historical or contemporary.[9] When I state that Islamic jurisprudence grants husbands a type of ownership over their wives, I do not mean that 'Islam' sanctions this, that God intends it, that the Qur'an requires it, or that the Prophet approved it. Rather, I intend to characterize the system of gendered rights and obligations developed by the jurists whose works I am discussing.

One basic fact is very important to keep in mind throughout: there is not now, nor has there ever been, a single, unitary Islamic law. Though Muslims agree that the *Shari'ah* – God's law for humanity – is complete, infallible, and universal, it cannot be known directly but only through the work of human interpreters. Historically, these interpreters have been the jurists. Their attempts to understand, develop, and implement *Shari'ah* are human, imperfect, and shaped by the constraints of their specific historical contexts. This boundary between revealed law (*Shari'ah*) and jurisprudence (called fiqh in Arabic, which means "understanding" or "comprehension") has been obscured in the modern period as nations have adopted the term *Shari'ah* to describe their legal codes. Even before the modern period, the human element in the creation of legal rules was often overlooked, particularly by non-specialists. Even among the jurists, conformity with school doctrine (*taqlid*) became important, and the particular rules themselves took on an air of inevitability. However, jurists themselves always recognized that it was their efforts that were central; the term *ijtihad*, used to refer to independent legal reasoning, refers to *striving* for results not the attainment of correct answers. The jurists knew of significant differences between the schools; there is a vital literature of dispute and polemic. While one finds, at times, disparaging remarks about legal doctrines held by other groups of jurists, one also frequently finds a disclaimer, most often after the expression of a ruling on which there is significant disagreement. The jurists state simply, "And God knows best." There can be no clearer recognition of the inability of human reason to fully comprehend and implement God's revealed law.[10]

Formation of Islamic Laws: Sources, Methods, and Juristic Disagreement

The Qur'an was revealed beginning in the year 610 CE; its revelation continued until Muhammad's death in 632. In addition to general pronouncements on the nature of the relationship that should exist between

spouses – love and tranquillity, good conduct – the Qur'an addressed a number of specific issues relating to marriage and divorce. These included dower, a payment from the husband to the wife at the time of marriage; polygamy; the waiting period to be observed following the end of a marriage to determine if the wife was pregnant; and various types of divorce including unilateral repudiation and divorce for compensation. Muhammad also adjudicated in numerous disputes himself, establishing precedents separate from, and sometimes in tension with, the words of the Qur'an.[11] In the decades following his death, the Prophet's Companions gave *ad hoc* decisions in cases brought to their attention. Some cases were decided in accordance with what a Companion recalled to have been Muhammad's practice in similar situations; others were based on what they expected he would have done in such a circumstance; others simply on a sense of community norms. Sometimes, Companions drew on the Qur'an as support for their decisions, though they differed on the proper understanding of numerous passages.

In later generations, into the eighth century, a process of recording these decisions and various other types of historical accounts from and about Muhammad and his Companions was underway. It eventually resulted in the compilation of books of traditions (*athar*, *ahadith*), the most famous of which was the *Sahih Bukhari*, completed in the ninth century. At the same time these traditions were being collected, a more systematic effort to explore legal issues was undertaken by jurists. Schools of law (*madhahib*, sing. *madhhab*) formed, with a base of shared doctrine and methodology, though jurists within each school sometimes diverged from the majority opinion on a given topic.[12] Today, these schools survive as four Sunni schools (the Maliki, Hanafi, Shafiʿi, and Hanbali) as well as one primary and several smaller Shiʿi schools.

The legal schools of the formative period differed substantially on a number of issues related to marriage and divorce: how far a father's right to marry off his virgin daughter without her consent extended; whether an adult woman had the right to contract her own marriage; whether three repudiations pronounced at once took effect together or only counted as one divorce; whether a minimum dower should be set; whether a woman had the right to contractually stipulate monogamy or that her husband could not take her away from her hometown; and whether a woman could stipulate the right to divorce her husband under certain circumstances. One should not assume that some schools held a "liberal" position and others a more "restrictive" one with regard to women's rights. The Hanafi school, which held that adult women were free to contract their own marriages without needing a male representative (*wali*) to act on their behalf, also held that a woman could not obtain a divorce from an unwilling husband on any grounds except total impotence or possibly leprosy, and even then only so long as the marriage had not been consummated.[13] The Maliki school provided the most extensive grounds for a woman to seek divorce, including failure to support and the broad category of "harm" (*darar,* also "cruelty").

Nonetheless, its jurists permitted a father to marry off his never-married daughter against her wishes even if she were forty and independently wealthy. Only the Hanbalis held that there were consequences if a husband violated his contractual stipulation not to move his wife from her hometown or to take another wife; other schools considered these conditions meaningless and unenforceable.

Thus, it is clear that there were significant – and for actual women, quite real – implications to being under the jurisdiction of one legal school or another; the differences between the schools were not, as some have asserted, merely in matters of detail.[14] Nonetheless, there was indeed a shared understanding of the contractual relationship of marriage that prevailed at that time. This common view was based, in large part, on cultural assumptions shared by the jurists as a result of their social location in a particular and, according to Leila Ahmed, particularly patriarchal environment. She has shown that the 'formation of the core discourses of Islam' including jurisprudence took place in an era of hierarchy, social stratification, and the widespread practice of slavery. One characteristic of this environment was the "easy access" of elite men to slave women. She argues that "for elite men in particular, the distinction between concubine, woman for sexual use, and object must inevitably have blurred."[15]

Indeed, the jurists were influenced in their elaboration of a system of marital rights and obligations by the norms governing slavery. Slavery and particularly slave-concubinage were normal and accepted facets of social life, and it was assumed by jurists of the ninth century that one could usefully draw analogies

between marriage and slavery, husbands and masters, wives and slaves. At its most basic, the jurists shared a view of marriage that considered it to transfer to the husband, in exchange for the payment of dower, a type of ownership (*milk*) over his wife, and more particularly over her sexual organ (*farj*, *bud'*). As evidence presented below will show, it was this ownership, while distinct from the outright ownership of another's physical body in slavery, that legitimized sexual intercourse between husband and wife. It also gave the husband the unilateral right to terminate the marital relationship at any time, by repudiating his wife for any, or no, reason. As the jurists frequently noted, this was analogous to the master's freedom to manumit a slave at any time.

Although marriage contained an element of ownership, this ownership was established by a contract that also gave rise to other rights and obligations between the spouses. These rights were interdependent – a wife's rights were obligations upon her husband and vice versa – and strictly differentiated by gender. A wife's most important marital duty was sexual availability, in exchange for which she was to be supported by her husband.[16] The primacy of, and linkage between, these particular rights is clearly illustrated in a passage from the *Umm*, the main Shafiʿi work of the period: "Al-Shafiʿi said: It is among her rights due from him that he support her, and among his rights to derive pleasure from her [*istimtaʿa minha*]."[17]

The wife's obligation to be available to her husband was set apart from other types of domestic duties. Maliki, Hanafi, and Shafiʿi jurists emphatically denied any wifely duty to perform housework. (Ibn Hanbal's responsa do not discuss this topic.) She need not even cook for herself, let alone her husband. The words of the third-century Hanafi jurist Ahmad b. ʿUmar al-Khassaf demonstrate this. He was asked, "What if she doesn't have a servant and her husband supports her, must she bake bread and labor to prepare [food] for herself?" He replied, "If she says, I won't do it, she is not compelled to. Rather, his claim on her is her making herself available for her husband [t*amkin al-nafs min al-zawj*], not for these tasks."[18] Al-Khassaf goes on to contrast the wife's situation to that of a servant, who, if she refuses to perform these services, is not due support and may be turned out of the house. Al-Khassaf was not alone in this view; rather, he was representative. Service is excluded from a wife's duties in the Mudawwana in an unequivocal way: "I said: Must a woman serve herself or perform household service or not according to Malik? He said: She need not serve herself or perform any household service."[19] Al-Shafiʿi suggested that whether or not a husband had to support a servant for his wife depended on whether or not "someone like her" was accustomed to serving herself; however, he was also adamant that even a woman who did not have a personal servant should be provided with prepared food and someone to bring her water so that she need not go out to collect it.[20] In all of these cases, the wife's performance of household duties is not expected, and is certainly not a condition of her support. Her maintenance is due, instead, as a result of her availability to her husband for sexual enjoyment.

The husband's right to derive pleasure from his wife, in exchange for his support of her, led the jurists to grant him total control over her mobility. A man could restrict his wife's movements in order to keep her available to himself, including forbidding her to go to the mosque or to visit her parents. The *Mukhtasar* of Shafiʿi jurist al-Muzani notes that a woman's husband even had the legal right to forbid her to attend the funerals of her parents or her children, though the jurist preferred that he not do so; jurists from other schools held similar views.[21] A woman who left the house without permission would be guilty of *nushuz*[22] – a term variously translated as "recalcitrance," "disobedience," or "rebellion." The Hanafis and Shafiʿis agreed that she would lose her right to support so long as she remained unavailable to her husband, while the Malikis and Hanbalis do not directly discuss the suspension of a wife's maintenance for *nushuz*.[23]

For the Shafiʿis, a wife's sexual refusal while remaining at home also constituted *nushuz* and was grounds for suspension of maintenance. For the Hanafis, a wife's sexual refusal was not grounds for loss of maintenance. However, this was because she was still considered "available" to her husband; he was entitled to force her to have intercourse.

> If she is in his house but she withholds herself from him is maintenance due to her from him? It is due...Is it lawful for the husband to have sex with her against her will...? It is lawful, because she is a wrongdoer [*zalima*].[24]

These passages, in addition to illustrating the link between maintenance and a wife's sexual duties to

her husband, make clear the extent of a man's sexual rights over his wife according to the early jurists.

These passages, in addition to illustrating the link between maintenance and a wife's sexual duties to her husband, make clear the extent of a man's sexual rights over his wife according to the early jurists.

Though the wife had a duty of sexual availability, she did not have a right to sex. Though today it is almost a cliche´ that Islam recognizes women's sexuality,[25] the legal reality in the early texts is that women's rights to sex in marriage were virtually nonexistent. In all four Sunni schools, a woman could have her marriage dissolved for impotence if the husband proved unable to consummate the marriage; she had to complain to a judge then wait for a year. In one other case, if the husband took a vow to abstain completely from sex with her for a period of more than four months (*ila'*), she could seek to have the marriage judicially dissolved on that basis if her husband continued to abstain after four months had passed according to jurists from the Maliki, Shafiʿi, and Hanbali schools. (The Hanafis considered a vow of forswearing to result in automatic divorce if not broken or expiated during the four months.)

However, after consummation, simple abstinence without a vow was not grounds for divorce in any of the four schools. Ibn Hanbal, when asked about a man who had intercourse with his wife one time, declared, "He is not impotent, and the couple are not separated. I hold this opinion even if he does not have intercourse with her again, and she has no right to request him to."[26] The Maliki texts record the same position, as in this passage from the *Muwatta'*:

> Yahya related to me from Malik from Ibn Shihab from Saʿid ibn al-Musayyab that he used to say, "Whoever marries a woman and is not able to touch (i.e., have intercourse with) her, a deadline of one year is set for him. If he touches her, [fine], and if not, they are separated.". . . Malik said, "However, someone who has touched his wife then avoids her (*iʿtarada ʿanha*) I have not heard that there is a deadline set for him or that they are separated."[27]

In the *Mudawwana*, Ibn Shihab states simply that "I have not heard [that] anyone [would] separate a man and his wife after he touched her, and that is practice among us."[28] The Maliki jurists do make one exception: if the husband's total abstinence constitutes deliberate or negligent harming of the wife (*darar*) it may be grounds for judicial divorce. (However, if the husband becomes impotent or suffers an injury that renders him incapable of intercourse, the wife has no such right.) This position reflects juristic ambivalence about a wife's right to sex. On the one hand, it is acknowledged that depriving a wife of sex can be harmful to her; on the other hand, while "harm" is grounds for divorce (for the Malikis), lack of sex *per se* is not. This unwillingness to grant wives regular rights to sex is part and parcel of the strict separation between male and female rights that early jurists maintained.

The jurists did, however, grant the wife a right to a portion of her husband's time, subject to certain limitations. A man's duty to divide his time among his wives did not prevent him from traveling or spending a portion of his time with his concubines instead of his wives. A woman had no absolute claim on his time, but rather only claim to equal treatment with her co-wives. A man with more than one wife had a duty to allot his nights between them equally, and very strict rules governed how he was to make up missed turns.[29] Some jurists recommended that he have sex with them all regularly, but despite this, there was no penalty for a husband who did not. Al-Shafiʿi voiced the consensus view when he stated that the husband's "division (of time) is based on staying, not having sex." He added – apparently unaware of the irony – that "intercourse is a matter of pleasure, and no one is compelled to it." Of course, he meant that no man is compelled to it; women's continual sexual availability was a condition of their support, and "refusal," again in al-Shafiʿi's words, was *nushuz*.[30]

I have shown that if the wife failed in her duty to be sexually available, the jurists agreed that she would lose her right to support. However, in the case where the failure to perform an obligation was the husband's – if he could not support her – the jurists were divided on the consequences. If she could borrow in his name, or liquidate his assets to provide herself with support, she was permitted to do so.[31] However, even if he were unable to support her and had no property upon which she could draw, Hanafi jurists refused to grant her dissolution no matter how long the non-support persisted.[32] In sharp contrast, Shafiʿi jurists allowed a wife to seek judicial divorce after as little as three days of non-support.[33] Furthermore, during the three days

he was not supporting her, she was allowed to leave the house without her husband's permission in order to obtain what she needed through work. This vast difference in these two schools' treatment of the non-supporting husband (the other Sunni schools fall in the middle of the spectrum between these opposites[34]) illustrates clearly that early Islamic jurisprudence was not monolithic. On topics such as this, some positions were quite favorable to women, and others were anything but. Nonetheless, these specific rules were all embedded within a system of rights and obligations based on the premise of male support for female sexual availability.

Contemporary Discourses: Neo-conservatives

The neo-conservatives are the most prominent faction in debates over the proper legal and social rights of Muslim women today.[35] Their views are represented in publications subsidized by the Saudi government and organizations like the Jamaat-i Islami, and distributed as pamphlets and booklets in mosques and conferences of Muslims everywhere; they are likely to be the most influential group in mosques in the West. Though they often support adherence to Islamic law, they do not have the political zeal of the fundamentalists, nor are they seeking a return to a pristine, original law. Rather, they support the continued enforcement of law as developed by jurists through the classical period and, in its transformed form, by legislatures in Muslim nations. I have lumped together in this group both those with traditional religious education (the *'ulama*) and those non-specialists – far more numerous – whose support for Islamic law is a matter of principle, but whose understanding of the law is derived from contemporary notions. Even though there are some differences between these groups that might warrant separate consideration, I treat them together in part because in both cases the discourses with which Islamic law is explained and justified take on a decidedly non-traditional tone. Neo-conservative authors may believe in adherence to classical legal doctrines (though, as will be seen below, this is not always the case), but they justify them with language that is, more than anything else, Victorian.

This phenomenon can be seen clearly in a treatise on *nushuz* by Saalih ibn Ghanim al-Sadlaan, a professor from the College of *Shari'a*h at Muhammad ibn Saud Islamic University in Riyadh. While the author is clearly trained in the doctrines and methods of jurisprudence, and his study draws on these sources, he adopts a tone of biological determinism that is alien to classical *fiqh* discourses:

> The woman is naturally conditioned and created by Allah to perform the functions of pregnancy, giving birth, and taking care of the internal affairs of the house. Man, on the other hand has been endowed with more physical strength and clearer thought and he is, therefore, more befitting to be the leader of the household and the one responsible for providing the means of livelihood, protecting the family and bringing about security and continuance in the family.[36]

While the notions of male superiority and headship of the family, and even of men's greater intellectual and physical capacities, are consonant with earlier jurisprudential treatments of spousal rights, the link the author draws between women's capacity for childbearing and their duty to "tak[e] care of the internal affairs of the house" is not merely a restatement of traditional jurisprudential views. Rather, this formulation assimilates early *fiqh* rules about male support to a male breadwinner / female housewife model that is more in keeping with ideas about 1950s America. As the previous section has shown, this model is inaccurate to describe the early jurists' rationale for male support of their wives. In the case of this particular work, despite the adoption of non-traditional rhetoric, the legal doctrines presented regarding its main topic, *nushuz*, are generally in keeping with the provisions of traditional jurisprudence. However, with regard to a woman's responsibility for "taking care of the internal affairs of the house," Al-Sadlaan departs from the established views of early jurists. His brief mention of this point illustrates a much larger phenomenon: in many cases, what is advocated by the neo-conservatives as the "traditional" Islamic view is not in fact historically the position adopted by the early and classical jurists.

The neo-conservative treatment of housework as well as women's work outside the home illustrates clearly the differences between early *fiqh* doctrines and contemporary apologia for them. Two examples suffice as evidence. The first is from *Marriage in Islam: A Manual* by Muhammad Abdul-Rauf.[37] First published thirty years ago, and now in its seventh printing, its chapter "A Happy Conjugal Household" gives listings of husbands' and wives' duties, which include the following:

> A husband is responsible for the protection, happiness and maintenance of his wife. He is responsible for the cost of her food, clothes and accommodation. Although she may have to cook, he has to buy her the raw materials and cooking and kitchen facilities, as may be required and applicable.[38]

> The management of the household is the wife's primary responsibility. She has to take care of meal preparation, house-cleaning and laundry. Whether she undertakes these tasks herself or has them done under her careful supervision, it is her task to manage them in the best interests of the family. She may expect some cooperation from her husband, but this should depend on what he can afford to do. What is important is the mutual goodwill and love which will no doubt stimulate each party to alleviate the burden of the other as much as possible.[39]

Not only do these passages assign to women the task – meal preparation – that earlier jurists most emphatically exempted her from performing, it sets up an explicit relationship between the husband's support of his wife and her responsibility to do cooking and other household chores. However, the author hesitates a bit: he must pay for food; she *may* have to cook it. Rather than declaring outright that the wife has to perform the listed services (a term he studiously avoids), Abdul-Rauf states that she must "take care" of these "responsibilit[ies]" and "manage" these "tasks."[40]

My second example is drawn from the much-read *Woman in Shari'ah* by 'Abdul Rahman Doi, a text frequently used by English-speaking Muslims as an authoritative resource on Islamic law.[41] Doi, making extensive use of biological and "natural" arguments for women's place in the home and society, avoids any hedging around women's domestic duties. He states, "When a wife is not employed the household becomes her first occupation. By household is meant the rearing of children and all domestic services required for maintaining a clean and comfortable habitation." Doi goes further, however, touching on the subject of women's work. He reserves for the husband the right to prevent his wife from working – acknowledging, though not explicitly, the authority legally granted to the husband to prevent his wife from leaving the marital home for any reason. Yet he departs from traditional jurisprudence when he states that if a man allows his wife to work, "Any gain from work realized by the wife belongs to the family and cannot be considered as her personal property."[42] In traditional doctrine, there is no marital property regime; the jurists never countenance a married woman's obligation to support herself, let alone her husband or children.

These few examples demonstrate that neo-conservative interpretations diverge from the traditional model in several ways, generally to women's detriment. The majority of North American Muslims rely on pamphlets and quasi-scholarly books such as these, which claim to present authoritative and authentic information, for their knowledge of Islamic law.[43] It is against this backdrop of pseudo-traditional doctrine that the feminist and reformist discourses to which I now turn must be understood.

Contemporary Discourses: Femnist Apologetics

A number of authors concerned with promoting Muslim women's rights in matters of marriage and divorce have discussed women's legal rights "in Islam." These authors oscillate between, on the one hand, upholding specific rules as an example of how Islamic law protects women and, on the other hand, critiquing traditional jurisprudence when patriarchal assumptions lead the jurists to unreasonable decisions.[44] In the latter case, these reformers turn to the Qur'an to challenge, often quite persuasively, juristic interpretations. However, I am concerned here with their attempts to defend the basic precepts of traditional jurisprudence on marriage.

In seeking to counter both stereotyped portrayals of women's legal rights and the negative consequences of neo-conservative interpretations, these authors point to provisions of classical law that guarantee women certain protections. These doctrines serve as evidence that Islamic law is not unremittingly patriarchal. They also provide practical guidelines for Muslim women seeking to ensure more egalitarian marriages for themselves. Both goals are laudable, and the strategy of promoting detailed marriage contracts is, in the short term, potentially quite effective at securing for women rights that are ignored today. However, there are two serious flaws in this approach. First, the strategy of including contractual stipulations is not, jurisprudentially, nearly as straight-forward as it is often made out to be. Second, and far more importantly, adding conditions onto a contract does

not change its basic essence. I will address the validity of stipulations first.

Among the clauses al-Hibri suggests women can include in their marriage contracts are some rights that accrue to women anyway according to traditional jurisprudence (such as to be supported by her husband or to not have to cook or clean) and some that are only hers if agreed upon in the contract (such as to work outside the home).[45] In this latter category are the oft-mentioned stipulations that a husband will not take any other wives or will not relocate his wife from her hometown. Al-Hibri writes that

> In fostering change, the Qur'an resorts to what has been known as recently in the West as affirmative action. In a patriarchal society, even a general declaration of equal rights is not sufficient to protect women. Consequently, divine wisdom gave women further protections. Paramount among these protections is the ability of the Muslim woman to negotiate her marriage contract and place in it any conditions that do not contradict its purpose. For example, she could place in her marriage contract a condition forbidding her husband from moving her away from her own city or town.[46]

The Qur'an, it should be pointed out, does not refer to stipulations in the marriage contract. So Al-Hibri is using the phrase "divine wisdom" to describe the jurisprudential doctrine of stipulations. However, according to Maliki, Hanafi, and Shafiʿi jurists of the formative period, the stipulation that the husband will not move his wife from her hometown is completely void; the Hanbali jurists alone allow it.[47] Even in the Hanbali case, the wife is given a choice as to whether or not to divorce her husband in this circumstance; she is not allowed to bind him to remain with her in her town. My discussion here will focus on the related issue of stipulations against polygamy, illustrating that the current discourses about these stipulations misrepresent the provisions of traditional jurisprudence on the subject. I will further argue that even if this provision can be satisfactorily formulated so as to be legally binding, it still fails to address the underlying inequities in spousal rights.

When a contemporary author mentions putting a condition in the contract that the husband will not take another wife, or that she has a choice to divorce him if he does so, she or he is lumping together two entirely different mechanisms for ensuring the wife's "right." The first is a simple contractual stipulation; the second is conditional delegated divorce. According to Maliki, Hanafi, and Shafiʿi texts from the formative period, contractual stipulations that a husband will not take additional wives (or any concubines) are meaningless.[48] For the Hanbalis, if the husband breaks the condition by taking an additional wife, the first wife has the option to divorce him.[49] However, in none of these cases is the validity of the second marriage affected.

The second mechanism is more potent. In this type of stipulation, the husband delegates his power of repudiation to the wife if he performs a certain action. Thus, a husband can state in the contract that "If such-and-such occurs, your affair is in your hands." If the wife learns that the condition has come to pass, she has the option to divorce him.[50] There is difference of opinion on whether such a choice is only good during the particular encounter where she learns of it or whether she retains the right even after that meeting so long as she has not had intercourse with her husband. For the Hanbalis, however, a woman can lose her right to divorce by having intercourse with her husband *even if she did not know that the event giving her the right to divorce had taken place*: "If her husband has intercourse with her, the wife in question no longer has the option of separating from him, regardless of whether she was aware of her option before the act of intercourse."[51] In this case, under Hanbali law, a woman who had not put a stipulation in her marriage contract that her husband would not take an additional wife, but rather relied on delegated divorce at a later date, would lose her freedom of choice if her husband simply concealed the second marriage long enough to have intercourse with the first wife. (Remember that she is legally obligated to have intercourse with him whenever he desires.)

There is one additional way that a wife can attempt to regulate her husband's taking of another wife: through having him pronounce a suspended repudiation. For all of the schools, if the husband makes an oath of repudiation conditional on his taking a second wife ("If I marry again, you are repudiated") the repudiation is effective. As a practical matter, when a woman has no other option for assuring her right to be separated from a polygamous husband, this conditional repudiation can be a useful strategy. But what makes the strategy possible is the unfettered nature of a man's right to

repudiation. His repudiation automatically takes effect when he marries again simply because of his absolute right to repudiate his wife. The same would be true if he said, "If you ever speak to so-and-so, you are repudiated" (or "If I ever speak to so-and-so . . .") or even "If it rains on Tuesday, you are repudiated." To hold up a woman's right to divorce on her husband's taking another wife as an example of how Islamic law protects women's rights ignores the specific legal rationale for validating such a divorce. It occurs in a context in which the woman has no way to protect herself from an unwanted repudiation, which is valid without her consent, participation, or even knowledge.

I have demonstrated that insuring against polygamy through a condition in the marriage contract is not the simple affair it is made out to be by contemporary authors. Yet even if one could find a way to construct stipulations against polygamy in a binding manner, it would not address this basic imbalance in men's and women's marital rights, or the definition of the marriage contract as being unilaterally in the husband's domain (*fi yadihi*). There is no condition that can restrict the husband's right to repudiate his wife at any time, for any reason or no reason at all. Raga' El Nimr acknowledges this, in an apologetic piece that differs only subtly from the views put forth by Abdul-Rauf, but does not explore its implications.[52] For El Nimr and others who stress women's protections in Islamic law, however, the dower serves that function by acting as practical deterrent or an economic safety net. I now turn to a consideration of how dower (*mahr* or *sadaq*) is understood in these discourses. Some stress its economic importance, while others suggest that a large deferred dower provides a disincentive to capricious repudiations, since the balance will become due at divorce. El Nimr considers that dower is intended "to safeguard the economic position of women after marriage." Drawing from Qur'anic verses on dower, El Nimr argues that dower is a critical means through which women can secure their well-being. She writes that "The object is to strengthen the financial position of the wife, so that she is not prevented, for lack of money, from defending her rights."[53]

Al-Hibri likewise stresses the dower's importance for women, providing a slightly different description of its purpose:

> Mahr, therefore, is not a "bride price" as some have erroneously described it. It is not the money the woman pays to obtain a husband nor money that the husband pays to obtain a wife. It is part of a civil contract that specifies the conditions under which a woman is willing to abandon her status as a single woman and its related opportunities in order to marry a prospective husband and start a family.[54]

In comparison, the Maliki jurists of the formative period express a quite different role for the dower, stating that a free woman "is due her dower, and her vulva [budʿuha] is not made lawful by anything else."[55] Nor do the jurists shy away from considering the dower a price. Indeed, Al-Shafiʿi explicitly uses the term "price" (*thaman*) on numerous occasions for the dower, stating that "dower is a price among prices."[56] Various discussions in the *Umm* illustrate that dower is "a price for the vulva" (*thaman al-budʿ*),[57] and that "a woman's fair dower is the fair value of her vulva" (*qima mithl al-budʿa mahr mithlaha*).[58] The commercial aspects of the marriage contract are unremarkable for the jurists. For example, in discussing a situation where a slave was specified as the wife's dower, Al-Shafiʿi states that "she sold him her vulva for the slave" (*baʿathu budʿaha bi ʿabd*).[59]

I do not give these examples to prove that marriage was a sale, for the jurists also made analogies that differentiated marriage from sales in particular respects. I simply want to demonstrate that jurists of the formative period did not have any hesitation whatsoever in using the terminology of sales and purchases to discuss marriage. The discomfort with these comparisons is our own, and was not shared by the pre-modern jurists. The explanations of dower given by Al-Hibri and El Nimr gloss over the logic and language of traditional jurisprudence, accepting its substantive rules but providing them with more palatable interpretations.

As with dower, Al-Hibri and El Nimr champion women's exemption from domestic duties in traditional jurisprudence, but provide a new rationale for it. In these discourses, a woman's lack of duty to cook or clean is an example of her marital rights. El Nimr writes that

> With regard to domestic duties, Islam has relieved women of all manual drudgery. According to strict Islamic injunctions, it is not obligatory for a woman to cook the food for her husband

> or children, or to wash their clothes or even to suckle the infants. A woman can refuse to do any of these things without this being made a ground of legal complaint against her. If she undertakes these duties, it is an act of sheer grace.[60]

While with regard to dower, El Nimr turns to the Qur'an for her explanation, here she refers only to "strict Islamic injunctions" – meaning, undoubtedly, jurisprudence. Though she makes the point forcefully that women do not have household or childcare duties, she does not offer any explanation of what responsibilities they do have as wives or why it is that they are exempt from the obligation to perform these services.

Al-Hibri's treatment of the same subject offers a glimpse into her interpretive strategy:

> Islam also views marriage as an institution in which human beings find tranquillity and affection with each other. It is for this reason that some prominent traditional Muslim scholars have argued that a woman is not required to serve her husband, prepare his food, or clean his house. In fact, the husband is obligated to bring his wife prepared food, for example. This assertion is based on the recognition that the Muslim wife is a companion to her husband and not a maid. Many jurists also defined the purpose of the marriage institution in terms of sexual enjoyment (as distinguished from reproduction). They clearly stated that a Muslim woman has a right to sexual enjoyment within the marriage.[61]

Al-Hibri, like El Nimr, is correct in her characterization of the traditional jurisprudential position that a wife has no obligation to do household chores (though she perhaps underestimates how prevalent this position was, attributing it only to "some prominent traditional Muslim scholars"). Seizing on the view that women are not required to do housework, Al-Hibri argues that this indicates that Muslim women were recognized to be "companions" to their husbands rather than maids. However, for the early jurists, as discussed above, wives were bound to provide service, but sexual rather than domestic.

The wife's sexual responsibilities are entirely sanitized by Al-Hibri's next statement that "Many jurists also defined the purpose of the marriage institution in terms of sexual enjoyment." This phrasing obscures the reality that sex in marriage was almost exclusively a female duty and a male right. While it was recommended that a husband satisfy his wife sexually, women had no enforceable rights to sex. Indeed, Al-Hibri's assertion here about women's right to sexual enjoyment is undercut by her later statement that "some traditional jurists gave women the right to seek judicial divorce if they had no conjugal relations with their husbands for more than four months."[62] Apparently, of the "[m]any jurists" who "clearly stated that a Muslim woman has a right to sexual enjoyment within the marriage" only "some" considered that a husband's abstention for more than four months constituted grounds for separation. Indeed, even this overstates the case; four months, as my discussion of the formative period jurists indicated, is only the relevant period of sexual abstention where a husband has completely forsworn his wife; it does not apply to cases of abstention without a vow.

Critique and Analysis

The early and classical Muslim jurists had a clear logical system underpinning their conception of marriage and the interdependent rights of spouses within it. The basic purpose of marriage was legitimizing sexual intercourse: the jurists formulated an interdependent system of spousal rights that put the wife's support and the husband's right to sex at its center. This system was predicated, at a very basic logical level, on an analogy to slavery and other types of ownership. Furthermore, its specific rules were based on the widespread availability of slave-servants. Thus, the jurists' debate was not over whether women were required to maintain their husbands' homes, cook, and clean, but rather whether the husband had to support only one of his wife's servants or more than that. Admittedly, this likely bore little resemblance to reality for the majority of Muslim women. But it served as a basis for the elaboration of many different rules that are unintelligible if removed from this framework and held up independently as an example of what "Islam" guarantees women.

Neo-conservative authors, even as they press for the observance of certain substantive rules that are the product of early *fiqh*, balk at using the commercial terminology and analogies to slavery that were part of the jurists' accepted language. While often upholding the spousal rights that were agreed upon in that model,

they provide new rationales for them, as can be seen in their discussions of a husband's duty to maintain his family. For the early jurists, "a husband must maintain his wife, whether she is rich or poor, for restricting her for himself so that he may derive pleasure from her [*bi habsiha ʻala nafsihi li'l-istimtaʻa biha*]."[63] The jurisprudential rationale for a husband's support of his wife is entirely separate from the rationale for any person's support of other relatives, including minor children or parents. For the neo-conservatives, however, a man's duty to support his family is part and parcel of his male nature that makes him fit for earning a living and supporting his "dependents." No distinction is made between wives and children. The wife's role is conceived of in a complementary fashion: her nature makes her suited for caring for the home and children. In the process, certain traditional female rights (such as a wife's exemption from housework) tend to fall by the wayside, as they are incompatible with the new understanding of male and female roles in marriage. When women's advocates seek to resurrect these rights, they do so by appeal to the authority of traditional jurisprudence. Like their neo-conservative antagonists, however, they frame these rights in a different conceptual vocabulary than that originally used by the jurists.

Feminist discourses that seek to promote more egalitarian Islamic laws are, undoubtedly, strategically useful. In particular, highlighting women's legal exemption from housework or childcare is a useful corrective to neo-conservative discourses that presume wives have an obligation to perform these services because of a natural aptitude for them. Likewise, the attempt to promote the inclusion of conditions in marriage contracts governing the husband's taking of additional wives or the wife's right to work and keep her earnings can be an important means of setting forth the spouse's expectations for the marriage. This appeal to traditional legal views, however, is not without its perils. Though potentially quite effective in securing for women rights that are not respected today, it runs the risk of further cementing the authority of the traditional opinions. With regard to women's work outside the home, while traditional jurisprudence rejects a man's right to take any of his wife's earnings, it upholds, as I have noted, his right to prevent her from working entirely – indeed, to forbid her from leaving the home at all. Some would suggest that a condition in the marriage contract would resolve that; it is an iffy proposition with regard to traditional law.[64] Even where conditions can be made enforceable, and where rights can be upheld, the feminist rhetoric of women's marital rights in Islamic law distorts traditional legal rationales – if not its substantive doctrines – at least as seriously as does the neo-conservative discourse.

Al-Hibri, El Nimr, and others fail to grapple with the way that the specific rights they point to as evidence of women's legal protections are part of a larger logical understanding of what is being contracted for in marriage. If women reserve the right not to do any household service or childcare, *and* to be entirely supported by their husbands, while at the same time being free to pursue whatever work they choose, *and* maintaining sole control over their earnings from that work, what rights does the husband have? What responsibilities does the woman have in this situation? What is the basic aim of marriage, in either case? If the husband no longer supports his wife and no longer controls her mobility, then what is the point, legally speaking? Such a marriage no longer serves the purpose for which it was regulated according to traditional jurisprudence: ensuring a woman's sexual availability in exchange for male support. If it is a different type of marriage, then it needs a different type of law. Half-measures to make the best of an existing situation are insufficient. It is necessary to question the traditional model that obliges a husband to support his wife and grants him the right to control her movements in return and expect sex at his whim. This will require a radical rethinking of Islamic marriage, beginning with a fresh approach to the Qur'an, above all.

A number of scholars, including Al-Hibri, have undertaken this effort to flesh out a new exegesis of sacred texts as a means of arriving at an alternative view of relations between the sexes in society, including in marriage. Their work is important, and challenges the androcentric nature of traditional interpretations. Al-Hibri turns to the Qur'an in those cases where traditional law does not offer a resolution to the problems she sees. Others such as Riffat Hassan, Amina Wadud, and Asma Barlas have focused on the Qur'an to the exclusion of jurisprudence. Their ground-breaking studies have inspired a willingness on the part of other progressive Muslims to address legal issues through new approaches to the Qur'an.[65] In and of itself, there is nothing wrong with such an approach; indeed, the Qur'an must be at the center of Muslim piety and thought. However, in focusing so single-mindedly on the interpretation of the Qur'an, discarding centuries

of jurisprudential texts as irredeemable, progressive Muslims run the risk of leaving the field of jurisprudence entirely to those trained in its methods and committed to its traditional assumptions. Scriptural exegesis, no matter how sophisticated, is not a legal methodology; the Qur'an is not a law book. Though the Qur'an does contain specific commands and prohibitions as well as moral and ethical guidance, it does not provide explicit regulations covering all possible circumstances. Some means of applying its provisions to the nearly infinite cases that arise among Muslims will always be necessary. The battle for egalitarian Muslim marriages will be fought on numerous fronts, and jurisprudence will undoubtedly be one of them.

Progressive Muslims cannot afford to ignore jurisprudence. There is a need for a thorough appraisal and analysis of the rules and methods of traditional jurisprudence. Such analysis will demonstrate, as I have done in part in this essay, that its doctrines are entirely inadequate to serve as the basis for laws governing Muslim families, communities, and societies today. However, it should also illustrate the phenomenal intellectual effort that went into creating the logical systems that produced law to govern millions of Muslim lives through the centuries. I would even venture to say that the legal method used by the jurists is basically sound, including the use of analogy. The issue is the assumptions from which they began, including the notion that marriage can be usefully compared to slavery or to commercial transactions. This does not mean, however, that doctrines should be simply modified, piecemeal, until we come up with something we can live with. Rather, whatever elements of traditional jurisprudential method are used, the process of regulating marriage and divorce will have to begin anew. Qualified Muslims must begin working to shape new laws, beginning from new assumptions – including those that feminist and progressive Qur'anic scholars have brought to the fore. The most critical of these insights is that men and women are ontologically equal, and that ultimately our equality as human beings in the sight of God matters more than any distinctions based on social hierarchy.

Conclusion

Azizah al-Hibri posits that the Islamic marriage contract "is a vehicle for ensuring the continued well-being of women entering matrimonial life in a world of patriarchal justice and inequality."[66] I agree that it can be; a large deferred dower is often successfully used as a disincentive to hasty repudiation, for example.[67] Certain other stipulations may secure rights that would otherwise be unenforceable. However, this formulation fails to address the complicity of jurisprudential institutions and doctrines in, at the very least, perpetuating the patriarchy and inequality that make such measures vital. The husband's unrestricted right to unilateral repudiation, for example, is not a necessary interpretation of scripture and prophetic tradition, yet traditional jurisprudence has affirmed his right to exercise it while denying women any parallel privilege. Since men have this unilateral power, contractual stipulations and practical strategies such as deferred dowers become crucial for women, a means of negotiating a patriarchal terrain. But given that jurisprudence itself is largely to blame for the state of affairs that requires women to implement these "affirmative action"[68] strategies, praise for the protections it extends to those women knowledgeable and powerful enough to invoke them seems misplaced.

Acknowledging the deeply patriarchal and discriminatory elements in Islamic jurisprudence is not cause for despair. It does not mean accepting that God intends Muslim women and men to live in hierarchical, authoritarian marital relationships. On the contrary, as I have illustrated, a thorough exploration and analysis of traditional jurisprudence will reveal the extent to which its rules are seriously flawed; they cannot be Divine. The role of human agency in the creation of these laws is evidenced by the diversity of legal views as well as the creation of a system of male marital privilege and sharply differentiated spousal rights that does not simply emerge wholly formed from the Qur'an. This system is the result of an interpretation, indeed of numerous acts of interpretation, by particular men living and thinking at a specific time. Their jurisprudence is shaped not by any malicious misogyny, or so I choose to believe, but rather by the assumptions and constraints of the time in which it was formulated. Our contemporary recognition that the traditional scheme of marriage law is compromised beyond repair liberates us to pursue a new jurisprudence, one based on assumptions that do not liken women to slaves or marriage to purchase. A marriage law that foregrounds the mutual protectorship of men and women (Q. 9:71) rather than male providership (Q. 4:34), or that focuses on the cooperation and harmony of spouses inherent in the Qur'anic declaration that spouses are garments for one another (Q. 2:187), can represent a starting

point for a new jurisprudence of marriage. The result will be a closer –but still only human, and therefore fallible – approximation of divinely revealed *Shariʿa*h than what currently exists. And God knows best.

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1 An early version of this essay was delivered as a lecture at the University of Missouri – Columbia in March 2002 as "Marriage and Divorce in Islamic Law: Contemporary Debates in Historical Perspective." I would like to thank the Women's History Month Committee for that invitation and the lively exchange that ensued. I would also like to thank Kate Albright, Ellen Dunning, Ann Kim, Khaleel Muhammad, Harvey Stark, and especially Omid Safi for their comments and suggestions. Of course, I am responsible for any errors of fact or interpretation that remain.

2 For a scathing critique of this type of discourse, see Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (London and New York: Zed,1999).

3 This s the reporter's summary, not al-Hibri's. Rebecca Mead, "Comment: A Woman's Prerogative," *New Yorker*, December 2001. It accurately conveys Al-Hibri's views as presented in that piece and several other published articles. For this essay, I draw from two articles by Al-Hibri: "An Introduction to Muslim Women's Rights," in *Windows of Faith: Muslim Women Scholar-Activists in North America*, ed. Gisela Webb (Syracuse, NY: Syracuse University Press, 2000), 51–71 (hereafter, "An Introduction"), and "Islam, Law, and Custom: Redefining Muslim Women's Rights," *American University Journal of International Law and Policy*, 12(1), 1997, 1–44 (hereafter, "Islam, Law, and Custom").

4 *Shart*, pl. *shurut*.

5 For example, in an article discussing honor killings, Lama Abu Odeh uses the heading "The classical jurisprudential treatment of crimes of honour" for a section dealing exclusively with contemporary Arab criminal codes. "Crimes of Honour and the Construction of Gender in Arab Societies," in *Feminism and Islam: Legal and Literary Perspectives*, ed. Mai Yamani (New York: New York University Press, 1996), 146. No mention is made of *fiqh* doctrines. I point this out not to disparage the article or its conclusions, but to emphasize that the terminology used to discuss Islamic law in its varied manifestations is seldom applied in a precise fashion.

6 I do not discuss the Shiʿi legal schools here, in part because the role of *mutʿa* ("temporary") marriage in Shiʿi law makes comparison difficult. However, in its broad outlines the Shiʿi view of marriage (*nikah*) is similar to Sunni law. See Shahla Haeri, *Law of Desire: Temporary Marriage in Shiʿi Iran* (Syracuse, NY: Syracuse University Press, 1989), especiallychapter 2, "Permanent Marriage: *Nikah*."

7 This is the body of literature that I survey in my doctoral dissertation, "Money, Sex, and Power: The Contractual Nature of Marriage in Islamic Jurisprudence of the Formative Period" (Duke University, 2002). However, the dissertation does not discuss Hanbali jurisprudence, which I include here. This essay draws on the following texts: for the Maliki school, the *Muwatta'* of Malik ibn Anas (d. 179/795) and *Al-Mudawwana al-Kubra* (hereafter, *Mudawwana*) of Sahnun al-Tanukhi (d. 240/854); for the Hanafi school, *Kitab al-Hujjah ʿala Ahl al-Madina* (*Kitab al-Hujjah*) attributed to Muhammad al-Shaybani (d. 189/805), and two other works attributed to him: a recension of Malik's *Muwatta'* (*Muwatta' al-Shaybani*) and *Al-Jamiʿ al-Saghir*; as well as the *Kitab al-Nafaqat* of Ahmad ibn ʿUmar al-Khassaf (d. 261/874); for the Shafiʿi school, *Al-Umm*, attributed to Muhammad b. Idris al-Shafiʿi (d. 204/820) and the *Mukhtasar al-Muzani ʿala 'l-Umm* of Ismaʿil b. Yahya al-Muzani (d. 264/878); for the Hanbali school, a compilation of Ahmad b. Hanbal's (d. 241/855) legal responsa (*masa'il*) edited from manuscript sources and translated by Susan Spectorsky as *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh* (*Chapters*). My citations of the Arabic volumes include the titles of the chapter and subsection to which I am referring, to make it easier for those using different editions of the texts to locate the relevant passages. Unless otherwise noted, all translations from the Arabic are mine.

8 Baber Johansen has addressed some of these issues for the classical period using Transoxanian Hanafi texts. See "The Valorization of the Human Body in Muslim Sunni Law," in Devin J. Stewart, Baber Johansen, and Amy Singer, *Law and Society in Islam* (Princeton: Markus Wiener, 1996), 71–112.

9 Numerous scholars have investigated these subjects and found compelling evidence of female agency and juristic effort to protect women's interests. Despite women's clear disadvantages in legal doctrine across the schools, in practice women were able to exercisemany rights, especially to property. Further, they often gained advantages that, in strict doctrinal terms, they should not have had. Scholars working with court records andcollections of *fatawa* (juristic opinions, sing. *fatwa*) have demonstrated that judges were often, in their application of the law, amenable to women's claims and flexible in their judgments. This was often done by sidestepping, rather than directly challenging, problematic doctrines. To take only one example, in Hanafi communities, a woman's inability to obtain divorce from an unwilling, non-supporting husband was dealt with not by changing the school's position, but by appointing a deputy judge from another legal school to pronounce the divorce. For an online bibliography of works on women, gender, and Islamic law, see www.brandeis.edu/departments/nejs/fse

10 Khaled Abou El Fadl has made this point eloquently in *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford: Oneworld, 2001), 32.

11 One well-known subject on which prophetic precedent is generally agreed to differ from Qur'anic revelation is that of punishment for a married person (*muhsan/muhsana*) guilty of illicit intercourse (*zina*). While the Qur'an prescribes flogging as a punishment for *zina*, some *hadith* record the Prophet as setting stoning as the penalty for adulterers, reserving flogging for fornication.

12 Several recent scholarly works have explored the early development of the Sunni legal schools and their methodologies. Two particularly useful studies are Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997) and Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.* (Leiden: Brill, 1997).

13 Occasionally, one or two other equally serious diseases were included by analogy to leprosy.

14 Farida Shaheed, writing about feminist criticism of Muslim laws, states in a footnote, "On the question of women's rights, status, and role, the four [Sunni] schools agree in principle. The differences between them relate to details of legal procedure." See "Controlled or Autonomous: Identity and the Experience of the Network, Women Living under Muslim Laws," *Signs: Journal of Women in Culture and Society*, 19(4), 1994, 1004, n. 7. In *Women in Islam: From Medieval to Modern Times*, rev. edn (Princeton: Markus Wiener, 1993), 50, Wiebke Walther writes of the four Sunni schools of law, "They are to be found in various regions of the Islamic world, but they do not vary very much in their dogmas."

15 Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992), 85. See also p. 67 and chapter 5, "Elaboration of the Founding Discourses."

16 Two aspects are important in the consideration of sexual availability: "deriving pleasure" (*istimta'a*) and "exercising restraint" (*habs*, later *ihtibas*). For purposes of this article, the two are combined in the notion of sexual availability, though there were some important distinctions between the two.

17 Muhammad b. Idris al-Shafi'i, *Al-Umm* (Beirut: Dar al-Kutub al-'Ilmiyya, 1993), K. al-Nafaqat, "Bab al-rajul la yajidu ma yunfiqu 'ala imra'atihi," 5:132.

18 Ahmad b. 'Umar al-Khassaf, *Kitab al-Nafaqat* (Beirut: Dar al-Kitab al-'Arabi, 1984), K. al-Nafaqat "Bab nafaqat al-mar'a 'ala al-zawj wa ma yajibu laha min dhalika," 33.

19 Sahnun b. Sa'id al-Tanukhi (Malik b. Anas), *Al-Mudawwana al-Kubra* (Beirut: Dar Sader, n.d.), K. al-Nikah IV, 'Fi ikhtilaf al-zawjayn fi mata'at al-bayt,' 2:268.

20 "And if someone like her does not serve herself, maintenance of a servant for her is obligatory for him." *Al-Umm*, K. al-Nafaqat, "Al-nafaqa 'ala 'l-nisa','" 5:153; see also "Wujub nafaqat al-mar'a," 5:127.

21 Isma'il b. Yahya al-Muzani, *Mukhtasar al-Muzani*, published as vol. 9 of Al-Shafi'i, *Al-Umm* (Beirut: Dar al-Kutub al-'Ilmiyya, 1993), K. al-Nikah, "Mukhtasar al-qasm wa nushuz al-rajul 'ala 'l-mar'a..., 9:199.

22 See Vardit Rispler-Chaim, "*Nusuz* between Medieval and Contemporary Islamic Law: The Human Rights Aspect," *Arabica*, 39, 1992, pp. 315–27; Kecia Ali, "Women, Gender, *Ta'a* (Obedience) and *Nusuz* (Disobedience) in Islamic Discourses," in *Encyclopedia of Women and Islamic Cultures*, ed. Suad Joseph (Leiden: Brill, forthcoming); and Sa'diyya Shaikh,"Exegetical Violence: Nushuz in Qur'anic Gender Ideology," *Journal for Islamic Studies*, 17, 1997, 49–73.

23 One fifth/eleventh-century Maliki text suggests that Ibn al-Qasim (d. 191/806–7), the main authority for Malik's views in the *Mudawwana*, considered the maintenance of a *nashiz* wife to be obligatory. See Ibn 'Abd al-Barr (d. 463/1071), *Al-Kafi fi Fiqh Ahl al-Madina al-Maliki* (Beirut, Dar al-Kutub al-'Ilmiyya, 1987), K. al-Nikah, "Bab fi 'l-nafaqat 'ala 'l-zawjat wa hukm al-a'sar bi 'l-mahr wa 'l-nafaqat," 254. However, I found no evidence of this in the *Mudawwana*. Perhaps further study of Maliki manuscript sources for the formative period will turn up additional information that can substantiate this claim and provide a rationale for it.

24 Al-Khassaf, *Kitab al-Nafaqat*, "Bab nafaqat al-mar'a 'ala 'l-zawj wa ma yajibu laha min dhalika," 35–6.

25 A representative statement is that of Asifa Quraishi: "In Islam, sexual autonomy and pleasure is a fundamental right for both women and men." See Asifa Quraishi, "Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," in *Windows of Faith*, ed. Webb, 131. Quraishi's comments in the note to this passage reference sources dealing with women's right to sexual pleasure. Though jurists may seek to protect women's right to sexual pleasure in any given act of intercourse, they do not require the husband to have intercourse with his wife in the first place. This is because of the strict separation of male and female rights in marriage that I am arguing for in this paper.

26 Susan Spectorsky (trans.), *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh* (Austin: University of Texas Press, 1993), 113. See also p. 234: "[W]hen a man has had intercourse with his wife once, he is not impotent."

27 *Muwatta'*, K. al-Talaq, "Bab ajal alladhi la yamassu imra'atahu," 375; see also *Mudawwana*, K. al-Nikah IV, "Ma ja'a fi 'l-'innin," 2:265.

28 Ibn al-Qasim reiterates this view: "I [Sahnun] said: If he has sex with her one time then keeps away from her, is he set a year's deadline in Malik's opinion? He [Ibn al-Qasim] said: No deadline is set for him if he has intercourse with her according to Malik then he avoids her." *Mudawwana*, K. al-Nikah IV, "Ma ja'a fi 'l-'innin," 2:265. The same view is expressed in Hanafi and Shafi'i texts. See Muhammad al-Shaybani, *Al-Jami' al-Saghir*, (Beirut: 'Alam al-Kutub, n.d.), K. al-Zihar, "Masa'il min Kitab al-Talaq lam tadkhul fi 'l-abwab," 241–2; *Mukhtasar al-Muzani*, K. al-Nikah, "Ajal al-'innin wa 'l-khasi ghayri majbub wa 'l-khuntha," 9:191; *al-Umm*, K. al-Nikah, "Nikah al-'innin wa 'l-khasi wa 'l-majbub," 5:65.

29 Equally between free wives, that is; Hanafis, Hanbalis, Shafi'is, and at least one prominent authority cited by the Malikis (Sa'id b. al-Musayyab) argued for two nights for a free wife to each night for a slave wife. Malik, on the other hand, defended an equal division between free and slave wives. See *Mudawwana*, K. al-Nikah IV, "Al-qasm bayna al-zawjat," 2:271; K. al-Nikah II, "Fi nikah al-ama 'ala 'l-hurra wa 'l-hurra 'ala 'l-ama," 2:204–6. It should be emphasized that a slave wife belonged, of necessity, to another master. Though a man could take his own female slaves as concubines, he could not marry them without first manumitting them or selling them to another owner, who then needed to give permission for the marriage. A slave concubine was not entitled to a share of her owner's time.

30 *Al-Umm*, K. al-Nafaqat, "Nushuz al-mar'a 'ala 'l-rajul," 5:285.

31 For a strong statement of this view by Ibn Hanbal, see Spectorsky, *Chapters*, 230.

32 Muhammad al-Shaybani, *Kitab al-Hujjah* (Hyderabad: Lajnat Ihya' al-Ma'arif al- Nu'maniyah, 1965), K. al-Nikah, "Bab al-rajul yatazawwaju al-mar'a wa la yajidu ma yunfiqu 'ala imra'atihi," 3:451–69.

33 "He said: If he finds his wife's maintenance day by day, they are not separated, and if he does not find it, he is not granted a delay of more than three [days], and he does not prevent his wife during the three [days] from going out to work or ask (i.e., ask for food). If he does not find her maintenance, she chooses [whether or not to divorce him] . . . And if they are separated then his situation improves it (i.e., the separation) is not rescinded. He does not possess the right to return to her during the waiting period, unless she wishes with a new marriage." *Al-Umm*, K. al-Nafaqat, "Bab al-rajul la yajidu ma yunfiqu ʿala imra'atihi," 5:132.

34 For the Maliki position, see *Mudawwana*, K. al-Nikah IV, "Fi farad al-sultan al-nafaqa li 'l- mara'a ʿala zawjiha," 2:258–63. For the Hanbali position, see Spectorsky, *Chapters*, 80, 190.

35 One could argue for other terms to describe this group, including traditionalist or neo-traditionalist. I do not attach any importance to the term "neo-conservative" beyond its simple descriptive nature.

36 Saalih ibn Ghaanim al-Sadlaan, *Marital Discord (*al-Nushooz*): Its Definition, Cases, Causes, Means of Protection from It, and Its Remedy from the Qur'an and Sunnah*, trans. Jamaal al-Din M. Zarabozo (Boulder: Al-Basheer, 1996), 13. Though published by an obscure press in the U.S.A., by the time of its translation the book was already in its third Arabic edition.

37 Muhammad Abdul-Rauf, *Marriage in Islam: A Manual* (Alexandria, VA: Al-Saadawi, 2000; reprint of 1972 edition). Many sections of this work are accessible online, giving some indication of its wide acceptance. See, www.jannah.org/sisters/relations.html

38 Abdul-Rauf, *Marriage*, 47.

39 Abdul-Rauf, *Marriage*, 55.

40 See also a modified version of this sentiment, which reflects the special attention devoted to food preparation among a woman's duties: "If the wife is sick and cannot perform her household duties or she belongs to a rich family and refuses to do her domestic work with her own hands or she regards it to be below her dignity, then she may be provided with cooked food. But it is better to do her domestic work with her own hands and as a housewife it is her responsibility. The duty of a husband is to provide means and a wife should manage and run the house." Muhammad Iqbal Siddiqui, *Family Laws of Islam* (Delhi: International Islamic Publishers, 1988), 108–9. This formulation preserves the traditional rule that a wife is not required to perform this work, but emphasizes her domestic duties nonetheless.

41 ʿAbdul Rahman I. Doi, *Woman in Shariʿah (Islamic Law)* (London: Ta-Ha, 1994). This work is one of the sources used by Raga' El Nimr in her article, discussed in the following section. Despite its generally accurate portrayal of various legal doctrines across the Sunni schools, the book has a few significant errors and numerous minor ones. Mistakes include: failing to acknowledge traditional rules allowing for the forced marriage of minors (35); stating that Malikis consider a marriage guardian's power of compulsion (*ijbar*) to apply to widows and divorcees (36); failing to note juristic disagreement on when and how apostasy causes a marriage to be dissolved (43) and how return (*rajʿa*) is effected during a woman's waiting period (86–7); failing to differentiate between irrevocable and absolute repudiation (86–7); claiming that there is no possibility of divorce oaths before marriage (89); misidentifying a woman in a *hadith* (93); affirming that compensation in *khulʿ* divorce is limited to the dower amount (96); mis-stating the time that must elapse before Maliki and Shafiʿi jurists will grant judicial divorce for non-support (107); and asserting vehemently that a marriage contracted for an unlawful dower "is null and void. All the jurists of the 4 schools agree upon this point" (160–1). In fact, *none* of the Sunni schools holds that view. While the specified dower would be invalid, the marriage is *at most* (e.g. for the Malikis) subject to dissolution (*faskh*), and even then only if not consummated; this is quite different from being void (*batil*), which implies having no legal effects whatsoever. Such errors in a work of this type are particularly unfortunate, because those knowledgeable enough to spot the mistakes will not be relying on this work for their understanding of Islamic law, and those who rely on it, unknowingly, will be misled.

42 Ibid., 107. However, he later states that if she runs a lawful business, she may "keep the whole income to herself. Islamic law does not put any responsibility for domestic expenses on her." (154). Doi does not note any contradiction or attempt to reconcile these positions.

43 In a more recent phenomenon, the predominance of this type of information on the web parallels its presence in Muslim communities. Khaled Abou El Fadl's *Speaking in God's Name* illustrates, through its analysis of Saudi *fatawa*, that this type of thinking is not present only in the United States.

44 Al-Hibri refers to this type of arrogant and "self-serving worldview" as "Satanic logic." "An Introduction," 51; see also p. 57, n. 19.

45 The specific issue of working outside the home at a salaried job is anachronistic, though of course women did earn money through commercial activities in the first Muslim centuries. The closest proxy by which to examine this right is the wife's stipulation that she may come and go as she pleases. Alternatively, one could look at the husband's right to determine the marital domicile unilaterally, since the wife's right to maintain stable employment is obviously compromised if the husband may relocate her at his whim. In both cases, wherever these stipulations are discussed in Maliki, Hanafi, and Shafiʿi texts they are simply deemed void. Hanbali jurisprudence, in contrast, allows these types of stipulations. See Spectorsky*, Chapters*, 183–4, 232.

46 Al-Hibri, "An Introduction," 58.

47 It should be pointed out that this stipulation, along with a prohibition against taking additional wives, has been used by numerous Muslim women through history, with a greater or lesser degree of success in judicial enforcement. On the distinction between judicial decisions (*qada'*), which are binding on litigants but do not set precedent, and juristic opinions (*ifta'*), which are precedent-setting but not binding on anyone, including those who have requested the *fatwa* (opinion), see Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, "Muftis, Fatwas, and Islamic Legal Interpretation," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. M.K. Masud, B. Messick, and D.S. Powers (Cambridge and London: Harvard University Press, 1996), 3–32.

48 Maliki views: Malik ibn Anas, *Al-Muwatta* (Beirut: Dar al-Fikr, 1989), K. al-Nikah, "Bab ma la yajuzu min al-shurut fi 'l-nikah,"

335, *Mudawwana*, K. al-Nikah II, “Fi shurut al-nikah,” 2:197–200; Hanafi views: *Kitab al-Hujjah*, K. al-Nikah, “Al-rajul yatazawwaju ʿala shay’ baʿduhu naqd wa baʿduhu ila ajal,” 3:210–2; Shafiʿi views: *al-Umm*, K. al-Sadaq, “Al-shart fi ’l-nikah,” 5:107–9, *Mukhtasar al-Muzani*, “Al-shart fi ’l-mahr …,” 9:195–196.

49 Spectorsky*, Chapters*, 183–4.

50 These texts do not specifically address this type of delegation occurring at a second marriage, but the principle is the same as in those events they do discuss. See Spectorsky*, Chapters*, 206–7, 219–20.

51 Spectorsky*, Chapters*, 206. Ibn Hanbal makes this statement when questioned about another jurist’s opinion “that if a husband has intercourse with his wife without her knowing that she has the option of choosing to be separated from him, she is asked to swear that she did not know of the option during intercourse. If she swears that she did not, then she is given the option of separating from him. If she did know of her option, she has lost it by the act of intercourse.” The option does not concern the husband breaking a stipulation against taking an additional wife, but the same logic applies.

52 “The wife may not legally object to the husband’s right of divorce. The marital contract establishes her implicit consent to these rights. However, if she wishes to restrict his freedom in this regard or to have similar rights, she is legally allowed to do so. She may stipulate in the marital agreement that she, too, will have the right to divorce or keep the marriage bond only so long as she remains the sole wife.” El Nimr does not explain how it is that “if she wishes to restrict his freedom in this regard . . . she is legally allowed to do so” if, as she affirms, a “wife may not legally object to the husband’s right to divorce.” El Nimr, “Women in Islamic Law,” in *Feminism and Islam*, ed. Mai Yamani (Ithaca Press: Reading, 1996), 96.

53 El-Nimr, “Women in Islamic Law,” 97.

54 Al-Hibri, “An Introduction,” 60.

55 *Mudawwana*, K. al-Nikah V, “Fi ihlal,” 2:292.

56 For example, disagreeing with the Maliki (and Hanafi) position that a minimum dower is necessary, Al-Shafiʿi states, “The dower is a price [*thaman*] among prices, so whatever they consent to as a dower that has a value [*qima*] is permitted, just as whatever two people engaged in a sale of anything that has a value [consent to] is permitted.” See *Al-Umm,* Kitab Ikhtilaf Malik wa’l-Shafiʿi, 7:376.

57 A*l-Umm*, K. al-Sadaq, “Fi ’l sadaq bi aynihi yatlafu qabla dafaʿahu,” 5:92.

58 *Al-Umm*, K. al-Nafaqat, “Ikhtilaf al-rajul wa ’l-mar’a fi ’l-khulʿ,” 5:300.

59 *Al-Umm*, K. al-Sadaq, “Sadaq al-shay’ bi aynihi fa yujadu muʿayban,” 5:111. See also *Mukhtasar al-Muzani*, K. al-Nikah, “Sadaq ma yazidu bi budnihi wa yanqasu,” 9:194, and *al-Umm*, K. al-Sadaq, “Fi ’l-sadaq bi aynihi yatlafu qabla dafaʿahu,” 5:92.

60 “Women in Islamic Law,” 97.

61 Al-Hibri, “An Introduction,” 57–8. On housework, see also her “Islam, Law, and Custom,”22.

62 Al-Hibri, “An Introduction,” 70.

63 *Al-Umm*, K. al-Nafaqat, “Wujub nafaqat al-mar’a,” 5:128.

64 Furthermore, this does not necessarily affect the social recognition of these rights. At an Islamic Society of North America session I attended in Chicago in 1994 or 1995, a woman raised a related issue before a panel of male “experts.” She had stipulated in her marriage contract that she was to attend medical school. Her husband, however, was objecting now that she sought to do so. The panelist who responded to her acknowledged the validity of the condition, but counseled her to drop her plans for medical school in order to preserve family harmony! What type of harmony can exist when it is predicated on the negation of women’s legitimate aspirations?

65 I do not mean in any way to suggest that these scholars have erred by not addressing jurisprudence; to the contrary, progressive Muslims must be grateful for the work they have done and the conceptual frameworks they have introduced. Nor do I intend to imply that exegesis is only a precursor to work on law. Rather, I mean that *some* progressive Muslims must devote attention to jurisprudence; it is a *fard kifaya*, a collective obligation the performance of which by a portion of the community exempts others from the duty to undertake it.

66 Al-Hibri, “An Introduction,” 60.

67 See, for example, Lisa Wynn, “Marriage Contracts and Women’s Rights in Saudi Arabia,”in *Women Living under Muslim Laws. Special Dossier 1: Shifting Boundaries in Marriage and Divorce in Muslim Communities*, ed. Homa Hoodfar (Montpelier, France: WLUML, 1996), 106–20. This topic has been discussed in numerous sociological studies. Today, the use of deferred dower is widely accepted in many parts of the world, and has been for centuries, as studies based on Ottoman court registers attest. Indeed, dividing a dower into prompt and deferred portions is common in North American Muslim communities. Yet while a fixed term for deferring payment of some portion of the dower was acceptable for jurists ofthe formative period (e.g. one or two years), the idea of deferring part of the dower’s payment until death or divorce was controversial and, at the very least, disapproved of. See, for example, *Mudawwana*, K. al-Nikah II, “Fi shurut al-nikah,” 2:197; *Kitab al-Hujjah*, K. al-Nikah, “Al-rajul yatazawwaju ʿala shay’ baʿduhu naqd wa baʿduhu ila ajal,” 3:211–2.; *al-Umm*, K. al-Sadaq, “Al-shart fi ’l-nikah,” 5:107–9; and *Mukhtasar al-Muzani*, “Al-shart fi’l-mahr …” 9:195–6.

68 Al-Hibri uses this term; see “Talk of the Town,” and “An Introduction,” 51 and *passim*.

A Meditation on Mahr, Modernity, and Muslim Marriage Contract Law

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From the moment I first learned that the *fiqh* on marriage contracts uses the template of a contract of sale it has bothered me. Why didn't they use partnership contracts instead? We have plenty of *fiqh* on partnership contracts. But I wasn't a specialist in contract law, and I never had time to do any further research on it, so I just let it simmer. And anyway, I found enough tools in the existing *fiqh* on marriage contracts to help women protect themselves against things like unwanted divorce and polygamy. So when I and my feminist Muslim lawyer friends advised women on this topic, those are the tools we gave them. But then, my good friend and editor of this volume, Kecia Ali, went and trashed our strategy! In her chapter in the 2003 book "Progressive Muslims," Kecia complained that the strategy of finding feminist uses of Islamic family law did not go far enough— "missing the forest for the trees" she said! As far as I was concerned, she had thrown down the gauntlet. It took me ten years (having babies and getting tenure tends to have that effect on people), but eventually I picked it up. When another dear friend, Marie Failinger, convinced me to be part of her book of interfaith women writing about law and religion, I went back to my thought experiment of "what if we used a partnership contract model instead" and worked out my answer to Kecia's challenge—along with a darn good defense of our original strategy.

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Introduction

> "Be a bit strategic," I advise the young bride. "Think about whether you might someday want to be a stay-at-home mom—you could set your *mahr* (dower) so that you won't have to be completely financially dependent on your husband at that time."
>
> "But that still feels like I'm putting a price on myself," she answers. "It just makes me uncomfortable. I would rather just make my *mahr* something symbolic and leave it at that."

I have had a version of this conversation with many different people as I have engaged the topic of Islamic family law as both an academic and activist over the years. It has always frustrated me when women, like the bride here, casually dismiss the *mahr* in apparent disregard for its women-empowering potential. Quranically-required of every valid Muslim marriage contract, the *mahr* provision designates some property to be given (or promised) to a bride upon marriage, and Islamic property law protects it as exclusively hers, not to be used by anyone (including the men) in her life. For these reasons, a substantial *mahr* can provide a woman with financial independence during marriage or give her the ability to leave a bad one. I have long felt that women who casually dismiss the *mahr* could be dangerously limiting their future life choices, just because it doesn't feel right.

On the other hand, these women do have a point. For a bride, but not a groom, to be paid some financial sum as part of a marriage contract does seem, at some level, like the woman is selling herself. This is certainly better than being sold, but not by much. As many have noted, classical Islamic jurisprudence often used the term "price" to describe the *mahr*, and Islamic marriage contract law was specifically based on the model of a contract of sale. Even more disturbing, in order to work out the doctrinal details of Islamic marriage law, early Muslim jurists often analogized marriage contracts to slavery, and especially to contracts for the purchase of a female slave. The gendered background presumptions that accompany this analogy permeate nearly every aspect of Islamic legal doctrine on marriage, affecting not only the *mahr* at the beginning, but also the rights and responsibilities of the parties during a marriage, and their respective access to divorce at the end.

The intertwining of slave sale contracts in the jurisprudence of Islamic marriage law is why Kecia Ali has argued that the strategy used by Muslim women activists to find feminist uses for classically-established Islamic legal doctrines like the *mahr* is fundamentally flawed. It "misses the forest for the trees," she argues, because it "focus[es] on isolated rights without paying attention to how they are embedded in a system of interdependent spousal obligations" (Ali 2003: 164)—a system flawed by historical norms about slavery and sexual autonomy that no longer hold true today. She therefore urges a wholesale rethinking of the whole paradigm of Islamic marriage law to better fit modern sensibilities and practice.

I agree with Kecia Ali—up to a point. I believe that the sales contract was indeed an unfortunate choice for framing Islamic marriage contract law, and that its inherent problems were further exacerbated by the development of Islamic law in a historical context where slavery (especially concubinage) was socially acceptable. But I do not have quite as much criticism as she does for the Muslim women's rights activism that works within the existing doctrine, and I will explain why below. Nevertheless, I agree with Ali that the slavery framework and its resulting doctrine are not dictated by scripture, so we are not obligated to perpetuate them today—especially when their historical contexts have so little in common with how we now think about marriage, women, and sexuality. Thus, it is not only theoretically possible but also appropriate to ask what sort of alternative model could be used to create a different scheme of Islamic family law for today. In this chapter, I will briefly describe what I think could be a better doctrinal model for Islamic marriage law, and point the way toward how it could be developed further by more qualified Muslim jurist-scholars. Despite her urging for a new paradigm, Kecia Ali does not offer any of her own ideas about what that might look like, so it is difficult to know if she and I would agree upon the same solutions.

In a nutshell, I think a workable alternative would be to use partnership, rather than sales, as the framework for Islamic marriage contract law. I believe that applying the well-established (and recently re-energized) principles of Islamic partnership law to Muslim marriage contracts would have several advantages over the current sales-based framework, including eliminating several traditional rules that have been harmful to women. Among other things,

some of the existing rules that would disappear under a partnership model include: the lack of mutuality between husband and wife, legal tolerance of marital rape, and a husband's exclusive right to unilateral divorce. A scheme of Islamic marriage law based on partnership contracts would also fit better with modern attitudes about marriage, mutuality, women, and individual agency. As such, it would support the *sharia*-based approach of Muslim women's rights activists more effectively than the current strategies that sometimes require uncomfortably stretching and pulling outdated doctrines to fit modern sensibilities.

But my enthusiasm for a paradigm shift to this alternative model for Islamic marriage law is tempered by this caveat: paradigm shifts are not easy. They usually require disentangling emotional connections and long-held patterns of behavior, and these changes usually require much more than a good theoretical argument. So, while as a legal theorist, I would wholeheartedly support new Islamic marriage law based on a partnership contract model, the activist in me is concerned about the pragmatic realities of making it stick. Simply put, no matter how perfectly developed it might be, not everyone will be convinced to switch to this new scheme of marriage law. I therefore end this chapter with a brief discussion of what I think are the real-life challenges to introducing such an alternative model, and what I think should be done in light of these realities.

Sharia-based Muslim Women's Rights Activism: Pros and Cons

I have recently written about the work of Muslim women's rights activists who operate from a *sharia*-mindful perspective, commenting on why I believe this approach is often more effective than that of secular feminists working for Muslim women's rights (Quraishi 2011). One advantage of the *sharia*-mindful approach is that much of its starting point is uncontested by even the most conservative and traditional of Muslims. Rather than dismissing all Islamic law as patriarchally biased, these scholars and activists take the more complicated route offending those parts of established Islamic legal doctrine that can be harnessed and proliferated to pursue and protect women's rights. Because they come from uncontroversial and established rules that already have persuasive weight with the vast majority of practicing Muslims, this approach can provide Muslim women with immediately effective tools for empowerment. This has a much more direct impact in individual women's lives than the much longer (and often unsuccessful) projects aimed at reforming Islamic legal doctrine that is harmful to women.

As it turns out, these activists have identified quite a few rules within established Islamic law that can be used to empower women. For example, recognizing and protecting a woman's right to own (and inherit) property in her own name has been a distinguishing feature of Islamic law among the world's legal systems for centuries. All the classical schools of Islamic law agree that a woman's property is exclusively her own—no one can assert any legal claim over it, including her male relatives. (Those familiar with women's rights under common law will recognize that this Islamic rule is quite a bit more feminist than the property rules that applied to English and American women until not too long ago.) Further, Islamic law also sets aside the *mahr* as a specific allocation of property available to every married Muslim woman. Because it is Quranically-mandated, Muslims often speak of the *mahr* in sacrosanct tones, making it a powerful tool for a Muslim woman to achieve financial security and independence—often the most difficult sort of independence for women to acquire. Whether saved or invested at the beginning of a marriage, or deferred to be paid in the event of divorce or widowhood, a well-calculated *mahr* could give an otherwise financially-dependent wife the ability to initiate divorce or survive life on her own. (And accessing one's *mahr* is often a quicker and more reliable way to set up one's financial life than waiting for court-ordered alimony and/or the division of marital property assets.) Moreover, a large *mahr* deferred to the time of divorce could also be used to deter a husband from exercising his established Islamic legal right to unilateral divorce (*talaq*) against his wife's will.

There are also other ways for women to protect themselves against the impact of traditional Islamic marriage rules that favor men. One emphasized by many *sharia*-based Muslim women's rights activists is the marriage contract itself. Under established Islamic legal doctrine, a Muslim marriage contract can include stipulations that alter the otherwise default rules of Islamic marriage law (rules that often disadvantage women). For example, a contract could include a stipulation limiting the husband's ability to take another wife or it could give the wife equal access to divorce. It might even specify that the wife

is not expected to do household cooking and cleaning, reflecting the established rule that a wife has no Islamic obligation to do housework (Quraishi and Syeed-Miller 2004). Muslim women's rights activists today regularly point to this old Islamic legal principle to counter the arguments of those who insist on a gendered division of household labor. They also point to the wisdom and foresight of classical Islamic law in holding that, if a wife does perform such work, it may be financially compensable. This rule could be crucial in the distribution of assets upon the divorce of a stay-at-home wife and breadwinning husband—especially where community property is not an option.

All of these examples take the approach of using existing Islamic doctrine, rather than emphasizing its reform, to improve the lives of Muslim women. I have seen the effectiveness of this approach in my work with and observations of Muslim grassroots organizations over the years. The use of established Islamic legal doctrine was instrumental, for example, in the legal advocacy strategies chosen by lawyers defending women against adultery charges in Nigeria and the way in which Pakistan's adultery laws were ultimately amended in 2006 (Quraishi 2011). The effectiveness of this approach explains why many Muslims emphasize Prophetic practice (rather than secular law) to condemn domestic violence in their communities and why average Muslim women and girls assert their right to an education by appealing to Quranic verses rather than to international declarations of the rights of the child. Simply put, Islamically-based arguments for women's rights give a religious edge to rights claims that secular and reform arguments cannot. Thus, it is not surprising that Muslim women's activists appropriate traditional Islamic legal concepts like the *mahr* to help empower Muslim women. This strategy appeals to, rather than challenges, the religious sentiments of even the most conservative Muslims and legal scholars and thus faces less opposition than feminist legal reform efforts. This is why promoting Islamic legal education for Muslim women has become a high priority for many *sharia*-based Muslim women's rights organizations. Fluency in established Islamic legal doctrine, it is believed, is crucial to giving Muslim women the necessary tools to fight for their rights (Quraishi 2011).

On the other hand, this strategy comes with a weakness. As Kecia Ali has argued, selectively emphasizing and giving feminist rationales to some parts of classical Islamic law fails to really engage with the jurisprudence as a coherent whole (Ali 2003). In other words, it may be dangerous to emphasize only the woman-empowering aspects of established Islamic law without adequately warning that many of these rules come with not-so-empowering side effects and caveats. By not telling the whole story, this approach runs the risk of leaving Muslim women vulnerable to unexpected consequences when the rest of the law comes into play. For example, many of the stipulations that a Muslim woman might include in her marriage contract are enforceable only in the Hanbali school of law. And even when a stipulation is recognized as valid, many schools offer very limited relief for its breach—and very rarely is it specific performance. Thus, in most schools of Islamic law, a marriage contract stipulation that a husband will remain monogamous does not entitle a wife to end her husband's marriage to a co-wife, but rather, it only gives her grounds for divorce in the event that this happens. Having the freedom to choose between divorce and polygamy is, of course, not a meaningful choice for most women, and is especially shocking to those who believe they have protected themselves against such a predicament in their marriage contract.

Even the *mahr* is not as sacred as one might expect from its Quranic origin. According to established Islamic jurisprudence, whether or not a wife may keep her *mahr* upon divorce depends upon the type of divorce. A wife's *mahr* is safely hers if her husband exercises his right to a unilateral divorce (*talaq*). But a wife-initiated divorce quite often results in a forfeiture of *mahr*. Established Islamic law provides two ways for a wife to initiate and secure a divorce: 1) extra-judicially, with the consent of her husband ("*khul'*") or 2) by proving sufficient grounds before a judge (*faskh*). It is generally assumed that in a *khul'* divorce, a wife returns her *mahr*. (Some men take advantage of this situation. A husband who would like to initiate a *talaq* but does not want to pay the *mahr* might make life so unbearable for his wife that she requests a *khul'* divorce, which he then agrees to when she forfeits her *mahr*.) The last type of divorce, *faskh*, could protect a wife's *mahr*, but this requires her to prove adequate grounds (i.e., fault of the husband), the sufficiency of which are to be decided by a judge, and some schools of Islamic law make this virtually impossible.

The practical implication of all this is that, while the current *sharia*-based strategies may be successfully encouraging Muslim women to take advantage of some

established doctrine for feminist reasons, sometimes these women face surprising disappointment when they attempt to enforce their understandings of their rights. The strategy is vulnerable because the jurisprudential theory that created the rules in the first place does not match the feminist rationales promoted by those focusing on the woman-empowering provisions. This is why Kecia Ali argues that more is needed than selective appropriation of some apparently favorable aspects of established Islamic law. Part of the problem, she argues, is that the methodological background to most established Islamic marriage law is so out of step with contemporary sensibilities that it is downplayed or ignored not only by modern Muslim feminist activists, but also by popular Muslim discourse generally (Ali 2003: 166). To take her argument further, unless these background presumptions and theories are brought into the light of contemporary discourse, they may prove to be the Achilles' heel of *sharia*-based Muslim women's rights advocacy. As a proponent of *sharia*-based Muslim women's rights work, I take Kecia Ali's critique seriously. To respond, I will describe what I think would be a better model for Islamic marriage law, but also note some potentially serious obstacles to its success. In order to explain why I think my suggested alternative would be an improvement over the current law, I will first review the existing rules of Islamic marriage law, including those aspects that are downplayed by *sharia*-minded women's rights activists.

Islamic Marriage Law Today: Jurisprudential Theory and Presumptions

Most Muslims today either are not aware, or do not like to emphasize, the theoretical presumptions embedded in the Islamic jurisprudence of marriage law because they are quite far from contemporary sensibilities. Established Islamic marriage contract law uses the contract of sale as its basic conceptual framework—a model which leads to some uncomfortable conclusions about what is being sold and the role of women's agency in that sale. Even more out of step with modernity is a historical context in which slavery and concubinage were socially acceptable. Because of their presumption that a man may legally have sex with his female slave, classical Muslim jurists draw an analogy between a marriage contract and a contract for sale of a concubine, using this analogy to work out the doctrinal details of the respective rights (sexual and otherwise) of a husband and wife. This analogy is supported by juristic interpretation of some Quranic verses to mean that there are two (and only two) situations in which sexual activity is Islamically licit: in marriage and with a female slave. Theorizing about what could be the commonality between these two situations, these jurists come to the conclusion that some sort of male ownership (the Arabic term is "*milk*," meaning control or dominion) is instrumental in legitimizing Sexual activity. As Kecia Ali explains in her detailed study of the subject, "a comparison [i]s drawn between the dominion imposed by a husband through which his wife is caused to surrender her sexual self and the sovereignty established by the master [over his slave]" (Ali 2010: 15). Established Islamic jurisprudence therefore often describes marriage as a type of sale, with the item being purchased being a wife's sexual organs. There are qualitative differences between the rights of a wife and a female slave, of course, and the jurists do carefully lay these out, but nevertheless, the concept of male ownership of women's sexual parts becomes an important part of the traditional juristic understanding of what makes sex licit in Islam.

I would like to note that I, personally, am not convinced that sex with one's female slave is approved by the Quran in the first place. My own reading of the relevant Quranic texts has always led me to a different conclusion than that held by the majority of classical Muslim jurists. (My alternative reading is untested, so I will not elaborate on it here except to say that I think it is plausible to read the critical Quranic phrase "what your right hands possess" as referring not to slaves but to some form of preliminary marital arrangement, such as we might today say someone has "pledged their hand in marriage.") But setting aside my personal skepticism about whether the Quran allows sex with female slaves, I believe it is important to understand the role that this concept played in the development of Islamic jurisprudence on marriage contract law. Once we appreciate the jurists' train of thought, it is then possible to ask productive questions about how much of the established doctrine of Islamic marriage law is still necessary today and how to most effectively construct meaningful alternatives.

The slavery analogy is distasteful today, but it is not *illogical*. If one begins with the contract of sale as the base model for marriage contract law, then we can ask, what sort of sales contracts are most analogous to marriage contracts? It does not take much thought to conclude that contracts involving human beings as

the subject of sale make a much better analogy than contracts for the sale of bushels of wheat or horses. After all, a horse cannot complain to authorities that he is being mistreated and a bushel of wheat cannot assert that it no longer wants to be owned. But under Islamic law, a slave can do both things. Add to this a presumption that the purchase of a female slave includes the right to have sex with her, and it is quite understandable why the idea of ownership became important to jurists trying to work out the respective rights in a marriage contract.

The slavery analogy and the sales contract model directly impact several areas of traditional Islamic marriage law that have a particularly negative impact on women. I will take up three of these here: *mahr*, marital support, and divorce.

Mahr

If we begin with the presumption that both marriage and slavery make sexual relations with a woman lawful, then it is natural to ask what these two situations have in common. One of the most obvious is that both involve some sort of payment—for a slave, it is the purchase price, and for a wife, the *mahr*. Thus it came about that juristic discussions of *mahr* "depend on and further the conceptual relationship between marriage and sale" (Ali 2010: 49). *Mahr* comes to be thought of as the "price" of access to a woman's sexual parts, which are then "owned" by the husband.

Moreover, this "ownership" is specifically gendered—only males may own this sort of property. This provides an explanation for the juristic belief that women who owned male slaves do not likewise gain sexual access to them by virtue of the purchase price of the male slave. As the classical jurist Shafi'i put it, "The man is the one who marries and the one who takes a concubine and the woman is the one who is married, who is taken as a concubine. It is not permissible to make analogies between things that are different" (Ali 2010: 178). In other words, although women are fully capable property owners in Islamic law generally, the type of ownership that makes sexual relations licit is considered to be different—it is available only to men. Moreover, this type of ownership is something that a man held with exclusivity. With its allowance of polygamy but not polyandry, Islamic law allows men to have more than one legal sex partner, but only allows women to legally have sex with one man (in a given time period). There is some logic to this as well, considering the ambiguous paternity issues involved when a woman has multiple sex partners. In communities where wealth, status and power were so strongly affected by paternalistic lines, it is not surprising to see legitimate sexual relations tied not only to male control, but to exclusive male control.

Marital Support (Nafaqa)

Classical Muslim jurists draw a parallel between a husband's obligation to pay *mahr* at the start of a marriage, and his obligation to pay for basic support ("*nafaqa*") during the course of a marriage, and both are connected to the licitness of sexual activity. As the jurists conceive things, the *mahr* makes a woman *initially* sexually available to a husband, and the *nafaqa* enables *continued* sexual access to her during the marriage. Support and sexual access thus become inextricably linked in Islamic marriage law: if a husband provides his wife with adequate food, shelter and clothing, she has no right to deny him sexual access whenever he so desires. If he fails to provide such maintenance, she is not obligated to make herself sexually available to him. In short, "for Muslim jurists sex is a husband's right and support is a wife's right" (Ali 2010: 94—121).

This leads to many related doctrines commanding wifely obedience that can be quite disturbing to modern sensibilities. Not only does this doctrine of sexual availability mean that a wife's mobility is severely dependent upon her husband's consent, but it also has serious implications for marital rape. Because a husband's right to have sex with his wife is conditioned solely on his payment of support, her consent is irrelevant. The idea of marital rape is thus conceptually virtually impossible in this legal paradigm. Indeed, despite significant Islamic literature stressing the importance of attending to a woman's physical desires and sexual pleasure (including orgasm), the idea of marital rape is nevertheless an oxymoron in classical Islamic jurisprudence. It just does not fit in a system where the legality of sexual activity is based not on consent of the parties but upon male dominion and payment of financial support.

Even short of rape, there is not much room for sexual mutuality in a system of marital rights built upon a male-ownership view of sexual licitness. Traditional Muslim jurists discuss a woman's right to sexual

activity within marriage, but her rights to sexual access to her husband (and even to non-sexual companionship) are virtually unenforceable. Indeed, these jurists think of sex as "the husband's right and not his duty," so it makes little sense to compel him to do it. Thus, a Muslim wife's right to sexual pleasure, though morally acknowledged in the scripture and literature, is legally meaningless. Because established Islamic jurisprudence fundamentally views marriage as an exchange of lawful sexual access for dower and continued sexual availability for support, it does not require any mutuality in sexual rights. This is why Kecia Ali argues that without rethinking the entire premise of this system, Muslim women activists focusing on such mutuality will always be left with an unenforceable ideal, rather than tangible legal rights to sexual equality (Ali 2003).

The topic of marital support exemplifies the problem with selectively emphasizing only women-empowering parts of established Islamic law. As mentioned earlier, it has become popular for Muslim women's rights activists to point out that classical Islamic law does not require a wife to do housework. This is true, but tells only part of the story. A husband's marital support obligation is not considered compensation for a wife's performance of household chores, but it is considered compensation for her making herself sexually available to her husband. That very important caveat is not conducive to the picture of marital respect and mutuality that modern Muslim women activists want to portray. But without fully acknowledging it, the advocacy approach appears under-theorized and incomplete, and ultimately vulnerable.

Divorce

Keeping in mind that established Islamic marriage law is based on a paradigm of male ownership of sexual access, it is not difficult to understand why the established legal doctrine gives a husband, but not a wife, the right to unilaterally end a marriage. The jurisprudence conditions the legality of sexual activity upon a husband's (or slaveowner's) exclusive ownership of the sexual bond, which means he must have unilateral control over the termination or continuation of that bond. Kecia Ali summarizes the doctrinal landscape this way:

> The strict gender differentiation of marital rights, the importance of women 's sexual exclusivity, and above all the strict imposition of rules about unilateral divorce, however contested in practice, all facilitate and flow from the key idea that marriage and licit sex require male control or dominion (Ali 2010: 181).

Indeed, the very meaning of the word "*talaq*," ("release") evokes parallels with the dominion involved in slavery. A *talaq* divorce "frees" or "releases" a wife, much as a slave is "free" or "released" in manumission, and jurists regularly use this analogy in their descriptions of unilateral divorce. Thus, the *mahr* enslaves a married woman's sexual self just as a slave comes to be owned through a purchase price, and *talaq* frees her from that bond just as manumission frees a slave.

Such a scheme does allow for limited wife-initiated divorce. *Khul'* divorce fits within the male-owned paradigm of marriage because it cannot happen without the husband's consent. To be sure, *khul'* is more empowering to women than divorce law in other systems where women could not initiate divorce at all, and it does honor the concept of marriage as a bilateral contract to which she is a party. But jurisprudentially speaking, *khul'* is still conceptualized in the language of sales in a way that does not portray marriage itself as a mutual relationship. According to the classical jurists, in *talaq*, the husband relinquishes his control over his ownership of the wife's sexual organ, and in *khul'*, the wife buys back ownership over herself by compensating her husband (usually by returning her *mahr*) in return for a divorce. Put even more starkly, *talaq* is analogous to manumission of a slave and *khul'* is analogous to "*kitaba*," the Islamic legal doctrine by which a slave contracts to pay for his or her emancipation. Both require the husband's/ master's consent, and both require the payment of some sum from the wife/slave for release.

Modernity and Legal Reform

Virtually all of the presumptions that formed the jurisprudential backdrop for Islamic marriage law are no longer held today. There is now a near universal consensus against slavery among the world's Muslims, as is evident from the absence of substantial Muslim resistance to laws abolishing it throughout the world. Indeed, the very fact that Muslims today seem uncomfortable with the analogy between marriage and slavery itself illustrates how much norms have changed since the formative period of Islamic jurisprudence,

when the analogy seemed to be a natural, almost self-evident one. It is unthinkable among most contemporary Muslims that a husband would have a female slave with whom he could have unlimited sex. In fact, both educated and lay Muslims routinely ignore the classical jurisprudence allowing concubines, often stating categorically that Islam allows sexual relations only in one situation: marriage.

Not quite as pervasive as the aversion to slavery, but nevertheless a significant shift from earlier norms are the changes in Muslim attitudes about mutuality in marriage and the role of women in society. Although equality is a contested concept, Muslims around the world nevertheless speak of marriage in terms of reciprocal and complementary rights and duties, mutual consent, and with respect for women's agency. Polygamy is tolerated in some Muslim circles, but the idea of male ownership of a wife's sexual parts in marriage would strike most contemporary Muslims as inappropriate and probably offensive to a healthy sexual relationship.

Many point to Muslim scripture and classical literature to support these ideals of mutuality—and there is significant material to work with. But formalizing these attitudes in enforceable rules is much more difficult. So, while Muslims generally disapprove of the idea of a husband forcing his wife to have sex, it is nevertheless difficult to find widespread Muslim consensus that marital rape should be a crime. This is because a wife's sexual availability is embedded in mainstream Muslim understandings of the rights and obligations of marriage. In fact, many who contest the general concept of wifely obedience will nevertheless tolerate it in the context of sexual access. Similarly, while Muslims routinely speak of marriage as a contract based on the mutual consent of both spouses, most Muslims do not contest the idea that Islamic law gives husbands exclusive right to unilateral divorce. Thus, while many areas of state-enacted family law in Muslim countries have changed in response to public pressure for women's rights (such as raising the minimum age of marriage), there is strong social resistance to the abolition of things like polygamy or unilateral *talaq* divorce. Kecia Ali argues that this is because these aspects of Islamic marriage law are inextricably intertwined with the jurisprudential background that relies on the analogy of marriage and slavery—and that is something no one wants to talk about (Ali 2006: 43, 51). In other words, because the paradigm of the male ownership tie is so fundamental to the theoretical foundation of all Islamic marriage law, any women's rights work (legislative, social activist, or otherwise) that does not take this into account will always be limited in how much it can ultimately accomplish.

The obvious question, then, is this: is it possible to create a different scheme of Islamic marriage law, one that is better suited to modern sensibilities and not based on presumptions about slavery and male ownership of female sexuality? This question involves two issues. First is the question of Islamic law reform generally: is it possible to challenge existing Islamic legal doctrine at all, or is this religiously set in stone? Second, if such change is theoretically possible, what could a new Islamic law of marriage look like? I will take up the first question here and the second question in the following section.

Sharia Basics and the Challenges of Reform

Is Islamic legal reform possible? Can established Islamic religious law be challenged without offending the divine? The answer may surprise those unfamiliar with the foundations of Islamic jurisprudence, and the fact that Islamic law is based on an epistemology that is self-conscious of its own human fallibility. In brief, the key principle is exemplified in the difference between "*sharia*" and "*fiqh*." "*Sharia*," usually translated as "Islamic law," represents the idea of ultimate justice, the idea of God's divine directions about the ideal way to live—thus, "God's Law." Muslim jurists use *ijtihad* (legal interpretation) to elaborate the doctrinal details when they are not obvious from the scriptural sources (the Quran and Prophetic narratives). What is significant about *ijtihad* is that it is a self-consciously fallible process. The jurists performing *ijtihad* to create legal rules recognized that in doing so, they were human beings struggling to articulate divine will, and therefore their conclusions could be, at best, only probable articulations of God's Law. No one could claim with certainty that his or her answers were "the right answer," at least in this lifetime. That is why they use the term "*fiqh*"—which means "understanding"—for the doctrinal rules of Islamic law.

Moreover, there are a variety of *fiqh* rules on the same topics. Because the legal scholars could claim only probable correctness for their conclusions, they all recognized that they had to respect the differing conclusions of their colleagues as possibly correct. In

other words, as long as it is the result of sincere *ijtihad*, any *fiqh* conclusion qualifies as a possible—and thus legitimate—articulation of *sharia*. This is why *sharia*, as a body of tangible law, is inherently and unavoidably pluralistic. Eventually, the variety of *fiqh* opinions coalesced into several definable schools of law, each with equal legitimacy and authority for Muslims seeking to live by *sharia*. In short, for a Muslim, there is one Law of God (*sharia*), but there are many versions of *fiqh* articulating that ultimate Law here on earth (Quraishi 2008).

In contemporary discourses, especially in a legal advocacy setting, it is very important to keep the two terms *fiqh* and *sharia* distinct. Sloppy use of the term *sharia* can (and does) generate unnecessary resistance to what otherwise would be legitimate and uncontroversial assertions. It is unnecessarily provocative to advocate, for example, changing or reforming *sharia*, because this implies that God's Law is not itself already perfect, a suggestion likely to generate resistance from many Muslims. But advocating a change or reform of *fiqh* is quite a different matter, because *fiqh* is fallible, and in fact its many manifestations already reflect the consideration of a variety of different social norms. In short, *sharia* (God's Law) cannot be questioned by Muslims, but our *understandings of sharia*— namely, the *fiqh* rules—are always open to question.

This brings us directly to the question of reform. Are all the *fiqh* rules set in stone or can they be changed? At the most basic theoretical level, the answer seems simple—and encouraging: all existing *fiqh* rules are the product of *ijtihad*, and because *ijtihad* is fallible, they can be challenged by any alternative *ijtihad*. But things get a bit more complex when we look at the details. To fully understand what is fixed and what is negotiable in the existing *fiqh* corpus requires detailed knowledge of the *ijtihad* that produced each *fiqh* rule. More specifically, it is important to know the methodological pieces of the *ijtihad* analysis that created it: what was textually ambiguous and what was not, what was the reasoning behind using some prophetic narrations but not others, and what other jurisprudential tools were used and why.

There are many ways in which new *fiqh* rules can be made. One of the easiest is where the jurisprudential tools used in the past relied on a social context that has changed today in relevant ways. In these cases, simply applying classically-established *ijtihad* methodologies in the new changed circumstances will produce a new *fiqh* rule. But it is important to realize that this way of arriving at a new rule is not legal reform in the sense of *changing* established Islamic legal theory. Rather, it is an example of how a new rule can naturally result when the same tools are employed in a new context. For example, the tool of *maslaha* (public good) happens to be one that is extremely responsive to changing circumstances. If one is faced with a problematic *fiqh* rule that directly relies on a historical evaluation of the public good, that rule can be easily changed if the relevant public good has changed. There are other jurisprudential analytical tools with a similar built-in potential to generate new *fiqh* rules without posing any major upheaval to Islamic legal theory. For example, *qiyas* (analogical reasoning) requires *fiqh* scholars to identify the cause (*'illa*) of an original textual rule before expanding it to new cases. In the body of classical *fiqh* doctrine, there can be a diversity of opinion on those causes and thus what analogies are appropriate and why. That diversity could continue today, with contemporary *fiqh* scholars identifying and applying a different cause—and thus reaching a new *fiqh* rule—for an established scriptural text.

Turning now to the issue at hand, Islamic marriage law, Kecia Ali has done a careful job of laying out how the analogy to slavery and concubines played a pivotal role in the development of traditional Islamic jurisprudence on marriage and marriage contract law (Ali 2006, 2010). That analogy was not scripturally-directed. It was created by fallible jurists who saw similarities between these two situations that led them to use this analogy in working out the doctrinal details of marriage law. These perceived similarities were largely based on social and philosophical realities of their time that no longer hold true today. Slavery and concubinage have fallen out of practice, and indeed, out of the moral compass of most Muslims. Moreover, new pervasive attitudes about mutuality in marriage make the idea of a husband's ownership of his wife's sexual parts surprising and offensive to many Muslims today. Thus, it would not be too radical a reform to re-think the slavery analogy. Jettisoning the analogy between marriage and concubinage does not challenge the use of analogy as an Islamic jurisprudential tool altogether, but rather just suggests that this particular analogy was based on social circumstances that are no longer appropriate today. This suggests that new *ijtihad* (Islamic jurisprudential reasoning) on Islamic

marriage law that does not presume an analogy to slavery is possible, and could create different doctrinal rules than those summarized above. Moreover, if done thoroughly and well, it would carry just as much validity as the existing traditional doctrinal scheme. That is because Islamic law requires tolerance and respect for all *ijtihad* conclusions, no matter how diverse.

But there are two important caveats to the viability of any new theory of Islamic marriage law. Jurisprudentially-speaking, the success of a new legal scheme is dependent upon: 1) the expertise of those performing the new *ijtihad* and 2) the impact of past consensus. The first criterion is fairly obvious: without proper training in *ijtihad*, a scholar's *fiqh* conclusion will not garner the status of probability that gives it validity, and *ijtihad* expertise is no small accomplishment. Many prerequisites of language, legal reasoning, and knowledge of context must be mastered before a scholar can even begin to extrapolate legal doctrine from the *sharia* source texts. The complex, layered, soul-searching process of Islamic jurisprudential analysis is not for amateurs, no matter how well-intentioned or socially conscious they might be. But once one is an expert, whatever one produces deserves to be respected as a legitimate articulation of *sharia*, no matter how innovative the conclusions. Thus, the success of any new Islamic marriage law will depend very largely on the *ijtihad* qualifications of the legal scholar(s) creating it. Without appropriate training in established Islamic legal theory, their conclusions are likely to lack credibility in the general Muslim public, as well as the juristic community whose doctrine it is challenging.

The second caveat—the impact of past consensus—is a bit more complicated and potentially more of an obstacle. Consensus, a core idea in established Islamic legal theory, can have a drastic impact upon the staying power of individual *fiqh* rules. To put it briefly, Islamic jurisprudence is built upon the multiplicity of many different schools of *fiqh* doctrine, but if there is unanimous agreement of all qualified jurists of a given age, that agreement has a higher status than an average *fiqh* rule. According to Islamic legal theory, consensus transforms a *fiqh* rule from mere probability to certainty—the same epistemological status as the Quranic text. In the world of Islamic jurisprudence consensus can thus change a fallible human opinion into certain truth, binding upon all. This means that creating new Islamic legal doctrine is not so simple a matter as just engaging in new *ijtihad*, because Islamic legal theory did not allow new *ijtihad* on questions that had already been answered by scholarly consensus. For brand new questions never before presented (such as those presented by modern bio-ethics and technology), this is not a problem, for no classical jurist could have imagined the possibility of, say, *in vitro* fertilization or the use of the internet for conducting business. But it is a harder one for age-old issues such as a woman's access to divorce, or sexual availability of wives, where changes in social understandings make classical rulings inappropriate or even oppressive, but the legal questions have nevertheless been asked and answered by past jurists. In short, the doctrine of consensus means that, if consensus was reached in the past, the field is not open to new interpretations of the same questions by new *ijtihad* taking into account the realities of our time, perspectives, and circumstances.

One way out of the grip of this dead hand of the past would be to radically reform Islamic legal theory altogether to argue for changing or even deleting the classical doctrine of consensus to allow new opinions even in the face of settled past conclusions. This would be an extreme move, one that would risk losing supporters that might otherwise support reform done within the existing jurisprudential rules. To reject consensus would be to reject a foundation of Islamic legal theory— that jurisprudential scaffolding upon which all Muslim jurists stand to craft their legal rules. Purging one part of the methodological structure might render all of it vulnerable to change or deletion, and might thereby create intolerable foundational challenges. In the aftermath, how would contemporary Muslim scholars decide which of the existing tools would stay and which would go? Would new ones be added, and how? Would it even still be Islamic law if it were grown from such a different set of roots? These are obviously very big questions to which there are no ready answers. That is why many reformers choose paths of reform that do not involve such destabilizing questions, such as working within the existing structure of classical Islamic legal theory—using them to update and even correct mistakes in the positive law, while still maintaining those established foundations.

Frankly, I have not done enough research on the role of consensus in established Islamic marriage law to know if it played a significant role in solidifying the doctrinal rules discussed here. I do not know, for example, if it was asserted that there is consensus

that male ownership is the basis of sexual licitness, let alone on the doctrines emerging from that concept (unilateral divorce, sexual availability of wife, etc.). But, given the pervasiveness of these concepts and the similarity of doctrinal rules across the schools, it is certainly possible that this is the case. If so, then there is a powerful dead-hand-of-the-past consensus challenge with which contemporary Muslim marriage law reformers must deal.

But if it is possible to get past the obstacle of consensus in established Islamic marriage law—and I personally hope that it is—I can imagine one possible approach that modern Muslim jurists could pursue to create an alternative scheme of Islamic marriage law, one that is not based upon an analogy to slavery and concubinage. The alternative, as I see it, lies in the Islamic law of partnership contracts.

A New Model for Islamic Marriage Law: The Partnership Contract

Could Islamic marriage contract law proceed from a different basis than the sales contract and the analogy to owning a female slave? I believe the answer is yes. There is an established body of Islamic contract law that seems to me quite well-suited for the subject of marriage and which would fit much better with contemporary sensibilities about marital respect and harmony, women's agency and the aversion to slavery. That body of law is the field of Islamic partnership contracts, a field that not only has historical pedigree going back to the earliest periods of Islamic legal practice, but also has commanded vibrant new attention, because it is instrumental in contemporary thinking about modern Islamic finance (El-Gamal 2006).

While I do not claim to be an expert in the Islamic contract law, let alone the nuances of partnership contracts, my review of this field indicates that it may be a fruitful area for new *ijtihad* on marriage contract law. To summarize, Islamic law regarding partnership contracts is based on several primary features that are useful for modern marriage contracts. Partnership contracts recognized under Islamic law depend on all the parties' continuous concurrent consent, in both the continuation of partnership and the terms imposed on each party. In addition, each party has to contribute something to the partnership—whether it is capital, labor, or something else. Beyond these generalities, there are many specific types of partnership contracts recognized in Islamic law, and the rules governing them vary across the schools. As an example of one doctrinal scheme, the Hanbali school (probably the simplest system) requires that partners agree 1) to assume relations of mutual agency and at times suretyship, 2) to contribute work, credit, or capital, or combinations of all three, and 3) to share profits in predetermined percentage shares. In addition, each partner binds the other partners in dealings with third parties and is liable for any infractions. Perhaps most significant for our present purposes, partnership contracts are revocable at will by any partner and terminate with the death of any partner (El-Gamal 2006).

There are three basic principles that are deemed to be essential to all partnerships, and cannot be varied even by the parties' agreement. These are 1) they are revocable at will, 2) losses are borne by partners in proportion to their shares of ownership of capital, and 3) profits must be shared by percentage, not in fixed sums. These three principles, too complicated to fully describe here, stem from Islamic legal doctrine prohibiting interest and speculative transactions (the underlying purpose being to prevent unfair advantage by capitalizing on future uncertainties) (Vogel 1998).

Given these basic parameters, I believe that Islamic partnership contracts are better suited to be the base theoretical model for modern Muslim marriage contracts than the current sales contract model. If we take seriously the principle—recognized by even classical jurists—that both husband and wife are parties to the contract, then partnership contracts are a logical framework for thinking about marriage contracts. Moreover, marriages vary widely between couples and contexts, and there are many different types of partnership contracts recognized in established Islamic law. This facilitates a variety of choices by spouses wishing to tailor their marriage contract to individual circumstances. For example, a limited partnership ʿinan) is one where each of the partners contributes both capital and work, whereas in a silent partnership (*mudaraba*), some of the partners contribute only capital and the others only work; in a labor partnership (*abdan*), the partners contribute only work, and in a credit partnership (*wujuh*), the partners pool their credit to borrow capital and transact business with it. (Each of these simple models could be combined to form more complex types of partnerships.) Given the infinite diversity of marriage styles, using

partnership contracts as the basis for Islamic marriage law is a very useful platform for couples to tailor their marriage contract to reflect their own unique financial, work, and life circumstances.

Another benefit of a new scheme of marriage law based on partnership contract law is that it would preserve the existing structure of marriage as a contract, and merely shift the contract type from that of sales to partnership. Thus, although it would not follow the existing jurisprudence based on sales and slavery contracts, a new partnership-based model of Islamic marriage law would not stray too far from established Islamic jurisprudence as whole, because it would draw from existing, well-established principles of a different area of Islamic contract law.

In sum, I believe that the Islamic law of partnership contracts is eminently well-suited to be the basis of new *ijtihad* for Muslim marriage law, because it would facilitate new rules honoring mutual spousal respect, including in sexual relationships, and the concept of women's agency. As I am not a specialist in Islamic contract law, I cannot fully work out the details here, but I can offer some preliminary suggestions on how this model could offer positive changes in some areas of existing Islamic marriage law that are harmful to women.

Licitness of Sexual Activity

As theorized in established Islamic jurisprudence, sex is made licit in marriage by a husband's payment (initially the *mahr*, and over time, marital support) by which he acquires exclusive "ownership" over the wife's sexual parts. As summarized above, this concept is directly related to the juristic analogy of marital sex to sex with a female slave: in both cases, payment makes sex lawful by analogy to a "sale" of sexual access. But what if the analogy to a sale contract is not used? What if the payment part of the marriage contract—the *mahr*—was not the *price* of sexual licitness, but rather, incidental to it?

In other words, what would make sex licit if marriage contracts are viewed through a partnership, not a sales, lens? The most obvious answer seems to lie in the core element of any contract—the mutual agreement of the parties. Even in established Islamic marriage law, the idea of consent of the parties is a crucial factor in establishing the validity of offer and acceptance of a marriage contract, and the payment of *mahr* and maintenance are only additional (required) components of that contract. Perhaps, then, mutual agreement could be considered the core element to the validity of a marriage contract, and thus the basis of the licitness of sexual activity within that marriage. This seems to me to be the most logical answer, and the most responsive to the idea of marriage as beginning with the mutual consent of autonomous human agents.

Basing the licitness of sex on mutual marital agreement also honors modern sensibilities about the nature of healthy sexual relationships. The classical scheme, by basing the licitness of sex on male control and ownership, easily leads to situations of women becoming sexual objects—mere receptacles for the male sex drive. Despite Islamic moral exhortations otherwise, existing Islamic law does not protect sex as a mutual act where agency and consent of both parties is essential. Today, the idea of treating women as sex objects is socially unacceptable. It is understood as harmful to women, to relationships, and to society in general. A partnership model of marriage contracts would facilitate a clear break from the destructive outdated idea of sexual licitness based on male ownership and exclusive control, looking instead to mutuality and consent.

This new concept of sexual licitness would also eliminate legal tolerance for marital rape. In a partnership model of marriage contract, marital support would no longer be a payment in exchange for the sexual availability of the wife, but rather, a bargained-for negotiation reflecting an agreement of mutual financial and labor responsibilities within a marriage. Because a husband's payment of support would no longer be the basis of the licitness of sex within the marriage, a financially-supported wife would no longer be obligated to be sexually available on demand. Sexual rights would be based on mutuality, respect and companionship, rather than male ownership and payment.

Mahr

This brings us specifically to the topic of the *mahr*. If, under a partnership model, *mahr* is not payment for access to a woman's sexual parts, then what purpose would it serve? Would it even still be important in a scheme of partnership-based marriage contracts? I believe that the *mahr* should remain an important

element of Islamic marriage contracts, even under the partnership model, but not for the same reasons as imagined in the sales model. The *mahr* is specifically designated in the Quran and Prophetic narrations as important, so I think it should be taken seriously. The scriptural sources are silent, however, on the reasons behind the *mahr*, so we are left to speculate on this question. The idea that the *mahr* is payment for licit sexual access in established jurisprudence is one speculation by classical jurists based on their own social context and analogies that seemed appropriate at the time. But we are not obligated to agree with their speculation.

Once we eliminate the idea of the *mahr* as consideration for sexual access, then some interesting new insights open up. One thing that is striking in the Quranic verses on *mahr* is the suggestion that it is a type of gift rather than a bargained-for consideration. In contract law, consideration always involves a mutual exchange of something. But gifts are given freely, not exchanged for something else. On the other hand, because it is commanded by the Quran, a *mahr* is not purely a gift either. Instead, it seems more like an effect or incident of the contract, automatically and externally imposed upon the parties by law—in this case, the Law of God. I imagine it to be similar to the fair labor statutes and rules of consumer protection in American law in that these are legislated to automatically attach clauses to some routine contracts in order to protect parties likely to be vulnerable.

While special protection to women as the vulnerable parties in a marriage contract might seem sexist to some, I do not find it offensive that the Quran would take into account the biological and social realities that can put women at a financial disadvantage. That is, there are natural limitations on many women's working hours due to childbearing, infant nursing and child rearing, for those who choose to do so. Add to these facts the historical realities of gender discrimination in the marketplace, many of which are still true today, and the gendered power imbalances that cause women specific financial disadvantages are hard to ignore. (To take just one contemporary example, an American Muslim woman might find good use for her *mahr* in simply funding post-partum time off from her job, given the lack of federally required paid maternity leave in the United States.) In sum, I find it quite logical to imagine that the Quranic verses require *mahr* in order to provide a type of "fair labor" tool by which women could neutralize the potential biological and social disadvantages they might face during their life.

Then again, not every woman becomes a mother, and not every woman needs help in attaining financial independence. Accordingly, the *mahr* requirement allows for individualized tailoring to respond to each woman's unique circumstances. The substantive content of each *mahr* is highly negotiable—it can be anything of value, ranging from a substantial financial sum to a symbolic token. (The Prophetic traditions mention several creative, non-monetary *mahrs*, including one man's conversion to Islam, and another's teaching his wife a chapter of the Quran.) Those women who do not feel they will need this tool can tailor their marriage contract accordingly. But for those who do, it is a powerful tool that, because of its Quranic source, cannot be easily dismissed by those around her.

In sum, whereas the classical jurists spent very little time thinking about the practical realities that the *mahr* serves in a woman's life, a new *ijtihad* of marriage law could benefit from the insights provided by women's activists (Muslim and non-Muslim) chronicling the financial disadvantages that women regularly face. Seen in this light, the *mahr* is, like consumer protection law, a legally mandated incident of every marriage contract that reflects a higher legal principle that must be respected by the contracting parties. This understanding of *mahr* could eliminate the feeling of "selling oneself' with which many brides associate it.

Marital Support

The *mahr* is not the only aspect of the marriage contract that could be tailored to a couple's individualized needs under a partnership model. Because marital support would no longer be the basis for a male-ownership concept of sexual licitness, there would also be no automatic presumption that the husband must be the breadwinner. Spousal maintenance would instead be a mutually bargained for provision of each marriage contract. I see several social advantages to this increased flexibility in spousal financial obligations. First, it fits the reality that every marriage is different, and each spouse may have different skills that don't always translate well to the husband-as-breadwinner default model. What if, for example, the husband is an artist who gets paid in large lump sums every

few years, but the wife has the skills to bring home a regular monthly paycheck? Or the husband prefers to be the primary child-rearer and the wife's job pays more anyway? The partnership model allows spouses to negotiate these roles rather than operate against default presumptions that do not fit their lives.

Given the many types of partnerships recognized in Islamic law, there are a variety of legally ready-made choices for spouses deciding how to allocate services and property contributions to their marital household. For example, one couple might create an *'inan* (limited) partnership marriage contract where both spouses agree to contribute both capital and labor ("labor" being defined as either an income-creating job or household work and childrearing, or both). I would imagine this scenario would work well for a marriage in which both spouses plan to earn an income, but in unequal or unpredictable amounts. The traditional stay-at-home-parent scenario, on the other hand, seems more suited to a *mudaraba* (silent) partnership where one partner contributes labor and the other contributes capital. In each case, Islamic partnership law would provide further details on how the profits and losses should be borne by each party. (In the case of the *'inan*, the spouses need not contribute equal amounts of capital and they may determine the profit shares as they like, but losses should be borne in proportion to the capital contributions. In a *mudaraba*, Islamic partnership law provides that the spouse who provides the capital is liable for all losses, and the non-capital-providing spouse bears no losses (except in losing his/her labor), and is not entitled to any capital profit until the capital-providing spouse has recouped his or her investment, and then only in the agreed percentage. An even more flexible marriage contract might use the model of an *abdan* partnership, in which both parties contribute only work, and Islamic partnership law holds that such partners are free to agree upon their relative shares of ownership of the partnership capital, and are obliged to share losses accordingly. And, again, all these simple models could be combined to create more complex combinations of marriage arrangements.

Finally, marriages mutually arranged under the partnership model would more powerfully include many contract stipulations that currently have only limited enforceability under existing Islamic marriage law. There is nothing inconsistent with the partnership model, for example, if a husband and wife were to agree that their marriage will be monogamous and create enforceable consequences for breach of this provision.

Divorce

Perhaps the most significant change that would occur in Islamic marriage law by switching to a partnership model would be the equalization of access to divorce. Because Islamic partnership law is based on the fundamental principle of all parties' continuous concurrent consent to the continuation of the partnership, this means that in Islamic marriage law based on partnership contracts, *both* spouses would have the right to end the marriage at will. Thus, both husband and wife would have a unilateral right of divorce (except in the Maliki school, which would require mutual consent). This very powerful doctrinal change would honor modern sensibilities about women's agency and correct the uneven, often manipulative power that traditional Islamic marriage law allows husbands to wield against their wives in a time of divorce. It would also complete the disentanglement of the idea of male ownership as central to the legitimacy of marital relations that exists in established marriage law.

Because it would be so drastic a change from centuries of established Islamic marriage law, mutual spousal rights to unilateral divorce might prove to be a rather hard sell in Muslim publics. Indeed, exclusive male access to unilateral divorce has been one area that has been extremely resistant to legislative change in modern Muslim-majority countries, largely because so many believe it is a fundamental aspect of Islamic marriage law. But the idea of women exercising *talaq* divorce is not itself unheard-of in established jurisprudence. Even under existing Islamic marriage law, a woman can acquire a "delegated" *talaq* right from her husband, usually documented in her marriage contract (Ali 2009). This "delegated divorce" option has in fact garnered a lot of attention from contemporary Muslim women's activists encouraging Muslim women to preserve this right for themselves in modern Muslim marriage contracts. What the partnership model of marriage contracts would do, then, would be to eliminate the gendered preference of the unilateral divorce right. Instead of automatically giving it to husbands (and allowing it to wives only through delegation from their husbands) the partnership model would give both spouses this right equally (or under the Maliki school, both would be limited by a requirement

of mutual consent). This is possible because (contra the sales model) male ownership of the marriage tie would not be the central legitimizing feature of a partnership-based Muslim marriage contract.

Moreover, equalization of access to divorce means that under the partnership model of marriage contracts, there would no longer be any need for a doctrine of woman-initiated divorce (*khul'*) and the sharp doctrinal differences between it and male-initiated unilateral (*talaq*) divorce. Whether or not a woman keeps her *mahr* would thus have nothing to do with whether or not she initiated the divorce. With the *mahr* being disentangled from the idea of payment for sexual access (and the return of *mahr* in a *khul'* divorce being described as a wife "buying herself back"), a woman's *mahr* would be controlled only by the mutually-agreed terms of the marriage contract. Similarly, judicial divorce (*faskh*), if it existed, need not focus on fault or grounds for divorce committed by the husband, but rather, could become more like third-party mediation of asset division and other logistical needs of divorcing parties, whenever a couple is in need of such assistance.

Conclusion

In this chapter, I have briefly sketched out how a new scheme of Islamic marriage law based on Islamic partnership law might work. If such a doctrine were fully developed and implemented, it would enable women-empowering rationales to flow logically with the doctrinal rules, rather than at cross-purposes to each other, as occurs now. The result would likely be a vast improvement in the situation of many Muslim women as well as the strategies employed by *sharia*-based women ʿs rights activists. However, I am also aware that not everyone would welcome such a new scheme. First, it may not be considered legitimate according to the jurisprudential boundaries of acceptable Islamic law reform, and thus would not be respected by religious authorities with the strongest influence on the general Muslim public. Second, many Muslims (jurists and laypersons) see no need for reform in the first place, and are quite satisfied with established *fiqh* doctrine on marriage as it is. Thus, it is inevitable that, no matter how solid the reasoning, a new partnership model of Islamic marriage law will only ever appeal to a part of a given Muslim audience.

From this fact, I take two lessons: 1) *fiqh* diversity means that the new has to tolerate the old, and 2) it is always good to have a back-up plan. The first lesson is simply this: the same *ijtihad* principle that would give legitimacy to a new partnership-based doctrine also gives legitimacy to the existing sales-based doctrine. The fallible nature of both old and new doctrinal schemes means that both must be allowed to exist. This preservation of doctrinal diversity is, in my opinion, one of the most powerful attributes of Islamic jurisprudence, because it facilitates choice. That means that there is no way to excommunicate or officially eliminate the established scheme of Islamic marriage contract law, even if a new scheme is crafted. That new scheme would simply exist alongside the existing scheme in the marketplace of *fiqh*, and modern Muslims would have the freedom to choose between them.

Given that first lesson, the second becomes even more important. Despite my enthusiasm for the prospect of a new partnership-based Islamic marriage law and what it could do for Muslim women, I have to ask: what is the back-up plan if this new model (if and when it is created) fails to take sufficient hold? Do we use the imperfect strategies developed under the established Islamic marriage law, or do we hold out until we can convince more Muslims to adopt the new and improved model? The dilemma feels similar to that faced by American proponents of the Equal Rights Amendment (ERA) to the United States Constitution in the early 1980s when it failed to be ratified by the last deadline. Given that the ERA provided clearly-stated coherent constitutional protection for women's rights, should these activists have held out until it could be proposed again, or was it better to use the not-as-ideal Equal Protection doctrine of the Fourteenth Amendment to work for gender equality? The activist in me leans toward doing the best we can with what we have, although the theorist in me much prefers the cleaner, more coherent path of new *ijtihad* and fresh legal reform. A back-up plan provides us something to use in the interim before an alternative scheme of Islamic marriage law can be created (and even afterwards, for those Muslim women choosing to follow the traditional scheme). This means that the strategies currently employed by *sharia*-based Muslim women's rights activists may be the only tools available to provide some modicum of mutuality and equality in Muslim marital rights right now. These strategies may not be, as Kecia Ali points out, as theoretically clean as a fully-formed alternative model of marriage in Islam, but they have the advantage of being immediately

effective in those limited areas where they can help women.

This brings us back to the *mahr*, and my advice to modern Muslim brides (and grooms). Yes, the jurisprudence that equates *mahr* with the "price" of female sexual access is disturbing, and thus it is understandable that many Muslim women opt out of including a substantial *mahr* in their marriage contracts. However, I believe that this knee-jerk rejection of *mahr* is shortsighted. Why let inappropriate and outdated juristic presumptions about sexuality rob women of what could be a very powerful tool for financial independence? I believe that strategic use of the *mahr* should be part of a back-up plan for women's empowerment under existing doctrine, and it will have an even more powerful role in women's agency if it is part of a partnership scheme of marriage law that is developed in the future.

So, to Kecia Ali's challenge for a new model, I answer "yes, there is a better way," and I have laid out here my ideas of what that way could look like. The legal theorist in me, the ERA supporter in me, would love a brand new doctrinal scheme along this model to become the Islamic norm. But the activist in me warns that if this doesn't happen, we must not abandon the needs of the many women living within the classical model. That is why I believe the current approach of *sharia*-based Muslim women's rights activists, no matter how much Kecia Ali points out its ideological mismatch with established law, should nevertheless be respected and understood for the pragmatic good that it does, working within the existing paradigm. But I also believe that Kecia Ali and I share a hope for a future where such back-up plans are no longer necessary. [1]

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1 I wrote this chapter during the last days before giving birth to my third child, a feat possible only with the enduring support of my cherished husband, Matthew. I would like to note my deep gratitude to him and to all three children for their patience.

Afterword from *Polygyny: What It Means When African American Muslim Women Share Their Husbands*

DEBRA MAJEED (2015)

Polygyny is a story of Black women and Black love. It acknowledges that legal, cultural, and religious understandings of the Islamic marriage institution in a Muslim minority context continue to significantly impact the lives of Muslim women as well as communities in which marriageable men are in short supply and women outlive those who remain. (A lengthy chapter is devoted to "The Islamic marriage institution" in Jamal J. Nasir, *The Status of Women Under Islamic Law and Modern Islamic Legislation*, 3rd edition [Leiden: Brill, 2009]. That "data pertaining to rates of marriage among Black women register a distinctive social reality," is a key theme in Dianne M. Stewart, *Black Women, Black Love: America's War on African American Marriage* [New York: Seal Press, 2021].) This is a story that speaks in generalities to maintain the anonymity of my subjects and in specificity to visibly link multiple-wife marriage among African American Muslim women to the heterosexual dyadic unions of other Muslims in the U.S., whereby both forms of household organization regulate relationships, resources, status, and identity. While Islam extends conditional permission to husbands to take up to four wives, their successful application depends upon the dynamic and evolving nature of communal exegesis and attention to otherwise declared private matters. My current project on Muslim widows serves as a fitting sequel to *Polygyny* in that both works interrogate interpretations of the Qur'an by twenty-first-century Muslims. This conclusion of the first book-length treatment to explore the embodied experiences of African American Muslim women who share their husbands focuses on a single story, one that reinforces the importance of spousal transparency and transgenerational support in healthy marriage formation regardless of form and the deficiencies inherent in communal practices that do not center the health and wellbeing of women and children.

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Muslim Womanist Praxis and Polygyny

> It's taboo for people to talk about polygamy, at least in front of the parties involved, because of the assumptions that the first wife is distraught, that the first marriage is on the rocks, or that the second wife doesn't care about the first.
>
> *Rabi'a, blog post*

As a womanist, I routinely ask the "So what?" of my scholarship. That is, I strive to link my intellectual explorations to practical applications that can benefit the communities and subjects I study. This is one way I attempt to give back to those who share their feelings, experiences, and lived realities with me. I wrote *Polygyny* with the hope that the musings within might lead to broader conversations and expanded initiatives about marriage and family life that could educate and empower women like Karimah, with whom I first began to reflect on multiple-wife marriage. I am pleased to say that such reflection is under way. Void of a unified direction that the association of Imam Mohammed is willing to embrace, however, the inequities that I observed will continue. As Mignon Jacobs has discerned, "Relationships define the well-being of a community and reflect its ideologies."[1]

From the start, I have been aware that some women resist becoming Muslim or aligning themselves with the association of Imam Mohammed because of practices like polygyny that they consider to be undesirable.[2] I have been concerned about where and in what manner Muslim women could be situated at the forefront of dialogues that involve them. How, I have wondered, can African American Muslim women bring their experiences of living Islam into the process of theological interpretations and practical applications of them? While I neither condone nor promote polygyny, I do support its decriminalization. I do realize that it is here and practiced by African American Muslims. Thus I feel, as Imam Mohammed has directed, that his community needs to confront it and marriage as a whole to enhance Muslim family life.

Here, I begin to theorize about what a Muslim womanist praxis might begin to look like if the subject were multiple-wife marriage. I have no definitive answers. Still, while these recommendations reside at the reflection stage, they do speak to the findings of this pro-woman, pro-family study.

It should be of no surprise that I am guided by my sources here as well as throughout the study. I take full advantage of a single source—the final interview subject for this book. Rabi'a has been a dear colleague for several years. When she began to home-school her children shortly after the birth of her first son, we drifted apart; our encounters became limited to occasional and chance conversations in the hallways of annual conferences. That said, I always thought she had the perfect academic position, a nice home in a geographical region with great weather, the support of one of the strongest mosque communities in the nation, and a wonderful marriage. I envied her, as did many others. But when we reconnected as publication of this book neared, I was reminded of the real reason I so admired her and continue to do so today. Rabi'a takes her faith seriously and lives it transparently, with a regular mix of vulnerability, honesty, and expectancy. In telephone conversations and email correspondence, we caught up recently. I quickly discovered that Rabi'a gave birth to her third child in 2013; her husband, Waleed, took a second wife two months later. Only now has Rabi'a been ready to talk with me about the experience of living polygyny. She called our conversations therapeutic; I received them as a fitting way to offer a few final thoughts.

Now in their thirties, Rabi'a and Waleed have been married for nine years. This is her first marriage, his second. From the start, Waleed was open about his interest in multiple-wife marriage if the opportunity emerged and if Rabi'a agreed. Like Rabi'a, he was concerned about women in their mosque who desired marriage but were unable to find suitable mates. Rabi'a was convinced that her husband was "the type of person who could do" polygyny, that he was emotionally, physically, spiritually, and financially mature enough to take on the additional responsibility. More important, Rabi'a characterized her husband as one who is faithful to Allah. So, together they studied the authoritative sources of Islam, talked to acquaintances living polygyny, and prayed—a lot, as other couples have done. As they did, Rabi'a reminded Waleed of two of her more earthly preconditions for living polygyny: at least seven years of marriage to her and an annual income of $100,000. Having met both within eight years, Waleed approached Shakirah, a woman Rabi'a agreed would be potentially a good co-wife. Rabi'a was not surprised to learn of Shakirah's first question to Waleed: "What does Rabi'a think?"

My encounters with Rabi'a and other sources for this book have prompted a number of recommendations regarding multiple-wife marriage, especially for five constituencies: mosque communities nationally, those who officiate at *nikah* ceremonies, women about to marry, women who desire to live polygyny, and men who are about to live polygyny and their current spouses.

First, I recommend a widespread process of engagement, dialogue, and education on the forms of marriage permissible in Islam and their application in the secular United States. While the findings of this study reveal a wide array of perceptions, contradictions, and paradoxes, one theme is undeniable: many people live polygyny without the backing of the Qur'an or the tradition of the Prophet, and they do so to the detriment of themselves and others. It is equally evident that no consensus exists among Muslims globally, locally, or within the community of Imam Mohammed on the purpose, benefits, and responsibilities associated with marriage as an institution established by G'd. By this I mean that a Muslim woman from Peoria, Illinois, may encounter different ideas about her marital rights in general or in reference to polygyny specifically if she moves from the Midwest to the South, for example. Furthermore, many imams and religious leaders are divided on the legality of polygyny in the United States and other countries where multiple-wife marriage is prohibited by civil law. For antipolygyny leaders, the equality prescribed by the Qur'an is unobtainable for co-wives in marriages that are unregistered with civil courts. These women do not have access to legal spousal rights in the event of divorce or the deaths of their husbands. Perhaps a series of monthlong events that occur at the same time in every willing mosque and are facilitated by women and men could help dispel the many myths about the single most important framework for family development. Such initiatives about marriage and family life could be incorporated in various forums (Friday congregational prayers, sisters' circles, brothers' classes, Sunday *taleem*, special events, and so forth). Those who say they follow the leadership of Imam Mohammed (and others) would benefit from clarity on a number of crucial issues, like timing, the importance of written marriage contracts, and notice to current wives.

I recommend discussions about children and mental health issues, too, with particular attention devoted to how to Islamically prepare children for marriage and, if necessary, for divorce. A recent focus group for a project on female religious authority reminded me of the urgency of the latter. There, nine African American Muslim women gathered weeks before Ramadan 2014 to respond to a video about Amina Wadud that focused on the woman-led prayer movement. Quickly the discussion turned to scripture and the importance of waiting on Allah for direction in life decisions. Suddenly, a burst from a thirty-eight-year-old woman interrupted the otherwise pleasant discussion, revealing the painful life her mother endured for years after her husband took a second wife. It was clear to all that the experience adversely altered the mother's and daughter's perceptions of themselves and their Creator. "My mother died waiting on Allah," the woman said, emphasizing the word "waiting." This woman did not feel her mother received the necessary care from her community, and she is still wrestling with G'd about the treatment of her mother. Thus, for this woman, her mother's wait extends beyond death.

I suggest an expansion of Imam Mohammed's nine guidelines to require some level of oversight of imams and others who officiate at *nikahs*, regardless of marriage form, and formal instruction on the road to healthy marriage for male and female Muslims. Perhaps some of his leaders who coordinate workshops and forums on family life around the country could take more visible and joint leadership in this endeavor. Already at work are Maryam Muhammad of Charlotte, Imam Faheem Shuaibe of Oakland, Imam Khalil Akbar of Charlotte, Imam Ronald Shaheed of Milwaukee, Munirah Habeel, Imam A. K. Hasan, and Debra Hasan of Los Angeles, and Ndidi Okakpu of Chicago, among others. Endeavors such as the Healthy Marriage Initiative organized by SHARE (Services for Human Advancement and Resource Enhancement) Atlanta add to the mix of opportunities that could be contexualized around the country. Linking these efforts with other activities nationwide might spearhead the formation of a database of contacts and resources by one of these groups that any American Muslim could access. Drawing upon the expertise of female health professionals, sociologists, and theologians could prove useful as well.

Second, I would recommend requiring local mosques and Islamic organizations to keep track of marriage registrations (both civil and religious) of couples affiliated with them, even *nikah*-only unions. In the absence of an ordained member of the clergy, any knowledgeable Muslim can officiate at a wedding; those

providing this service have been overwhelmingly male.[3] The lack of transparency in this area has contributed to a number of secret ceremonies. Perhaps the handbook for imams that Imam Rabbani Mubashshir of Chicago has been charged to draft by the Conveners of the Midwest Region will include attention to the roles and responsibilities of female guardians, those who assist in the negotiation of marriage contracts and those who conduct marriage ceremonies.

I certainly am not an advocate for American family law or civil courts, in which petitioners of divorce are required to publicly appear and testify to personal details in the presence of strangers. I must acknowledge, however, that women whose marriages are registered with the state have access to legal judgments that carry enough weight to induce most men to comply. Without communal involvement or enforcement, women living polygyny and divorce in Muslim-minority areas are on their own when they may be most in need of care and protection. Yes, women in Muslim countries can be—and many are—vulnerable, too. But in the United States, a marriage license enables the state to investigate the status of potential spouses. No doubt, this would mean state intrusion, but it could also mean state protection of women and children. For those opposed to civil involvement, a similar process could be developed for religious-only ceremonies. In this study I have discovered that polygyny leaves open the possibility of incredible manipulation; a process of recourse could help ensure gender equality and social justice.

The third recommendation is one I intend for women whose husbands are considering taking additional wives. Rabi'a and other women living polygyny have chosen to exercise their agency by stating in their contracts what type of marriage theirs will be. In addition, Rabi'a and her husband discussed the matter privately and with Shakirah, who was about to enter her second polygynist union. The three also sought advice from knowledgeable and respected community members, marriage therapists, and family law experts. Engaging in such a process could help some women, like those living polygyny of coercion, avoid the pitfalls of unhealthy family dynamics. Rabi'a said she had to learn that "just because he's taken a second wife doesn't mean he doesn't care about you." She had to admit that what she felt distinguished her from all other women, being the only mother of her husband's children while he is married to her, could change one day.

Among the pieces of advice Rabi'a received was this: "Focus inward because this journey is yours, not your husband's, sister's, friend's . . . yours."[4] Even with good advice, however, Rabi'a is quick to acknowledge that living polygyny isn't a simple journey:

> Know that this is potentially a sad situation.... To prefer someone over you, you have to have a certain type of relationship with Allah, a certain way of seeing, not the average way. You have to see for the next life. You don't always see through Allah's eyes.
>
> When you're having these apprehensions [that accompany polygyny], it's because your heart is occupied with other than Allah.[5]

Finally, Rabi'a cautions women not to say "yes" or "okay" when they mean "no." It is every woman's Islamic right, she and others say, to choose not to live polygyny even if the wife thinks her husband is approaching the practice according to the dictates of Islam. "Believe that there is something in this for you," Rabi'a adds. "If he's a good man and he really loves you, now he's trying to please you even more."

My fourth recommendation is directed to women who desire to marry and to live polygyny. Findings in this study suggest that justice and a peaceful existence are more likely when first and potential subsequent wives communicate prior to any multiple-wife marriage. Rabi'a suggests that others do what Shakirah did: reflect upon the likely journey of the husband's current wife, talk with her about her feelings, and share one's own. The two women ideally would explore potential issues such as the likelihood of additional children, managing family outings and special celebrations, explaining the marriage decision to others. They would ask questions like "Can he really afford this?" They would not proceed if the first wife or wives disapprove. The prospective wife would be mindful, too, that while he is negotiating a new union with her, his current wife or wives may be renegotiating their contracts. In the end, if women want for each other what they want for themselves, my subjects say, justice and the fear of Allah should be their yardstick.

This study reveals the benefits of a fully public *nikah* for second, third, and fourth wives. On this front, I find the link of acknowledgement to responsibility articulated by Lamisha and Rabi'a instructive. Making vows public,

particularly in the presence of a husband's current wife or wives, can add legitimacy to all his marital decisions, my sources say. But even if they choose not to attend, *nikahs* should be conducted with the awareness, if not approval, of all current spouses.

I acknowledge that this recommendation differs from the qualifications outlined by Imam Mohammed. But he taught his students to have minds of their own, fully aware that each individual is responsible for her behavior before Allah. Rabi'a wrote this in her private blog:

> When you do something like this, you do it for God. You do it to please God, to be in God's favor, to receive God's love, to be one of God's favorites. Because, as the Qur'an states, God loves those who prefer others above themselves, God loves those who are patient, God loves those who put their trust in Him, God loves those who carry out the most beautiful acts.
>
> I realized about a month before my husband's wedding that cultivating a friendship with my co-wife would make things easier for me particularly because we see each other all of the time in our mosque community. Both of us are active and loved members of the community. We have pretty much the same friends, though our closeness to these friends varies. Since people were going to be watching us, it would be best, I realized, to make those moments in the mosque or other community spaces as comfortable as possible, and forming a friendship with my co-wife would make a difference. And it has![6]

Obviously for Rabi'a, Shakirah, and others living polygyny of liberation or choice, women who choose their form of marriage and are involved in the selection of subsequent wives position themselves to enhance their marriages and their personal well-being. This means taking "the higher way." Rabi'a has embraced this concept and found the words of one religious leader especially encouraging. She e-mailed them to about a dozen close family members and friends with whom she has shared her "life situation":[7]

> Some of the *ulama* say *ahsanahu* means that when Allah calls you to the higher way, you take that way. You don't take the low way, even if it is acceptable. You take the high way. This is the time when Muslims have to rise above their ego, have to rise above their tribalism, rise above their own self identity, rise above their own images of worth that they put up higher than the din [*deen*] sometimes.[8]

Rabi'a says, "My heart was agitated about my life situation" some days, as the other women informants likewise have acknowledged. She says she gains strength in knowing that "this situation is really all about me and my journey to Allah."[9]

The fourth and fifth recommendations are related, but the latter is directed specifically to men. As the strongest examples of living polygyny with any semblance of justice demonstrate, a man who desires to live polygyny must realize that courting or engaging in conversations with prospective wives with the full knowledge of his present wife or wives is the key to an Islamically strong and healthy marriage. It also is important for men to strive to legitimize subsequent unions with the immediate family of their potential wives. Waleed, for example, chose to communicate his rationale first to Rabi'a's family and then to his soon-to-be in-laws:

> Rather than being excited, I am rather cautious and concerned, for Rabi'a, for Shakirah and also the impact on my sons. The major reason that more men do not even consider [polygyny] is because it is a serious responsibility; our faith has strong consequences for men who do not treat their wife/wives with fairness and justice. Additionally, there is the financial responsibility that most men would not or could not handle appropriately.
>
> While I realize that polygyny is not the answer for creating healthy relationships in our faith community and beyond, it is one option available to the Muslim community to ensure that women have husbands to support them and children have fathers (stepfathers) to assist in guiding them. Looking back, I wish a courageous brother chose this path with my mother who was single and faithful for the last twenty years of her life.[10]

Interestingly, Waleed's father is a polygynist who took a non-Muslim woman as his second wife but cautioned his son to forgo the practice due to the timing: Waleed

approached Shakirah when Rabi'a was pregnant with their third son. He and Shakirah exchanged vows when the youngest son of Waleed and Rabi'a was two months old.

Finally, I recommend the removal of communal acceptance of marriage ceremonies that occur without the knowledge of a husband's current wife or wives. In other words, transparency needs to be woven into the process so that at least the local mosque community is aware of the commencement and conclusion of marriage contracts. This might mean that some men would be encouraged to adjust their timing or discouraged from entering polygyny at all. It may be prudent for them to contemplate the psychological, spiritual, and physical restrictions on their current wives, such as illness and pregnancy, that may limit the options women believe they can exercise. Such reflection might motivate some men to forgo polygyny or to delay taking additional spouses until their current wives are free to fully exert their agency, as Waleed's father encouraged him to do. I would argue further that this is what Nasif, the father of Naim, means by "orientation."

I would characterize the approach of the imam who conducted the *nikah* for Waleed and Shakirah as particularly instructive. Like some other women living polygyny do in this circumstance, Rabi'a chose to attend the event. During the ceremony, the officiating imam announced her agreement before the community and prior to the exchange of vows between Waleed and Shakirah. The imam explained the road to living polygyny he established together with the three of them. His expectations included Rabi'a's presence at one of three premarital counseling sessions he required Waleed and Shakirah to attend. Rabi'a says she encouraged Waleed and Shakirah to make their marriage public and is convinced the officiating imam would not have conducted the wedding without her agreement. Making Waleed's marriage to her co-wife public helped position it on an equal plane with her own, Rabi'a says, and provides space for family members to verbalize their concerns.

As is common with many African American Muslims living polygyny, Rabi'a's extended family included non-Muslims. In fact, her mother, Hanan, also a Muslim, shared the news of her son-in-law's impending marriage, paying particular attention to acknowledge her daughter's role and perspective. Her e-mail read, in part:

> Rabi'a is alright with her husband taking on 2nd wife, even though we know that it will not be an easy path, but God willing, a steeper path where Allah will shower a lot of Blessings and Mercy on them in this world and in the next. Marriage is a very important institution in Al-Islam. Our tradition states that you complete half of your religion through marriage. Each wife will be known publicly and equally as Waleed's wife and not as a mistress. The relationships are honored in the sight of Allah. In most cases, the women have separate households and the man has to equally share his time between the two. This will be the case for them.
>
> Polygyny is not the norm in our religion, but allowed. Allah states through the Qur'an that the man has to be just to all of his wives. If he cannot be just, then he is only allowed one wife. One imam stated that if polygyny is done appropriately it can be a Mercy and a beautiful thing. If it is done inappropriately, it will be a messy thing. All three people involved, Rabi'a, Waleed, and Shakirah are special people of high morals and Muslim character and are good candidates for this situation, God willing. It takes a lot of courage and responsibility. They all want to please Allah and obey Allah. They are looking for the good that Allah has in it for themselves, the families involved, and the community.
>
> We also understand and believe that Allah (God) only wants Good for the believer and we trust in that, and we trust in Him. Our immediate Muslim families (of Rabi'a, Waleed, and Shakirah) have been in many discussions about this upcoming event. There are mixed feelings amongst us as to be expected, but we have tried to honestly address our concerns, doubts, and well wishes openly. This has been therapeutic.[11]

The journey of Rabi'a, Waleed, and Shakirah continues, as do those of many of the sources in this book. Ultimately, the expectations of Qur'anic justice remain whether one enters monogamy or polygyny. Muslim men and women alike must acknowledge that the marriage and divorce processes they embrace in the United States are part of their religious and cultural identities.[12] Together, they have the power, authority, and agency to decide the meaning of these processes

for themselves and for their future. My hope is that this book is received as one tool to help foster the good that Allah intends for all of our relationships.

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1 Mignon R. Jacobs, *Gender, Power, and Persuasion: The Genesis Narrative and Contemporary Portraits* (Grand Rapids, MI: Baker Academics, 2007), 15.

2 See Dawn-Marie Gibson and Jamillah Karim, *Women of the Nation: Between Black Protest and Sunni Islam* (New York: New York University Press, 2014), 190.

3 Scholar and activist Kecia Ali, among other women, was asked and consented to officiate at a nikah in 2004. She records her reflections of the experience in "Acting on a Frontier of Religious Ceremony." (Reproduced in this volume)

4 Rabi'a, e-mail conversation with author, July 17, 2014.

5 Rabi'a, interview with author, July 18, 2014.

6 Rabi'a, blog post used with permission. This is a private site for which either a link sent by the author or a password is needed. Those with access to the blog are Rabi'a's family and friends who are aware of her household arrangement.

7 In an earlier e-mail, Rabi'a refers to Eckhart Tolle's use of the phrase "to distinguish between our life and the situations that come up in life (so we don't identify our essence with a temporary situation)"; Rabi'a , e-mail conversation with author, July 18, 2014.

8 Rabi'a, e-mail reflection shared with author, July 28, 2014.

9 Rabi'a, e-mail conversation with the author, July 21, 2014.

10 Waleed, e-mail shared with the author, July 17, 2014. Waleed gave permission for Rabi'a to share with me the e-mail he sent to the family of his fiancée on the eve of their wedding.

11 Hanan, e-mail message shared with the author, July 18, 2014.

12 For a fuller discussion on marriage and divorce in the West, see Julie Macfarlane, *Islamic Divorce in North America: A Shari'a Path in a Secular Society* (Oxford: Oxford University Press, 2012).

Divorce

Specific Issues in Muslim Divorce

ZAHRA AYUBI (2006)

This article from the Georgia State Bar's *Family Law Review* serves as a brief primer for non-Muslim lawyers who are not familiar with Islamic law issues that might arise in Muslim divorces involving parties who want to incorporate laws from Islamic jurisprudence in their civil divorces. Muslims seeking divorce might find it useful to share it with their lawyers if they are interested in pursuing Islamic legal terms in divorce. It, like "Negotiating Justice" which is also included in this reader, arose from a research project on the intersections of civil divorce and Islamic divorce in the American context at a time when there was little published on the topic, other than Asifa Quraishi-Landes and Najeeba Syeed's "No Altars," also republished here.

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There are are an estimated four to six million Muslims in the U.S. and approximately 50 thousand reside in the state of Georgia. With the American Muslim population growing, U.S. courts have begun to rule on cases in which parties invoke Islamic law, and Muslim divorce laws in particular. Some courts have supported the use of traditional law or dispute resolution of the involved parties to settle their affairs using their own traditions, if they so desire.[1] Increasingly, judges have made decisions on issues related to religious divorce.

These decisions have been, at best, inconsistent from case to case and, at worst, unjust, unduly favoring one party because the information on Muslim divorce law presented by expert witnesses or by one or both parties is incomplete, conflicting or inaccurate.[2] Muslim divorce cases are similar to other American cases in that parties put forward any argument that will further their desired outcome and the usage of Islamic law is one way of doing that.

The most common issues related to Islamic law that emerge in Muslim civil divorce cases are: securing an Islamic divorce for the wife; *mahr* (dower paid directly to the wife or deferred); and division of marital assets and custody according to Islamic law. Often Muslim couples consider civil marriage a separate entity from the *nikah* (Muslim marriage contract) or religious marriage in the "eyes of God." Divorce too can have similar dual, civil and religious, nature for Muslims who do not want civil law to exclusively determine their divorce terms.

Before discussing divorce, I will briefly describe how the *Shari`a* (Islamic law), which is made up of injunctions derived from the Qur'an (revelation) and *hadith* (reports of the Prophet Mohammed's words and actions), can be used to represent different bodies of law. Today many scholars and lay Muslims include in their use of the term "Islamic Law" not just the *Shari`a*, but also *fiqh* (classical jurisprudence derived from *Shari`a* and local customs). Medieval jurists engaged in establishing the laws of *fiqh* expanded upon the Qur'an and hadith via four main schools of Sunni thought and two major schools of Shi'i thought. Although there are variations among these schools, contentions that arise in interpreting Islamic law are generally based on questioning the applicability of the classical *fiqh* in modern times because of its diverging doctrines, potentially sexist interpretations of Qur'an and hadith and outdated assumptions. It is important to note that Muslims in divorce courts may use the term "Islamic law" to imply verses of the Qur'an, *hadith*, *fiqh*, legislation from their countries of origin, or any combination of these. Although Islamic law is defined by the *fiqh* for many Muslim men and women, some American Muslim women who are concerned with adherence to religion, turn to gender egalitarian interpretations of the Qur'an and *hadith* to establish divorce terms in their favor that are also rooted in religion. However, women who do not have access to egalitarian literature, but insist on settling the divorce using Islamic laws over civil laws, are in danger of acquiescing to sexist interpretations of classical *fiqh*, which men or other women may put forward. It is because of these unresolved differences in interpretation of Islamic law and differences in adherence to Islamic law within the American Muslim community that proposals for establishing Islamic tribunals similar to the *Beit Dins* for Orthodox Jewish communities have become controversial and are seen as potentially unfair to women, even though making Islamic legal claims may be more understood in such a venue.

A common primary Islamic legal concern that arises in civil courts directly from the nature of Islamic divorce law, is securing religious divorce for the wife. *Talaq* is unilateral divorce in which a husband verbally, or in writing, repudiates his wife. Pronouncement of *talaq* is followed by a waiting period for the wife, during which the couple can reconcile and remain mar-ried. However once the waiting period expires, a couple is irrevocably divorced. If a husband divorces his wife, then takes her back during the waiting period, only to divorce her again, he may only take her back once more; a third repudiation is irrevocable. American Muslim men seeking divorce are usually able to pronounce *talaq* either before or after the civil divorce process.

By contrast, women have limited access to Islamic divorce. Traditionally, they may declare a *khula* (irrevocable female initiated divorce), but they must elicit consent from their husbands to end the marriage. Alternately they may seek judicial divorce in which a *qadi* (Islamic court judge) can dissolve the marriage on grounds proven by the wife that may include abuse, impotence, insanity or incarceration of the husband.

In the absence of an Islamic court system in the U.S., some women equate a civil divorce decree as an Islamic judicial divorce; others who seek religious

divorce, in addition to civil divorce, are able to substitute an imam for a *qadi* by either asking an imam for a religious divorce decree or religious permission to divorce in civil court. But some who believe that Islamic courts and *qadis* cannot be replaced by civil courts or imams, must either convince their husbands to pronounce *talaq* or give consent for *khula* in order to be religiously divorced. Therefore, for some American Muslim women, obtaining a religious divorce becomes a challenge in which divorce attorneys may involve themselves; like in some orthodox Jewish circles where established religious law is followed in addition to civil law, husbands can be reluctant to consent to religious divorce if civil divorce procedures have been initiated by wives—perhaps to keep them in limbo. (In Jewish law this is known as the Agunah problem). Some divorce attorneys have begun to include a stipulation of religious divorce in settlement offers as a potential remedy, but these measures are not always successful.

A second issue of contention is finances. In traditional *fiqh*, there is no concept of marital wealth. Husbands and wives do not share wealth, earnings or inheritance; however, wives are entitled to maintenance from their husbands for their living expenses. Both parties can use this fact of Islamic law during divorce to make very different arguments. Many American Muslim women do financially contribute to the household despite the separation of wealth in Islamic law and view their claims on martial assets as legitimate, but still hold that men's claims on their earnings in the event of divorce unislamic. By the same token, women feel it is unislamic when men ignore laws of *fiqh* and verses from the Qur'an, which indicate that women are entitled to an equitable divorce and compensation.[3] Men's counter argument generally involves the separation of wealth in Islamic law as a reason to ignore any due compensation. Many American Muslim women who claim a right on marital assets either do so because of their own contribution to martial wealth or by citing religious injunctions that entitle them to compensation in return for taking care of the household and child rearing.

The *mahr* can be an extension of disputes over finances. For many women, especially those not earning, the *mahr* signifies security money, which wives keep for themselves even in the event of *talaq* (a woman usually has to return the *mahr* in the event of a *khula*). However, in common practice in the U.S., the *mahr* has not been high enough to function as security money or has been promised, but not paid. Therefore, many women are only able to claim their *mahr* in the event of divorce and have attempted to do so through the civil divorce process. Some men (and women) have misunderstood this common practice to mean that *mahr* is a sum to be paid only in the event of divorce, rather than as a marriage dower to be paid at the wedding. Capitalizing on this misunderstanding of *mahr*, some men have made claims in civil court that the *mahr* is the only sum they are responsible to pay the wife according to Islam, especially if the *mahr* they agreed upon at the time of the wedding was symbolic (such as a gold necklace) or some other low amount. The inaccurate understanding of *mahr* is another example of how misinformation of religious law may be used to dismiss women's legitimate civil and religious claims on marital assets.

Finally, another, but less common, allusion to Islamic law in civil divorce cases involves child custody. Because differences in legal opinion among the schools of *fiqh* are most apparent in this matter and since custody can be contested in a traditional Islamic system, custody battles over children in Muslim divorce cases usually resemble those in other American divorce cases. Litigants using Islamic law for determining custody may dispute over different rulings for male and female children, depending on their respective ages and when custody transfers from one parent to the other. Regardless of the school of thought, the assumption behind these particular laws is that staying with a particular parent at a particular age is presumed to be in the best interests of the child.

Even though Muslims have their own traditions in divorce, Islamic law is cited to various degrees in Muslim divorce cases depending on the religious orientation of the parties involved, or sometimes the number of generations their families have lived in the U.S.; still, many Muslim couples do not discuss Islamic law at all as they feel state laws prevails over religious law. Because pressing Islamic legal claims in civil divorce may work to women's disadvantage, knowing the basic issues in Islamic divorce law and how biased inter-pretations against women could be easily passed off as a couple's traditional method of settling divorce is important, especially when there are disputes over which set of laws, Islamic or civil, should be applied.

1 Asifa Quraishi and Najeeba Syeed-Miller. No Altars: A Survey of Islamic Family Law in the United States. Islamic Family Law US Case Study. (2002) http://www.law.emory.edu/ifl/cases/USA.htm

2 Qaisi, Ghada G. "A Student Note: Religious Marriage Contracts: Judicial Enforcement of 'Mahr' Agreements in American Courts" Journal of Law and Religion. Vol. 15, No. 1/2 (2000-2001), 67-81.

3 Verses 2:231, 2:241, 65:2 from the Qur'an

No Altars: A Survey of Islamic Family Law in the United States

ASIFA QURAISHI-LANDES AND NAJEEBA SYEED (2004)

When I was still a graduate student and there were about only five Muslim law professors in the country (I'm not exaggerating), one of them called me up with a project. Abdullahi An-Na'im was working on a book on Islamic Family Law around the world and he wanted me to work on the chapter about the United States. I remember actually chuckling out loud when he said "United States" – after all, how much could there be? Turns out, not only was there plenty for an article, but this turned out to be one of the most important areas that directly affects American Muslims. And it is an area that most American Muslims know nothing about. Once I realized how big the topic was, I brought in my good friend Najeeba Syeed, an expert in arbitration and mediation, as my co-author. There is a lot to be learned from studying these cases (hint: don't call your kitab a "pre-nuptial agreement"!). The chapter ended up so informative for women's issues that it ended up not in An-Na'im's global compilation, but instead in Lynn Welchman's edited volume on *Women's Rights and Islamic Family Law*.

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Introduction

The family unit has long served as an organizing system for both social and legal regimes. The mechanisms to contract a marriage, raise one's children, or dissolve a family are now basic elements of any well-developed legal framework. Central to the establishment of a family law system is the recognition that it will be invoked most often when a conflict occurs between those who are related to each other through the family unit. Indeed, those who focus on family law issues find that 'the legal system is perhaps the most obvious manifestation of the value which society places on institutionalized mechanisms for conflict resolution' (Kressel 1997: 48). Religion has also played a role in defining family interactions and their social consequences. In addition to preserving the future of a religious tradition, the concept of the family contributes to the development of religious law, because the complex financial, social and legal relationships in the family structure demand constant attention and regulation. Moreover, the intimate nature of family relations often triggers the desire for religious sanction of one's actions, and most religions have filled this need well. Islam is no exception. Muslim jurists' *fiqh* addresses critical aspects of family life in various detail, from the requirements of a valid marriage to mechanisms for divorce, and a variety of questions in between.

Muslims in the United States are in a complex position when it comes to applying family law, because they are governed by two sets of relevant rules, one religious and the other secular: Islamic law governs the family relations of those Muslims who want to validate before God their most intimate relations, while, simultaneously, United States law binds them through simple territorial sovereignty.[1] Considering their religious identities important enough not to sacrifice at any secular altar, many Muslim couples are asserting their Islamic legal rights in American family courts and, as a result, the law surrounding Muslim marriages is becoming an important and complicated part of the US legal landscape.

Part III surveys the application and perception of Islamic family law in the United States, and the impact of living in this intersection of legal authority on Muslim families and communities. In the first chapter, 'Islamic Family Law in American Muslim Hands', we address the intellectual and social discourse of US Muslims on Islamic family law topics, paying special attention to key issues of concern and debate and providing a brief overview of the sources of information available. In the following chapter, 'The Muslim Family in the USA: Law in Practice', we examine the practices of Muslims in conducting their marital lives in the USA, leading to a review in Chapter 12 of court cases involving Muslim marriage and divorce litigation in the United States, drawing general conclusions where possible with regard to the attitudes of US courts. The final chapter puts this study in broader context by addressing the theoretical roots of the current US Muslim experience. Special attention is given to uniquely US-based efforts to interpret and apply Islamic norms and values in everyday lives. Looking at both academic and grassroots work, this review also points the reader in the direction of future trends and goals, including potential community-based efforts to address Islamic family law issues not satisfactorily resolved in formal American courtrooms.

This section will stand out from the overall project (surveying global Islamic family law and directed by Abdullahi An-Na'im) of which it is a part, because it deals with Muslims as a minority population in a non-Muslim state, presenting findings about the use of Islamic family law in places where it is not officially enforced by the state. The reader should thus keep in mind that most family issues involving Islamic law in this minority population are handled informally through internal mechanisms (family, community leaders, close friends, etc.), because Islamic law *per se* is not enforceable by state authority in the USA. Some cases do rise to the level of formal litigation in US courts, as will be seen, but the cases discussed in Chapter 12 may be unrepresentative of all applications of Muslim family law even within the formal court system, and are most probably not representative of applications of Islamic family law in the country as a whole. Nevertheless, despite its limitations in terms of space and scope, this study aims to provide the reader with a basic overview of how Muslims in the USA discuss topics of Islamic family law, the way it impacts on their lives directly, how the judicial system addresses its Muslim minority in these most intimate family issues, and, ultimately, what might be expected in the future from this unique community.[2]

TEN: Islamic family law in American Muslim hands

Authority figures

To understand the wide variety of applications of Islamic family law that we will encounter in this study, it is important first to realize that the Muslim population in the USA is made up of a complex and continuously changing demographic. Of the estimated 6 to 8 million Muslims in the United States, about half are immigrants from Asia, the Middle East, Africa, Europe - literally, all over the world.[3] The other half is indigenous — meaning not only African Americans and European Americans, but also Native Americans and Latinos, as well as second- and third-generation children of immigrant parents. Moreover, of all the above ethnicities, any number can be converts to Islam or raised in the faith from birth.

This wide range of backgrounds is fertile ground for the pluralism of Islamic law (its *ikhtilaf* structure of simultaneously valid differing opinions)[4] and results in a healthy diversity of ideological perspectives among Muslims in the USA. Thus, we find Muslims on all sides in debates around topics such as polygyny, gender roles and adoption, to name just a few.[5] In finding a legal opinion to apply in their own lives, individuals can choose between the guidance of local Muslim scholars, community leaders, activist organizations, or their own personal interpretive efforts on a given question. Obviously, this plurality of sources creates a wide variety of applications of marriage and divorce procedures in the Muslim community - applications surveyed in more detail below.

Another wrinkle in US Muslim family law practices stems from the structure of authority in Islamic jurisprudence. Because there has never been an official church certifying individuals to speak on behalf of the religion, the field is open for any dedicated Muslim to seek to act as imam and lead a community. In a large Muslim society, there are usually societal checks to help maintain a sufficiently qualified cadre of these spiritual leaders. Even further, in Muslim countries with a formal system of *Shari'a*-based family law in place, as well as private pious and learned individuals available to guide the individual petitioner, there are likely to be state-recognized and sometimes state-appointed muftis to issue guidance on issues of law, and state-appointed judges to apply it. In the USA, however, where there are no such checks, the quality of imams tends to run the gamut, and many take their place with little or no training in critical leadership areas (such as Islamic jurisprudence, relevant US law and the workings of the US legal system, or counselling and mediation skills).[6] The impact of this phenomenon on the application of Islamic family law in the United States is significant, because it is to these imams that many go for Islamic marriage and divorce proceedings — proceedings that end up having varying validity under both US and Islamic law, depending on the imam. For example, many imams will not officiate at an Islamic marriage ceremony unless the couple has a valid state marriage licence first, or the imams will themselves be qualified to officiate marriages under the laws of the state, thus ensuring the secular validity of the Muslim marriage, but not all imams concern themselves with secular law and procedure. New Jersey attorney Abed Awad (interviewed in 2000) reports that some mosques in New York and New Jersey officiate Muslim marriages without any civil marriage licence, and in some cases even issue divorce and alimony orders where, arguably, Islamic law would not justify it. Maryland attorney Naima Said reports the same phenomenon in the Washington DC area (Said 1998). Similarly, Cherrefe Kadri (interview, 2000), a lawyer based in Toledo, Ohio, comments on the sharp difference between family dispute resolution processes undertaken under the authority of an untrained imam and those, for example, of an imam not only knowledgeable about Islam but also with experience as a social worker in the West. In the former, disregard for US marriage and divorce certification often prevails, not to mention frequent gender bias cloaked under the name of Islam.

Looking more specifically at what happens in family disputes, we first see that, as is true worldwide, many cases are resolved outside any formal process, whether a court or an imam. In the USA as elsewhere, Muslims often prefer to keep family conflicts within the family, and will turn first to relatives as arbitrators and mediators. One Muslim marriage counsellor himself reports that he advises Muslim couples to go first to parents, uncles or aunts before approaching him (Chang 1990). It might be noted, however, that this is often more difficult for immigrants, whose extended family is most likely to be overseas. Alternatively, where there are Muslim attorneys or social workers, these professionals often act as informal mediators, drawing client confidence from their expertise in the Western legal system combined with an understanding of Muslim concerns and, sometimes, their bilingual

language skills. For example, Los Angeles attorney Sermid al-Sarraf (interview, 2000) reports that, in family dispute cases, he often first describes to clients what is likely to happen in full litigation in an American family court (including the accompanying high cost), and then assists the parties to try to reach an amicable settlement that avoids this costly approach. Similarly, Toledo attorney Cherrefe Kadri (interview, 2000) notes that she uses her mediation and Arabic-language skills to assist trust-building with clients attempting to resolve disputes out of court. Al-Sarraf (interview, 2000) also notes that he has an arrangement with a local Muslim scholar for reference on Islamic legal issues if any arise. He states that he has seen Islamic law referred to occasionally by the parties during these negotiations (for example, one party asserting things such as 'under Islam, you would get nothing'), albeit sometimes inaccurately. Usually, however, his experience is that the reality of the US legal system is what drives the ultimate resolution of these cases.

Intellectual resources

Muslims in the USA have a plethora of sources from which to learn about Islamic law, and Islamic family law in particular. A remarkable number of English-language books, articles, magazines, scholars, conferences, and now websites on this topic are available. They range in accessibility from the most readily available mainstream bookstores and popular Muslim magazines to more obscure academic pieces in scholarly journals and research encyclopaedias. The information available in these sources covers not only expositions and translations of classical doctrine, but also reformist and practical guides for the lay Muslim.

Among the more readily available resources are books such as those by Esposito (1982), Doi (1984, 1989) 'Abd al-'Ati (1977) and al-Qaradawi (n.d.), which include fairly thorough summaries of classical Islamic jurisprudence relating to marriage and divorce. The first two also include examinations of the application of Islamic family law in certain modern Muslim states, which are of considerable interest; for Muslims in the United States, however, it is the classical jurisprudence that is of the most relevance, as they seek to abide by Islamic law in the absence of state enforcement.

Other resources on Islamic family law are books written as historical and sociological resources for a primarily academic audience. These books include works like Amira el-Azhary Sonbol's *Women, the Family and Divorce Laws in Islamic History* (1996), a collection largely made up of empirical studies giving a sense of family law issues as they played out in Muslim history, with some special focus on contradicting the claims that Muslim women were prisoners of Islamic family law. The academic works, whether monographs or articles in legal and professional journals, may be less accessible to the lay reader, and offer for example critiques of legal reasoning in a particular school of thought or a particular legal issue, or presenting the law in a social or historical context. An example of an academic work with particular relevance for the USA is Mohammad Fadel (1998), who undertakes a detailed legal analysis of the doctrine of the guardian in Maliki law, not only explaining the legal theory behind the rule allowing a minor to be contracted in marriage by his or her guardian, but also critiquing what he determines is a basic legal error in the Maliki doctrine of emancipation for girls. He also makes the innovative argument that a local Muslim community should play the role of legal guardian for Muslims living as a minority in a non-Muslim country such as the United States, enabling them to adjust for these sorts of discrepancies in classical doctrine. Other works investigate the parameters of the Hanafi doctrine permitting a woman to contract herself in marriage without a guardian (Siddiqui 2000; Ali 1996). Azizah al-Hibri (1997) has also taken up the question of the right of a Muslim woman to contract her own marriage, as well as questions of a wife's duty to obey her husband and to initiate divorce.

Another aspect of considerable scholarly study is the Muslim marriage contract and its various elements. Works here include Farah (1984), Rapoport (2000), Shaham (1999) and el-'Alami (1992). Azizah al-Hibri (1993) compares Muslim marriage contracts with prenuptial agreements in an inter-faith symposium article and Mohammed Tabiu (1990—91) addresses the implications of defects in Muslim marriage contracts.

Finally, the complicated area of dissolution of marriage is also a subject of considerable academic writing, such as by el-Arousi (1977), Carroll (1996) and Quick (1998). The latter addresses this subject in the particular context of Muslims in North America, and reviews the efforts and actions taken by Muslim organizations in the West to achieve dissolution of marriage by an Islamic authority.

For those seeking a more practical resource on Muslim marriage, there are works such as the pieces by Maqsood (1998) and al-Khateeb (1996) which take a conversational tone to offer guidance based on Islamic law and principles to Muslim married couples. Works like these are not legal references on Islamic family law, but father are focused on translating the basic Islamic rules of marriage for the average Muslim in plain language. Maqsood, whose book offers frank advice on the emotional, spiritual and sexual aspects of married life, has been called 'the John Gray of the Muslim world'.[7] A similar book by Mildred M. el-Amin (1991) begins each chapter with 'Dear Couple' or 'Dear Sister/Brother'. Al-Khateeb's article includes a sample marriage contract, examples of stipulations, and a short list of Islamic legal rules affecting marriage (see 'Terms of the contract', in Chapter 11 for further discussion of the resurgence of interest in Muslim marriage contracts).

Resources on Islamic family law often overlap with literature on the continually popular topic of women and Islam, as is evident from the number of Muslim family law works including the word 'women' in their titles. Many of these authors seek to critique classical Islamic family law with an eye to a women's empowerment, sometimes urging new interpretations of old texts.[8] Specifically US examples of this are included among the essays in Webb's *Windows of Faith: Muslim Women Scholar-Activists in North America* (2000) by well-known American Muslim legal scholars Azizah al-Hibri and Maysam al-Faruqi. Al-Hibri's piece, 'An Introduction to Muslim Women's Rights', includes an overview of marriage relations in Islam (e.g. contractual terms, guardianship, maintenance, divorce procedures) emphasizing how Islamic principles promote women's liberty in a way contrary to how these principles were applied and interpreted in patriarchal Muslim societies, ultimately leading to biases in the law itself. Maysam al-Faruqi's chapter, 'Women's Self-Identity in the Qur'an and Islamic Law', focuses on particular Qur'anic verses often cited on the subject of women's rights (e.g. male superiority over female, obedience of wives, beating), providing a critical analysis of juristic interpretation of each. Articles and collections like these testify to the emergence of a new contribution to the field of women and Islamic family law: the contribution of a specific US Muslim scholarly literature written by women. Gisela Webb says in her introduction to *Windows of Faith* that such works are 'evidence of the lively, creative, critical, and self-critical discussions currently taking place in the academy and in Muslim communities and professional organizations in the United States, raising issues of religious pluralism, democracy, gender, and modernity as they relate to Islam and Muslim identity' (Webb 2000: xii). Khaled Abou el Fadl's *Speaking in God's Name: Islamic Law, Authority and Women* (2001) similarly takes up issues of Islamic family law in the context of his critical analysis of authority and authoritarianism in Islamic law and society.

Consistent with Webb's observation, Muslim organizations are also a rich source of information on Islamic law, and Muslim women's organizations are especially interested in disseminating information about family law, often with a progressive look at well-known issues. For example, the Muslim Women's League, 'a non-profit American Muslim organization working to implement the values of Islam and thereby reclaim the status of women as free, equal and vital contributors to society', includes among its many position papers those titled 'An Islamic Perspective on Sexuality' and 'An Islamic Perspective on Divorce'.[9] Another example is Karamah: Muslim Women Lawyers for Human Rights, an organization which defines its objectives as seeking to 'increase the familiarity of the Muslim community with Islamic, American, and International laws on the issues of human rights', and 'provide educational materials on legal and human rights issues to American Muslim women'.[10] Karamah's website lists publications for further study, including family law tides such as 'Family Planning and Islamic Jurisprudence', and 'Marriage and Divorce: Legal Foundations', both by Azizah al-Hibri, founder of Karamah.

Of course, not all Muslim organizations take a progressive, reformist attitude towards the subject of Islamic family law and women's rights. Many Muslims advocate more traditional interpretations such as encouraging wifely obedience (in all but directly anti-Islamic behaviour), the primacy of motherhood and discouraging public careers involving cross-gender interaction. Examples of this end of the ideological spectrum can be found on websites such as that of Alsalafyoon, which posts pieces such as 'The Duty of a Woman to Serve her Husband',[11] and in books like Muhammad Abdul-Rauf's *Marriage in Islam* (1995), which, for instance, describes household management as the wife's primary responsibility, though acknowledging that individual couples may agree on other arrangements.

The final arena of readily accessible resources on Islamic family law is the internet. This modern technology has created several avenues for the dissemination and exchange of information on Islam, and Islamic family law is no exception. These fora range from discussion groups (e.g. members of the 'sisters' list moderated from Queens University in Canada[12] often discuss the legal and social parameters of Muslim marriage and divorce) to online universities (e.g. the College of Maqasid *Shari'a*[13] offers a twenty-credit 'Introduction to Family Law' course) and websites devoted to education of family law-related issues, such as <www.zawaj.com> which describes itself as 'a complete portal site for information and resources regarding Muslim marriage, weddings, family relationships, and parenting'. On its website are posted articles describing the proper relationship between spouses, raising Muslim children, sexuality and Muslim cases in the courts. There is even a list of recommended scholars to contact for *fatwas* (Islamic legal opinions), complete with their email addresses.[14] Another site, called 'Loving a Muslim', includes a summary of Islamic family law in its effort to address the 'non-Muslim woman in a loving relationship with a Muslim man'.[15] Finally, <beliefnet.com>, the popular inter-faith site on religion, includes several links to family law issues in its Islam section.

Reviewing all these sources in the context of current discourse in the United States, one aspect of Islamic family law stands out as being of particular interest: the concept of the Islamic marriage contract. This subject has attracted recent and continuing attention, stemming largely from the fact that the jurisprudential importance of marriage as a contract makes drafting a marriage contract an important tool to particularize individual marital relationships, and has in fact been used as such throughout Islamic history. As Sharifa al-Khateeb puts it in her 1996 article in a Muslim. women's magazine: 'The Islamic marriage contract is meant to solidify the [purposes of an Islamic marriage] and specify stipulations important to the woman and man.'[16] Interest in the Islamic marriage contract is growing, prompting a full weekend conference at Harvard Law School,[17] a panel at the 2001 national conference of the Islamic Society of North America (see Lieblich 2001), numerous Muslim magazine articles, and website discussions, all of which have contributed to educating the public (both Muslim and non-Muslim) about this now underutilized *shari'a* tool (ibid., p. 1). These efforts highlight the fact that Muslim marriage contracts can contain a myriad of additional clauses, from a promise of monogamy and a wife's delegated right of unilateral divorce, to equal participation in household chores and the right to complete one's education.[18] Some note that Islamic schools of thought differ over the enforceability of these clauses, though these details are not always fully explained in the Islamic law summaries available for the layperson's practical use.[19] Finally, addressing the question of the Muslim marriage contract in the United States, the Karamah organization lists among its projects 'drafting a model Islamic marriage contract which meets the objections of those American courts that have found Islamic marriage contracts unenforceable'[20] - a project whose importance will become apparent in Chapter 12, summarizing the treatment of Muslim marriage contracts by US courts.

Islamic law on divorce is also a popular topic among American Muslims, as the divorce rate rises and Muslims seek to understand their marital status under both religious and secular law. The lay Muslim's knowledge about divorce generally includes awareness of *talaq*, the husband's unilateral right to divorce by oral declaration, but details on its practical application (terminology, revocability, voidability) are less well known. Alternative methods of divorce such as *khul'* (divorce for remuneration conducted through mutual consent) and *faskh* (judicial dissolution) are further from public consciousness, and the situation becomes more complicated when one adds in the potential for a wife to include a delegated *talaq* right in the marriage contract.[21] Besides analyses of divorce law in the literature mentioned elsewhere in this review, some contributions by Muslims and Muslim organizations in the USA go beyond the classical Islamic law on the subject, offering instead non-mainstream interpretations. For example, the Muslim Women's League position paper, An Islamic Perspective on Divorce', after explaining the basic elements and types of divorce in classical jurisprudence, goes on to comment: 'The controversy with divorce lies in the idea that men seem to have absolute power in divorce. The way the scholars in the past have interpreted this is that if the man initiates the divorce, then the reconciliation step for appointing an arbiter from both sides is omitted. This diverges from the Qur'anic injunction.'[22] With this argument, the Muslim Women's League critiques the established *fiqh* allowing unilateral husband-initiated divorce, by appealing to the Qur'anic verse stating 'if you fear a breach between

them, then appoint two arbiters, one from his family and the other from hers; if they wish peace, God will cause their reconciliation' (Qur'an 4: 35).

Whether it is in the form of summaries of classical mainstream jurisprudence or progressive interpretations of original religious texts, there is significant information on Islamic family law for Muslims in the USA seeking to educate themselves, either in the basics or the more complicated nuances of Islamic jurisprudence. The average Muslim carries around some understanding of the basics and very little of the jurisprudential nuances, but how he or she applies these Islamic laws in the context of US society varies widely, due somewhat to the varying levels of individual knowledge, but also because of ideological differences and simple practicalities. This variety in the practical application of Islamic family law is the subject of the next chapter.

ELEVEN: The Muslim family in the USA: law in practice

Solemnizing the union

The intersection of US and Islamic law becomes important right at the formation of the family unit — the creation of the marriage itself. Each state of the USA requires a civil marriage licence for every marriage created within its borders. Details on the specific requirements for these licences vary from state to state, but generally they require an official signature of the person performing the wedding, qualified by the state to do so, and those of witnesses to the ceremony. Islamic wedding requirements, consisting of an offer and acceptance and witnesses to the event, do not conflict with this if the person officiating the wedding is registered with the state as having this authority. In the United States, many Muslim leaders and lay individuals have this state authority, thus making the Muslim ceremony over which they preside simultaneously legal under the laws of the state, provided all necessary forms are filed. However, because not all Muslim marriage officiants carry such qualifications, Muslim weddings in the USA take a variety of forms. Many conduct one Muslim ceremony with a state-qualified imam, but many others have two events: a Muslim ceremony as well as a civil ceremony through state channels.[23] Still others have only a Muslim ceremony and never bother with state registration requirements,[24] a risky practice under US law because, barring a finding of common law or putative marriage, the parties and their children have no state-enforceable legal rights upon each other, thus affecting inheritance, health insurance, taxes and even immigration issues.

Terms of the contract

As for the contents of these Muslim marriage contracts, most Muslims in the USA seem to consider only one thing really important that would not otherwise be included in a standard civil marriage licence: a provision regarding the wife's bridal gift or dower (*mahr/sadaq*). The majority of classical Muslim jurists hold dower to be an automatic result of the marriage contract, to the effect that even if no dower is stipulated, or it is stated that there will be no dower, the wife is entitled to claim a 'proper dower', assessed by her peers and those of her individual standing (Esposito 1982: 25; Welchman 2000: 135-6; Ali 1996: 159). Customarily the dower is divided into one part payable immediately on the marriage (the 'prompt dower', sometimes only a token amount or symbol) and anothervpart deferred to a later date, either specified or more usually payable on the termination of the marriage by death or divorce (Rapoport 2000; Welchman 2000: 144; Moors 1995:106—13). Written documentation of Muslim marriages thus routinely includes mention of the dower arrangements, and in the USA, many mosques and imams include a fill-in-the-blank provision in standard marriage contracts (Kadri, interview, 2000). Case law of Muslim marriage litigation in the USA reveals that Muslims do generally include *mahr/sadaq* provisions in their contracts, their nature varying with the financial status and personal preferences and aspirations of the parties.[25] Some examples of actual *mahr/sadaq* clauses in the USA and Canada are: $35,000, a Qur'an and set of *hadith*, a new car and $20,000 (Canadian), a promise to teach the wife certain sections of the Qur'an, $1 prompt and $100,000 deferred, Arabic lessons, a computer and a home gym, a trip around the world including stops in Mecca, Medina and Jerusalem, a leather coat and a pager, a wedding ring as immediate *mahr* and one year's rent for deferred *mahr*, and eight volumes of *hadilh* by the end of the first year of marriage and a prayer carpet by the end of five years of marriage (al-Khateeb 1996).[26]

One case vividly illustrates the significance vested by some Muslims in their dower agreements: in *Aghili v. Saadatnejadi* (1997), the husband threatened not

to record the Muslim marriage contract with state authorities unless the wife first agreed to relinquish that contract and sign a new one. The original contract included a dower of Iranian gold coins to the value of $1,400 and a provision for a payment of $10,000 as damages for any breach of contract by the husband. The husband's threat suggests that he felt bound by the *mahr* terms of the initial contract. Also, Los Angeles attorney Sermid al-Sarraf comments that he has seen, in informal divorce negotiations, a husband's recognition of the *mahr* amount, prompting the parties to include in their settlement an offset of this amount with other property (interview, 2000). Other Muslims tend not to consider the dower important at all, and include a clause about it (often only a token dower) in their contracts only because the Muslim officiating the ceremony tells them it is required (Kadri, interview, 2000).[27]

Discussions among US Muslim women include debates over the importance of the *mahr*/*sadaq* in the first place — some rejecting it as putting a monetary value on the bride, others advocating it as a financial protection for women in the event of death or divorce and sometimes as a deterrent against divorce (especially powerful where there is a large deferred dower).[28] There is indeed a dilemma presented by the institution: setting the *mahr* very high may provide good financial security for the wife and (where deferred) a good deterrence against husband-initiated divorce, but on the other hand, it burdens wife-initiated *khul'* divorces, which are usually negotiated with an agreement by the wife to forfeit her *mahr*, with the significant financial cost of waiving the outstanding amount and returning whatever prompt dower has already been paid. Setting the *mahr* low, or as only a token gift, has the reverse double-edged sword effect. That is, there is not as much to be lost in returning the *mahr* if the wife wants to negotiate a *khul'* divorce, but she also loses the deterrent effect on *talaq* divorce by the husband which is accomplished by a high deferred dower. Where the divorce occurs not through extra-judicial *talaq* or *khul'*, but rather judicial dissolution by third-party arbiters, the impact on *mahr* payment does not follow an absolute rule. Rather, the arbiters assess blame and harm caused by the spouses and allocate costs accordingly. Where there is no harm by the wife, she generally keeps all of the *mahr* (el-Arousi 1977: 14; Quick 1998: 36-9; Ali 1996: 125).[29]

As elsewhere in the Muslim world, additional stipulations (e.g. stipulations of monogamy, delegated right to divorce, wife's right to work outside the home, etc.) further defining the marital relationship of the new couple seem to be much less utilized than dower provisions,[30] presumably because the dower is obligatory whereas additional stipulations are not only optional but also a subject of little public awareness, and some clauses are even controversial in classical jurisprudence and local community attitudes (Kadri, interview, 2000). Nevertheless, the idea of particularizing one's Islamic marriage contract is gaining attention among the US Muslim population. Encouraged by Muslim women's organizations and activists seeing the use of additional stipulations as a tool for women's empowerment, more and more US Muslims are educating themselves about how to use the Muslim marriage contract. Says Sharifa Al-Khateeb of the North American Council for Muslim Women: 'The contract is a tool to help men and women design their future life together so there are no surprises ... and so women won't be saying "I can't do this because my husband won't let me" ' (Lieblich 1997).

Far from considering it a new, reformist feminist tool, many see the proactive use of the Islamic marriage contract as a way of protecting their basic Islamic rights. It is for this reason that Karamah reports it is working on a model marriage contract, grounded in classical Islamic legal principles, to be used by Muslims worldwide. One visitor to the Karamah website praises a friend for drafting her marriage contract to include clauses on monogamy and equal right to divorce (among others) and comments that many Muslim men unfortunately have a negative attitude towards drafting a marriage contract, considering it an 'insult to their ability to behave as model Muslims' and that they 'forget that in times of imminent divorce, men and women do become irrational and make demands that are hard to agree upon'.[31]

The empowering potential for women in the Islamic marriage contract has also attracted scholarly interest among academics. According to John Esposito, Islamic marriage contracts were originally intended to raise the status of women because, being party to the agreement, women could add stipulations of their own (Lieblich 2001). Carol Weisbrod (1999) notes: '[t]here is considerable interest among Islamic women in the idea of using the contractual aspects of Islamic marriage to protect women's rights.' Of course, such use of the contract stipulations presumes that the woman has the awareness and education necessary to utilize

it. This is often not the case and, as Lynn Welchman has pointed out, the Islamic marriage contract system leaves 'the protection - or clarification - of rights such as education and waged employment for women out of the law per se and subject to the knowledge, ability and initiative of the individual women not only to insist on the insertion of a stipulation but to phrase it in a manner that gives it legal value' (Welchman 2000: 180). On the other hand, the marriage contract remains a very valuable tool because its grounding in classical law gives a 'clear indication of the acceptability of the changing of the more traditional parameters of the marriage relationship' (ibid., p. 180). It is for this reason that many activists take the need for education on the topic of marriage contract law so seriously, and their efforts largely focus on simply making women aware of this tool.[32]

Women's empowerment is not the only motivation, however. Those advocating the use of additional contractual stipulations focus not only on their potential to equalize gender-based advantages, but also as a way for both spouses proactively to express partnership in their new, unique union. Ayesha Mustafaa of the Muslim American Society says: '[i]t forces conversation on important issues: where you are going to live, whether your wife is going to work, whether she accepts polygamy' (Lieblich 2001).[33] Similarly, Kareem Irfan, of the Council of Islamic Organizations of Greater Chicago, says: '[t]he contract forces the bride and groom to have a reality check before marriage' (ibid.). What form this reality check takes depends upon the ideologies of the individual couple. For some, it may mean a reaffirmation of traditional roles, such as that the wife won't go to college or work after the couple has children (ibid.). But for others, especially non-immigrant Muslims whose image of married life is very different from the traditional one, arrangements such as monogamy and equal access to divorce are more or less presumptions in the structure of marriage, and these men are not threatened by a woman's interest in including these (and other rights-specific terms) in the marriage contract. Indeed, in many cases it is the groom as well as the bride seeking to have such stipulations included.[34] The attitude of many of these couples is exhibited in the following statement of one Muslim bride: 'I love him ... and I can't see him [taking a second wife], ever. But we put it in the contract because you never know' (ibid.). These young Muslims tend to view the contract drafting process not only as an allocation of rights and duties, but also as an exercise in learning to express their new identity as a couple, and, even more importantly, as a way to open up discussion (and determine compatibility) on important family issues (career, children, finances, residence location, etc.) that might otherwise be postponed to more stressful times (Quraishi 1999).[35] In other words, among a growing proportion of the American Muslim population, there is an interest in drafting more detailed, personalized Muslim marriage contracts - documents that are not a generic stamp of mere legal status conferred by some external authority, but rather, full, detailed expressions of the way each couple defines itself.

For those who choose to include specific stipulations in their marriage contract there are many insightful ideas from which to choose. Islamic history attests to Muslim marriage contracts including stipulations in which the husband promises not to marry additional wives (usually with the remedy that the wife may obtain a divorce, or even force a divorce of the second wife, if this promise is breached), delegates his *talaq* right to the wife, agrees not to relocate the family without the wife's consent, agrees never to prevent her from visiting her relatives, and to provide her with servants for household work as is befitting her accustomed lifestyle, among many others (Rapoport 2000: 14; Fadel 1998: 24-6; al-Hibri 2000: 57). Muslims in the United States have already taken advantage of the creativity allowed in these provisions and have included stipulations limiting visits from inlaws, that the wife will not be expected to cook or clean, protecting the wife's overseas travel required by her profession, and custody of the children upon death of either spouse (Lieblich 2001, 1997).[36] Many clauses affecting the ongoing marital relationship (such as rearing the children as Muslims, providing household services, allowing a wife to attend school, and location of the home) are included despite a realization by the couple that a US court would probably not intervene to enforce such terms (discussed further below). Other terms, such as a promise not to marry additional wives, have little effect in the USA for a different reason: the action is already prohibited by US law. Nevertheless, these couples feel it important to include such terms for religious reasons (i.e. thus preventing even a non-civil but nevertheless Muslim marriage to an additional wife), as a protection in the event they relocate to a jurisdiction that does allow such activity, and also as a mutual expression of the nature of their partnership. Finally, some marriage contracts use stipulations to

provide for remedies in the event of a breach of other contractual terms (e.g. a monetary value or a wife's right to immediate divorce upon occurrence, etc.).[37]

Within the marriage

So far we have predominantiy discussed areas where Islamic and US law are different, but not direcdy conflicting. There are, however, other practices where some might regard the two laws as in direct opposition, and Muslims fall on both sides of the question of which law takes precedence. Polygyny is one of these areas. Because classical interpretations of Islamic law allow men to marry up to four wives, some Muslims believe that the US prohibition of polygamy directly violates their freedom of religion and, believing that Islam supersedes secular law, proceed to become part of a polygynous marriage. Thus, we see for example, in *N.Y. v. Benu*, a husband giving custody of his children to his wife after he married a second woman, and other reports of Muslim polygynous marriages (Little 1993; Taylor, interview, 2000). Aminah Beverly McCloud relates the dilemma faced by many US Muslim women whose husbands take a second wife - they feel religiously bound not to object to a practice God has permitted. She notes that even some Muslim leaders engage in this practice, leading to 'marriages of years of devotion fall[ing] into chaos' (McCloud 2000: 141—2). Generally, the first wife in these marriages is recognized as legal under US law, but any subsequent wives and their children are not. These later wives are 'married' to the husband in Muslim ceremonies either in the USA by imams willing to do so, or in ceremonies overseas where polygyny is legal. Because of the religious dilemma, however, McCloud states that many of these women file charges not for bigamy but for some sort of fraud. She also states that 'all of the potential legal consequences of the practice of polygamy in the American context have not yet appeared, but ... are bound to find their way into the courts as more and more women seek alimony and child support' (ibid., p. 142).

Clearly, the majority of the population does not engage in polygynous marriages, but views on the practice differ, as can be seen in a book by Abu Ameenah Bilal Philips and Jameelah Jones entitled *Polygamy in Islam* (1985), providing a lengthy social and legal justification for the practice. Moreover, many Muslims themselves committed to monogamous marriages nevertheless recognize Muslim marriages involving more than one wife as Islamically valid. Thus, in an online Muslim advice column responding to a woman wondering how to marry a man already legally married in the USA, the columnist does not question the Islamic legalities of such a marriage, but nevertheless advises against it because of the woman's uneasy feelings and apparent lack of knowledge of the first wife (Hanifa 2000). Others, on the other hand, argue strongly against Muslims participating in such marriages in the United States, urging that the Qur'anic norm is monogamy and pointing to classical juristic arguments constraining the institution of polygyny (al-Hibri 1993: 66—7). For example, Azizah al-Hibri cites classical Islamic scholars stating that if marriage to a second wife causes the first wife harm, it is forbidden, and also notes Islamic schools of thought allowing the couple to include a clause in the marriage contract barring the husband from taking more wives. Similarly, Amina Wadud (1999), in addition to critiquing several traditional justifications for polygyny, undertakes her own textual interpretation of the relevant Qur'anic verses and sets forth an alternative reading of the permission for the practice, emphasizing its specific limitation to the just treatment of orphans. The Muslim Women's League makes the additional argument that because the subsequent wives are not legally recognized under the laws of the state, then by definition they cannot be treated equally, a requirement of Islamic law in polygynous marriages.[38] That is, subsequent wives in the United States not only do not have any rights to general spousal benefits (such as insurance benefits and inheritance) but they also necessarily lack any avenue of enforcing their spousal rights if a husband chooses to abuse or divorce them, since the marriage will have no validity in the US courts. There is also the possibility of a prosecution for bigamy if the authorities are so inclined. Another argument against American Muslim men marrying more than one wife relies on the simple Islamic jurisprudential principle that one must obey the laws of the land where one chooses to live, as long as they do not prevent one from performing one's religious obligations. Since polygyny is at most permitted in Islamic law, rather than being an obligation, it is held that US laws requiring monogamy should be respected.

Another area of potential conflict in types of allowable marriages lies in the question of inter-religious marriages. Classical Islamic law allows Muslim men but not women to marry non-Muslim monotheists, those who belong to religious communities recognized

as ‘people of the book’, whereas US law puts no religious restrictions on spousal partners (Esposito 1982: 20; Doi 1984: 36). Given the melting-pot nature of life in the USA, many Muslims, both men and women, do indeed marry non-Muslims (Haddad and Lummis 1987: 148).[39] While those who criticize Muslim women marrying non-Muslim men find a basis in standard *fiqh* positions, some object also to Muslim men marrying non-Muslims, on the basis that this constitutes an unfair double standard or results in a reduced number of Muslim men whom Muslim women may marry (Haddad and Lummis 1987: 146; Marquand 1996).[40] Others argue that the allowance is limited to those living under Muslim rule and therefore does not apply in places like the United States.[41] Azizah al-Hibri makes a *shari'a*-based argument against both Muslim men and women marrying outside the faith, arguing that the original reason (*'illa*) for the Islamic prohibition of women marrying non-Muslim men has now changed in our context. That is, the reason classical Muslim jurists denied a woman the option of marrying a non-Muslim man was to protect her from the husband’s potential denial of her free exercise of her religion (acknowledging the patriarchal nature of marriage, and the fact that Christianity and Judaism prohibited interfaith marriages at the time). Al-Hibri concludes that this *'illa* still exists, but argues further that additional realities of the American Muslim context (i.e. the likelihood of a Muslim man losing custody of his children and/or being unable to fulfil the Islamic obligation to raise them as Muslims if divorce from his non-Muslim wife occurs) mean that Muslim men also deserve the protective attention thus far granted to Muslim women, and, thus, the prohibition of inter-faith marriage should be extended to them (al-Hibri 2000: 68-9). Nevertheless, marriages in which the husband is Muslim and the wife Jewish or Christian are generally accepted by most US Muslims. For women marrying non-Muslim men, on the other hand, there is usually a stigma, or worse. Many Muslims follow Islamic *fiqh*’s rejection of women marrying outside the faith, and most respected imams will not officiate at such ceremonies (Haddad and Lummis 1987: 145).[42] Muslim women’s reactions range from disregard of the rule and consequent critical attitudes, to full support and justification of the *fiqh* position as beneficial to society and family. In between are many who reluctantly accept the rule, and perhaps seek alternative interpretations.[43]

Some inter-religious marriages involving Muslims are inter-cultural marriages between indigenous US citizens and immigrants. When the immigrant is the husband, mainstream US culture has developed the fear that the husband will ultimately abscond with his children (and perhaps the wife) to his country of origin, depriving the wife of all spousal rights recognized in the USA. The 1987 book and corresponding film titled *Not Without My Daughter*[44] arguably largely created and certainly entrenched this fear in the wider US public (Baker 2002), resulting in particular attention in the State Department information on ‘International Parental Child Abduction’.[45] A piece featured on its travel website titled ‘Islamic Family Law’ is posted to ‘make clear the basic rights and restrictions resulting from marriages sanctioned by Islamic law between Muslim and nonMuslim partners’, noting that ‘for Americans, the most troubling of these is the inability of wives to leave an Islamic country without permission of their husbands, the wives’ inability to take children from these countries, and the fact that fathers have ultimate custody of the children’.[46] While it appears to be a sincere effort to summarize Islamic family law for those living in the United States, the State Department’s narrow focus on only Muslim-non-Muslim marriages skews the tone of its report and the reality of these issues. Clearly, the problems addressed (inability to leave without permission of husbands, barriers to custody) are faced by all women living under Islamic law, whether Muslim or non-Muslim. The State Department’s limited view perpetuates the *Not Without My Daughter* stereotype that Muslim men are a particular threat to non-Muslim American women. Moreover, stereotypes in the dominant US culture that portray Arabs and Muslims as violent fundamentalists oppressive to women further fuel distrust of inter-cultural Muslim marriages in the non-Muslim population.[47] As will be seen in the next chapter, this distrust sometimes extends to Muslims and Islamic law generally, and has a direct impact when Muslim marriages end up in divorce courts.[48]

Stereotypes also frequently confuse religion with culture, again leading to mistakes about what exacdy is part of Islam and Islamic family law. For example, though arranged marriages (in various forms, ranging from complete parental control against the wishes of their children to family-arranged meetings of a potential couple) are found in many Muslim cultures (Haddad and Lummis 1987: 149-51), Islamic source texts do not require third-party intervention as a necessary or even preferred process of finding a spouse.

Muslim scholars in the USA, such as the late Fazlur Rahman among others, point out that there is nothing in the Qur'an or *hadith* 'asking Muslims to have arranged marriages' (Iqbal 1987). This is true even in the face of much of classical Muslim jurisprudence requiring guardian involvement in marriage negotiations for minors and even for adult women, reasoning (among other things) that this is necessary for their protection. Some Muslim women activists emphasize the non-Qur'anic basis for these guardian rules in arguments for reform beyond patriarchal interpretations in Islamic law (al-Hibri 2000: 60; Fadel 1998). Similarly, wedding particulars, from clothing and food to where the bride and groom sit, all vary from culture to culture, none of which commands Islamic official sanction, but may often be confused as such (Chang 1990).[49] It is not just non-Muslims who confuse culture with religion. Some Muslims assume cultural practices that have been within their families for generations are actually required by Islamic law. Thus, many debates within US Muslim families, whether they are inter-generational or inter-cultural, often superficially seem to be about religion, but are really based on a mixture of cultural and religious/legal norms. These debates include, for example, arguments over the level of parental involvement in choosing one's spouse (and participation in wedding formalities themselves), the amount of pre-marital contact future spouses may have, the nature and amount of dower, allocation of household responsibilities (financial and physical), and spousal activities and work outside the home, to name just a few. Many of these issues do appear in juristic discussions (both classical and modern), but usually in the context of what role custom plays in lawmaking, as these issues are not specifically addressed in the Qur'an and *hadith* (see 'Intellectual Resources' in Chapter 10). As the community evolves and migrates, discussions of these topics become complicated as the line between law and culture blur for the average Muslim.

Male superiority within the hierarchy of the family is one culturally validated but also often religiously justified ideology (Marquand 1996).[50] Many US Muslims believe in a patriarchal final authority over family matters, and look to Qur'anic verses in support of this belief. Others resist this notion as an antiquated cultural preference, and look instead to Qur'anic and Islamic concepts of partnership and equality of the sexes (Wadud 1999, 2000; al-Hibri 2000; al-Faruqi 2000; Barazangi 2000; Muslim Women's League, 'Gender Equality', n.d.). Both philosophies, and variations in between, can usually support harmonious and successful families. However, the idea of male superiority sometimes is used to justify physical and mental abuse of other family members, especially women and children, as a Muslim male's right, presented as somehow endorsed by the *shari'a* (Kadri, interview, 2000; Winton 1993).[51] In the words of Kamran Memon (1993), an attorney and one of the first in the US Muslim community to write publicly on the subject:

> Tragically, some Muslim men actually use Islam to 'justify' their abusive behavior...considering themselves to be Islamically knowledgeable and disregarding the spirit of Islam, they wrongly use the Qur'anic verse that says men are the protectors and maintainers of women to demand total obedience and order their wives around ... These men misinterpret a Qur'anic verse that talks about how to treat a disobedient wife and use it as a license for abuse.[52]

Even worse, as Memon and other Muslims note, is when battered Muslim women accept these religious claims and suffer the abuse, believing it to be some sort of religious duty on their part, and are unfortunately supported in this belief by Muslim community members, even leaders (Kadri, interview, 2000).[53]

This attitude, of course, disrupts the family unit with its acceptance of violence and general instability, and even more seriously if it drives the wife to flee the household or causes social workers to remove children from a dangerous family setting. Recendy, members of the Muslim community have begun to recognize the problem of domestic violence, publicly speak against it,[54] and take proactive steps inspired by Islamic principles to respond to the situation (Nadir 2001: 78; al-Khateeb 1998: 17; Syed 1996; Memon 1993). For example, the Peaceful Families Project, a programme funded with a $76,000 grant from the US State Department and spearheaded by Sharifa al-Khateeb, has held conferences in several major American cities dedicated to educating and advising the American Muslim public to combat domestic violence in Muslim families (Kondo 2001). Moreover, a number of Muslim organizations have been established specifically to assist battered Muslim women, or have developed programmes targeted at this objective, through education, creation of shelters and providing legal and counselling assistance.[55]

Dissolution of American Muslim marriages

Most Muslims pursuing divorce are careful to follow local state rules in order to ensure its recognition under US law. Sometimes Islamic family law does arise in these civil divorce proceedings, usually in the form of a claim for payment of the *mahr/sadaq* amount. Family law attorney Abed Awad reports, for example, that he sees a trend of husbands resisting dower payments, sometimes using the *shari'a*-based argument that wife-initiated divorces entail the wife's forfeiture of the *mahr* (interview, 2000). Another Muslim attorney, Sermid al-Sarraf, describes one case where the spouses turned to Islamic law to assist in determining the custody of their children, each consulting different Muslim legal scholars on the question. In the end, however, other issues, such as competency and capability of support, played a stronger role in the custody decision (interview, 2000). In general, US Muslims facing divorce disputes seem to seek advice and assistance on both their Islamic and secular legal rights; and as the number of Muslim legal professionals and legal organizations in the USA grows, more and more experts become available who can assist with both simultaneously.

In a minority of cases, Islamic divorces are conducted outside the American system altogether, either by a husband's private *talaq* declaration or through a third-party determination by local Muslim arbiters, and the parties fail to file any divorce documents under state rules.[56] Such divorces would lack validity under US law, and the parties may be faced with complications in any subsequent attempts to marry in the United States (Little 1993).[57] They would also present obstacles to either spouse attempting to enforce any terms of an Islamic divorce settlement, such as the distribution of property or custody of children, in the event that the other spouse breaches the deal. Some case law, discussed in the next chapter of this report, reflects efforts by the courts to deal with these extrajudicial divorces.

Deliberately opting out of US default rules

Some Muslims are proactively interested in ways to legitimately opt out of United States legal norms that potentially conflict with their Islamic preferences. For example, in community property states some Muslims are concerned that a community property distribution of half a wife's property to her husband infringes on the Muslim woman's right to full and exclusive ownership of her property.[58] Others believe that community property distributions should not be given to Muslim women in addition to their *mahr*, which they hold already to fulfil the need sought to be resolved by community property statutes.

But community property is not absolutely mandatory, even in community property states. One can opt out of community property by executing a valid pre-nuptial agreement to that effect, but few couples have the knowledge or foresight to arrange this.[59] A complicating concern is the possibility that the *mahr* agreement will be insufficient or not ultimately enforced, and therefore opting out of community property distribution will leave a Muslim woman with neither *shari'a*-based nor secular-based adequate support. Ironically, there are historically established financial compensation norms in Islamic law aimed at responding to the same problem to which community property laws are addressed. Azizah al- Hibri (2000: 57) points out in this respect that under classical Islamic law, wives who perform household chores are entided to financial compensation from their husbands for this work or, where the woman is accustomed to it in her social circles, to have paid help to do it for them because such work is not a religious obligation. While some Muslim countries today are seeking to revive this principle in practical terms in financial distributions upon divorce,[60] the doctrine remains unknown among most lay Muslims, in the United States and worldwide. Of course, enforceability of this Islamic doctrine in the United States is dependent upon voluntary compliance by ex-spouses, as it is unlikely to be applied by United States courts without some compelling reason to do so.

TWELVE: Islamic family law in US courts

We now turn to the question of how Muslim marriages have fared in the US courts.[61] There is fairly little awareness in the US Muslim community about this subject, and consequently many mistaken assumptions are made. Much confusion surrounds the question of the validity of the marriage contract itself, as many assume that the law of pre-nuptial agreements will safeguard the enforcement of Muslim marriage contract clauses.[62] As will be seen in this chapter, Muslims seeking to enforce their marriage contract as a pre-nuptial agreement have actually had varying success in the courtroom. One essential question that will be addressed is whether David Forte's prediction that there will be difficulty in 'pleading Islamic law in

American courts' has been fulfilled (Forte 1983: 31). In this chapter, we will review the treatment of Muslim marriage in published US case law, and review the thoughts of Muslim attorneys working in this field.

The validity of Muslim marriages

The question begins at the beginning—whether a Muslim marriage will be recognized as valid under domestic US law in the first place. As mentioned in Chapter 11, this is only a real concern where the couple did not also follow secular state rules in registering their marriage. But even where there is only a Muslim marriage ceremony, the courts have not rejected such marriages outright, but rather undertake their own inquiry into whether the marriage was valid under the laws of the place in which it was conducted. For example, *Farah v. Farah* was a 1993 Virginia case involving the proxy marriage in England of two Pakistanis (with a subsequent wedding reception in Pakistan) who subsequently moved to the United States. Because the proxy marriage did not follow English requirements for a valid marriage, the Virginia court held that it could not recognize it as a valid marriage, stating that the fact that the proxy wedding complied with general Islamic family law rules (which would be relevant in Pakistan) was irrelevant. Conversely, in a more recent case, *Shike v. Shike* (2000), a couple married in a Muslim *nikah* (marriage) ceremony in Pakistan and subsequently documented it in Texas by having a Texas imam sign a standard Texas marriage licence. Though the couple initially believed their *nikah* to be only an engagement,[63] the court's inquiry revealed that the parties' public representations were that of a married couple and therefore the court found the marriage valid under Texas law, even though performed outside Texas. Finally, in *Aghili v. Saadatnejadi* (1997), the Tennessee Court of Appeals held that an Islamic marriage ceremony, followed by later compliance with state marriage licence law, qualified as a legal marriage, reversing the trial court's summary judgment that the Muslim marriage 'blessing' did not qualify as a solemnization ceremony.

When there is no documentation of a marriage at all, Muslim or secular, then the court is faced with the difficult question of determining whether there was a 'putative' marriage (or in some states, a 'common law' marriage). This is what happened in *Vryonis v. Vryonis*, a 1988 case in California in which a couple entered into a private *mut'a* marriage (a marriage for a temporary period of time recognized under Shi'i but not Sunni Islamic jurisprudence) with no written documentation or witnesses. The court of appeals rejected the trial court's inquiry into the wife's reasonable belief in the validity of her marriage under Islamic law, and instead inquired into whether she had a reasonable belief of a valid marriage under California law. In the end, with no evidence of public solemnization, no licence, and no public representations of the couple as a married unit, the court answered the question in the negative. In reading *Vryonis*, it is interesting to note two elements considered by the court as persuasive against the existence of a real marriage: that (1) the wife kept her own name and (2) maintained a separate bank account. Commenting on this case, Azizah al-Hibri points out that, among Muslims, these facts would carry no persuasive weight against the existence of a marriage because the changing of the wife's family name on marriage is not required by *fiqh*, and indeed has not been a characteristic of most Muslim communities. And second, Muslim women often keep separate bank accounts to protect their right under Islamic law to exclusive control over their personal property (Muslim Women's League and Karamah 1995).[64]

Finally, there have been some cases of marriages held invalid by the courts where the Muslim parties are found to have violated basic norms of justice as recognized in the USA. For example, where a Muslim parent forces a minor to marry against his or her will, the courts have brought criminal charges against the parent.[65] In such cases, parental cultural defences are unsuccessful and held simply to violate public policy and the constitutional rights of the minor.

The enforceability of specific marriage contract provisions

The question of judicial enforcement of the terms of marriage contracts is important to Muslims because, as a minority community in a secular legal system, the only authority with physical state power to which individual spouses can turn when their partner breaches a marital agreement is the domestic courts. While local Muslim authorities (scholars, imams, family elders) are widely used to assist conflicts internally, these authorities ultimately rely on voluntary compliance by the parties; they do not have the police power necessary to force compliance against a recalcitrant spouse. However, courts interpreting complex personalized Muslim marriage contracts face a dilemma because there is a judicial preference not to interfere in an ongoing

marital relationship (Rasmusen and Stake 1998: 484).[66] Thus, clauses that demand compliance during the life of a marriage (such as a spouse's right to complete an education, a promise of monogamy, or the nature of raising the children), even if they do not offend public policy, are rarely the subject of judicial oversight. If the marriage is at the point of breakdown, however, the court may be willing to include breach of marital agreements in its calculation of damage remedies for the violated spouse. This is often frustrating for those who would have preferred to maintain the marital relationship as agreed, rather than receive damages for its dissolution. As American legal scholar Carol Weisbrod (1999: 51) puts it: 'In many family law cases, money is not an adequate remedy... [but] other more direct remedies may be barred because, for example, personal services contracts are not specifically enforceable and the United States Constitution guarantees the "free exercise of religion," with all the complexities of that idea.' As will be seen, this may have serious consequences for those relying on agreements regarding the religious upbringing of the children.

Provisions regarding the *mahr/sadaq* in a Muslim marriage contract are somewhat easier for the courts to handle because they are usually already defined in terms of a monetary amount payable upon dissolution of the marriage — a secular concept understandable to US judges. In the most recent case to take up the question, *Odatalla v. Odatalla* (2002), a New Jersey court treated the Muslim marriage contract in question under standard contract law and ultimately upheld the $10,000 postponed *mahr* as binding in a US court. Said the New Jersey judge: '[W]hy should a contract for the promise to pay money be less of a contract just because it was entered into at the time of an Islamic marriage ceremony? ... Clearly, this Court can enforce so much of a contract as is not in contravention of established law or public policy' (Odatalla 1995). What is unique about this case is that, contrary to the predominant approach of most US courts up to this point, it did not analyse the *mahr* as a pre-nuptial agreement, but rather under neutral principles of contract law.[67] Abed Awad, who litigated the case on behalf of the prevailing wife, insists that the misconstruction of *mahr* agreements as pre-nuptial agreements under US law has created a serious warping of American judicial understanding of Islamic law as well as a hindrance to providing justice to US Muslim litigants.[68] As urged by Awad in the *Odatalla* litigation, *mahr* is not consideration for the contract, but rather an effect of it — an automatic consequence whenever a Muslim couple marries (Awad 2002). This is borne out by classical jurisprudence on the subject and the fact that Muslim jurists would assign an equitable *mahr* to those wives whose contracts did not specify one (Welchman 2000: 136, 140; Rapoport 2000: 14).69 Thus, enforcement of Muslim marriage contracts, says Awad, should be by simple contract law principles, and not by the more particularized rules of pre-nuptial agreements that vary from state to state and generally carry heightened scrutiny (Awad 2002).

The characterization of Muslim marriage contracts as pre-nuptial agreements is not exclusive to US judges. Many lay Muslims, unaware of the legal distinctions between pre-nuptial agreements and simple contracts, often refer to Muslim marriage contracts as pre-nuptial agreements, and moreover some actively advocate the employment of this legal tool by US Muslims.[70] Attorney Abed Awad points out that these Muslims are often unaware of the technical requirements attached to valid pre-nuptial agreement drafting, and also that such agreements are assumed to override all other standard laws regarding dissolution of marriage, such as inheritance, community property, alimony and so on (Awad, interview, 2001). In Islamic law, however, these are separate questions — a Muslim wife is entitled to both her *mahr* and her standard inheritance portion — and Awad points to this as another proof that the Muslim marriage contract should not be seen as a pre-nuptial agreement.

A California case illustrates what happens when pre-nuptial agreement analysis meets an incomplete understanding of Islamic law in a US court. In *Dajani v. Dajani* (1988), the California Court of Appeals interpreted the *mahr* in a Muslim marriage contracted in Jordan to be a pre-nuptial provision 'facilitating divorce' because the 5,000 Jordanian dinars became payable to the wife only upon dissolution of the marriage. In California, as in most states, a pre-marital agreement may not 'promote dissolution' and thus a promise of substantial payments upon divorce may be interpreted to invalidate that clause.[71] The court thus considered the *mahr* windfall to be potential profiteering by divorce' by the wife and against public policy, and held the provision unenforceable, causing Mrs Dajani to lose her expected *mahr*. Azizah al-Hibri has critiqued this court opinion, showing it to reflect a basic misunderstanding of Islamic law and the institution of deferred dower, particularly

since deferred dower is also due upon the death of the husband (al-Hibri 1995: 16-17).[72] It might also be pointed out that, under Islamic law, if a woman initiates divorce extra-judicially through *khul'*, then she is likely to forfeit her *mahr*.[73] Thus, a *mahr* clause in this situation acts as a deterrent to (not a facilitator of) no-fault divorce by the wife - a result quite opposite from the 'profiteering' assumptions made by the California Court of Appeals.

The whole life of the *Dajani* case, from trial to appeal, illustrates mistakes that can be made when US judges attempt to adjudicate matters of Islamic law. At trial, for example, Muslim experts testified to the *Dajani* judge regarding the forfeiture of the dower upon divorce initiated by the wife, and, based on this testimony, the trial court concluded that the wife must forfeit her *mahr* because she initiated the divorce, an oversimplified understanding of Islamic law on the matter. (Unfortunately, the court did not undertake an analysis of *faskh* dissolution in Islamic law where an inquiry into harm is made, distinguishing it from extrajudicial *khul'*.) But when it got to the Court of Appeals, the inquiry into Islamic law was even more superficial: it went straight to rejecting all *mahr* provisions generally as 'facilitating divorce'.

Demographic distribution may play a role in the ability of US judges fully to understand minority religious practices affecting family law rights. For example, the *Odatalla* case originated in New Jersey, in an area with a significant Arab-American population. Similarly, New York family courts dealing with Muslim litigants have relied on their experience with the Jewish *ketuba*, a custom carrying many parallels with Muslim marriage contracting. Thus, in *Habibi-Fahnrich v. Fahnrich* (1995), the New York Supreme Court, though a bit confused in its usage of terms,[74] specifically stated: 'The *sadaq* is the Islamic marriage contract. It is a document which defines the precepts of the Moslem marriage by providing for financial compensation to a woman for the loss of her status and value in the community if the marriage ends in a divorce. This court has previously determined that *sadaq* may be enforceable in this court.' In this case, the court ultimately ruled the *sadaq* at issue to be unenforceable, but it did so in a way that is more instructive to Muslims. In *Fahnrich* (1995), the New York court had difficulty giving effect to the *sadaq* provision in the Muslim marriage contract simply because the terms were too vague under basic contract principles. The clause '[t]he *sadaq* being a ring advanced and half of husband's possessions postponed' left too many financial calculation 'questions unanswered (e.g. half of which possessions calculated at what point in the marriage? Postponed until when?). Thus, it was a violation of the Statute of Frauds, not public policy, which doomed this *mahr* provision. In fact, these same criticisms would be likely to be raised under an Islamic investigation of the terms of the contract (Rapoport 2000: 5-21). In both jurisdictions, Muslims would be wise to pay more attention to writing clear terms in their marriage contracts.[75]

The need for clarity arises in another clause often included as standard in Muslim marriage contracts, stating something to the effect that the marriage is governed by Islamic law. These sorts of clauses have been found by one court to be insufficiently clear to warrant court enforcement of its terms. In *Shaban v. Shaban* (2001), the California Court of Appeals rejected a husband's attempt to enforce the *mahr* (the equivalent of $30) listed in his Egyptian Muslim marriage contract, instead awarding the wife $1.5 million in community property. The marriage contract included a clause stating that the 'marriage [was] concluded in accordance with his Almighty God's Holy Book and the Rules of his Prophet', and the husband asserted that this meant that the dissolution should be governed by 'Islamic law'. The court flatly rejected this attempt to incorporate Islamic law by reference, stating that 'Islamic law' was such a broad, abstract concept that brought too much uncertainty into the terms of the contract. Pointing out the many manifestations (schools of thought, state legislation) of Islamic law, the court concluded: 'An agreement whose only substantive term...is that the marriage has been made in accordance with "Islamic law" is hopelessly uncertain as to its terms and conditions.'[76] Thus, the Statute of Frauds, requiring clear contract terms, prevented its enforcement. Interestingly, the court did not even get to the question of whether the *mahr* clause was against public policy (as they had in *Dajani*, and as the trial court had done in this case). Said the court: 'It is enough to remark that the need for parole evidence to supply the material terms of the alleged agreement renders it impossible to discuss any public policy issues. After all, how can one say that an agreement offends public policy when it is not possible even to state its terms?'

The California court's attitude in *Shaban* is significantly different from the New York Supreme Court's

treatment of a similar clause in *Aziz v. Aziz* (1985), in which it found a Muslim marriage contract, with its *mahr* provision of $5,000 deferred and $32 prompt, to be judicially enforceable despite its being part of a religious ceremony, because it conformed to the requirements of New York general contract law. This is true even though the contract apparently stated that it united the parties as husband and wife 'under Islamic law'. The concerns of 'Islamic law' by incorporation so central to the California *Shaban* court apparently did not bother the New York Supreme Court. In the words of the court: 'The document at issue conforms to the requirements of [state contract law] and its secular terms are enforceable as a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony."[77]

There are two interesting aspects of *Shaban* that are relevant for our study here. First, the court's rejection of the entire contract because of a clause stating it is governed by 'Islamic law' is important to Muslims because most, if not all, Muslim marriage contracts include this type of statement. This is true even of marriage contracts drafted in the United States. Since the court appeared particularly frustrated with the lack of any other substantive terms in the contract besides this one and the *mahr* provision, it may be that by individualizing and embellishing their marriage contracts with many substantive stipulations, Muslim couples may be able to avoid a result like the one in *Shaban*, but there is no guarantee. In addition, as will be seen in more detail later, other states have found their way to enforcing Muslim marriage contracts despite such references.

The other interesting thing about the California court's treatment of *Shaban* is its absolute lack of interest in investigating the permutations of Islamic law if it were to govern the agreement. They are justifiably concerned about the complexity and diversity of 'Islamic law' and their reluctance to engage it is understandable. Nevertheless, one is left with the impression that the court took for granted the husband's version of Islamic law — i.e. that the wife would be limited to $30 *mahr* under Islamic law, and that the obviously fairer thing to award the ex-wife of a now-wealthy American doctor after twenty-seven years of marriage is her community property entitlement of $1.5 million. But if the court had decided to make a deeper investigation of Islamic law in such a situation, they might have found that the stipulated *mahr* is not always the end of the story for a Muslim court—she might have been given an adjusted *mahr mithl* if the stipulated *mahr* was out of proportion to women of her peer group, and she might even have been awarded *muta* maintenance (equivalent to alimony) in an amount close to the community property award (Rapoport 2000). Further, Islamic legal precedent establishing that women have no obligation to do housework or even to nurse children (and thus should be compensated for it if they choose to do so),[78] points to an awareness of the very problem that community property laws in the modern West seek to remedy (al-Hibri 2000; Walter 1999). It is a mistake to assume that awards under Islamic law are necessarily going to be worse for the wife than under US law. In fact, it appears that most spouses attempting to enforce Muslim marriage contracts in US courts are wives (not husbands), attempting to enforce rather high *mahr* amounts.[79]

An interesting aspect of these cases is that they show, in general, that for those courts that do undertake the effort, they have been fairly good at understanding the relevant Islamic jurisprudence defining the nature of a Muslim marriage contract, in order to discern which elements it can enforce as a secular court. These judicial understandings are largely from their own research as well as Muslim expert witnesses presenting courtroom testimony. Though they often disagree with each other in a particular case and frequently leave out jurisprudential details, the outcome of the cases indicates that, by and large, these experts have served to give the judges a rather good idea of the important elements at work. In one case, an appellate court even corrected its trial court in understanding the nature of Muslim wedding officiants. In *Aghili v. Saadatnejadi* (1997), the Tennessee Court of Appeals, citing expert testimony, explained:

> In contrast to Western religious teaching and practice (particularly in Christianity, both Catholic and Protestant, but also to some extent Judaism) Islam from its inception to the present has consistendy rejected the distinction between clergy and laity. Islamic law stipulates quite precisely that anyone with the requisite knowledge of Islamic law is competent to perform religious ceremonies, including marriage. One is not required to have an official position in a religious institution such as a mosque (*masjid*) in order to be qualified to perform such ceremonies.

This understanding of Muslim wedding officials (and imams in general), though it overstates the facts in assuming there is a need for an officiant at all (Islamic law does not require one), is still instructive in accurately trying to appreciate the different structure of religious authority in Islamic law as compared to other religions, and does so in a respectful way. There is here an appreciation that a Muslim marriage does not have to look like a Christian one, and need not have an altar or a minister in order to be valid. In this case, the court's awareness resulted in its rejection of the husband's claim that his marriage was not valid because the officiant was not a real 'imam'. Said the court, his 'right to bear the title imam is irrelevant'. Of course, the education of judges is not uniform across the USA (as the *Dajani* case exemplifies), but this review of the case law indicates an overall positive picture, especially in those states that have more experience with minority religious legal traditions, such as New York.

The lesson for American Muslims from these cases is that, even though a Muslim marriage contract serves a religious function, if its terms are clear, an American court might find a way to enforce those terms serving a 'secular' purpose, such as the financial *mahr/sadaq* awards due upon dissolution. But a final note on secular court understandings of *mahr/sadaq* clauses: it is worth noting that Muslim jurisprudence, classical and modern, identifies a number of functions fulfilled by the institution of *mahr*, whether in its status in the contract or more broadly in the social life of the wife in particular. A number of these functions have been identified by US courts in the cases described above.[80] These include: (i) it serves the purpose of financial security for the wife in the event of a divorce;[81] (2) it may serve as a deterrent to the husband declaring a unilateral *talaq* divorce;[82] (3) it constitutes a form of compensation to a woman unjustly divorced by the husband's unilateral *talaq*; (4) it is the husband's consideration for entering the marriage, under basic contract law principles; or, lastly, (5) it is simply a gift from the husband to the wife.[83] Each of these functions of *mahr* might prompt a different analysis by a secular court attempting to understand it in secular terms, and there is consequently the potential for inconsistencies between courts and frustration by Muslim litigants who may interpret the purpose of their *mahr* differently than that focused on by the court. For example, if the *mahr* is merely a gift, then why does Islamic law treat it as a debt owed by the husband if he chooses not to pay it? (Esposito 1982: 25; Rapoport 2000: 10). If it is compensation for unjustified unilateral divorce by the husband, then what if the divorce at issue was initiated by the wife instead? If it serves as financial support for the wife after divorce, then does the initiator of the divorce (i.e. whether it is *khul'* or *talaq*) really matter, and can secular alimony and child support payments be substituted instead? Rapoport's review of the evolution of the deferred *mahr* suggests that that institution did act as a substitute for alimony, but this does not speak to the rationale of the prompt *mahr* (Rapoport 2000). Further complicating all these analyses are the myriad variations on what *mahr* amount is payable up-front and what amount is deferred — i.e. if it is substituted for alimony, then should Muslim women start asking for a large amount upfront instead of a large deferred amount, to protect themselves against the possibility that a court will award them neither alimony nor their deferred *mahr*? And then there is the question of how to treat dowers that are not specified in monetary terms at all. All of these questions remain unanswered, and perhaps there is no uniform answer that applies to the situation of every woman (i.e. while one might need financial security, another might need deterrence against her husband's unilateral divorce). Nevertheless, as these cases demand more and more judicial attention, they will also draw the eye of Muslim legal experts in the USA to focus on basic Islamic jurisprudence on the subject, its appropriate interpretation in the context of modern-day USA, and then address how to present these conclusions to the judiciary.

At present, US Muslim attorneys differ over the viability of pursuing the enforcement of *mahr/sadaq* provisions in the courts. Some believe it to be generally a losing proposition, citing local cases they have seen where the *mahr* was denied (Kadri, interview, 2000). Others are optimistic about the future of *mahr* recognition in the United States and encourage those pursuing these cases (al-Sarraf, interview, 2001). Indeed, in the cases reviewed above, spouses asserting the enforceability of a Muslim marriage contract as a pre-nuptial agreement did not always succeed. In both California cases dealing with *mahr* claims as pre-nuptial agreements, *Dajani* and *Shaban*, the court ultimately refused to honour the contract. In New York and Florida, the parties fared a bit better: in Aziz (NY) and Akileh (FL) the Muslim dower provisions were upheld, though the language of the Florida court indicates that they perceived the *sadaq* to be the husband's consideration for entering

into the contract, an analysis with which Awad would strongly disagree.

Reviewing the history of the subject in general, it appears that interest in enforcing *mahr* provisions in the courts has taken particular hold in the Muslim community over the past five years or so. In earlier years, Muslim couples apparently tended to opt for informal recognition, voluntarily enforced through internal channels. As more and more Muslims draft formal Muslim marriage contracts in the United States, the courts will presumably see more litigation of *mahr* clauses. It remains to be seen whether there will be consistent treatment of these cases by state family law courts, and whether that treatment will be to review these cases as pre-nuptial agreements, seek to reject them as contracts with uncertain terms due to their religious references, or analyse them under straight contract law.

As for the enforceability of contractual stipulations other than the dower, there is much less case law because, as noted earlier, these sorts of stipulations are less popular in Muslim marriage contracts, and have even less frequently become the subject of full litigation ending up in published case reports. One stipulation many Muslims wonder about is a clause regarding the religious upbringing of the children, a relatively popular clause in inter-religious marriages. Specifics vary from state to state but, generally, agreements that a child will be raised in a particular religion are not enforceable in a pre-nuptial agreement, but if included in a separation agreement (when the marriage is ending) are usually recognized. For example, in *Jabri v. Jabri* (1993), a New York court held: 'Agreements between divorcing spouses with respect to the religious upbringing of their children will be upheld by the courts only when incorporated into separation agreements, court orders, or signed stipulations… In the absence of a written agreement, the custodial parent… may determine the religious training of the child.' And in *Arain v. Arain* (1994), the New York Supreme Court rejected for lack of supporting evidence a custody-change request based on a claim that the wife had violated her agreement to 'raise the child pursuant to the Muslim faith'. Muslims will note that this is in contrast to standard Islamic law rules on custody, which would hold that a non-Muslim's wife failure to raise the children as Muslims would cause her custody of the child to lapse at least once age of discrimination is reached. This US judicial policy is based on several reasons, including the unconstitutional judicial promotion of a particular religion, and avoidance of judicial interference in an ongoing marriage (*Zummo v. Zummo*, 1990). As a result, Muslim marriage contracts including a religion-of-the-child clause are unlikely to be enforced because these contracts are usually likened to pre-nuptial agreements in order to be enforced. However, upon divorce, if such an agreement is possible (either through divorce mediation, or informally between themselves), the parties may be able to accomplish this goal, if the agreement is included in their documented separation agreement. In any case, religious upbringing of the children is a complicated and risky business, and (as discussed earlier) is one of the reasons some Muslims today warn against marriage to non-Muslims (al-Hibri 2000).

The validity of Muslim divorces

The basic rule governing the validity of divorces in US courts is *lex domicili*, that is, the validity of the divorce is dependent upon the law of the domicile of the parties (Reed 1996: 311). Thus, where it is sought to enforce Muslim divorces conducted outside the United States, the court will look to the law of the foreign state. For example, in a case as old as 1912, *Kapigian v. Minassian*, the Supreme Court of Massachusetts held as valid the Turkish law of the time which automatically nullified the marriage of a non-Muslim woman to a non-Muslim man upon the wife's conversion to Islam, and therefore upheld the divorce of a Turkish Muslim woman convert whose husband was then living (and remarried) in the United States.

Of further interest to the Muslim community is the treatment of domestic non-judicial divorces — those accomplished by verbal *talaq* or through formal approval by a local Muslim imam. These have not fared well. In *Shikoh a Shikoh* (1958), the federal Court of Appeals for the Second Circuit held that a religious divorce granted by a local shaykh failed to constitute a 'judicial proceeding', which was required for all legitimate divorces under New York law, and held the divorce invalid. Said the court, *lex domicili* still applied: 'where the divorce is obtained within the jurisdiction of the state of New York, then it must be secured in accordance with the laws of that state'. And even where the domicile is a Muslim country, the US courts have demanded a judicial proceeding. Thus, in *Seth v. Seth* (1985), the Texas Court of Appeals refused to recognize

a *talaq* divorce conducted in Kuwait as valid because there was 'no factual showing [that] any official state body in either India [where they were married] or Kuwait... had actually executed or confirmed the divorce and marriage'.

Looking over these cases as a whole, we might notice that they reflect a basic Western assumption built into the judicial reasoning — i.e. that a divorce has to be somehow officially recognized by some official body, even in a Muslim country, in order to be legitimate. However, Islamic laws of divorce do not follow this same premise, as private declarations of divorce (*talaq*) or private mutually-consented divorce agreements (*khul'*) are nevertheless given legal validity in Islamic *fiqh*. Of course, modern Muslim countries, with variations on classical Islamic law as their legislated codes, often require something more for legal recognition of a divorce, even if only a registration of an extra-judicial divorce with the authorities. The question that has apparently not yet reached a US court is whether it would recognize an extra-judicial *talaq* or *khul'* divorce if it had been registered with the state as a divorce deed, and therefore perfectly valid as a divorce in that particular country (as is the case in Egypt or Pakistan, for example) but not the subject of a 'judicial proceeding' as required by this US case precedent. If the question is ever raised and the court is willing to undertake a study of Islamic law in order to answer it, the argument might be made that the rationale behind the 'judicial proceeding' requirement is the due process principle of notice and the right to be heard,[84] and therefore *khul'* divorces (obtained extrajudicially but with mutual consent of both parties) should be recognized but *talaq* divorces (whereby a husband merely declares the divorce with no necessary consent by or even notice to the wife) should not. This level of Islamic law awareness and analysis, however, can only be hoped for, as the cases summarized thus far illustrate the serious misunderstandings of Islamic law upon which some of these cases have been adjudicated.

The divorce cases requiring 'judicial proceedings' and other cases where Islamic legal norms are rejected for violation of public policy, tend to reflect the presumption that the secular rules which override religious laws are somehow better, fairer, and reflect more progressive views on women, children and human rights. Yet, US Muslim scholars might take issue with this presumption, pointing out that in some cases, Islamic law is more progressive and beneficial to women than its secular counterpart. For example, the institution of *khul'* divorces, allowing a woman to end a marriage (usually for the price of her *mahr*) without having to go through the long and often painful process of divorce litigation, might be seen as a very useful tool for women. Moreover, the right to a *mahr* is so central to Muslim consciousness that it is usually the only marital stipulation Muslim women are aware they must include in their marriage contracts. Many see the deferred *mahr* as meaningful deterrence against a hasty divorce by the husband, and the prompt *mahr* as a means of ensuring financial security and independence to women who may or may not have an outside income. When a US court strikes down a *mahr* provision (whether as too religious or against public policy), many Muslim women believe this is a step backwards, not forwards, for women. Many assert that some of these cases do a serious injustice to Muslim women and to the aspects of Islamic law that protect their interests (al-Hibri 1995). Other woman- affirming aspects of Islamic law as yet unaddressed by US courts include the recognition that a woman's household work is financially compensable, that her property is exclusively her own, and the ability personally to tailor a marriage contract. These are all illustrations of Islamic jurisprudential progressiveness, some of which have only recently been paralleled in the West. Comparing different legal systems, therefore, must be undertaken with care, and it is dangerous to assume that a comity-based recognition of an alternative norm is always a concession to the lesser law. Sometimes it may be a step forwards.

Child custody

As in every community, many Muslim divorce cases necessitate a custody determination. Islamic family law can arise in these cases when one party asserts classical *shari'a* custody rules based on the age and gender of the children (Doi 1989: 37).[85] Such claims may play a large role at the informal level (mediated divorce settlement agreements, for example) in the US Muslim community, but published case law focuses mainly on the validity of overseas custody decrees from Muslim countries. There is not a huge amount of published case law on this subject, although Henderson (1997-98: 423) notes a certain recent increase, with only three cases involving state court interpretation of custody decrees from Muslim countries being reported between 1945 and 1995, while a further three were reported in

the year 1995-96 alone. These cases reveal differing treatment by states towards Islamic law's custody rules, sometimes showing deference to Muslim courts and sometimes not, but always within the context of the US standard of the 'best interests of the child'. For example, in *Malak v. Malak* (1986), the California Court of Appeals evaluated one Muslim custody decision from Abu Dhabi and one from Lebanon. The Abu Dhabi decision, awarding custody to the father because of its rule automatically granting custody to fathers when the child reaches a given age, was held inconsistent with best interest standards and was rejected. The Lebanese Muslim court decree, on the other hand, was found to comply with American courts' expectations of notice and also legitimately considered 'educational, social, psychologic[al], material, and moral factors, for the purpose of insuring the best interest of the two children and their present future and in the long run'.[86]

Some courts have recognized the child's religion as a legitimate factor to be considered in a 'best interest' analysis, for courts in a society where religion is centrally important. Thus, in *Hosain v. Malik* (1996), a Maryland court concluded that, in Pakistan, custody determination of the best interest of the child was appropriately determined according to the morals and customs of Pakistani society. Said the court:

> We believe it beyond cavil that a Pakistani court could only determine the best interest of a Pakistani child by an analysis utilizing the customs, culture, religion, and mores of the community and country of which the child and —in this case — her parents were a part, i.e., Pakistan...[B]earing in mind that in the Pakistani culture, the well being of the child and the child's proper development is thought to be facilitated by adherence to Islamic teachings, one would expect that a Pakistani court would weigh heavily the removal of the child from that influence as detrimental.

Judicial consideration of the religion of the child in 'best interest' analyses is not limited to review of international decisions. Some courts have found it relevant as a positive factor in their own 'best interest' evaluation, for example, where religion has been an important part of the child's life until that point; but, again, the importance given to this criterion varies widely from state to state.[87]

Returning to *Hosain*, it is interesting to note that the court there viewed classical Islamic custody rules as not necessarily contrary to public policy. Said the court: 'We would be obliged to note that we are simply unprepared to hold that this longstanding doctrine [*hazanat* - i.e. custody] of one of the world's oldest and largest religions practiced by hundreds of millions of people around the world and in this country, as applied as one factor in the best interest of the child test, is repugnant to Maryland public policy.'

Not all American courts are so reluctant to condemn classical Islamic custody rules outright, however. In *Ali v. Ali* (1994), for example, a New Jersey court rejected a Palestinian custody decree as not in the 'best interests of the child', commenting on the law applied by Palestinian *shari'a* courts in Gaza that automatically entitles the father to gain custody of a son at age seven in the following terms: 'Such presumptions cannot be said by any stretch of the imagination to comport with the law of New Jersey whereby custody determinations are made based upon the "best interests" of the child and not some mechanical formula.' Incidentally, this attitude also finds an audience in legal academia; Henderson (1997-98), for example, devotes an entire article to warning judges to be 'circumspect of foreign custody decrees based on Islamic law' because it is 'mechanical, formulaic and should not be followed'.

One final note on American judicial treatment of Muslim marriage litigation as a whole: the fact that many of the cases reviewed in this section involve marriages either contracted or ended in a foreign country may at first seem not directly relevant to a study of Islamic family law in the United States. However, the complex international demographic of the Muslim population in the USA means that many do not live in the same place over their entire lifetime — they may, for example, emigrate to the USA early in life, move overseas later in life, or live a dual citizenship in more than one country. Or, perhaps, because they have overseas relatives, an individual Muslim may live in the United States fulltime, but have his/her Muslim wedding ceremony overseas with extended family. Cases where the marriage is executed or dissolved overseas could all end up being litigated in the US courts. As the population of second-generation and native US Muslims grows and more Muslim marriages end up in US courts for litigation, we may see more cases where the full law-related gamut of marital life occurs here in the USA. In these cases, comity to other

nations will not be at issue, and US judges will be faced with the question of how to treat Islamic family law in the context of litigants from one of their own domestic religious minorities.

THIRTEEN: Future trends and predictions

In order fully to appreciate the current developments in the broader picture of Muslim family law in the USA, it is imperative to investigate the roots of current theories utilized by Muslim thinkers in North America. Over the past sixty years or so, Muslims in the USA, whether indigenous, immigrant or simply based in the USA for a variety of reasons, have developed a vibrant and dynamic discourse on issues of Islam and modernity. This intellectual tradition focuses on both the development of theoretical approaches to relevant problems and practical methods for resolution of those challenges.

The theoretical basis for creating a new legal methodology for Islamic family law finds its origin in the early efforts of Muslim thinkers within the Western academy. For example, scholars such as the late Ismail al-Faruqi called for the 'Islamization' process of all Western disciplines (al-Faruqi 1982). Some of the intellectual forebears of this movement include Muslim scholars such as Muhammad Abduh and Rashid Rida, from the end of the nineteenth and early twentieth centuries. Rida has been characterized by Wael Hallaq (1997: 216) as one who 'steered a middle course between the conservative forces advocating the traditional status quo of the *shari'a*, on the one hand, and the secularists who aimed to replace the religious law by non-religious state legislation on the other'.[88] This involved, first, the turning of the Muslim focus on to Western thought and creating an environment where Muslim scholars began to distinguish between a full-blown condemnation of all Western thought and the possibility of reconciling various forms of knowledge. Al-Faruqi's legacy is found in works that present an Islamic viewpoint on disciplines as diverse as linguistics and physics. The late Fazlur Rahman was another scholar who engaged with issues facing modern Muslims and proposed specific strategies for addressing them. One of Rahman's specific contributions was a focus on the ethics of revival and emphasizing the link between morality and legal thought (Rahman 1982). The works of these and other scholars have opened the door for many new generations of reformers and thinkers who are grounded firmly within the Muslim tradition but are able to employ also concepts from other sources. In the area of Islamic law, and specifically *usul al-fiqh* (jurisprudential theory), Muslim scholars in the USA have explored a rich variety of issues that face the local Muslim community. One scholar who focuses on applying classical *usuli* scholarship to questions of modern Islamic law in the USA is Taha Jabir al-'Alwani, who reviews historical perspectives on the evolution of juristic disagreement in Islam and offers a methodology of modern inclusive scholarship (al-'Alwani 1985).

Bridging the worlds of Islamic and US law, there are a number of Muslim law professors in the United States. Though few, these professors have left their mark in community building and Islamic legal education, as well as excellence in their chosen secular legal fields. For example, Gherif Bassiouni, Professor of Law at DePaul University College of Law for over thirty years, is an expert in international criminal law and human rights. His numerous publications in several languages include pieces on general criminal law and human rights as well as Islamic law on these issues (for example Bassiouni 1982, 1983, 1987) and he has been at the forefront of international and national debates on issues of human rights and Islam (including receiving a 1999 nomination for the Nobel Peace Prize), urging that human rights are not alien to Islam, and in fact are founded on Islamic principles. Similarly, Abdullahi An-Na'im, Professor at Emory University School of Law, is a significant contributor to the discussion on Islam and human rights. An-Na'im (1990, 1992) has highlighted the critical issues and areas that must be addressed by modern Muslim societies in order to form institutions that respect basic human rights and liberties.

Another Muslim law professor, Azizah al-Hibri, has contributed to the ongoing dialogue of women's rights and Islam, publishing extensively on Islamic law issues especially affecting women (al-Hibri 1993, 1997, 2000). Professor of Law at the University of Richmond School of Law, al-Hibri is also founder of Karamah: Muslim Women Lawyers for Human Rights, and frequently makes presentations in both domestic and international fora speaking on *shari'a* -based legal mechanisms to protect the human rights and welfare of Muslim women. Finally, there are diverse perspectives on the use of classical scholarship and its connection to modern interpretations. Khaled Abou el-Fadl, Professor of Law at the University of California at Los Angeles, has, among other things, examined the

historical and cultural record of Muslim communities who lived in non-Muslim states and drawn upon these lessons to particularize his interpretation of Islamic law to the US Muslim environment (Abou el-Fadl 1994). Abou el-Fadl remains grounded in the classical traditions to the extent that he continues to inform his own work with discussions from classical Islamic scholarship (Abou el-Fadl 2001).

The precarious position of being a part of a minority Muslim population has informed not only Muslim legal scholars, but also another group of reformers who have focused on activism as a tool to introduce new positive and creative responses to some of the legal needs of the community. For example, the difficulties of explaining Islamic family law to domestic courts and institutions, as well as the desire to resolve intimate matters with those who share the same faith-based system of ethics and morals, has prompted some members of the Muslim community to examine the viability of establishing local faith-based tribunals. Similar efforts have been embarked upon in the United Kingdom with the establishment of Muslim Law Shariah Councils (MLSC) whose aim it is to 'keep the identity of our community, to keep its laws, to keep it whole, while at the same time not breaking the laws of the state, having our own private language, while speaking the common language' (Shah-Kazemi 2001: 10). Muslims in the United States have begun to discuss the possibility of establishing such tribunals.[89] One of the differences between the US and UK experiences is that Muslims in the USA have, at least at the theoretical level, been interested in a model of marriage dispute resolution that is more egalitarian in its approach. The English MLSCs, on the other hand, seem predicated on the role of the *qadi* as mediator or judge in the process of Muslim marriage dissolution (Shah-Kazemi 2001). An example of the American approach can be seen in the work of Amr Abdalla, who calls for an Islamic model of interpersonal intervention in conflict based on three principles: (1) restoring Islam to its message of justice, freedom and equality; (2) engaging the community in the intervention and resolution process; and (3) adjusting the intervention techniques according to the conflict situation (Abdalla 2000: 153).[90] As the idea of establishing US Muslim tribunals evolves, it will be important to examine whether they will mimic the role of a Muslim *qadi* who is the expert, or rather will be infused with the involvement of various other Muslim professionals and community members. The choice between these two approaches will have a significant influence on the ultimate nature of decisions emerging from these tribunals.

The attitude of the US courts to the rise of these tribunals is as yet unknown, but there are indications that some judges would welcome the existence of reliable arbiters of Islamic family law issues, and may even be undertaking their own consultation with Muslim authorities in the interim. For example, in a recent divorce case in Pomona, California, a complicated *mahr* question was ultimately resolved by referral of the parties to two Muslim imams (mutually agreed to by the parties) on the *mahr* question, which was then returned to the family judge who allocated the dissolution amount accordingly (Erickson, interview, 2001). This very innovative approach honoured the parties' allegiance to Islamic law while still maintaining state jurisdiction over the case.

Muslims in the USA have a helpful precedent for these efforts in the experience of the Jewish community, which has already established an alternative dispute-resolution faith-based system. The Jewish community's *beit din* institutions play the role of arbitrators or mediators in marriage dissolution processes (Greenberg-Kobrin 1999: 364). Further, many states have adopted laws that include clergy as potential mediators or counsellors for family disputes; some now make it mandatory for couples and families to consult with some type of mediator whenever any issue of dissolution or custody arises (Lyster 1996). Muslims may find that, in addition to their imams, they can use the services of Muslim lawyers or social workers. Panels similar to *beit din* within the Jewish community might function as faith-based tribunals for various family law issues. Muslims may explore the option of naming possible mediators or arbitrators in their marriage contracts or pre-nuptial agreements. The contract that one signs must conform to all of the standard hallmarks of contract law.[91] The idea of restoring Islamic values through creating an Islamic mediation model is echoed in other Muslim activist work asserting a restoration of Islam to its basic values of justice, freedom and equality. Many US Muslims see the message of reform as central to any action taken by a Muslim. They find the impetus to form social change movements inherent in the fact that they are Muslim, and hope to find a space that exists between the realm of an Islamic belief system and their US cultural milieu.[92] This feeling of individual obligation has been manifested in the creation of various

organizational structures seeking positive change in the form of activist, grassroots activities and education of the Muslim and non-Muslim public on issues of both Islamic and US law. One example is Karamah, noted earlier, an organization engaging both the Muslim and non-Muslim communities on the topic of human rights and women. Its activities include participation in the Fourth United Nations World Conference on Women, and inter-religious fora on women's rights issues,[93] as well as the model marriage contract project noted earlier. Through this work Karamah has provided a critique of mainstream secular and Islamic opinions on legal issues relevant to women.

Another organization of interest to our study and mentioned above is the National Association of Muslim Lawyers (NAML).[94] Initially established in 1995 as a web-based community forum for discussions and networking among Muslim lawyers, this organization has now evolved into a formal organization addressing the needs of the burgeoning Muslim legal community. Its annual conferences have covered topics of interest to those following the legal situation of Muslims in the USA, both in terms of Islamic and US law.[95] Moreover, the searchable online database of Muslim attorneys provided on NAML's website is a significant contribution to the Muslim community at large, providing a readily usable contact list of legal professionals who are also sensitive to Muslim family norms.

The increased use of web-based communication has greatly contributed to the formation and expansion of unprecedented and spontaneous debates on Muslim family law issues such as marriage, divorce and child custody. In addition to the domestic impact of discussion groups such as the NAML email list, the use of webpages to disseminate various new doctrines and religious rulings has had a tremendous effect on the international discussion of Islamic family law. The active nature of the American Muslim community online has placed it in an influential position in these global discussions of Islam and Islamic law. For example, during the Bosnian war, a Muslim website based in the US, <islam.org>, posted two religious rulings on abortion. The website rulings had an impact on the question of abortion within an international context by providing differing perspectives from various sources (Watanabe 2000; <www.islam.org>). In countries where the government or a specific group of scholars control a religious hegemony and discourage divergent interpretations and views, these types of diverse perspectives accessible via the internet can revolutionize the way that individuals view a certain topic.

The US Muslim experience is contextualized in a democratic, secular society. Women have emerged as an integral part of the Muslim activist and intellectual movements, as noted earlier in this study, especially in the areas of issues involving domestic violence and abuse of women in general. Muslim women have not only served as activists and community organizers; they have also been able to offer their perspective on relevant legal issues. In the United States, scholars such as Amina Wadud are able to publish their interpretations of the Qur'an openly and share them with the wider Muslim community (Wadud 1999). Furthermore, American Muslim scholars such as Aminah Beverly McCloud present the reality of a dynamic and living form of Islam within the African-American Muslim community (McCloud 1991). With voices like these in the community, immigrant Muslims cannot limit their interpretations to those scholars who exclusively represent their country or their school of thought. A back-home focused approach is thus challenged by indigenous and second-generation communities that are already fully aware of and dealing with modern Western society.[96]

FOURTEEN: Conclusion

This survey has sought to catalogue and explain the nature and application of Islamic family law within the US Muslim community. The potential of this community is evident by the wide range and depth of its contributions in this area. This study has demonstrated that Islamic family law as manifested in the United States has been a subject of significant interest and considerable complexity, both in terms of US domestic and Islamic law, as well as their interaction. In the previous chapter, we have seen that within the United States are significant trends of reform and activism addressing Islamic family law. Yet it is important to keep in mind that these reform efforts also face several potential problems as they progress. For example, one of the main concerns that the Muslim community shares with other religious groups in the United States is the recognition that forward-thinking actions and scholarship that steer away from religious orthodoxy may lose acceptance by the mainstream faith-based system. In a parallel situation, the Jewish orthodox community has, at

times, refused to accept terms that do not conform to a traditional understanding of religious rights when those rights were negotiated in a *ketubah*, or religious pre-nuptial agreement (Greenberg-Kobrin 1999: 397).

Another major potential problem lies in the need to differentiate between culture and religion. Enmeshed in this particular question is the role of cultural practice and interpretation. While a cultural practice may actually protect the family rights of an individual, when the family serves as a negotiating representative in marriages, it is possible that a cultural pattern of family interaction can be more limiting than the constraints actually set by religious law (Hashim, interview, 2000).[97] The Muslim community will have to sift through its multicultural history and traditions and decide which practices will be preserved and which will be discarded if they do not fit an appropriate religious and societal agenda. Creation of a unified agenda or perspective will remain a challenge for this community. At the heart of this issue is the fact that there remain on-going internal debates in the United States' Muslim community as to who should be in charge or involved in formulation of community-wide agendas. In some instances, gender has remained a barrier to the full involvement of Muslim women. Different cultural practices are reflected in women's space in a mosque. For instance, *The Mosque in America* report notes that there is an increasing practice of separating women in prayer from men by a hung cloth, or having them pray in another room (Bagby et al. 2001: 11).[98] While this is not definitive evidence that women are not a part of the general community space, it is interesting to note that there is an increasing trend towards gender segregation in the mosque environment. The study did not reach the conclusion that certain cultural groups had higher levels of segregation in their mosques. This would be a relevant topic to explore in future studies and would provide an analytical tool to differentiate between cultural variables that affect gender participation and religious interpretations that are used to justify segregation. Finally, the reality of class differences among Muslim Americans has been an ongoing divide. For instance, the actions of the immigrant Muslim community have included acknowledgement that they 'had been guilty of ignoring the persistent and social problems of the indigenous Muslims' (Dannin 2000: 26).

Another important challenge for the future of Islamic family law in the United States stems from the demographic of Muslims. This report, in talking about Islamic family law in the USA, has assumed a certain level of adherence and belief in Islam as a legitimate organizing system for one's life and society. We have mentioned the several varieties of interpretation of Islamic law among the diverse Muslims in the United States, but there is also significant variation in levels of adherence to Islam as a source for behaviour in the first place. As noted in both Haddad and Lummis and the Mosque project, Muslim practice ranges from those who are 'unmosqued' to those who attend holiday prayers, and those who are more involved in their particular communities (Lummis and Haddad 1987: 9; Bagby et al. 2001: 3). It will be a challenge for Muslim scholars and activists in America to bring together these different types of Muslims and develop a consensus, especially in the volatile area of family law that touches on intimate interpersonal relationships and deep moral values. This is the ultimate challenge for any minority faith: to adhere firmly to its values and traditions while also adapting to the social, legal and cultural contexts in which it exists.

APPENDIX: Table of Cases

US Supreme Court cases

Bradwell v. Illinois, 83 US 130 (1873)

Federal Court cases

Shikoh v. Shikoh, 257 F.2d 306 (2d Cir. 1958)

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Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961)

Aghili v. Saadatnejadi, 958 S.W2d 784 (Ct. App. Tenn. 1997)

Ahmed v. Ahmed, 689 N.YS.2d 357 (Sup. Ct. NY 1999)

Akileh v. Elchahal, 666 So.2d 246 (Fla Ct. App. 1996)

Ali v. Ali, 652 A.2d 253 (NJ Sup. Ct. 1994)

Arain v. Arain, 209 A.D.2d 406 (1994)

Aziz v. Aziz, 488 N.YS.2d 123 (NY Sup. Ct. 1985)

Dajani v. Dajani, 204 Cal. App. 3d 1387 (1988)

Farah v. Farah, 429 S.E.2d 626 (Ct. App. VA 1993)

Habibi-Fahnrich v. Fahnrich, WL 507388 (NY Sup. 1995)

Hosain v. Malik, 671 A.2d 988 (Ct. App. Md. 1996)

In Re Marriage of Murga, 103 Cal. App. 3d 498 (1980)

Jabri v.Jabri, 598 N.YS. 2d 535,537 (1993)

Kapigian v. Der Minassian, 99 N.E. 264 (Mass. Sup. Ct. 1912)

Maklad v. Maklad, WL 51662 (Conn. Super.Jan. 3, 2001)

Malak v. Malak, 182 Cal. App. 3d 1018 (1986)

Mehtar v. Mehtar, 1997 Conn. Super. LEXIS 2400

NY v. Benu, 385 N.YS.2d (Crim. Ct. NY 1976)

Odatalla v. Odatalla, 810 A.2d 93 (NJ Super. 2002)

Ohio v. Awkal, 667 N.E.2d 960 (Sup. Ct. Ohio 1996)

Seth v. Seth, 694 S.W2d 459 (Ct. App. TX 1985)

Shaban v. Shaban, 88 Cal. App. 4th 398 (2001)

Shike v. Shike, Tex. App. LEXIS 2733 (April 27, 2000)

Shikoh v. Shikoh, 257 fad 306 (2d Cir. 1958)

Tazziz v. Tazziz, 533 N.E.2d 202 (Mass. App. Ct. 1988)

Vryonis v. Vryonis, 202 Cal. App. 3d 712 (CA Ct. App. 1988)

Zummo v. Zummo, 574 A.2d u30 (Pa. 1990)

Notes

Our sincere thanks to Steve Vieux and Abed Awad for their helpful research assistance, and to all those who shared their experiences and expertise in our interviews with them (see attached interview list).

1 Anglo-American family law itself has religious Christian origins, as acknowledged in *Bradwell v. Illinois,* 83 US 130 (1873), where the Supreme Court described the 'divine ordinance' of the 'constitution of the family organization' (ibid., 141; Mason 1994: 53); but this aspect of US law will not be elaborated here.

2 The research material for this study is comprised of: interviews with professionals who serve the US Muslim community, legal research of current United States federal and state case law, review of general literature (books, magazines, newspapers) addressing issues concerning Muslims in the United States, internet searches of Muslim-related sites, and the professional experiences of the authors. As the research time was constrained due to publication deadlines, the report is itself quite limited, and makes no claim to be exhaustive of all issues, resources, scholars and other elements potentially relevant to this topic. For surveys conducted by other sources, see Haddad and Lummis (1987). Haddad and Lummis studied eight mosques located in the Midwest, upstate New York and the East Coast over a period of two years. They focused on personal backgrounds and religious attitudes of the seventy to eighty participants in the study. Haddad and Lummis surveyed 346 Muslims, 64 per cent of whom were immigrants, and 16 per cent were children of immigrant parents. Thirty-four per cent of their sample were Lebanese American, 28 per cent were Pakistanis, with individuals from other Arab nations comprising the remainder of the sample. Another useful and more recent study is *The Mosque in America: A National Portrait* (Bagby et al. 2001), sponsored by a number of Muslim organizations and part of a larger study of American congregations coordinated by Hartford Seminary's Hartford Institute for Religious Research. The project included a random sampling from 1,209 mosques across the United States, based on responses from 416 mosque leaders. The new survey showed African Americans were the dominant ethnic group in 27 per cent of mosques, South Asians in 28 per cent and Arabs in 15 per cent, with the remaining mosques described as 'pluralistic' (ibid., p. 3). See <http://fact.hartsem.edu> for further information.

3 See American Muslim Council (1992). The number of Muslims in the USA con tinues to be an unsettled issue. Haddad and Lummis (1987: 3) noted that these might be between 2 and 3 million. The Mosque in America project findings reflect 2 million Muslims who attend or participate in mosques to a varying degree, with an overall estimate of 6- 7 million Muslims present in the USA (Bagby et al. 2001: 3). One of the supreme challenges for counting the number of Muslims in the USA is the fact that there remains a large, as identified by Haddad and Lummis (1987: 9), 'unmosqued' proportion of the population who not have a direct and regular affiliation with a mosque.

4 See Quraishi (2001); Al-'Alwani (1993: chapter on *lkhtilaf);* Abou el-Fadl (1997: 18) notes the belief that 'a major contributing factor to the diversity of Islamic theological and legal schools is the acceptance and reverence given to the idea of *ikhtilaf* (disagreement)'.

5 See Sciolino (1996) on different 'versions' of Islamic law regarding marriage.

6 See Haddad and Lummis (1987) for a discussion on imams in the United States.

7 Azam's 'The Muslim Marriage Guide', at <http://www.beliefnet.com/story/73/story_7319_1.html> (reviewing Maqsood 1998).

8 See for example the articles by Raga El Nimr and Najla Hamadeh in Yamani (1996).

9 See <http://www.mwlusa.org> The Muslim Women's League is based in Los Angeles, California. Other Muslim women's organizations interested in similar work include the DC-based Georgetown Muslim Women's Study Project (organized to review the UN Platform for Action prior to the 1995 Beijing Fourth UN World Conference on Women), and the North American Council for Muslim Women (NACMW), based in Virginia, which was launched in 1992 with a large national conference.

10 See <http://www.karamah.org>

11 See <http://www.alsalafyoon.com>

12 The fora email is sisters@post.queensu.ca

13 See <http://www.studyislam.com>

14 Similarly, the Canadian Society of Muslims includes on its website many sources of Islamic jurisprudence, as well as articles on 'Family Matters' addressing such topics as birth control and abortion, adoption, custody and guardianship, polygamy, arranged marriage, and women's rights in an 'Islamic prenuptial agreement'. See <http://www.canada-muslim.org>

15 See <http://www.domini.org/lam>

16 See al-Khateeb (1996: 15). Similarly, another source says: 'The Islamic marriage contract is meant to solidify bond and specify stipulations that are important to both parties. The contract is intended to safeguard present and future legal rights of both the husband and wife, should encourage marital harmony, and should keep the family within the boundaries of the Qur'an and Sunna for the pleasure of Allah.' See 'Cont ... The Marriage Contract' at <http:// geocities.com/lailah2000/contract2.html>

17 'A Conference on the Islamic Marriage Contract', Harvard Law School Islamic Legal Studies Program, 29-31 January 1999.

18 For popular dissemination of this information, see al-Khateeb (1996) for a list of sample stipulations and Mills for similar suggestions. For a more detailed, academic discussion of contract stipulations, including specific examples, see Welchman (2000: 35), Shaham (1995: 464) and Abou el-Fad! (1999).

19 Compare Mills who leaves out Islamic jurisprudential differences in a list of suggested stipulations in the marriage contract with Abou el-Fadl (1999) who explains general Hanbali allowances of contractual stipulations, compared with other schools' reluctance on the same, and their use of legal devices created to accomplish similar goals.

20 See <http://www.karamah.org/projects/index.php>

21 See al-Hibri (1997: 28) who notes differing validity depending on school of thought; Welchman (2000: 167); and Carroll (1982: 277).

22 See the article, 'An Islamic Perspective on Divorce', at <http://www.mwlusa.org/pub_divorce.html> Similarly, the Muslim Women's League points out that classical custody laws (deciding custody based on abstract rules of the age and gender of the child) are among those that must 'adapt to dynamic circumstances', commenting that there is 'no Qur'anic text to substantiate the arbitrary choosing of age as a determinant for custody'. The League urges similar flexibility in determining alimony awards as well.

23 See *Akileh v. Elchahal* (1996), a case involving two separate marriage contracts — an Islamic *sadaq* and a civil ceremony the following day incorporating the *sadaq* document specifying the wife's dower; *Ahmed v. Ahmed* (1999), distinguishing religious ceremony from civil; *Ohio v. Awkal* (1996), describing two separate marriage ceremonies, civil and Islamic, on separate dates; *Dajani v. Dajani* (1988), involving a Jordanian couple married by proxy in Jordan, followed by a civil ceremony in the USA upon the wife's arrival; and the al-Sarraf interview (2000) in which the lawyer describes Muslim couples generally having a Muslim ceremony first, and then taking care of state requirements.

24 See *Tazziz v. Taaiz* (1988), a marriage ceremony in the United States, in accordance with Islamic law; *NY v. Benu* (1976), a marriage performed by a local New York City imam not authorized in a city clerk's office to perform marriages; the Awad interview (2000), in which the lawyer describes mosques in New York and New Jersey performing weddings with no state licensing; and McCloud (2000: 140) who urges Muslim women in the USA to get civil documents of both marriage and divorce. Some US Muslims, less concerned with Islamic law *per se,* may have only the civil ceremony, forgoing the Muslim one entirely, but these cases do not fall within the subject of this study.

25 See *Farah v. Farah* (1993) (deferred *mahr* of $20,000); *Akileh v. Elchahal* (1996) (immediate *sadaq* of $1 and deferred $50,000; noting that when he proposed, the husband 'recognized that wife had the right to a *sadaq'); NY v. Benu* (1976) (sewing machine as dower).

26 See also marriage contracts on file with author (Quraishi). Islamic history verifies the use of non-monetary *mahr*. For example, a *hadith* from the Prophet explicitly validates the teaching of sections of the Qur'an (Doi 1984: 163) and the *shahada* (declaration of Islamic faith) of the groom as dower; see Ibn Sa'd (1997: 279) describing Umm Sulaim's marriage to Abu Talha, and stating that 'her dower was the Islam of Abu Talha'.

27 Kadri comments (interview, 2000) on her experience with clients whose only interest in attempting to enforce a *mahr* provision is in unfriendly divorce proceedings, with the demand for a high *mahr* being used as an opportunity to punish the husband.

28 See listserve email discussions on 'Sistersnet' (sisters@post.queensu.ca) in 1996-98 (notes on file with author Quraishi).

29 Ali (1996) comments that when divorce litigation is bitterly contested by a Muslim husband, it is often not because he does not want a divorce, but rather because he does not want to pay the *mahr*.

30 Kadri comments (interview, 2000) that brides and grooms tend simply to fill in *mahr* provision in standard boilerplate contracts and rarely add specified provisions. Similarly in interviews with four Muslim family lawyers, none reported seeing any particularized contracts of this sort (Awad, interview, 2000; al-Sarraf, interview, 2000; and Kadri, interview, 2000).

31 Email message to Karamah responding to Marriage Contract Project announcement (on file with author Quraishi). Another visitor to the website expressed dismay at not having a formal marriage contract written at her wedding, and asked if it is possible to create one retroactively.

32 See <http:/ /www.karamah.org>

33 This is also the position of Mona Zulfikar, who spearheaded the marriage contract legislative efforts in Egypt. She says one of the most important aspects is to 'encourage frankness, mutual understanding and dialogue between the spouses, reduce the need to have recourse to the courts in difficult and bitter litigation procedures' (Zulfikar and al Sadda 1996: 251; and cited in Welchman 2000: 181).

34 This is indicated by four out of the nine couples for whom one author (Quraishi) provided marriage contract information.

35 One of the brides assisted by this author (Quraishi) writes: 'It wasn't always easy to discuss the topics of our contract but in the end the entire process has brought me and... my fiancé so much closer and we have grown stronger' (personal email on file with author).

36 Quoting Samia el-Moslimany saying: 'I put in that the burden of domestic chores was going to be shared by both of us... My father thought it was trivial, but I wanted it in the contract.'

37 See *Aghili v. Saadatnefadi* (1997) in which $10,000 damages was provided as a remedy to the wife if the husband breaches contract.

38 See the position paper, 'Marriage on Islam', at <http://www.mwlusa.org>

39 Noting that over a third of the respondents reported marriages of Muslim women to non-Muslim men in their families; and noting that the number of Muslim men marrying non-Muslim women is larger.

40 'Some Muslim women whom we interviewed expressed the opinion that the man's freedom to marry outside the faith is neither fair nor conducive to preserving the Islamic faith in future generations born in America' (Haddad and Lummis 1987= 146). Marquand (1996) quotes a father saying: 'I will have a huge problem if my son marries a non-Muslim... and will do everything I can do to stop it.'

41 See the article, 'Why Muslim man should not marry a non-Muslim woman', at <http://www.soundvision.com/marriage/nonmuslimwoman>

42 In one extreme example, Marquand (1996) reports some members

of one Muslim community sought to displace a leader whose daughters had married non-Muslims, arguing that such a failure should cause him to lose his status in the community.

43 For example, says one Muslim woman, 'I love the religion with all my heart, but I don't like that the women don't have choice' (Todd 1997).

44 Mahmoody (1993); *Not Without My Daughter,* MGM Studios, 1991. This movie depicts the true story of Betty Mahmoody's escape from Iran with her daughter after her Iranian husband attempted to turn a two-week vacation into a permanent relocation of the family.

45 See <http://www.travel.state.gov/abduct.html>

46 See <http://www.travel.state.gov./islamic_family_law.html>

47 For more information about such stereotyping, see for example Shaheen 1997. In addition, refer to the online sources of the Council of Islamic-American Relations at <http://www.cairnet.org/> and the Anti-Arab Discrimination Committee which can be found at <http://www.adc.org/>

48 Betty Mahmoody (see above note 44) has herself served as an expert witness in a few cases involving Muslim marriages (Gustafson 1991).

49 Describing a 'traditional Muslim wedding in Walnut', including many things not included in other Muslim ceremonies, such as dancing, singing, bride and groom sitting side by side, and the bride's head covered.

50 Marquand (1996) quotes one Muslim saying, 'Sometimes male domination is machismo, sometimes it is genuine faith'.

51 Winton (1993) reports the story of a severely injured Muslim woman stating that her husband believed Islam allowed him to beat her.

52 Memon (1993) provides a summary of Islamic texts (including Qur'an 4: 34) used to 'justify battery, showing the misinterpretations by those who do so, and urges the American Muslim community to recognize and fight against domestic violence in their community.

53 Kadri (interview, 2000) notes a conversation with a woman complaining of her son beating her but who would not complain of such actions by her husband because she believed it was his right to do so. Attorney Kamran Memon (1993) notes that some imams tell these women to be patient and pray for the abuse to end, urging them not to leave their husbands and break up the family, and not break family privacy by talking about it to others.

54 Also featured on <http://www.zawaj.com>

55 These include (as a very brief sampling) the National Islamic Society of Women in America (NISWA) <http://www.niswa.org>; Baitul Salaam (House of Peace) <http://alnisaa1.hypermart.net> PO Box 11041 Atlanta, GA 30310; Kamilat, <http://www.Kamilat.org>; Karamah: Muslim Women Lawyers for Human Rights <http://www.Karamah.org/>; the Muslim Women's League (who co-sponsored the Los Angeles conference of the Peaceful Families Project) <http://www.mwlusa.org>; and Muslims Against Family Violence, a project of 'Stepping Together' <http://www.steppingtogether.org>

56 In *Seth v. Seth* (1985), a non-Muslim male had converted to Islam after a marriage contracted under US civil law and subsequently divorced this wife by *talaq* and married a Muslim woman in a Muslim ceremony. In *Shikoh v. Shikoh* (1958), the husband, an Indian national, declared divorce before a Brooklyn imam before witnesses, signed and sent a copy of the imam's documentation of the declaration, entitled 'certificate of divorce', to the wife who was in Pakistan.

57 Little reports family lawyer Ahmed A. Patel saying that he reminds his clients who perform *talaq* divorces that they cannot remarry under US law.

58 Community property states in the USA include: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin; income and property earned or acquired during marriage is divided equally between the two spouses upon dissolution, even if one spouse was the predominant source of income. Allen (1992) quotes a Minneapolis imam stating that 'in Muslim marriages, there is no notion of community property; whatever a woman earns outside the home she may keep, but a man is obligated to support his family'.

59 One encouraging case exhibits respect by one court for a religiously-motivated provision opting out of community property laws. In *Mehtar v. Mehtar* (1997), a Connecticut court upheld a Muslim couple's pre-nuptial agreement opting out of South African community property laws (the marriage contract was executed in South Africa), stating that 'the purpose of the agreement was to comply with principles of Muslim law held by both parties' and holding that the requirement of financial disclosure usually required to validate such opt-out clauses in Connecticut 'would be unfair to apply to an agreement mutually sought to honour deeply held religious beliefs'.

60 Iran is a primary example. Ayatollah Mohsen Kadivar has been quoted as saying: 'a woman should be paid by her husband for working in the house, for cleaning, for breast-feeding. She can even say "I don't want to do this work, I need a servant," and her husband has to pay for this. This is in Islam, that he has to do this' (Walter 1999).

61 The vast majority of family law cases are never published, and therefore are largely unavailable as a subject of research. Thus, most of the cases discussed in the chapter are appellate court cases, which may or may not be representative of Muslim family litigation in the United States. Moreover, family law cases are almost always a matter of individual state jurisdiction and thus the case precedent of one state does not bind another. The review of the cases in this study does, however, provide a good idea of the established persuasive and precedential authority to which a judge might turn in evaluating future cases.

62 For example, without citation to case law, Amina Beverly McCloud (2000: 140) states that marriages of Muslim immigrants to the United States 'have generally received the protection of the courts' because 'marriage contracts are understood as pre-nuptial

or nuptial agreements'. Similarly, Imam Yusuf Ziya Kavakci, the imam of a Texas mosque, urges Muslims to get pre-nuptial agreements because they can be used to 'safeguard your Islamic rights within a marriage and, if necessary, in the case of a divorce'. See 'Why You Need a Prenuptial Agreement' at <http://www.soundvision.com/weddings/prenuptial>.

63 This attitude is probably culturally-influenced. Under Islamic law, once the offer and acceptance have been made (both usually included in a *nikah* ceremony), the couple is legally married. Because many Muslim couples sign the contract *(kitab* or *nikah)* at one ceremony but do not begin to live together until some later date, however, many believe themselves to be only 'engaged' after the *nikah*.

64 See <http://www.Karamah.org> (audiotape also on file with author Quraishi).

65 See *NY v. Benu* (1976) in which the mother was charged for contributing to the delinquency of her minor daughters, who were placed in foster care with a Muslim family, and the men who 'married' the girls were charged with first degree sexual assault of a child.

66 Rasmusen and Stake (1998) comment: 'even if it does not offend public policy, courts are reluctant to enforce such terms because of the costs to the courts, the difficulty of enforcement without invading the sanctity of the marital home, and the possibility that enforcement would increase conflict within the marriage'.

67 The court elaborated: 'the Mahr Agreement in the case at bar is nothing more and nothing less than a simple contract between two consenting adults. It does not contravene any statute or interests of society. Rather, the Mahr Agreement continues a custom and tradition that is unique to a certain segment of our current society and is not at war with any public morals' *(Odatalla* at 98).

68 In the cases reviewed below, for example, spouses asserting the enforceability of a Muslim marriage contract as a pre-nuptial agreement did not always succeed. In both California cases dealing with *mahr* claims as pre-nuptial agreements, *Dqjani* and *Shaban,* the court ultimately refused to honour the contract. In New York and Florida, the parties fared a bit better: in *Aziz* (NY) and *Akileh* (FL) the Muslim dower provisions were upheld, though the language of the Florida court indicates that they perceived the *sadaq* to be the husband's consideration for entering into the contract, an analysis with which Awad would strongly disagree.

69 Welchman (2000: 140) comments that a majority of jurists consider *mahr* to be an 'effect of the contract'.

70 For example, Al-Khateeb (1996) includes a form titled 'Islamic marriage contract/ pre-nuptial agreement'.

71 Pre-nuptial agreements also generally may not include provisions relating to child custody and child support.

72 Al-Hibri points out that one might just as well interpret *mahr* provisions as facilitating murder — a conclusion just as ludicrous as the *Dajani* court's conclusion regarding divorce.

73 Of course, she may be able to keep it if she goes through judicial dissolution, in which case the question of harm will be assessed by the arbiter, but this process is generally much longer and entails a burden of proof upon her.

74 The court refers to the entire marriage contract, rather than the dower provision only, as a *sadaq.*

75 Incidentally, and unfortunately, the marriage contract at issue in this case is very similar to generic boilerplate contracts distributed and used by many American mosques (samples on file with author Quraishi).

76 The court went on to say: 'Had the trial judge allowed the expert to testify, the expert in effect would have written a contract for the parties.'

77 Later, the Florida Court of Appeals in *Akileh v. Elchahal* (1996), when first confronted with the question of enforceability of a Muslim marriage contract, cited *Aziz v. Aziz* (1985) favourably and upheld a Muslim dower provision because it found that Florida contract law applied to the secular terms of the Muslim contract. The Florida court found that, even though the husband and wife later disagreed over the meaning of the *sadaq* (the husband claimed that his understanding was that women always forfeited the *mahr* if they initiated the divorce), there was a clear agreement at the outset of the marriage that *sadaq* was to be paid if the parties divorced, and the court honoured that agreement.

For reference back to our earlier discussion of the treatment of these contracts as pre-nuptial agreements, in the reported opinion, the New York court does not refer to the contract in *Aziz* as a 'pre-nuptial agreement', but in *Akileh* (1996), the Florida court references *Aziz* as a case enforcing the *sadaq* as a pre-nuptial agreement.

78 Moreover, it might be argued that a rationale for the institution of the deferred *mahr* provision is the fact that most husbands will be better placed to pay high amounts later on in their careers, also part of the rationale for community property laws.

79 *Shaban* happened to involve a very low *mahr* amount and thus it was the husband who sought enforcement of the marriage contract. The court went so far as to say that the wife performed under the contract by entering into the marriage, and this constituted sufficient consideration on her part.

80 For a comparative view of the judicial treatment of *mahr* in Germany, see Jones Pauly (1999). For analysis of Muslim marriage cases in the UK, see Freeland and Lau (forthcoming); and Pearl (1985-86, 1995).

81 See *Aghili v. Saadatnejadi* (1997), 786 (likening *sadaq* to maintenance); *Akileh v. Elchahal* (1996), 247 *(sadaq* is a postponed dower that protects the woman in the event of a divorce); *Dajani v. Dajani* (1988), 872 (commenting that one purpose of the dower is to provide security for the wife in the event of death or dissolution, but also can be an outright gift).

82 See *Aghili v. Saadatnejadi* (1997), 786 n. 1 (commenting that *sadaq* was meant to protect the wife from unwanted divorce); *Shaban* (2001), n. 6.

83 See *Dajani v. Dajani,* 872.

84 This assertion is supported by the court's reasoning in, for example, *Maklad v. Maklad* (2001), where the court declined to give comity to an Egyptian certificate of divorce because the wife was not present at the time the decree was issued, had no prior notice that the certificate was sought, and was given no opportunity to be heard prior to its issuance.

85 Clearly not all Muslims subscribe to this as the only legitimate means of determining custody, but classical Islamic jurists addressed custody in these terms as the safest way of determining that the child will be placed with the best custodian. Some American Muslims argue for a different rule, pointing out that this is a jurisprudential invention, not one directly dictated by the original texts (see Muslim Women's League, 'Divorce'). It is, how ever, the classical Islamic custody rules that are most well known and are what is at issue in these cases (though often in modified form through modern legislation in these Muslim countries).

86 See also *Adra v. Clift* (1961), where the court upheld a custody decree from Lebanon.

87 Conversely, religion has been counted as a negative influence if it harms the child; see *In Re Marriage of Murga* (1980).

88 For an extensive discussion on the precursors to modern Muslim discourse in the area of Islamic jurisprudence, see Hallaq (1997).

89 At the second 'Islam in America' conference, 9-11 March 2001, at Harvard University, one panel was titled 'Feasibility of Muslim Courts/Tribunals in the United States'. A mainstream US television network even recently presented a fictionalized version of what one of these tribunals might look like, in an episode of the television show *JAG* ('The Princess and the Petty Officer', 14 November 2000, written by Mark Saraceni).

90 Various Muslim organizations in the United States have explored conflict resolution issues within the realm of an Islamic framework, for example, the Islamic Society of North America has held annual training conferences on conflict resolution. The organization scheduled a conference titled, 'Muslim Peacebuilding after 9/11' in 2003. For more information on such efforts, see <www.isna.net>

91 In particular, when one waives the right of pursuing litigation in court, the contract must be an 'objective manifestation of a party's intent to be bound by the religious court's decree and the party knowingly and voluntarily waived his rights to pursue litigation in secular court without any religious group's interference' (Weisberg 1992: 995).

92 For example, see the website, 'American Muslims Intent on Learning and Activism', at <http://www.amila.org> for their mission statement which states 'AMILA was formed in October 1992 by Muslims of college age and above to meet the spiritual, educational, political, and social needs of Muslims in the San Francisco Bay Area. We are working towards building an active American Muslim community with a strong commitment to spiritual enrichment, intellectual freedom, and community service.' AMILA's lectures, projects and activities reflect a progressive attitude towards claiming Islam as a vibrant American identity.

93 For example, Karamah recently participated (15 October 1999) in a panel of women of faith entitled 'Religion and World Conflict'. The event was organized by the Inter national Women's Forum. See 'news and events' section at <http://www.karamah.org/news/index.php>

94 See <http://www.namlnet.org> There are also a few local city-based Muslim bar associations with similar focus, for example in Chicago and the DC area.

95 See <http://www.namlnet.org>

96 'On the other hand is the generation of children and grandchildren who have no emotional ties to the homeland of the fathers and find little of value in their customs which are seen as counterproductive and an impediment to the progress in the society in which they are born' (ISIM 1998: 5).

97 As a teacher in a Muslim school, Hashim notes that parents from a specific cultural background would not allow female children to spend the night even for activities such as prayer outside of the home due to their interpretation of proper cultural gender roles. Eventually, she states, when parents were able to see that 'the religious teachings, in fact, promoted the practice of seeking opportunities to worship God', they did decide to allow their daughters to pursue such activities.

98 They compared statistics from 1994 with 2001 responses, noting that the proportion of mosques with separation by curtain, barrier or another room had increased to 60-66 percent of those surveyed in 2001.

Interviews

1 Sermid al-Sarraf, family and estate planning attorney, Los Angeles, California, 8 December 2000.

2 Abed Awad, family law attorney, Nutley, New Jersey, 14 November 2000.

3 Sydney Ericson, family law attorney, Brea, California, 1 October 2001.

4 Jinan Hashim, teacher in an Islamic elementary school, Chicago, Illinois, 7 December 2001.

5 Cherrefe Kadri, family law attorney, Toledo, Ohio, 5 December 2000.

6 Tayibbah Taylor, editor, *Azizah* magazine, Atlanta, Georgia, 12 October 2000.

Negotiating Justice: American Muslim Women Navigating Islamic Divorce and Civil Law

ZAHRA AYUBI (2010)

Fifteen years ago, a divorce in the family put the questions that arise at the intersections of civil divorce and Islamic divorce front and center in my mind. Having found only one significant piece of scholarship that had been written at the time (Asifa Quraishi-Landes and Najeeba Sayeed's "No Altars," republished in this volume), I undertook a qualitative field research project in which I interviewed American Muslim women about their divorce experiences, the choices they had to confront about how to get divorced, their finances and children, their sense of justice and right and wrong in Islam as they practiced it in the United States. Two articles republished in this volume came from that project. This article on divorce from the *Journal for Islamic Studies* both documents several Muslim women's divorce experiences in the United States and also argues that Islamic legal discourses in the United States do not address Muslim women's concerns in divorce.

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Abstract

Drawing on interviews with divorced American Muslim women, I will discuss the range of ways Muslim women in the U.S. incorporate Islamic law into their lives and how they negotiate the religious and legal aspects of their divorces. A common challenge my interlocutors faced in divorce was establishing an access to Islamic divorce and a divorce on equitable terms. Using their understanding of Islamic law as a standard for justice, my interlocutors employed both civil law and religio-legal strategies to re-define the terms of Islamic divorce for themselves. Their experiences demonstrate a need for reform in American Muslim divorce ethics and Islamic legal thought.

Nawal comes from an educated, conservative Canadian-American Muslim home and takes her faith very seriously.[1] She always knew that her parents would arrange her marriage to a man from her native country, Pakistan, and agreed to a proposal from a distant cousin, whom she did not know. She married him in both a civil and religious ceremony in Canada. Nawal soon found that she and her husband were incompatible because of their different upbringings. She faced constant abuse from him and his family as they made belligerent and disrespectful comments about her, taunting her, saying that she was ugly, a bad cook, and not good enough for him. His parents and siblings took priority over her and he threatened to divorce her if she objected to this. For years she attempted to save her marriage, which was expected of a good Muslim woman, but after Nawal could no longer tolerate his abuse, she filed for a civil divorce. She did not want her daughters to think that this was an acceptable model of a Muslim marriage.

During the two-year divorce, local Muslim community elders tried to reconcile the couple. Her reputation was destroyed and she was viewed as a woman of little patience and loose morals. Her husband counter-filed for a civil divorce, contested the custody of their daughters, and claimed possession of the home and all marital assets, emphasising that under Islamic law she was entitled to nothing. Nawal challenged whether this was truly Islamic. He subsequently refused consent for an Islamic divorce and told their daughters they were still married in accordance to Islam and that she could not remarry, yet it was legal for him to marry again as he was allowed to have four wives.

Nawal's story reveals the many challenges American Muslim women face during a divorce. Dominant American Muslim culture rejects divorce as a reasonable resolution to conflicts that couples experience, with frequent citations to a *hadith* (Prophetic saying) of disputed authenticity in which the Prophet Muhammad was reported to say, "Of all the lawful acts the most detestable to Allah is divorce".[2] Family pressure, Muslim communities, and social circles encourage women, in the form of religio-legal arguments, to stay in bad marriages, regardless of which spouse initiates the divorce and thus makes obtaining an Islamic divorce and establishing Islamic terms, which according to *fiqh* (Islamic Jurisprudence), are never an independent decision for women.

In this essay I will discuss only the legal aspects in divorce cases of nine women, particularly the women's experiences navigating between civil law and the multiple interpretations of religious law during a divorce.[3] I will argue that the experiences of American Muslim women in contending with divorce law and exploring their relationships to legal and religious discourses emphasise the need for reform of American Muslim legal thought on both marriage and divorce of American Muslims. In discussing how and whether women pursued an Islamic divorce in the American context, I will examine the legal choices women make based on their own sense of religious ethics and will shed light on the process of negotiation with ex-husbands, civil law, Islamic institutions, or the *imams* who may or may not have assisted the women's needs in divorce. In particular, I am interested in how the women's religious identity and personal observance affected their decisions on whether to incorporate Islamic law in the negotiation of divorce; how they managed competing notions of Muslim marriage and divorce, and finally their use of the civil courts as a means to negotiate for Islamic justice.

Muslim divorce in the U.S. has generally centred around two legal issues. The first, scholars have studied U.S. court decisions on claims to Islamic law, paying particular attention to the enforceability of *mahr* (marriage dower) claims and stipulations made in some *nikah* (Muslim marriage) contracts.[4] Although these studies refer to individual cases, their focus is on tracking the admissibility of Islamic law in court, though they barely touch on the effects it has on women. Secondly, Muslim lawyers or leaders of Islamic institutions confront the lack of enforceability of

Islamic law in the U.S. by advocating for the creation of institutionalised Islamic tribunals or the adoption of Muslim personal status laws that would grant Islamic divorces.[5] These proposals, however, do not consider the women's relationship with religious law prior to divorce and rarely accept the plurality of Muslim interpretations of marriage, divorce, or Islamic law.

There has been little attention given to American Muslim women's perspectives and the personal, religious decisions they make in the legal divorce process, in particular, on how they select between religious interpretations for application in civil cases. In any divorce involving an American Muslim woman, a number of questions arise. Is there a need for Islamic divorce in the U.S. where civil law governs conjugal ties? What is the definition of Islamic divorce and do women have access to it? Who holds the authority to pronounce the divorce? What are "Islamic" divorce terms; are they just and are there limits to their reinterpretation? As women make decisions about these questions, they interpret religious texts, challenge patriarchal notions in the legal tradition, and yet may choose not to engage Islamic law at all.

Similar to the framework of "*tafsir* through praxis," which Sa'diyya Shaikh uses to describe South African women's resistance to domestic violence, which places women's experiences at the center of their understandings of the Qur'an, my informants also formulated their own *tafsir* (Qur'anic exegesis) by patching together an understanding of divorce as an expression of divine justice, sometimes through textual references to justice in the Qur'an, *hadiths*, *sunna* (Prophet Muhammad's example), and various laws of *fiqh*.[6] In what also resembles liberation theology, these women have a sense of Islam as an ethical religion and a source of justice, which enables them to seek an equitable resolution to marital injustices through divorce, both civil or religious.

Field work: informants and methods

In this essay I will present the experiences of nine ethnically diverse American Muslim women who were all divorced in the U.S. Two of the women are American-born daughters of immigrants, four are immigrants, and three are converts to Islam, two of which are African American and one, a Caucasian. Two women are of Middle Eastern descent and four are of South Asian origins. They range in age from mid 20s to late 50s. Due to the limited number of informants in this investigation, I will not attempt to draw broad conclusions on the causes or prevalence of divorce or legal strategies. This qualitative discussion validates these women's narratives as real and important individual experiences that help us understand the dysfunction and potential for reform of American Muslim institutions. Like in other ethnographies involving North American Muslim women's stories, such as the works by Jamillah Karim, Carolyn Rouse, and Shahnaz Khan, my goal is to analyse a full narrative of the choices women make and examine the details of their experience.

There is no set model of how a Muslim woman obtains a divorce. I have, however, divided the ten divorces amongst my nine informants into three categories: first, two are exclusively religious divorces (resulting from exclusively religious marriages); second, there are three exclusively civil divorces; and finally, five are cases involving both civil and religious law. These last cases are the most revealing about how American Muslim women sift through religio-legal claims and try to adhere to their notions of Islamic justice in the divorce process. Their personal understanding of Islamic and civil law, level of religious observance, the type of community in which they lived, their financial situations, and the flexibility of religious authorities were all factors that affected these women's legal decisions.

American Muslim demographics, institutions, and marriage and divorce practices

There are approximately six million[7] Muslims in the U.S. who comprise of transnational and American origins. Muslim communities have formed national-scale institutions, often along ethnic lines, such as the American Society of Muslims, which is predominantly African American, and the Muslim Students Association and the Islamic Society of North America, which are predominantly made up of American Muslims of immigrant origins. These organisations help amalgamate Muslim communities into a cohesive American Muslim population and formulate an ideal "Islamic" lifestyle within the U.S. One such organisation, the Fiqh Council of North America (FCNA), is a group of American Muslim scholars with varied training in Islamic law, who study classical and modern *fiqh* and pass *fatwas* (legal opinions) through websites and publications distributed or sold at

mosques on a variety of topics ranging from Islamic banking practices to Islamic divorce terms.

Compared to Muslim majority countries where Islamic law is encompassed by family codes in civil law, and many Commonwealth countries where Muslim personal law is recognised, Islamic law is not formalised in the United States. American Muslims live under civil law, but by practising Islam and participating in a Muslim lifestyle with respect to marriage and raising children, many Muslims adhere to both Islamic and civil laws and do so without any reservations. This creates a form of Islamic legal culture, rather than a binding system, that Muslims follow out of personal and religious obligation. The freedom of practising one's religion in the U.S. allows the two legal frameworks, religious and civil, to exist independently. The FCNA's *fatwas* are only binding for those who accept the authority of the scholars on the council and seek an authentic Islamic resolution to religio-legal challenges in America. On a community level, mosque boards, local imams, and religious elders have also functioned as religious authorities for mediating legal disputes or religious controversies.

Some conservative segments of the Muslim society in the U.S. maintain careful adherence to Islamic legal principles, such as the prohibition of usury, whereby they object to purchase items on credit, or a man's right to practice polygamy by not declaring their plural marriages on civil documents. Other Muslims choose not to adopt Islamic laws in their daily lives. The practices of most American Muslims fall somewhere in the middle in the spectrum of legal adherence to *Shari'a* and *fiqh*.[8] For many American Muslims, a marriage involves two processes, civil and religious. The solemnisation of marriage in Islamic terms is important to Muslims because it forms a union in the "eyes of God" and within social traditions of Muslims, it distinguishes their marital relations from *zina* (illicit sex). The *nikah*, which is usually officiated by a figure of religious authority, who may also be licensed by the state to perform marriages (or else couples often have separate civil marriages), is composed of an offer and acceptance of marriage in front of two witnesses and usually contains a previously determined *mahr*, which is paid, or partially deferred, by the husband to the wife at the time of *nikah*. A divorce can also have both a religious and civil nature. Muslim women may choose which law determines the divorce terms, but many times it all depends entirely on the husband's willingness to cooperate as to whether an Islamic divorce will take place.

There are many types of divorce in Islamic law. *Talaq* is a unilateral repudiation pronounced by a husband, after which the wife observes a three-month waiting period, *'idda*, and at its conclusion, the marriage is irrevocably dissolved. During *'idda*, a man can withdraw the *talaq* and take his wife back; he can reject her a second time but after a third pronouncement the divorce is irrevocable. If the husband has an outstanding balance on the *mahr*, it must be paid in full to the wife upon *talaq*. This common practice should not be confused with potential compensation or alimony due to a wife when obtaining a civil divorce.

Khul' is an irrevocable divorce initiated by a wife usually in exchange for the return of the *mahr,* but most schools of jurisprudential thought agree that the husband's consent is required for it to be valid (although the husband's consent is not specifically mentioned in the Qur'anic verse upon which the legal concept of *khul'* is based).[9] Theoretically, women also have access to a juridical divorce, *faskh*, which is concluded by a *qadi* (a judge trained in Islamic law) presiding in an Islamic court.[10] In order to establish a case for *faskh* and waive return of the *mahr* to the husband, a woman must prove her case, such as the husband's insanity, impotence, imprisonment, abandonment, physical harm, or lack of moral conduct or financial maintenance. This option is not available in the U.S. as there is no juridical structure of Islamic law in place; however some imams may issue informal Islamic divorce decrees.

In attempts to distinguish Muslims from the rest of the population and to promote pious lifestyles, Islamic institutions encourage U.S. Muslims to follow Islamic law in their family affairs. This generally involves romanticised references to the medieval *fiqh*, which restrict women's self-determination, by organisations such as the FCNA.[11] *Fiqh* was constructed on the basis of pre-modern gender roles and it includes the legal assumption that women have very little power in determining their own affairs. They need consent from a *wali* (male guardian) to enter a marriage and their husbands' consent to exit a marriage. Thus, in applying classical *fiqh* standards, women are regulated through marriage and divorce and thus become fully responsible for upholding the vision of an ideal Muslim family to which the greater American Muslim community is

committed. This vision is based on an unchanging *fiqh* that is treated as sacred, even though Islamic law in the U.S. context is an amalgamation of classical jurisprudence, immigrant notions of manifestations of *Shari'a* in modern Muslim nation states. It is also the result of American Muslim apologetic attempts to shape Islamic law in response to non-Muslim, and western criticism that women have no rights in Islam. Increasingly, reform-minded Muslims refer to *Shari'a* as the standard of God's justice, however this standard is disjointed from the evolution of Islamic legal thought in America.

The experiences that many immigrant Muslims have had of resistance to colonial domination in their countries of origin, or continued post- colonial opposition to "Western" gender roles, persuades immigrants and non-immigrants alike to adhere to a conservative model of gender roles in the U.S., which is considered Islamic. Ziba Mir-Hosseini points out that because of criticisms from outside the Muslim community regarding the "patriarchal biases of *fiqh* rules" Muslims often take an:

> oppositional stance and a defensive or apologetic tone: oppositional, because their agenda is to resist the advance of the 'Western' values and lifestyles espoused by twentieth- century Muslim states and their secular elites; apologetic, because they attempt to explain and justify the gender biases which they inadvertently reveal by going back to *fiqh* texts.[12]

As Kecia Ali says, even Muslim feminists like Azizah al-Hibri fall into apologetic traps of ignoring the fundamental ways in which Islamic law is an historical product of patriarchal interpretations. In their desire to show Islam in a favourable light and take pragmatic approaches to negotiating rights for women, feminist apologists latch onto isolated rights that allow women some agency in their matters such as claims to the *mahr* and rights to include stipulations in the *nikah* and "provide new justifications and interpretations for these rights that do not accurately reflect their original place in a system of spousal rights and obligations."[13] In facing a plethora of religio-legal claims from their communities, some of my informants selected injunctions from *fiqh* favourable to women in order to obtain an Islamic divorce or construct favourable terms. However, many moved beyond apologetic tactics by focusing on justice as the underlying purpose of Islamic law, rather than searching for favourable *fiqh* terms in divorce.

Women who divorced exclusively using religious law

An exclusively religious marriage is one that is solemnised by the religious authority and not by civil law. At first, this type of marriage seems unfavourable for women because it allows the unofficial wife or co-wives[14] to be deprived of health insurance or healthcare, public education or benefits acquired through marriage, and limits their mobility out of fear of discovery by state officials. In the event of an exclusive religious divorce, women may lose complete custody of their children and become financially disadvantaged. However, there may not be any civic difficulty in such marriages for women. For example, Noor and Tanveer, who did not have civil marriages, were able to determine or improve upon their divorce terms according to their own understanding of religion.

Noor, the daughter of Egyptian immigrants, is an obstetrician/gynaecologist who grew up in the U.S. with a strong sense of her Muslim identity and awareness of women's Islamic rights. One evening after work, Noor found a new acquaintance visiting her parents' home with an imam, proposing their nikah take place that very evening. Without the opportunity to reflect on any stipulations that she wanted to include in it, Noor accepted the *nikah*. She remembers being overwhelmed: "I was not in my senses, post-call and not fully present."[15] The couple intended to have an additional civil marriage but that never occurred. This, however, did not bother Noor because in her view the *nikah* was a spiritual contract and real marriage.

During the two-year marriage, Noor found her husband to be detached, aloof, and hid the entirety of his income. Her situation conflicted with her knowledge that in a Muslim marriage wives have the right to receive *nafaqa* (maintenance) from husbands, and that no one has a claim on a woman's independent wealth and earnings. She never expected to have to financially support her husband and child. When she tried to confront him he became hostile and so she "left the house and declared a *khul'*. At first her husband was reluctant [to consent] but he accepted that he was not fulfilling his duties."

After the *khul'* Noor devised a visitation schedule for her ex-husband and child and calculated the amount

of child support she needed. Although religious contracts are rarely enforceable, to the surprise of Noor's family, her ex-husband complied with the Islamic divorce terms. Noor concedes, "I trust[ed] him because he followed Islam. It would have been very easy [for him] not to," indicating he felt morally and religiously compelled to co-operate. Later, however, she used civil law to make her divorce contract legally binding by taking written documentation of their agreement to court. It was for this reason that when her ex-husband failed on one occasion to make child-support payments, Noor was immediately able to file a complaint with the courts. A judge ordered him to make future payments through a wage deduction system instead of direct payments to Noor.

Even though civil law does not recognise exclusively religious marriages or divorce, Noor was able to use the courts to enforce her visitation schedule and child support payments because the court recognises paternity and enforces child support even when parents are not married according to civil law. However, if she was not financially secure, she would not be able to rely on the courts. For the future, Noor says that when she remarries she will contract a civil marriage as well as a *nikāh* for the sake of "protecting [her] rights." This is an interesting shift in choice of legal system from her earlier position in which she felt that Islam sufficiently protected her rights. She now feels she must use civil law in order to preserve her Islamic rights as a wife.

Tanveer is a twice-divorced African-American woman. After learning from a difficult first marriage and divorce, which I will discuss later, Tanveer contracted her second *nikah* with various stipulations regarding her personal autonomy during the marriage such as "being able to travel without supervision, fast without permission from [her] husband, and a unilateral right to divorce."[16] Tanveer did not have a second civil marriage as she felt that in the event of a possible divorce she did not want to relive the experience and trauma of a civil divorce. However, this marriage was a short one and Tanveer divorced again, but due to the stipulation of the right to unilateral divorce, it enabled her to divorce without contentious negotiations for her husband's consent to *khul'*.

Stipulations as a Tool for Women

Although Noor and Tanveer decided their own terms in religious divorce, they both concede that their positive experience with religious contracts was due to their ex-husband's "God-fearing" nature and desire to adhere to an Islamic morality that bound them to abide by the *nikah* or divorce if they breached its conditions. Often Muslims have apologetically pointed to the bargaining power women have for stipulating conditions in the *nikah*, as evidence of women's equality in marriage according to *fiqh*, despite the lack of enforceability in many contexts and difficulties in negotiating stipulations in the first place.

In her study on spousal abuse among American Muslim women, Dena Hassouneh-Phillips explores the efficacy of stipulations.[17] Hassouneh-Phillips explains that her interlocutors endured physical abuse because "marriage for Muslim women is integral to religious and social life [...]. Many of the women [...] unfortunately tolerated significant abuse for many years, hoping that through faith, things would improve over time." They were often quoted the *hadith*, "Marriage is half of faith." Her informants' attempts to empower themselves by drafting lengthy stipulations in the *nikah* or renegotiating their marriage contracts in Islamic arbitration led by imams proved ineffective in preventing the abuse.

Her analysis of the failure of stipulations as deterrents against domestic violence demonstrates that the inclusion of stipulations in the *nikah* is not a definitive solution to ensure marriage partners are on equal footing. As Kecia Ali points out, including stipulations would not curb men's access to a unilateral, no-fault Islamic divorce.[18] There is no incentive (i.e. the threat of divorce) that pressures husbands to comply with stipulations, while the pressure exists for the wives. Stipulations cannot be a long term reform solution, not only because they are unenforceable contracts, but more vitally because: "it would not address this basic imbalance in men's and women's marital rights, or the definition of the marriage contract as being unilaterally in the husband's domain (*fī yadihi*)."[19]

Even if all women stipulated the right to unilateral divorce through pre-nuptial agreements,[20] until an honest discussion of equal rights for men and women in Muslim marriage takes place, the definition of *nikah* remains the same, a product of medieval gender inequalities in *fiqh*. Although in some cases women can hold men accountable to religious contracts. Noor's need to employ the U.S. courts to enforce the terms of her *khul'* shows that Muslim women in the

U.S. can benefit from legal duality in marriage and divorce negotiations to create incentive for husbands' compliance. This poses the question, to which I will return, of whether the recognition of Islamic divorce law in the U.S. is desirable.

Women who divorced exclusively using civil law

In this section I will discuss the divorce experiences of three women, Firdaus, Zarrin, and Hafsa, who all had civil and religious marriages but chose to divorce using only using the civil law. They acknowledged Islamic law insofar as settling their personal questions or establishing an Islamic justification for seeking divorce. Their cases illustrate one way Muslim women accommodate both civil law and religious authority in the dissolution of their marriage.

Firdaus emigrated from Pakistan as a teenager and married her college sweetheart in a civil and religious marriage, the latter of which was "very important to [her]" because "it's a requirement for a Muslim family to have a religious marriage."[21] After twenty-two years of marriage Firdaus learnt that her husband was cheating on her. Firdaus filed for civil divorce even after receiving many phone calls from her brother and elders in her community, who said divorce is not Islamic and not the answer.

Although the *nikah* was important to her, she says, "Islamic divorce didn't really come up because my husband and I were physically separated and the physical separation in combination with the American divorce resulted in the final divorce." Her reasoning for use of the term, final divorce, resembles the idea of the irrevocability of *khul'* or, of *talaq* after the separation period of *'idda* has expired. Although Firdaus did not pursue an Islamic divorce independently, her idea of physical separation coupled with the civil divorce was cause for final divorce which reflects various "religious" notions. With respect to *mahr* she said, "In a divorce, *mahr* doesn't come into play [...] living in the United States, your divorce goes through the legal avenue in which everything you own is split half way. My *mahr* was so nominal compared to my divorce settlement that it just fell in." She viewed both her civil divorce decree and settlement inclusive of Islamic law. It was also financially safer for Firdaus, who was unemployed, to receive half the marital assets and child support rather than claiming a nominal *mahr* as her compensation due at divorce.

Islamic Permission to Divorce using civil law

In contrast, Zarrin's experience of a civil divorce was a negative one. She married straight out of high school and lived for thirteen years under strict conditions in which her controlling husband did not allow her to drive or learn English; he required her to log all the phone calls she made and received. After becoming depressed and contemplating suicide, Zarrin ignored her parents' wishes to stay in the marriage and went to a Muslim counsellor and a Muslim shelter as she did not want to "give [non-Muslims] a reason to say bad things about Muslims."[22]

When she filed for divorce her husband said, "under Islamic laws [she] could not divorce him, [...] this was unholy and bad and [she] was going against God's will. [But she] knew it was the right thing."[23] Instead of negotiating religious divorce with her uncooperative husband, Zarrin confirmed with the *hoja* (figure of religious authority) who had officiated their marriage, if it would be acceptable in Islam for her to seek divorce: "I knew I was two hundred percent right but I just wanted to confirm. I described [to] him [only] the sexual problems he had and I [asked] is it okay under these conditions for me to divorce [...] he said yes, by all means go ahead and divorce." She presented the situation as a case for juridical divorce *faskh* to receive her *hoja's* approval, but she only pursued the divorce through civil law.

Zarrin initially viewed religious and civil laws as separate entities. Her *nikah* was "the difference between *zina*" and permissible sexual relations; in comparing it to civil marriage she says, "in our religion at least two people need to know that you got married, that's why there are witnesses [...] and in legal marriage there are at least two witnesses so it is probably the same process." As the processes of civil and Islamic marriage resemble one another, she felt a civil marriage fulfilled the Islamic requirements of *nikah*. Similarly, in seeking divorce, she confidently accepted the civil divorce as a religious divorce because her *hoja* had pre-approved it.

Zarrin's husband suggested an inexpensive Muslim lawyer who could settle their divorce. She agreed, realising that she could not afford a fight for child custody or a financial settlement. She recalls, "He said 'I want the custody of the kids because I'm afraid that you're going to kidnap them' [...] I had nothing. I had no rights whatsoever." The lawyer he hired was

"[reluctant] to draw up the papers" for finalising the divorce and told her to "go to another lawyer and get [her] rights" because he believed Zarrin was entitled to more as a Muslim woman and could make legitimate Islamic claims through the civil courts. As she could not afford her own attorney, she settled on her ex-husband's terms, which he claimed were Islamic.

Hafsa was a first-generation Pakistani-American woman who fell in love and got engaged with a suitor from her community. Her brother, acting as her *wali* (male guardian), opposed the match because he had identified certain problematic features of her fiancé's personality, but later consented to it. Within two months of the marriage, "all the issues he had as an individual [...] became apparent."[24] He was depressed, dropped out of graduate school, drank and gambled excessively. To salvage the marriage, she supported him financially, paid his tuition, convinced him to go to counseling for "anger management and abusive behavior," and take medications for his depression. He was unresponsive and inconsistent with treatment and after several failed attempts in helping her husband who promised to change, Hafsa filed for divorce.

Before doing so, she approached the progressive Imam she had selected to officiate her *nikah* two years earlier because, "[she] wanted to make sure that [she] was doing everything according to Islam." She told him exactly what had been going on [...] and he was supportive of her. The Imam felt that Hafsa chose divorce as a last resort and her repeated attempts to reconcile with her husband and involving others was comparable to attempts at reconciliation that may occur during the *'idda* period. She recalls: "I really had done more than I needed to do [...] because he knew that I had gotten the psychiatrists and everybody involved, he did feel that somebody had tried to intervene." With regard to an Islamic divorce she says, "I guess it was more along the lines of the law of the land superseding any cultural or religious beliefs [...] and for me that settled the question [...] I felt really comfortable in hearing it from him. The Imam just validated it for me."

Although the Imam's permission to divorce answered her question about Islamic divorce, Hafsa discussed her ten thousand dollar *mahr* outside of court, in the hope that his parents would admit to their son's flawed character and honour the *nikah*. As they were not obligated by civil law to pay her the ten thousand dollars, they claimed that the ring, the only gift she kept from the marriage, was intended to be her *mahr*. They did not address the money she had invested in attempting to salvage the marriage and although she felt their refusal to pay the *mahr* or reimburse her was not Islamic, she believed her civil divorce decree was.

Firdaus, Zarrin, and Hafsa consider the civil system as the institution that divorced them from their husbands as they felt civil law was inclusive of Isalmic law or resembled it closely. For Firdaus's case this provided financial security. In the cases of Hafsa and Zarrin, by having religious permission from sympathetic imams to divorce in the civil system they avoided making a distinction between the two legal entities, which could have allowed the ex-husbands to prevent an Islamic divorce from taking place. However, by subsuming Islamic law under civil law, they were not able to use the courts to negotiate for what they felt was their Islamic due such as financial compensation or custody, because either it was too late, cost prohibitive, or to ensure their ex-husbands' compliance.

Use of both civil and religious systems

Unlike the women I discussed in the previous section, five of my interlocutors, who are fairly well versed in Islamic legal debates and Muslim women's rights, treated the civil and religious divorces as separate and considered *khul'* or *talaq* essential to feel truly divorced in both a personal sense and in the eyes of God. Their cases fall into three categories based on the order in which civil and religious divorces took place. Sadaf and Tanveer declared *khul',* then proceeded through the civil divorce process. Nawal and Lisa filed for civil divorce first and then sought Islamic divorce during or after the civil process. Aliya's ex-husband mailed her a *talaq* notice and she subsequently went through the civil divorce process. The order in which the religious or civil divorces took place greatly affected the women's agency in negotiating which laws, civil or Islamic, were applied and whether the women obtained Islamic divorce at all.

Sadaf is an African-American woman who converted to Islam in college and was widowed at a young age with two children. She faced community pressure to remarry and recalls, "I wasn't ready to get married but the concern everywhere in the community was that I was alone and there was pressure on me to get married and so I just said okay."[25] Because she was rushed into remarriage, several unresolved issues surfaced

frequently. Sadaf 's husband was abusive, irresponsible with their children, and disrespectful towards her. After staying married for the sake of the children and getting pregnant year after year, Sadaf declared a *khul'*. Her husband refused consent but Sadaf took him to counseling with an imam who knew her situation well and convinced him to sign Islamic divorce papers.

She felt this was a real divorce: "when we got an Islamic divorce, I had seen myself as divorced, and the court would be a formality." However, this process turned into a ten-year long custody battle and numerous court dates for missed child support payments. He "did what he could do to prolong the situation because he knew that [she] wanted the divorce." Sadaf 's understanding of civil marriage as a separate entity from the religious marriage enabled her to remarry while the civil divorce case was pending. She says, "In my world, the Islamic part is necessary." She then married the imam of a predominantly African-American mosque and had carefully drafted stipulations in her *nikah*, which she felt her husband would respect because of his personal and public religious obligations.

Tanveer, whom I discussed earlier in the context of her second divorce, had a more complex first divorce. She had four children with her husband of 20 years but felt he was controlling and not the spiritual partner she envisioned him to be when they married. She recalls: "I felt that [during] the whole marriage, there wasn't any communication and [any] level of love [...] So I felt, why am I married? He tried to exert a certain level of control over me [...], not acknowledging my spiritual autonomy." She changed her core beliefs to suit his tastes and was "unhappy for a long time." When Tanveer told her husband she wanted a divorce, "he was very angry and distraught and said [it was] because [she] wanted to be a career woman and that's not Islamic and divorce is not Islamic. He said 'it's going to be on [her]. I'm not responsible for it.'" She decided to "do the Islamic [divorce] first because [she] felt that would have more weight spiritually."

Tanveer met with a "moderate imam" to discuss her *khul'*. However, he did not trust Tanveer's carefully deliberated decision and told her he would only sign as a witness for her *khul'* if she waited for two months to determine if divorce was her final decision. After two months, Tanveer left the house, returned the *mahr*, which was made up of some furniture and cash, and took the children as per their wishes. She determined the visitation schedule, which the court enforced, and sent her husband a notice titled "Declaration of Khula", signed by her and the Imam. Even though her husband was extremely angry a few months later he consented to the divorce.

In a traditional Muslim marriage there is no concept of conjugal wealth, a position which is supported by a *fatwa* by the FCNA.[26] A woman leaves with the same wealth she brings into a marriage and has little or no claim on marital assets. This poses a challenge for women like Tanveer who divorce by both civil and Islamic laws: which law should determine the division of property and what financial settlement is considered Islamic for a homemaker who cannot rely on an extended family for support? As Tanveer first pursued the religious divorce and left the house, she encountered great financial hardships. Initially she "was not going to ask for anything [because] that definitely wasn't Islamic." However, a divorced friend convinced her that it was indeed Islamic: "Islamically [she] was entitled [to] something" because "[she] breast-fed the kids, [...] took care of the kids, and took care of the house while he was working." Using a similar reasoning found in Moroccan divorce law, Tanveer asked herself, "If I didn't do it, then how much would it cost for someone to do it?"[27] So she claimed half of the equity of the marital house and "made a clause that a portion of it should go to the children when they are eighteen." By first pursuing an Islamic divorce, Tanveer was able to ground herself in the *Shari'a*, which her husband cited as the very reason she could not divorce him. It was important to Tanveer that the subsequent civil divorce terms be just and Islamic, but that was only possible through questioning the very core of what is Islamic.

Establishing a religious divorce before a civil divorce was beneficial to Sadaf and Tanveer in that they did not elicit much debate about obtaining religious divorces from their husbands, and perhaps showed their assertiveness by declaring *khul'* with the support of an understanding imam. The civil process, however, was either too lengthy or difficult for debating Islamic divorce terms.

The *Mu'allaqa* problem

The next two women I will discuss first initiated civil divorces and then had great difficulty in subsequently obtaining an Islamic divorce. The *mu'allaqa* (woman who is hanging, or in limbo) problem is a predicament that some American Muslim women experience as they

have obtained a civil divorce but are unable to secure a religious divorce from their husbands or religious authorities. Upon learning that their wives had filed for a civil divorce, Nawal and Lisa's ex-husbands denied them Islamic divorce by taking advantage of women's limited access to an Islamic divorce and men's advantage in *fiqh* of owning the marriage contract as part of their domain.[28] According to Nawal and Lisa, their motivation for doing so was to take revenge on their ex-wives for filing a civil divorce and to spiritually bind them from moving on or remarrying.

When Nawal, whose marriage I detailed in the introduction, filed for civil divorce, her ex-husband suggested to "do this according to *Shari'a* law."[29] He wanted to pay her the *mahr*, which she said was unnecessary because "[She] was the one requesting the divorce […]" He then wanted mediation at the mosque to "make some decisions about the children and the property." Initially she thought this was the right course but she says, "I realised that […] even if it was Islamically the right thing to do, there was no recourse behind it – no action I could take if he didn't abide by it." She concluded that his motivation for using *Shari'a* and his offer to pay her the *mahr* was based on his distorted understanding of the law.[30] He said to her, "if it was by *Shari'a*, it was by religion, he would get the house, he would get the children, he wouldn't have to pay child support." She responded,

> Even if that happens in Pakistan, […] the legal system here gives the woman a lot of rights that are closer to the *Shari'a* than what the women in Pakistan are allowed and that's another reason why I wanted to go through the court system, because it would force him to do what he was supposed to be doing with respect to Islam.

With a belief that the Qur'an defines "Islamic" divorce terms as what is fair and just, Nawal turned to the civil court to carry out her sense of Islamic justice. In contrast, her ex-husband believed that an "Islamic" divorce is advantageous for men in *Shari'a*, as defined by Pakistani legislations. This difference in their understanding of what is "Islamic" is a reflection of a broader national debate: which discourses of Islamic law ought to be incorporated into American Muslims' lives. As *Shari'a* is not institutionalised, organisations such as the FCNA typically refer to traditional bodies of *fiqh*. However, individual American Muslims, such as Nawal, may refer to primary sources of the Qur'an and *sunna*, while recent immigrants may refer back to the family laws of their countries of origin where manifestations of *Shari'a* are institutionalised through civil laws with which they are familiar.

The moment Nawal decided to use the civil system, her ex-husband retracted the idea that they should decide any terms according to *Shari'a* as it would be unprofitable for him and he would have to share the marital assets with her. He subsequently refused her a *talaq* (although he threatened her with it during the marriage), refused to take the nominal *mahr* in return for *khul'* (although he initially suggested to divorce according to *Shari'a* if she accepted her two hundred and seventy-three dollar *mahr* as a divorce settlement), contested custody of their daughters, and refused to swear on the Qur'an during his depositions, saying that "now we weren't doing it according to *Shari'a*, everything should be a civil matter."

Nawal recounts searching for just Islamic divorce terms:

> I was told that the father was supposed to get the kids but in the end it turned out that was not the case. […] Because a woman is not allowed to divorce the husband, *per se*, how is a woman supposed to go about getting a divorce in Islam? I needed guidance on the financial aspects and what were in my rights to request [in order to] stand in front of Allah on the Day of Judgment and say I did the best I could.

She constructed her civil divorce decree using her sense of Islamic justice and extensive research on modern *fiqh* and reformist discourse in Islamic law.

Obtaining an Islamic divorce pronouncement still remained an issue because "according to him it was just a civil divorce and according to the religious aspect [she] was still married to him". This was a problem if she wished to remarry, and because she wanted to counsel her daughters when they knew that their parents were no longer married. She wrote to several American Muslim scholars and imams, asking for an Islamic divorce decree but "they kept saying ask him again" for *talaq*. He had refused "on three different occasions." She then "wrote to an Islamic judge in Pakistan about [her] divorce, […her] life with him and why [she] needed to get the divorce." After several months the judge granted her a *Shari'a* divorce decree. In wanting to end her state of *mu'allaqa* , Nawal

wrote to an informal, non-state employed *qadi* outside of the U.S. and based on descriptions in her letter, the unofficial *qadi* issued an unofficial divorce decree. In the United States, figures of religious authority have reservations in doing the same, citing that they have no official power, revealing that there is a lack of new *ijtihād* (juristic reasoning) to resolve the *mu'allaqa* problem within the American context. Nawal's need was not to obtain a legally binding Islamic divorce decree, but rather to have am religious dissolution to the marriage because she had been married both by civil and religious law.

Lisa[31], a Caucasian American who converted to Islam had no option of writing to a *qadi* from a native Muslim country. She married her boyfriend shortly after they both converted to Islam. Throughout the marriage Lisa was financially supporting her husband, who refused to work, had extreme rage, was depressed and physically abusive. When she began to fear for her life Lisa moved out of their home and filed for a civil divorce. To prevent her from remarrying, her husband refused her request for *talaq* and did not consent to *khul'*. While researching how she could obtain a religious divorce in the U.S., Lisa came across a *fatwa* of the FCNA that stated her civil divorce decree should be accepted by religious authorities as a religious divorce.[32] Lisa acknowledged that her divorce case would take several years to finalise as her husband showed no sign of settling out of court.

Lisa learned that according to *fiqh*, an Islamic juridical divorce cannot be pronounced by anyone other than a *qadi*, presiding over an Islamic court. As there are no *qadis*, or any formal *Shari'a* tribunals in the U.S., she had nowhere to take her case. However, Lisa recognised that even if there were such a system in place, the tribunal whose foremost interest as imagined by its proponents would be to save Muslim marriages and exercise classical *fiqh*, would have denied her a religious divorce because according to *fiqh* the burden of proof for grounds would fall on her. For each of her three reasons, her husband's mental incapacity, abuse, and lack of maintenance she would face a plethora of limitations from *fiqh*. She would have to produce four witnesses to testify to his mental state or produce medical records, which in the U.S. are inaccessible due to patient confidentiality laws; and so, if he appeared sane in the tribunal, she would be proven wrong. As her scars had faded she did not have any proof of physical abuse and there were no witnesses to that abuse. Finally lack of financial support for her could be overlooked, especially as Lisa supported her husband before their marriage and it could be supposed that he had a right to expect continued support. Despite believing that she is divorced "in the eyes of Allah," she recognizes that if *Shari'a* tribunals existed in the U.S it is quite possible that she would be denied an Islamic divorce. When Nawal and Lisa were denied religious divorces by their husbands, they both researched the Qur'an, *sunna*, and *fiqh* in order to explore other avenues available to them for obtaining a religious divorce. The American imams the women approached for documentation of Islamic divorce said that it was not in their power to grant them. While Nawal was able to find an authority from a foreign country to issue a religious divorce, Lisa believed that due to the unjust biases in classical *fiqh*, no authority existed to issue her a religious divorce in the U.S. Although Nawal's case reveals the lack of a *qadi* system in the U.S., Lisa recognises that the presence of such a system would not be beneficial as long as Muslim institutions uphold traditional interpretations of *fiqh* which accommodate a husbands' unfettered access to an instant divorce and their right to withhold it when they wish, while insisting that women need an intermediary and proof to appeal for divorce.

Unexpected Triple Talaq[33]

In this section I will recount the experience of an immigrant Pakistani woman, Aliya, and the Muslim authorities' support in granting a man's right to an instant, unilateral divorce. She was married for ten years when her husband suddenly insisted on divorce. "He abandoned the children and [Aliya]"[34] and sent her an irrevocable triple *talaq* notice, "typewritten on a sheet of paper—Islamic divorce witnessed by two people." Shocked, Aliya did not accept the notice as legal in the United States where Islamic law is unofficial. She said, "this was just a piece of paper especially because he didn't even register it in Pakistan [...] and you can't just write an Islamic divorce three times — it has to be over a three month period so technically that was not a divorce." In her definition, Islamic divorce must take place within a formal, state-sponsored space, with the opportunity to reconcile during the *'idda*, which was obviously eliminated with the instantly irrevocable triple *Talaq*.

Soon after Aliya learned that religious authorities in Europe deemed his triple *talaq* notice as legitimate,

enabling him to legally marry her best friend. He moved back to the U.S and to a state in which he could file a no-fault civil divorce. He claimed to the judge that the *mahr* was all that Aliya was entitled to because in Islamic law "*mahr* is the amount you give in the divorce." Aliya fought back: "this is how they distort Islam [...] I got an affidavit saying that *mahr* is the amount you have to give your wife at the time of marriage, it has nothing to do with divorce." The case eventually went to trial and she received alimony and child support.

Even after his triple repudiation, which she believed was not a valid form of *talaq* and could be revoked, Aliya wanted to stay married. Muslim figures of authority and everyone in Aliya's life instantly accepted the triple *talaq* as valid, in contrast to a wife-initiated divorce. She had no chance to express her desire for reconciliation. Although Aliya would have wanted a divorce if she knew her husband was having an affair, his use of the unilateral right in *fiqh* to divorce without having to provide an explanation meant that Aliya had to accept an unwanted divorce.

Conclusions

The avenues my informants used in negotiating their divorces were either the civil system or Muslim networks familiar with Islamic law, and both. Their cases demonstrate several religio-legal challenges women face such as limited access to divorce, establishing equitable divorce terms, and confronting patriarchy in *fiqh*. It is clear that neither the civil system, nor services offered by various religious authorities offer women just solutions to the challenges that arise in a Muslim divorce. The civil system can be expensive, lengthy, and unprepared to handle litigants' debates over what is or is not Islamic. Meanwhile, religious authorities allow for the man's use of their unilateral right to divorce as a tool to threaten their wives or to withhold divorce, despite the existence of no-fault civil divorce and the sound arguments for a religious divorce by women.

There are several solutions to the challenges American Muslim women face in divorce but they are not all practical. Total abandonment of the *nikah* is not a solution because as my interlocutors emphasise, contracting a *nikah* is central to affirming their Muslim identity and beliefs. The inclusion of stipulations in the *nikah* does not address the gender inequities in *fiqh*, and the definition of *nikah* within it. Finally, the establishment of tribunals or legalising the procedure for obtaining an Islamic divorce within the bounds of traditional Islamic law or current American Muslim legal thought would not allow women an easier access in either obtaining an Islamic divorce or establishing equitable terms for their divorce. Solutions may be found by improving the understanding of Islamic marriage and divorce ethics in the American Muslim discourses (i.e. American Muslim institutions and communities) which have so far been influenced by archaic *fiqh* from the medieval period. My interlocutors suggest use of the Qur'an, *sunnah*, and the understanding of justice as the criterion for Islamic law.

The experiences of divorced American Muslim women and the legal methods they use in negotiating justice, such as reinterpretation, research, and return to their belief of parity in an ethical Islam, are important cues for reform in American Muslim legal thought. My interlocutors' diverse interpretations of Islamic divorce, whether separate or the same as civil law, and the terms that they felt executed Islamic justice, suggest potential channels for reform in American *fiqh*. For example, Islamic marriage and civil marriage could remain separate processes in which couples negotiate what they believe the *nikah* means. Entering into a Muslim marriage contract does not necessarily mean that both parties have the same understanding of the nature of the contract, which has been indicated by the numerous difficulties women face when dissolving the contract. Another potential option could be that Muslim couples should have one marriage contract, a civil contract which includes a *nikah* which has been agreed to by both parties. The process of reform for American Muslims is reliant on the evolution, albeit slow, of Islamic legal culture and requires a different understanding of the definition of *nikah* on the basis of equality, and the rethinking of Islamic law, as a system of justice.

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1 I have used pseudonyms for all my informants for confidentiality.

2 Hadith 2173 in *Sunan Abu Dawud: Kitab at-Talaq*. Retrieved September, 2005, from http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/abudawud/012.sat.html#012.2173. For examples of frequent citation see *fatwas* (legal opinions) by members of the FCNA at islamonline.net

or discussion in Kecia Ali's *Sexual Ethics and Islam: Feminist Reflections on Qur'an, hadith, and Jurisprudence* (Oxford: Oneworld Publications, 2006), pp. 24-36.

3 To avoid repetitive themes, I present a selection of interviews from Zahra Ayubi 'American Muslim Women Negotiating Divorce' (BA Honors Thesis, Brandeis University, 2006).

4 Asifa Quraishi and Najeeba Syeed-Miller, 1998. 'No Altars: A Survey of Islamic Family Law in the United States', *Islamic Family Law: Possibilities of Reform Through Internal Initiatives*. Retrieved June 3, 2005 from http://www.law.emory.edu/IFL/index2.html; Ghada Qaisi, 'A Student Note: Religious Marriage Contracts: Judicial Enforcement of "Mahr" Agreements in American Courts', *Journal of Law and Religion*, 15, 1/2, 2000-2001, pp. 67-81.; Yvonne Haddad, Jane Smith, Kathleen Moore, *Muslim Women in America: the Challenge of Islamic Identity Today* (Oxford: Oxford University Press, 2006), pp. 113-118.

5 Abdul Hakim Quick, 'Al-Mu'allaqah: The Muslim Woman Between Divorce and Real Marriage', *Journal of Islamic Law*, 3, Spring/ Summer, 1998, pp. 27-40; Talal Y. Eid, 'Marriage, Divorce, and Child Custody as Experienced by American Muslims: Religious, Social, and Legal Considerations' (ThD Dissertation, Harvard Divinity School, 2005).

6 Shaikh, Sa'diyya. 'A Tafsir of Praxis: Gender, Marital Violence, and Resistance in a South African Muslim Community' in Daniel Maguire and Sa'diyya Shaikh (eds.) *Violence Against Women in Contemporary World Religion: Roots and Cures* (Cleveland: Pilgrim Press, 2007), p. 70.

7 This figure is contested. Estimates range from 4.5 million to 9 million.

8 *Fiqh* refers to pre-modern and modern Islamic jurisprudence based on the *Shari'a*, law derived from the Qur'an, *hadith* and *sunna*. Often the term "Islamic law" incorporates both *Shari'a* and *fiqh*.

9 See verse 2:229.

10 *Tatlīq* is another kind of juridical divorce in cases of abandonment or absence of the husband in which a *qadi*or judge uses the husband's right to initiate divorce on his behalf.

11 Ali, *Sexual Ethics,* pp. xxiii.

12 Ziba Mir-Hosseini, 'The Construction of Gender in Islamic Legal Thought and Strategies for Reform', *Hawwa* 1, 1, pp. 16.

13 Kecia Ali, 'Progressive Muslims and Islamic Jurisprudence' in Omid Safi (ed.), *Progressive Muslims on Justice, Gender, and Pluralism*, 163-189 (Oxford: Oneworld Publications, 2003), pp. 166.

14 For more on American Muslim polygyny see Debra Mubashshir Majeed, 'The Battle Has Been Joined: Gay and Polygynous Marriages Are Out of the Closet and in Search of Legitimacy', *Cross Currents*, 54, 2, 2004, pp. 73-81.

15 Noor. Personal Interview. June 1, 2005. All quotations from Noor are from this interview in Ayubi 'American Muslim Women', pp. 21-23.

16 Tanveer. Personal Interview. October 22, 2005. All quotations from Tanveer are from this interview in Ayubi 'American Muslim Women', pp. 23-24, 36-38.

17 Dena Saadat Hassouneh-Phillips, '"Marriage Is Half of Faith and the Rest Is Fear Allah": Marriage and Spousal Abuse Among American Muslims', *Violence Against Women*, 7, 8, 2001, pp. 927-947.

18 Ali, *Sexual Ethics*, pp. 28.

19 Ali, 'Progressive Muslims on Islamic Jurisprudence', pp. 177. Also, American Muslim women do have access to no-fault civil divorce, but it is not always interpreted as equivalent to Islamic divorce.

20 Azizah al-Hibri advocates building *nikah* stipulations into pre-nuptial agreements in 'An Introduction to Muslim Women's Rights' in Gisela Webb (ed.), Windows of Faith: Muslim Women Scholar-Activists in North America, 51-71 (Syracuse, NY: Syracuse University Press, 2000).

21 Firdaus. Personal Interview. May 31, 2005. All quotations from Firdaus are from this interview in Ayubi 'American Muslim Women', pp. 26-28.

22 Shahnaz Khan discusses Canadian Muslim women's dual struggles to overcome "Muslim" oppression while combating bigoted views of Muslims by non-Muslims in *Muslim Women: Crafting a North American Identity* (Florida: University Press of Florida, 2000).

23 Zarrin. Personal Interview. October 11, 2005. All quotations from Zarrin are from this interview in Ayubi 'American Muslim Women', pp. 29-30.

24 Hafsa. Personal Interview. October 19, 2005. All quotations from Hafsa are from this interview in Ayubi 'American Muslim Women', pp. 31-34.

25 Sadaf. Personal Interview. November 21, 2005. All quotations from Sadaf are from this interview in Ayubi 'American Muslim Women', pp. 35-36.

26 FCNA declares that women are entitled to *some* compensation in *talaq* along with their *mahr* (the *fatwa* does not mention *khul'*), but not half the marital assets because it is un-Islamic. Sheikh Muhammad Ali Hanooti, 'The Financial Settlement after Divorce in U.S.A', *Fiqh Council of North America*, Retrieved September, 2005 from http://www.fiqhcouncil.org/articles/financial.html

27 *Ujrat al-mithl* is a fair wage paid to the wife for her services in the husband's household. See Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* (London: I.B.Tauris, 2000) pp. 147 for reference to *ujrat al-rida'*, wages for suckling children and *ujrat al-hadana*, or fees for child care and continued child support in Moroccan Law.

28 The *mu'allaqa* problem has a parallel in Jewish law, known as the *agunah* problem in which women have limited grounds to seek divorce. After civil divorce their ex-husbands can deny them religious divorce. The women cannot remarry according to Jewish law and any children they may have from civil remarriage would be illegitimate.

29 Nawal. Personal Interview. August 27, 2005. All quotations from Nawal are from this interview in Ayubi 'American Muslim Women', pp. 47-50.

30 Advocacy for enforcement of all *mahr* claims in U.S. court overlook that some men attempt to prevent division of marital assets by claiming that women are only entitled to the *mahr*.

31 Lisa's interview appears in Ayubi 'American Muslim Women', pp. 51-53.

32 Muzammil Siddiqi, 'Non-Muslim Judge Dissolving Islamic Marriage', *Islam Online Fatwa Bank*, Retrieved September, 2005 from http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503544550

33 Triple *Talaq* is legally undesirable but valid divorce, in which a man repudiates his wife three times on a single occasion causing an instant, irrevocable divorce.

34 Aliya. Personal Interview. October 28, 2005. All quotations from Aliya are from this interview in Ayubi 'American Muslim Women', pp. 43-46.

Secular is Not Always Better: A Closer Look at Some Woman-Empowering Features of Islamic Law

ASIFA QURAISHI-LANDES (2013)

When I got divorced in 2009, it was painfully obvious to me that if I had gotten divorced under the rules of fiqh, I would have walked away with a lot more money. Community property cut in half what I thought was clearly mine (I had earned or inherited most of our assets, but that didn't matter to the state - or to the lawyers). That fact, coupled with just being sick and tired of apologizing for sharia as rising tides of Islamophobia took on more and more paternalistic and condescending tones, prompted me to write this piece. There are certainly many areas where I think the fiqh rules could stand some much needed reform (my "Meditation on Mahr," also in this volume, elaborates one of them), but it is still just simplistic, and more than a little "White Man's Burden"-y, to presume that contemporary secular law is *always* better for women. I decided to make a list proving my point, and my good friends at the Institute for Social Policy and Understanding published it as this policy brief.

"Secular is Not Always Better: A Closer Look at Some Woman-Empowering Features of Islamic Law" first appeared as ISPU Policy Brief #61 in June 2013 and is included here with permission. It is also available at ispu.org.

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If you are interested in women's rights and Islamic law, you have plenty to read. Mostly, you will find descriptions of how Islamic law treats women unequally, often with significant criticism of Islamic law as a whole based on this premise. Sometimes you will find suggestions for how it could be reformed to better honor women's rights.[1] But it is much harder to find literature discussing the woman-empowering aspects of classical Islamic law. This omission is unfortunate, because these aspects are the foundation of most Muslim feminist work[2] and yet they remain in the shadows of global (especially western) feminist discourse. This brief highlights some of Islamic law's woman-affirming aspects, with special comparison to women's rights in American law.

A common presumption of western feminists is that Islamic family law restricts women's rights more than American family law does. This is one reason cited by those who oppose the use of sharia-based provisions of Muslim marriage contracts in American courts.[3] Yet some of the rules of Islamic family law can be very empowering for women—in some cases arguably more so than American law.[4]

Below are three examples of how the rules of classical Islamic law could leave a woman financially better off than the relevant American law.

1. Its not a brideprice, it's an insurance policy

The Qur'an requires the groom present to the bride a mutually agreed upon bridal gift (mahr) as part of a valid marriage contract. Unfortunately, it is common in western literature to translate mahr as "brideprice," thus giving the impression that the bride is being sold to the groom. (Ironically, this description fits better with the dowry paid by fathers to grooms in Jane Austen's England than it does with the role of the mahr in Muslim women's lives.) For many Muslims, the mahr is a woman-empowering tool, a sort of insurance policy that facilitates female financial independence upon marriage.

With a substantial mahr, a Muslim wife can choose, for example, to be a stay-at-home parent and/or choose not to pursue a financially lucrative career without becoming completely financially dependent on her husband. Using the mahr for financial independence can also empower a wife to leave a bad marriage, an option that is often not taken by those without a separate income. Living off of a mahr can be a far more financially secure way to begin a new life during and after divorce rather than, for example, waiting for alimony payments or a divorce settlement's division of assets, a procedure that can take months or even years in an American family court. No legal system can provide foolproof protection against abusive marriages, of course. But it is important to recognize that, contrary to the image created by the term brideprice, the mahr is a powerful tool for women's independence built into classical Islamic law that can be effectively used by women faced with this unfortunate situation.

2. Ours and hers: Women and Islamic property law

Under established rules of Islamic law, a Muslim man's property is not wholly his, whereas a woman's property (of all sorts, whether land, money, personal assets, etc.) is exclusively her own. Classical Islamic law states that women are not obliged to use their assets to financially support her household's needs, whereas a man is legally obligated to provide food, shelter, and clothing for all of his immediate family members as well as those members of his extended family who have no other support. In light of this, one might plausibly argue that, at least on paper, Islamic property law discriminates against men rather than women.

The above examples present quite a different picture of Islamic property law and women than does the impression created by focusing only on gender-discriminatory Islamic inheritance rules, such as allocating a sister half of her brother's share. However, this rule takes on a different significance when considered alongside the rule that obligates men to use their income and assets to support their sisters, mothers, and wives (and all close relatives), whereas a Muslim woman's property is exclusively hers and totally beyond the reach of others, including her husband and male relatives. And, contrary to popular misinformation, Islamic law has always flatly rejected the idea that a woman herself is someone's property, (in stark contrast to pre-modern European attitudes).

A Muslim woman's exclusive control over her property under classical Islamic law can be seriously disrupted by American community property laws, which hold that all income acquired during the marriage is owned equally, regardless of who actually earned it. Muslim women living in community property states in the United States are often shocked to discover that,

according to state law, their husbands have a legal claim to half of the assets that they had believed were (and under classical rules of Islamic law would be) exclusively theirs.

Pre-modern European laws, especially English common law (upon which the American legal system is based) severely limited women's ability to acquire property, through, for example, restricting their ability to enter contracts in their own names, and by transforming whatever separate property they did have into the property of their husbands if they married. Community property presented a radical departure from the common law scheme because it designated a woman's pre-marriage property as her own separate property (something that Islamic law already gave them), and gave wives ownership interests in the property acquired by their husbands during the marriage.

When compared to classical Islamic law, however, community property is not necessarily a step forward for women. Community property transforms all property acquired by either spouse during marriage into joint property owned equally by both. But this takes away half of a wife's property as given to her under Islamic law. That is, under classical Islamic law, all assets that a woman acquires—even during marriage—are her exclusive property, not to be divided with anyone, including her husband. In other words, if one begins from the Islamic legal presumption that a woman's property is exclusively hers, then community property actually takes away the exclusive ownership of all the income and assets that she acquires during the marriage. Thus, in a divorce settlement in a community property state, a higher income-earning wife would likely walk away with significantly less than if her divorce were decided according to Islamic property law.

3. Cooking and cleaning *not* included

Islam does not expect women to be housewives when they get married. Classical Islamic family law specifically states that wives have no marital obligation to perform household cooking or cleaning. Moreover, many Islamic schools of law state that, in some cases, the husband must either pay for these services or do them himself and, moreover, that a wife who performs these services is entitled to financial compensation for her work. This can have a significant impact on the post-divorce allocation of assets, especially if for a marriage of many years. So, while classical Islamic law does not have a specific concept of alimony, it does have a mechanism for a divorced homemaker to receive compensation that equals or exceeds the alimony that might be awarded by an American court.

Recommendations

Don't assume.

When comparing secular and Islamic law, do not assume that the results for women will automatically be worse under Islamic law. With the help of Islamic law experts, take a close nuanced look at the body of all relevant Islamic law before dismissing its potential for Muslim women's empowerment. The fact that gendered Islamic rules of marriage, inheritance, property, charity, and divorce are all interconnected is likely to be missed by those looking at individual rules in a vacuum. Many Muslims find this constellation of rules acceptable (and even empowering for women), and often rely upon it when making marriage and career plans.

Remember diversity.

Islamic law, being pluralistic in nature, is made up of different schools of law and new rules continue to be created by Islamic legal scholars today. There is not just one "Islamic law" that is good or bad for women. Moreover, individual Muslims are free to choose from the many Islamic legal rules available when deciding how to live as a Muslim. Due to this diversity, not all American Muslim women want these classical Islamic rules applied to them. Some may prefer Islamic legal reform in light of changed social circumstances, while others might very well prefer the secular law. But what the above examples illustrate is that when a Muslim woman requests legal recognition of the rules of classical Islamic law, this does not necessarily mean that she is oppressed or will be financially worse off than if the otherwise applicable secular law were enforced.

Some resources for expertise on Islamic law and women's rights can be found at:

- Islawmix (www.islawmix.org)
- Karamah: Muslim Women Lawyers for Human Rights (www.karamah.org)
- Sisters in Islam (www.sistersinislam.org)

1 There are far too many to list here. As an example, my own proposal for reforming Islamic marriage contract law can be found in my chapter, "A Meditation on Mahr, Modernity, and Muslim Marriage Contract Law," in Feminism, Law, and Religion (Failinger, Schlitz & Stabile, eds.), (Ashgate, forthcoming 2013).

2 For more detail on how Muslim feminists use classical-era Islamic law, see Asifa Quraishi, "What if Sharia Weren't the Enemy?" Rethinking International Women's rights Advocacy on Islamic Law, 25 Columbia Journal of Gender and Law 173 (2011).

3 For more details on this, see Asifa Quraishi-Landes, "Sharia and Diversity: Why Some Americans are Missing the point," ISPU report (available at http://www.ispu.org/getreports/35/2620publications.aspx).

4 For more elaboration of the examples listed here, see Asifa Quraishi–Landes, "Rumors of the Sharia Threat Are Greatly Exaggerated: What American Judges Really Do with Islamic Family Law in Their Courtrooms," 57 N.y.L. Sch. L. rev. 245 (2012–2013).

What to Consider If You're Considering Divorce

ZAHRA AYUBI (2021)

As I explain in the introductory notes to my other articles in this volume, I started researching the intersections of civil divorce and Islamic divorce fifteen years ago. Since then, many Muslim women have reached out to me for advice on how to get a divorce and remain true to their faith. We discuss the numerous elements of Muslim divorce in America. This new essay, "What to Consider If You're Considering Divorce," is a recapitulation of the major discussion points that arise in those conversations.

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If you are thinking about divorce, most likely you are pondering numerous what-if scenarios. You'll have questions about how it will happen, on what terms, and what divorce will mean for you and for your children, family, and friends. Beyond the theological concerns and community dynamics, there are legal issues, both Islamic and civil. If you had a *nikah*, does that mean you have to get an Islamic divorce? What if your husband is not willing to agree to an Islamic divorce, or what if he divorced you by *talaq* but doesn't want a civil dissolution? What if you never had a registered marriage in the first place? Below I'll go over what pursuing Islamic divorce might mean and what steps you ought to take to protect yourself before making your decision. I'm not a lawyer—so please don't use what's below as a substitute for advice by a licensed attorney—but what I offer here addresses many concerns and considerations that women have come to me with in the past fifteen years of my research and engagement with discussions on American Muslim divorce.

Deciding on Divorce

Whether or not to divorce is one of the weightier decisions a person might have to make in their life. It's a deeply personal decision and one that can only be made based on individual experience. Yet many divorce stories sound similar. Divorce has been historically common among Muslims worldwide, though less so in South Asia. Today about 40% of marriages in the United States end in divorce. The rate of divorce for second or subsequent marriages is even higher. The last statistical study on American Muslim divorce was conducted in the early 1990s put the American Muslim divorce rate at 30% but many of us who research American Muslim divorce have noted that the rate has surely been climbing. Many Muslim women find comfort in how commonplace divorce is, either because they feel less at fault personally, or they see larger structural issues of male dominance among Muslims as part of the reason their husbands were not compatible with them in the first place.

Most Muslims who offer their opinions on divorce, whether religious authority figures, community or family elders, or friends, warn about its calamitous nature and treat it as a major *fitna* in our community. Some Muslim community members discourage men from divorcing hastily but **most** pressure falls on women to stay in bad marriages, or even dangerous ones. While plenty of people are concerned for women in bad situations, that concern and sympathy is often tempered by worries about family reputation, community norms, or the supposedly threatened state of the *umma*. They often quote a hadith that divorce is "the most detested" lawful thing. But the hadith uses the term talaq, husband-initiated divorce, hated by God likely because of its unilateral and irrevocable nature (more on that below), not terms involving wife-initiated divorce. As you read the rest of this article, do your best to set aside this judgmental counsel so that you can ask yourself how you want to live and what you want for yourself—and your children, if you have them.

No one can tell anyone else whether to stay in a marriage or end it. The decision must come from within. So much of our lives revolves around the institution of marriage: it is one of the most essential ways we relate to people and organize our personal lives. Marriage also structures extended families and community life, including and maybe especially in places like the United States where Muslims are minorities.

However, an outside perspective is key if your husband is abusive. The longer one stays in an abusive marriage the bigger or more impossible it **feels** to make a plan and escape from it. Certain sociological truths about abusive men are relevant to your decision-making process. For example, abusive husbands almost never change, and certainly not without substantial extended counseling and intervention from friends and family, a level of support that is nearly impossible to find and virtually never offered by those who counsel women to remain married for the sake of the family. Further, abusive men often gaslight or make their victims feel as though they are the guilty ones. Verbal threats can easily escalate to physical assaults. And calling law enforcement/police is often not an option, either because of their lack of dealing fairly with people of color and/or Muslims, or because they often do not like to protect women or get involved in what they view as "domestic squabbles." Many of the women I have worked with over the years state that their ultimate reason for choosing divorce was to mitigate the lasting negative impact of an abusive climate on their children. Additionally, there are a number of ways abuse can occur that do not involve physical danger. Please refer to the Islamic wheel of domestic abuse to see whether these situations might apply to you. There are resources at Peaceful Families as well.

Islamic Divorces

What does it mean to get an "Islamic" divorce? Islamic can mean different things to different people. It can be what satisfies your personal conscience or relationship to your understanding of faith and duty, or what's recognized now in your family or community, or what's is found in classical Islamic jurisprudence, or what's deemed Islamic in a given country's laws. Here, I'll talk about three major types of divorces in classical Islamic law, which many American Muslims look to when they investigate what "Islam says" about divorce. In practice, these rules are typically mixed with other types of notions of what is "Islamic" in different ways and some may decide not to pursue "Islamic" divorce at all. Knowing more might help you decide whether you need or want to get an "Islamic" divorce:

1) *Talaq* – this is husband-initiated divorce, which does not require a wife's consent to end the marriage, i.e., it's unilateral. A husband can end a marriage by pronouncing talaq against his wife and letting three months/menstrual cycles go by without any sexual contact. That waiting period is called the *iddah*, which is used to ascertain if the wife is pregnant. She is not allowed to remarry during that time.

During the iddah he can take her back, though, cancelling the talaq pronouncement. He can pronounce talaq and cancel it twice, but if he pronounces talaq a third time, it can't be undone, i.e., it's irrevocable. Some scholars state that three pronouncements of divorce on a single occasion just counts as one pronouncement, while most state that it causes a final irrevocable divorce. Many men have been known to blackmail or abuse wives by threatening them with talaq.

2) *Khula* – this is wife-initiated divorce, in which the wife asks the husband for his consent to end the marriage. This is often called a ransom divorce because jurists usually expected it to involve the wife paying back her *mahr* (marriage dower) or paying some other sum of money/property etc. to the husband in exchange for his consent to divorce. The khula is irrevocable and the husband cannot unilaterally take her back during the 3-month iddah waiting period.

3) *Faskh* – this is a juridical divorce which is also usually a wife-initiated divorce in which the husband's consent is not necessary. A judge/*qadi* declares the marriage dissolved. Qadis require that the wife prove legitimate grounds such as the husband's abandonment of Islam, insanity, or impotence. Some judges accept physical abuse or serious sins committed by the husband as legitimate grounds, but not all do. This method of divorce seems like a way to get around the requirement of the husband's consent for divorce as well as payment or repayment of mahr but there are limitations. First, in the United States it's not clear who holds the authority of a qadi, because we don't have Islamic courts here. Second, it involves shopping around for a qadi (sometimes from a foreign country) who would agree that the wife's reasons for seeking divorce are legitimate. And even one finds a qualified qadi, or qadi-like religious authority figure, even in the United States there have been many situations in which husbands challenged the religious-legal authority of the chosen qadi, calling into question the validity the whole avenue of juridical divorce. Note that some of these issues exist in many Muslim majority countries as well, especially for women seeking redress in nikah-only/unregistered marriages.

In sum, if a wife **doesn't want** a divorce but the husband is declaring one, there isn't much recourse from a classical Islamic law point of view. Today a common response by imams is that the wife can spend the three-month iddah period as a time trying to win back her husband. If a wife's mahr was really high and never paid to the wife, then perhaps demanding it might deter a husband from talaq, but basically the unilateral nature of talaq gives men an unfair advantage in Islamic jurisprudence in the ease with which they can end a marriage.

Additionally, if a wife **wants** a divorce, being made to feel guilty because God "dislikes" divorce is an unfair position to put women in, because the hadith is not about wife-initiated divorces at all. That said, if a wife wants a divorce and the husband is unwilling to give his consent no matter how much money a wife offers, or if she doesn't have any much money to offer, or doesn't want to talk about offering money and just wants out, then the question arises as what lengths she'll go to in getting an Islamic divorce: how much does it matter? It's not unheard of for men to go along with civil divorce proceedings only to withhold their consent to an Islamic divorce, just to be nasty or as revenge. Withholding Islamic divorce can keep women from feeling divorced in the eyes of God, or being accepted as divorced by the community, barring them from remarrying in another nikah. For this reason,

many Muslim women and some Muslim organizations treat civil divorce decrees as equivalent to Islamic divorce because all the intensions are the same for all the parties involved: to end the marriage.

In the event that your ex is refusing a civil divorce, consult an attorney about petitioning the court for a dissolution of marriage.

Islamic Divorce Terms

Whatever the legal system, two main issues require resolution in a divorce: money and child custody, both physical and legal. Although there are exceptions, the fact that divorce rules in classical Islamic law favor men in terms of money and legal custody ("guardianship") of children (and usually but not always physical custody) can be a reason why some men strongly advocate "doing things Islamically" or insist on Islamic divorce in addition to civil divorce.

In classical Islamic law, men and women theoretically retain wealth or property they brought into the marriage. In practice it might be hard to disentangle your wealth, or not worth it, especially without the facilitation of civil courts. In talaq, men are required to pay the wife the mahr specified during the nikah, if it has been deferred. If it was paid, then she keeps that amount. Other than the mahr, the only other sum she receives is financial maintenance for herself through the end of the three-month iddah period. More on custody below, but if she has children she's still nursing, she receives support for those children. That's it. Unless a woman is independently wealthier than her husband, the Islamic law rules for finances in divorce result often favor men because there is no such thing as ongoing spousal support (as there may be in civil divorces), even if the wife has no or low income, and if finances can't be untangled, wives who brought in wealth or accumulated it during marriage cannot easily take it back.

Child custody, which includes both physical custody and legal guardianship, has a complex history in classical and pre-modern Islamic law, but generally favors fathers over mothers. In Islamic law, all children belong to their fathers; they take the father's name and the father is financially responsible to provide for them until they are independent or married. However, this also means that fathers get custody of children in most scenarios. Historically some jurists, as well as in the laws of some Muslim countries that have adopted various forms of Islamic law as state law, allow women to keep custody of their daughters until or unless they remarry, in which case custody may revert to her relatives or to the child's father. Other jurists hold that mothers may only retain custody until weaning. In still other situations in which fathers do not have the capacity, means, or ability to care for children have resulted in mothers retaining custody or other maternal or paternal relatives taking custody according to a hierarchy of kin relations.

Overall, however, the best interests of the child are assumed to be upheld by the father unless proven otherwise. So even though there have been historical and legal exceptions to the "children belong to the father" rule, the search for exceptions to this rule in order to create Islamic legal situation that favor a mother's custody is not very different from just going with civil law codes that are focused on the awarding custody according to the best interests of the child, which often, but not always, favor physical custody by, or predominantly by, the mother. In practice, many American Muslim men have accepted this. A common reason I have observed is that men do not want to be saddled with childcare duties. It is also worth mentioning that in many states, courts treat missing child support payments as a very serious offense, ending in contempt of court, fines, and potentially even jailing, or remedied through garnishing of wages. Still, plenty of men from all backgrounds remain delinquent in paying court-ordered support.

Muslim men have been known to insist on Islamic divorce terms because they would then owe only mahr, which often a token sum amongst American Muslims and/or because they know that children "belong to the father" in Islamic law. Some men have even argued for "Islamic" divorce terms to lawyers and judges for these reasons and sometimes judges who prefer matters be settled out of court consider allowing divorcing parties to settle using "Islamic" divorce terms by mutual consent. If your ex-husband is making such an argument, or even if he isn't, don't feel pressure to agree to any divorce terms just because they are being labeled Islamic. Desiring a custody arrangement that centers your child(ren)'s best interests or safeguards your financial future to the extent possible doesn't make you less of a Muslim; it makes you a wise and self-respecting one.

Does that mean that you shouldn't pursue Islamic divorce at all? You should follow your conscience and your sense of Allah's justice. Some Muslim women find what is granted in civil law is closer to Islam because it protects vulnerable parties to some extent or because it protects their respected status in Islam as mothers. That said, there are still many ways women can be disadvantaged in divorce, especially if they are completely or mostly financially dependent on their husbands. Attaining justice or recourse for husbands' bad behavior or abusive actions may be too high an expectation from court dates that are scheduled so far apart that the sense of urgency is lost in over-scheduled court dockets. Women may not have the knowledge or financial means to contest for custody or claim fair financial settlements. Yet preparation for divorce can mitigate these issues to some extent.

Preparing for divorce

Civil divorce takes months at least, and possibly a couple of years, to finalize. You must plan for the interim period once you've begun the process but before the judge signs off on your divorce decree.

Immediate housing

Before anything, figure out your physical exit strategy, prioritizing your safety and that of your children. Will you stay at a friend's house? With your parents or a sibling? Will you stay at your current residence while he moves out? (That usually happens if the divorce is amicable or if he initiates/files or both.) Do you need to find a shelter? How long will you stay in temporary housing? Will you move to your own place if the divorce takes a long time to settle or if the divorce process involves the sale of the marital home?

Immediate finances

How much money will you need to carry you through until the divorce is finalized? Figure out how much you'll need in rent (including first and last month and security deposit) or how much you might give to your sister, for example, to pitch in with the added expense if she agrees to have you and your children stay with her. Will you have any other expenses or bills to pay? Finally, figure out how much money you'll need to budget for your divorce attorney, even if you will be claiming attorney's fees in your divorce. Divorce can get expensive so try to save as much as possible for this after budgeting for more essential items.

If you have no idea about the state of your marital finances, before you declare your intention to divorce try to figure out the basic income and expenses of your family. How much debt do you have and who is responsible for paying that debt? Whose name appears on the credit card statements? Do your best to set aside the total estimated money you'll need for about a year into an account only in your own name, if you do not have one already, or transfer money to a trusted person's account just before announcing your intension to divorce. If you do not have any savings, or you have a lot of personal debt, figure out what sources of support you might have and what resources might be available in your area for free, e.g., afterschool childcare subsidies if you are working, food pantries, free legal assistance, and government safety net programs for which you're eligible.

Document ill-treatment/abuse/violence

Document any and all types of abuse. You want a paper trail of evidence you might need for future legal action such as custody hearings or filing restraining orders. Even if you haven't decided whether you want to use it, having the evidence gives you options. Even if you're not sure whether something is abuse, make a note or take a picture. Documenting incidents, even if they don't seem like a big deal, helps show patterns of behavior. If you and/or your children are experiencing any kind of physical abuse document, document, document! Take pictures of any old scars as well as fresh bruises, cuts or marks, and email them to yourself and/or trusted parties and/or your lawyer, if you have one, who will save the photographs in case your abuser discovers and destroys your documentation. Additionally, even if there is no visual evidence, write down the date, time, and description of instances of ill-treatment and again email them to yourself and trusted persons. Tell people whom you believe would vouch for you to a court and/or religious authority figure. If you are being abused in other ways, including fraud, blackmail, or your husband withholding access to money, the same principle of documenting the abuses and creating witnesses applies.

Interim child visitation

If you have children, you will learn quickly whether child custody is going to be a sticking point in

your divorce. Figuring out whether and under what conditions you would be comfortable with your ex having access to your children, if at all, is important to decide early on. You can convey that to your lawyer or at court appearances. Before you declare your intensions to divorce, if your husband acts in ways are harmful to children or otherwise inappropriate, it is important that you document that behavior, keeping a journal of examples, complete with names of witnesses to his behavior. This will support the custody arrangement you'll be seeking.

Ending nikah-only/unregistered marriages

If you only had a nikah—that is, not a civil or state-registered marriage, then your course of divorce and the ease or difficulty of the process will depend on your circumstances. In such cases, what seems Islamically correct to you, to your husband, and to your family or community might be different. You may or may not need to contend with others' notions of what is Islamic. To start with, you may feel that your own intensions and action in declaring divorce are valid, and equal in weight to a man declaring divorce (although he might not see it that way).

In some situations, a nikah-only marriage is really easy to dissolve. There are no courts involved. It can be fast, especially if parties mutually agree to divorce. You can divorce by talaq, khula, or faskh. If you happen to have no children, or your children are grown, and/or you have at least relatively steady, adequate income, physically separating yourself, followed by initiating divorce yourself, either by declaring and negotiating khula or having a qadi-like religious authority figure intervene and declare divorce on your behalf, might be relatively easy.

It wouldn't be easy if you have minor children and/or no or low income and scant savings, or if you have a husband who would never agree to ending the marriage for a variety of reasons. In this situation, if you can create a safe way of separating yourself and your children, that is the first priority before declaring your intentions to leave. If you suspect that your husband will withhold consent for khula and you don't think your grounds for divorce would be convincing to a qadi/qadi-like figure, it might help to have friends and family that can support your reasoning speak to that qadi. It is possible that multiple parties will try to advise against divorce, but if you have decided to end your relationship, especially if there is abuse, again, prioritize your safety and stability and then search for a sympathetic religious authority figure who has social legitimacy in your family, networks, and/or community. Even if your husband doesn't respect that person's authority, he might accept it with social intervention. That said, try your best to center your sense of Allah's justice while going about finding a way to dissolve your nikah.

As far as divorce terms go, even for nikah-only/unregistered marriages, a woman can still file a restraining order (through a lawyer or at a courthouse) if she fears for her physical safety. In that case involving law enforcement if he approaches you is possible, even if for some it's undesirable. Even with a nikah-only/unregistered marriage, a mother can still approach the courts (through a lawyer, or legal aid if you have few means, or even child protective services) to petition for custody and child support. Even women who have been supporting the household can petition for child support.

It is not easy to decide on divorce and move through the often-long process of dissolving a marriage, whatever the legal steps involved. But planning ahead and translating your faith in Allah into personal resolve will help, Inshallah.

KECIA ALI

Toward Love and Mercy: A Concluding Note

This afterword exists partly because it seemed wrong, or maybe unlucky, to start a reader on marriage with weddings and end it with divorce. Of course, divorce isn't always a failure, even if virtually no one enters a marriage (apart from *mut'a*, obviously) expecting it to end. As someone married for more than half my life, I know the pleasures *and* the challenges of a long-term partnership. Myriad forces—cultural, religious, legal, and economic—recognize and support some marriages and deny or undermine others. As someone who studies gender and sexuality, I'm keenly aware that assumptions about what marriage should be like are neither timeless nor universal. And as anyone who's read the work collected here will be aware, varied expectations exist even among and within American Muslim communities.

One recurring theme in this reader is that some models of marriage and family upheld by Muslim community members and religious authorities are out of step with women's diverse realities and needs. That's true when it comes to who and how we marry; how we navigate elements of joint life like money, chores, and childcare; and if and how we dissolve unions that no longer serve their scriptural purpose of dwelling together in love and mercy (Q. 30:21). Seldom is it asked how ideals and practices—whether purportedly Islamic or found in civil law or emerging from widespread American cultural norms—serve American Muslim women's interests. Not infrequently, women are cautioned by conservatives about preserving the marital unit as a bulwark against dissolute (non-Muslim) American society. What's more interesting to me are the strategies, documented by this volume's contributors, by which women faithfully and creatively deploy Islamic ideals and doctrines to build flourishing marriages, safeguard themselves and those they love from myriad threats and harms, and contribute to fruitful community life.

Several years ago, in an essay for *Critical Muslim*, I wrote about how the nuclear family frequently preached and praised among American Muslims is profoundly misaligned with the myriad examples of extended and blended families that characterize the lives of prophets, including Muhammad, whose "own family experience does not conform to the oft-touted Islamic family model. The standard biographies tell us that he was orphaned, fostered by another family, taken in by extended family, shuffled from relative to relative. He became a step-father before becoming a father, adopted a 'son' – a grown man whom he later disaffiliated, and then married that former son's former wife. He mourned the loss of parents and parent-substitutes, children, and more than one wife." While we often emphasize his long, companionate, monogamous marriage with Khadija, "seldom do we linger on the strangeness" of the *sira* account of his marriages and kin relations in comparison to the idealized norm.

The writings collected here demonstrate that there's no single, simple story about American Muslim marriage or divorce either. Weddings are complicated. Marriages are very complicated. Divorces are very, very complicated. My goal in compiling

and sharing this body of work, which centers women's scholarship and respects women's experiences, is to contribute to a better understanding of these features of contemporary life. The articles here are only a small fraction of a rich literature, which itself represents only a tiny portion of the conversations happening in homes and mosques, on Twitter and in group chats, in classrooms and in community organizations. There is more to read, more to understand, and more to do. It is my hope that greater understanding leads to participation in the ongoing struggle for necessary changes in practices, laws, and norms in our polity and our communities, with love and mercy as our goals and the Loving and the Merciful as our guide.

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Kecia Ali is Professor of Religion and Chair of the Department of Religion at Boston University. She publishes primarily on Islam, women, and gender. Her books include *Marriage and Slavery in Early Islam* (2010) and *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (2006, rev. ed. 2016). Along with Juliane Hammer and Laury Silvers, she coedited *A Jihad for Justice: Honoring the Work and Life of Amina Wadud* (2012), an open access festschrift. Her current projects include an introductory book on *Women in Muslim Traditions* and a study of the gender politics of academic Islamic Studies. During the pandemic, in addition to helping coordinate collaborative projects like this reader and a roundtable on "Full Catastrophe Mentoring" in the *Journal of Feminist Studies in Religion* (2020), she's killed two sourdough starters (so far).

Zahra Ayubi is an associate professor of Islamic studies in the Department of Religion at Dartmouth College and is the author *of Gendered Morality: Classical Islamic Ethics of the Self, Family, and Society* (Columbia University Press, 2019). She specializes in women and gender in premodern and modern Islamic ethics and has published on gendered concepts of ethics, justice, and religious authority, and on Muslim feminist-thought. She has also researched American Muslim women's experiences in divorce and in healthcare decision making. Her forthcoming book is called *Women as Humans: Life, Death, and Gendered Being in Islamic Medical Ethics*.

Juliane Hammer is associate professor of religious studies at the University of North Carolina at Chapel Hill. She specializes in the study of gender and sexuality in Muslim societies and communities, race and gender in US Muslim communities, as well as contemporary Muslim thought, activism and practice, and Sufism. She is the author of several books including *Peaceful Families: American Muslim Efforts against Domestic Violence* (2019); *American Muslim Women, Religious Authority, and Activism: More Than a Prayer* (2012), and *Palestinians Born in Exile: Diaspora and the Search for a Homeland* (2005). She is also the co-editor of *A Jihad for Justice: The Work and Life of Amina Wadud* (with K. Ali and L. Silvers, 2012); the *Cambridge Companion to American Islam* (with O. Safi, 2013), and *Muslim Women and Gender Justice: Concepts, Sources, and Histories* (with D. El Omari and M. Khorchide, 2020). Dr. Hammer is

currently working on several research/book projects related to negotiations of sexual ethics and practices in US Muslim Communities; patriarchal definitions of Islam as a stable concept through gender and sexual norms; and Muslim women's activism as knowledge production.

Debra Majeed, Professor Emeritus of Religious Studies at Beloit College, is a religious historian who makes the interconnection between religion, gender and justice central to her life's work. She retired from Beloit in 2020. She is the first African American female and first Muslim to be tenured in the 175-year history of Beloit College, and the first to be awarded Emeritus status. Her contributions to social justice on the campus and in the wider community during her 21 years of teaching led the City of Beloit to proclaim January 21, 2011, "Dr. Debra Majeed Day." Dr. Majeed received her doctorate in Religious & Theological Studies from Northwestern University in 2001. With the publication of her groundbreaking work *Polygyny: What It Means When African American Muslim Women Share Their Husbands* in 2015, Dr. Majeed continues to work with mosque communities for the cultivation of resources and support for healthy marriage regardless of form. Her current research has expanded to include the care and support of Muslim widows, domestic abuse as an act of violence that happens in the lives of women, and the advocation of the normalization of Muslim marriage contracts. Most recently, concern for family life issues led Dr. Majeed to develop Queen City Family Advocates, a grassroots initiative that interrogates and challenges attitudes, norms and policies that undercut the health and wellbeing of families in Charlotte. As its first endeavor, Queen City Family Advocates compiled and distributed "The 2020 Election: Where NC Candidates Stand on Issues Key For Muslims," a guide created by NC Muslims to help NC Muslims become more politically literate, encourage further political participation, and strengthen their sense of agency. Dr. Majeed is certified as a Guardian ad Litem, or legal advocate for abused and neglected children.

Asifa Quraishi-Landes is Professor of Law at the University of Wisconsin Law School, specializing in comparative Islamic and U.S. Constitutional law, with a current focus on modern Islamic constitutional theory. She is a 2009 Carnegie Scholar and 2012 Guggenheim Fellow. Her recent publications include "Legislating Morality and Other Illusions about Islamic Government" and "The Sharia Problem with Sharia Legislation." She is currently working on a book on Islamic constitutionalism which presents a non-theocratic and non-secular model of Islamic constitutionalism for today's Muslim-majority countries. Professor Quraishi-Landes holds a doctorate from Harvard Law School and other degrees from Columbia Law School, the University of California at Davis, and the University of California at Berkeley. She has served as a Public Delegate on the United States Delegation to the United Nations Commission on the Status of Women, the Task Force on Religion and the Making of U.S. Foreign Policy for the Chicago Council on Global Affairs, and as advisor to the Pew Task Force on Religion & Public Life. She currently serves on the governing board of the Section on Islamic Law for the Association of American Law Schools, the Muslim Public Service Network, Bayan Islamic Graduate School and the Muslim Youth Camp of California. She has been a past President and Board Member of NAML (National Association of Muslim Lawyers) as well as Karamah: Muslim Women Lawyers for Human Rights. She is an affiliate of the Muslim Women's League, and a Fellow with the Institute for Social Policy and Understanding.

Half of Faith gathers a selection of resources on, and reflections and analyses of, Muslim marriage and divorce in twenty-first-century America. In the United States as elsewhere, marriage is central to ongoing Muslim conversations about belonging, identity, and the good life. The articles collected here, written over the course of two decades by American Muslim women scholars, provide a window onto moments in American Muslim life and thought. Though far from comprehensive, topics covered include diversity in Islamic legal thought, marriage contracts, wedding customs, dower norms, divorce practices, and experiences of polygyny. Contributors engage—and disagree with—each other, and sometimes with their past selves. By bringing together and making more widely available existing publications alongside a few purpose-written essays, this reader aims to enrich current conversations and to help document scholarly debates and community activism.

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