

KECIA ALI

*Sexual  
Ethics  
&  
Islam*

*Feminist Reflections  
on Qur'an, Hadith  
and Jurisprudence*

## SEXUAL ETHICS AND ISLAM



# **Sexual Ethics and Islam**

Feminist Reflections on Qur'an, Hadith,  
and Jurisprudence

**K. Ali**



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## SEXUAL ETHICS AND ISLAM

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For my mother, my first instructor in ethics,  
and for my children; may their instructor prove as capable.

Study of the tradition demands an exercise of the historical imagination that is sympathetic as well as critical; sometimes what is branded as obscurantism or bigotry is simply a reflection of a climate of ideas wholly alien from that of our own time. Some of the sexual notions transmitted to us from the past are unfounded, and their effect has proved to be damaging; but while we may deplore this, we must also make the effort to understand where they originated and why they were accepted – and to realize that their advocates were rarely moved by malevolence or stupidity.

Sherwin Bailey, *Sexual Ethics: A Christian View*

# Contents

Acknowledgements	ix
Note on texts, translation, and transliteration	xi
Introduction	xii
1 Marriage, Money, and Sex	1
“And according to what they spend from their wealth ...”	3
Sex	6
Intermarriage	13
Conclusion	21
2 Lesser Evils: Divorce in Islamic Ethics	24
Untying the knot	25
Extreme circumstances	29
Prospects for reform	34
Conclusion	36
3 “What your right hands possess”: Slave Concubinage in Muslim Texts and Discourses	39
Islam and slavery: overview of sources and history	44
Women, war captives, and withdrawal	47
Conclusion	52
4 Prohibited Acts and Forbidden Partners: Illicit Sex in Islamic Jurisprudence	56
Protecting chastity: the classical texts	60
Paternity, legal fictions, and non-marital sex in contemporary Muslim thought	66
Conclusion	72

5	Don't Ask, Don't Tell: Same-Sex Intimacy in Muslim Thought	75
	History	79
	Don't ask, don't tell	85
	Same-sex marriage	91
	Conclusion	95
6	"Reduce but do not destroy": Female "Circumcision" in Islamic Sources	97
	Islamic or un-Islamic?	99
	"Reduce but do not destroy"	105
	Conclusion	109
7	"If you have touched women": Female Bodies and Male Agency in the Qur'an	112
	To whom am I speaking?	113
	A difficult verse	117
	Garments for one another	126
	Conclusion	131
8	The Prophet Muhammad, his Beloved Aishah, and Modern Muslim Sensibilities	135
	Apologetics and polemics	138
	Searching for solace	144
	Conclusion	147
9	Toward an Islamic Ethics of Sex	151
	Notes	158
	Bibliography	193
	Index	213

## Acknowledgements

This book advocates, among other things, assessing customary practices and, rather than implementing them unquestioningly, modifying them as necessary. It seems fitting, then, that as I uphold the tradition of acknowledging the numerous debts accrued in writing this volume, I alter it in one important respect: I wish to thank my family first, rather than last. My husband Mohamad Ali has been extraordinarily supportive over the years I have worked on this project. Our children Shaira, Saadia, and Tariq continue to inspire me with their insistence on asking “why” when confronted with unfairness and injustice as well as their unwillingness to accept unconvincing answers. The confidence and encouragement from members of our extended family have sustained me over the years. They all have my gratitude as well as my love.

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Boston University, Brown University, Clemson University, Duke University, New York University, and Princeton University.

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Finally, I would like to thank Hend al-Mansour for granting permission to use her painting on the cover. It contains text drawn from Surat Yusuf, the chapter of the Qur'an that tells the story of the attempted seduction of the Prophet Joseph by his master's wife, traditionally known as Zulaykha. This "best of stories" includes passionate female desire, attempted sexual coercion, and divinely ordained standards of intimate conduct for men and women. It seemed particularly apt as an image: Muslim women are rereading and reimagining the Qur'an, in dialogue and in tension with previous approaches but still bound by certain constraints of the text itself.

## Note on texts, translation, and transliteration

Because the specific Arabic terminology and its connotations are so vital to the issues at stake, particularly where the words have legal implications, I have striven for consistency in my translation of key terms. Where I had to choose between a literal-but-awkward rendering or a more idiomatic but less precise rendering, I have generally chosen the former. Unless otherwise noted, translations of works cited in Arabic are mine and works cited in English translation are by the translator. However, because of the nuances of the terms at stake, I have often chosen to retranslate passages from Arabic text included in a parallel English/Arabic edition of a particular text. I have made clear in the Notes where I have done so.

Where I have quoted hadith works and legal texts, I have provided the titles of chapter and subsection in addition to volume and page number for the editions cited in the Bibliography, so that those working with other editions of the texts can more easily locate the relevant passages. In the case of the *Sahihs* of Bukhari and Muslim, I have usually chosen to cite the English or English/Arabic editions for ease of reference.

I have generally followed the IJMES system for transliteration but, for the sake of simplicity, I do not use diacritical marks with the exception of ' for medial hamza and ' for 'ayn. Those familiar with Arabic should not have difficulty recognizing the terms used.

## Introduction

For the vast majority of Muslims world-wide – not only extremists or conservatives, but also those who consider themselves moderate or progressive – determining whether a particular belief or practice is acceptable largely hinges on deciding whether or not it is legitimately “Islamic.” Even many of those who do not base their personal conduct or ideals on normative Islam believe, as a matter of strategy, that in order for social changes to achieve wide acceptance among Muslims they must be convincingly presented as compatible with Islam. This focus on Islamic authenticity is particularly intense on matters relating to women, gender, and the family, where complex issues are often reduced to fodder for charged debates over “women’s status in Islam.” The so-called woman question is central to both anti-Muslim polemic and the apologetic counter-discourse that adopts a terminology of liberation to describe the way “true” or “real” Islam respects and protects women, despite the existence of potentially oppressive “cultural” practices. The limitations of these dichotomous approaches are evident, and a rich and growing body of scholarship by Muslim women and men seeks to deepen and complicate discussions of issues relevant to women’s lives as well as our understanding of the layered and intertwined nature of dominant discourses.

As a precursor to my own foray into these treacherous waters, I want to highlight the importance of questioning women’s status in Islam – a phrase that can be read at least three ways. First, despite its reductionist language, the notion of “women’s status in Islam” can serve as shorthand conveying the point that a number of interrelated inequities constrain the lives of many Muslim women. But this acknowledgement alone will

not get us very far. A second approach would question the usefulness of the concept of “women’s status” itself. Muslim women are so diverse in terms of class, geography, ethnicity, age, marital history, and education that generalizations about our “status” are meaningless. Even if one limits the application of the term to the realm of ideals rather than women’s lived experience, the presupposition of an idealized and uniform tradition dramatically oversimplifies a complex and heterogeneous intellectual and textual legacy that spans nearly a millennium and a half. Yet the tendency to cast discussions in terms of women’s status persists, particularly where Muslims want to point out that there is no necessary link between Islam and specific injustices. Several years ago, after the September 11 attacks, I contributed a chapter to an anthology of writings by American Muslims.<sup>1</sup> I chose a title, “The Problematic Question of Women’s Status in Islam,” appropriate to my essay’s argument that the formulation of the question was inherently flawed. An editor returned my proofs with the content intact, but a new and improved title: “The True Status of Women in Islam.” Although we did reach agreement on another title (which did not mention “status” at all), the incident made clear to me that even for those with a critical agenda, it requires vigilance to escape reliance on clichéd and defensive modes of presentation.

The phrase “questioning women’s status in Islam” can also be read in a third way, as addressing the status of women who question. Too often, Muslims, especially females, who challenge certain widely accepted views are met with warnings to desist; that way, it is said, lies heresy, blasphemy, apostasy. Those who have appointed themselves the guardians of communal orthodoxy are particularly vigilant on matters concerned with women and gender – in part, because it is in these realms that the construction of Muslim identity in self-conscious opposition to a decadent West takes place.

The terms “Islam” and the “West” are oppositional but also interdependent; their relationship to one another is in a process of constant renegotiation, particularly now that one can speak of “Western Muslims.” The growing Muslim populations in nations that have long exemplified the Other for Muslim

thinkers are only one reason that this dichotomy is unsatisfactory. Muslim thinkers as well as their works easily cross borders, through satellite television, Internet sites, and subsidized translations of doctrinally correct materials for distribution in European and North American mosques. Even materials produced for audiences in Muslim societies of the Middle East and South Asia are not unaffected by Western discourses; centuries of give-and-take, built on the unequal socio-economic and geopolitical foundations of European colonialism, have resulted in a palpable enmeshing of concern with the West in all facets of Muslim intellectual life and production, but none more so than women and gender.

To generalize, Western discourse from the colonial era onward portrays the basic condition of the Muslim woman as downtrodden, in contrast to the respected and (sometimes) liberated Western woman.<sup>2</sup> By and large, Muslim discussions of women's place, position, or status – in English and other Western languages, especially – are a reaction to these Western critiques. In quite a number of works, selective quotations from nineteenth and twentieth-century European authorities are used to either praise Islamic norms as superior to Western ones, or to corroborate a view about female nature also held by the Muslim author. In other instances, Muslim authorities may attempt to reverse the values assigned to Muslim and Western treatment of women by criticizing lax moral standards or other elements of Western social life.

Although these works are ostensibly concerned with women, the rhetoric on both sides tends to revolve around sex and sexuality. Western media present the Muslim woman as a figure whose oppression is inextricably linked to her sexuality; her oppression is a particularly sexual one, symbolized by fanatical concern with women's bodies, "the veil," and female seclusion. Muslim critique, unwittingly echoing certain Western feminist arguments, counters that when it comes to female dress, Western societies oppress women by judging their worth as persons based on physical attractiveness. While non-Muslims judge the lot of the Muslim woman harsh because of the permissibility of polygamy, Muslim authors counter, not without

some justification, that an obsessive focus on polygamy as degrading to women is hypocritical when adultery, serial remarriage, and out-of-wedlock births to men who do not take paternal responsibility are rampant in the West. In non-marital liaisons, "The man has no commitment or obligation toward the mistress or girl friend"<sup>3</sup> which, the argument goes, stands in contrast to the humane, honest, and realistic nature of polygamy.<sup>4</sup>

On matters of sexual morality in general, Muslim authors from a variety of perspectives present the Muslim model as better for women than degrading Western norms which, in allowing unrestricted sexual liberty, fail to protect women from male exploitation. A Nigerian scholar whose works on Islamic topics are circulated extensively, 'Abdul Rahman Doi captures a common sentiment when he declares, "Heart-breaking transference of love and affection, neglected wives, forsaken children, mistresses, and street girls are common features of Western life."<sup>5</sup> In contrast to "Western women [who] are the most unhappy creatures on earth," Muslim women are protected by breadwinning husbands who provide adequately and consistently for their dependents, a category that includes wives and children.<sup>6</sup> A Muslim husband is the ultimate authority within his home but does not act in a dictatorial fashion or abuse his powers of decision-making, and it is his greater rationality that prevents the family from the easy dissolution that would occur if women were given control over divorce.

This idealized portrait of Muslim family life clearly cannot be compared fairly to the worst abuses found in non-Muslim Western society. It is seldom acknowledged or even recognized, however, that the model of family life Doi and others idealize in this way not only does not describe reality for the majority of Muslims, but is also quite distinct from the ideals upheld in authoritative premodern texts, where sexual availability, not child-rearing or homemaking, was a wife's main duty. Of course, these texts were prescriptive rather than descriptive, and other evidence suggests that many non-elite women did perform considerable household work and were primary providers of care for their children. At the level of ideals, however, Doi's

neo-traditional vision departs considerably from earlier models of Muslim sexual ethics. Although classical and medieval thinkers expressed, like Doi, strong concern for a husband's economic responsibilities toward his wife as well as his kind treatment of her, they authorized multiple wives and unlimited concubines for men with no stigma attached and accepted restrictions on women's mobility to ensure their exclusivity and availability to the men with sexual rights over them. Ninth-century jurist al-Shafi'i spoke for the majority when he declared that a husband was not bound by a stipulation in his marriage contract not to marry additional wives or take any concubines from among his female slaves, justifying his view on the ground that such a condition "would be narrowing what God made wide for [the man]."<sup>7</sup>

In fact, the matter-of-fact references to concubinage throughout the writings of Muslim scholars highlight the most striking difference between contemporary and classical sexual ethics: the premodern acceptance of a male owner's sexual access to his female slaves. Classical texts were not describing demographic reality, but rather participating in a discourse of advice and regulation. Nonetheless, their assumption that men would have multiple sexual partners, wives and/or concubines, stands in marked distinction to contemporary Muslim discourses on sexual relationships which, when they discuss polygamy approvingly, generally do so with justifications premised on female needs for protection rather than simple male prerogative. Although generalizations about modern sensibilities are fraught with peril, particularly given the diversity within the billion-strong Muslim populace, it is not a stretch to claim that most Muslims today would view al-Shafi'i's doctrine on permissible sexual relationships, particularly concerning slave concubines, as incompatible with fairness and justice (themselves notoriously variable concepts).<sup>8</sup> Yet while virtually no one advocates reviving slavery as an institution, slaveholding fundamentally shaped the contours of Islamic ethical and legal thought on sex in ways that have not been fully recognized. And although the clearly unequal model of sexual ethics enshrined in classical texts no longer makes sense to a significant number of

Muslims, at least at an intuitive level, nothing new has emerged to replace it. Despite the readiness of some Muslims to discard the model inherited from the classical jurists in favor of something more egalitarian – and the desire, on the part of a subset of these, to be open to new forms of sanctioned relationships – little attention has been paid to themes such as consent, reciprocity, and coercion that are crucial to both an understanding of traditional Islamic sexual ethics and the possibilities for transformations in those ideals. My exploration of these issues in this book is a preliminary contribution to a necessary and far-ranging conversation over all aspects of sexual ethics in Muslim life and thought.

Of course, the sexual subordination of women is by no means exclusive to Muslim societies or Islamic thought. Until the very recent past there was a near universality of laws proposing a system of allocating marital rights based on an exchange of male support and protection for female “sexual, reproductive, and housekeeping services.”<sup>9</sup> (The exact contours of such exchanges varied dramatically between and even within societies due to variables including class status and religious doctrine; in Muslim societies, the requirement of housekeeping was usually absent in theory, however prevalent in practice.) Slavery in ancient Greece and Rome, which was both widespread and legal, illustrates that the sexual use of owned persons is not unique to Islamic texts or practice; likewise, biblical texts also permit, or at least tacitly condone, the sexual use of female slaves as well as polygamy.<sup>10</sup> Nor are sexual slavery and sexual abuse (of both males and females) limited to ancient societies, as contemporary debates over human trafficking and sex work indicate. Specifically sexual abuse exists within a larger climate of widespread intimate violence against women and girls, from bride-burnings or “dowry deaths” in India, to “crimes of passion” in the United States and Latin America, where jealous men murder (ex-)wives or (ex-)girlfriends.

Systemic injustices call for comparative treatment of hierarchical and gendered domination across geographic, chronological, and cultural boundaries.<sup>11</sup> Yet although such study is necessary and fruitful, calls for comparison by those

working on Islam-related topics are too often motivated not by a sincere wish to understand deeper structures of oppression but by the desire to divert attention and criticism from Islam and Muslims. It is true that Muslim norms and practices are historically consonant with those of other religions and civilizations, and that the criticisms frequently levied against Islam by non-Muslim Westerners reflect both cultural ignorance and historical amnesia. To take just one example, Americans and Europeans who decry the normative requirement of marital subordination for Muslim women seem to forget that “Obedience was so fundamental to the biblical idea of a wife that it remained in Jewish and Christian wedding vows until the late twentieth century.”<sup>12</sup> This work takes the existence of these parallels as a given, using comparative examples primarily to highlight significant variations – as, for example, between ancient Near Eastern and biblical views on illicit sex and those of classical Muslim authors. In restricting myself largely to Islamic texts and, to a lesser extent, Muslim experiences, I am aware that I run the risk of contributing to the common impression that Islam is uniquely oppressive toward women or that the problems of sexual ethics Muslims face are somehow more intractable than those confronted by adherents of other faiths. Some may view my focus on sexual matters as playing into the Western obsession with Muslim sexuality at the expense of other, more vital, areas of concern. Poverty, political repression, war, and global power dynamics are, indeed, crucial to Muslim women’s lives.<sup>13</sup> However, even these issues cannot be entirely divorced from sex and sexuality: poverty matters differently for women, when it constrains women’s inability to negotiate marriage terms or leave abusive spouses; repressive regimes may attempt to demonstrate their “Islamic” credentials by capitulating to demands for “Shari‘a” in family matters or imposing putatively Islamic laws that punish women disproportionately for sexual transgressions. Nonetheless, as Jewish feminist theologian Judith Plaskow points out, “writing about sexuality unavoidably re-enacts singling it out as a special issue and problem.”<sup>14</sup> The possible benefits of an exploration of sexual ethics seem to me worth the risks, given the frequent invocation of

Islamic authenticity in those spaces where religion has a normative impact – that is, nearly everywhere.

Why, though, focus on texts when Islamic normative doctrine has never been entirely reliable as an indicator of Muslim practice? Notwithstanding British colonial official F.X. Ruxton's claim, in the preface to his translation of a fourteenth-century Maliki legal manual, that "in the case of Muhammadan countries, it is the Law that has moulded the people, and not the people the Law," in reality the effects of social circumstances on both the formulation and the implementation of the law has always been of central importance.<sup>15</sup> Real women's (and men's) lives do not neatly follow the patterns set out in legal manuals, and have never done so.<sup>16</sup> As noted above, differences between and within Muslim populations are so significant that any attempts to discuss "the Muslim woman" or "sex in Islam" must be suspect; variables of class, geography, and time period, not to mention individual characteristics which are impossible to account for in statistics, make generalizations frequently misleading. Additionally, for the sensitive subjects under discussion here, empirical evidence concerning practice is difficult to obtain. But there is a relationship between ideal and reality and there is a certain coherence to premodern prescriptive models of Muslim womanhood and sexual relations.<sup>17</sup> It is precisely in the arena of sexual ethics where normative Islamic texts and thought have been, and continue to be, most influential.

Before proceeding to consider these texts, it is worth asking why a Muslim who considers herself progressive (with all the caveats about the inadequacy of that term) should bother with engaging the Islamic intellectual tradition at all. Doing so, it is true, bolsters the authority of "written Islam, textual, 'men's' Islam (an Islam essentially not of the Book but of the Texts, the medieval texts)" at the expense "of the oral and ethical traditions of lived Islam."<sup>18</sup> As Leila Ahmed points out, "textual Islam" has historically been the province of a male elite, and does not accurately represent the understandings of Islam embedded in the experiences of many Muslims, especially women. If I do not accept the sole interpretive authority of the juristic and exegetical heritage – which is strongly patriarchal and sometimes

misogynist – why not bypass it entirely, and turn to the Qur’an alone as a guide? What is to be gained from focusing energy on analysis and critique of texts that I do not consider authoritative?<sup>19</sup> There are several possible answers to these questions. In part, the scholars are worth studying because of their methodological sophistication, acceptance of divergent perspectives, and their diligence in the pursuit of understanding of the divine will. More obviously, they are worth analyzing because their frameworks and assumptions often undergird modern views in ways that are not fully recognized or understood.

For all of its flaws and insufficiencies, the Muslim intellectual and, especially, legal tradition provides significant ground for engagement on matters of ethics. Conventional wisdom in some circles has come to view “oral” Islam (which Ahmed equates to “women’s” Islam) as more compassionate and ethical than “textual” or “official” (“men’s”) Islam but this is an oversimplification. As Ahmed and others show, “official” or “textual” Islam is sometimes more protective of women’s rights than cultural practices that depart from the jurists’ rules. It is impossible to generalize about whether popular practices are more favorable to women than strict observance of doctrine, because so much depends on which women and which doctrine. In any case, the premodern legal texts dismissed by many contemporary thinkers as hopelessly patriarchal or narrowly legalistic are attuned to ethical considerations to a considerable extent, even though, on many matters of gender and sex, their authors’ ethical visions depart from those that I see as being in accordance with highest aspirations of the Qur’an. In part, this book is an attempt to demonstrate that constructive and critical engagement with the Islamic intellectual heritage can be important in providing a framework for renewed and invigorated Muslim ethical thought.

The scholarly tradition is one significant source of knowledge and wisdom; much is lost when Muslims – Qur’an-only feminists or pro-hadith Salafis – choose to bypass it for a literalist approach to source texts.<sup>20</sup> Careful investigation of the legal tradition, for instance, demonstrates the ways in which authorities have, from the earliest years of Islam, used their own

judgment and the customs of their societies to adapt Qur'anic and prophetic dictates to changed circumstances. It illustrates that some of the doctrines taken for granted as "Islamic" emerged at a particular time and place as the result of human interpretive endeavor and need not be binding for all time. Furthermore, the precedent of earlier jurists can authorize a similar interpretive and adaptive process for Muslims today, including bypassing (through a variety of interpretive devices) even seemingly clear Qur'anic statements. A legal methodology offers legitimacy for a flexible approach to the Qur'an and the Prophet's *sunnah* as revelation that emerged in an historical context.<sup>21</sup>

How does this discussion of jurisprudence and law relate to the issue of ethics? The word ethics does not have a precise equivalent in Arabic; *akhlaq*, the usual term, is better rendered as morals or character, and *adab*, a less frequently used alternative, is more appropriately translated as comportment.<sup>22</sup> Most of what falls under the rubric of ethics as understood in the modern West was the purview of the Muslim jurists, who addressed issues well beyond the scope of what is usually understood by "law." As Jonathan Brockopp states, "Islamic 'law' is better characterized as an ethical system than a legal one. It does not merely separate action into categories of required and forbidden, but also includes intermediate categories of recommended, reprehensible, and indifferent."<sup>23</sup> This five-fold classification scheme (*al-ahkam al-khamsa*) became standard among Muslim thinkers, although they often disagreed about where particular acts fell on the scale.<sup>24</sup> It allows for more nuanced categorizations than the simple "lawful/forbidden" (*halal/haram*) dichotomy – often equated to Islamic/un-Islamic – that informs contemporary Muslim discourses.<sup>25</sup> The lawful/forbidden dyad was, of course, relevant for premodern Muslim scholars, who warned against "making lawful what is forbidden and forbidding what is lawful," but they generally engaged in a less categorical and more nuanced analysis of moral and immoral behavior.

What does it mean to say that something is lawful or forbidden according to Islam (or Islamic law or *shari'a*) today?

The relationship between enforceable duties and ethical obligations has become increasingly blurred in a world where Islamic legal institutions no longer function in anything like the manner they did in the classical and medieval periods.<sup>26</sup> Even in the pre-modern Muslim world, the jurists' doctrines did not find direct expression in the courts. Given these shifts, is Islamic jurisprudence the necessary framework for resolving how to address issues of marriage, family, and sex? While some insist that the legal framework developed by Muslim jurists from approximately 900–1400 CE must govern all Muslim behavior, the reality in the contemporary world is that the vast majority of social and economic transactions engaged in by Muslims, even in majority Muslim societies, do not strictly follow these legal precepts. Only on some matters of personal status do some majority-Muslim nations retain religiously based laws, and these differ widely from one country to another. In many cases, these post-colonial family laws also diverge sharply from the classical Islamic jurisprudence on which they are purportedly based. Among Muslim-minority populations in the nations of North America and Europe, moreover, Muslims are free to apply only those regulations that they choose, either writing them into contracts drafted to comply with applicable civil laws or entrusting compliance out of belief and conscience, just as in matters of religious practice.

As an American, I am particularly concerned with the issues facing what British scholar Abdal-Hakim Murad refers to as “Muslims living in post-traditional contexts in the West.”<sup>27</sup> Living in a nation where Islamic law has no coercive power, regardless of its moral weight for individual believers, I write as one with the luxury of deciding whether and how to apply religious doctrine in my own life – whether to arrange my affairs to follow the dictates of one or another school of jurisprudence, or the regulations in the Qur'an, or to follow civil law. The entirely voluntary nature of all types of religious observance means that the urgent questions for Muslims living under civil laws in North America and Europe in particular are ethical or moral rather than narrowly legal. At the same time, the fact that there are no putatively Islamic civil statutes involved means that those

Muslims concerned with Islamic law tend to focus on “authentic” texts, rather than national legal codes, making engagement with the tradition necessary.<sup>28</sup>

Even in majority-Muslim societies, there has been a dramatic shift over the past century in the role of the ‘ulama, who once held a monopoly on many forms of religious authority. Although the ‘ulama retain prominence in a variety of contexts, some of the most influential thinkers of the late nineteenth and especially twentieth centuries have come from outside this class, a tendency which seems likely to continue unabated in the twenty-first century. Basheer Nafi and Suha Taji-Farouki argue that reformist (*salafi*) insistence on “the primacy of the foundational Islamic texts, the Qur’an and Sunna,” has been one important factor in “the rupturing of traditional Islamic authority.” They suggest that “As the salafi idea of returning directly to the founding texts gradually displaced the assumption of the ulamatic traditions of learning as the necessary credentials for speaking on behalf of Islam, the Islamic cultural arena became wide open to an assortment of voices, reflecting new notions of authority.”<sup>29</sup> In theory, the processes Taji-Farouki and Nafi identify could lead to inclusiveness. Yet as Khaled Abou El Fadl has shown, the “new notions of authority,” far from opening up a democratic intellectual space, have tended toward authoritarianism, and a rigidification of debates.

Four interconnected issues recur throughout this study. First, the discourse of Islamic authenticity has had a stifling effect on intra-Muslim debates about sex and sexuality. Second, the increasing gap between classical doctrines, present-day “values,” and actual sexual practices has led to questioning by some of the “don’t ask, don’t tell” model embedded in Islamic norms that allows for deviation in practice, provided certain ideals aren’t questioned. Third, the shift in values surrounding sex brings into relief the legal tradition’s systematic, though not necessarily intentional, devaluation of mutual consent as an ethico-religious value for sexual relationships and sexual acts. This classical model exists in tension with the stress on consent and mutuality in contemporary Muslim discourses on marriage and gender relations. Finally, and cutting across the previous

three items, I am concerned with structures of authority and the shifting and competing models of authoritativeness invoked by participants in contemporary debates over sexual ethics. I will address the first three items in a bit more detail, returning to questions of authority throughout the study.

The continual framing of discussions over sex in terms of “Islamic-ness” is part of a broader flattening of moral argument and thoughtful debate among Muslims. Kevin Reinhart has noted the shift among Muslims to talking about “Islam” as a source of authority rather than the Qur’an, God, the Prophet, or the scholars.<sup>30</sup> On the one hand, this shift may facilitate attention to principles; on the other hand, it allows for the emergence of doctrinal authoritarianism. Abou El Fadl has presented a painstaking portrait of this authoritarianism, which he views as pervasive in contemporary Muslim discourse. While the primary targets of his critique are the numerous conservative authorities who presume to speak for Islam – or rather, for God – his arguments are equally relevant to those who advocate change. According to Abou El Fadl, those who would argue against the weight of inherited tradition have an obligation to make clear that they are doing so, even as they present their case for why an alternate position has more merit.<sup>31</sup> This requires acknowledging the extensive and diverse views of previous generations of thinkers, not just citation of isolated hadith or Qur’anic verses as if those texts were entirely dispositive of a particular point.

The issue of full disclosure is particularly relevant given the fundamental shift in conventional wisdom among many Muslims on issues of sexual morality and gender equality, manifested in particular in an emphasis on individual consent. Just to take one example, while the classical Muslim legal tradition uniformly accepted a father’s right to marry off his minor daughters (and sons) without consulting them, modern statements, including a recent Saudi fatwa, gloss over this consensus in favor of prophetic statements commanding that they be consulted.<sup>32</sup> For many Muslims born and raised in Western nations, the issue of consent emerges as well in discussions of sex outside marriage. The widespread acceptance of sex between

consenting adults in the broader culture has led some Muslims to question the rationale behind Qur'anic, hadith, and legal prohibitions of such liaisons. The confusion over the issue arises in part because of the unfamiliarity of lay Muslims with the basic concepts structuring Islamic notions of lawful sex – my third point.

There is a mismatch between views of marriage and sexual intimacy as based in mutual consent and reciprocal desire and the entire structure of classical jurisprudential doctrines surrounding lawful sexuality. These doctrines viewed *milk* – that is, ownership, dominion, or control – as the basis for licit sex, whether it was within marriage, *milk al-nikah*, or slavery, *milk al-yamin*. The general disappearance of slavery in Muslim nations has meant, of course, that only sex within marriage is now considered lawful, to the point that some Muslim apologists refuse to acknowledge that slave concubinage was considered a perfectly lawful and normal institution for well over a millennium. Because slavery is no longer legally practiced in the Muslim world, many have assumed that the regulations surrounding slavery are irrelevant to contemporary discussions of Muslim marriage and family law; thus, discussions of legal texts make little reference to the jurists' frequent treatment of questions involving slaves. Nonetheless, slavery remains conceptually central to the legal regulations surrounding marriage. The basic understanding of marriage as a relationship of ownership or control is predicated on an analogy to slavery at a fundamental level, and the discussion of wives and concubines together strengthens the conceptual relationship. These connections tend to pass unremarked, however, and the lack of active grappling with the implications of abolition can lead to irony or even absurdity. For instance, an English translator of *Sahih Muslim*, one of the two most important Sunni hadith collections, asserts that one finds “In Islam ... the absolute prohibition of every kind of extra-matrimonial connection” in his preface to a chapter (Marriage) containing several matter-of-fact references to Muslim men having sex with their female slaves.<sup>33</sup> His impassioned declaration seems to me less an apologetic remark tailored for Western or non-Muslim consumption than a

reflection of the extent to which the entire edifice of classical thought on sex and sexuality clashes with modern expectations, including those of Muslims who are deeply committed to the relevance of the classical tradition.

It is an obvious point, but it bears stating directly: in making value judgments, people are influenced not only by religious texts and teachings but also by their own social, cultural, and religious backgrounds. The early jurists were no exception to this rule; like contemporary Muslim thinkers, they could not help but be influenced by their own sense of what was right and wrong, natural and unnatural. In engaging with Muslim texts of the past, it is important to consider the ways in which their authors' base assumptions differ from those of the present. One useful indicator of the distance separating a contemporary reader from a past audience is the hierarchy of sexual acts that twelfth-century scholar al-Ghazali, whose writings on sexuality have been frequently quoted by modern authors, presents in his magisterial work *The Revivification of the Religious Sciences*. Al-Ghazali counsels a man who cannot afford to marry a free woman that if he feels sexual urges that he needs to satisfy, marrying another's female slave is a lesser evil than masturbation, even though children born of the union will be enslaved. Neither is as bad as *zina* – in this context, fornication. Although *marriage* to someone else's slave is problematic, al-Ghazali simply assumes the permissibility of a man's sexual use of his own female slaves. Intercourse with a slave who has no opportunity to grant or withhold consent is morally better than masturbation, which cannot involve coercion, or illicit sex with a willing woman. Many Muslims today find it simply unintelligible that sex with a slave acquired for that purpose would be preferable to sex with a consenting partner to whom one had no legal tie.

I will return to the complicated subject of consent in chapter 9, but want to stress at this point that while I do not believe consent and mutuality are fundamentally incompatible with an Islamic ethics of sex, these values were not prefigured in premodern Muslim texts in a way satisfactory for the twenty-first century. Although there are important lessons to be learned from the writings of premodern Muslim scholars, a great

psychic distance separates Muslims today from the circumstances of past centuries when authoritative doctrines were formulated. Given this very real dissonance<sup>34</sup> between the cultural assumptions undergirding the classical edifices of jurisprudence and exegesis and the modern notions influencing Muslim intellectuals and ordinary people everywhere, even those who consider themselves conservative or traditional, there is an acute need to explore vital themes and connections through a variety of texts.

One “modern” value that is criticized in some discussions of the Muslim heritage concerning sex is prudery. Muslims have often been self-congratulatory about the heritage of explicit discussions of sex in legal and literary works, without recognizing the pervasive nature of androcentric and even misogynist assumptions in those texts. The presence of erotica in Muslim literature, as well as the positive valuation of sexual pleasure in authoritative sources, does not resolve the problem of the double-standard inherent in this literature; texts focus on men’s needs and desires.<sup>35</sup> Even sensitive scholars can overlook these dynamics, which are deeply ingrained in the tradition. When the “Sex and the Umma” section of the website Muslim WakeUp was launched in early 2004, the site editor solicited articles from Muslim scholars in support of the endeavor.<sup>36</sup> One essay quoted a ribald joke attributed by Ahmed al-Tifashi to the Prophet’s cousin and son-in-law, the fourth Sunni caliph and first Shi’i Imam, ‘Ali b. Abi Talib in a work containing “the amusing stories, entertaining poems and flagrant incidents involving sexual pleasure he had witnessed or heard from colleagues.”<sup>37</sup> The joke was intended to demonstrate the “raunchy and delightful” nature of medieval Islamic discourse in contrast to the prudery that characterizes contemporary Muslim discussions of sex and sexuality. In it, a woman approached ‘Ali to complain “that she had given away her daughter in marriage, but the husband divorced her because she was only three feet tall. ‘Three feet!’ declared Ali, ‘that ought to have been enough – at most she needs to be able to take nine inches!’” The article immediately garnered comments from readers when it was posted, with the majority aghast at the intimation that ‘Ali could have possibly

said such a thing. Did these replies express outrage, disgust, or even mild concern at the idea that ‘Ali could have referred to a woman in such an objectified manner, reducing her to a sexual receptacle? Hardly: what shocked readers was the scandalous assertion that ‘Ali could have joked in such a familiar manner with a woman who was not a close relation to himself! My point is that it is not merely contemporary prudery that Muslims concerned with sexuality have to combat; despite valuable elements in premodern texts, including a willingness to be explicit *and* have a sense of humor about sexual matters, there are deeply troubling elements that must not be ignored.

Before proceeding, I want to delineate what I am and am not attempting to accomplish in this volume. I am not a jurist, a Qur’an scholar, or an ethicist, and I certainly do not “do” jurisprudence here. Yet although this work is primarily concerned with analyzing current debates, I have tried to be forthright in stating my opinions, even when I was inclined to be more circumspect, in an effort to move discussion of issues in sexual ethics beyond critique and toward possible resolutions of difficult problems. Where I have indicated possible directions for further thought, my suggestions should be taken as tentative steps in the direction of a just ethics of sex, not as an attempt to formulate a comprehensive program of religio-legal doctrine or to have the definitive word on any of the matters under discussion here. Sherwin Bailey, writing about Christian sexual ethics, noted several decades ago that “even among those who are concerned to think and act responsibly, and to maintain high standards, there are differences of opinion as to what is right and wrong in given circumstances.”<sup>38</sup> It is my sincere hope that this book will be taken as an invitation to conversation and fruitful debate.

# 1 Marriage, Money, and Sex

The husband should go to his wife once every four nights. This is fairest, because the [maximum permissible] number of wives is four. One is therefore allowed to extend the interval up to this limit. It is best that the husband should increase or decrease the amount of intercourse in accordance with his wife's need to guard her virtue, since the preservation of her virtue is a duty of the husband. If the woman's claim on intercourse has not been fixed, this is because of the difficulty of making and satisfying such a claim.

Al-Ghazali, *Book on the Etiquette of Marriage*<sup>1</sup>

After the first time, intercourse is his right, not her right.  
*Radd al-Muhtar*, early nineteenth-century Hanafi legal text<sup>2</sup>

Muslims have practiced Islam in an enormous range of geographic, historical, and social contexts, and Muslim scholars differ, sometimes significantly, on crucial points of doctrine. Despite this diversity, virtually all agree that marriage obligates the husband to pay his wife a dowry, that a Muslim husband bears the sole burden of providing for his wife and household, and that Muslim women may only marry Muslim men. Yet even Muslims who assiduously affirm these regulations do not always follow them. The gap between expressed doctrine and practice is perhaps largest in Western nations, especially the United States, my focus in this chapter. Although there are no hard figures available for American Muslim practices, anecdotal and other evidence suggests that dowry continues to figure in most marriages of Muslims despite its unenforceability as a matter of civil law and the fact that it often remains unpaid. The majority of

American Muslim women contribute materially to their own support and that of their households, as many have done historically and do elsewhere, the accepted gendered allocation of marital rights and responsibilities notwithstanding. And, although “the prohibition to give Muslim women in matrimony to unbelievers ... is one of the strictest and least disputed prohibitions in Muslim law of personal status,”<sup>3</sup> the marriage of Muslim women to non-Muslim men occurs in the U.S. with some regularity, though not nearly as frequently as the marriage of Muslim men to non-Muslim women.<sup>4</sup>

With no coercive central authority or national legislative body dictating what is required for marriage between Muslims, American Muslims have adapted Islamic marriage regulations to fit prevailing legal, social, and cultural norms. These norms are not uniform even within the subset of the world’s Muslims who live in the United States. African-American Muslims constitute the largest single ethnic group of Muslims, followed by Asian, Arab, and African immigrants and their descendants. These larger groups are supplemented by significantly smaller numbers of white and Latina/o converts. Most are Sunnis; some are Shi’a. Marriage practices and ideals vary between and within these communities, but all must confront the relationship between civil law and religious obligation. Choices about which religio-legal precepts to observe and which should be allowed to slip into disuse are not always logical or consistent, and may have unanticipated results for individual Muslims or their communities.

This chapter considers dower, the regulations governing spousal support and sexual availability, and the prohibition of intermarriage between Muslim women and non-Muslim men. I suggest that the arguments used by Muslim thinkers, and often adopted by ordinary Muslims, to justify continued adherence to certain classical rules are incompatible with other commonly held ideas about marriage. Further, none of these regulations takes into account the vastly different context in which American Muslims live and marry. I do not attempt to construct legal arguments in opposition to standard views, but rather to critique the way in which the views are reproduced and defended.

Ultimately, I suggest that reconsideration of dower, spousal support, and intermarriage provides one possible way of thinking about a new structure for egalitarian marriage that bypasses the patriarchal presumptions of these rules and avoids becoming mired in the minutiae of incremental legal reform.

*“And according to what they spend from their wealth ...”*<sup>5</sup>

Property transfer on marriage has been a common practice throughout human history, though with dramatic variation in who pays, how much they pay, and who receives the cash or goods exchanged. Sometimes gifts are reciprocal; at other times, the transfer is unidirectional, either dowry paid to the husband by the bride’s family or bride price paid to the wife’s family by the husband and/or his family. Marriage and dower practices in pre-Islamic Arabia have been the subject of significant speculation and little consensus.<sup>6</sup> Most agree that in pre-Islamic Arabia, *mahr* was compensation paid to a bride’s family in exchange for considering her offspring part of the husband’s tribe rather than that of her father and brothers. The Muslim dower (*mahr* or *sadaq*), paid to the wife rather than her family, is usually regarded as a modification of this practice.<sup>7</sup> (Numerous authors cite this shift as proof of Islam’s liberatory stance toward women.<sup>8</sup>) There is some evidence suggesting that the *mahr* and the *sadaq*, terms used interchangeably by classical jurists, were originally distinct forms of compensation, with the latter going to the wife herself. On this view, dower payment to the bride would not be an Islamic innovation but rather an instance of the way that “Islam selectively sanctioned” certain Arabian tribal practices “while prohibiting others.”<sup>9</sup> In any case, Islamic rules definitively allocated the money to the bride, although under certain circumstances fathers were allowed to receive it and spend it for a daughter’s trousseau. Among Muslims, dower has frequently been an important part of property arrangements.<sup>10</sup> How significant it was or is in practice has depended on the wealth of the parties; whether the dower is in cash, in kind, or in immovable property; and whether it is paid up front, deferred to

death or divorce, or split between prompt and deferred. When the deferred portion of the dower is set at a sufficient amount, it may also compensate women for some of the risk inherent in marriage when men have or have had unrestricted rights to divorce with no long-term liability for alimony; under most circumstances, a wife is only entitled to three menstrual cycles worth of lodging and maintenance after divorce.<sup>11</sup>

Much modern Muslim discourse, from neo-traditionalists and feminists alike, praises dower as a source of economic security for women and a token of a husband's willingness and ability to provide. This rhetoric is pervasive even in the United States, where most Muslims marry according to civil law. Dower persists in the vast majority of American Muslim marriages; though it is often only a symbolic amount, it differentiates Muslim marriage from that of the surrounding American society. In the United States, it is simple to set a dower amount at marriage, because religious authorities are frequently certified to perform marriages recognized by American law. However, following through on enforcement of dower obligations in the wake of divorce is much less common, in part because these same religious figures have no role in civil divorce. Other reasons include the nominal amount of dower often allocated to the bride, the informality of verbal or written dower agreements that do not meet standards for enforceable contracts, and the fact that U.S. courts have proven ambivalent in their treatment of dower obligations.<sup>12</sup> The practical impact of these factors belies the rhetoric about dower's importance as a safety net for women, and as an instance of the generous rights Islam "guarantees" women.

Not only are most discourses on dower irrelevant to Muslim practice in the U.S., they are also detached from the logic governing dower in Islamic jurisprudence, where dower constitutes compensation paid by the husband for exclusive legitimate sexual access to his wife. (Al-Shafi'i, among others, graphically refers to dower as "the vulva's price," *thaman al-bud'a*.<sup>13</sup>) Dower has a very specific purpose and is linked inextricably to other rules, such as male-initiated divorce, that are incompatible with the forms of civil marriage and divorce

utilized by the majority of American Muslims. The Qur'an refers in general terms to a man's financial obligations toward his wife.<sup>14</sup> The hadith texts discuss a range of dower possibilities from symbolic (an iron ring) to minimal (a quarter dinar or three dirhams) to ideal (the dower paid by the Prophet to his wives or that received by his daughters) to maximum (none fixed). For the most part, these texts are silent on rationales, although the Qur'an does refer to the *ajr* (reward, compensation) paid by a man for "what he enjoys from her."<sup>15</sup> In the developed logic of the jurists, however, dower came to be understood as compensation in exchange for *milk al-nikah*, the husband's exclusive dominion over the wife's sexual and reproductive capacity, which also conveys his sole right to dissolve the marriage tie by unilateral divorce.

The linkage of divorce with dower may seem odd, but the husband, in the jurists' logic, is paying for a type of control. It is this control that makes sex lawful. The wife may not dissolve the marriage without a judge's approval unless specific conditions to the contrary, escape clauses of a sort, were included in the contract.<sup>16</sup> Given that the full dower becomes obligatory after consummation, and could represent a significant sum of money, it makes a certain kind of sense that only the husband would be able to release the wife from the marriage. Otherwise, a woman could simply marry, consummate the marriage (or rather, allow it to be consummated), and then divorce her husband while claiming the full dower amount to which she was entitled. This linkage between dower and divorce rights illustrates the interconnectedness of each element of classical legal tradition, and its attempt to achieve conceptual consistency; any attempt to modify the rules surrounding divorce but not those governing dower, as some advocates for women's rights have proposed, would alter the marital dynamic significantly.

Dower is not alone among the financial obligations associated with marriage that have been given new rationales by modern Muslim authors. Contemporary Muslim thought generally links male provision of *nafaqa*, or support, with a wife's household service: the husband/father earns a living and a

wife/mother stays home and keeps the house and raises the children.<sup>17</sup> Yet this provider-homemaker division of labor does not reflect the actual experience of most Muslim families, where women contribute to their own support and/or that of their households and children, nor does it resonate with classical texts. Those texts, while sometimes suggesting that women have a religious obligation to manage the household, generally stress that the husband maintains his wife in exchange not for household services but for her sexual availability to him.

### Sex

Current conventional wisdom among Muslims and non-Muslims alike holds that Islam is a religion with a positive view of human sexuality.<sup>18</sup> Medieval Christian polemics against Islam viewed its sensualism as barbaric in comparison to the purity of Christianity, but many modern commentators see Islam's world-affirming perspective as more realistic than the supposedly ascetic and world-denying stance of Christianity.<sup>19</sup> The comparison relies on an oversimplified view of Christianity, but the claims with regard to Islam have a basis in Muslim tradition. Key Islamic texts present marriage, and sex within it, as a natural and desirable part of human life. The Prophet Muhammad reportedly objected to religious celibacy ("No monkery in Islam")<sup>20</sup> and specifically claimed marriage as part of his *sunnah*, or authoritative practice. Premodern biographical treatments of his life celebrate his virility as part of his sound human nature.

Both classical and contemporary authors likewise recognize women's sexual needs and appetites, but with different emphases.<sup>21</sup> Classical texts note the importance of female fulfillment, but usually focus on the discord-producing effects of female dissatisfaction (the potential for social *fitna*) while stressing the wives' duty to remain sexually available to their husbands. Contemporary authors, often quoting selectively from this corpus, pay less attention to these themes.<sup>22</sup> Instead, they focus on women's sexual rights within marriage, attempting to prove the importance of female pleasure by highlighting

the dissociation of sex from reproduction and the importance of female orgasm.

Significant texts in the Qur'an and hadith allude to the importance of female gratification and satisfaction in the sexual act. These sources, drawn on by al-Ghazali in his frequently-cited writings, stress men's responsibility for making their wives' experiences pleasurable.<sup>23</sup> Al-Ghazali frames his discussion of the sexual act in terms of a husband's responsibility for keeping his wife satisfied; it is a matter of the husband's duty, rather than the wife's right.<sup>24</sup> This duty has social, as well as intimate, dimensions: a man is obligated to keep his wife satisfied in part to keep her from wreaking social havoc. Given women's generally slower trajectory of arousal and orgasm, both foreplay and prolonged stimulation are required, the former to ensure readiness for penetration, the latter to ensure attainment of climax. Foreplay, in his view, is the subject of the Qur'anic command "do some good act for your souls beforehand."<sup>25</sup> He also cites a statement attributed to the Prophet, counseling men not to fall upon their wives like beasts, but rather to send "a messenger" prior to the sexual act. When questioned, Muhammad is said to have clarified that this "messenger" was kisses and caresses.

Al-Ghazali insists that it is the husband's responsibility, having aroused his wife sufficiently for penetration, to see to it that she also reaches orgasm. It is likely that she will only climax after "the husband has attained his desired end;" nonetheless, "mutual estrangement" may occur "whenever the husband is too quick to ejaculate; simultaneity in the moment of orgasm is more delightful to her." This is part of his rationale for foreplay; if the wife is sufficiently close to orgasm before penetration, mutual climax is more likely. Al-Ghazali insists that the wife's dissatisfaction can damage the intimate relationship between the couple. Again, the husband is charged with ensuring this does not occur: "The husband should not be preoccupied with his own satisfaction, because the woman will often be shy."<sup>26</sup>

Al-Ghazali's explicit discussion of female orgasm highlights one of the drawbacks of coitus interruptus (*'azl*), the method of birth control best known to early Muslims: a man

must withdraw prior to his ejaculation to prevent conception, but “coitus interruptus may diminish her pleasure.” As Sa’diyya Shaikh points out, a wife is “entitled to full sexual pleasure” and has “the right to offspring if she so desires.” Shaikh views this doctrine as evidence of “the priority given in Islam to mutual sexual fulfillment as well as consultative decision making between a married couple in terms of family planning.”<sup>27</sup> Sex for non-procreative purposes was clearly permissible: with very few exceptions, Muslim authorities accepted contraceptive measures and approved of sex with pregnant women and nursing mothers, making clear that sexual pleasure was a worthwhile aim even where pregnancy was an impossible, unlikely, or undesirable outcome of intercourse. Shaikh is thus largely correct in her broad claim that “Within the Islamic view of marriage, an individual has the right to sexual pleasure within marriage, which is independent of one’s choice to have children.”<sup>28</sup> Yet the mention of an ungendered “individual” who has this right ignores the context within which classical thinkers discuss marital sex. Although Hanbalis, Malikis, and Hanafis viewed the wife’s permission for withdrawal as necessary, most Shafi‘is disagreed, and the reasons behind their disagreement are instructive.<sup>29</sup> According to one rationale, since a wife didn’t have the right to demand intercourse at any given time (a point on which the jurists largely agreed across the legal schools), her husband could prevent her from conceiving or attaining sexual pleasure by abstaining from intercourse with her entirely. Given that she therefore had no independent right to orgasm or to conception, her consent regarding withdrawal was irrelevant. This doctrine, a minority view, complicates the simple view of an “Islamic right” to female sexual pleasure.

Muslim acknowledgement of the positive aspects of female sexuality has historically coexisted with two views that challenge it in different ways. First, certain elements of the classical Muslim tradition treat female sexuality as dangerous, with potentially disruptive and chaotic effects on society.<sup>30</sup> Historians have demonstrated how anxieties about temptation and female sexuality translated into insistence (never fully achieved in reality) on restricting the appearance of women in public

spaces.<sup>31</sup> Muslim worry over *fitna* – chaos and disorder – has often focused on the sexual temptation caused both by women’s unregulated desires and the troublesome desire that women provoke in men. Second, and in a paradoxical relationship to this view of women as sexually insatiable and thus prone to create social chaos, Muslim authorities have stressed the importance of the fulfillment of male sexual needs, especially in the context of marriage. Drawing particularly on several hadith delineating dire consequences for women who refuse their husbands’ sexual overtures, the insistence on men’s sexual needs and wives’ responsibility to fulfill them has competed for prominence in modern intra-Muslim discourses on sex with the recognition of female sexual needs.

Despite the scholars’ acknowledgement of the importance of female satisfaction in the sexual act, the overwhelming weight of the Muslim legal and exegetical tradition is on women’s obligations to make themselves sexually available to their husbands, rather than the reverse. This bias in the sources emerges even in contemporary discussions that attempt to discuss male and female sexual rights in parallel, highlighting the immensity of the task for those who would redefine sex within marriage as a fully mutual endeavor. A fatwa by conservative Saudi mufti Ibn Jibreen<sup>32</sup> exemplifies the extent to which concepts of reciprocity and mutuality permeate even conservative Muslim discourses. At the same time, his strongly gendered understanding of male and female sexuality is broadly representative of much contemporary Muslim discourse, including that produced in Western contexts.

Ibn Jibreen’s fatwa, entitled “The Ruling on Either of the Two Spouses Denying the Other Their Lawful Rights,” responds to the query, “Is it permissible for either of the two spouses to deny the natural rights of the other for a long period of time, without any acceptable excuse?”<sup>33</sup> The mufti’s response exemplifies the tension between moral exhortations surrounding wives’ sexual rights in marriage, and the legal logic governing sex as part of the structure of gender-differentiated marital claims beginning with dower and carried through to divorce. Though the questioner posed the problem of “either of the two spouses

[denying] the natural rights of the other” as a gender-neutral one, sex in marriage is not a gender-neutral question. Ibn Jibreen opens by accepting his questioner’s premise of parity, declaring that “sexual relations” are among the “needs” of both husband and wife, but proceeds very quickly to discuss men and women in parallel, and then to differentiate them. Eschewing the view that women’s desires are unmanageable, he opines that men generally have “a stronger desire” for sex than women. The rest of the fatwa considers men’s sexual claims in marriage, then women’s sexual claims in marriage, lastly returning to universal statements about sex in marriage.

The limited and contingent sexual rights of a wife stand in contrast to the unrestricted right of a husband to sex “when-ever he desires it.” With the caveat that a man may not harm her or prevent her from performing any of her religious duties, Ibn Jibreen declares that a wife has “an obligation ... to allow her husband to have sexual intercourse with her whenever he desires it.” (Note the passivity here: she is to “allow” him “to have sexual intercourse with her,” rather than actively having sex with him.) Ibn Jibreen accurately categorizes this as the dominant, virtually unanimous, view of the Muslim jurisprudential tradition. Like al-Ghazali, who supports the wifely obligation to be available to her husband in a passage less often quoted by modern Muslim authors,<sup>34</sup> Ibn Jibreen recognizes that a wife also “has rights to have her intimate needs fulfilled.” However, a husband is not obligated to satisfy her “whenever” *she* “desires it;” rather the husband must “have sexual intercourse with his wife (at least) once in each third of the year, if he is able to do so.”<sup>35</sup>

A number of hadith that make assertions about wives’ sexual obligations serve as proof for this husbandly right; although Ibn Jibreen does not cite them in this fatwa, they appear in other opinions issued by the Saudi fatwa council with which he is affiliated, as well as the writings of other thinkers. Abu Huraira is the authority for five closely related narrations in the two *Sahih*s of Muslim and Bukhari. Muslim reports three statements by the Prophet associating the husband’s displeasure with divine displeasure in a chapter entitled “It is not permissible for a woman to abandon the bed of her husband:”

When a woman spends the night away from the bed of her husband, the angels curse her until morning.<sup>36</sup>

By Him in Whose Hand is my life, when a man calls his wife to his bed, and she does not respond, the One Who is in the heaven is displeased with her until he (her husband) is pleased with her.

When a man invites his wife to his bed and she does not come, and he (the husband) spends the night being angry with her, the angels curse her until morning.<sup>37</sup>

Bukhari's two traditions attribute similar words to the Prophet:

If a man invites his wife to sleep with him and she refuses to come to him, then the angels send their curses on her till morning.

If a woman spends the night deserting her husband's bed (does not sleep with him), then the angels send their curses on her till she comes back (to her husband).<sup>38</sup>

Details in these Prophetic hadith vary. In three of the five, the husband invites his wife to bed; the other two do not mention an invitation, only that she remains away. In all but one version, the angels curse the woman till morning or until she returns to her husband's bed; in the last, God is directly "displeased until [her husband] is pleased with her." These variations do not affect the central point, which is that women's sexual duties to their husbands are a matter of divine concern and divine approval is contingent on a husband's approval.

Aside from the abstract, if horrific, prospect of being cursed by angels or subject to divine displeasure, a wife's sexual refusal had practical consequences in the legal tradition. Most jurists viewed the husband's support of his wife as an exchange for her sexual availability to him, and agreed that her sexual refusal constituted grounds for suspension of her support.<sup>39</sup> The dominant Hanafi view differed in a crucial way; a man had to continue to support his wife even if she refused him, so long as

she remained in the marital home.<sup>40</sup> As an Indian author argues in 1987, in euphemistic language, in case of the wife's refusal of sex, "It is taken that she shall be in his power and [he] can be intimate with her by applying some pressure."<sup>41</sup> The early jurists would have considered marital rape an oxymoron; rape (*ightisab*, "usurpation") was a property crime that by definition could not be committed by the husband, who obtained a legitimate (but non-transferable) proprietary interest over his wife's sexual capacity through the marriage contract, incurring the obligation to pay dower in exchange. The Hanafi view that husbands were entitled to have sex forcibly with their wives when the latter did not have a legitimate reason to refuse sex was not widely shared outside that school. Even the majority of Hanafi thinkers who accepted this doctrine recognized a distinction between forced intercourse and more usual sexual relations between spouses; although both were equally licit, sex by force might be unethical.<sup>42</sup>

Unlike the clear penalties that a wife could face if she did not fulfill her husband's demand for sexual access, a sexually dissatisfied wife had few avenues for redress, despite a man's obligation to keep his wife satisfied. Those sources that do exist, beyond those cited above as encouraging foreplay, do not receive nearly as much attention as the Abu Huraira hadiths cursing recalcitrant wives. In one case, Muhammad is reported to have told a man who boasted of fasting every day and praying at night that he should follow the Prophet's own example, and moderate his devotions so that he could partake of normal human activities: food, sleep, and sex. Interestingly, the terms used liken the wife in that case to almost an extension of her husband's body: "Your body has a right over you, your eyes have a right over you and your wife has a right over you."<sup>43</sup> This hadith is important because it moves beyond the question of women's satisfaction in a particular act, discussed by al-Ghazali and others, to the larger question of wives' rights to sex itself.

What was the extent of the wife's sexual claim on her husband? With the exception of the literalist Zahiris, all legal schools adopted the view that a marriage could be dissolved for impotence – that is, the husband's failure to consummate the

marriage. In the absence of any passage from the Qur'an or statement from the Prophet on the topic, the jurists based themselves on a ruling from the second caliph 'Umar. The choice by some (such as Abu Hanifa and his disciple Muhammad al-Shaybani) to follow this ruling while ignoring 'Umar's precedent in other cases demonstrates an exercise of jurisprudential discretion.<sup>44</sup> The near unanimity on the point suggests that there is, indeed, a strong strand of thought believing that sex is a vital element of marriage. Nonetheless, despite the wife's right to press a claim of impotence in an unconsummated marriage, the vast majority of jurists went on to declare that she has no such right once the marriage has been consummated. One opinion quoted in the late Hanafi text *Radd al-Muhtar* presents this sentiment particularly bluntly: "After the first time, intercourse is his right, not her right." At best, as in Ibn Jibreen's fatwa, she might be able to insist on intercourse once every four months, assuming her husband was capable of it.<sup>45</sup>

Sex is, by and large, a male right and female duty, according to *fiqh* texts, whatever the ethical importance of a husband's satisfying his wife and thus enabling her to keep chaste. The repeated, though ultimately unenforceable, assertions of some scholars as to a wife's sexual rights – or, more particularly, the husband's obligations – demonstrate an unresolvable tension. The modern attempt to render the spouses' sexual rights parallel without departing from the overall framework of gender-differentiated rights and duties set forth by classical jurists is destined for failure; the model cannot accommodate piecemeal modifications. The legal tradition fundamentally views marriage as an exchange of lawful sexual access for dower, and continued sexual availability for support. To the extent that these doctrines still inform Muslim discourses, mutuality in sexual rights cannot be a requirement, merely an ideal.

### *Intermarriage*

As with regulations surrounding dower and sex, the issue of marriage of Muslims to "people of the Book" – *ahl al-kitab*, generally

understood as Christians and Jews – demonstrates both the mutability and the limitations of existing jurisprudential approaches to intimate relationships. The Qur'an explicitly grants permission in Surah 5, verse 5 for Muslim men to marry virtuous women (*muhsanat*)<sup>46</sup> from among those who have received scriptures in the past. Surah 2, verse 221 prohibits marriage between Muslim men and women to those who associate partners with God (*mushrikun/mushrikat*). Surah 60, verse 10 prohibits sending female converts who have come to the Muslims back to their unbelieving husbands, who are declared to be inappropriate spouses for them. The vast majority of Muslim scholars have understood these verses, taken collectively, to forbid the marriage of Muslim women to non-Muslim men, whether “of the Book” or not, and to require the dissolution of any marriage to a non-Muslim husband when a wife converts to Islam.<sup>47</sup>

Their interpretations presupposed two kinds of hierarchies: Muslims were to be dominant over non-Muslims and husbands over wives. As wives were to be subordinate to their husbands, the marriage of a non-Muslim man to a Muslim woman would challenge this authority structure: “A marriage of a Muslim woman to a non-Muslim man would result in an unacceptable incongruity between the superiority which the wife should enjoy by virtue of being Muslim, and her unavoidable wifely subjection to her infidel husband.”<sup>48</sup> The same rationale governed, although to a lesser extent, other legal discussions about socio-economic parity between spouses, particularly important in the Hanafi understanding of *kafa'a*, measuring the suitability of the groom according to whether he was the bride's equal or better in lineage, wealth, and religious status.<sup>49</sup> The reverse was not true: twelfth-century Hanafi scholar al-Marghinani's statement that “[I]t is not necessary that the wife be the equal of the husband, since men are not degraded by cohabitation with women who are their inferiors” was meant to apply with regard to suitability but applied equally to intermarriage.<sup>50</sup> Though some prominent early Muslims did object to intermarriage with Christians in particular on theological grounds, the notion of a Muslim husband's authority over a non-Muslim wife posed no conceptual problems.

As exegetes and jurists grappled with the issue of intermarriage, they took for granted the absolute necessity of both Muslim political authority and male familial authority. Classical exegetes explicitly grappled with the Qur'anic verses mentioning intermarriage, and tried to sort out the relevant categories (Muslims, believers, people of the Book, Jews, Christians, non-believers, *mushrikun*). Jurists, more pragmatically inclined, attended to issues of permissibility and conditions for interreligious marriages. For the most part, scholars simply assumed that Muslim women couldn't marry non-Muslim men and did not consider it necessary to elaborate on their evidence and rationales. Ibn Rushd does not discuss Muslim women marrying non-Muslims in his *Distinguished Jurist's Primer* which, because it treats matters on which jurists disagree, is often a repository for minority opinions.<sup>51</sup> More tellingly, neither Ahmad b. Naqib al-Misri nor his nineteenth-century commentator 'Umar Barakat deemed it necessary to state that Muslim women could not marry non-Muslim men in the classic Shafi'i manual *Reliance of the Traveller*; however, a late twentieth-century transmitter of the text adds it as a clarification for the English translation; literally, what once went without saying no longer does.<sup>52</sup>

The scholar quoted in the *Reliance* states the prohibition without presenting a justification for it, but numerous others have addressed the point. The increasing frequency with which (civil) marriages between Muslim women and non-Muslim men are occurring, or where women who convert to Islam independently remain married to non-Muslim husbands, has led to impassioned, but deeply flawed, arguments by Muslim thinkers intent on upholding the standard prohibition of such marriages, though in quite different terms from those provided by early and medieval thinkers, when they addressed the matter at all.<sup>53</sup> The rationales presented, however, are often nonsensical, as well as simplistic in their discussions of intermarriage by Muslim men. The premodern tradition demonstrates a level of complexity in discussions of intermarriage that does not carry over into contemporary discussions, suggesting the relevance of context as a factor in determining the (im)permissibility of particular types of marriages. At the same time, a reconsideration of the relevant

Qur'anic passages in isolation from their traditional interpretation suggests that the text is less categorical than generally assumed; *sunnah* may also provide a model of flexibility.

Even leaving aside the dominant Shi'i view that men may not contract *nikah* with non-Muslims of any type, early Sunni discussions of intermarriage between Muslim men and Jewish or Christian women are more complex than the view, often expressed today, that while women are forbidden from intermarrying, Muslim men may marry Christian or Jewish women. Marriage of Muslim men to non-Muslim women was not as straightforward as simple permissibility. First, authorities debated who should be included in the definition of "people of the Book." Ibn 'Umar's blanket disapproval of marriage to a Christian (for who is more an idolator who says that God is one of three?) is a well-known minority view, but Christian and Jewish women were agreed by Sunni scholars to be acceptable, if not ideal, as marriage partners. Instead, the debate tended to center around the categories of the Sabeans (Abu Hanifa permitted marriage to Sabean women, though his disciples did not) and Zoroastrians (not lawful, according to the Hanafis, but the inclusion of this disclaimer makes clear that some *did* hold it permissible).<sup>54</sup> More importantly, quite a number of thinkers held that circumstances mattered in assessing the permissibility of marriage between Muslim men and *kitabī* women. It was one thing to marry a *kitabīyya* within the safe haven of Muslim-ruled Dar al-Islam, but quite another to do it in Dar al-Harb when the possibility of the children being brought up as non-Muslims was more of a threat (assuming the husband divorced the woman and returned to his native land, which some scholars considered a strong probability). According to the view presented in the Hanafi text *Fatawa-I-Kazee Khan*, such a marriage was "valid" but "abominable" (*makruh*).<sup>55</sup>

The early jurists also devoted substantial discussion to the conversion of one spouse to Islam.<sup>56</sup> When a Christian or Jewish husband converted, he was allowed to remain married to his wife of the same faith; his conversion resulted in a permissible marriage between a Muslim man and a *kitabīyya*. On the other hand, if the wife converted while her husband retained

their original religion, there was general (although not universal) agreement that their marriage could not continue, a position that has been generally upheld by scholars until the present day. However, two recent opinions by Western Muslim authorities have declared that a woman who converts to Islam is not necessarily required to divorce her *kitabī* husband. Although the positions taken in these fatwas suggests a serious challenge to the dominant view of intermarriage, an exploration of their reasoning shows that neither upsets conventional wisdom as much as might be expected.

The first fatwa, by Taha Jabir Alalwani, appears on the website of the mainstream and influential Islamic Society of North America.<sup>57</sup> He argues:

A questioner asks, “Is it forbidden (*haram*) for a Muslim woman to be married to a non Muslim, and what should one do?” The standard answer based on the Qur’an is that it is forbidden for a Muslim woman to be married to a non-Muslim so she should be divorced immediately. However in this particular case the circumstances are as follows: The woman has just converted to Islam and she has a husband and two young kids. The husband is very supportive, but is not at this time interested in converting. The woman was told immediately after converting that she had to divorce her husband of 20 years. Within these circumstances the question should have been: Is it worse for a Muslim woman to be married to a non-Muslim husband or for her to leave the religion? The answer is that leaving the religion is much worse, so therefore it is acceptable for her to continue with her marriage and she is responsible before Allah on Judgment Day.

Alalwani situates his response to a “questioner” asking about “a Muslim woman [being] married to a non Muslim” within a consideration of the larger issue of whether questions have been properly formulated to lead to appropriate results. The question posed was whether the situation was “forbidden” and what would be the appropriate action to take in case of such marriage.

After discussing the woman's personal circumstances, Alalwani reframes the issue as a choice between the convert remaining married to a non-Muslim or leaving Islam. In asserting that the way a question is formulated affects what answer can be given, Alalwani recognizes a key facet of all intellectual endeavor, Islamic jurisprudence not excluded. However, he does not acknowledge the extent to which his own statement of what "the question should have been" predetermines its outcome: there can be no consequence worse than leaving Islam, so any alternative, even violating the prohibition on marriage between a Muslim woman and a non-Muslim man, seems reasonable.

Rather than undertaking a serious reconsideration of interreligious marriage by Muslim women, Alalwani provides a dispensation (*rukhsa*) which lightens a normal restriction to respond to an extraordinary circumstance. Indeed, he provides a truly extraordinary example: a woman married twenty years would be far more reluctant to leave her husband than one married only a few years. Further, a woman with young children would be especially hesitant to separate from their father. The fact that both these elements are present suggests contrivance: how many women married for two decades still have "two young kids"? Though the situation he describes is biologically possible, it is far more likely that a woman married for such a long time would have teenaged offspring. By depicting a situation where one is very sympathetic to the woman involved, Alalwani increases the likelihood that readers will concur with his deliberations. But does this fatwa have relevance beyond the individual case at stake?

Although the logic of this fatwa is internally sound, its methodological premise is too superficial to be sustained or applied more broadly, as it allows for almost any manipulation of the question to result in the desired answer. Would he accept the same rationale if it were not a convert's marriage at stake but rather an unmarried Muslim woman in love with, and wanting to marry, a non-Muslim, and in danger of leaving Islam if she could not do so? What if it were two Muslim women wanting to marry each other, now permissible under civil law in certain parts of North America and Europe? Presumably, Alalwani

would approach these situations differently, but this fatwa does not provide any methodological justification for doing so.

Alalwani does not suggest a broader differentiation between permitting a convert to Islam to remain married to her *kitabī* husband (where her apostasy from Islam was not feared) and cases where an unmarried Muslim woman wanted to marry a Christian or Jewish man. There is some textual support for this distinction; anecdotal evidence suggests that the first generation of Muslims viewed the preservation of an existing marriage somewhat differently than the case where no marriage yet existed.<sup>58</sup> The second fatwa, from the European Council for Fatwa (an all-male organization that includes North America-based Jamal Badawi among its members), does make this distinction, “affirm[ing] and repeat[ing] that it is forbidden for a Muslim female to establish marriage to a non-Muslim male” while permitting a convert to maintain her marriage under certain circumstances.<sup>59</sup> The fatwa acknowledges that “According to the four main schools of jurisprudence, it is forbidden for the wife to remain with her husband or indeed to allow him conjugal rights, once her period of waiting has expired.” The Council bases its dissenting view on “some scholars” (those named are Ibrahim al-Nakha’i, al-Shi’bi, and Hammad ibn Abi Sulayman) who held that “it is for her to remain with him, allowing him and enjoying full conjugal rights, if he does not prevent her from exercising her religion and she has hope in him reverting [i.e., converting] to Islam.” The Council’s rationale (“for women not to reject entering into Islam if they realize that they are to separate from their husbands and desert their families by doing so”) is similar to Alalwani’s objective to prevent the convert’s apostasy, although the situation of one who never becomes Muslim is less dire than that of one who becomes Muslim only to abandon the faith.

Both fatwas acknowledge their departure from the near-universal view on the dissolution of a female convert’s marriage. Neither, however, reconsiders the evidence on which that doctrine is based. Alalwani states simply that “the standard answer based on the Qur’an is that it is forbidden for a Muslim woman to be married to a non-Muslim.”<sup>60</sup> However, his

intimation that the Qur'an explicitly forbids such marriages is misleading. The Qur'an does not address the situation of women's marriage to "non-Muslims" in general but rather discusses specific categories of potential spouses such as "those who associate partners with God" (*mushrikin*) and "unbelievers." Although both fatwas refer to a woman's freedom to practice her new religion, neither discusses the relation of the cases at issue to the Qur'anic verse disapproving of Muslim women remaining married to unbelievers (*kuffar*). A woman's conversion separately from her "very supportive" husband suggests her freedom of conscience and action. In contrast to the cases considered by these muftis, the Qur'anic verse explicitly treats the situation of women who had converted and left their husbands. The situation of female converts to Islam who had come as refugees from a community engaged in conflict with the Muslims is, in several respects, quite different from that of women who desire to remain with their husbands, not to mention those living in a society in which Muslims and non-Muslims co-exist peacefully. The muftis could have chosen to argue that this Qur'anic ruling is context-specific and therefore does not apply in the dramatically altered scenario of a Christian or Jewish woman who converts to Islam in the United States today.

If one holds that Surah 60, verse 10 does not apply to the situation of converts in the West today, then the remaining Qur'anic evidence against women's marriage to non-Muslims is twofold: the prohibition in Surah 2, verse 221 on marrying women off to those who associate partners with God, and the silence surrounding women's marriage to *kitabīs* in Surah 5, verse 5. The prohibition of marriage to *mushrikin* in the former explicitly applies to both Muslim men and Muslim women. It cannot, therefore, be applicable to all "non-Muslims," as many exegetes, both classical and contemporary, have assumed in the case of women.<sup>61</sup> Rather, it is accepted to stand in non-contradiction to the permission for Muslim men to marry women from "those who have received the book before you" in the latter verse. To view the same command prohibiting marriage to *mushrikin* as applying more broadly to women than

to men requires a significant interpretive leap, moving far beyond the verse itself. The prohibition of marrying women off to *mushrikin* in Surah 2, verse 221 does not by itself foreclose the possibility of permission for women to marry *kitabīs*. And although Surah 5, verse 5 does not explicitly grant permission for such marriages, there are numerous other instances in the Qur'an where commands addressed to men regarding women are taken to apply, *mutatis mutandis*, to women.<sup>62</sup>

If the Qur'an does not directly address the marriage of Muslim women to *kitabī* men, and if the presumptions about male supremacy and dominance in the home no longer hold, such that a female convert living in a majority non-Muslim nation is assured freedom to practice Islam in her home unencumbered (or to obtain a civil divorce independently if she is not), what rationale exists for continuing to prohibit marriage between Muslim women and *kitabī* men in the first place? My aim is not to construct a legal argument for the permissibility of such marriages but rather to highlight the weaknesses in most arguments against them, particularly their reliance on unspoken but fundamental assumptions about male dominance in marriage. These assumptions are no longer widely shared, or at least no longer broadly acceptable as justifications for the prohibition of intermarriage. At the same time, greater attention to the discussions surrounding men's marriage to *kitabīyyas* in both hadith and jurisprudence suggests the relevance of taking context into account in both permission for and prohibition of intermarriage. There are cogent arguments to be made for considering the permission to marry non-Muslims on the basis of factors other than gender.

### *Conclusion*

Discussions of marriage among scholars, pundits and ordinary Muslims consist of a curious and continuously shifting mix of specific classical doctrines, isolated citations from Qur'an and hadith, and modern assumptions. Among Muslims in the United States, as in most Muslim-majority societies, classical models

for marriage no longer hold sway in numerous respects. Rules that allowed for fathers to contract binding marriages for their minor children of either sex no longer persist. Apologetic discourses stress wives' sexual rights while downplaying the importance of wifely obedience. In fundamental respects, in social practice at least, the understanding of Islamic marriage has shifted. Yet there has not been a coherent alternative to the classical understanding of marriage as a fundamentally gender-differentiated institution which presumes, at least at some level, male authority and control.

Dower, which holds a central place in the legal structure of marriage and in the social practice of some Muslim communities often takes on a merely symbolic form among American Muslims. Adhering to the symbolism comes at a price, however. If dower is meant to be an economic safety net for women, then a more useful approach would depend on factors other than consummation, such as length of marriage, contribution to the household economy, wages lost and earning potential diminished during childbearing and caretaking, and so forth. Feminist assertions that women do not have any Islamic obligation to perform domestic services or childcare may have the ironic effect of devaluing those contributions. Although stress on the voluntary nature of women's performance of domestic duties can highlight their significance, this recognition that dower does not compensate for a wife's household contribution is not usually accompanied by a discussion of *precisely for what it is* that dower compensates a woman.

Discussions about dower, spousal rights, and intermarriage must occur in the context of a broader consideration of what men and women contribute to marriage and to the family, including the recognition that most American Muslims do not maintain the separate asset regime assumed by classical law and that complete male economic responsibility is more theoretical than actual. Perhaps one positive outcome of the neo-traditional vision of the wife providing homemaking and childrearing services in exchange for male providership could be the dissociation of sex from support; if sex is no longer the wife's marital duty, then it could become a fully mutual right. This does not

resolve the problem of how to deal with the double-shift that emerges when women work outside the home to provide partial support for the household without the husband taking over a portion of the household duties, but it might be more reasonable to see those duties as less explicitly gendered than the others. If some Muslims want to adopt a provider/homemaker division of labor that provides some kind of economic independence for women, that ought to be negotiable. But the pretense that such a structure, and only such a structure, is religiously legitimate avoids the reality that many Muslims organize their lives differently, as well as the real incompatibility of classical definitions of male and female obligations with most contemporary understandings of spousal roles in marriage.

## 2 Lesser Evils: Divorce in Islamic Ethics

God did not make lawful anything more repugnant to Him than divorce. Reported saying of the Prophet Muhammad, *Sunan Abi Dawud*<sup>1</sup>

A woman knows (that is, comes to know with certainty) that her husband has divorced her thrice; the husband denies having divorced her; and the woman has not the ability to prevent the husband from (having access to) her person: it is permissible to the woman to kill the husband; because she is helpless in preventing mischief to her person; and, therefore, it shall be allowable to her to kill him; but it is proper that she should kill him with drugs, and not with an instrument of death; because if the woman should kill him with an instrument which inflicts wound, she shall be put to death by way of *kisas* (or retaliation).

*Fatawa-I-Kazee Khan*, Hanafi legal text<sup>2</sup>

The image of a husband repudiating his wife by declaring “I divorce you, I divorce you, I divorce you” has been one of the most persistent and negative stereotypes of Muslims. And while it does not tell anything resembling a complete story, this image has a basis in reality. So-called triple divorce, while widely considered blameworthy even among the earliest Muslims, is nonetheless still practiced in many places. Recent controversies over its use have erupted in India and in Malaysia. In the former case, the All-India Muslim Personal Law Board considered whether to declare that all such triple pronouncements would be considered to effect only a single divorce; in the latter case, the issue at stake was whether such divorces were valid if delivered via text message. Both situations were complicated by the intricate and multi-layered relationship between civil and religious law, a tension that exists within every Muslim community to a greater or lesser

extent.<sup>3</sup> Divorce is a contested issue for Muslims in nations where personal laws are ostensibly religious as well as in those places, such as the United States, where civil law alone holds formal sway. Why is a husband's unilateral, and extrajudicial, pronouncement of *talaq* so meaningful to Muslims who otherwise abide by civil laws? What are the structural considerations at stake in attempts to make divorce regulations more egalitarian? How does this treatment of divorce in the writings of the jurists relate to American Muslims? The premodern case, cited in this chapter's epigraph, of a wife whose husband has pronounced the powerful words of divorce but refuses to admit having done so, rendering the state powerless to intervene and forcing her to resort to poison to thwart his sexual advances, has surprising relevance to contemporary discussions on the relationship between individual acts, ethical practice, and enforceable law.

### *Untying the knot*

Its religious dimensions notwithstanding, Muslim marriage is, above all, a contract. Though it will persist until death if neither spouse takes action to dissolve it, a marriage can also be ended before that time. There are both good and bad reasons for ending a marriage, according to Qur'an, *sunnah*, and the opinions of the commentators and jurists, and good and bad ways to proceed with divorce whatever the motivations behind it. It is a well accepted principle that disharmony between spouses should not lead immediately to divorce. The Qur'an advocates reconciliation where possible, through negotiated settlements between the spouses themselves or arbiters from their families.<sup>4</sup> However, there will be instances when mutual good treatment is not possible; in such cases, there should be an amicable parting. This negotiated settlement may involve the wife's payment of a sum to her husband; normally, in case of *talaq*, he must not take back anything of what he gave her as dower.<sup>5</sup> The Qur'an contains a variety of regulations concerning these and other forms of divorce (such as the now-obscure *zihar* and *li'an*), which built on and modified pre-Islamic Arab practices.

The English term “divorce” encompasses several means of ending a marriage that are distinct in Islamic jurisprudence. The most common, *talaq* (literally, “release”), is a unilateral repudiation of the wife by the husband. This form of divorce does not require the wife’s consent, and most of the classical jurists held that it was valid even without her notification. *Talaq* can be either revocable (*raj’i*) or irrevocable (*ba’in*). In a revocable divorce, the husband has the right to take back the wife during the three menstrual cycle waiting period (*‘idda*) that follows the dissolution of all consummated marriages.<sup>6</sup> However, following the end of the waiting period from a revocable divorce (or after an irrevocable form of dissolution such as judicial divorce or divorce for compensation, on which see below), the couple can still remarry. This is the case even after two divorces. However, when the husband repudiates the wife for the third time, the divorce becomes “absolute.” In this case, the spouses cannot remarry until the wife has married another man, and that marriage has been consummated, then ended through death or divorce. Only after this can the original spouses remarry.<sup>7</sup>

Triple divorce, *talaq thalatha*, occurs when a husband pronounces three repudiations at once rather than divorcing his wife once, revocably, and simply allowing the waiting period to expire without taking her back. In this way, he immediately makes his divorce of her absolute, creating a bar to remarriage between them. The Sunni jurists generally consider triple repudiation, or other similar pronouncements that lead to absolute divorces (*talaq al-batta*), to be reprehensible (*makruh*). Yet even while considering such divorces blameworthy, the vast majority of Sunni thinkers – Ibn Taymiyya is a notable exception – hold that they are effective and binding. (Shi’i jurists hold a much more restricted view of what means of divorce are legally valid, requiring, not merely preferring, the presence of witnesses, and considering only one pronouncement of divorce at a time valid. This dramatic difference illustrates quite clearly that Sunni doctrine was the result of interpretive decisions, and could have been otherwise.<sup>8</sup>)

Just as marriage has financial implications, so does divorce; in fact, they are closely intertwined. A wife divorced by

*talaq* retains the dower she received at marriage or, if it was divided into a prompt and deferred portion, the deferred portion becomes immediately due at divorce. Predictably, the prospect of receiving or having to pay a large deferred sum can serve as inducement or restraint on a spouse's actions. Some women set a large deferred dower as a disincentive for their husbands to divorce them impulsively. However, this strategy can backfire if the wife is the one to seek a divorce. In *khul'*, divorce for compensation, a wife returns her dower, waives the deferred portion, or pays some other sum to her husband in order to obtain a divorce. Almost all jurists consider his consent essential though it is not mentioned in the Qur'an or in some of the prophetic traditions that refer to it. *Khul'* is by definition irrevocable; the husband has no right to take her back during the waiting period, though the pair may remarry subsequently by mutual consent with a new contract and dower.<sup>9</sup>

In addition to unilateral repudiation and divorce for compensation, both of which are mentioned in the Qur'an, judicial divorce (*fraq*, *faskh* or *tatliq*) becomes permissible when the wife has cause. Judicial divorce is preferable to *khul'* for a wife who has grounds because she need not relinquish her claim to dower. Acceptable grounds for divorce vary widely among the legal schools. In the Hanafi school, which is the most restrictive, a woman has almost no grounds for obtaining a divorce provided her husband has consummated the marriage; neither failure to support her, nor life imprisonment, nor abuse is considered grounds for divorce (although she may get a separation and support if she convinces a judge). If he is declared missing, she may have the marriage dissolved (on grounds of presumed widowhood) at the time when he would have completed his natural lifespan, which could be as old as ninety. In contrast, Maliki law allows the most generous grounds for a woman to seek divorce including non-support, abandonment, and the broad charge of "injury" (*darar*), which can be physical or otherwise.

Women can use other legal strategies to obtain access to divorce without recourse to a judge. For instance, in conditional or delegated divorce the wife includes a condition in her

marriage contract that allows her the right to divorce on her own initiative under certain specific circumstances, or states that she will be automatically divorced if a particular event occurs such as the husband taking another wife or moving to another town. There are possible benefits to these types of stipulations, if women have the requisite knowledge and are willing and able to convince future spouses to agree to the conditions, but they are not a panacea for inequalities in traditional divorce law. The extent to which such clauses in the marriage contract are enforceable varies widely in legal schools or contemporary national laws. Further, even clauses that were originally valid can be easily rendered ineffective through the wife's unwitting actions. More troubling still is that though these conditions can increase a woman's access to divorce, they do not restrict in any way the husband's right to repudiate her unilaterally at will. The increasingly influential view of marriage as a romantic rather than contractual institution often makes women unwilling to negotiate for or demand stipulations in their contracts, seeing them as a sign of bad faith.<sup>10</sup> In any case, the inclusion of such stipulations regarding divorce ratifies the notion that unilateral divorce by the husband is valid and effective, since conditional and delegated divorces function through the mechanism of *talaq*. Thus, it is contradictory to press for such stipulations regarding divorce while simultaneously arguing that a husband's right of unilateral *talaq* is not supported by the sources. If his *talaq* is not valid, then any conditional or delegated divorce right she has is equally void. (One way to avoid this conflict is to insist that the only permissible divorce is a judicial divorce; however, this raises its own set of issues surrounding the validity of civil law versus religious law.)

This sketch of legal doctrine seems to provide a fairly bleak picture for Muslim wives, but a number of historians have demonstrated that in practice women have enjoyed a good deal of flexibility in obtaining divorces on favorable terms, thanks to sympathetic judges and a variety of bargaining strategies, frequently involving claims to dower, maintenance, and custody of children. Looking at the way "Islamic family law translate[d] into the reality of medieval marriage," Yossef Rapoport finds

that women's economic independence, among other factors, facilitated woman-initiated divorce, although the unrestricted nature of male oaths of repudiation contributed to the high divorce rate.<sup>11</sup> Twentieth-century legal reforms in nations such as India, Egypt, and Iran (both pre- and post-revolution) have sometimes dramatically improved women's access to divorce and have, to a lesser extent, penalized men's unrestricted use of *talaq*. The progress of such reforms has been hampered by continual struggles over "authenticity" and the self-aggrandizing tendencies of the modern nation-state to work to bring everything under its control. The relationship between civil and religious marriage and divorce is complex even in nations such as Pakistan, where both are ostensibly Islamic, but for Muslims in primarily non-Muslim societies the dictates of classical legal thought, as they have trickled down into conventional wisdom, remain influential.<sup>12</sup>

### *Extreme circumstances*

The regulations surrounding divorce that I have just outlined do not directly account for the extreme case, mentioned in this chapter's epigraph, where Qadi Khan gives a woman permission to defend herself against her former husband's sexual advances even to the point of killing him – discreetly:

A woman knows (that is, comes to know with certainty) that her husband has divorced her thrice; the husband denies having divorced her; and the woman has not the ability to prevent the husband from (having access to) her person: it is permissible to the woman to kill the husband; because she is helpless in preventing mischief to her person; and, therefore, it shall be allowable to her to kill him; but it is proper that she should kill him with drugs, and not with an instrument of death; because if the woman should kill him with an instrument which inflicts wound, she shall be put to death by way of *kisas* (or retaliation).<sup>13</sup>

This fatwa attempts to resolve an intractable problem. By divorcing his wife three times, the man has rendered her absolutely divorced from him, making sexual relations between them completely unlawful. However, his denial of the divorce is accepted as final.<sup>14</sup> (The legal efficacy of his declaration is taken for granted; the reponse does not even allude to it.) What, then, may his “wife” do in this case? She is certain of having been divorced and that therefore it is no more lawful to allow her husband to have sex with her than it would be for her to allow a stranger access to herself; her (former) husband is at this point legally a stranger. Failing to resist him in some fashion would be morally, if not legally, tantamount to consenting to illicit sex; she has the right (or perhaps obligation) to defend herself against such an attack, even to the point of killing her would-be rapist. What might be a mundane evidentiary dispute over whether or not a divorce has occurred becomes a life or death issue.

In allowing the woman to pursue the dictates of religious law and her conscience, Qadi Khan recognizes a distinction between the law applied by God, which grants the woman the right to defend herself against his advances, and that followed as a matter of procedure by the state, which, bound as it is by procedural rules, is only an approximation thereof. Although the man in question is trying to have sexual access to a woman over whom he no longer has any sexual rights, he cannot be brought before the authorities as a rapist, because the law as applied by the state authorities would still recognize him as her husband. The text thus differentiates between the morally permissible action – killing him – and the legally acceptable one.

This distinction between what is acceptable to God and what is acceptable to the state influences the solution arrived at by Qadi Khan, following Abu Hanifa: the woman may kill her “husband” provided she does so with “drugs,” not a “weapon.” Why is poisoning acceptable, while killing in some other fashion is not? Although Qadi Khan may have been influenced by the view that it was unladylike to kill using a weapon, the more salient rationale is that if she were simply to kill him by stabbing, for example, the fact of his having died an unnatural death would be obvious, and a culprit would be sought and punished.

It is not fair that a woman should be subject to execution in retaliation for having defended herself against sexual assault, but she has no way of proving what transpired. Her testimony that she killed in order to avoid his attempt to have intercourse with her after he had divorced her absolutely would not be exonerating in this circumstance, just as it would not be considered adequate to prove her divorce itself. Thus, one can deduce that Qadi Khan grants permission to poison the ex-husband in order that his unnatural death escape detection. If it does not become known or cannot be proven that he has been deliberately killed (as would most likely be the case before the introduction of sophisticated forensic methodologies), then her actions will not come under scrutiny, she will not have to provide justification for them, and hence the issue of the reliability or legal worth of her testimony as to her motive for killing him – the fact of his having divorced her and denying it – will not come up.

Prominent seventeenth-century Palestinian Hanafi mufti Khayr al-Din al-Ramli's treatment of a similar case confirms this analysis. In this instance, "an evil man who harms his wife, hits her without right and rebukes her without cause" has, after swearing to divorce her "many times", finally done so. When she is able to demonstrate "that a thrice divorce had taken effect," the mufti declares that "it is permissible for her to kill him, according to many of the *'ulama'*, if he is not prevented [from approaching her] except by killing."<sup>15</sup> Because the divorce is proven, she is granted permission to kill him if he attempts to have sex with her. The juxtaposition of these two fatwas illuminates the existence of two distinct types of legal rules. Those that govern the wife's ability to kill her husband in the case addressed by Qadi Khan, where she cannot prove the divorce, can only be moral – she will be absolved of guilt in this case, and will not have to answer to the divine for a transgression. However, though her killing him is religiously licit, if she is brought before temporal authorities, she will be subject to retribution because her testimony cannot be accepted on this question. In Khayr al-Din's case, however, the divorce is proven; the woman's ex-husband is legally a stranger and she can defend herself against his advances even to the point of killing without fear of retribution.

In Qadi Khan's fatwa, the entire matter revolves around the inadmissibility of the wife's testimony. Why is it that a wife's testimony cannot be accepted regarding *talaq*? It is not, as might be supposed, an issue of women's testimony having less weight than men's but rather an issue of "plaintiff" and "defendant." Although one Qur'anic verse attributes different weight to male and female testimony, and jurists have further limited the range of cases in which women can testify, in numerous matters related to marriage the words of husband and wife are equivalent. Yet in discussing the wife's response, Qadi Khan does not even suggest that there might be any possible way for her to seek judicial recognition of his divorce of her. Allowing women's word to count with regard to their own divorces would open up the floodgates to women claiming to have been triply repudiated – likely to cause more trouble for the Hanafis in particular, given the extremely limited grounds on which women could seek divorce.<sup>16</sup> In Qadi Khan's implicit calculation of the relative harm in each case, to allow this man's death is acceptable in a way that tampering with the overall weight of rights granted to husbands in matters of divorce would not be.

The Hanafi solution, however, is not palatable to everyone. Moralistic traditionist-jurisprudent<sup>17</sup> Ibn Hanbal confronts the same question, several centuries before Qadi Khan arrives at a different ruling. First, the wife should seek to ransom herself from her husband in divorce for compensation. Though he does not say so directly, one can deduce that this is merely a strategy to get him to recognize the divorce. It will have no legal effect, since no marriage actually exists after his absolute divorce. If her husband refuses to allow this but rather compels her to remain "married" to him, "She should not adorn herself for him, nor should she come near him, and, if she possibly can, she should escape from him." Asked specifically "Should she fight him, when he desires her?" Ibn Hanbal hesitates. "I do not know," he replies. "She should not fight him. Abu Hanifa said she should fight him. She should escape from him if she can."<sup>18</sup> The wife here has the obligation to resist sex, but this should be accomplished by non-combative means. Ibn Hanbal's

invocation of Abu Hanifa's view perhaps serves to give his listener an option beyond what he is willing to endorse.

The burden is on the woman to place herself out of reach, sexually, whether she hears the divorce pronouncement herself (according to Ibn Hanbal, "Her case is strongest" in this instance) or hears the testimony of two witnesses who can be trusted. In a case where there were witnesses, presumably she could have used their testimony to establish that her husband had in fact divorced her. Perhaps in this case her escape is a short-term measure until the witnesses can give testimony publicly to the fact of her divorce, resulting in the clarification of her marital status. If there are no witnesses, she has even stronger justification for escaping. But what exactly does it accomplish in that case? Ibn Hanbal does not say, as the text moves on to discuss an unrelated matter. If a woman escapes, presumably back to her natal kin, what happens to her marriage if her husband continues to insist that he has not divorced her? She loses her right to support and remains unable to remarry – though she avoids the collusion in illicit sexual acts, she cannot end her marriage (while her erstwhile husband is free to take another wife). Unlike in the Hanafi scenario where she kills him, she remains tied to him until and unless he acknowledges dissolving the marriage.

Cases such as those just discussed are extreme, not representative. Though judges were undoubtedly faced regularly with "claims and counterclaims" regarding the occurrence of divorce, it is impossible to know whether any particular case ever resulted in killing.<sup>19</sup> One of the limitations of working with legal handbooks and compilations, rather than archival documents, is that it is not possible to determine what discussions are in response to actual events and what is merely hypothetical. Particular scenarios can garner jurists' attention far out of proportion to their likelihood of occurring, simply because in resolving the legal issues at stake, challenging legal points can be illustrated or clarified. My choice of this dramatic example to discuss divorce was meant to illuminate, in a tangible way, the extensive, unilateral privilege held by husbands in the realm of divorce. Only once this is understood can contemporary discussions of *talaq* and its reform be more fully comprehended.

*Prospects for reform*

Reforms to divorce laws in the contemporary Muslim world have been plentiful.<sup>20</sup> Most of these reforms have attempted to either restrict men's unfettered exercise of their rights to *talaq* or to increase women's access to divorce for cause. Some majority Sunni nations have accomplished the first aim by requiring some type of intervention or registration from a judge, or by declaring that three repudiations pronounced at once will count as only one divorce, as in the recent Indian debate.<sup>21</sup> Other nations, such as Iran, have imposed financial penalties on a husband who divorces his wife without cause. Despite these attempts to curb men's impulsive and extra-judicial use of *talaq*, almost all courts ultimately consider *talaq* pronouncements legally effective since they are recognized by religious authorities. The widely held view that a husband's pronouncement of *talaq* is religiously valid regardless of whether approved by a court, and regardless of whether or not it contravenes provisions of civil codes, constitutes a major stumbling block for efforts to reform divorce law in those nations where putatively Islamic family codes hold sway. In some ways, the codification of marriage and divorce laws has reduced the flexibility that women of the upper classes may have enjoyed in the past.<sup>22</sup> Though reforms have altered some of the specifics of divorce laws, they have not challenged the basic idea that divorce is a man's prerogative, while women may only obtain divorce for cause.

A more recent Egyptian law, approved by the chief jurist of Al-Azhar, the most respected institution of traditional learning in Egypt and perhaps the entire Sunni Muslim world, provides an alternate approach. As noted above, the vast majority of premodern jurists as well as contemporary national laws have considered the husband's agreement essential to *khul'*, divorce for compensation. Beginning in March 2000, Egypt granted the wife the right to obtain a *khul'* divorce from a judge without the husband's consent if she returns the dower she received at marriage.<sup>23</sup> Judicial *khul'* has been legal in Pakistan since the middle of the twentieth century, meaning that a wife who does not have effective grounds for divorce for cause may seek this

type of divorce, returning her dower and getting out of a marriage in which she refuses to remain.<sup>24</sup> Similar legislation has yet to pass elsewhere, but I think it likely that eventually more reforms of this type will pass; *khul'*-on-demand is the most egalitarian reform possible without a major transformation of the legal structure of marriage. It is reasonably fair, given the role of dower, that women cannot collect dower and then proceed to divorce without any fault of the husband's. To the extent, though, that women who have grounds for judicial divorce may be induced to forgo financial rights in order to obtain *khul'* it could lead to injustice. Uncontested *khul'* has faced serious resistance wherever it has been proposed, as a violation of the husband's rights.<sup>25</sup> Women, it has been alleged, are too emotional to wield control of divorce.<sup>26</sup>

In the case of Muslims living in the United States and other nations where Islamic law is not implemented by civil courts, the relevance of modern legal reforms is minimal; and classical Islamic doctrine matters only where individuals take it into account in extrajudicial interpersonal negotiations. While it is relatively straightforward to combine an "Islamic" marriage with a civil one – religious authorities are frequently authorized by state legislatures to perform valid civil marriages – only the civil courts may pronounce divorce. A couple married both religiously and civilly can be in the awkward position of being *only* civilly divorced (if the wife insists on the necessity of a divorce pronouncement that the husband refuses to make) or only religiously divorced, if the husband pronounces *talaq* long before the civil court takes action. For the most part, American Muslim leaders have chosen to treat a divorce pronounced by the courts as the equivalent of judicial divorce in classical Islamic law, but the coexistence of civil law with an amalgam of jurisprudential doctrines and Muslim conventional wisdom makes for a confusing situation. Further, for those committed to egalitarian marriages, the existence of *talaq* as a religiously acceptable institution creates obstacles to full marital agency for women.

*Talaq* is so problematic because it is an entrenched right connected to the legal structure of marriage as a form of *milk*, ownership or control. A husband's power of *talaq* derived from

his exclusive control over the marriage tie, just as a master's power of manumission resulted from ownership of a slave. Pre-modern jurists frequently drew analogies between *talaq* and manumission (*'itq*), reflecting their shared understanding that a husband, like the master of a slave, held *milk*, "ownership," over the tie joining the parties. This right was basic to the nature of marriage: the husband acquired a limited *milk* over his wife at the time of contract through payment of a dower, just as a master acquired *milk* through purchase of a slave; either could unilaterally relinquish it whenever he chose. The wife, as the one bound by the marriage tie, did not share in this power of unilateral divorce (any more than a slave could simply choose to free him- or herself). Instead, her opportunities to dissolve the marriage were limited to judicial divorce for cause, grounds for which varied greatly depending on the school; delegated divorce if authorized by her husband; and *khul'*, divorce for compensation, which was roughly analogous to a slave's negotiated purchase of his or her own freedom. Of course, the analogy can only be carried so far: a wife was not her husband's slave. But because the structure of the Islamic marriage contract presumes the husband's *milk*, control, over the continuation of the marriage, piecemeal reforms of divorce laws that do not address this basic norm will be limited in the amount of change they can ultimately effect. Long-lasting and far-reaching reform of divorce requires, more fundamentally, a reform in the basic structure of Muslim marriage itself.

### *Conclusion*

In many countries, the primacy of civil law over "Islamic law" has been accepted in numerous realms of law, including commercial, but the repeated appeals by various actors to the authenticity of Islam with regard to rules regulating family life and sexuality has meant that in matters associated with women and family, regulations are still purportedly "Islamic." Muslims living someplace where there is a civil system of marriage and divorce with no pretensions to being based on a religious law face different challenges. In the United States, courts deal

routinely with divorces among Muslims; divorces are granted to both wives and husbands on the same grounds available to any other couple. The regulation of divorce is fraught with difficulties because, aside from the interpersonal challenges, it is normally interwoven with other crucial elements of marriage structures, including who has the right to dissolve the marriage and with what financial claims. Despite claims by a number of feminist scholars and women's advocates to the contrary, inequities in divorce law – which many Muslims would agree exist – are not merely read into the Qur'anic text by misguided or even misogynist jurists. They are not anomalies that can be remedied by the simple expedient of appeals to men's better nature. The necessary shift in patterns of *talaq* must recognize that it is deeply embedded in Muslim marriage as a whole system.

Perhaps a sensible marriage and divorce structure for Muslims living in nations such as the United States, where dower is not a customary part of marriage practices among the broader population and where all divorces must go through the courts, might exclude both dower and all forms of extrajudicial divorce – claims that are closely linked in traditional jurisprudence. It would be possible to make financial arrangements as well as other household contributions the subject of a prenuptial agreement validated by the American legal system, and insist that civil marriage and divorce are the only licit forms of relationship. If marriage is structured in such a way that it can be dissolved only by a judge, whether by mutual consent or otherwise, that would eliminate much of the dual-system conflicts over the validity of unrecorded divorce pronouncements in numerous Muslim-majority countries. This is not entirely unheard of: one lesson of Qadi Khan's case, in addition to the one about the male abuse of authority, is that state authority can override certain jurisprudential doctrines, even as those doctrines guide individual life and action.

Appeals to religious sensibilities have emerged in several attempts to entice North American Muslims to participate in *shari'a* tribunals or parallel mediation/arbitration systems.<sup>27</sup> Such tribunals, though undoubtedly well meant, would likely be disastrous for women's rights, even leaving aside the fact that

there has not been substantive discussion as to how to guarantee the qualifications of those assigned to arbitrate. At best, women might get a sympathetic interpretation of doctrines understood to be Islamic, but it is highly unlikely that they would get sophisticated modifications of legal rules. My objections to the formation of Islamic law courts in the West do not extend to individual Muslims choosing to follow particular legal doctrines in their personal affairs (what Abdullahi An-Na'im refers to as "voluntary compliance out of religious commitment"<sup>28</sup>) or with "independent scholars providing moral guidance to their communities on [a] private voluntary basis."<sup>29</sup> And it is certainly possible to write contracts that enshrine religious rights and duties for spouses – at least financial ones – in a way that makes them enforceable by Western courts.<sup>30</sup> Individuals should be free to negotiate those contracts, with as much information as possible about both classical and reformist interpretations of rights and obligations. However, if consenting to participate in Islamic arbitration becomes possible on a wide scale, it will also become a mark of faith, and those who choose not to will have to contend with accusations of not being good Muslims, when they may simply not believe that a *shari'a* court is capable of providing a realistic and appropriate rendering of Islamic principles into a just verdict in a context radically different from that where the law was first formulated.

Setting aside the influence of human historical factors on the development of the law, there is also the question of the contextuality of the Qur'anic revelation itself. Despite the reflexive praise for Islamic legal flexibility, there is a broad unwillingness to interfere with elements of marriage practices, such as divorce, that are explicitly referred to in the Qur'an. But are the verses on divorce meant to apply in every possible situation, or are they specific in some way to seventh-century Arabia? If they can be modified, on what basis should one do so, and how far can one go in altering specific rules? What is taken as common sense by many ordinary Muslims (the twenty-first century West is quite different from either the seventh-century West or the contemporary Muslim world and hence rules should be different) is still controversial for numerous Muslim leaders and scholars.

### 3 “What your right hands possess”: Slave Concubinage in Muslim Texts and Discourses

A free man may marry four free women and female slaves, not more, and he may take as many concubines as he wishes from among his female slaves. If a man has four free [wives] and a thousand concubines and wants to buy another [concubine] and a man reproaches him for that, it will be as if [that man] had committed unbelief. And if a man wants to take a concubine and his wife says to him “I will kill myself,” he is not prohibited [from doing so], because it is a lawful act, but if he abstains to save her grief, he will be rewarded, because of the hadith “Whoever sympathizes with my community, God will sympathize with him.”

Muhammad ‘Ala al-Din Haskafi, seventeenth-century Hanafi jurist,  
*Al-Durr al-Mukhtar*<sup>1</sup>

Prior to the abolition of slavery in the nineteenth and twentieth centuries, marriage was not the exclusive mode of licit sexual relationship in most Muslim societies. Instead, throughout Islamic history, slave concubinage was practiced by those men who could afford it. Though several features of the finalized regulations governing the possession and use of female slaves were unique to Muslims, the use of female slaves as sexual partners was an accepted practice in most of the ancient Mediterranean and Near Eastern world where Islam originated. Indeed, in seeking to establish friendly relations with the Prophet Muhammad, the Byzantine commander of Alexandria sent him two enslaved sisters as a gift, along with a donkey and other goods. Medieval Muslim tradition records that the Prophet took one of these young women, Mariyya, as his concubine, eventually freeing her after she bore him a child.<sup>2</sup> The fact that a seventh-century Christian figure saw nothing amiss in sending a female as a gift to

a powerful leader demonstrates the general acceptance of women and girls as sexual commodities in the ancient world. In pre-Islamic Arabia, as well, female captives were frequently used as sexual partners, a practice agreed by early Muslim interpreters to be sanctioned in the Qur'an's repeated references to the permissibility of men's sexual relations with women "that their/your right hands possess" (*ma malakat aymanuhum/kum*).

Ownership of slaves in general, and female slaves in particular, was referred to in non-Qur'anic texts as *milk al-yamin* ("ownership by the right hand"), and the same phrase was used to denote the slaves themselves ("property of the right hand"). Unfree women were also called *ama*<sup>3</sup> (female slave), *jariyya* ("slave girl;" also sometimes used for a young girl), and *suriyya*.<sup>4</sup> The latter term especially was used for concubines, those slaves with whom their masters maintained special sexual relationships. Concubines often received additional privileges – better quality food and clothing, and usually exemption from duties of household service – and were subject to additional restrictions, usually related to keeping them exclusively available to their masters. The status of concubine was informal, however; law and custom allowed a master to have sex with any of his (unmarried) female slaves. It was also insecure: a concubine could be freed and married by her owner, or she could be sold off, so long as he had not impregnated her.

While the Qur'an accepts the notion of men's sexual access to some unfree women – whose social, if not legal, status may have been ambiguous, according to Ingrid Mattson<sup>5</sup> – it does not explore the possibility of large-scale concubinage, nor was such practiced in the first Muslim community. Some modern authors have argued that only through marriage did sexual access to captive or enslaved women become permissible, but this is not the view that the medieval jurists took, nor, if one accepts the hadith sources as historically accurate, was it the practice of the first Muslim community; records show that the Prophet as well as a number of Companions and Successors had a concubine or two. However, after the Arab conquests of the seventh and eighth centuries, when the wealth of the Muslim elite increased dramatically, rulers mimicked their non-Muslim

Sassanian predecessors, keeping dozens if not hundreds of female slaves, of whom many were used for pleasure.

The widespread availability of female slaves as sexual objects had dramatic implications for the development of Muslim thought on sex and marriage,<sup>6</sup> even if, in practice, the “harem” culture of the elite bore little resemblance to the practices of the majority of the populace. Prominent eighth-century jurist al-Shafi‘i voiced the consensus legal view when he stated that a man could take as many concubines as he wished, since God did not restrict this in any way, while God forbade taking more than four wives.<sup>7</sup> This sentiment was conventional juristic wisdom for a millennium, as evidenced by the remarks of Hanafi Mufti of Damascus, Muhammad ‘Ala al-Din Haskafi, in the late seventeenth century, to the effect that suggesting that a man with a thousand concubines should not take another was tantamount to unbelief.

Though large-scale ownership of female slaves for sexual use was an elite-only practice, slavery was a social fact in most of the Muslim world with many slaves employed in domestic service as well as commerce from origins of Islam until abolition was decreed in the late nineteenth and twentieth centuries. Large-scale agricultural slavery, like the plantation slavery of the U.S. South, was seldom practiced in the Muslim world.<sup>8</sup> This was not due to any prohibition against such forms of slave labor, but rather to economic and geographical factors. This does not mean that Islamic slavery was not harsh, as some apologists have argued, or that masters were not sometimes brutal to their slaves. Paradoxically, slavery did not always equal low social status. In medieval Egypt, the Mamluk (literally, “owned”) dynasty ruled for some time, with manumitted military slaves rising to govern others. The conscript slave troops (janissaries) of the Ottomans are another example. Most striking is the case of the royal concubines who wielded tremendous influence and amassed considerable wealth in the later centuries of the Ottoman empire.<sup>9</sup>

Slavery in Muslim societies was not merely a medieval practice; it has lingering contemporary effects, especially in certain parts of Africa and the Gulf states, regions that were the

world's last to outlaw slavery, with Saudi Arabia becoming the final nation to do so in 1962. Vestigial effects of domestic slavery persist in certain Gulf nations in the failure of police and lawmakers to protect immigrant household workers against potential abuses by employers.<sup>10</sup> Female "guest workers" employed as maids and nannies have little recourse against sexual coercion or harsh beatings; in some cases, those who have escaped and sought refuge with police have been forcibly returned to their abusive employers.<sup>11</sup> Such women are not legally enslaved, and they generally receive compensation for their work that differentiates their situation from that of those in debt bondage.<sup>12</sup> However, because of the acceptance of controls on their mobility (employers often take their passports), and the refusal of law enforcement officials to respond to complaints of maltreatment, they are particularly vulnerable to abuse. In some African nations such as Mauritania, actual slavery continues despite repeated declarations of abolition, the last in 1980; according to one recent report, 90,000 black Mauritians remain essentially enslaved to Arab/Berber owners. In the Sudan, Christian captives in the ongoing civil war are often enslaved, and female prisoners used sexually, with their Muslim captors claiming that Islamic law grants them permission.<sup>13</sup>

Islamic law is not the only salient frame of reference in these cases, though, even if it is sometimes used as justification for enslavement and slaveholding. Although premodern jurists permitted slavery without qualms, they absolutely forbade the enslavement of other Muslims. Contrary to this principle, Muslim captives, usually from other ethnic groups, are sometimes enslaved in ongoing civil or tribal conflicts; Mende Nazer, a Sudanese Muslim, recounts her own experiences of capture and enslaved domestic labor in the Sudan and the U.K., where she eventually escaped her captors, in a chilling memoir.<sup>14</sup> Though most common in Africa, it occurs elsewhere; one scholar has suggested that among the Taliban's "atrocities" toward Afghani Shi'a was "the enslavement of Hazara women as concubines."<sup>15</sup>

The existence of actual and quasi-slavery is by no means unique to the Muslim world; slavery and slavery-like practices are found in numerous nations world-wide.<sup>16</sup> Further, they are

not found everywhere in the Muslim world; rather than “Islam” being the cause, there are specific socio-economic and political factors that help to account for their existence. Still, the claiming of religious justification for slaveholding in some of these cases makes them particularly urgent to address. Although the vast majority of contemporary Muslims agree that there is no place for slavery in the modern world, and some nineteenth- and twentieth-century reformers such as Sir Sayyid Ahmad Khan opposed the practice, the pressure to abolish slavery generally came from some combination of European colonial powers and economic and demographic shifts.<sup>17</sup> A few Muslim clerics, such as one writing in the mid-nineteenth-century Arabian peninsula, opposed abolition on the grounds that slavery was accepted in religious texts.<sup>18</sup> Similarly, one scholar argues “that slavery enjoyed a high degree of legitimacy in Ottoman society. That legitimacy derived from Islamic sanction,” among other factors.<sup>19</sup> Although abolition did eventually occur, there was not a strong internally developed critique of slaveholding based in religious principles.

Modern Muslims, especially in the West, have devoted little attention to thinking about or discussing the religious, ethical, and legal issues associated with slavery, resorting instead to apologetic and denial.<sup>20</sup> Yet slavery, in norm and practice, dramatically influenced the development of laws regulating marriage, divorce, and sex that many Muslims consider binding today. The existence of slavery during Islam’s early centuries resulted in a complex set of linkages between marriage and slavery in Islamic law, both seen as forms of ownership, *milk*, that legitimized sex (in the case of slavery, only when the owner was male and the owned, female). Classical texts are replete with analogies between dower and purchase price, and divorce and manumission.<sup>21</sup> These seldom acknowledged interrelationships continue to affect regulations and mindsets surrounding marriage, divorce, and sex. The once ubiquitous conceptual vocabulary of ownership or dominion (*milk*) applied to slavery is seldom used today to discuss marriage, and the previously common parallels between husbands and masters as well as wives and slaves have largely disappeared from learned discourse. The

sexual ethics forged in slaveholding contexts, however, continue to be influential in ways that are often not fully understood. Understanding the historical and legal dimensions of Muslim slavery, particularly as regards sexual access, is a necessary precursor to thinking through an ethics of sex. Reconsidering slave concubinage raises larger issues of the universality of revelation as well as substantial theological issues related to theodicy and whether justice can be historically and culturally relative.

*Islam and slavery: overview of sources and history*

The Qur'an makes numerous references to unfree persons – servants, captives, and slaves. These categories are not mutually exclusive, and frequently overlap.<sup>22</sup> Like numerous passages in the Hebrew bible and the New Testament, the Qur'an assumes the permissibility of some individuals owning or controlling others – “what their/your right hands possess” – which was an established practice in Arabia before its revelation. The Qur'an does not explicitly condemn the practice of slavery or attempt to abolish it. Nonetheless, it does provide a number of regulations designed to ameliorate the situation of those owned. It recommends freeing slaves, especially “believing” slaves,<sup>23</sup> a mode of classification that presumes sufficient personhood on the part of those owned to have individual faith. Manumission of a slave is required as expiation for certain misdeeds.<sup>24</sup> Another verse discussing emancipation involves the initiative and qualities of the enslaved person, not merely the piety or expiation of the owner, stating that masters should allow slaves who demonstrate some good to purchase their own freedom.<sup>25</sup> Jurists disagreed over whether this verse obliged a slave's owner to grant such a request or merely recommended such action, but clearly slavery was not always considered to be a permanent state for an enslaved individual.

The Qur'an also suggests certain means of integrating slaves, some of whom were enslaved after being captured in war, into the Muslim community, with special attention to interpersonal relationships. It allows slaves to marry other slaves or

free persons<sup>26</sup> and prohibits owners from prostituting unwilling female slaves.<sup>27</sup> Despite this protection against one form of sexual exploitation, female slaves were not granted an absolute right to control sexual access to their own bodies. Rather, the text indicates that men may have lawful sexual access to “what their/your right hands possess.”<sup>28</sup> On several occasions, the Qur’an mentions this category alongside “wives” or “spouses” as being those to whom sexual access is licit, thus making clear both the distinction between the two groups, who are mentioned separately, and their joint status as lawful sexual partners. (Although in some instances these references are gender-neutral, the possibility that such verses permitted women’s, or for that matter men’s, access to male captives or slaves was never seriously countenanced.)

In the first generations of Muslims, there was ambiguity and variability in status among unfree women, with less clear differentiation between the pre-Islamic category of captured wives and the Islamic category of female captives taken as war booty and subject to sexual use.<sup>29</sup> The hazy distinctions among those classified as “what your right hands possess” were subject to refinement over time. The classical jurists elaborated significantly on the Qur’anic material concerning slavery, drawing on the practice of the Prophet and the first Muslims as well as on the customs of conquered areas, as the Muslim empire expanded and solidified under the Umayyads and subsequently the Abbasids. Legal works from that era regulate the enslavement of war captives along with the purchase and sale of slaves. While it was decidedly forbidden to enslave other Muslims, if a non-Muslim converted to Islam after enslavement, he or she remained a slave and could be lawfully purchased and sold like any other slave. (This rule, justifiable on the basis of the Qur’anic praise of freeing “believing” slaves – meaning, the simple fact of belief does not itself free the slave – closes a potential loophole allowing for slaves to gain their freedom through conversion.) The jurists also prescribed penalties for slave owners who maltreated or abused their slaves, up to and including forced manumission of the slave without compensation to the owner.

Regulations for slave marriage and concubinage also developed over time, with special emphasis on rules to determine the paternity and/or ownership of children born to a female slave. A man could not simultaneously own and be married to the same female slave.<sup>30</sup> The male owner of a female slave could either marry her off to a different man, thus renouncing his own sexual access to her, or take her as his own concubine, using her sexually himself.<sup>31</sup> Both situations had a specific effect on the status of any children she bore. When female slaves were married off, any children born from the marriage became slaves belonging to the mother's owner, though her husband was established as their legal father. When a master took his own female slave as a concubine, by contrast, any children she bore would be free and legitimate, with the same status as any children born of a free wife. The slave who bore her master's child became an *umm walad* (literally, mother of a child), gaining certain protections. Most importantly, she could not be sold and she was automatically freed upon her master's death. These guidelines for the *umm walad* were not set forth in the Qur'an; they are frequently attributed to the caliph 'Umar, though the Prophet's precedent in freeing Mariyya after she bore him Ibrahim (who died in infancy) was, no doubt, influential.<sup>32</sup>

Mariyya al-Qibtiyya, or Maria the Copt, appears in most premodern sources as a slave (*ama* or *jariyya*) owned by the Prophet. Many twentieth- and twenty-first-century works authored by Muslims object to this portrayal, implying or outright declaring that she was his wife. Take Henry Bayman's emphatic rejection of the view that Muhammad owned a concubine: "[T]he Prophet was *legally married* to all his wives, even to slave girls with whom he was presented. In Islam, not multiple marriages but illicit sex – pre- or extramarital fornication and adultery – is immoral. Islam limited the number of female consorts to four (but recommended one), and with this the proviso that all were brought under the protective umbrella of legal marriage."<sup>33</sup> Bayman's statement is circular: by definition, Muhammad was married to his wives; it is only through marriage that a woman becomes a wife. He means, presumably, that Muhammad was married to all the women with whom he

had sex. Bayman thus connects the subject of concubinage to broader questions about sexual morality in Islam: by insisting that Muhammad did not simply have sex with “slave girls,” and associating marriage with both lawfulness (“legal marriage”) and protection (“protective umbrella”), Bayman claims Islamic superiority in matters of sex. His assertion, though, confronts major logical difficulties. He must either ignore the Sunni and Shi‘i legal traditions’ permission for slave concubinage and the hadith evidence showing that the Prophet’s companions (if not the Prophet himself) had sex with female captives and slaves, or he must deem both legal doctrine and Muslim history to fall outside the scope of “Islam.”

There is less revisionism and apology on the issue of slave concubinage in works not written, or intended for consumption, by Westerners – Muslim and non-Muslim. Still, it is almost unimaginable today by many Muslims that a sexual relationship between a man and a female slave bound to him only by the tie of ownership and not matrimony could be legal, much less moral. And yet, since the Prophet is the standard for morality, the exemplar of uprightness, the question of his actions – both personal and as a leader of Muslims – takes on importance.

### *Women, war captives, and withdrawal*

Despite its intrinsic importance, in the absence of agreed upon criteria for approaching the matter of prophetic *sunnah* on the enslavement of war captives and the ownership of slaves, authors usually bypass the troublesome topic in silence. At times, however, such silences scream for attention, as with Ghazi Algosaibi’s presentation of seven hadith with brief commentaries under the title *Revolution in the Sunnah*. Algosaibi – a Saudi who has published in a variety of literary genres, in addition to serving in various government posts – covers topics ranging from “Integrity in Political Life” to “Prevention of Cruelty to Animals” in this volume, translated into English and published in the U.K. Three of the seven deal in some significant way with women: “Women’s Role in Society (and in the Military!);” “The Rules of

Proof Safeguard Rights,” which has to do with witnesses to illicit sex; and, my concern here, “Family Planning.” Although ostensibly concerned with the “revolutionary” words and deeds of the Prophet, in order to focus on these themes Algosaibi ignores other elements in the stories he tells that are deeply troubling for those Muslims committed to a view of Muhammad as inerrantly just and protective of the weak and defenseless.

*Revolution in the Sunnah* is a fitting title for his book, Algosaibi explains, because the hadiths he recounts were revolutionary in their original Arabian context, and “continue to represent a real ‘revolution’ against the outmoded and discredited practices prevailing in these areas of life in some, if not the vast majority of, Muslim countries.” By making a distinction between “Islam” and “culture,” although not in so many words, Algosaibi’s objective is to prove that instead of “need[ing] to import reform from abroad,” Muslims can find the necessary resources for reform within Islam, “provided the opportunistic selectivity with which Islam is practised in Muslim countries is brought to an end.”<sup>34</sup>

Algosaibi’s objection to “opportunistic selectivity” is ironic, given that he displays precisely that quality in his discussion of the hadith that he chooses to illustrate his point about family planning. Quoting on the authority of “Abu Said al-Kh[u]dri:”

We went out with The Messenger of Allah (pbuh) on the expedition to the Bani al-Mustaliq and captured some concubines<sup>35</sup> [as part of the spoils]; and we desired them, for we were suffering from the absence of our wives, and we wished to have sexual intercourse with them, observing ‘*azl* (*coitus interruptus* [...]). But we said: “We are doing an act before asking the Messenger of Allah who is amongst us?” So we asked the Messenger of Allah, and he said: “It does not matter if you do not do it, for every soul that is to be born up to the Day of Resurrection will be born.”<sup>36</sup>

The Prophet’s reported words here are sometimes reported with slight variation in other versions of this story;

sometimes he affirms that no soul that God has decreed to come into existence will be thwarted. Muslim scholars debate back and forth over whether the Prophet’s words mean one may practice withdrawal, but should not, or whether they grant permission without taint of disapproval, serving only as a warning that conception may occur despite the measure taken to avoid it. The moral status of withdrawal as an act was of significant enough concern to the victorious Muslim combatants that they asked the Prophet about it. The permissibility of sex with the captive women was taken for granted by all the men involved, including the Prophet himself. (There is no indication what the captured women thought, or the wives of the men involved.) Not only do the Prophet and the soldiers ignore the question of the women’s consent or lack thereof, but so does Algozaibi, focusing solely on contraception in his discussion of this hadith.<sup>37</sup>

The issue of female captives and their treatment cannot always be ignored in such a glaringly obvious way. When directly confronted, in a polemical context, with historical and textual permission for the sexual use of unfree women, Muslim authors sometimes respond defensively, seeking to protect Islam’s reputation. It may be argued, for instance, that Islamic “slavery” bore no resemblance to harsh American chattel slavery. In this view, the Qur’anic permission for men to have sex with “what their right hands possess” was merely a way of integrating war captives into society. Sometimes, it is added that the captives would be “integrated” into the Muslim community through becoming the property of a specific man who would be responsible for them and their offspring. Whatever merit these arguments have in the context of inter-communal polemics and apologetics, however, they are insufficient for internal Muslim reflection. In particular, the notion that women would be integrated into society by bearing offspring to their owners or captors does not apply to the case of the Bani Mustaliq: the rationale for the captors to practice withdrawal, according to other accounts, is that they did not want to impregnate the women lest they spoil their chances to ransom them.<sup>38</sup>

This provision of a rationale incompatible with the scenarios represented in the historical sources is one instance of a

larger phenomenon of attempting to make sense of instances where Prophetic *sunnah*, classical jurisprudence, and modern notions clash. Attempting to assess an event such as the capture of women from the Bani Mustaliq (assuming one accepts the historical record as provided by Bukhari's account) by the standards even of later jurisprudence causes difficulties as "some traditions ascribe to the Prophet actions that appear to be incompatible with the opinion prevalent in later sources."<sup>39</sup> How can one reconcile Abu Sa'id al-Khudri's account, for example, with the later insistence of Muslim jurists that any time a man came into possession of a captive or slave, he had to wait until she had a menstrual period before having intercourse with her, in order to determine whether she was already pregnant?<sup>40</sup> The Prophet's reported permission for the Muslim captors to practice withdrawal with their female captives does not take any notice of this point. It has been suggested that the fact that the Prophet's reported action does not take account of the need for a waiting period is evidence that Abu Sa'id al-Khudri's account is wrong; the Prophet could not have allowed the men sexual access to the captives. This apologetic account seeking to deflect the accusation of impropriety makes the error of assuming that later legal doctrine cannot impose a requirement that was not grounded in the Prophet's actions. As an historical point, just because the jurists required something does not mean that the Prophet did it; likewise, just because the jurists allow something does not mean the Prophet did. Still, another hadith included by Abu Dawud in his Book of Marriage records the purported words of the Prophet in asserting that men must wait to have sex with captive women until they have menstruated once, and still others forbid men to have sex with women pregnant by other men. A similar issue arises regarding the religion of the captive women, who were likely to be from among the pagan Arabs. Later jurists state quite clearly that only Christian and Jewish (and perhaps Sabeian or Zoroastrian) captives or slaves were permissible as sexual partners.

Nonetheless, questions about the religious affiliation and menstrual status of the female prisoners pale in comparison to the larger issue at stake: what does it mean for those who view

the Prophet’s actions as exemplary to accept that he tacitly allowed the rape of female captives? Is it correct to refer to the actions of the Muslim soldiers as rape, or does that term have connotations that are contextually inappropriate? Does the fact that “marriage” by capture was a common Arab custom at the time make his actions intelligible? Acceptable? Finally, assuming one accepts that the accounts in Bukhari, Muslim, and other hadith compilations are essentially accurate, what are the implications of the Prophet’s action for the contemporary world? Is his precedent binding or is it to be understood as limited to the particular circumstances of his time and place?

There is general silence on these questions and their broader implications in Muslim scholarship. Algoşaibi mentions the incident in passing, under the title “Family Planning,” without any analysis or acknowledgement of its significance for matters beyond contraception. Other influential works treat the issues of slavery differently, but no more satisfactorily. For instance, in his 1991 translation of the classic Shafi‘i work *Reliance of the Traveller*, Nuh Keller excises nearly all mention of slavery from the English text, leaving it, bracketed off, in the parallel Arabic discussions of marriage, divorce, and other social transactions.<sup>41</sup> The translation carries no ellipses or notation that something has been removed. As a result of this editorial sleight of hand, the importance of slavery to the medieval Middle Eastern context in which this text originated simply disappears. By way of rationale for these frequent changes, Keller affirms in his introduction that “Not a single omission has been made from it” – that is, the Arabic text – “though rulings about matters now rare or non-existent have been left untranslated unless interesting for some other reason.”<sup>42</sup> A specific reference to the missing material on slavery comes in place of a translation of the chapter on manumission: “Like previous references to slaves, the following four sections have been left untranslated because the issue is no longer current.”<sup>43</sup> Keller thus suggests that the regulations on slavery, a now obsolete social institution, are somehow separable from the rest of the work; the other rules contained in this “Classic Manual of Islamic Sacred Law,” as the translation’s subtitle proclaims, are directly relevant to the lives of contemporary Muslims.

A different approach, utilized by the official Saudi fatwa council as well as some other twentieth- and twenty-first-century jurists, has been to reiterate classical doctrines as though slavery had never been abolished by national governments. In their responses to legal queries – which have influence far beyond Saudi boundaries, through online distribution and subsidized translations into European languages – they maintain references to slavery throughout, just as their medieval counterparts would have. Evaluating the conditions making polygamy permissible, the late Saudi mufti Ibn Baz stated that “If a person fears that he will not do justice [between wives], then he may only marry one wife in addition to having slaves.”<sup>44</sup> Though seemingly the opposite of Keller’s strategy of excision, this rote inclusion of material presuming the existence of slavery (even when slavery was not even mentioned in the original question) demonstrates the same unwillingness to engage with the basic problem at hand: how does one reconcile the presumption of slaveholding in Qur’an, hadith, and classical jurisprudence with the contemporary reality of the Muslim world where legal slavery no longer exists? Although the vast majority of Muslims do not consider slavery, especially slave concubinage, to be acceptable practices for the modern world, the reticence to confront the juristic, as well as social, legacies of slavery has resulted in blindness to the hierarchical residue of its practice to Islamic gender relations more broadly, and to marriage and sexual relations in particular.

### *Conclusion*

I have repeatedly referred to the scriptural and legal acceptance of slavery as something troublesome to the vast majority of contemporary Muslims, when it is thought about at all. Because of the repugnance with which slavery is viewed, arguing that other matters are linked with, or analogous to, slavery creates an opening for Muslims to think differently about them. I claim no originality for this tactic; Fazlur Rahman applied it to good effect at least two decades prior to this writing, when he compared

slavery to polygamy.<sup>45</sup> Both, he argued, were institutions that it was impossible to eradicate at once but which were harmful and which God intended to abolish, even if one had to follow indications of a trajectory toward abolition in the Qur’an rather than its literal words. Treating the Qur’an as a document with some verses bound by context, but others containing broad principles of justice that should take precedence over specific, time-bound commands, is one essential element of feminist and other reformist interpretation of scripture. For many ordinary Muslims, particularly those for whom slavery is distant history, it is simple common sense. This should not, however, be mistaken for the view that it is “obvious” that Islam disallows slavery, and that it was always meant to be abolished.<sup>46</sup> The insight is more powerful if one acknowledges that abolition was not a forgone conclusion, but rather the result of both non-religious historical processes and interpretive choices by individuals. Indeed, even today some scholars insist that although the specific circumstances making slavery permissible may have ceased to exist – i.e., there is no legitimate caliph to declare jihad and divide the spoils of war, or that Muslim nations have signed international treaties agreeing to prohibit slavery – that it is nonetheless unacceptable to declare slavery forbidden. To do so, they argue, constitutes a sin, because one is declaring unlawful something permitted by God.

Muslim thinkers who reject slavery as unjust have applied two main methods to argue that this rejection of slavery is based in the Qur’an. First, some suggest that the abolition of slavery is implicit in the Qur’anic message, and Muslims simply did not see it before, being blinded by their social circumstances. Mohamed Syed’s stance that sex with captive or unfree women was always forbidden without marriage, and that legal permission for sex with *milk al-yamin* was the result of the jurists’ misinterpretation, applies this perspective on a smaller scale.<sup>47</sup> Second, developing Rahman’s methodology, others have argued for a trajectory from hierarchical institutions to more egalitarian ones, from acceptance of slavery to its abolition: the practical limitations of the Prophet’s mission meant that acquiescence to slave ownership was necessary, though distasteful, but meant to

be temporary. Fatima Mernissi makes a parallel argument that the Prophet's compromises regarding husbands' rights to control their wives were similarly necessary accommodations with patriarchal power in the interests of ensuring the success of Islam.<sup>48</sup> Both perspectives contain valid points: the presuppositions of interpreters matter a great deal in implementation (or lack thereof) of the Qur'an's precepts; and there is evidence that in some instances the Qur'an accommodates or gradually prohibits certain practices that God and/or Muhammad might have preferred to abolish immediately (e.g., consumption of alcohol). However, neither of these approaches is sufficient if one does not take the responsibility of individual interpreters seriously.

An approach to revelation that takes both propositions seriously allows one to interpret scripture without being bound by the assumptions of previous generations of exegetes who accepted male superiority and other social hierarchies, including slavery, without question. Additionally, one can see certain passages and Prophetic *sunnahs* as gestures in the direction of egalitarianism, capable of full realization only in a world where equality and freedom are common shared values. Yet neither of these approaches engages the critical, and critically difficult, question: where is God's justice in permitting slavery in the first place, if slavery constituted an injustice and a wrong in the seventh century, just as it would and does in the twenty-first century? And if it did not constitute an injustice and a wrong in the seventh century in God's eyes, then on what basis may anyone subsequently declare it unjust without rendering divine justice subordinate to the vagaries of human, and therefore inherently flawed, moral sensibilities?

A full consideration of questions about God, history, and justice would require delving further into philosophy and theodicy than I dare attempt; these issues have preoccupied many generations of theologians and I make no pretense of resolving them here. I raise them, though, because although generally omitted from feminist reflections on Qur'an, *sunnah*, and law, these theological questions are deeply relevant to larger issues of ethical definition.<sup>49</sup> How can one reconcile God's

justice and goodness with the injustice of slavery, or does viewing God as just and good necessitate acceptance of slavery as part of the divine plan for humanity? To my mind, a proper response involves two propositions, each of which places a great deal of responsibility on individual Muslims. First is the view that while God is responsible for the just and the good, and guides human beings accordingly, injustice and oppression (*zulm*) come from human beings; imperfection is inevitable once one accepts the complicated possibility of human free will.<sup>50</sup> Second is the distinction noted by theologians between legal justice, where human beings are “commanded to observe a minimum standard of duties,” and ethical justice, which “is justice in accordance with the highest virtues which establish a standard of human conduct.”<sup>51</sup> Combined with the view that historical developments render certain specific regulations irrelevant, these notions make reform more attainable at the same time as they place a greater burden on human beings to achieve it. God clearly orders Muslims in the Qur’an to combat injustice and oppression yet simultaneously permits institutions such as slavery. Outside of accepting that slavery is a just and therefore not problematic practice (or insisting, against the clear sense of the text, that the Qur’an never actually allowed it), the only possible response is to suggest that the Qur’anic text itself requires Muslims to sometimes depart from its literal provisions in order to establish justice.

## 4 Prohibited Acts and Forbidden Partners: Illicit Sex in Islamic Jurisprudence

Women have an Islamic right to exemption from criminalization or punishment for consensual adult intercourse.

Asra Nomani, “Islamic Bill of Rights for Women in the Bedroom,” 2005<sup>1</sup>

The woman who commits *zina* and the man who commits *zina*,  
lash each of them one hundred lashes.  
Do not let pity deter you in a matter ordered by God,  
if you believe in God and the Last Day  
Qur’an, Surah 24, verse 2

Sex is, paradoxically, both the most private, intimate act humans can undertake and a profoundly social activity. All societies and cultures regulate sexual activity among their members. Certain pairings are permissible, while others are not; some acts are approved, while others are disallowed. Muslims are not alone in making distinctions between what is lawful and unlawful, what is proper and improper. Nor have Muslim societies historically been unique (or uniform) in imposing consequences, including physical chastisement, on those who break the rules. However, although the particular configuration of licit and illicit sexual activities developed by classical Muslim thinkers from prescriptions in the Qur’an and *sunnah* shares certain elements with other cultures and traditions, it differs in crucial ways – in particular, in punishing men and women equally for failure to heed the limits.

The Qur’an speaks in scathing terms of sex outside lawful bounds – with a spouse or with what one’s “right hands possess” – as corruption and sin, and repeatedly refers to chastity (literally, protecting one’s genitals) as a virtue for both males and

females.<sup>2</sup> *Zina*, sex between a man and a woman who is neither his wife nor his slave, was the most serious of the sexual transgressions described in the Qur'an and treated in the Prophet's *sunnah*. One critical component of *zina* as elaborated by Muslim thinkers is its consensual nature, although some thinkers categorized regular *zina* along with "zina by force" (*bi'l-jabr*). The free consent of two individuals to engage in sexual relations was not sufficient or even necessarily relevant to whether sex between them was licit and socially acceptable. Like ancient Near Eastern and Mediterranean codes, Muslim source texts and developed Islamic law held the view that the individual status of and legal relationship between two parties determined whether sex was licit. Were the individuals free or enslaved; married, previously married, or never married; were they male or female?

The particular configuration of lawful and unlawful acts formulated by premodern Muslim jurists does not match current laws or practices in Muslim-majority societies or among Muslims living in the West. That classical scheme, in keeping with common practice in the region at the time, accepted (non-consensual) sex with enslaved females, as well as the marriage (without consent) of male and female minors by fathers; laws today forbid both slavery and marriage of minors (although the definition of minority varies greatly).<sup>3</sup> The view "that consent makes a difference to whether some sexual activity is seen as immoral or not"<sup>4</sup> is widely shared. Most Muslims who espouse the view that consent matters do not phrase their views as categorically as American Muslim writer Asra Nomani does in stating that "consensual adult sex" should not be punishable. Rather, consent is often seen as necessary but not sufficient for sex to be lawful. Classical Muslim views about consent and its relationship, or lack thereof, to lawfulness were unremarkable in the context of broader Near Eastern and Mediterranean late antiquity, where even free women could be treated as sexual property in some sense, and familial participation in the marital arrangements of family members, especially girls, was expected. At the same time, a variety of semi-marital arrangements, including slave concubinage and temporary liaisons, were sometimes permissible, allowing some more fluid unions.

Over a thousand years later, legal concubinage no longer exists in the Muslim world, polygamy has been legally restricted in many places, and nation-state bureaucracies have become involved in marriage licensing and registration. At the same time, alternate marriage and marriage-like practices are emerging or re-emerging in various places in the Muslim-majority world. These include *mut'a*, a form of time-limited marriage approved by Shi'i law but occasionally engaged in by Sunnis in the West; *zawaj al-misyar*, "marriage in transit," a type of union which conveys more limited spousal claims than usual and has found approval from some Saudi muftis; and *zawaj 'urfi*, "customary marriage," as practiced particularly in Egypt. This last, a religious marriage not registered in accordance with civil law, is similar in numerous respects to the practice common in some European immigrant and African-American communities of marrying in only religious ceremonies without seeking civil recognition. The rise in these informal marriage practices, as well as what is likely to be a rising incidence of sex outside of marriage, is attributable in part to a large and increasing gap between sexual maturity, beginning at puberty, and social maturity, the age at which it is socially reasonable to get married. This does not mean that illicit sex (premarital intercourse, extramarital liaisons, etc.) was unknown in the past or is not practiced in Muslim majority societies today, often without discovery or punishment.<sup>5</sup>

The rising age of marriage for both male and female Muslims in numerous societies means that alternate forms of sexual liaisons are gaining ground de facto, notwithstanding the continuing importance of female virginity in many communities. Yet there is a general unwillingness on the part of many Muslims to confront the existence of sex outside of marriage. This reluctance is due in part to a well-integrated principle of comportment that forbids broadcasting one's own sins and requires covering up sins of others. It does not allow for serious consideration of how Muslims' sexual practices have shifted, how modern notions about the importance of consent makes a flat prohibition on all non-marital sex seem less sure to some Western Muslims, and how practical matters such as the

intersections between religious and civil marriage are to be addressed in modern nation-states, especially those where Muslims are a minority.

As a prelude to discussing contemporary Muslim thinking on non-marital sex, this chapter will address the classical definitions of licit and illicit behavior, and the rewards and punishments associated with each. The regulatory attention of the classical jurists was not limited to illicit activities but also encompassed even lawful sexual activity, such as between spouses.<sup>6</sup> In notable contrast to the hyper-attention on the imposition of penalties for illicit sex in some Muslim contexts today, where the enforcement of *hadd* punishments stands as a symbol of Islamic authenticity, the response of premodern jurists to unlawful sex was generally pragmatic regulation rather than dogmatic insistence on punishment for offenders. It is clear from both what is explicit and what remains unarticulated in their texts that various types of unlawful sexual activity have always been practiced in Muslim societies. Jurists and judges accepted *hadd* punishments in principle, but – at least in part because the rules of evidence made proving a charge of *zina* no small matter – frequently assumed that instances of illicit sex would go unpunished by human authorities.

Just because *zina* went unpunished did not mean, though, that there were no earthly legal consequences to intercourse outside of marriage. The effects of *zina* were regulated as part of the jurists' broader treatment of Muslims' sexual behavior, and the legal effects of lawful and unlawful sexual encounters often overlapped. The view that any sexual act merits either "payment or punishment" explains both the requirement of marriage, with dower (or purchase, in the case of a female slave), and the possibility of transmuting punishment by treating an impermissible sexual act as a mistake, for which the woman involved would receive compensation in the amount of her fair dower. Such "mistakes" also allow for the imputation of paternity, which illicit relations do not. The boundary (*hadd*) between lawful and unlawful remains unchallenged, but in practice, specific acts are not always so neatly categorized.

*Protecting chastity: the classical texts*

According to Qur'anic passages, hadith narratives, and the works of jurists and exegetes, lawful sex – that is, approved acts between partners who are legally permitted to one another – is good, healthy, and praiseworthy as a divinely approved form of pleasure. Unlawful sex – where the partners are forbidden to one another or, to a lesser extent, the specific acts engaged in are disapproved<sup>7</sup> – is reprehensible, the cause of social chaos and personal sin, and deserving of earthly punishment as well as divinely wrought chastisement in the hereafter. Several hadith, found in *Sahih Muslim* among other sources, illustrate both the naturalness of sexual desire and the importance of its satisfaction only within licit contexts. Muslim presents these accounts of the Prophet's words and deeds under the heading "He who sees a woman, and his heart is affected, should come to his wife, and should have intercourse with her." The accounts, reported by Jabir b. 'Abdullah, state that Muhammad "saw a woman, and so he came to his wife, Zainab, as she was tanning a leather and had sexual intercourse with her." In the most detailed report, the Prophet subsequently advises his Companions that "When a woman fascinates any one of you and she captivates his heart, he should go to his wife and have an intercourse with her, for it would repel what he feels."<sup>8</sup>

From this account and other similar narrations scholars have deduced that a man is not to blame for becoming aroused by a woman to whom he has no lawful sexual access – provided he does not deliberately seek out such stimulus; another relevant piece of advice attributed to the Prophet states, translated freely, "The first look is free, but the second one will cost you."<sup>9</sup> Seeking satisfaction due to that arousal is not only permissible, but recommended: a man in that situation should follow the Prophet's example and return home to have intercourse with his wife. The Prophet is also reported to have said that a man will be rewarded by God for acting thus. When questioned by an incredulous companion as to why God would reward him for such a pleasurable activity, the Prophet responded by asking whether God would punish him for satisfying his desire unlawfully. Just as the

illicit satisfaction of desire is punishable, Muhammad explained, so the lawful satisfaction of desire is rewarded. Female desire, it must be noted, makes no appearance in these traditions, which presume both the wife's availability and her acquiescence, not to mention her interchangeability: desire sparked by one woman could be easily satisfied with another.

Islamic definitions of lawful and unlawful sexual activity shared a double-standard governing male and female sexual behavior with other ancient legal systems (Greek, Roman, and biblical). A Muslim male could have more than one licit partner – up to four wives and an unlimited number of slave concubines (and for Shi'i men, an unlimited number of *mut'a*, or temporary, wives) – while a Muslim female could only be sexually lawful to one man at a time, either her husband or, in the case of an unmarried female slave, her master. However, the scope of partners available to men under Islamic law was also restricted in a much more significant way than was the case in these other legal systems. Most obviously, male partners, entirely legal under Greek and Roman (though not biblical) law where the males in question were slaves or social inferiors, were prohibited under Islamic law.<sup>10</sup>

Muslim rules governing sex between men and women were also more stringent in key respects than those of other ancient societies, which tended to punish men for sexual contact only with virgin or married women whose sexuality was under the control of a father or husband. Under ancient Greek law, "The only officially forbidden fruit was the wife of another citizen."<sup>11</sup> Roman law likewise made a distinction for married men between being unfaithful and committing adultery; the more serious offense of adultery involved another man's wife.<sup>12</sup> Under rabbinic law, moral constraints governed the behavior of divorced or widowed women, but only offenses by or involving virgin, betrothed, or married women were punishable.<sup>13</sup> For a Muslim man, by contrast, any consensual sex with a woman who was neither his wife nor his *own* female slave constituted *zina*, the form of illicit sexual activity with which the classical Muslim jurists were most concerned. (There seems to have been some early tolerance for the lending of female slaves, but it was

ultimately not permitted by the established legal tradition.) Although a Muslim male's partners may have been numerically unlimited in theory, for non-elite men, without the resources to own slaves or marry a second wife, monogamy would have been the norm rather than the exception.

Despite the double standard with regard to the number of lawful partners men and women could have, as well as how much say they had in the initiation, continuation, and termination of those legal ties, there was no difference with regard to punishment for sex outside those ties. The Qur'an specifies one hundred lashes each for both the male and female participants in *zina*, if free, with half as many for enslaved offenders.<sup>14</sup> According to precedent attributed to the Prophet Muhammad, only enslaved or never-married offenders are to be lashed; free offenders who are or have been married<sup>15</sup> are subject to the harsher penalty of lapidation, stoning to death – a biblical punishment for a different sexual offense.<sup>16</sup> Islamic law links the more severe punishment of stoning to marital status rather than gender. Thus, if a never-married woman committed *zina* with a married or previously married man, she would be flogged and he would be stoned. The reverse would be the case if the woman was or had been married and the man was a bachelor. The jurists applied these criteria unfailingly, never suggesting that women should be subjected to harsher punishment than men for the same offense, or that a man's offense was lessened if the woman he bedded was not someone else's wife or betrothed.

Though these *hadd* punishments are clearly spelled out, the imposition of either penalty for *zina* requires stringent proof, generally either by witnesses or confession. The Qur'an requires the testimony of four eyewitnesses<sup>17</sup> whom the jurists specify must be adult, male, Muslim, and able to testify to having seen the actual act of penetration; describing what the testimony must include, they use analogies such as a key going into a lock, or a pen dipping into an inkpot. Harsh punishment is to be meted out to those who accuse a woman of unlawful intercourse but cannot produce three additional witnesses to her crime. Such accusers become themselves guilty of the *hadd* crime of slander (*qadhf*) and are liable to flogging – eighty lashes, according to Surah 24,

verse 4, almost as severe as what is specified for the crime of *zina* itself. Confession can also prove a charge of *zina*. Although the Qur'an does not mention this form of proof, a number of *hadith* report the Prophet punishing offenders on the basis of their own confessions – which, tradition makes clear, he discouraged them from making.<sup>18</sup> For the most part, the tradition literature and the jurists' writings demonstrate a real aversion to both accusation – at least some of which can be attributed to the Qur'anic punishment for unsupported charges – and confession.

Proof by witnessing or confession is equally applicable to men and women accused of *zina*, but one doctrine places women disproportionately in jeopardy of punishment. The dominant opinion of the Maliki school of legal thought is that pregnancy in a woman who is not currently married (or in her waiting period from divorce or widowhood) is *prima facie* evidence of *zina*. This view is not shared by the other legal schools, which hold that pregnancy does not provide the necessary degree of certainty that an unlawful act was committed. Even among the Malikis, the impact of the view that pregnancy is proof of *zina* was muted by the acceptance of a lengthy gestation period, up to four or five years, during which a pregnancy could be attributed to a previous husband. In fact, jurists and judges in premodern Muslim societies used a variety of legal maneuvers and excuses to thwart application of *hadd* penalties, even where the parties acknowledged having intercourse outside of a valid marriage. Because of the seriousness of *hadd* crimes and the severity of the penalties, it became an important legal principle that in cases of doubt, *hadd* punishments were to be dropped in favor of milder discretionary punishments. Two statements attributed to the Prophet favor this dropping of the *hadd*: “Avoid punishments so long as there is room for avoiding them” and “Keep the Muslims away from punishments wherever possible. If there is any way out for an offender to escape punishment acquit him. It is better for a judge to err in acquittal than in conviction.”<sup>19</sup>

The jurists' strict attention to seemingly unattainable evidentiary standards also firmly placed responsibility for judgment and punishment for *zina* squarely in the hands of the

public authority, rather than making it a matter for private retribution.<sup>20</sup> Numerous hadith found in both Bukhari and Muslim make clear that even if a man were to find his wife with another man, he could not take the law into his own hands, but rather would have to bring three additional witnesses to her act before the public authority could judge her offense. What about the case of a husband who witnesses his wife's adultery but cannot substantiate his claim with the necessary additional witnesses? In such a situation, the most he can do is deny paternity of a child his wife is carrying or has delivered, by proceeding with a series of mutual oaths, set forth in the verses directly following those on punishment for *zina*.<sup>21</sup> In the Qur'anic procedure known as *li'an*, he can disavow the paternity of his wife's child without being subject to the usual, nearly impossible to satisfy, requirements of proof for *zina*. However, she can defend herself against his accusations by taking four oaths that she is not guilty; then, their marriage will be dissolved and she will not be liable to punishment, but she will have sole care of the child – just as if it had been born from *zina*. Although a child born of *zina* is not himself or herself guilty of any wrongdoing, the existence of such a child is threatening to the stability of the system governing kinship and social interaction.

Marital intercourse is the paradigmatic sexual act in Islamic law. Its lawful nature does not exempt it from legal scrutiny; if anything, the opposite is the case. Sex within marriage has a variety of financial, social, and ritual consequences that require jurisprudential regulation. The first act of sexual intercourse in marriage obliges the husband to pay the wife her full dower, removes her opportunity to have the marriage dissolved on the basis of his impotence, creates kin prohibitions – that is, barriers which prevent each spouse from marrying certain close relatives of the other in the future, and obliges the wife to observe a waiting period if she is widowed or divorced. Every act of marital intercourse in which penetration occurs requires each spouse to complete a major ablution (*ghusl*) to re-establish ritual purity before he or she can pray. This list does not exhaust the legal consequences of marital sex, but it provides a starting point for considering how illicit sex compares in its legal effects.<sup>22</sup>

*Zina* differs in two crucial ways from lawful marital intercourse, aside from the issue of punishment. First, an obligation to pay dower never results from consensual unions outside of marriage. Second, any offspring of *zina* have no legal father. These twin issues of dower and paternal affiliation are the primary consequences of lawful sex between married partners (and exist, in modified form, in liaisons between owners and their concubines as well). There is one area, on the other hand, where it is uniformly agreed that *zina* does not differ from lawful marital sex: intercourse between forbidden partners makes ablutions necessary just as it does between spouses. When it comes to determining the other legal consequences of *zina*, however, the jurists disagree among themselves. Yet despite this disagreement, it is striking that they attend primarily to determining where and whether parallels between *zina* and marital intercourse exist, debating extensively over whether, for example, kin prohibitions are created by an illicit sexual encounter as they would be by marriage.

In making arguments about this issue, by and large the jurists do not discuss punishment at all, merely the question of whether kin prohibitions are established. To take one hypothetical case: does a man's wife become forbidden to him because he committed *zina* with her mother (as she would become if he consummated a marriage with her mother, even accidentally)? Since the man is married and thus, by juristic consensus, liable to be stoned to death for his offense, the issue of whether his wife becomes forbidden to him should be irrelevant. It does not matter if a man sentenced to death may or may not have intercourse with his wife, since carrying out the *hadd* punishment renders the issue moot. However, the ways in which jurists of all legal schools discussed this issue demonstrates that the *hadd* penalty was not their primary concern; in fact, the query essentially presupposes that the *hadd* will not be applied. Only if this is assumed does the question of whether the man may continue a marital relationship with his wife have any importance. This brief example shows that the jurists persisted in applying the traditional legal consequences of marital intercourse to illicit sexual acts as often as possible, in an attempt to encompass them

legally, and reduce their power to cause social havoc. Even when they decided that the same consequences did not apply, it was with these ordinary effects of unlawful sex that they largely concerned themselves, rather than with punishing offenders.

It is tempting for someone who wants to minimize the importance of *hadd* punishments to emphasize the jurists' matter-of-fact treatment of illicit sexual acts, but their detail-oriented attention to the banal consequences of otherwise forbidden sexual encounters should not be mistaken for tacit approval of those acts. The jurists' approach to dealing with sexual transgressions does not mean they did not, at other times, condemn them in the strongest possible terms. The pragmatic regulation of sex did not exist only with regard to acts that some liberals might find tolerable today, such as consensual sex between unmarried adults. Rather, the same pragmatic approach extended to acts agreed to be horrific, including rape. The jurists were not giving a wink-and-a-nod approval to rape when they discussed whether a raped female needed to perform ablution after forced intercourse (the rapist, all agreed, had to do so before he could pray).<sup>23</sup> While the rape may have been both horrifying and deserving of punishment, the jurists had a particular concern and objective and were not distracted from it. This pragmatic, technical, legalistic approach to the issues in question does, at times, seem to lose sight of the big picture. However, it is also helpful to keep in mind the jurists' assumption that whatever sexual sin individuals might have committed, they will continue to live, and pray, as Muslims.

*Paternity, legal fictions, and non-marital sex in contemporary Muslim thought*

A widely cited account set during the Prophet's lifetime illuminates the continual tension between punishment and regulation as responses to unlawful sexual activity. In this narrative, two different men assert that a particular youth, born to a female slave, is of their own lineage. The son of the slave-woman's owner affirms that the young man is his brother, "born on his

[father's] bed," the result of a legitimate union between owner and slave. The man who asserts this is the brother of the Prophet's wife Sawda, the slave-owner in question was her father. Another man declares that his own brother, since deceased, claimed paternity of the youth, the result of an illicit affair with the slave. The Prophet, so the story goes, attributed paternity to the slave-owner, Sawda's father, famously stating: "The child belongs to the bed, and the adulterer (*'ahir*) is to be stoned."<sup>24</sup> However, apparently noticing a family resemblance between the other claimant and the young man, the Prophet told Sawda to screen herself from the youth.

In part, this anecdote is a reaffirmation of basic legal norms governing sexual morality. Paternity is established by marriage or, in the case of a slave concubine, ownership. By affirming that the slave-owner was indeed the legal father of the youth borne by his female slave, the verdict rendered by the Prophet ensured the stability of this system for attributing paternity and reiterated that sexual transgressions would be severely punished.

There is another level to this tale, though, found in the Prophet's order to his wife Sawda to screen herself from the youth, despite his own verdict declaring the youth legally her brother, and therefore among those relatives in front of whom she could appear. The Prophet's command represents an acknowledgement that this particular attribution of paternity was a legal fiction. The appearance of this story in works of jurisprudence represents an acknowledgement by the jurists that their regulations also at times create legal fictions that attempt to normalize illicit sexual activity.<sup>25</sup>

The issue of legal fictions surrounding paternity remains a complicated issue in the present day and age, as a recent Egyptian case demonstrates. Hind al-Hinawwy bore a child, claiming that Ahmed al-Fishawy was the father and that he had married her in a widespread but largely clandestine phenomenon known as *zawaj 'urfi*, or customary marriage. *Zawaj 'urfi* is usually kept secret from parents, and remains completely outside the bureaucratic channels of the Egyptian nation-state. Nonetheless, if there are sufficient witnesses, some scholars

accept that it meets the minimal requirements for a valid marriage under those interpretations of Islamic law where a bride is not required to be represented by a guardian. Al-Hinawwy's putative husband, a well-known actor, denied the marriage and rejected paternity of the child. The mother's request for DNA testing to allow her to press her claim of paternity raises a crucial question with implications far beyond her individual case: if she cannot prove the marriage, is there valid paternity even if the test results point to the man she claims sired the child? In classical jurisprudence, there is no necessary relationship between biological paternity and legal paternity.<sup>26</sup> If a child were to be from *zina*, no acknowledgement from either mother or biological father can establish legal paternity for the child involved. What is at stake here is not whether or not the woman could be punished for *zina* – Egypt does not prosecute *zina*, and even if it did, whether or not the man's claim that there was no valid marriage is accepted, there are certainly grounds for a claim of mistake (*shubha*) on her part which would prevent conviction for *zina*. Rather, the issue was whether the child's alleged father could be forced to take paternal responsibility for the child, as the mother demanded.

This case would, for a variety of reasons, likely be treated as *shubha*, a mistake, which conveys paternal affiliation. But the use of DNA testing to link legal paternity with biological fatherhood raises a number of difficult questions that women who have hailed this case as a step for sexual parity must address. In some respects, DNA as proof of paternity is analogous to physiognomy used in early Muslim communities to differentiate among various claimants (in cases of women who remarried before observing proper waiting periods, etc.). However, as the case of Sawda's half-brother shows, evidence gathered in that fashion was insufficient to override a legal claim or to establish a legal tie where none existed. Does the shift in technology with the ready availability of DNA testing alter this dynamic? And if so, is it a good thing?

One consideration is that if paternity testing becomes a standard practice in cases of dispute, it would substantially alter the existing legal dynamics that set a very high bar for accusing

women of being unfaithful.<sup>27</sup> In the time of the Prophet and subsequent centuries, jealous and suspicious husbands had few avenues to pursue without irremediable consequences. Men who called into question their wives' chastity, by imputing illegitimacy to children they bore, either had to disavow such children formally through the virtually defunct mechanism of mutual cursing (*li'an*), thus permanently ending their marriages, or to withhold any accusations and refrain from any defamatory speculation. If a man could order DNA testing on his child without automatically dissolving his marriage, it would change the balance of rights and duties in unexpected ways.

The notion of checking for compliance with paternity would fundamentally violate the "don't ask, don't tell" principle that is deeply influential in Muslim ethical discussions and social practice, sometimes for better, sometimes for worse. Ebrahim Moosa, writing about the offspring of *zina*, makes a point that is more broadly valid: "juristic ethics discourages any such probing that may produce incriminating evidence that delegitimizes the child."<sup>28</sup> Despite the discouraging of this probing, could a woman be prosecuted for *zina* if found to have borne a child to a man other than her husband? What about an unmarried woman? Would DNA evidence count in place of the usually required witnesses to the sexual act? Answers to these questions must reflect the entire range of consequences to tinkering with some portion of the system. If DNA were considered proof, then one could argue that in cases where a woman is prosecuted for *zina* on the basis of pregnancy, any man she names should be tested as well, and prosecuted if DNA results show his paternity. If evidence of the result, rather than the act, is all that is required, then the man is just as liable to prosecution. It could be that the acceptance of DNA evidence would be of benefit, but the full range of consequences must be considered, lest the unintended effects prove far worse for women than the status quo.

The debate around this Egyptian case raises compelling issues beyond that of DNA testing. First, of course, is the complicated situation that arises from a mixed system, where classical legal models and doctrines both converge and conflict with a civil judiciary. Second is the social double-standard that ascribes

far more severe consequences to females than to males for breaches of chastity norms, even when the legal strictures governing their sexual contact outside of marriage are exactly the same. Third, although the dynamics of *zawaj 'urfi* are specific to Egypt, it is but one of several flourishing types of quasi-marriage through which couples seek to legitimize their sexual unions religiously while avoiding the full burden of mutual obligations – social, financial, legal, and sometimes familial – that come with fully recognized, civilly registered marriages.

Muslims who contract *zawaj 'urfi* are generally seeking to engage in sex without the expenses and complications of civil marriage while avoiding the sin of commission of *zina*. In the Egyptian case, the costs are not related to getting married per se, but rather to the social expectations of what a groom of a certain class will be able to provide for his bride at the time of marriage, the most significant being “key money” – effectively, a substantial down payment for housing. These financial expectations are one factor leading to the delay in marriages, and thus the sense of needing interim sexual outlets. The specific circumstances are different elsewhere, but in many Muslim communities later age at marriage, due in part to the increased importance of post-secondary education, has led to new challenges for Muslims who want to adhere to accepted regulations surrounding sexual conduct while at the same time having difficulties suppressing their sexual drives for a decade or more after puberty. Modern shifts in marriage patterns, however, are not the only significant change. Equally or more important is a broad shift in sensibilities to a view of sex as an activity that is primarily about the mutual consent and individual attachment of the persons involved. This perspective is particularly prevalent among Muslims living as minorities in societies such as the United States.

In her “Islamic Bill of Rights for Women in the Bedroom” (the successor to her widely circulated, and generally well received, “Islamic Bill of Rights for Women in the Mosque”), activist, author, and self-identified single mother Asra Nomani declares, as the eighth of ten items, that “Women have an Islamic right to exemption from criminalization or punishment for consensual adult intercourse.”<sup>29</sup> Nomani claims as an “Islamic

right” something that contradicts Qur’an, *sunnah*, and centuries of jurisprudential consensus. Yet her statement is worth considering, rather than rejecting out of hand, as it illustrates important tendencies in contemporary Muslim discourse. Those who are not ‘ulama increasingly make authoritative claims about Islam. Where those who are not necessarily any better trained than Nomani make claims that their audience views as “traditional,” the claims tend to be accepted without the same level of scrutiny. Nomani’s strategic choice to argue on the basis of conformity to Islam is representative of much modern discussion, even if the specific claim she makes is in blatant opposition to scholarly and popular consensus.<sup>30</sup> Finally, Nomani’s underlying assumption that the consensual nature of a sexual relationship is relevant to whether it is, or should be, subject to censure would not have been accepted by the classical jurists, but even those modern ‘ulama who would disdain Nomani’s characterization of the “Islamic” position on sex outside of marriage place more stress on consent than their predecessors (even if it is usually consent to marriage they are considering, rather than consent to sex outside its bounds). Nomani’s statement crystallizes a widespread but largely inchoate sentiment among many contemporary Muslims: consent matters.<sup>31</sup>

Nomani’s view on non-marital intercourse (note that it seems to be irrelevant, from her perspective, whether the parties involved are married to other individuals) reflects a broader social shift. Thus, commenting on an article that appeared on Muslim WakeUp, one self-identified American Muslim wrote:

Many Muslims at the mosque I attend believe that sex outside of marriage is wrong. Many Muslims don’t even date (not in the American way at least) in order to avoid pre-marital sex. Personally, I wouldn’t be so quick to say sex outside of marriage is wrong, for two reasons. First, other than marriage, there was one other sexual relationship that was allowed in Islamic Law, and that’s slave concubinage. Second, although I, personally, believe that one night stands and casual sex are wrong (not to mention rape), what about sex in committed relationships that aren’t

marriages? Is that *haram*? I'm sure that slave concubinage would disgust a lot of Americans, given that slave owners were allowed to have sex with their slaves with or without their consent. But if this is allowed in Islamic Law, how could sex by mutual consent in committed relationships in which both the man and the woman love and respect each other, but are not married, be *haram*? That question represents my struggle. I'm not arguing that such a relationship is *halal*. My honest answer to that question is I don't know whether it's *halal* or *haram*. But I do suggest not being so quick to call it *haram*. Perhaps it's a question that requires a fatwa.<sup>32</sup>

This statement from a convert reflects a combination of deference to jurisprudence combined with an assessment of how its rules (such as slave concubinage) diverge from his or her personal beliefs. The author accepts the basic validity of concepts such as *haram* and *halal*<sup>33</sup> and seems to respect legal authority when she suggests that "a fatwa" might be required. At the same time she is unaware that there is a very clear established answer to whether "sex by mutual consent in committed relationships in which both the man and the woman love and respect each other but are not married" is absolutely unlawful. What this author does not do is suggest that, in light of new perspectives (e.g., finding slave concubinage disgusting), the question of lawful and permitted should be re-evaluated.

### *Conclusion*

It is obvious that the classical model of Islamic sexual ethics no longer applies in several critical respects. Yet in order to begin to think about how a more viable and equitable ethics of sex might be developed, Muslims must grapple actively with the centrality of sex and sexuality to communal life. In the U.S. and Europe especially, but not exclusively (as the Egyptian *zawaj 'urfi* case demonstrates), Muslims are facing a crisis of sexual morality. One alternative is to push for complete adherence to classical

normative standards of relating to members of the opposite sex.<sup>34</sup> Some communities and families manage to enforce a semblance of segregation, but it is unlikely to succeed on a large scale. Even in the medieval Muslim world, strict observance of gender segregation was practiced exclusively by an elite. Today, in societies such as Saudi Arabia, strict gender segregation is under siege; in the U.S. or the U.K. it exists only on the fringes of the Muslim populace. Gender segregation, of course, does not by itself prohibit all illicit sex, and gender mixing, despite some alarmist projections, does not mean that illicit sex will transpire. More than the shifting practice, it seems to me that there is a divide at the level of ideas and ideals between contemporary conventional wisdom among Muslims, especially those living in the West, and classical formulations of sexual ethics. The fear, of course, is that discarding the established legal rules for conduct will leave Muslims without any guidance. Is there a way to move past patriarchal and sexist limitations of both traditional and contemporary double-standards while acknowledging that there are, and need to be, boundaries to sexual relationships?

One obstacle to frank conversation about shifting behavioral patterns is the insistence on avoiding revealing talk, a point explored further in the next chapter's treatment of same-sex intimacy. As one scholar notes, "Talk about illicit sex might be as socially destabilizing as its perpetration."<sup>35</sup> This is not a simple matter of prudery; the practice of avoiding potentially incriminating questions, and not sharing information about indiscretions, is woven into the fabric of Islamic legal thought as well as embedded in Muslim social norms. Covering up one's own faults, or the faults of others, is understood as a vital duty for a believer.<sup>36</sup> However, the "don't ask, don't tell" model provides a tremendous obstacle to transforming ethical standards: if everyone refuses to publicly discuss the fact that, with the disappearance of early marriage, many Muslims are not waiting for marriage to have sex, the problem continues. And the social double-standard (in the case of virginity, for example) means that the consequences for women are worse than those for men, even where, in legal terms, the issues are the same.

In March 2005, European scholar Tariq Ramadan alluded to this double-standard in his eloquent and persuasive (but controversial) call for a moratorium on *hadd* punishments for *zina*. But in nations where “consensual adult sex” is not punished, regardless of its compliance with religious law, there are still very important matters to be discussed.<sup>37</sup> The Qur’anic and classical jurisprudential boundaries of what counts as licit and illicit have already been redrawn, for all practical purposes, by Muslim acceptance of the abolition of slavery and, therefore, of slave concubinage. The double-standard that was operative in the past (even if, in practice, it applied only to men wealthy enough to take more than one wife or own concubines) has largely disappeared as a matter of law, with the increase in monogamy and the disappearance of slave concubinage as a legal option. *Zina* can be redefined for the twenty-first century as sex between partners not married to one another. But what element of marriage legitimizes sex and differentiates it from *zina*? Do dower payment and a unilateral right by the husband to dissolve the union at his whim (regardless of whether or not this is the usual practice) make marriage moral? Is religious marriage, a voluntary contract without civil registration, sufficient to make sex licit, without consideration of national laws that enforce certain property relationships? Ultimately, where does lawfulness rest? These are not flippant questions, but serious attempts to think about what transforms sex into something licit. What is God’s stake in marriage?

## 5 Don't Ask, Don't Tell: Same-Sex Intimacy in Muslim Thought

Illicit sex between a man and a woman (*zina*);  
anal intercourse between men (*liwat*);  
having intercourse with livestock (*ityan al-baha'im*);  
having anal intercourse with a female stranger (*ityan al-mar'a al-ajnabiyya fi dubriha*);  
tribadism (*musahaqat al-nisa'*), which is a woman doing with a woman something resembling what a man would do with her;  
and a husband having intercourse with his wife's corpse.  
From Ibn Hajar Haytami's list of *Enormities*, #338–343<sup>1</sup>

The excerpt above forms part of one of the many lists of major sins, or enormities (*kaba'ir*), compiled by medieval Muslim scholars.<sup>2</sup> Sometimes ranked in order of importance, at other times listed thematically, the entries combine theological and social sins. Sexual offenses frequently occupy prominent places in these compilations, though always below the gravest sin of associating others with God (*shirk*) and often below the sin of disrespectfulness toward one's parents. These lists are still influential today, as evidenced by Nuh Keller's inclusion of two such lists, including Ibn Hajar's sixteenth-century version, as appendices to his late twentieth-century translation of the medieval Shafi'i legal manual *Reliance of the Traveller*. Other lists, such as that of fourteenth-century hadith scholar al-Dhahabi, are readily available in print in Arabic.<sup>3</sup>

Al-Dhahabi's influential *Enormities* (*al-Kaba'ir*) contains seventy sins, with extensive evidence from Qur'an and hadith presented to illustrate the gravity of each act and justify its inclusion in his list. Of this number, only a handful relate to

sex; of these, the most serious is *zina* (#10), illicit sex between a man and a woman, followed directly at #11 by *liwat*, or anal intercourse between men. (The term *liwat* is derived from the name of the Prophet Lot; most Qur'anic discussion of same-sex acts between men refer to the attempt by male townsfolk to molest Lot's angelic visitors.) This entry also includes a brief reference to tribadism.<sup>4</sup> Other relevant entries include #21, slander (*qadhf*) of a chaste woman;<sup>5</sup> #34, condoning or tolerating a wife's transgressions;<sup>6</sup> and #35, employing or acting as a *muhallil*.<sup>7</sup> A woman's *nushuz* (recalcitrance) toward her husband, which could involve sexual refusal or mere disobedience, is the least serious of the sex-related enormities included, at #47.<sup>8</sup>

Tenth-century Iraqi scholar Abu Talib Makki, whose list Keller also includes, limits his compilation "solely to sins explicitly designated as enormities by the primary texts."<sup>9</sup> He divides his seventeen item list into deeds of the heart, of the tongue (including "slander of a chaste person who is a free, adult Muslim"<sup>10</sup>), the stomach, the genitals, the hands, the feet, and the whole body. There are "two [sins] of the genitals and they are *zina* and having anal sex in the manner of the people of Lot."<sup>11</sup> This joining of *zina* and *liwat* – with *zina* always mentioned first – is a common feature of the lists of al-Dhahabi, Makki, and Ibn Hajar.

Ibn Hajar's list is not selective, but rather comprehensive. While Makki itemizes seventeen enormities, and al-Dhahabi seventy, Ibn Hajar lists hundreds, divided into sections. His objective, according to Keller, "is to warn readers against any act that an Islamic scholar has classified as an enormity."<sup>12</sup> The sexual offenses listed in the portion of Ibn Hajar's list devoted to crimes (*jinayat*) include "*zina*; *liwat*; having intercourse with livestock; having anal intercourse with a female stranger; tribadism, which is a woman doing with a woman something resembling what a man would do with her; and a husband having intercourse with his wife's corpse."<sup>13</sup> This grouping begins with reference to *zina* and *liwat*, the primary sexual sins signaled by al-Dhahabi and Makki, and encompasses several other acts as well, including tribadism, which merits a brief mention in al-Dhahabi's discussion of *liwat* but does not appear

in Makki's list. Aside from the exclusion of acts related to marriage, which appear in a separate section of Ibn Hajar's list, there is no easily discernible logic joining these items. The section includes both acts subject to *hadd* punishments and those subject to discretionary chastisement; acts involving two persons of the same sex, two persons of the opposite sex, and one person with an animal; acts that are forbidden because they are intrinsically sinful, as is the case with intercourse with an animal or a corpse, and those where the problem is not the act itself, but the lack of a proper legal relationship between the parties, as in the case of *zina*. While there are no circumstances under which bestiality or necrophilia can lawfully be performed,<sup>14</sup> in the case of *zina*, there would be no sin in the intercourse had the participants been married to each other.

What categorization applies to the same-sex<sup>15</sup> sexual acts described in the passage? This question itself presupposes a category that may not be relevant. Ibn Hajar deals with *liwat* and tribadism or lesbianism (*musahaqat al-nisa'*) individually and separately, not as instances of a broader sin called homosexuality. However, as I noted above, tribadism appears briefly in the section al-Dhahabi devotes to *liwat*, suggesting that they have something important in common. What, though, of the acts? In the case of anal sex, the act itself may be an enormity, regardless of who engages in it; Ibn Hajar condemns anal sex between men (*liwat*) as well as anal sex between a man and a female "stranger" – that is, a woman who is neither his wife nor his slave and over whom he has no sexual rights. In the section on marriage, Ibn Hajar also condemns a man having anal sex with his wife (though, in what is potentially an oversight, he makes no mention of a man having anal sex with his slave concubine). Tribadism is another story. Frottage is perfectly permissible between legitimate partners (a man and his wife or his concubine), so his prohibition of "a woman doing with another woman something resembling what a man would do with her" is not based on the impermissibility of the act itself. As in the case of *zina*, it is the lack of a lawful tie between the parties that renders the act illicit.

Could there be circumstances under which such a tie could legalize otherwise permitted sexual acts between two

women or two men? For the vast majority of Muslims, and certainly for Ibn Hajar and his colleagues, this is a ludicrous question; a licit same-sex relationship is a categorical impossibility. Recently, however, some self-identified queer Muslims have challenged this view, affirming the naturalness of their sexual orientation as divinely granted and seeking to consider whether it might be possible to construct a religiously valid bond between two men or two women that would legitimize sex between them. The desire on the part of some self-identified gay and lesbian Muslims to have exclusive and publicly recognized same-sex relationships, and to do so in a way that falls within an “Islamic” framework, is without precedent in Muslim history.

In describing this as a recent development, I do not mean to imply that there have not been previous instances of sexual activity, potentially including long-term affective relationships, between individuals of the same sex. What differs is the attempt made by some to reconcile a “homosexual” identity with a Muslim identity, and to legitimize same-sex intimate partnerships within the constraints of Islamic religious discourse. Their desire to have sexual relationships that break conventional Islamic rules but that aspire to the highest standards of Muslim ethics, as they understand them, exists in tension with vital theological and juridical principles aside from those forbidding illicit sex. The two most salient principles are that one should not expose sinful behavior, whether one’s own or another’s, and that it is a greater offense to deny certain rules than to break them. Taken together, these rules render any discussion of same-sex sexual intimacy a risky proposition, and make adherence to the “don’t ask, don’t tell” status quo appealing for many. For others, however, the tacit toleration of illicit same-sex activity, provided one does not seek public affirmation of any intimate relationship, represents deep hypocrisy and a flagrant violation of other ethical principles.

After providing a brief survey of how the texts treat sexual activity between two men or two women, this chapter will consider the way modern Muslim thinkers from a variety of perspectives approach the relationship between sexual orientation, sexual acts, and sexual identities. The view that exclusively homosexual

desire is innate in some individuals – a core argument of those seeking acceptance of gay and lesbian identity – has made inroads even among some relatively conservative Western Muslim thinkers, but the implications of this acceptance have not been fully delineated. Those who view sexual orientation as inborn but suggest that same-sex desires can never be fulfilled lawfully confront the problem of divine injustice, particularly where they also argue for the importance of sexual satisfaction as a human need. On the other hand, those who argue that innateness conveys permissibility do not satisfactorily address either the macrocosmic principles of male/female partnership expressed in scripture or the ahistorical nature of their claims to an innately gay orientation, claims which ignore the diversity of historical and contemporary understandings of sexuality. In either case, the minority Western movement for acceptance of a gay Muslim identity, and the reaction to it, has implications for intimate relationships in all segments of Muslim communities, including between men and women in marriage. For this reason, no discussion of sexual ethics can avoid the issue of same-sex intimacy.

### *History*

Although most Muslims would acknowledge that sexual activity between persons of the same sex exists in Muslim-majority societies, this concession is frequently accompanied by an insistence that homosexuality is “western” or “modern,” and certainly “un-Islamic.”<sup>16</sup> Writing in 1993, Khaled Duran stated confidently that there were “no self-proclaimed gays in Muslim countries” and that no movement toward the acceptance of homosexuality or gay identity was taking place among Muslims.<sup>17</sup> Yet contemporary insistence on the forbiddenness of homosexuality aside, a number of scholars have suggested “that one might consider Islamic societies ... to provide a vivid illustration of a ‘homosexual-friendly’ environment in world history.”<sup>18</sup> According to Scott Kugle, “when one looks through the historical and literary records of Islamic civilization, one finds a rich archive of same-sex desires and expressions, written

by or reported about respected members of society: literati, educated elites, and religious scholars.”<sup>19</sup> Another scholar states, more bluntly: “same-sex relations between men are ubiquitous in the medieval Arabo-Islamic textual universe.”<sup>20</sup> Khaled Al-Rouhayeb, insisting on nuanced readings of texts from different genres, calls for close attention to the varieties and registers of competing discourses, allowing for some types of homoerotic desire and even activity to be celebrated, and others, including those resulting in penetration, to be condemned.<sup>21</sup>

Although medieval Muslim sources give the impression that homoerotic desire and sexual activity of some type between males was a normal, if religiously illicit, part of elite Muslim life, there is comparatively little on female homoeroticism in Qur’an, hadith, or interpretive texts. Although literary and, to a lesser extent, legal texts include some discussion of sexual acts between women – usually *sihaq* or *musahaqa*, “rubbing” or “pounding” – most discussion of homoerotic acts focuses on male/male sexual activity.<sup>22</sup> Several factors contribute to the silence surrounding female same-sex activity. Perhaps the most important is simply that many legal effects of sex depend on penetration by a penis. In the few cases where sex between women is mentioned, the legal discussion revolves around what punishment, if any, is to be imposed by the authorities as well as whether compensation equivalent to dower must be paid if hymeneal rupture has occurred. Legal discussions of male/male sex acts, by contrast, never mention dower, focusing not only on punishment but also more mundane issues such as the necessity for ablutions after penetration and the possible impediments to marriage created by same-sex liaisons.<sup>23</sup>

In any event, whatever textual sources reveal about the prevalence of same-sex intimate relations, the fact that some Muslims have engaged in homoerotic activities does not mean it is religiously legitimate to do so. For contemporary Muslims grappling with same-sex attractions, the key question is not: what have (some) Muslims done? but rather: what may Muslims do? or, even more generally: what does “Islam” allow?<sup>24</sup> Some leave Islam entirely, while others choose to separate sexuality from religion, considering themselves Muslim but acknowledging

that their sexual acts or identities are not acceptable from a religious perspective. Still others choose to actively grapple with religious precepts in order to attempt to reconcile a Muslim identity with a gay or lesbian one.

Bypassing Islamic legal thought (which, as will be seen below, does not seriously consider the possibility that any same-sex relationship could be lawful), such reconsideration usually begins with the Qur'anic discussion of male and female same-sex acts. There are numerous hadith of varying degrees of authenticity addressing *liwat* in a harshly condemnatory fashion; hadith collections also condemn lesbian acts on those rare occasions they mention them. Scholars interested in developing a framework of tolerance and acceptance for same-sex relationships usually ignore hadith entirely or address specific reports only to discredit their authenticity. The Qur'an itself becomes the basis for new interpretations, which again focus on male/male sex. There is no consensus as to whether the Qur'an even mentions female same-sex activity. It might or might not be the subject of Surah 4, verse 15, which orders that, with the incriminating testimony of four witnesses, "those (fem. pl.) among your women who approach lewdness (*al-fahisha*)" are to be "confine[d] to houses until death claims them, or God ordains for them some (other) way."<sup>25</sup> The precise relationship of the provisions of this verse to those on *zina* has been a topic for much debate. Does the verse "ordaining" flogging abrogate the one ordering confinement, or does this verse refer to a punishment for same-sex acts distinct from that for illicit sex between a man and a woman? This verse does not specify "two women," which would have been possible using the dual form. Immediately following, Surah 4, verse 16 also addresses illicit behavior, using the masculine/inclusive dual "two ... from among you." As with all dual or plural masculine forms in Arabic, it can include both male and female, and there has been disagreement among commentators as to whether this verse refers to two men by contrast with the preceding verse, which specifies only females (though not two women), or a male-female pair, also grammatically possible.<sup>26</sup> Male same-sex acts, however, are mentioned on several occasions in conjunction with the story of the Prophet Lot,

which is the constant referent for both classical and contemporary discussions of all same-sex sexual activity.

Contemporary scholars disagree sharply about the Qur'anic perspective on same-sex intimacy and desire as presented in the Lot story. Duran presents the conventional view when he states that the Qur'an "is very explicit in its condemnation of homosexuality, leaving scarcely any loophole for a theological accommodation of homosexuals in Islam."<sup>27</sup> In contrast, Kugle argues that "the Qur'an does not address homosexuality or homosexuals explicitly[.]"<sup>28</sup> Rather, the sacred text (like the jurists' writings) addresses particular acts, saying nothing about "identities" and very little about desires. The revisionist attempt to promote a new, more inclusive view of Qur'anic teachings on same-sex sexual acts, desires, and orientations relies on a distinction between the Qur'anic condemnation of particular same-sex acts, in this case those of the townsfolk in the Lot story, and the possibility of divine acceptance of other forms of same-sex relationships.

In order to interpret the Lot story as something besides an "explicit ... condemnation of homosexuality," scholars have used two main approaches. First, they have explored other aspects of the Lot story beyond the issue of same-sex acts. Second, they have argued that even if the acts were problematic, they were objectionable due to a factor other than those involved being of the same-sex. As to the first point, the commentarial tradition and conventional wisdom have erred, Amreen Jamal shows, by placing undeserved emphasis on sexual deviancy as the particular sin of Lot's people.<sup>29</sup> Building on Jamal's work by painstakingly assessing the work of several prominent pre-modern exegetes, Kugle demonstrates that "Word-for-word replacement in classical commentaries has given rise to the dubious equation of the divine punishment of Lot's people with a condemnation of homosexuality and juridically enforceable punishments for same-sex acts."<sup>30</sup> The transgressions of Lot's community were far more extensive and far-reaching than sexual misconduct. Spiritual corruption has been reduced to sexual transgression, undeservedly narrowing the divine guidance contained in the stories of Lot's people.

Although these scholars make a compelling case for understanding the sexual transgressions of Lot's people in a larger context of disbelief and moral turpitude, I am less convinced by their suggestion, echoed by a number of advocacy groups, that the townsfolk's behavior was objectionable not because they sought same-sex intercourse but due to other considerations including their lack of concern for Lot's visitors' consent.<sup>31</sup> The argument that the Qur'an objects not because the men in question sought same-sex intimacy but rather because they intended non-consensual violation rests on an assumption that consent is necessary for an ethical or lawful sexual relationship. However, elsewhere in the Qur'anic text, as with female captives ("what your right hands possess"), consent is not always relevant to the formation of licit sexual relationships. Further, Lot offers his daughters to the marauding townsfolk without any indication that their consent mattered.<sup>32</sup> The daughters' lack of consent is quite striking, whether it is to simple paternally sanctioned sexual use by the would-be rapists or to marriage as a licit sexual outlet for the men. Kugle argues that this is not a case of valuing male over female, but rather guests over family members "who happen to be female."<sup>33</sup> One could argue that in the case of premodern patriarchal societies, only paternal consent mattered. In that case, could Lot have offered his sons to the men with equal impunity?

The more significant obstacle to reinterpretations of the Lot story is that the Qur'anic text seems to object clearly to the men's sexual object choice: these men approach men *in preference* to those whom God created to be their mates.<sup>34</sup> One way of getting around this objection would be to argue that men who would otherwise choose female partners were opting to seek sex with men – this argument would be compatible with the view, expressed by some queer Muslim authors, that there are men created to take male mates, a notion I discuss below. There is strong justification for reading the Qur'an to suggest that males and females are created to mate with one another, and any *choice* to deviate from that path is blameworthy.

One cannot understand premodern Muslim scholars' interpretations of the Lot story without considering how their

views on same-sex desire and sexual activity differ in crucial ways from those held by modern Westerners, including some Muslims. Their concerns were largely for actions, not orientations. That is not to accept the once-conventional view that any “homosexual” identity is a purely modern invention, and premodern thinkers knew only acts. Premodern texts, as scholarship in other contexts has shown, can present specific sexual acts as “*more or less* related to sexual dispositions, desires, and subjectivities.”<sup>35</sup> Even where specific identities were associated with the performance of particular acts, these were not consistent across time and place, nor are they identical to contemporary notions of “homosexual,” “gay,” or “queer.” The exegetes and jurists’ understandings of male/male sexual activity do not take into account the possibility of a partnership where both men consider themselves “gay,”<sup>36</sup> but rather presuppose an age- and status-stratified asymmetrical relationship between unequal partners.

There are crucial similarities between classical Greek and Roman views on male/male sex and the norms (and practices, so far as historians can tell) of elite medieval Muslim culture. Muslims in the region generally accepted the ancient Mediterranean model, based on hierarchical notions of penetration, where no stigma except perhaps that of profligate attaches to an adult male who penetrates but where a free adult male who allows himself to be penetrated suffers stigma.<sup>37</sup> Even a preference for male youths over and above female partners, explored satirically by ninth-century littérateur al-Jahiz in his famous essay “Maids and Youths,”<sup>38</sup> did not make a man “homosexual” in the sense that Duran or Kugle uses the term. Male desire to penetrate desirable youths (generally, although not always, defined as “beardless,” *amrad*) was perfectly normal – if never lawful – and not necessarily indicative of a deviant subjectivity, desire, or a particular sexual orientation.<sup>39</sup> The commonplace, not pathological, nature of such desire is illustrated by *Reliance of the Traveller’s* passing mention of the “handsome beardless youth” in its discussion of circumstances under which it is permissible or impermissible for a man to look at a female who is not his wife, slave, or kinswoman. Notably, Keller omits

this portion of the text from his late twentieth-century English translation.<sup>40</sup>

*Don't ask, don't tell*

Despite the widespread medieval acceptance of same-sex desire between men and attractive male youths, Muslim thinkers took for granted that such sexual relations were neither licit nor possible to legitimize. Yet the explicit condemnation of same-sex sexual activity in medieval Islamic legal thought and by most contemporary Muslim thinkers has been tempered by tacit tolerance for its practice, provided some degree of discretion is observed. As Abdelwahab Boudhiba argues, “The fact that homosexuality” – he means same-sex acts – “was always being condemned proves only one thing: neither the religious nor the social conscience could put an end to practices that were disapproved of by Islamic ethics but to which in the last resort society closed its eyes.”<sup>41</sup> Steven Murray, discussing both male/male and female/female sexual relations in present-day Muslim contexts, has referred to this unwillingness to acknowledge what is an open secret as “the will not to know.”<sup>42</sup> While certainly some aspects of this logic governing same-sex encounters is specific, the overall logic of refusing to point out sins that are not crimes is not unique to same-sex sexual intimacy. Rather, it is part and parcel of a general insistence on not attempting to pursue potentially incriminating information about one’s fellow Muslims or to disclose it about oneself.

The unwillingness to seek out and condemn instances of same-sex sexual activity, the preference to let them pass by, if not unnoticed then unnamed and therefore unpunished, makes sense where same-sex sexual activity, like any sexual activity outside of marriage, is considered a criminal and therefore punishable offense. For this reason, “don’t ask, don’t tell” norms make sense at a practical level, as a strategy to avoid persecution and prosecution. In North America and Western Europe, however, the situation is fundamentally different. In modern Western contexts, the question emerges of the Muslim population’s

reactions to the larger scale acceptability of same-sex relationships in the broader society. While some Muslim leaders have been outspoken opponents of “gay rights,” a few Muslim organizations and individuals who avoid addressing same-sex sexual intimacy from a religious perspective have come out in favor of tolerance and even acceptance of gays and lesbians as a matter of civil or human rights. In doing so, they sometimes make an analogy between discrimination against Muslims and discrimination against sexual minorities.<sup>43</sup> For example, the president of the Muslim Canadian Congress endorsed same-sex marriage legislation in early 2005, declaring that “It is incumbent upon us, as a minority, to stand up in solidarity with Canada’s gays and lesbians despite the fact that many in our community believe our religion does not condone homosexuality.”<sup>44</sup> Her remarks implicitly distinguish between Muslims, on the one hand, and gays and lesbians, on the other: although both are minorities, she does not acknowledge any potential overlap between the categories. Yet she leaves a space open for interpretation, claiming not that Islam “does not condone homosexuality,” but merely “that many in our community believe” that to be the case.

Muslim discussions of “other people’s homosexuality” are less controversial than intra-Muslim dynamics when some Muslims desire or adopt a “gay” identity (as opposed to merely selecting a sexual partner of the same sex).<sup>45</sup> Moderate and liberal Western Muslim discourses display an acceptance of the notion of innate sexual orientation but do not question traditional religious prohibitions of same-sex activity. The “don’t ask, don’t tell” philosophy informs views such as those presented in the Muslim Women’s League position paper, “An Islamic Perspective on Sexuality.” In a subsection on “Homosexuality,” it states that:

Human beings are capable of many forms of sexual expression, orientation and identification. The existence of such variety again is not found in any other species and thus further demonstrates our uniqueness among God’s creations. The potential for behavior, such as homosexuality, does not mean that its practice is lawful in the eyes of God. Therefore,

individuals are expected to control themselves and not act on their desires if such action is contrary to the guidelines of Islam. Homosexuality, like other forms of sexual relations outside of heterosexual marriage, is thus prohibited.<sup>46</sup>

The statement goes on to imply that individuals should not seek to “prosecute or judge” those known to engage in “prohibited acts;” only conviction through witnessing or confession can allow for “punishment by the State.” In the absence of punishment, those who engage in such acts “will then deal with the consequences of their behavior in this life and will be accountable to God on the Day of Judgment. How He ultimately judges is known only by Him.” The most obvious aim of this statement is to argue against the imposition of punishments for “homosexuality,” but since this is an American group, writing in the United States, the question of punishment is effectively moot. More relevantly, the exhortation not to “prosecute or judge” maintains the fiction of social harmony and adherence to rules by not exposing behavior “contrary to the guidelines of Islam.”

In seeking to avoid public acknowledgment of same-sex sexual activity, the Muslim Women’s League statement continues the traditional legal stance toward same-sex behavior; in other respects, however, it departs quite dramatically from the classical understanding that governed discourses surrounding same-sex attractions in acknowledging not only the possibility of an exclusively homoerotic “orientation” but also its potentially God-given nature. This view is shared by a number of Muslim groups from across the socio-political spectrum; not only Muslim gays and lesbians seeking a “theological accommodation” of their sexuality, but also some conservative Muslims who strongly oppose any such accommodation, agree on the modern idea that homosexual orientation is an inborn component of the human psyche.<sup>47</sup> The question of whether the innateness of desire requires an acceptance of same-sex sexual activity, however, is subject to strong disagreement.

Conceding the naturalness or God-giveness of an exclusively same-sex oriented desire puts conservative scholars into a logical bind. An essay by British Muslim Abdal-Hakim

Murad, "Fall of the Family," exemplifies the perils of this approach. Murad accepts "homosexuality as an innate disposition" in some (though not all) cases, seeing a potential biological basis for it. Yet, like the Muslim Women's League, Murad stresses that there are no circumstances under which an individual with homosexual "tendencies" – which he likens to the impulses of a pyromaniac "mental patient" – can lawfully act on his or her desires. The only religiously acceptable option for someone with a homoerotic orientation is permanent chastity: Murad sees it as a test from God. His stance coincides with the Muslim Women's League statement that "individuals are expected to control themselves." However, this expectation of self-control as a defense against sexual sin runs contrary to what is prescribed not only by most medieval texts, but also by Murad elsewhere in the same essay, which focuses primarily on male/female sexual misconduct. He argues in favor of sex segregation in daily life where practical, to assist in maintaining sexual morality by suppressing opportunities for illicit sex; most individuals, he claims, are not super-moral figures who can reject temptation when freely accessible.<sup>48</sup> (Ironically, he does not consider the effects of sex segregation on those who are exclusively attracted to members of the same sex.) Even in a largely temptation-free society, there must be lawful outlets into which sexual desire can be channeled.<sup>49</sup> For heterosexuals, this lawful channel is marriage, but for those with exclusively homoerotic desires, there can be no lawful satisfaction of desire. (Most medieval Muslim authors did not confront this precise problem, at least insofar as the desire for attractive male youths was generally not considered solely a desire for them; it was the same desire as that directed toward women, and could therefore be sated with lawful partners.)

If one accepts that exclusive desire for partners of the same sex is (at least in some cases) natural and divinely originated, *and* acknowledges, as Murad does, that long-term abstinence from all sexual contact will likely fail for most individuals, then one presumes that most Muslims with orientations toward members of the same sex *will* commit transgressions. The stress on not discussing these sexual acts creates a safe space for

transgression to occur without challenging the normative view that such relations are forbidden. At the same time, while such relative freedom to act has some benefits, it also puts individuals in danger from the usual concomitants of illicit liaisons (with partners of whatever sex), including not only the spread of HIV and other sexually transmissible diseases but also the unethical behavior of possibly betraying marriage vows and, indeed, one's self-respect.

The naturalness of same-sex desire for certain individuals constitutes the basic point of departure for queer-positive Muslim organizations. As the Rainbow Crescent website declares, in what is presented as an appeal to "Logic and Reason," "being Gay is not a matter of choice – but rather a divinely created reality." The exclusion of "Gay people" "from Islam ... would be excluding a whole dimension of The Creation and this would in fact undermine any claim by Islam to be The Truth (which it is)."<sup>50</sup> This tactically shrewd position removes the element of choice from the equation; gay (and lesbian) Muslims cannot be blamed for something innate. As intended by some gay-positive Muslim discourses, the acceptance of the view that sexual orientation is not a matter of choice but rather divine decree creates a space for queer Muslims to press for religio-legal acceptance of same-sex relationships, however unlikely widespread acceptance of this view seems as of this writing.

However, aside from the social difficulties such a strategy faces, the "just created that way"<sup>51</sup> discourse of sexual identity is a fundamentally ahistorical move, and requires one to ignore the complex ways in which same-sex desire and practices have operated in other times and places. What accounts for the fact that men's sexual desire for other men in the past – or in non-Western Muslim contexts today – is not viewed as "innate" in the same way? A Foucauldian approach, recognizing the historicity of desire and its representations in social and individual contexts, is attractive for historians and scholars concerned with understanding the past.<sup>52</sup> How does it work, though, to transform the present and shape the future, if one is concerned with determining God's stance on sexual licitness and following it? Jeffrey Weeks argues convincingly for understanding sexual identities as

“necessary fictions” and “historical inventions,” and themselves “sites of contestation,”<sup>53</sup> but how does this matter to a Muslim concerned with whether God approves of his or her partner choice and form of relationship? Is there a middle ground between essentialist and constructionist views of sexual orientation and desire, where Muslims can grapple with same-sex sexual orientation – their own or that of other Muslims? Is it possible to think that individuals are neither “created” to think and act in a particular way nor do they simply “choose” a homoerotic orientation? What does the view of “the erotic as highly socially malleable”<sup>54</sup> mean when one confronts the Qur’an which is both a timeless text and a historically contextualized one?

There is broad agreement among Muslim thinkers that individuals bear moral responsibility for any sexual acts that they engage in by free choice and that illicit desires themselves do not result in any culpability before God. If one accepts the view that homoerotic desire is neither freely chosen nor inherently blameworthy, but can have no licit satisfaction, then one is left with the untenable stance that those who desire a satisfaction that cannot be obtained through licit means are, through no fault of their own, destined to choose between a celibate life devoid of sexual gratification and one of sexual release obtained through sin.<sup>55</sup> Both options are unpalatable. One avoids having to choose between these unacceptable alternatives if one rejects either the innateness of homoerotic orientation or the inherent sinfulness of all same-sex intimacy. If one holds that same-sex desire is not innate but rather constitutes freely chosen debauchery (as in the case of the men of Lot’s story), then one does not confront the issue of divine injustice in creating individuals without providing the means for them to fulfill lawfully their basic human need for sexual expression. Yet this notion that an exclusive same-sex sexual attraction is freely chosen is problematic for a variety of reasons, including its lack of conformity with the expressed experience of modern Western queer individuals.

The other alternative is to accept, in contrast to the near totality of Muslim thinkers, that homoerotic desire is innate *and* that its satisfaction through lawful means is possible. This view requires tricky exegetical maneuvering around the male/female

dynamics of various Qur'anic verses describing creation and mating,<sup>56</sup> but can be reconciled with the view that same-sex acts become reprehensible or forbidden when, and only when, same-sex intimacy is freely chosen as a transgressive act by those who would ordinarily seek satisfaction with different-sex partners. It is only in this case, where same-sex desire is viewed as not sinful because it is part of a divine plan, that recognition and legitimization of intimate partnerships between same-sex couples becomes an objective.

Murad's terminology proves helpful in thinking about this new perspective. He does not identify those who have or act on same-sex desires as homosexuals, considering private behavior outside the realm of social concern. Rather, he uses the intriguing, if awkward, term "homosexualist," reserving it for those who seek to make same-sex intimacy a publicly respectable form of socio-sexual partnership. In this, he revalidates the conventional view that illicit sexual activity is a matter between an individual and God but that challenges to religio-legal regulations constitute a major transgression. Monogamous marriage between two men or two women, in its insistence that same-sex relationships can be licit, is a more disturbing prospect than multiple casual sexual relationships that, even if they constitute something of an open secret, nonetheless do not directly challenge the prohibition of same-sex intimacy.<sup>57</sup>

### *Same-sex marriage*

Muhammad Abdul-Ra'uf, writing in 1977, declares that "toleration of an evil leads to other evils. First, we condone public exposure [of women's bodies]; next dating and easy mixing; next, pre-marital 'games', extra-marital relations, and open marriages; next, the elevation of homosexuality to an acceptable moral status; and next, uni-sex marriages. Where, and when, shall we stop?"<sup>58</sup> In this litany of increasingly serious "evils," same-sex marriage is the worst Abdul-Ra'uf can imagine. Yet, aside from the question of what makes it an evil – divine censure being the obvious answer for Abdul-Ra'uf – the notion of relative

seriousness of sinful acts is an interesting one to apply to the case of same-sex intimacy. The acts he discusses as “evils” are uniformly consensual acts; there is no mention of rape, sexual abuse of children, or any other inherently coercive practice, such as non-consensual marriage or slave concubinage – practices which would undoubtedly violate his twentieth-century sensibilities, but which were widely accepted by Muslim scholars of preceding centuries.<sup>59</sup> Just what about same-sex marriage makes it so threatening that it becomes the pinnacle of all sexual sins?

When Abdul-Ra’uf was writing in the 1970s, same-sex marriage was not even on the horizon for nascent gay-rights movements in the West. A few years into the twenty-first century, marriage between persons of the same sex has gained legal standing in several places in Europe and North America, including the U.S. state of Massachusetts. The notion of marriage of a man to a man or of a woman to a woman is completely outside the frame of reference for classical Muslim jurists. Most do not even consider it a possibility in order to dismiss it. Even where it is mentioned, it is merely as a brief disqualification in terms of who can marry. The definition of *nikah* in the *Durr al-Mukhtar*, a seventeenth-century Hanafi commentary on an earlier legal manual, makes a claim regarding gender as relevant to marriage:

[*Nikah*] according to jurists is a contract which is productive of an exclusive right of enjoyment, i.e., which validates the enjoyment by a man, of a woman, with whom marriage is not prohibited by reason of any legal impediment. Thus are excluded (from the objects of enjoyment) a male, an idolatress, a hermaphrodite – because of the possibility of the hermaphrodite’s being a male – prohibited females,<sup>60</sup> a *jinnee* woman, and a watery person [*insan al-ma*] because of the difference of genus.<sup>61</sup>

This text definitively sees maleness as an impediment to marriage with another male, so much so that hermaphrodites are forbidden as marriage partners on the grounds that they might be male. (Note, of course, that this formulation assumes every individual has one true sex, even if ambiguous genitalia and secondary sex characteristics make it difficult or impossible

to determine.) Marking it as a text of its time, the text also rejects marriage between a man and a female spirit (*jinn*) or “a watery person.” Notably, while the gender of the *jinn* is specified as female – presumably, the prohibition against marriage to a male applies to the *jinn* as to the human – the prohibition of marriage to “a watery person” is gender-neutral. It is not the lack of gender fixity but “the difference of genus” that renders merpeople unsuitable as marriage partners, apparently.

In Muslim history, the relationship between sex, gender, and desire is far more complex than simplistic binary regulations would suggest. Rusmir Music, writing of “an essential ambiguity” within Muslim legal categories, argues that “Islam’s jurists repeatedly allow for exceptions, though they profess to be preserving immutable boundaries ordained by God.” While in some ways these ambiguities should open up space for a queer project, they do not function in the jurists’ works to create such a flexible system. Rather, “the uncertainties allowed by Islamic jurists, otherwise interested in neatly ordering all aspects of life, predominantly serve to preserve a power hierarchy benefiting men.”<sup>62</sup> A brief discussion of classical legal treatment of hermaphrodites and the modern question of sex-change operations make clear both the room for accommodations in the Islamic sex/gender system and the limits to that ambiguity. While there is space for (temporary) ambiguity in the realm of sex – meaning biological determinations of maleness or femaleness assigned to a particular body – there is little tolerance for ambiguity in sexuality – that is, with whom a person of a particular sex may have sexual contact.<sup>63</sup> The connection between bodily sex, socially ascribed gender, and sexual “orientation” is crucial.

Classical and medieval texts accept the existence of cases where assigning sex to a particular body, and therefore gender to a particular person, is not automatic. While a number of tests and tactics allowed for resolution of the question in most such cases, in the stubborn instance of the “problematic hermaphrodite” (*khuntha mushkil*), the jurists failed in their attempts to assign gender to what Paula Sanders calls the “ungendered body.” In modern understandings, some jurists adopt a similar framework to justify sex-change operations as not correcting an

indeterminacy but rather realigning body with reality – in effect, uncovering the “real” or “true” sex of the person in question. Some progressive scholarship has viewed these operations as a watershed, but the acknowledgement of the existence of transsexuals is not more of a challenge to the standard jurisprudential discourse of sex/gender than that of the hermaphrodite in classical and medieval discourses, nor is a person of ambiguous sex a challenge to the binary system once properly categorized.<sup>64</sup>

The danger from transgendered individuals is less about biological sex than about sexuality and its licit exercise.<sup>65</sup> Some of those who objected to one Egyptian surgery, where Syyid became Sally – and to her reclassification as a woman – did so on the grounds that the relevant factor was not that of Sally’s innate sense of gender but rather of sexual object choice. That is, it was not that Syyid really was a woman, but that Syyid wanted to have a woman’s body in order to be able (lawfully) to have sex with men.<sup>66</sup> Specifically, she (or rather, he, because in the view of those who opposed the reclassification, there had been no change, only mutilation) “was fundamentally a *khawal*, that is, an effeminate man who is willing to play a passive, female role in sexual intercourse with other men.”<sup>67</sup>

Returning to the subject of same-sex marriage, it becomes clear that the impermissibility of formalized same-sex relationships is only partially due to a prohibition on same-sex sexual activity. Same-sex marriage fundamentally challenges the basic structural premises of marriage as a contract. It is not just in the sex *act* that male and female are differentiated, but in the legal control over said act, in the legal right to claim it, in the legal right to form the relationship permitting it. I have shown that the boundaries of licit sex in Islamic jurisprudence – a man with his wife or his own female slave, both of whom are in some sense “owned” – require an exclusive dominion as a correlate of lawful sex. Male owners may have sex with female slaves but not (lawfully) with male slaves, and female owners may not have sexual access to their slaves of either sex. Men are the only ones permitted to be “owners” in this sense, and only women may be “owned.” Ultimately, Murad and Abdul-Ra’uf are correct: same-sex marriage represents a more fundamental challenge to norms

governing sexuality than does any type of illicit or clandestine union, precisely because viewing such a union as a *marriage* challenges the definition of licitness itself.

The legal structure of Islamic marriage is predicated on a gender-differentiated allocation of interdependent claims, which would be thrown into chaos by a same-sex union. In the standard contractual understanding of marriage, the husband holds *milk al-nikah*, control of the marriage tie, and the wife has a claim to dower and the obligation of sexual exclusivity and availability. Several early jurists considered the possibility of whether these rights and duties could be reallocated – whether a woman could pay a man a dower, for example, and retain control over sex and divorce – and agreed unanimously that such a reallocation is not permitted. Not only are husbands' and wives' rights distinct, but each role is fundamentally linked to the sex/gender of the person exercising it. A woman cannot wield control of the marriage tie; a man cannot be contractually bound to sexual availability to his wife. Thus, following that logic, it would not be possible for one woman to adopt the “husband” role and the other to adopt the “wife” role in the marriage of two women. The self-contained logic of the jurisprudential framework does not permit such an outcome.<sup>68</sup>

### *Conclusion*

Same-sex intimacy cannot be separated from discussion of other topics in sexual ethics because the rules making a same-sex marriage unthinkable emerge not primarily, or at least not exclusively, from an explicit prohibition of same-sex activity but rather through the legal construction of marriage and sexual relationships as both gendered and hierarchical. Many of the same things that would be necessary to make marriages more gender-egalitarian would be necessary precursors to any attempt to think about same-sex partnerships. Of course, this is one reason that some will argue that such attempts to reform marriage do in fact lead inexorably down a slippery slope to same-sex marriage. The measures necessary to reformulate the

nexus of marriage in the direction of egalitarian and fully mutual relations between men and women do not remove serious obstacles to the legitimization of same-sex acts, above all the notion that male and female are created to be mates for one another. However, if one sets aside macrocosmic issues, however compelling, and turns to ethical and legal reflection, one must ask whether there is some absolute standard on which same-sex intimacy can be compared to other forms of intimate partnership. Are consensual, exclusive, and long-term same-sex unions morally worse than slave concubinage, or serial marriage and remarriage? Are they worse than abusive marriages?<sup>69</sup> The issue of consent in weighing the ethicalness of certain acts has relevance far beyond the issue of same-sex relationships. The comment made by “an American Muslim” on the Muslim WakeUp comment boards discusses sex outside of marriage. She does not expand her point to same-sex relationships, but others do. She is unable to understand how a consensual adult relationship between a man and a woman if committed to one another could be wrong, even outside of marriage, because she is operating under a fundamentally different logic of licitness than the medieval jurists. Indeed, the jurists saw a consensual relationship between two free men as significantly worse – and deserving of *hadd* punishment for both parties – than a coerced relationship between a man and his male slave.<sup>70</sup> Such sexual use was not lawful, but the master’s ownership sufficiently resembled his ownership of a female slave to give rise to a legal protection. A recent news report described a Saudi man who has wed nearly five dozen women and girls in his lifetime (and divorced all but the last four).<sup>71</sup> He has clearly acted in a legally valid, if reprehensible, manner. However, two men or two women who live together in a lifelong pseudo-marital union, remaining faithful, cannot be said to have acted lawfully according to jurisprudential rules – but have they done something unethical? Is lawfulness a prerequisite, if not a sufficient guarantor, of ethical behavior? Confronting same-sex sexual relationships and acts challenges us to define sexual lawfulness and ethical sex for all intimate partnerships, including those between men and women.

## 6 “Reduce but do not destroy”: Female “Circumcision” in Islamic Sources

“I as Imam would like, with my colleagues, to turn to the Islamic world, particularly in Africa, and inform people that female genital mutilation is prohibited. It is a matter of abuse and violation of the female body and is quite clearly forbidden according to Islam.”

Swedish Muslim leader Sheikh Omar Ahmed, November 2003<sup>1</sup>

“Circumcision is obligatory for every male and female. [For men,] it consists of cutting the foreskin of the glans of the penis, while female circumcision consists in cutting the clitoris and is called reduction.”

*Reliance of the Traveller*, classic Shafi‘i legal manual<sup>2</sup>

Who determines whether a particular practice is Islamic? Is it God, via the literal words of the Qur’an? The Prophet and, secondarily, his Companions, as their statements and actions have been recorded in books of *hadith*? Should such determinations be based on the judgment of the religiously trained scholars, the ‘ulama, who interpret these sources in works of exegesis and jurisprudence? Or perhaps what is Islamic might be better identified with the actual practice of Muslims rather than any normative ideal. In that case, what happens when practices vary dramatically among Muslims, or when what Muslims do contravenes the authoritative texts? When views have shifted over time, do earlier ideals or practices have more weight or does the contemporary state of affairs take precedence? Much of the confusion and imprecision in Muslim and non-Muslim discussions of controversial issues results from a lack of clarity about the scope of the claims made.

The two epigraphs to this chapter make seemingly contradictory claims about female genital cutting. The classical legal text calls it circumcision and pronounces it “obligatory,” while the contemporary *imam* calls it mutilation and declares it “forbidden.” This chapter will explore why these divergent views exist, how they are expressed, and why they matter for the majority of Muslims who are from regions where female genital cutting, or FGC, is not practiced. I tackle this subject with some trepidation, as I am not an expert either on FGC or on those regions of the Muslim world where forms of excision are most frequently practiced. Given the history of resistance and legitimate resentment surrounding Western intervention on this issue, I want to make clear that, while I ardently support the ultimate eradication of all forms of female genital cutting on a variety of grounds, I am not attempting to set myself up as an authority as to how reform should best be achieved; women and their male allies from regions where FGC is practiced must be at the forefront of any movement for change.<sup>3</sup> I have chosen to address the topic here as a case study of how religious sources and authority are marshaled and manipulated, and to illustrate how the demands of scholarship and advocacy can clash.

Although undoubtedly well meant, Shaikh Omar Ahmed’s claim to present the definitive Islamic view on what he terms “female genital mutilation” fits into patterns of modern legal authoritarianism, as described by Abou El Fadl. It also dovetails with an apologetic discourse that pervades much Muslim English-language discussion of the subject. This stance results in, among other things, misleading translations of key terms and passages from legal and hadith texts even in otherwise scholarly works. The evasion and misdirection surrounding the textual basis for acceptance or rejection of female genital cutting is due to desire to combat negative stereotypes of Muslims as well as to abolish the practice itself. At stake is who has the right to decide what counts as normative for Muslims, and what authority, if any, the determinations of the classical jurists, who treated female circumcision approvingly, should have today.

There are solid reasons for Muslims to reject female genital cutting without making grandiose claims about its

“un-Islamic” nature, but such an approach requires a willingness to treat not only jurisprudence but also *sunnah* and hadith as products of their time, with limited currency as formal rules for contemporary application. Thorough and honest discussions of controversial practices such as female genital cutting must move beyond simplistic binaries of “Islamic” and “un-Islamic” or lawful/prohibited to a more complex scheme of ethical and moral valuation. Engaging with the complexities of the tradition is worthwhile in issues of sexual ethics far beyond the matter of excision. Nonetheless, although it is all well and good to proclaim the need for greater sophistication in methodological approaches to understanding the relationship between religious and customary practices, for those concerned with practical reforms, sweeping claims about “Islam”’s forbidding of female genital mutilation (FGM) may be more effective than detailed investigation of the layered jurisprudential treatment of the subject.

### *Islamic or un-Islamic?*

The debate over whether or not female circumcision is “Islamic” is a specifically modern way of framing the question, although the relevance of Islamic legal categorizations to Muslim life is ages-old.<sup>4</sup> The “Islamic-ness” of excision is relevant to ongoing controversies because internal Muslim debates occur in a context of Western scrutiny and criticism. Externally motivated attempts to stop all female genital cutting began with European colonial officials and have continued through the efforts of Western feminists and some missionaries. (Notably, at the time Westerners were beginning to campaign against FGC in Africa, clitoridectomy was being selectively practiced in England and the United States as a cure for various female ailments.) The desire to combat stereotypes of Islam as uniquely misogynist is the primary motivation for many to argue that FGC is not an “Islamic” practice. Noor Kassamali, a physician with clinical expertise as well as activist credentials in the struggle against what she prefers to call female genital cutting, suggests that the “alleged association of Islam with FGC” by “the Western media”

is “an even more basic issue” than whether it is “Islamic” or not. She argues that the portrayal of the practice “as a violent custom whose aim is to subjugate women and girls ... perpetuates the stereotype of Islam as a violent faith and of Muslim women as subjugated and submissive.”<sup>5</sup> This outwardly focused critique reflects a set of power relationships that often does stand in the way of an honest scrutiny of Muslim practices.<sup>6</sup> At the same time, it is naïve to expect Muslims to be entirely unconcerned with dehumanizing stereotypes when the resultant Othering of Muslims contributes to the devaluation of Muslim lives and serves as justification for violence and repressive international policies.

In any case, female genital cutting is neither universal among nor exclusive to Muslims. The majority of Muslims do not practice any form of female circumcision and where it is common, it is generally performed by members of all religious groups; in Egypt, for instance, both Muslims and Christians practice female genital cutting. Kassamali notes that “Muslim groups that practice this custom often cite religious justifications ... [y]et religion is not a determining factor.”<sup>7</sup> The severity of the practice – which varies considerably – depends on variables of locale, educational attainment, and socioeconomic status, rather than religious affiliation.<sup>8</sup> In the majority of Muslim societies, by contrast, female circumcision is virtually unknown. In those regions where it is practiced, it almost always predates Islamization.<sup>9</sup> Exceptions occur in instances where immigrant groups carried the practice with them to new areas.<sup>10</sup> In Southeast Asia, female circumcision seems to have been unknown before the coming of Islam; in Malaysia and Indonesia, only Muslims practice female circumcision. One can speculate that the transfer of the practice to this region is due to the historical pre-eminence of the Shafi‘i law school there. The Shafi‘is, unlike the other Sunni schools, have held that circumcision is obligatory for females as well as males, as the passage quoted at the beginning of this chapter demonstrates.

Several typologies describing female genital cutting differentiate between less and more severe procedures.<sup>11</sup> The least invasive procedure falling under the rubric would be the

removal of the prepuce or hood of the clitoris, effectively analogous to the removal of the penile foreskin that constitutes male circumcision. This delicate operation – clitoridotomy, but sometimes erroneously called clitoridectomy – is rare, especially in Africa, and, in any event, is extremely difficult to perform on small girls where it can be difficult to distinguish between the clitoris and its prepuce. Clitoridectomy more properly refers to full or partial excision of the clitoris itself; this procedure may or may not involve removal of part or all of the labia minora. The most drastic form of genital cutting is infibulation, where not only the clitoris and labia minora but also portions of the labia majora are removed, and the vaginal orifice sewn closed, with only a small aperture left for the release of urine and menstrual fluid. Often known as the “pharonic” circumcision, it is common in certain parts of Africa such as the Sudan. The final type of “circumcision” escapes the name FGC, because in many cases it involves only a symbolic pricking, rubbing, or scraping.<sup>12</sup> This type seems to be most common in Southeast Asia, although it has been advocated and implemented occasionally elsewhere, including in Africa, as an interim measure in the struggle toward eradication.

Beyond combating stereotypes, the desire to eradicate female genital cutting is the second, and more compelling, reason for denying it normative status. Sheikh Ahmed’s statement, perhaps inadvertently, heeds an appeal issued by activist Asma A’Haleem several years earlier for “a final religious announcement clearly stating that [female circumcision] is a form of mutilation and therefore forbidden. It is not sufficient for religion to shun female circumcision. Religion should be used as a tool for condemning and preventing its occurrence.”<sup>13</sup> A’Haleem’s statement raises crucial questions about how Muslim thinkers are to engage in public discourse, and if it is ever acceptable or even ultimately productive to engage in methodologically problematic oversimplifications for strategic aims, if the alternative is not being able to affect oppressive social and cultural practices.

The instrumental use of religion promoted by A’Haleem returns us to contests over the meaning of the term “Islamic.” One definition would hold that Islamic can be properly used as an

adjective to describe anything that significant numbers of Muslims do. If this were the only salient definition, then FGC could reasonably be called Islamic on these grounds, at least for certain regions of the Muslim world. However, this definition lacks rigor: many Muslims do, in fact, drink alcohol despite its clear prohibition in scripture and jurisprudence. Another level of definition reserves the term for a practice that is defined by its practitioners as religious: Muslims who drink alcohol would not dream of suggesting such a practice is permitted, let alone encouraged or mandated, by their religion, but those Muslims who practice female genital cutting often justify it with reference to Islam. Opponents of the practice seek to undercut this rationale when they insist that “FGM is a practice of culture, not religion.”<sup>14</sup>

FGC, however, is not merely a customary practice incorrectly understood as having religious authority despite its lack of sanction in authoritative scholarly sources. Rather, female circumcision of some type is either recommended or required by the dominant classical view of all Sunni schools of Islamic jurisprudence, and seems to have been generally approved by Shi‘i jurists as well.<sup>15</sup> Jonathan Berkey surveys the legal literature, and demonstrates that although jurists’ opinions “differ[ed] in nuance” they “were overwhelmingly favorable to the practice of female excision.”<sup>16</sup> A number of modern jurists have suggested the question is open to re-examination. These include Egyptian scholars Shaikh Tantawi of al-Azhar, who has suggested that it is an appropriate question for medical doctors to decide, and Muhammad al-Ghazali, who noted that there is no account of the Prophet having his daughters circumcised.<sup>17</sup> Yet other members of the ‘ulama support it as either *sunnah* or, in the words of Egyptian jurist Gad al-Haq ‘Ali’s fatwa, “a laudable practice that does honor to the women.”<sup>18</sup> Thus, a blanket denial, such as that by Sheikh Ahmed, that “Islam” permits FGC is patently false and obscures the very real status of some type of circumcision for women as an accepted practice according to traditional jurisprudence, even if the majority of Muslims reject FGC as abhorrent and do not practice it.

A further evaluation of the Swedish leader’s words leads to questions of terminology. Is he being deliberately evasive,

implicitly accepting “circumcision” while explicitly condemning “mutilation”? The context in which he made his remarks, at a conference opposed to FGC, suggests otherwise. His adoption of the terminology of mutilation used by the practice’s opponents makes his position very clear. Islamic legal texts, such as that by Ibn Naqib al-Misri and ‘Umar Barakat quoted above, use the neutral/positive term *khitan*, circumcision, to describe the procedures carried out on both males and females, noting that *khifad*, “reduction” or “lowering,” is the proper term for the latter. This terminology, along with the occasional use of “*tahara*” (purification, also used for both male and female circumcision), carries a specifically religious resonance, although the manual is devoid of explicitly religious appeals to its audience. By contrast, Sheikh Ahmed makes explicit appeals to religion, referring to his religious title (“I as Imam”), his target audience (“the Islamic world”), and the basis for his verdict (“quite clearly forbidden according to Islam”).

This declaration, which demonstrates the type of authoritarianism that Abou El Fadl has so forcefully critiqued, is representative rather than unique.<sup>19</sup> Rather than acknowledging the traditional legal view but critiquing its bases or conclusions, those opponents of female circumcision who invoke religion as support for their position simply bypass it while claiming their own position as “Islamic.” They may invoke, as evidence for the stance that Islam forbids FGC, the absence of Qur’anic statement on female circumcision and the lack of any “authentic” hadith supporting it. I will address the Qur’anic point here, and turn to the hadith sources below. A reductive definition of “Islamic,” characteristic of some feminist and reformist thought, equates the Qur’an with Islam. One implication of this view is that Qur’anic silence on a particular point means that there is no valid religious authority for it. Thus, because stoning as punishment for *zina* appears only in the hadith and not in the Qur’an, stoning may be understood as an illegitimate cultural practice rather than a religiously mandated penalty. When it comes to FGC, many opponents point out that there is no Qur’anic mention of female circumcision.<sup>20</sup> The power for this argument is limited in the realm of circumcision, however; for one thing, the Qur’an

does not make explicit mention of male circumcision either. Most who have argued against female circumcision on these grounds would not likewise present male circumcision as being un-Islamic based on the lack of Qur'anic references to it.

Other arguments speak to questions of principle rather than from Qur'anic silence. Although a number of anthropologists have recently begun to consider the ways in which some women's understanding of FGC relies on deeply ingrained notions about female beauty and gender dimorphism, most scholarship has shown that practices of, and justifications for, FGC relate to male control over female sexuality.<sup>21</sup> However, the linkage between FGC and female sexual interest works both ways: opponents have argued for the practice's impermissibility precisely on the grounds of wives' sexual rights; because it prevents women from achieving sexual satisfaction, "the position of these religious leaders is not only contrary to the Prophet's teaching but also the Qur'an."<sup>22</sup> Likewise, the Muslim Women's League position paper on Sexuality argues that "The practice of clitoridectomy ... is totally un-Islamic because it is in direct violation of both Qur'an and hadith which clearly stress the importance of sexual satisfaction for both husband and wife."<sup>23</sup>

Others have taken a more wholistic approach, arguing for the sanctity of the body from a spiritual rather than a medical perspective. How could the jurists accept clitoral excision when they rejected "changing God's creation" (*taghyir khalq Allah*) by tattooing, plucking hairs, or filing the front teeth to create an attractive gap between them? Egyptian physician and feminist Nawal el-Saadawi argues forcefully that excision of the clitoris is a violation of the divine plan for the human body: "God does not create the organs of the body haphazardly without a plan. It is not possible that He should have created the clitoris in a woman's body only in order that it be cut off at an early stage in life."<sup>24</sup> The usefulness of this argument for activists, however, is significantly lessened by the fact that the same case could be made about the male foreskin, the removal of which is virtually universally accepted as a religious duty.<sup>25</sup> However, one can make a strong case for rejecting female circumcision based on the severity of its consequences compared to male circumcision – medical

complications, including pain, infection, and secondary infertility, as well as diminished sexual response. The “changing God’s creation” argument only works with those who, like Sami Aldeeb Abu-Sahlieh, also object to male circumcision. And as he acknowledges, “Male circumcision is considered to be obligatory by all Muslims. Contrary to female circumcision, it is still unimaginable, till today, that this practice could be prohibited in Muslim countries.”<sup>26</sup> This unambiguously positive presentation of male circumcision in Muslim law and tradition can serve to highlight the persistent uncertainty and unease surrounding female circumcision, an unease manifested in the hadith sources to which I now turn.<sup>27</sup>

*“Reduce but do not destroy”*

On what sources and using what reasoning did the jurists arrive at their conclusions that female circumcision was, at the least, a meritorious act? The scant evidence concerning female circumcision centers on a few hadith found in collections other than those of Bukhari and Muslim. The most important is this report, collected by Abu Dawud:

A woman used to perform circumcision in Medina. The Prophet (peace be upon him) said to her: “Do not cut severely as that is better for a woman and more desirable for a husband.”<sup>28</sup>

*La tunhiki*, which Ahmad Hasan translates as “do not cut severely,” might be more literally rendered “do not ruin” or “do not uproot.” Although Abu Dawud reports this hadith, he criticizes its transmission and calls it weak. Another hadith, also classified as weak, states that *khitan*, circumcision, is a *sunnah* for men and a *makruma* (noble act) for women. Other evidence for early approval of female circumcision is less direct – unwitting rather than deliberate – and perhaps therefore more persuasive. One famous hadith declares that both partners in a sexual act must perform an ablution (to restore ritual purity before prayer)

“when the two circumcised parts (*al-khitanan*) meet.” It is possible to explain this away as a linguistic peculiarity of classical Arabic, according to some: the less dominant part (the female organ) is subsumed under the characterization of the more dominant part (the male organ).<sup>29</sup> A more likely explanation is that genital cutting was practiced on some women in seventh-century Arabia.<sup>30</sup> The use of “large-clitorised” as an insult (suggesting that the woman in question had not been circumcised), or reference to a man’s mother as a “clitoris-cutter” assumes the existence of the phenomenon. There are also references to female circumcisers in other contexts that certainly suggest some form of clitoral excision was an accepted, if not necessarily universal, practice among some Arab tribes at the time of the Prophet.

Opponents of FGC have dealt with the circumcision hadith texts in various ways. Some scholars and activists have pointed out that the isolated hadith texts that exist on the subject are weak (e.g., *mursal* – missing a link in the chain of transmitters), and thus unreliable as evidence, a point which even supporters of the practice generally concede.<sup>31</sup> Alternately, or additionally, they are interpreted as recommending moderation of an existing practice, not the imposition of something unknown, a point to which I will return. In no case do the hadith convey obligation. In contemporary English-language texts, misleading summaries or translations of the Abu Dawud hadith (“Do not cut severely”) often do much of the work of interpretation. To take one example, a pamphlet distributed by Minaret of Freedom and also available online quotes the hadith, explaining it as “one tradition of disputed authenticity [which] permits (but does not encourage) the removal of a miniscule segment of skin from the female prepuce, provided no harm is done.”<sup>32</sup> The explanation of the command “do not ruin” as “removal of a miniscule segment of skin from the female prepuce” is reading a great deal into the vague words attributed to the Prophet.

Jamal Badawi, in an appendix to his well-known and frequently quoted *Gender Equity and Islam*, attempts to make similar points by interpolating several words into his own English translation suggesting specific directives that are missing from the Arabic: “Cut off only the foreskin (outer fold of skin

over the clitoris; the prepuce) but do not cut off deeply (i.e. the clitoris itself), for this is brighter for the face (of the girl) and more favorable with the husband.”<sup>33</sup> Although the Arabic text (which Badawi does not provide) does not specify what part of the anatomy is mentioned, Badawi does so himself. He defines what is to be cut (“the foreskin,” “the outer fold of skin,” “the prepuce”) and, more importantly, what is not to be (“the clitoris itself”). As in the previous pamphlet, Badawi’s objective is not to clarify for individual Muslims how they should conduct their personal affairs but rather to present Islam in a positive light to both non-Muslim and Muslim readers who may be uncomfortable with what they have heard, read, or been told about various controversial matters.

Keller’s objective in his translation of *Reliance of the Traveller* is somewhat different from that of the authors just discussed, as the text is primarily a conduct manual rather than a contribution to a broader controversial literature, and he is dealing with jurisprudential doctrine rather than a Prophet statement. Nonetheless, he makes similar changes to his English rendering of the passage that I translated, in the epigraph to this chapter, as “Circumcision is obligatory for every male and female. [For men,] it consists of cutting the foreskin of the glans of the penis, while female circumcision consists in cutting the clitoris and is called reduction.” For comparison, his translation (which involves several levels of elaboration of the text, utilizing coded letters and parentheses to indicate commentary) reads:

Circumcision is obligatory (O: for both men and women. For men it consists of removing the prepuce from the penis, and for women removing the prepuce (Ar: bazr) of the clitoris (n: not the clitoris itself, as some mistakenly assert). (A: Hanbalis hold that circumcision of women is not obligatory but sunna, while Hanafis consider it a mere courtesy to the husband.))[]]

Only the first three words of this passage (“Circumcision is obligatory”) belong to Ibn Naqib al-Misri; the words introduced by “O:” represent the commentary of ‘Umar

Barakat, who is responsible for much of the content of Keller's *Reliance*. The explanation of the less onerous requirements of the Hanbali and Hanafi schools, introduced by "A:" is the commentary of a modern Syrian scholar. Only rarely, with particularly sensitive matters or those on which there is striking disagreement between the legal schools, does Keller typically include such material. The inclusion of these qualifications here functions to diminish the reader's perception of the place of female circumcision within religious law. The most important feature of this translation, however, is the definition of female circumcision with Keller's own parenthetical definition (introduced by "n") of the crucial term *bazr*.

In his translation, Keller attempts to describe the two types of circumcision in entirely parallel ways, which requires him to omit certain words from the discussion of male circumcision and add words to the description of female circumcision. The Arabic text indicates that circumcision of males requires "qata'a al-jilda alati 'ala hashfat al-dhakar," which Keller renders as "removing the prepuce from the penis." *Qata'a*, which he renders as "removing," I have translated, above, as "cutting" so as to preserve the potential for ambiguity in the description of the circumcision procedure for females, although "removing" – cutting off – is the most likely meaning. The rest of the Arabic is straightforward: *al-jilda* ("the prepuce," skin, or foreskin) which is on the glans (*hashfat*) of the penis (*al-dhakar*). Keller's English text presents slightly less information in its description of the male anatomy; while the Arabic refers to the penile glans, his translation simply refers to the penis. When it comes to female circumcision, Keller departs from the text more significantly by adding a key term. He renders "qata'a al-bazr" as "removing the prepuce of the clitoris," treating *bazr* as a term specifically for the clitoral hood or prepuce. (Keller does not indicate what other term might mean clitoris, if *bazr* does not.) The vast majority of scholars, however, take for granted that *bazr* means clitoris, not clitoral prepuce.<sup>34</sup>

The insistence of Keller, Badawi, and others on minimizing the extent of cutting recommended or required by the Prophet's words and/or the classical legal tradition can only

succeed via well meaning but deceitful manipulation of the texts. Would it not be a better alternative, if one accepts the hadith texts, to accept that previous approval even by the Prophet, but certainly by the classical jurists, need not preclude rejection today? To some extent these sources can prove helpful, as both hadith and legal texts seek to minimize the scope of cutting performed, and not to impose a new practice or render existing custom more severe.<sup>35</sup>

Those activists who struggle against FGC in contexts such as Egypt and the Sudan, where some members of the ‘ulama have sided with the practice’s opponents, have used a variety of strategies to argue for its prohibition. Many acknowledge, as a precondition for an open and honest dialogue, that some form of female circumcision has been justified in religious terms, and attempt to discern how to present an honest, compelling argument for significant modification of the realm of what is understood to be properly Islamic. Gradualism is one vital strategy; Toubia argues that, while “The ideal goal would be total eradication” as an interim measure “recommending alternative customs is necessary.” She suggests perhaps “a ritual of just nicking the clitoris or labia without excising any tissue” because “The transition from infibulation to no procedure is so drastic that few will be comfortable with it.”<sup>36</sup> However, the extent to which this will be satisfactory is unclear; research done by Rogaia Abusharaf in the Sudan suggests that while some women are strong advocates of “sunnah” circumcision (here meaning clitoral excision, not merely a “ritual nicking”) to replace the standard infibulation, others do not consider the milder cutting to be “real” circumcision.<sup>37</sup> In any case, in these instances scholars and activists are concerned with convincing the women who perpetuate the practice, not with affecting Western perceptions.

### *Conclusion*

One promising avenue for change is from within the legal tradition, but there are limits to the impact the ‘ulama can have on the practice of FGC. Some scholars have begun the process of

attempting to shift the frame of reference and treat female circumcision as a medical procedure, as activists have suggested,<sup>38</sup> rather than a religious ritual and marker of Muslim identity. In doing so, they have suggested a different set of standards by which to judge associated practices. Shaykh al-Tantawi, stating that the Qur'an contains nothing on the subject and that the hadith attributing any stance to the Prophet are weak, opines that therefore one should defer to the views of doctors. On medical grounds, of course, the "surgery" fails basic qualifications for performance. Egyptian jurist Gad al-Haq, among others, however, objects to this approach on the grounds that medical knowledge is continuously changing and evolving, and it is foolish to fore-sake what is eternal for what is ephemeral.<sup>39</sup> While the 'ulama can be instrumental in struggles to eradicate FGC, there will likely always be dispute among its members. Further, relying on internal struggles within the 'ulama or even campaigns to legally ban FGC (as an Egyptian law did before it was overturned) ignores the crucial point that formal religious authority may not be the most salient ground for both practitioners and those who make decisions about following the practice, who are uniformly female, even though religious sentiment is influential.

What tactics should be employed by activists, and what role should religion play as a justification? Activist A'Haleem's appeal for a "final religious announcement" against FGC relies on a mistaken view of Islamic religious authority as something unidirectional and static. Pronouncements in this vein, such as that by Swedish Sheikh Ahmed, suppress rather than promote interpretive leeway. A historically contextualized approach – which recognizes the likelihood that the practice existed but also that it is deeply troubling in many respects – can support a process of gradual change. Although based on a tendentious presentation of the hadith text, the Minaret of Freedom's broader conclusion that the Prophet's directive as quoted in Abu Dawud "clearly forbids severity in circumcision and bases such limitation on both the potential to harm the woman and the potential to make her less desirable to her husband" seems more appropriate (though "forbids" might be replaced by "advises against"). The pamphlet argues, though, that "Permitting such a ritual

constitutes an act of tolerance by Islamic law for pre-Islamic practices, and may be overruled by the Islamic prohibition against harmful acts.”<sup>40</sup> Both of these points are potentially helpful. One can think of female genital cutting as something subject to gradual change and, as Kevin Reinhart has pointed out, it can be liberating to think in terms of principles rather than specifics. Nonetheless, caution is warranted in claiming a power to “over-rule” accepted practices on the basis of broad principles.

Changes in public policy and national law without concomitant changes in public opinion are futile, and potentially even counterproductive. Reform in legal thought is slow, and is not a guaranteed success. There will likely always be those, such as Egyptian scholar Gad al-Haq, who will vehemently support female circumcision. Both legal and jurisprudential reform are, I believe, necessary. But ultimately, the most crucial shift must take place in public opinion. And in order for such a shift to happen, religious language will need to be employed. However, I think that on this issue in particular – and the lesson can be applied more broadly – the simplistic invocation of “Islam” is a recipe for failure. The insistence that Islam forbids FGC is not so much false as meaningless: it depends entirely on what one intends by the term “Islam.” The texts, as is frequently noted, do *not* speak for themselves, though I do think it is possible to read them in ways that yield a determination that any form of female genital cutting is reprehensible at best and that extreme forms such as infibulation must be forbidden. How does one marshal ethico-legal arguments that will be couched in terms of reprehensibility, of minimization of a customary practice? Rather than ask whether or not female circumcision is Islamic, it is more helpful to ask what legal or ethical values should be assigned to the range of practices that fall under the rubric of FGC. And indeed, if one determines that such practices are reprehensible or forbidden – verdicts for which I think there is a great deal of justification in the texts – then one must attempt to discern the best way to combat their performance. At the same time, it can be difficult to resist the temptation to make totalizing claims based on one’s own sense of justice, particularly when debates are not merely theoretical but result in real injury to real women and girls.

## **7 “If you have touched women”: Female Bodies and Male Agency in the Qur’an**

O ye who believe! Approach not prayers with a mind befogged, until ye can understand all that ye say, – nor in a state of ceremonial impurity (Except when travelling on the road), until after washing your whole body. If ye are ill, or on a journey, or one of you cometh from offices of nature, or ye have been in contact with women, and ye find no water, then take for yourselves clean sand or earth, and rub therewith your faces and hands. For Allah doth blot out sins and forgive again and again.

Qur’an, Surah 4, verse 43<sup>1</sup>

Two brief sentences in a verse discussing observance of the dawn-to-dusk Ramadan fast succinctly capture much of what is essential about marriage and sex in the Qur’an: “Lawful for you on the nights of the fasts is the approach to your wives. They are garments for you and you are garments for them.”<sup>2</sup> First, and most obviously, sex between spouses is not opposed to spiritual practice – in this case, fasting – but exists as a complement and a supplement to it. Second, and a point much remarked on by contemporary interpreters,<sup>3</sup> there is an undeniable reciprocity in the marital relationship; a husband is a garment for his wife just as a wife is a garment for her husband. Third, and much more seldom acknowledged, there is a basic asymmetry in God’s speech here: God is speaking to men, about women. In this verse, as in numerous others that treat the relationship between spouses or refer to women’s bodies in sexual contexts, men are the “you” and women are the “they.”<sup>4</sup> This androcentrism is not equivalent to misogyny, but neither is it unproblematic for interpreters concerned with matters of gender and justice.<sup>5</sup>

Since the Qur’an is the primary mode of divine guidance to humanity as well as the basis for so much Muslim thought, any attempt to formulate an ethics of sex and intimacy must engage with the revealed text. Recent interpretations of the Qur’an have tackled many important topics related to women and gender, but few have explicitly dealt with the verses discussing sex. In this chapter, I argue that close attention to those Qur’anic verses that discuss sex can provide a new lens through which to engage in feminist exegesis. Qur’anic rules are gender-differentiated in intimate and familial matters above all, with men seemingly given greater rights and responsibilities. Recent works by a number of gender-conscious scholars have shown the extent to which standard exegetical treatments of these issues have been shaped by interpreters’ presuppositions about male dominance and superiority. At the same time, feminist attempts to approach the question of male marital and familial authority have not attempted to disaggregate the issues surrounding marriage, divorce, and sex. Despite the way quite a number of verses on all topics are directed *to* men *about* women, I suggest that there is often a difference in content and tone between those focusing on marriage and divorce on the one hand, and those discussing sexual intimacy on the other. The former usually direct men to allow women particular freedoms; the latter do not contain similar directives, but rather only command men to behave in particular ways. Even those verses that posit men as having greater agency and control in intimate relationships, though, situate all human actions as being directly subject to divine scrutiny, which implies a higher ethical standard alluded to by, but not explicitly presented in, the Qur’anic text.

*To whom am I speaking?*

As Amira Wadud has shown, God does not always speak to a specifically male audience; indeed, such treatment is the exception rather than the rule. Yet because Arabic, like French and Hebrew, relies on gendered nouns, readers of the Qur’an must pay close attention to the content and context of each verse

to determine whether particular passages are gender-specific or gender-neutral. Many Qur'anic verses address women and men together using the gender-neutral terms "human being" or "people" (*insan, nas*). These words are often poorly translated into English as "man," "mankind," or "men."<sup>6</sup> Part of the reason that these terms have often been rendered in this way is that these words take masculine pronouns in Arabic, but the gender of nouns is only sometimes indicative of the gender associated with the signified object. To insist that because *insan* takes a masculine pronoun it refers to a male person is untenable; logic would also then dictate that *nafs* (self or soul), which takes a feminine pronoun, would necessarily refer to a female, making the first creation female rather than male (as Muslim interpretation generally, although not universally, holds) or of unspecified gender, as some premodern commentators and a number of contemporary scholars have argued.<sup>7</sup>

The structure of Arabic plural forms can make it especially difficult to determine whether a gendered meaning is intended. Only exclusively female groups can be referred to with the feminine plural, while both exclusively male groups and groups including both males and females must be referred to with the masculine plural.<sup>8</sup> A Muslim man is a *muslim* while a Muslim woman is a *muslimah*. A group of Muslim women is *muslimat*; a group of Muslim men is *muslimun*. A group that includes both men and women is also *muslimun*.<sup>9</sup> Thus, when a collective noun such as *muslimun* appears in the Qur'an, it cannot be assumed that it only refers to men. In most cases, *muslimun* and similar collective plurals refer to all Muslims, male and female.

In some instances, though, a particular collective noun clearly refers specifically to males, as it is accompanied by its exclusively feminine counterpart. This tendency is most clearly illustrated in Surah 33, verse 35:

Muslim men (*muslimin*) and Muslim women (*muslimat*),  
believing men and believing women, devoutly obedient  
men and devoutly obedient women, truthful men and  
truthful women, patient men and patient women, humble

men and humble women, charitable men and charitable women, men who fast and women who fast, men who protect their chastity and women who protect their chastity, and men who remember God frequently and women who remember God frequently, God has prepared for them forgiveness and a great reward.

This verse describes men and women separately but in parallel fashion that makes absolutely clear their spiritual equality. Though an equivalent meaning could have been conveyed by the use of these terms in the masculine inclusive plural, the separate references to men and women emphasize both the inclusiveness of the revelation and the sameness of divine reward to members of both sexes. The latter point is explicit in other verses such as “And whoever does good deeds, whether male or female, and is a believer, will enter Paradise and not be wronged in the least.”<sup>10</sup> The word “believer” appears here in the male singular due to grammatical convention,<sup>11</sup> but the meaning is clear: God will reward males and females alike according to their deeds. Interpreters intent on proving male/female equality in the Qur’anic message frequently quote these and similar verses as proof of women’s equality with men.<sup>12</sup>

On other occasions, the separate treatment of men and women in the Qur’an indicates a lack of sameness. Regulatory verses discussing matters such as witnessing and inheritance explicitly differentiate between males and females. In witnessing certain types of commercial contracts, Surah 2, verse 282 declares that one can employ two men, or one man and two women “So that if one of them errs, the other can remind her.”<sup>13</sup> In dividing inheritance between children of a decedent, Surah 4, verse 11 states that a male gets twice the portion of a female, a ratio that also holds for a number of other cases.<sup>14</sup> Difference, in these instances, involves obvious inequality,<sup>15</sup> though whether this inequality constitutes injustice is a separate and more complicated issue.

The clear Qur’anic declarations of sameness and the equally clear Qur’anic acceptance of inequality based upon differentiation must be understood in the context of an

ever-present tension in the Qur'an between egalitarianism and hierarchy, which exists not only with regard to the sexes but also when it comes to matters such as wealth or slavery.<sup>16</sup> Although the Qur'an famously insists that all people are equals before God and the only distinguishing criterion is piety, other verses acknowledge and seemingly authorize disparities in treatment based on freedom or gender.<sup>17</sup> Not only are some abstract rules meant to apply differently, as in the cases of witnessing and inheritance, but hierarchies of power in the interrelationships between individuals are accepted as a matter of course.<sup>18</sup> As Barbara Stowasser succinctly sums up, "the Qur'an does not associate its principle of equal human dignity and worthiness with notions such as absolute and individual social, political, or economic equality."<sup>19</sup>

Male-female relations embody both norms of ultimate sameness and earthly differentiation. One common line of argument suggests that while men and women are ontologically equal as human creations, they are not meant to be socially equal in the life of this world. Revelation is seen to justify social differentiation, either because of an assumed male superiority or, in the twentieth century, a more palatable view of male and female complementarity.<sup>20</sup> Asma Barlas acknowledges, but swiftly dismisses, the argument that one can "distinguish between religious and social/legal equality" in her *Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an*.<sup>21</sup> In rejecting this division, Barlas must attempt to explain away numerous verses that suggest or command differential treatment for males and females. (She does so in part by making the sound point that difference is not always unequal.) Others have argued, persuasively, that the Qur'an does present such a distinction, but that the ontological equality of all human beings takes precedence over the earthly, temporally bound regulations that privilege men over women, as in inheritance and witnessing. Thus, specific regulations which are discriminatory toward women need not apply always, or in every context.

Feminist or gender-conscious interpretation of the Qur'an, a discipline still in its infancy despite some paradigm altering scholarship, has tended to focus much of its attention

on the issue of power as wielded in intimate relationships.<sup>22</sup> How, scholars have attempted to discern, can one reconcile the Qur’an’s basic stance that Muslim women are first and foremost Muslims, the religious equals of men,<sup>23</sup> with the notion expressed in Surah 4, verse 34 that men are “*qawwamun ‘ala*” (“bread-earners,” “maintainers,” “protectors and maintainers,” “the managers of the affairs of,” “in charge of,” “have authority over,” or “shall take full care of”) women?<sup>24</sup> Even within a single verse, such as Surah 2, verse 228, there can be a tension between the notion that women have rights “similar to” or “just as” or even perhaps “equal to” (*mithl*) those of men, but that “men have a degree over them.” Both verses are crucial for those concerned with gender equality or equity, and the ways that they have been treated illustrate both the significant insights of feminist scholarship as well as the limitations of certain approaches to the Qur’an.

### *A difficult verse*

Traditional scholars and contemporary Muslims from a variety of backgrounds and perspectives have interpreted Surah 4, verse 34. While classical and medieval interpretations of this verse stress female obedience and male authority, recent interpretations tend to emphasize the financial component of men’s marital duties and the limits on a husband’s power over his wife.<sup>25</sup> Many Muslims have gravitated toward the latter views, in keeping with modern discourses of complementarity rather than hierarchy, and fitting with the Qur’anic portrayal of women in other verses as full human beings and partners in the relationship of marriage. The range of ways in which this verse’s key provisions have been interpreted illustrates both the presence of androcentrism and misogyny in some aspects of the Muslim tradition as well as possibilities for more egalitarian readings of scripture.

This verse presents numerous difficulties for translation, since so many of the words have contested meanings. My provisional rendering here leaves three terms in the original

Arabic since they cannot be translated without taking a position on how they should be interpreted.

Men are *qawwamun* in relation to women, according to what God has favored some over others and according to what they spend from their wealth. Righteous women are *qanitat*, guarding the unseen according to what God has guarded. Those [women] whose *nushuz* you fear, admonish them, and abandon them in bed, and strike them. If they obey you, do not pursue a strategy against them. Indeed, God is Exalted, Great.<sup>26</sup>

Interpreters from a variety of perspectives have addressed the key issues raised by this verse: are men “in charge” of women? What are the characteristics of righteous women? What is *nushuz* and what are its consequences? Is the command to “strike them,” that is, women, to be taken literally?

This verse begins with the declaration that “Men are *qawwamun* in relation to women.” The word *qawwamun* (singular, *qawwam*) derives from the Arabic term for standing. It signifies one who “stands over” or “stands up for,” thus potentially encompassing both authority and responsibility. These dual elements were recognized by classical commentators on this verse who attributed men’s role as *qawwamun* to both divine favor of men in general over women in general (“according to what God has favored some over others”) and to husbands’ financial responsibility for paying dower and maintenance to their wives (“according to what they spend from their wealth.”) Some commentators devoted more attention to male “perfection” and female “deficiency” than to men’s financial obligations, while others acknowledged male superiority as a given but stressed a husband’s duty to support his wife.

Progressive interpretations contest the notion that men are inherently superior to women. Some argue that while the verse can indeed be taken to refer to favoring men over women, this favor is only in the limited realm of the greater inheritances men receive (possibly alluded to in the immediately preceding verses). These interpreters see this connection in the next clause

of Surah 4, verse 34 which refers to men’s financial responsibilities (“and according to what they spend from their wealth”). Other interpreters stress that the Qur’an only states that “God has favored some over others” (or “one over the other”) not that men are favored over women; there is no grammatical reason for taking men as the “some” and women as the “others.” Thus, the verse might refer to some men being privileged over other men, thereby differing in the amount of wealth they use to maintain the women for whom they are *qawwamun*.<sup>27</sup> Regardless of the specifics, the most important element in rereadings of this verse is the focus on male support of women. If men are *qawwamun* in part “because of what” (one possible translation of *bi ma* along with “according to what”)<sup>28</sup> they spend on women, then their role is dependent on their exercise of financial responsibility. If men no longer support women, then they lose any resultant authority. Thus, in a family where both husband and wife contribute to the household expenses, the husband would not be the wife’s *qawwam*.

After giving one very broad statement about men and women, the verse turns to a specific category of women, the “righteous women” (*al-salihat*), defining them in two ways: as *hafizat li’l-ghayb*, women who guard or protect what is absent or unseen, and as *qanitat*, a term that can mean obedient, subservient, or deferential. Commentators disagree on how to interpret the phrase “*hafizat li’l-ghayb*,” particularly in conjunction with *bi ma hafiza Allah*, according to, or with, or because of what God has guarded or protected. Based on a widely quoted hadith, most commentators suggest that these women are those who, in the absence of their husbands, protect their own chastity and their husbands’ possessions. Progressive and feminist interpreters, however, have tended to interpret “those who guard what is unseen” as those who fulfill their religious obligations and protect their faith, as God has guarded it.

Classical and reformist interpretations of *qanitat* also diverge sharply. *Qanitat* is the feminine plural of *qanit*, meaning one who is obedient, subservient, or deferential, one who demonstrates *qunut*, from the same Arabic root (*q-n-t*). Medieval commentators often reduce *qunut* in this context to a

woman's obedience to her husband. However, the term *qanit(at)* is used elsewhere in the Qur'an only for obedience to God and God's Messenger. 'Abdullah Yusuf Ali renders it as "devoutly obedient," in his translation of this verse, just as he does where the Qur'an applies the term to men and women alike in Surah 33, verse 35, which includes "devoutly obedient men (*qanitin*) and devoutly obedient women (*qanitat*)" among the list of those who will be rewarded by God. The Qur'an also refers to exceptional figures such as Mary and Abraham with the term *qanit*.<sup>29</sup> There is thus no reason for considering the use of the term in Surah 4, verse 34 to refer to anything other than women's obedience and devotion to God. In fact, interpreting *qanitat* in terms of obedience to the husband is particularly problematic, given the way that the Qur'an treats obedience to human beings and human authorities (with the exception of the Prophet) as generally significantly less worthy than obedience to God.<sup>30</sup>

There is, however, some type of disjunction between deference to God and the misbehavior discussed in the latter portion of the verse. The root of the word *nushuz* (*n-sh-z*) refers to rising. Most medieval Qur'an commentators understand women's *nushuz* as disobedience or rebelliousness (*isyan*) toward their husbands. Two behaviors repeatedly mentioned as forms of *nushuz* are leaving the marital home without permission and refusing the husband's sexual overtures. More rarely, disrespectfulness, "lewdness," or failure to perform religious obligations are mentioned as forms of female *nushuz*.<sup>31</sup> A woman who commits *nushuz* is referred to as *nashiz* or *nashiza*. Men can also commit *nushuz*, but the term is understood differently in that case.

Contemporary interpreters differ somewhat in their interpretation of *nushuz*, whether on the wife's part or the husband's. Generally, they view *nushuz* as a type of marital disharmony, arising on the part of either husband or wife, or lewd conduct, falling short of adultery, on the part of either spouse.<sup>32</sup> When a woman commits *nushuz*, past generations of authorities have generally agreed on measures that the husband may use. In addition to those sanctioned by the Qur'an, discussed below, jurists generally agree that a man may suspend his

wife's support (*nafaqa*) if she refuses him and/or leaves home, since she has made herself unavailable to him.

Moroccan feminist Fatima Mernissi argues that *nushuz* is conceptually central to the Islamic gender system. “*Nushuz* is a Qur’anic concept; it means the rebellion of the wife against her Muslim husband’s authority,” she writes. “The Qur’an only refers to *nushuz* in order to describe the punishment a husband must inflict upon the wife in case she rebels.”<sup>33</sup> Mernissi elaborates elsewhere: “[*N*]ushuz refers specifically to the wife’s rebellious tendencies toward her husband in an area where female obedience is vital: sexuality. The Qur’an calls *nushuz* the wife’s decision not to comply with her husband’s desire to have intercourse.”<sup>34</sup> Mernissi is mistaken in her assertion that the Qur’an explicitly defines *nushuz* in this way and in her claim that the term only appears in the Qur’an with reference to a wife’s behavior, but she is substantially correct in her characterization of how the classical and medieval scholars understood the wife’s *nushuz*.<sup>35</sup>

The Qur’an also discusses a husband’s *nushuz* in Surah 4. As in verse 34, the Qur’anic passage on men’s *nushuz* (verse 128) appears near other verses discussing marital discord: “If a woman fears *nushuz* or rejection (*i’rad*) from her husband, there is no blame on them if they come to a settlement, and settlement is better, even though people’s souls are stingy.” Interpreters generally agree on the definition of, and remedies for, men’s *nushuz*. Most hold that the husband’s *nushuz* is his dislike of, or aversion toward, his wife. Some accounts hold that this verse was revealed in the case of a husband who came to dislike his wife because of her advancing age or some other factor. Some state that this man was Rafi‘ b. Khadij, who had married a young bride and favored her over his wife of many years. Other accounts suggest that it was revealed about the Prophet and his wife Sawda. In either case, the exegetes and jurists agree that the “settlement” the Qur’an refers to consists in the wife giving up certain marital rights, as both as both Rafi‘’s wife and Sawda eventually did, as a means of inducing her husband not to divorce her.

While most defined the husband’s *nushuz* as dislike of a wife, a minority held that the husband’s *nushuz* was his

maltreatment of his wife. Specifically, frequent or excessive violence, including striking her in the face, constituted *nushuz*, in this view. (This interpretation has increased in popularity in modern times.) This condemnation of a husband physically harming his wife stands in contrast to the generally accepted view that he may strike her under certain circumstances. The three measures given in Surah 4, verse 34 to be taken in cases where men fear female *nushuz* are “admonish them, and abandon them in bed, and strike them.” The verb *daraba*, “to strike,” is commonly translated in this context as “hit,” “beat,” or “scourge,” though two recent translations have rendered the word as “spank.”<sup>36</sup> The verb appears numerous times in the Qur’an with other meanings, leading some to question why it must be understood as striking in this context. One translator has proposed that *daraba* in this context does not mean strike, but rather “separate” or even “have sex with” (a metaphorical meaning attributed to the same Arabic root).<sup>37</sup> Commentators have broadly agreed, though, that the term is meant literally, not metaphorically, and that the verse gives permission for a husband to strike his wife for *nushuz*, although only if admonition and abandonment in bed have had no effect.

There are several layers to the problem of interpretations raised by these two verses discussing *nushuz*. It is clear that medieval interpreters were guided by certain unflattering presumptions about female nature in their discussions of righteous women and marital obedience. Further, the treatment of male and female *nushuz* as unrelated phenomena, part of the atomistic verse-by-verse approach that Fazlur Rahman criticizes, misses a vital connection between the two, something modern commentators such as Sayyid Qutb have remedied to a certain extent.<sup>38</sup> Yet simply noting that the Qur’an treats both male and female *nushuz* as problems does not automatically absolve the Qur’an of preferring the male over the female in this respect. That is to say, the consequences for female *nushuz* – even if *nushuz* is understood as antipathy or high-handedness, which can rightly be attributed to either spouse – do not merely differ in the interpretations of the exegetes, but are clearly differentiated in the text of the Qur’an itself.

How, then, can one approach the Qur'an in a gender-conscious manner, neither accepting patriarchal premises nor falling into what Farid Esack refers to as “simplistic apologia”? The challenges facing feminist exegetes can be clearly seen in a comparison of two essays on Islam from the volume *What Men Owe to Women: Voices from the World's Religions*.<sup>39</sup> One, by Esack, challenges much conventional reformist wisdom about the Qur'an's treatment of women and gender relations. The other, by Asghar Ali Engineer, exemplifies the most common modernist way of dealing with the issues involved, including a significant proportion of apologetic. Their essays center largely on Surah 2, verse 228 (the “degree” verse) and Surah 4, verse 34 (“Men are *qawwamun*”), notoriously difficult verses for exegetes concerned with gender justice and equality. Though women constitute the majority of contemporary scholars concerned with these problems, the similarities and differences in this pair of essays by male scholars exemplify both the promise and peril of particular approaches to the matters at hand.

Indicative of his unwillingness to grapple with particularly thorny problems, Engineer omits all reference to men's “degree over” women when he quotes from Surah 2, verse 228. He presents only the first portion of the verse, which he translates “The rights of the wives (with regard to their husbands) are equal to the (husbands’) rights with regard to them ...”<sup>40</sup> A more literal translation of this phrase would have, “To them (fem. plural) like due from them (fem. plural) [according to what is proper].”<sup>41</sup> Admittedly, this rendering is too vague to be satisfactory for those reading in English only; Engineer justifiably adds in the notion of rights and duties (*haqq*) which, while not present in the Arabic text, is clearly implied. Nonetheless, his use of the term “equal” without any qualifiers or alternatives is misleading. Still more disingenuously, Engineer substitutes an ellipsis for the second portion of the verse which declares: “and men have a degree over them (fem. pl.).”<sup>42</sup> His omission of this clause is particularly problematic given that he uses this verse, in tandem with Surah 33, verse 35 (“For Muslim men and Muslim women ...”), as evidence for both justice and equality. According to Engineer, “Both of these verses leave no doubt that gender

justice is highly crucial to Qur'anic teachings. These verses also make it abundantly clear that gender justice cannot be realized without gender equality."<sup>43</sup>

Engineer's dual assertion that gender equality is a necessary component of gender justice, and that both equality and justice are found in Surah 2, verse 228, is only rendered plausible by his manipulation of the Qur'anic text. By omitting the "degree" portion of the verse, Engineer avoids the stereotype of Muslim women as irremediably oppressed and without rights. However, to anyone familiar with the verse or who pursues the matter further, Engineer's tactic appears as a blatant attempt to hide what the Qur'an says, as if that is the only way Muslim women's rights could be affirmed. Engineer is not the only author to bypass the troublesome notion of a "degree;" non-Muslim Islamicist John Esposito, for example, gives a similarly partial quotation of the verse in *Women in Muslim Family Law*.<sup>44</sup> Of course, some authors – both non-Muslim polemicists and Muslims seeking to affirm male familial authority – take the opposite tack, only quoting the portion of the verse where the degree is mentioned, leaving off the description of the woman as a moral personality with both rights and obligations.<sup>45</sup>

More nuanced explorations of the "degree verse" by other commentators acknowledge the existence of the degree but limit its scope to the immediate Qur'anic context of divorce.<sup>46</sup> In granting men the additional authority to pronounce or take back divorces, "the Qur'an recognizes men as the locus of power and authority in actually existing patriarchies,"<sup>47</sup> but does not otherwise stipulate a husband's superiority in marriage. (Divorce is, in fact, a realm in which Qur'anic verses clearly accept or confer greater power for husbands in relation to their wives. Female responsibility to act also appears in this verse, which expresses a command regarding their action – "Divorced women shall wait concerning themselves for three [menstrual]<sup>48</sup> cycles" – but does so in a way that makes clear women's legal passivity, referring to them as women who have been divorced.) The Qur'an's declaration in this verse that "their husbands have more right to take them back in that period if they (masc./inclusive plural) wish for

reconciliation”<sup>49</sup> has been plausibly construed to refer to the “degree” mentioned in the verse.

The specifics of the Qur’an’s regulations cannot be understood in isolation from their historical context, but how precisely that context is to serve later readers is open to debate. Engineer places himself in an ultimately untenable position: he insists, on the one hand, that the Qur’an affirms the equality of men and women, yet acknowledges, on the other, that there are “situational constraints”<sup>50</sup> governing the Qur’an, meaning that particular verses may not always demonstrate this equality. According to Engineer, “Scriptures both reflect the given situation and also transcend it.”<sup>51</sup> There are both “normative” and “contextual” verses in the Qur’an.<sup>52</sup> *Ijtihad* – defined by Engineer as “exerting oneself to solve newly arising problems if no precise guidance was available in the Qur’an and in the Prophet’s Sunnah”<sup>53</sup> – is to play a major role in transforming modern understandings of verses that seem unfair to women today. Ironically, Engineer blames earlier scholars for deviating from the “normative” message of the Qur’an by putting their individual interpretation on its verses, while asserting that contemporary scholars should exercise the same type of *ijtihad*.

Esack, in an article that focuses on Surah 4, verse 34, agrees with Engineer and other scholars that interpretation of the Qur’anic text has always played a significant role in determining how its verses have been understood and implemented. He notes key verses where the Qur’an advocates gender justice, including a more accurately translated but similarly truncated version of the degree verse.<sup>54</sup> Where he moves against the grain of Muslim feminist and reformist discourse on the Qur’an is in his assertion that it is impossible to place all blame for the difference and inequality in interpretations of the Qur’an on its interpreters. Considering himself “a Muslim with a passionate commitment to both the Qur’an and to gender justice,” he recognizes that these can be “seemingly conflictual voices.”<sup>55</sup> Esack makes the crucial point that interpreters of the Qur’an must grapple with its androcentrism in addressing certain revelations to men; indeed “The Qur’an’s essential audience is

males. ... [Women] are essentially subjects being dealt with – however kindly – rather than being directly addressed.”<sup>56</sup>

Esack discusses Surah 4, verse 34 as a prime example of a verse presupposing male listeners; it also assumes male physical control of women. The provisions outlining measures to be taken in case of women’s *nushuz* – or, more exactly, in case of men’s fear of female *nushuz* – are addressed to a male audience, in sharp contrast to the way that women’s different options in the face of a husband’s *nushuz* are discussed in Surah 4, verse 128, where both men and women are discussed in the third person. Esack demonstrates that while classical commentaries oversimplify the matter of women’s devotion to God and obedience to husbands, modern apologetics and feminist analyses frequently overlook the very clear authority delegated to men over women’s bodies.

### *Garments for one another*

In Surah 2, verse 228, positing that men have a degree over women (or that husbands have a degree over their wives), men and women are spoken of in reciprocal but unequal terms – but they are both spoken of. In both Surah 4, verse 34, the “striking” verse, and Surah 2, verse 187, the “garment” verse, women are spoken of, but men are spoken to.<sup>57</sup> This commonality between these two verses is all the more noteworthy given that the clause so frequently quoted from the latter refers to a reciprocal and mutual relationship between spouses, while the former presumes (or commands) hierarchical and gender differentiated spousal interactions. I will consider the garment verse in its entirety below, but here I want to suggest that the Qur’anic mode of address is not in itself sufficient to classify the contents of particular verses. The Qur’anic text repeatedly refers to women as a “them” who must be dealt with by men, who are its implicit or explicit addressees, with regard to matters associated with sex, women’s bodies, and conduct in intimate relationships. Yet not all of these verses addressed to men about women endorse customs and rules supporting male dominance.

Verses addressed (in the second person) to men discussing women (in the third person) may or may not assume or advocate women’s legal or social passivity, though the very mode of address presumes a privileged position for men as the audience for divine guidance. The extensive discussions of divorce and widowhood surrounding the “degree” verse in Surah 2 take the male as the hearer (“you”) and the female as the subject or object of the revelation (“they”), but do so in order to promote women’s liberty. Examples include Surah 2, verse 232 (“When you have divorced women and they [fem. plural] have reached their term”), verse 234 (“When any of you die leaving wives, they [fem. plural] are to wait on their own account”), and verse 240 (“And those of you who die leaving wives”). Though these verses are addressed to a male audience, it is not the males who are being tasked with obligations and granted agency. The women of whom God speaks are passive in the sense of *being* divorced or widowed (though one may presume a man leaving a widow did not do so intentionally), yet the crucial information conveyed in these verses is female freedom to act independently in the aftermath of a marriage’s termination. Even though men, not women, are the recipients of the commands, these regulations promote women’s right or duty to act – especially since, in the case of widowhood, husbands are only the addressees in a theoretical sense.

Similar injunctions in other verses, such as those stressing that the choice to remain married or to separate should be mutual, promote the relaxation of male marital and familial controls on women. The use of the dual form in relevant contexts makes clear that both spouses are intended, as in Surah 4, verse 130 (“if they [dual] separate”). A series of statements in Surah 2, verses 229–30 addresses both male and female feelings.<sup>58</sup> Even Surah 2, verse 230, which depicts the male action of divorce as unilateral, does not dismiss female agency entirely, presenting the woman as the active party in another marriage. (This stands in contrast to Surah 2, verse 221 where men marry and women, in the passive voice, are married.) Further, any possible reunion between two spouses after divorce appears as a mutual action, based on a mutual ability to observe God’s limits.

Amina Wadud and Asma Barlas have argued that the places where the Qur'an addresses men *qua* men respond to the practical exigencies of an extant patriarchy – specifically, that of seventh-century Arabia.<sup>59</sup> This explanation accounts satisfactorily for discussions such as those about divorce or widowhood, and consent to marriage; commands that men fulfill obligations toward women but allow them independent action suggest a trajectory away from male familial domination and control, if not a complete rejection of patriarchy. With regard to sexual intimacy, though, this interpretation is less convincing. In a number of verses concerned with sex, women are spoken about and men are spoken to in a way that presumes male control and is unconnected with ameliorative measures intended to restrict men's scope of action or enlarge that assigned to women.

A number of considerations arise when the “garment” verse is considered in its entirety:

Lawful for you on the nights of the fasts is the approach to your wives. They (fem. pl.) are garments for you and you are garments for them. God knows that you used to cheat yourselves, and [God] turned to you and forgave you. So now be intimate with them (*bashiruhunna*, fem. pl.) and pursue what God has written for you. And eat and drink until the white thread becomes distinct from the black thread, from the dawn, then fast completely until night. And do not be intimate with them (fem. pl.) when you are in retreat in the mosque. Those are the limits ordained by God, so do not approach them. Thus does God make signs clear to humanity, that they may be conscientious.<sup>60</sup>

This verse speaks to men about pursuing or abstaining from intimacy with women. Despite the address to men, there does not seem to be anything inherently gender specific in the commands. The regulations with regard to fasting are universally taken to apply equally to male and female Muslims.<sup>61</sup> Perhaps, then, not only the regulations surrounding eating and drinking but also those pertaining to sex should be read as

non-gender differentiated; clearly, the description of spouses as “garments” for one another is equally applicable to both sexes.<sup>62</sup> Moreover, there is no indication that the human consciousness of divine guidance that is counseled at the end of the verse should be limited to men. Nonetheless, the verse clearly presumes male initiation of sexual activity (“Lawful for you ... is the approach”) and male restraint from initiating sex when impermissible (“do not be intimate with them then”).

Another passage presumes a level of male control over the intimate relationship between a couple that even more clearly assigns a dominant role to men in the sexual decision-making process, with regard to both initiation of sex and sexual positions. Surah 2, verses 222–23 declares:

They ask you about menstruation. Say, It is a hurt (*adhan*), so keep away from women during menstruation and do not approach them until they become pure. When they have purified themselves come to them in the way (*min haythu*) God has ordered you. God loves those who repent, and loves those (masc./inclusive pl.) who purify themselves. Your wives are a tilth (*harth*) for you; so come to your tilth as you wish, but do something for your souls beforehand. And be conscious of God, and know that you are going to meet God. And give good tidings to the believers.<sup>63</sup>

In addition to the obvious (these commands are addressed to men, about women) and the tangential (menstruation renders women impure for intercourse), these verses make two essential points. First, they presuppose male agency and female passivity with regard to the initiation of sex. Second, they place all sexual relations, like other human activity, firmly within the scope of divine regulation.

Exegetes understand Surah 2, verse 222 to be divine guidance conveyed to the Prophet in response to questions posed to him by Muslims (“They ask you about ...”). It is perfectly intelligible that commands or advice about women should be directed toward men, if they were the ones doing the questioning. The content of the first verse, about sex during

menstruation, clearly indicates that men bear responsibility for either keeping away from or approaching their wives for sex. It does not, for example, command men to wait for their wives to approach them after they have purified themselves from menstruation. Though women have the duty to purify themselves, it remains a male duty (or prerogative) to initiate sex once purification is complete.

The second of these verses famously declares “*nisa’ukum harthun lakum*” – “your wives are a tilth for you.” The choice of metaphor seems to suggest passivity; a field, after all, is an object to be tilled, not an active partner in the decision whether or not to plow, or plant, or harvest (or to *be* plowed, etc.).<sup>64</sup> Barlas has argued, suggestively, that one cannot read this verse to justify the treatment of “women as men’s sexual property”, because “property in land” was not known in that place and time; besides, other Qur’anic verses give a different semantic scope for the term *harth*.<sup>65</sup> Others accept the land analogy, but stress that the likening of a woman’s body, or genitals, to a tilth implies an obligation of careful cultivation, not proprietary license to act without thought for the woman’s well-being.<sup>66</sup> Others have suggested that the passage refers to procreation and the (im)permissibility of contraception.<sup>68</sup> However this passage is interpreted, though, the fact remains that the Qur’an here objectifies women in the most literal sense, discussing them as matter to be acted-upon not agents in their own right.

The usual account of the revelation of Surah 2, verse 223, strengthens the view that the Qur’anic text supposes male control of women’s bodies; it is said to have been revealed in response to a dispute between husband and wife over the acceptability of a particular position for intercourse. The wife reportedly objected to the husband’s desire to enter her from behind; this verse granted him permission to have sex with her in the position of his choosing.<sup>68</sup> If such is its circumstance of revelation, the verse seems to preclude a woman having any right to deny her husband sexual access (except during menstrual impurity) in the manner of his choosing. Of course, the occasion of revelation usually proposed for this verse may instead be a post-facto rationalization; the Qur’anic text might merely

grant freedom to married couples to determine their own sexual positions.<sup>69</sup> Even this analysis, however, leaves intact the presumption that husbands instigate and control sexual activity.

That said, the most important content of all of these verses is not the content related to intercourse itself but the placement of sex firmly under divine oversight – in the sense that God will call each human being, and here particularly men, to account for their deeds, even with regard to sex. As with the discussion of divorced or widowed women, these passages are anything but a license for unbridled male actions; men’s access to women’s bodies is controlled by divine regulation. Unlike in those cases, however, Qur’anic discussions of sexual intimacy contain no appeal for female freedom to act.<sup>70</sup>

### *Conclusion*

Though the Qur’an stresses individual accountability on numerous occasions without reference to gender, men seem to have greater scope for action and moral agency, particularly with regard to marriage and sex. That is not to say that women’s feelings and desires are not taken into consideration at all; discussions of verses on marriage and divorce in this chapter have shown that a woman’s role in selection of a marriage partner and in regard to continuing her marriage may be necessary, if not decisive. Overall, however, the Qur’an directs men to exercise responsibility for numerous decisions in familial and intimate matters. Dominant interpretations that acknowledge this gender differentiation suggest that this arrangement reflects the natural order of things; men have both greater responsibilities and greater privileges in the divinely approved hierarchical forms of social and familial organization outlined in the Qur’an. Others, though, insist that such verses merely reflect the social norm of patriarchy, by addressing those with greater power in it. Although I am reasonably persuaded of this latter view with regard to marriage, divorce, and polygamy, I find it less convincing with regard to intimate sexual relations between husband and wife. The Qur’anic privileging of male sexual agency

suggests that in some crucial sense the Qur'an is a thoroughly androcentric – though not, I would argue, misogynist – text.

Modern scholarship on the Qur'an has rightly pointed out serious oversimplifications and distortions in the commentarial tradition, where commentators' own assumptions about female inferiority and male supremacy have led to seriously flawed exegeses of particular verses. Yet, scholars intent on reform have at times committed the same error of allowing their own presuppositions to color their interpretations of the Qur'an to the extent that they fail to consider other possibly legitimate readings. It is not enough to simply posit that "the Qur'an is egalitarian and antipatriarchal,"<sup>71</sup> and to blame interpretations that deviate from that perspective entirely on "misreadings." Barlas, in an exercise of considerable intellectual honesty, acknowledges the role of the interpreter's beliefs in "*Believing Women*" in Islam. She writes that:

I set out to absolve the Qur'an "itself" of culpability for what Muslims have, or have not, read into it. This does not mean that I did not consider seriously the alternative argument that the problem is not one of reading but of the very nature of some of the Qur'an's teachings. ... I wondered whether the Qur'an itself is responsible for its misreadings.<sup>72</sup>

Even in this attempt to query her work's presumptions, Barlas does not acknowledge the possibility that a reading of the Qur'an that arrives at different conclusions could be a legitimate reading or a faithful explication of "the Qur'an's teachings." The way she frames the issue in fact presupposes what she sets out to prove: that any patriarchy or inequality seen in the Qur'anic text is the result of a "misreading."

Barlas's work operates under the assumption that the existence of mutuality and reciprocity in intimate relationships are incompatible with hierarchy; since the former clearly exist in the Qur'an, the latter cannot. However, as David Halperin has argued with regard to ancient Greece, inequality does not preclude real and enduring affection and may, in certain circumstances, even be a condition for it; in some contexts,

“personal affection and social subordination ... are two sides of the same coin.”<sup>73</sup> It is one thing to accept this as a description of an ancient society, however, and another to view it as part of the divine plan for humanity. If the Qur’an – and, by extension, God – treats the male as the primary recipient of guidance on matters of sex, if divine revelation endorses man-on-top (figuratively, of course, as the occasion-of-revelation literature seems to suggest that position-wise, it is not the placement of the man’s body but his decision about the position that matters), one must ask whether the egalitarian vision of gender justice that I and others would like to see diverges from God’s understanding of essential human nature.<sup>74</sup>

Honesty requires me to concede the strength of some scriptural interpretations positing a privileged role for males in family and society. Still, just because these are possible – even the most straightforward – readings does not mean there cannot be equally compelling feminist interpretations of the text when historical context is considered and when critical principles of justice, kindness, and love are taken seriously. However, in order to create a body of persuasive and thorough feminist interpretation these principles will need to be defined and explored because justice, just to take one example, can mean a variety of things. One must debunk and counter aggressively patriarchal and indeed misogynist interpretations, but also justify the project of egalitarian interpretation. In the process, one must acknowledge that esteeming equality as the most important interpersonal value is a peculiarity of some modern Muslims and not something inherent in the text of the Qur’an. Feminist exegetes must take care not to be as blinded by the commitment to equality, and the presumption that equality is necessary for justice, as classical exegetes were by their assumptions about the naturalness of male superiority and dominance in family and society.

In any case, the Qur’an is not primarily a rule book but rather a revelation that captivates and engages hearts and minds. It serves not only as a source of divine guidance but also as an indicator of the divine intelligence at work in the universe; it reminds human beings of God’s existence, generosity, wrath,

mercy, and justice. The fact that the Qur'an has a larger purpose – and a more complicated relationship to human social and familial life than simply to provide regulations – does not excuse sloppy or apologetic readings of difficult passages. However, we do well to remember that there are limitations not only to the work of human interpretive intelligence, but to the Qur'anic text itself, at least as manifested in the earthly realm. It is, and can only ever be, a pale shadow of the ultimate Reality.

## 8 The Prophet Muhammad, his Beloved Aishah, and Modern Muslim Sensibilities

Aishah narrated that the Prophet married her when she was a girl of six and he consummated the marriage when she was a girl of nine.

– *Sahih Bukhari*<sup>1</sup>

In 2002, Southern Baptist preacher Jerry Vines caused an uproar in the United States when he referred to the Prophet Muhammad as “a demon-possessed pedophile.”<sup>2</sup> The accusation of demon possession hearkened back to the “satanic verses” controversy sparked by Salman Rushdie’s 1988 novel, but Vines’ remarks did not reignite that firestorm. Instead, it was his accusation of pedophilia – based on Muhammad’s marriage to the young Aishah – that proved potent. Even in the post-9/11 climate of American hostility toward Islam, American Muslims found this attack on the Prophet particularly offensive. Outraged, many instinctively refused to accept the evidence provided by Vines and his associates for Aishah’s age at marriage, though they were on solid ground as to their sources.<sup>3</sup> According to *Sahih Bukhari*, viewed by Sunni Muslims as the most authentic compilation of hadith reports about the Prophet and his companions, Aishah was a girl of six when her father, Abu Bakr, married her off to his close friend Muhammad. Accounts in *Sahih Muslim*, the second most respected compilation, suggest an age at marriage of either six or seven.<sup>4</sup> The accounts agree, however, that she was “a girl of nine” when Muhammad consummated the marriage.

American Muslim leaders and organizations found themselves at a loss as to how to deal with the issue aside from frequent repetitions of the obvious counterclaim that Vines’

remarks were inflammatory. Most response focused on the sinister motivations behind, and the divisive effects of, Vines' comments, using terms such as "venomous," "bigoted," and "hate-filled." Sidestepping the substance of the allegations, Shakur Bolden, an Islamic Center president from Florida, declared: "It's outrageous that he made those comments. He should not have made those comments. Those comments do not bring people together and that's what we ought to be about – bridging communities."<sup>5</sup> A few spokespeople for Muslim organizations cautiously suggested that Vines' statements were inaccurate. But in one of the few attempts to refute directly the allegation about Aishah's age, Ibrahim Hooper, spokesman for the prominent Council on American-Islamic Relations, resorted to clumsily (and erroneously) suggesting that "six" and "nine" have been interpreted by many Muslim scholars to mean "sixteen" and "nineteen."<sup>6</sup>

There is nothing new, of course, about the Prophet's marriages being the target of non-Muslim criticism. Accusations of lust and sensuality were regular features of medieval attacks on the Prophet's character and, by extension, the authenticity of Islam as a religion.<sup>7</sup> This "rather abrasive criticism"<sup>8</sup> focused, more often than not, on the large number of Muhammad's wives or his marriage to Zaynab, the former wife of his adopted son Zayd. Aishah's age was rarely the subject of controversy in premodern discussions. In recent years, however, it has figured prominently in criticisms leveled against Islam not only by Christian polemicists but also a number of feminist, human rights, and secularist organizations. Though the controversy over Aishah's age at marriage died down fairly quickly in the national media, years later it still rages online, where it has appeared as a staple in evangelical polemics against Islam well before Rev. Vines' remarks.<sup>9</sup> Partially due to this added scrutiny, Muhammad's marriage to Aishah has become a topic of discussion and debate among Muslims as well.

This chapter considers contemporary Muslim treatments of Aishah's age at marriage and what they reveal about certain types of Muslim anxieties, focusing on online sources. Muslim discussions of the Prophet's personal conduct in

general, and his marriage to Aishah in particular, provide a lens through which to view changed attitudes toward sex and marriage, and unresolved concerns about the appropriateness of applying medieval standards in modern life.<sup>10</sup> There are dangers in both historical anachronism and unchecked moral relativism, and in analyzing Muslim reflections on Muhammad's marriage to Aishah, several questions emerge about both the accuracy and relevance of historical information. The most obvious, of course, are: how old was Aishah when her marriage to the Prophet took place? and how old was she when it was consummated? I make no attempt in this chapter to assess the historical record, nor do I take a position as to Aishah's actual age at the time of consummation of her marriage. I do not think the Bukhari account of Aishah's marital history is implausible, given later legal discussions of menarche and majority, nor do I view it as infallible simply because Bukhari includes it. The cavalier treatment of this hadith by those who find its content objectionable, however, has implications that many Muslims not directly engaged in ongoing polemical struggles have not recognized. Rejecting the view that Aishah was six and nine, respectively, at marriage and consummation implies a willingness to question the reliability of Bukhari's compilation which, under other circumstances, can subject one to attack.

How to treat hadith texts is perhaps the most crucial methodological issue for contemporary Muslim reformist thinkers. Just as with the Prophet's ownership of Mariyya, or his actions in permitting Muslim soldiers sexual access to females captured in battle, if one accepts the hadith account of his marriage to Aishah, one confronts the actions of the Prophet in doing something that is unseemly, if not unthinkable, for Muslims in the West. Suggesting that he was wrong to do so raises profound theological quandaries. Yet accepting the rightness of his act raises the question: on what basis can one reject the marriage of young girls today? At stake are broader issues regarding the relevance of prophetic example to Islamic sexual ethics and the relevance of historical circumstance to the application of precedent.

*Apologetics and Polemics*

Contemporary Muslim discussions of the Prophet's marriages in general, and his marriage to Aishah in particular, are attentive to the broader climate of non-Muslim scrutiny and criticism of Islam. As in controversies over female circumcision, Muslim discourses on the Prophet's personal life have the dual objective of defending Islam by responding to allegations of impropriety while also engaging in intra-Muslim reflection and debate. There is a voluminous Muslim-oriented literature, in pamphlets and books, treating the Prophet's wives, and making reference to the Prophet's exemplary behavior as a husband.<sup>11</sup> Not surprisingly, there are also numerous discussions of these topics on a variety of Internet sites, expressing diverse perspectives, and addressed to different audiences. Muhammad's marriage to Aishah is a prominent theme in treatments of the Prophet's married life. Some articles explicitly respond to criticism of the marriage; these range from refutation to apologetic to counter-polemic, and seem to be mostly directed toward non-Muslims. Other pieces – articles, fatwas, question/answer format discussions, and postings in chat rooms and on discussion boards – are geared toward intra-Muslim dialogue. Even in Muslim-focused forums, though, the various approaches adopted by Muslim authors reflect their sense that they are engaged in an ongoing ideological struggle with “Christianity” and “the West.” This oppositional stance emerges clearly in directly polemical articles but is present at least as an undercurrent in almost all discussions.

The variety of Muslim responses to the issue of Aishah's age at marriage reflects differing audiences and attitudes to the hadith sources as well as varying levels of identification with the world-wide *umma*, or Muslim community. A few groups outside the mainstream, such as the Ahmadiyya or the Submitters, flatly deny that Aishah was nine when she began marital life with the Prophet. They do so by rejecting the authority of the hadith that present this “fact.” One online Ahmadi source questions the credibility of the reports about Aishah's age at marriage while attempting to defend the authenticity of the hadith literature as

a whole; the article suggests that “the compilers of the books of Hadith did not apply the same stringent tests when accepting reports relating to historical matters as they did before accepting reports relating to the practical teachings and laws of Islam.”<sup>12</sup> In making this distinction between history and law, the author attempts to deny the information in the report at hand without impugning the reliability of one core source of Muslim ritual and law. Reflecting its increased distance from Muslim orthodoxy, the Submission site, linked to the organization founded by controversial figure Rashad Khalifa, goes much further, equating hadith to Internet rumor: “All the stories circulating on the Internet and in the hadiths [sic] books about Aishah’s marriage at age of 6 or 9, are no more than lies found in the corrupted books of Hadiths and completely contradict the teachings of the prophet Muhammed that came from his mouth, the Glorious Quran.”<sup>13</sup> Despite their different attitudes to the hadith sources, both of these groups on the margins of Muslim orthodoxy agree with non-Muslim polemicists that *if* the Prophet had indeed engaged in sex with a nine-year-old girl, regardless of whether or not she was his wife, such behavior would be blameworthy. For these groups, the conflict over Aishah’s age provides a chance to prove that they alone embrace “true” Islam, while other Muslims are guilty of distorting the legacy of the Prophet.

Most Muslim authors, though, are not so openly dismissive of the hadith sources, however inconvenient they may find them in this case. Those who reject the notion that the Prophet consummated his marriage with Aishah when she was nine sometimes argue or merely insinuate that the specific reports cited are inaccurate, leaving aside the question of the reliability of Bukhari or Muslim as a whole, and indeed usually refraining from even mentioning the specific location of the reports in question. For example, T.O. Shanavas, affiliated with a Kentucky-based organization called the Islamic Research Foundation International<sup>14</sup> simply states that “We do not know the exact age at the time of her marriage due to lack of reliable records.”<sup>15</sup> Other accounts may attempt to discredit the reliability of Hisham b. ‘Urwa as a narrator, in order to cast doubt on the particular account in question, which is related from Aishah on

the authority of her nephew ‘Urwa on the authority of his son Hisham.<sup>16</sup> Alternately, they may propose a different chronology, drawing from *sira* narratives, suggesting an earlier date of birth for Aishah based on an account declaring her to be a “girl” when a particular event occurred. Recalculating Aishah’s age at marriage based on this nebulous evidence, such articles generally put her in her early to mid-teens at the time of consummation.

The attempt to revise the standard narrative of Aishah’s age at marriage is not limited to online sources. In fact, the specific features of the online discussion can be better appreciated after a brief detour to evaluate how the question of Aishah’s age is treated in several recently published or reprinted works aimed at Muslim audiences. The late Pakistani ‘*alim* Syed Suleman Nadvi writes proudly of her youth and virginal status, declaring: “Out of all the wives of the Holy Prophet [only] Hazrat Aishah had the distinction of being a virgin wife.”<sup>17</sup> The “wedlock” occurred when Aishah was at the “tender” age of six. Three years later, “the consummation of her marriage” occurred. “Aishah was then only nine years of age,” he writes.<sup>18</sup> The “only” in Nadvi’s statement is a mark of pride, not a condemnation. Nadvi here echoes statements attributed to Aishah herself in classical sources including Ibn Sa‘d, where her youth and especially virginity at marriage were a mark of honor, not a badge of shame.<sup>19</sup>

By contrast, in his book on the Prophet’s wives British Muslim Ahmad Thompson studiously avoids any mention of consummation. Thompson presents a succinct account of events: “Soon after arriving in Madina, ‘A’isha, who was now nine years old, was married to the Prophet Muhammad, who was now fifty-four years old. It was at this point that she left her family’s household and joined that of the Prophet Muhammad.”<sup>20</sup> The age Thompson provides for Muhammad in this passage coincides with the standard historical view of when consummation took place; those who dispute Aishah’s age at that time do so by suggesting an earlier birthdate rather than a later date of consummation. By giving Aishah’s age as nine when she “was married,” Thompson thus implicitly accepts the Bukhari

view of when consummation occurred. Yet by not mentioning the earlier contracting of the marriage at age six or seven, Thompson leaves the reader free to imagine that Aishah's joining of the Prophet's "household" at age nine represents a mere shift of residence, not the beginning of a marital sexual relationship.<sup>21</sup>

Mumtaz Moin, a Pakistani author, devotes one lengthy paragraph in her biography of Aishah to the question of her age at consummation, but refrains quite deliberately from taking a definitive position. She begins by noting that "The Muslim medieval writers generally accepted the *hadithes*, according to which the age of 'A'ishah at the time of her *nikah* with the Prophet was six or seven years, and thus she was nine years old when the marriage was consummated, three years later." Immediately following this, she declares that this view of events has "been criticized by modern historians in the light of careful research. They hold that she was fourteen or, according to some authorities, fifteen years of age at the time of the consummation of marriage." While she refers to a few of the pieces of evidence cited in support of this view, mainly two references to Ibn Sa'd (who elsewhere gives the same information as Bukhari), she does not name or cite any specific modern scholars who have purportedly upheld it.

Moin proves reluctant to advocate these revisionist views explicitly, presenting her points in detached terms, using expressions such as: "They hold," "They base their argument," "They also hold," "It has also been argued," and "It is further argued." Nonetheless, Moin structures her discussion in such a way that she leaves the reader with the impression that Aishah was fourteen or fifteen at consummation.<sup>22</sup> The assumption that she supports this view is strengthened by her reiteration, in the conclusion to the chapter, that "although most of the medieval Muslim historians and a number of modern writers" – and she goes on to add the "Western Orientalists" to this group, in a further move to discredit their stance – "have rather uncritically accepted the view that 'A'ishah was only nine years old when her marriage was consummated, there are valid reasons to differ from this view."<sup>23</sup> Moin thus impugns the reliability of the

accepted narrative without directly confronting the hadith sources or explicitly affirming an alternate view.

The authors of online materials are dealing with an environment that differs in crucial ways from that of these authors. First, while Nadvi, Thompson, and Moin are addressing the question of Aishah's age at marriage in the context of larger works on, respectively, the female companions of the Prophet, the Prophet's wives, and Aishah herself, online materials are usually accessible in such a way that the question of Aishah's age appears separately from any other biographical discussions. Second, while some of the online discussions are aimed specifically at Muslims, the availability of materials to anyone with Internet access makes the actual audience significantly more diverse. Though, of course, there are no restrictions preventing non-Muslims from purchasing books from Islamic publishing houses, it is less likely that they will come across these materials without putting significant effort into obtaining them. Third, and importantly, those who gain access to online articles discussing Aishah's age at marriage will likely have located them through an Internet search engine. This means that readers have plenty of opportunity to compare and contrast various accounts, making it more important to address competing perspectives directly.

That said, quite a number of online articles simply refrain from providing specific details about the Bukhari hadith, even to question its reliability. Thus, a response to a query posted at Islam Online quotes Muzammil Siddiqi, former president of the largest American Muslim organization, the Islamic Society of North America. Siddiqi does not discuss textual evidence specifically but asserts that "Historically, it is not confirmed that she was 9 years old when she came in the household of the Prophet. There are various reports from age 9 to age 24."<sup>24</sup> Later, he notes that "I do not agree that she was 9."<sup>25</sup> Such a formulation, with only vague references to "various reports," without any consideration of relative authoritativeness of the sources, sidesteps the problem of the canonical nature of the hadith included in Bukhari's *Sahih*.<sup>26</sup> Siddiqi treats the report on which Vines' accusation is based, and on which most polemics

center, as simply an unconfirmed report with which he does not agree; he deftly dodges the larger issue of the reliability of Bukhari's accounts.

In the context of an ongoing polemical struggle, however, rejection of the narrative found in Bukhari and elsewhere would be a dangerous tactic, since it grants the premise that the most respected and widely accepted textual sources for Islam, outside of the Qur'an, are unreliable. Thus, those pieces found at the "Answering Christianity" website (engaged in an ongoing series of detailed and vigorous arguments with the "Answering Islam" site) do not ever question the premise that Aishah was nine at the time her marriage was consummated. Instead, they turn first to rational justification and then to counter-polemic.

Responding to the argument that it was morally wrong and sinful for Muhammad to have had intercourse with such a young girl, the authors at Answering Christianity and other polemical sites argue that marriage at puberty – which they assume Aishah had reached – has historically been a common human practice. The Prophet's consummation of a marriage with a nine-year-old girl was perfectly acceptable, they point out, in its socio-historical context. Puberty marked both physical and social maturity, and Muhammad's contemporaries found nothing unusual in this marriage. Even medieval critics of Islam did not object to this marriage on the basis of Aishah's youth. Thus, one author notes that "It is therefore undeniable that consummating the marriage upon puberty was also their practice and not prohibited in their religions. The age restrictions therefore only came to **certain countries** in our **current century**. It is indeed extremely hypocritical and 'self-righteous' to judge other centuries, based on new criteria."<sup>27</sup> Proceeding to counter-attack, the authors claim that biblical and rabbinic sources demonstrate the legitimacy of marrying very young girls. Indeed, they charge that criticism of the Prophet's marriage to Aishah is hypocrisy given the acceptability of even larger age gaps between some male figures and their female consorts.<sup>28</sup> One prominent line of argument distorts a Talmudic discussion to suggest that Jewish law permits men to have sex with

three-year-old girls.<sup>29</sup> Compared to such a rule, a nine-year-old girl seems positively mature.

It is worth pointing out, however, that despite the suggestion by some of these authors that the delay between the contracting of Aishah's marriage and its consummation was in order for her to reach puberty, I have not found explicit references in classical sources to Aishah's menarche serving as the trigger for consummation of her marriage; in a few instances, precisely the opposite claim is made.<sup>30</sup> Subsequent legal discussions fixing nine as an age of presumptive or potential majority if the girl claims menarche sometimes rely on a parallel to Aishah's age at consummation. However, majority and/or arrival at puberty have no necessary connection with the consummation of marriage. Though it is sometimes misleading to extrapolate back from later legal discussions, there was general agreement among later jurists that the wife's puberty was not a necessary precondition for consummation of a marriage. Pre-modern sources, including legal handbooks and Ottoman court archives, link a wife's readiness for consummation not to *bulugh* but rather to being physically desirable and fit for intercourse.<sup>31</sup>

### *Searching for solace*

Quite a number of articles geared at Muslims adopt and adapt arguments found in these polemics and counter-polemics, reshaping them into apologetic form, aimed at reassuring readers.<sup>32</sup> The issue of Aishah's age at marriage is often framed as a matter of addressing "misconceptions" held by non-Muslim Westerners, even when the author and audience are both presumably Muslim. For example, one petitioner at Islam Online requests that the mufti "help us address the misconceptions filling the mind of some people, especially the Westerners about the Prophet's marriage to "Aishah, may Allah be pleased with her, as they claim it to be a sign of child abuse[.]"<sup>33</sup> Another query, addressed to the online mufti of the Pakistani Jamaat-e-Islami by a South African doctor, describes having read the hadith discussing Aishah's marriage as part of a Muslim study

group. The writer then requests guidance as to how to answer questions from non-Muslims about the matter. The response from mufti M. Haq displays a great deal of angst over having to address the topic, noting that "I find it hard to discuss" and declaring that "I wished you had avoided this marriage or age question."<sup>34</sup> It is improper, he makes clear, for a Muslim to entertain doubts about any aspect of the Prophet's conduct. It seems that the mufti is picking up on the unarticulated anxieties of his questioner, who had actually only asked about strategies for responding to non-Muslims. However, there is no suggestion that this questioner had actually been asked about the issue by anyone; it seems likely that he felt discomfort at Aishah's youth and was asking about how to discuss the matter with non-Muslims as a way of asking for explanation and justification of Muhammad's conduct without suggesting that he himself harbored any doubts about its propriety. In another instance, a contributor to a Muslim discussion board makes explicit the connection between being asked about the marriage and feeling discomfort. He states that a question from his Christian friend "left me with a thorn in the heart of my faith."<sup>35</sup>

Clearly, whatever the context in which it is raised, Aishah's age at marriage is a difficult topic for many Muslims. To a much lesser extent than in published works directed at Muslim audiences, some online authors do present specifically "Islamic" rationales for the marriage of Muhammad to Aishah, thus contributing to a view of the marriage as serving a larger divine purpose and rendering irrelevant any discussion of Muhammad's motivations. The marriage was divinely ordained, they point out, with the angel Jibril having displayed an image of Aishah to the Prophet, declaring that she would be his wife. Further, the marriage cemented political allegiances and was therefore important to the Muslim community.<sup>36</sup> Most salient to the question of age, Aishah's youth enabled her to live a long time after the death of the Prophet and serve as an authority on his actions. Thus, as Sabeel Ahmed writes, "The Prophet married Aishah for the benefit of Islam and Humanity."<sup>37</sup> The notion of a divine purpose to the marriage is, of course, not likely to sway anyone who views the marriage as evidence for Muhammad's base

instincts, or indeed anyone who does not believe in Muhammad's prophethood. The inclusion of this type of material in articles centered on Aishah's age suggests that, rather than solely addressing non-Muslim criticism, the authors recognize the need to reassure and convince Muslims of the appropriateness of this marriage.

The need to assuage Muslim doubts vies with the desire to present an Islamic critique of Western and modern cultural ideals and social practices. The author of one article from the *Jamaat-e-Islami* website addresses the contemporary relevance of this marriage when asked about age differences in marriage and the Prophet's marriage to Aishah specifically. He counsels that while child marriage might seem unacceptable today, and Muslims are under no compulsion to engage in it, one should be wary of criticizing it. Too strong a rejection of child marriage is tantamount to accepting a Western agenda of women's liberation and even "UN sponsored shari'ah."<sup>38</sup>

The anxiety over capitulation to "Western" norms is ever-present in Muslim discourses, even when texts are written by, and aimed at, Muslims living – and in some cases, born – in the West. One article that strikes a particularly defiant tone in this regard is the widely cited "The Young Marriage of 'Aishah" by AbdurRahman Robert Squires.<sup>39</sup> This article first appeared in 1999, three years before Vines' remarks, and it aims both at non-Muslim critics and Muslims who seek to appease them. "In the face of [non-Muslim] criticism," Squires argues, "Muslims have not always reacted well." Squires solidly backs the hadith sources, claiming that the evidence for Aishah's age in Bukhari and Muslim "is – Islamically speaking – overwhelmingly strong and Muslims who deny it do so only by sacrificing their intellectual honesty, pure faith or both." Presumably, Squires would have harsh words for former ISNA president Siddiqi, who referred to these reports as "not confirmed."

Yet "pure faith" seems insufficient for many Muslims, who must attempt to accept the Prophet's action as blameless while reconciling it with their own discomfort. Reflecting the difficult nature of such an endeavor, a contributor to a discussion on ShiaChat wrote, in response to another's suggestion to

simply accept that Aishah was nine: "Like you said, there's no point trying to cover up and make excuses for what the Prophet did, because that indicates that you are ashamed of Islam and do not agree with all of the rules, which makes you being a Muslim pointless."<sup>40</sup> His statement reflects unresolved, and uncomfortable, questions about the relevance of historical precedent to contemporary circumstances, and the appropriateness of using contemporary criteria to evaluate authoritative religious texts in general and prophetic *sunnah* in particular. The radical variations in tone and content among the online discussions of Aishah's age at marriage suggest that many Muslims feel torn between the impossibility of uncritical acceptance of their inherited tradition and the fear that any critical stance toward that tradition will be a capitulation to those Siddiqi calls "the enemies of Islam."

### *Conclusion*

As scholars of history will affirm, one cannot use the standards of the present to judge the past.<sup>41</sup> However, most Muslims are not historians and their interest in the Prophet's life and conduct is not an academic exercise but an acutely felt religious one. It is a tricky proposition to accept that the Prophet is the model of conduct for all Muslims while simultaneously believing that it would be wrong of a Muslim man to follow his example in consummating a marriage with a nine-year-old. This dissonance accounts for the substantial effort many have put into asserting or proving that Aishah had reached her teen years before her marriage was consummated. A few individuals have suggested that one can accept the Bukhari account of the marriage while considering Muhammad's marriage to the young Aishah among those matters in which the regulations governing the Prophet's actions differ from those governing that of other believing men.<sup>42</sup> However, though the accounts in works of *sira* and hadith treat Muhammad's marriage to Aishah as something worthy of note, in part because of several divine signs of approval, they do not suggest that it was her youth that made the marriage exceptional or noteworthy.

A more satisfactory means of grappling with the Prophet's commencement of conjugal life with a girl young by any standard, whatever her precise age, would recognize that the circumstances under which this marriage took place were radically different from those of the twenty-first century. Though in the vast majority of Muslim contexts today a nine-year-old girl would emphatically *not* be seen as an appropriate marriage partner, there was nothing shocking or socially inappropriate about such behavior in seventh-century Arabia.<sup>43</sup> Though most first-time brides were not nearly so young, there does not seem to have been controversy over the age difference, and some Companions of the Prophet seem to have engaged in marriages with a similar age gap.<sup>44</sup> Notions of childhood, as numerous historical studies have shown, vary dramatically from place to place, and imposing modern notions of adulthood as a criterion for entering into marriage validly may be inappropriate. Recognizing the vast difference between socio-historical settings can be freeing, initiating debates over the relevance of precedent, specifically *sunnah*, in radically changed contexts.

Just because one should not judge anachronistically, however, does not mean one should withhold all judgment. Just because a behavior is socially accepted does not make it good. As with slaveholding, thinking in terms of unjust social structures, rather than individual sin, can provide a helpful way of reconsidering matters of sexual ethics.<sup>45</sup> But while this avoids the theologically problematic notion that the Prophet did anything objectionable, what does it say about the inherent goodness of marriage between males and females of substantially different ages and levels of experience? What of such marriages today? Is it possible to argue that in any setting – tribal Afghanistan or rural India or the Arabian desert – such marriages are always unfair to the girls involved? Can one argue that different sets of standards should apply to Muslims living in different societies, without falling into the trap of extreme moral relativism masquerading as multiculturalism? In order to address these questions, Muslim discussions of *sunnah* in general, and the Prophet's marriages more particularly, need to move beyond defensiveness. Being consumed with combating negative

portrayals of Islam and Muslims can lead thinkers to overlook or excuse injustices that do occur, failing in the basic duty to command the right and forbid the wrong. But how does one know right and wrong, justice and injustice?

Philosophers and ethicists, both Muslim and non-Muslim, have been engaged for centuries in debates over what constitutes “good” and what is necessary for “justice.” For most premodern thinkers, slavery was morally neutral; it fell within the realm of justice – appropriate rights and obligations for those of varying statuses – provided basic parameters of good treatment were met. Likewise, equality or sameness of rights between husbands and wives in marriage was largely unthinkable. Marriage was not meant to be a setting for love between equals, but rather a particular kind of exchange by individuals fulfilling complementary roles; love was a bonus rather than a prerequisite.<sup>46</sup> With this set of expectations, power might come to a wife because of her youth and virginity (Aishah is reported to have boasted of the latter, which distinguished her from the Prophet’s other wives, all of whom had been previously married) rather than because of wisdom and wealth.<sup>47</sup>

Those Muslims who strive for gender equality, considering it an essential component of justice, must address the central issue: what is justice and on what basis does one know it? Is something good because God says so? Or does God say it is good because it is, inherently, so?<sup>48</sup> If what God says – and indeed, what the Prophet, “a beautiful example” (Q. 30:21), does – is automatically good, then what happens when this clashes with one’s own view of what is just or good? Arriving at a working resolution of this dilemma requires a consciousness of history and an acceptance of the role of the individual conscience. If one wants to consider certain moral standards as absolutes – such as the injustice of slavery – one must accept that God sometimes tolerates injustice. However, in a universe with human free will, allowing injustice is not the same as being the cause of it; God repeatedly rejects responsibility for injustice in Qur’anic passages declaring that God does not wrong or oppress people in any way, but rather people do wrong (*zulm*) “to their own selves” (or “to their own souls”).<sup>49</sup> This assertion is freeing, in

that God does not demand that Muslims act contrary to the dictates of conscience. However, it also implies a much more significant responsibility for the individual human being to make ethical judgments and take moral actions. Qur'anic regulations, in this case, must be seen as only a starting point for the ethical development of the human being, as well as for the transformation of human society.

## 9 Toward an Islamic Ethics of Sex

It is customary to title the final section of a book “Conclusion,” but I have not done so here. Far from having completed a journey, in this volume I have only attempted a first step toward defining a problem. And the problem, as I currently see it, is this: meaningful consent and mutuality, both of which I believe to be crucial for a just ethics of sexual intimacy, are structurally impossible within the constraints of lawful sexuality as defined by the classical Muslim scholars, whose views – drawing from and building on Qur’an and *sunnah* – permeate all Muslim discourses. It is possible to rethink Islamic sexual ethics to accommodate these values and there are resources within Muslim texts, both revealed and interpretive, for doing so. Nonetheless, an egalitarian sexual ethics cannot be constructed through pastiche; a methodology of picking-and-choosing, combining isolated elements in expedient ways, will prove insufficient to resolve the core issue at stake. We need, instead, a serious consideration of what makes sex lawful in the sight of God. The obvious response of “marriage” does not really answer the question. What type of bond does God require between spouses? Is it payment of dower that transforms an illicit liaison into a respectable union? Is it a groom’s right of extrajudicial repudiation? A civil marriage license? The bride’s father’s consent? A public ceremony? Sincerity of commitment by the would-be spouses? All of these things? Something else entirely? Moreover, once it is decided what makes sex lawful, what makes it good? By “good” I do not primarily mean sex that is physically pleasurable, although pleasure certainly matters, but rather sex that

embodies, among other virtues, kindness, fairness, compassion, and generosity.<sup>1</sup> These are all necessary if one is to live up to the ideal of marriage set forth in the Qur'anic declaration that God "created for you mates from among yourselves that you may find tranquility with them, and put love and mercy between you."<sup>2</sup>

Of course, despite this powerful and moving (and gender-neutral!) description of the divine purpose for marriage, the Qur'an also includes hierarchical and androcentric provisions for marriage and sex. The Prophet's *sunnah* as recorded in hadith contains beautiful reminders to men to consider both female pleasure and women's tender feelings, but the same sources have demeaning references to women as objects of, and subject to, male desire. The Muslim jurists who repeatedly exhorted men to treat their wives kindly, to consider women's needs for sex and companionship, and not to abuse their powers of divorce, did so within a logical framework that considered a licit sexual union impossible unless a man's exclusive control over a woman's sexual and reproductive capacity was established through marriage or slavery, which they discussed using similar terminology. Given the competing models of appropriate sex and sexual relationships between and within these complex texts, how can Muslims draw on the sources in a coherent way to make ethico-legal decisions about our intimate lives?

My way of framing the question presupposes that Muslims will undertake this process of reflection primarily as individuals, for ourselves and in dialogue with those close to us. That does not mean that religious authorities do not matter; there are thinkers whose ideas have wide currency in the West as well as in Muslim-majority societies, and for those of us lucky enough to have a respected and thoughtful *imam* or other spiritual figure at our mosque or in our community, he – or perhaps, she – may be a trusted resource. Still, while there are some formal institutions of Muslim religious learning in the United States, the majority of those who speak about Islam (or *for* Islam) have no special credentials to do so. It is often said that there is no clergy in Islam. Although that is technically true, previous generations in Muslim majority societies have allocated a special role to the 'ulama. In the West, there is no such class of

individuals to serve as an anchor or foil for Muslim public and private discussions of these complicated issues. Indeed, there has been little public discussion at all of what role religious leaders should play in Muslim life in the West, how they should be chosen and trained, and ultimately what type of authority they should wield. A limited conversation began in 2005, sparked by the controversies over female prayer leadership, but it has not yet developed into the kind of broader debate necessary for full exploration of the key questions surrounding Muslim religious authority and institutions in the United States. Still, even formal structures of religious authority will not remove the need for individual Muslims to be substantially better informed about vital issues.

Reinterpretation is not only an individual project, for application in personal lives; it must also be a collective enterprise of scholars thinking, talking, and writing jointly and in counter-point. Muslim feminists have become part of the Islamic intellectual tradition and, in doing so, have begun to push at its boundaries and reshape its contours.<sup>3</sup> As we engage more deeply with the intellectual heritage of centuries of Muslim thinkers, we must neither romanticize the tradition as it stands nor be blindly optimistic about prospects for transformation within it. Most importantly, as we expose reductive and misogynist understandings of the Qur'an and hadith, refusing to see medieval interpretations as coextensive with revelation, we must not arrogate to our own readings the same absolutist conviction we criticize in others. We must accept responsibility for making particular choices – and must acknowledge that they *are* interpretive choices, not merely straightforward reiterations of “what Islam says.”

In this project of interpretation, we must also recognize that on matters of sexual ethics, the Qur'an itself poses challenges for those committed to egalitarian social and intimate relationships. Progressive approaches to the Qur'anic text cannot be limited to selective presentation of egalitarian verses in isolation from their broader scriptural context. Such an approach is both fundamentally dishonest and ultimately futile; arguments about male/female equality built on the systematic

avoidance of inconvenient verses will flounder at the first confrontation with something that endorses the hierarchical and gender-differentiated regulations for males and females that so many reformers would like to wish away. This is where jurisprudential methods can offer much to Muslim feminists. Not because the rulings of the jurists are themselves egalitarian – for the most part, they are not when it comes to matters of gender and sex – but because the ways in which jurists have related source texts to social contexts demonstrates that the law they constructed has “always already” been subjected to acts of interpretation. Their practice both authorizes by example human interpretive reasoning and provides a useful model for constructive dialogue between textual sources and social custom, something that has always mattered a great deal where sex and intimacy were concerned.

There are, and always have been, strong elements within Muslim norms that value sex, both as a strong human need and also as a foretaste of the delights of paradise. Sex is powerful and needs regulation, no less so for its link with the sacred. As Ze’ev Maghen points out, “Both sexuality and spirituality are largely exercises in unruliness; the *shari’a* delimits each of them and thereby makes them possible.”<sup>4</sup> How, though, can a feminist think about sexual intimacy within the constraints of God’s revelation to humanity without becoming limited by patriarchal notions that deny women’s lived experience and potential as fully human, fully moral, and fully sexual beings? It is easy to find revelatory support for women as fully human and fully moral; it is more challenging, but not impossible, to see women as fully sexual in a way that recognizes their status as moral agents. One must seek out and privilege these elements in the tradition, and justify one’s choices. Appealing to timeless principles rather than historical specifics is a crucial interpretive strategy. But one must be prepared to define and defend the principles chosen and promoted in this way. For instance, the necessity of equality as a component of justice must be defended, not merely asserted. Discussions among feminist, reformist, liberal, and progressive Muslims must continue increasing in philosophical and ethical complexity. Simplistic

invocations of justice and equity are insufficient without consideration of the wide range of ways in which those terms have been and continue to be understood throughout Muslim history. This will mean, in part, working through the conceptual legacy of past generations of thinkers who have grappled with these questions. Although there is something to be said for a “fresh” approach to the Qur’an, there is a wealth of insightful material that directly engages critical issues for those who seek egalitarian social relations today. And there is a lot to be said for not having to reinvent the wheel.

It is important to realize, though, that if only those who are trained as religious scholars (whatever that comes to mean) are deemed capable of engaging in discussions over how Muslims should behave in their intimate lives and how Muslim families should be regulated, women will be largely excluded from ranks of those wielding religious knowledge. Although there are no restrictions on female participation in scholarly endeavors in theory – and a number of exceptional women, past and present, have been recognized as religious authorities<sup>5</sup> – there are significant practical obstacles to female education in madrasa-settings. Likewise, there are social considerations restricting the ascription of religious authority to women. If mastery of the classical tradition is required in order to be considered credible, women are likely to be marginalized, if not entirely excluded, from interpretive reforms. And it matters deeply that women, whose concerns and perspectives differ from men’s, be among those engaging in renewed ethical thought on topics including marriage and sex.

As to the question of religious authority and influence, it is important to note that many Muslim thinkers and authors who are perceived as authorities, and who write and speak from a position of authenticity, are not themselves fully grounded in the classical tradition; they have a selective and often incoherent relationship to law and scriptural interpretation. (As Abou El Fadl points out, “the connections between the classical epistemological and hermeneutic heritage and Muslims living in the United States have been thoroughly severed.”<sup>6</sup>) Yet because their views are congruent with conventional wisdom about what is

“Islamic” – or because their maleness and ethnic background give them an air of authority – their pronouncements are not questioned. There are some scholars with a thorough grounding in the tradition who also engage with modernity in a complicated and thoughtful way but they are, sadly, relatively few compared to the broader group of those who speak in platitudes and, on issues associated with sex and sexuality in particular, make sweeping generalizations about women, gender, and Islam that do not allow for nuance, dispute, or transformation.

Part of this book’s aim has been to highlight striking inconsistencies in the way that several controversial topics are approached in the work of specific authors and, more importantly, certain conventional discourses. By pointing out these inconsistencies and contradictions, it is possible to challenge and possibly dismantle certain dominant discourses. If someone insists that a wife must be continuously sexually available to her husband because Bukhari includes the Prophet’s reported words to that effect, one can ask whether the questioner also accepts the authenticity of Bukhari’s report that the Prophet consummated his marriage with Aishah when she was nine. If someone insists that polygamy is valid for all times and in all places because the Qur’an authorizes it, one can inquire whether the same holds true for slavery. Such juxtapositions do not replace systematic and nuanced exploration of the topics at hand; they serve, rather, to shock one’s discussion partner into considering a familiar topic without the comfortable veneer of apologetic conventional wisdom. One should not stop with rough analogies on complex issues, but rather use those analogies to (re)open dormant questions about the timelessness of specific points in the Qur’an and hadith.

The freedom to treat Qur’an and hadith not as repositories of regulations to be applied literally in all times and places but as sources of guidance for Muslims in transforming their societies in the direction of fairness and justice is important. Individuals must be willing to take responsibility for acts of interpretation, rather than insisting that they are simply doing what “Islam” requires. In fact, it is a precondition for keeping Islam relevant that Muslims’ understandings shift over time and

place. Islam is meant to be lived in history, and human beings have, for better or worse, taken on the role of earthly vicegerents. That role cannot be fulfilled by merely carrying out orders, but must involve the exercise of initiative, judgment, and conscience. This matters not only at the level of social reform, however; the conservative view that the family is the bedrock of society deserves real attention. The values that are taught and especially lived in intimate contexts should be guided by deep ethical reflection on the overarching divine purpose for human life on earth: to command what is right, to forbid what is wrong, to do good deeds, and to be ever-conscious of God.

## Notes

### *Notes to Introduction*

1. Wolfe and Beliefnet, eds., *Taking Back Islam*.
2. On the genesis of these images, see Kahf, *Western Representations of the Muslim Woman*.
3. Al-Sheha, *Woman in the Shade of Islam*, p. 79.
4. One Indian author writing in the 1970s sums up a dominant view: "While we are by no means opposed to the granting of all legitimate freedom to women, we cannot afford to import the characteristic evils of Western civilization in respect of sexual liberty." Niazi, *Modern Challenges to Muslim Families*, pp. 60–61.
5. Doi, *Woman in Shari'ah*, p. 185.
6. See also Wani, *Maintenance Rights of Muslim Women*, p. 9.
7. Al-Shafi'i, *Al-Umm*, K. al-Sadaq, "Al-shart fi'l-nikah," vol. 5, p. 108.
8. Sheila Briggs' remarks, Feminist Sexual Ethics Project colloquium III, Brandeis University, September 2005.
9. Yalom and Carstensen, "Introduction," in idem., eds., *Inside the American Couple*, p. 10. See also Yalom, *A History of the Wife*.
10. A number of female slaves mentioned in biblical stories bore children sired by their masters, who included Abraham and Jacob. On the sexual use of male slaves in the ancient world, see chapter 5.
11. Michael Sells' insistence that work on religion and violence must be first, comparative, and second, both critical and self-critical, applies equally to work on issues of religion and sexuality. Michael Sells, lecture at Brandeis University, April 21, 2005.
12. Yalom, "Biblical Models: From Adam and Eve to the Bride of Christ," p. 15. Even if Yalom is generalizing here – there are some denominations that ceased using wifely promises of obedience long before the time she designates – the point is well taken. See also the 1945 New Jersey verdict quoted by Shanely, *Just Marriage*, p. 8.
13. Haideh Moghissi, however, argues that "only individuals who have somehow escaped the sexual repression which dominates the lives of women and men in Islamic societies can deny its overriding role in defining women's experience. Poverty and hunger hang over women's heads throughout the region. But ... sexuality and sexual repression are where women suffer most." Moghissi, *Feminism and Islamic Fundamentalism*, p. 95.

14. Plaskow, "Decentering Sex," p. 30.
15. Ruxton, *Maliki Law*, p. v.
16. Historian Huda Lutfi, referring to a fourteenth-century Cairene document makes a more broadly applicable point: "prescriptive religious literature should not necessarily be taken as a reflection of reality." Lutfi, "Manners and Customs of Fourteenth-Century Cairene Women," p. 102. See also Sonbol, "Introduction," in idem, ed., *Women, the Family, and Divorce Laws in Islamic History*.
17. Tucker, *Gender and Islamic History*.
18. Ahmed, *A Border Passage*, p. 128. Ahmed does recognize the value of this tradition, at least in comparison to "fundamentalist Islam, textual Islam's more narrow and more poorly informed modern descendant." See also Ahmed, *Women and Gender in Islam*, p. 239, where she writes of the dominance of the "technical, legalistic, establishment version of Islam, a version that largely bypasses the ethical elements in the Islamic message."
19. Kevin Reinhart (at the Mapping Muslim Ethics colloquium, Duke University, April 2005) pointed out the paradox in my project: I am attempting to contest the jurists' interpretive authority in part by focusing on them.
20. Khaled Abou El Fadl describes the selective approach to Qur'an and *sunnah* reflected in "the endless stream of dogma that one encounters in Muslim conferences, lectures, and publications," in *The Authoritative and the Authoritarian in Islamic Discourses*, p. 17. A focus on Qur'an and "authentic" hadith to the exclusion of jurisprudential doctrines characterizes even some self-identified progressive authors, such as Syed, *The Position of Women in Islam*. Syed (p. ix) describes his approach: "I start with the relevant verses of the Quran followed by the appropriate, authentic Hadith and have supplemented where necessary with relevant remarks and comments of Islamic authorities and scholars;" additionally, he provides his "own comments in areas where there is no compelling authority to follow and yet where an urgent answer is needed."
21. Rahman, *Islamic Methodology in History*, is the best developed defense of this approach.
22. Jonathan Brockopp notes that there is "a substantial literature under each of these categories," but "we would look in vain here for practical application of Islamic ideals to matters of daily life." See "Taking Life and Saving Life," in idem, ed., *Islamic Ethics of Life*, p. 10. On ethical thought broadly, see Hourani, *Reason and Tradition in Islamic Ethics*.
23. Brockopp, "Taking Life and Saving Life," p. 10. He also notes that "sharia is far too large a category to be reduced to ethics," as it also encompasses ritual matters that are outside the purview of ethical thought (p. 11).
24. Faruki, "Legal Implications for Today of *al-Ahkam al-Khamsa*." Faruki mentions, but does not discuss in detail, historical developments of this scheme over several centuries.
25. See Jackson, *Islam and the Blackamerican*, p. 160. The phenomenal success of scholar and media figure Yusuf al-Qaradawi's *The Lawful and the Prohibited in Islam*, is indicative of the desire for simple answers; a children's title by Mohammad Mazhar Hussaini likewise proclaims its relevance as *My Little Book of Halal and Haram*.

26. Wael Hallaq argues “that the shari‘a is no longer a tenable reality” and those who advocate its reapplication are “in an irredeemable state of denial.” Hallaq, “Can the Shari‘a be Restored?,” p. 22.
27. Murad, “Boys will be Boys: Gender Identity Issues.”
28. Zahra Ayubi points out, however, that some immigrants base their view of Islamic legal requirements (e.g., with regard to woman-initiated divorce) on modern statutory provisions of their country of origin rather than any legal school. Ayubi, “American Muslim Women Negotiating Divorce,” p. 48.
29. Taji-Farouki and Nafi, “Introduction,” in idem, eds., *Islamic Thought in the Twentieth Century*, p. 10.
30. “[O]ne of the most significant features of contemporary Muslim thought is the attachment to and even veneration of ‘Islam’ in controversial debate. Thus we find that [authors] accurately represent Muslim thought when they say that ‘Islam requires,’ or ‘Islam accepts,’ or some other similar locution.” Reinhart, “The Past in the Future of Islamic Ethics,” p. 216.
31. Abou El Fadl, *Speaking in God’s Name*, pp. 144–5, 62–3.
32. *Al-Yawm al-Sa‘udi*, “‘Al-tahjiz’ wa ijbar al-mar‘a ‘ala al-zawaj min akbar anwa‘ al-zulm.” Antoun, “The Islamic Court,” p. 464, discusses a case where a contemporary Jordanian judge concluded that al-Shafi‘i was wrong in allowing fathers to compel marriages for their children. For references to female consent in works aimed at a general audience, in addition to the sources cited in Ali, “A Beautiful Example,” pp. 283–4, see, e.g., Al-Sheha, *Woman in the Shade of Islam*, p. 39: “Islam considered the opinion of the daughter in the marriage as an essential condition for the validity of the marriage itself.” Describing “classical Islamic law” (or *Shari‘a*) specifically, Khadduri, “Marriage in Islamic Law,” p. 213, declares: “Although an offer to marry is actually made through a woman’s father, the woman’s consent is considered imperative if the contract is to be binding.” Fadel, “Reinterpreting the Guardian’s Role,” provides a substantive re-evaluation of Maliki doctrine, and discusses its relevance to Muslim marriage in the United States.
33. *Sahih Muslim*, trans. Siddiqi. The quote is from vol. 1–2, p. 702; hadith discussing sex with female slaves are found in vol. 1–2, pp. 734–5 and 743–4. See also Hidayatullah, “Islamic Conceptions of Sexuality,” p. 263, where she declares that “According to the Qur’an, the proper vehicle for enjoying the union between sexual partners is marriage. In fact, it is the only acceptable framework for sexual relations between two human beings.” She refers briefly to the Prophet’s practice of concubinage on p. 290, n. 14. On slavery generally, and slave concubinage specifically, see chapter 3.
34. I owe the use of the term “dissonance” in this context to Farid Esack, personal conversation, April 2005.
35. Mohja Kahf, personal communication, March 2004.
36. Full disclosure: I was one of three scholars contributing a brief essay.
37. Kugle, “Enough with the Prudes: Bring On ‘Sex and the Umma’.”
38. Bailey, *Sexual Ethics: A Christian View*, p. 8.

## Notes to Chapter 1

1. Al-Ghazali (Kitab Adab al-Nikah from *Ihya' 'Ulum al-Din*), trans. Holland, *The Proper Conduct of Marriage*, p. 75.
2. Ibn 'Abidin, *Radd al-Muhtar*, vol. 4, p. 379. The text points out divergent views among earlier Hanafi authorities about the precise contours of a husband's sexual obligations to his wife (and even his concubines), but even those who hold that a husband may not abandon intercourse with his wife entirely acknowledge that any failure in this regard is not actionable before a judge once he has "exhausted her right" by consummation.
3. Friedmann, *Tolerance and Coercion in Islam*, p. 193.
4. For one first-person account of such a marriage, see Sharif-Clark, "Marrying a Believer."
5. This phrase, from Q. 4:34, is usually taken by exegetes to refer to both dower and spousal support, *nafaqa*. See below.
6. Ahmed, *Women and Gender in Islam*, pp. 42–6, and sources cited there.
7. Khadduri, "Marriage in Islamic Law," p. 213.
8. Mashhour, "Islamic Law and Gender Equality," pp. 564–5.
9. Ahmed, *Women and Gender in Islam*, p. 45; Ahmed is making a general point here, not specifically discussing *sadaq*.
10. Women's clear legal claim to dower might be vitiated in practice, with the payment either withheld by the husband or his family after marriage, divorce, or widowhood, or received and kept by the bride's family. Judges have routinely and consistently enforced female dower claims when these are brought to court. For one anecdote, see Antoun, "The Islamic Court," pp. 456–7; see also Tucker, *In the House of the Law*, pp. 53–5. On the shifting patterns of dower in Palestinian women's experiences, see Moors, *Women, Property, and Islam*. Additionally, although the legally required transfer is unidirectional, a number of Muslim societies have had informal exchanges that, in practice, transferred resources from the bride's family to the groom through trousseaus or other exchanges. See Tucker, *In the House of the Law*, pp. 55–7; Zomeño, *Dote y matrimonio en al-Andalus y el norte de Africa*; and Rapoport, *Marriage, Money, and Divorce in Medieval Islamic Society*, pp. 12–30, who discusses the function of the trousseau as a type of "gender-specific pre-mortem inheritance" (p. 30).
11. Wynn, "Marriage Contracts and Women's Rights in Saudi Arabia," and Hoodfar, "Circumventing Legal Limitation." See also Mir-Hosseini, *Marriage on Trial*, for discussion of how dower and support obligations are used as bargaining chips in divorce negotiations in Iran and Morocco.
12. Qaisi, "A Student Note."
13. See Al-Shafi'i, *Kitab Ikhtilaf Malik wa'l-Shafi'i*, in *Al-Umm*, vol. 7, p. 376; and, for similar language, Al-Shafi'i, *Al-Umm*, K. al-Sadaq, "Fi'l sadaq bi aynihi yatlafu qabla dafa'ahu," vol. 5, p. 92; K. al-Nafaqat, "Ikhtilaf al-rajul wa'l-mar'a fi'l-khul'," vol. 5, p. 300; K. al-Sadaq, "Sadaq al-shay' bi aynihi fa yujadu mu'ayban," vol. 5, p. 111; and Al-Muzani, *Mukhtasar al-Muzani*, K. al-Nikah, "Sadaq ma yazidu bi budnihi wa yanqasu," in *Al-Umm*, vol. 9, p. 194.

14. See, among other verses, Q. 4:4, 20, 24–5, and 34.
15. Q. 4:24.
16. In which case, as discussed further in chapter 2, she is using a delegated power of divorce.
17. Ali, “Progressive Muslims and Islamic Jurisprudence,” pp. 169, 178–9; Mir-Hosseini, *Islam and Gender*, p. 72, for one example of where this rhetoric breaks down.
18. See Moghissi, *Feminism and Islamic Fundamentalism*, pp. 21–2; Kugle, “Sexuality, Diversity, and Ethics,” pp. 192–3.
19. Schmidtke, “Homoeotericism and Homosexuality in Islam,” p. 261 (although she generalizes regarding “the Judaeo-Christian tradition”). On attempts to draw a similar distinction between Judaism and Christianity, see Boyarin, *A Radical Jew*.
20. “La rahbaniyya fi’l-Islam.” Although this hadith is famous, it is apparently non-canonical. See Maghen, *Virtues of the Flesh*, p. 5, n. 11.
21. For one contemporary example, see Abdul-Ra’uf, *Marriage in Islam*, pp. 49–53. Abdul-Ra’uf quotes some of the Qur’anic passages and hadith reports used by al-Ghazali, below.
22. Al-Sheha, *Woman in the Shade of Islam*, p. 49 notes this rationale for wives’ sexual rights: “The husband is required and obliged by Islamic law to fulfill the sexual rights of his spouse, to ensure the satisfaction of the spouse so as to refrain one’s spouse from getting involved in shameful acts, may Allah forbid.”
23. Al-Ghazali died in 1111 CE. For a recent discussion of al-Ghazali, see Moosa, *Al-Ghazali and the Poetics of Imagination*. Moosa writes (p. 12) that “the Muslim tradition is saturated with Ghazali’s traces.” Al-Ghazali’s discussion of sex in the *Ihya’* is one of the main sources for scholars today discussing sexuality in the classical tradition. See, for instance, Hidayatullah, “Islamic Conceptions of Sexuality,” pp. 264–9, 273. Fourteenth-century jurist Ibn al-Hajj expressed similar sentiments; see Lutfi, “Manners and Customs of Fourteenth-Century Cairene Women,” pp. 107–8.
24. Of course, within marriage the husband’s duties are the wife’s rights, and vice-versa, but the choice to address the husband as the relevant actor is noteworthy.
25. Al-Ghazali, trans. Holland, *The Proper Conduct of Marriage*, p. 74. The verse is Q. 2:223 trans. ‘Abdullah Yusuf Ali. For discussion of other provisions of this verse, see chapter 7.
26. Al-Ghazali, trans. Holland, *The Proper Conduct of Marriage*, p. 75.
27. Shaikh, “Family Planning, Contraception, and Abortion in Islam,” p. 115.
28. Shaikh, “Family Planning, Contraception, and Abortion in Islam,” p. 114; see also al-Hibri, “An Introduction,” pp. 57–8.
29. Shaikh does not refer to the Shafi’i view that the wife’s consent is not required. See Musallam, *Sex and Society in Islam*, p. 31; Bowen, “Muslim Juridical Opinions,” pp. 325, 327–8. Also see Keller, *Reliance of the Traveller*, p. 526.
30. These points have been treated in works from Fatna Sabbah’s *Woman in the Muslim Unconscious* to Geraldine Brooks’ journalistic *Nine Parts of Desire: The Hidden World of Islamic Women*. Sabbah’s text is problematic in numerous respects for conflating source texts with their interpretation. However, it was groundbreaking and still offers some

- important insights into the Islamic tradition. Fatima Mernissi's work addresses the same issues; see especially the articles collected in *Women's Rebellion and Islamic Memory*. Malti-Douglas' *Woman's Body, Woman's Word* traces these themes through a variety of medieval Arabo-Muslim literary texts.
31. See, e.g., Ahmed, *Women and Gender in Islam*, p. 27 and Lutfi, "Manners and Customs of Fourteenth-Century Cairene Women," esp. pp. 117–8.
  32. Ibn Jibreen is one of the muftis associated with the Saudi fatwa organization studied by Abou El Fadl in his *Speaking in God's Name*.
  33. Ibn Baz, et al., *Fatawa Islamiyah*, vol. 5, p. 391.
  34. In another passage in the *Ihya'* overlooked by those who quote him in support of women's sexual rights, al-Ghazali praises the practice of female circumcision; see Berkey, "Circumcision Circumscribed," p. 32.
  35. The parenthetical "at least" seems to be the translator's addition.
  36. *Sahih Muslim*, K. Al-Nikah, "It is not permissible for a woman to abandon the bed of her husband," trans. Siddiqi, vol. 1–2, p. 732. A variant ending is also mentioned with "until she comes back" instead of "until morning."
  37. *Sahih Muslim*, K. Al-Nikah, "It is not permissible for a woman to abandon the bed of her husband," trans. Siddiqi, vol. 1–2, p. 732.
  38. *Sahih Bukhari*, K. Al-Nikah, "If a woman spends the night deserting her husband's bed," trans. Khan, vol. 7, p. 93.
  39. See Ali, "Money, Sex, and Power," esp. chapter 2.
  40. *Fatawa-I-Kazee Khan*, vol. 1, p. 270 (1588, #688).
  41. Wani, *Maintenance Rights of Muslim Women*, p. 24.
  42. See Ali, "Money, Sex, and Power," chapter 2. Consent to sex within marriage is one area where comparative examples can be especially useful in sorting through the range of Muslim views. On medieval Catholic canon law, see Brundage, "Implied Consent to Intercourse." Marital rape is a fairly recent legal offense; a woman's husband "could force sexual intercourse upon her without being guilty of rape" in England until a 1991 court decision. See Doggett, *Marriage, Wife Beating, and the Law in Victorian England*, p. 46.
  43. *Sahih Bukhari*, K. al-Nikah, "Your wife has a right over you," trans. Khan, vol. 7, p. 97; see a similar anecdote in Al-Sheha, *Woman in the Shade of Islam*, pp. 49–50.
  44. See Ali, "Money, Sex, and Power," chapter 2.
  45. Ibn Taymiyya is often quoted as espousing a more categorical right to divorce for a woman whose husband does not have sex with her. See Al-Sadlaan, *Marital Discord (al-Nushooz)*, p. 33; and al-Hibri, "An Introduction," p. 70, n. 70.
  46. The term *muhsanat* is used in at least two different senses in the Qur'an. In some places, such as Q. 4:24, it means married females; in Q. 5:5 it clearly refers to unmarried women. Views differ as to whether, in this context, it means women who are chaste or those who are free. This ambiguity gave rise to juristic disagreement over whether a free Muslim man could marry an enslaved *kitabiyya* (i.e., woman from *ahl al-kitab*). The general Hanafi view was that such a marriage was permitted, but other Sunni jurists held that while concubinage with an enslaved *kitabiyya* was acceptable, and marriage with a free *kitabiyya* likewise, a

- free Muslim man could only marry an enslaved woman if she was Muslim. None of this discussion considers the linkage between virtue and freedom, or rather the presumption that a female slave could or would not be chaste. I borrow the translation of *muhsanat* as “virtuous” from Friedmann, *Tolerance and Coercion in Islam*, pp. 161, 179. My discussion of intermarriage touches on classical topics also covered by Friedmann’s thoughtful and thorough chapter, “Interfaith Marriage,” pp. 160–93, and I have cited his text as a resource for those interested in pursuing further the specific topics discussed here.
47. They disagreed, however, as to whether that dissolution took place immediately and irrevocably or was suspended until the end of the wife’s post-marital waiting period; in the latter view, if the husband converted before the waiting period expired, the marriage would continue in force.
  48. Friedmann, *Tolerance and Coercion in Islam*, p. 161.
  49. For a brief discussion of “marriage equality,” see Marlow, *Hierarchy and Egalitarianism in Islamic Thought*, pp. 30–34; also see Siddiqui, “Law and the Desire for Social Control,” and Zomeño, “Kafa’a in the Maliki School.”
  50. Hamilton, *The Hedaya, or Guide*, vol. 1, p. 110. Hamilton’s often quirky rendering (“more like a summary of al-Marghinani’s views, as they appeared in the Persian translation, expressed in Hamilton’s language” than a translation, according to Imran Ahsan Khan Nyazee [Ibn Rushd, *The Distinguished Jurist’s Primer*, xlvi]) is the only accessible English version to date; I have retained his language here. A new translation of the *Hidaya* by Nyazee is forthcoming from Amal Press (Bristol, England), with the first volume slated for publication in 2006.
  51. Rather, he provides an extended discussion of the (im)permissibility of men’s marrying *kitabiyat* and/or “idolatresses,” *mushrikat*, either free or enslaved. *The Distinguished Jurist’s Primer*, 2:51–3. This is not simply because he is concerned with the lawfulness of men’s actions alone; the immediately preceding section discusses, if only briefly, the case of women marrying male slaves. (It is permissible, provided that the women’s guardians agree and that the slaves in question do not belong to the women themselves. *The Distinguished Jurist’s Primer*, 2:49, 51. However, a number of legal thinkers consider marriage between free females and enslaved males so blameworthy as to be practically forbidden.)
  52. Keller, *Reliance of the Traveller*, p. 529.
  53. See Friedmann, *Tolerance and Coercion in Islam*, pp. 172–3, esp. n. 72, and my discussion below.
  54. *Fatawa-I-Kazee Khan*, vol. 1, p. 115 (1216 #316); see also Friedmann, *Tolerance and Coercion in Islam*, p. 180. Friedmann, pp. 185–6, identifies Ibn Hazm and Abu Thawr as holding that marriage to Zoroastrians was permissible. In other contexts where Hindus or Buddhists were the relevant minority, some Muslim scholars seem to have held that they were to be considered recipients of revelation (*ahl al-kitab*), suggesting a strong practical role for proximity in what some consider purely theological questions.
  55. *Fatawa-I-Kazee Khan*, vol. 1, p. 115 (1216 #316).
  56. Here, I am only treating the case of conversion by “people of the Book.” In the case of other (pagan, polytheist, etc.) converts to Islam, or of apostasy

- from Islam, no marriage can stand, whether it is the husband or the wife who is the Muslim partner. Again, however, very early Muslim practice allows for ambiguity on this topic; there is some dispute, for instance, over whether the marriage of one of the Prophet's daughters to Abu al-'As was preserved despite his refusal to convert until her waiting period had long expired or whether a new marriage followed his conversion. Accounts taking both views are found in *Sunan al-Tirmidhi*, K. al-Nikah, "Ma ja'a fi'l-zawjayn al-mushrikayn yuslimu ihdahuma," vol. 3, pp. 447–8.
57. Alalwani, "Fiqh of Minorities (1 of 3)." I would like to thank Junaid Qadri (personal communication, November 2004) for bringing this article to my attention.
  58. See Friedmann, *Tolerance and Coercion in Islam*, p. 172. Friedmann does not highlight the distinction between already being married and getting married when noting the eventual demise of the "current of opinion willing to countenance the preservation of a Muslim woman's marriage to an unbeliever." Notably, some of these unbelievers were non-kitabis.
  59. European Council for Fatwa, Resolution 3/8, "A woman embraces Islam and her husband does not," from the Final Statement of the 8th Ordinary Session.
  60. He thus passes the first test that Abou El Fadl sets in his discussion of authoritarianism in Islamic thought. Syed, discussing this issue (*The Position of Women in Islam*, pp. 44–7), also acknowledges the jurists' prohibition and that "practice from the earliest time is against such unions" but uses a legal maxim regarding permissibility to declare (p. 47) that "it is an acceptable proposition that Islamic law permits marriage between Muslim men and Muslim women with women and men, respectively, belonging to the ahli'l kitab." Syed contends that the Qur'an and the hadith "are silent on the question of Muslim women marrying kitabis."
  61. See, for example, the fatwa from Islam Q&A ([www.islam-qa.com](http://www.islam-qa.com)) "Ruling on a Muslim man marrying a non-Muslim woman and vice versa" (Question #21380). No individual mufti is listed as the author of the response in question, but renowned classical exegetes are quoted as prohibiting all marriages between Muslim women and any non-Muslim, whether *mushrik* or *kitabi*.
  62. On the applicability of Qur'anic commands to men and women, see chapter 7.

### Notes to Chapter 2

1. *Sunan Abi Dawud*, K. al-Talaq, "Bab fi karahiyyat al-talaq," vol. 1, p. 503. Also there: "To God, Exalted and Majestic, the most repugnant (*abghad*) of what is lawful is divorce.
2. *Fatawa-I-Kazee Khan*, vol. 2, p. 167 (2263 #1363).
3. For a survey of twentieth-century reforms in divorce laws, see An-Na'im, ed., *Islamic Family Law in a Changing World*. For a mid-twentieth-century discussion of Indian application of Muslim divorce law, see Fyzee, *Outlines of Muhammadan Law*, pp. 123–62.
4. Q. 4:35, 128.

5. Barring her involvement in “clear lewdness,” on which see Q. 4:19; Q. 2:229 discusses the permissibility of compensation if both parties fear they will not be able to adhere to appropriate limits. Ibn Rushd, *The Distinguished Jurist’s Primer*, vol. 2, pp. 79–84 discusses the debates over when and whether (and how much) compensation was permitted.
6. There are two exceptions: widows wait for four months and ten days, regardless of whether the marriage was consummated, and pregnant women’s waiting periods end when they give birth. There has been dispute, however, about the case of the pregnant widow; most have settled on the view that her *‘idda* ends when she gives birth and she need not observe the rest of the mourning period. Additionally, there is a different length of waiting periods for slave and free women.
7. The jurists understand this intervening marriage to be necessary from Qur’an (2:230); they rule that this marriage to a different husband must be consummated based on a reported statement from the Prophet that it was not lawful for a woman to return to a husband who had divorced her three times “until she has tasted the sweetness [of intercourse]” with her other husband. See, among other sources, *Sahih Bukhari*, Book of Divorce, “If he divorces her triply and she marries another husband after the waiting period,” trans. Khan, vol. 7, p. 182; and Tirmidhi, K. al-Nikah, “On the one for whom [she is] made lawful and the one who makes [her] lawful,” vol. 3, pp. 427–9.
8. See, for a brief summary of differences on this point, Coulson, *A History of Islamic Law*, pp. 111–13.
9. A few early authorities including Sa‘id ibn al-Musayyab held that a man could take his wife back during her waiting period from *khul‘*, even without her consent, if he returned to her the compensation she had paid him.
10. Ironically, even some members of the ‘ulama turned to this type of argument in their efforts to defeat proposed Egyptian legislation for stipulations in marriage contracts. Ron Shaham summarizes the arguments of the Shaykh al-Azhar: “The Qur’an defined the required relationship between the spouses as being based on love and compassion, whereas the proposed stipulations in the marriage contract reduced this relationship to a property transaction based on bargaining.” Shaham, “State, Feminists and Islamists,” p. 477.
11. Ayubi, “American Muslim Women Negotiating Divorce,” pp. 128–33.
12. Zahra Ayubi’s thesis in progress, however, indicates that in some cases Muslim immigrants refer to the laws of their nations of origin as their source for authoritative Islamic law.
13. *Fatawa-I-Kazee Khan*, vol. 2, p. 167 (2263 #1363). See also Haskafi, *The Durr-ul-Mukhtar*, pp. 230–1.
14. The husband’s ability to refute a woman’s claims that he has divorced her by taking an oath seems to have been widely practiced. One case in the *Musannaf* of Ibn Abi Shayba (vol. 5, pp. 251–2) unwittingly attests to this practice when discussing a matter of inheritance in the case of “the man whose wife claimed that he had divorced her and she brought him up to the Sultan, and he had him swear that he had not divorced her, then he returned her to him.” When he dies, the fact that she inherited from him implies the continued validity of the marriage.
15. Tucker, *In the House of the Law*, p. 65; Tucker’s translation.

16. As a practical matter, premodern Hanafi judges found ways around women's access to divorce while preserving inflexibility of doctrine.
17. For the concept of "traditionist-jurisprudent," see Melchert, "Traditionist-Jurisprudents and the Framing of Islamic Law."
18. Spector, *Chapters on Marriage and Divorce*, pp. 248–9.
19. Jennings, "Divorce in the Ottoman Sharia," p. 165 notes that cases of "claims and counterclaims" are common.
20. See country profiles in An-Na'im, *Islamic Family Law in a Changing World*, for specifics.
21. This can cause problems where a suspended or conditional oath of divorce working to secure the wife's option to leave the marriage if the husband does (or fails to do) a particular deed relies on the resulting divorce to be final. Given the interconnected and intricately interwoven nature of legal doctrines, tinkering with one portion of the system is likely to have significant unintended consequences elsewhere.
22. As Amira Sonbol argues, it is not always the case that codified national laws are always better than "traditional" jurisprudential doctrines. See "Introduction," in Sonbol, (ed.), *Women, the Family, and Divorce Laws in Islamic History*.
23. Esposito with DeLong-Bas, *Women in Muslim Family Law*, p. 60; see also Mashhour, "Islamic Law and Gender Equality," pp. 582–4.
24. Esposito with DeLong-Bas, *Women in Muslim Family Law*, p. 80.
25. Some have argued that the availability of *khul'* induces women who have legitimate grounds for judicial divorce without relinquishing of dower to give up their dower in exchange for ease of obtaining marital dissolution.
26. See Al-Sheha, *Woman in the Shade of Islam*, pp. 101–3 for a summary of representative views on women's initiation of divorce. Al-Sheha insists that "The most natural and logical way to this peace [mentioned in Q. 4:128] is to let the man have control of the divorce process, not the woman."
27. Eid, "Marriage, Divorce and Child Custody as Experienced by American Muslims," proposes such a system. The Canadian Council of Muslim Women has been arguing against a similar proposal at the provincial level.
28. An-Na'im, "Shari'a and Islamic Family Law," p. 3; see also p. 16.
29. An-Na'im, "Shari'a and Islamic Family Law," p. 8.
30. The use of U.S. law has been an essential element of the strategy proposed by Karamah: Muslim Women Lawyers for Human Rights ([www.karamah.org](http://www.karamah.org)) for Muslim women to safeguard their rights.

### Notes to Chapter 3

1. Haskafi, *The Durr-ul-Mukhtar*, p. 24. I have altered B.M. Dayal's translation of this passage in several respects.
2. Modern apologetics, as will be seen below, frequently claim instead that she was a wife. A war captive, Rayhana, is likely to have been Muhammad's concubine, though some sources suggest that he manumitted and then married her, as he had done with Safiyya, another war prisoner he

- purchased from her captor. See Ibn Kathir, *The Life of the Prophet Muhammad*; and Hidayatullah, *Mariyah the Copt*.
3. Q. 2:221, 24:32.
  4. Terms for male slaves included 'abd (also "worshipper") and both *ghulam* and *fatah*, which could refer to either male slaves or male youths.
  5. Mattson, "A Believing Slave is Better Than an Unbeliever," p. 134.
  6. Ahmed, *Women and Gender in Islam*, pp. 67, 79–101.
  7. See Q. 4:3. *Al-Umm*, K. al-Nafaqat, "Ma ja'a fi 'adad ma yahillu min al-hara'ir wa'l-imma' wa ma tahillu bihi al-furuj," 5:215.
  8. While there were frequently distinctions made between types of slaves based on race, slavery as a whole was not racialized in Muslim contexts in the way that it was in the U.S. See Lewis, *Race and Slavery in the Middle East*.
  9. Peirce, *The Imperial Harem*. Their situation was unusual, however, and some have suggested that scholarship should not treat them alongside other slaves, or perhaps even as slaves at all. See Toledano, "Representing the Slave's Body in Ottoman Society," p. 57. Davis suggests likewise that "regardless of law or theory, a slave's actual status could historically vary along a broad spectrum of rights, powers, and protections." *In the Image of God*, p. 125.
  10. For one discussion, see Diederich, "Indonesians in Saudi Arabia," pp. 133–6.
  11. A number of reports over the past decade from organizations including Amnesty International and Human Rights Watch have documented these abuses.
  12. There is significant dispute among human rights activists today as to what constitutes an acceptable use of the term "slavery." Miers ("Contemporary Forms of Slavery," p. 239) notes that, for some servants, "in practice their condition is very like that of chattel slaves" although "it is very different in theory." Toledano (in "Representing the Slave's Body") argues for understanding slavery as a "continuum" and Davis makes a similar point: "[T]he condition of slavery itself has not always been the most abject form of servitude, and it is not necessarily so today. Some contract labor, though technically free, is more oppressive than many types of conventional bondage." *In the Image of God*, p. 123.
  13. U.S. Department of State, "Slavery, Abduction and Forced Servitude in Sudan;" and iAbolish, "Spotlight on Sudan."
  14. Nazer and Lewis, *Slave: My True Story*. On the past and contemporary practice of slavery in the Sudan, see Collins, "Slavery in the Sudan in History." For discussion of the historical practice of enslavement of Muslims by Muslims in Africa, with attention to racial and ethnic patterns, see Mack, "Women and Slavery in Nineteenth-Century Hausaland," esp. pp. 89–90; also Lewis, *Race and Slavery in the Middle East*, pp. 57–9.
  15. Algar, *Wahabbism: A Critical Essay*, p. 57.
  16. On this topic, see the Feminist Sexual Ethics Project website and the links collected there: [www.brandeis.edu/projects/fsa](http://www.brandeis.edu/projects/fsa).
  17. Sikainga, "Slavery and Muslim Jurisprudence in Morocco," esp. pp. 64–6 and p. 70. Lovejoy downplays the significance of European abolitionist pressure, arguing that Europe "reluctantly pursued the fight whenever compromise proved impossible." He argues, instead, that

- abolition resulted from the incompatibility of Africa's absorption into the modern industrial economy with "a slave-based social formation." *Transformations in Slavery*, p. 253. Likewise, Collins notes that in the Sudan, British colonial officials were largely content to focus their attention on the slave trade, and overlook the widespread practice of slavery. "Slavery in the Sudan in History," p. 80.
18. Lewis, *Race and Slavery in the Middle East*, pp. 80–81.
  19. Toledano, *Slavery and Abolition*, p. 127.
  20. Toledano, *Slavery and Abolition*, pp. 122–9 remarks on the Muslim view of Muslim slavery as humane and, in particular, distinct from chattel slavery as practiced in the American South. On the attention to Muslim sensibilities in Western scholarship on Muslim slavery, see Lewis, *Race and Slavery in the Middle East*, p. vi (also Toledano, *Slavery and Abolition*, pp. 138–9 on this remark by Lewis; and Davis, *In the Image of God*, pp. 137–50 for a review of Lewis' work as a whole). See also Miller, "Muslim Slavery and Slaving: A Bibliography."
  21. Ali, "Money, Sex, and Power," chapters 1, 4, and 5.
  22. See, in addition to other verses cited below, Q. 2:178; 16:75; and 30:28.
  23. Q. 4:92.
  24. Q. 4:92; 58:3.
  25. Q. 24:33.
  26. Q. 2:221; 4:25; 24:32.
  27. Q. 24:33.
  28. E.g., Q. 23:5–6; 70:29–30.
  29. See Mattson, "A Believing Slave is Better Than an Unbeliever," pp. 131–41 for discussion of these issues and the suggestion that the Qur'anic verses may make a distinction between permissible sex with war captives and sex with female slaves obtained in another fashion. On the general acceptability of sexual access to captured women in the ancient Mediterranean world, see Azam, "Sexual Violence in Islamic Law."
  30. Nor can a woman (who cannot have sexual access to her male slave as a "concubine") marry her own male slave.
  31. On marriage to female slaves, see Ali, "Money, Sex, and Power," especially chapters 2 and 5.
  32. In addition to Mattson, "A Believing Slave is Better than an Unbeliever," see Brockopp, *Early Maliki Law*, pp. 192–205 on the early development of regulations surrounding the *umm walad*.
  33. Bayman, *The Secret of Islam*, p. 173. Emphasis in original. Note that he makes a point about the exemplariness of the Prophet, then segues into the numerical limit of four, but does not address the Prophet's exemption from that limit.
  34. Alghosaibi, *Revolution in the Sunnah*, p. 10.
  35. The use of the term concubine here, in the English translation of Alghosaibi's commentary, makes it seem as though the use of the "prisoners" for sexual purposes was a forgone conclusion. Khan translates the phrase that appears in Alghosaibi's English essay as "captured some concubines" as "received captives from among the Arab captives." There is a similar report in Bukhari's *K. al-Nikah*, "Al-'Azl," trans. Khan, vol. 7, p. 103. *Sahih Muslim* contains similar reports in its *K. al-Nikah*, "Al-'Azl," trans. Siddiqi, vol. 1–2, pp. 732–3. Sachedina, "Islam, Procreation and the Law", p. 108, cites this story, as quoted in Musallam,

- Sex and Society in Islam*, in a series of hadith, also without any comment on its implications for any matter beyond contraception.
36. Algozaibi, *Revolution in the Sunnah*, pp. 37–8.
  37. Algozaibi, *Revolution in the Sunnah*, pp. 40–41.
  38. See one report in *Sahih Muslim*, K. al-Nikah, “Al-‘Azl,” (trans. Siddiqi, vol. 1–2, pp. 732–3) and another in the *Muwatta’* of Malik ibn Anas (K. al-Talaq), which makes reference to the ransom the captors hoped to receive.
  39. Friedmann, *Tolerance and Coercion in Islam*, p. 177 (writing on a different matter). This did not always go unrecognized by earlier jurists.
  40. The exception the jurists sometimes made for those too young to menstruate implies, of course, the permissibility of having sex with them.
  41. See, for example, p. 529, from the section on marriage, which contains several untranslated passages.
  42. Keller, *Reliance of the Traveller*, ix.
  43. Keller, *Reliance of the Traveller*, p. 459.
  44. Ibn Baz, “Concerning Polygyny,” in Ibn Baz et al., *Islamic Fatawa Regarding Women*, p. 178. He is responding to a questioner who partially quotes Q. 4:3, mentioning orphans but avoiding the portion of the verse discussing “what your right hands possess.” On the interconnections between polygamy and slavery, see Hasan, “Polygamy, Slavery, and Qur’anic Sexual Ethics.”
  45. Rahman, *Major Themes of the Qur’an*, p. 48; see also Mashhour, “Islamic Law and Gender Equality,” pp. 568–9.
  46. See, for instance, Khadduri, “Marriage in Islamic Law;” al-Hibri, “Islam, Law and Custom,” p. 26; and Mashhour, “Islamic Law and Gender Equality,” p. 569. The latter argues that “what is definitely clear in the Quran is that all its texts encourage the release of slaves.” Wadud expressed a similar view in *Qur’an and Woman*, p. 101, but makes a different and, I think, more persuasive argument in her later essay “Alternative Qur’anic Interpretation and the Status of Muslim Women,” pp. 14–15.
  47. Syed, *The Position of Women in Islam*, pp. 33–6; Syed states (p. 36) that “those jurists of Islamic law who laid down the rule that a master may have sexual relationship [sic] with his female slave without marriage are totally mistaken.”
  48. Mernissi, *The Veil and the Male Elite*, esp. p. 139; Khadduri, “Marriage in Islamic Law,” p. 217, makes the same point a decade earlier, regarding polygamy specifically. He argues that “Because he was a religious reformer who was principally interested in preaching a belief in one God – a revolutionary belief principle in pagan society – the Prophet Muhammad did not go so far as to seek a complete change in the social system. The Prophet felt that advocating radical change might adversely affect the spread of his religious teachings; therefore, he sought to effect gradual change in the law.” See also Wadud, *Qur’an and Woman*, p. 9.
  49. If God is all-powerful, why did God not create a better, more just world? If this is not the best world, then God is an oppressor (*muzlim*) – needless to say, a problematic view. If it is the best world, however, then it cannot be unjust (if God is just). For a more thorough exploration of these issues as they were engaged by Muslim theologians and jurists, see Ormsby, *Theodicy in Islamic Thought* and Khadduri, *The Islamic Conception of Justice*, pp. 39–77.

50. This view, linked to Hasan al-Basri (Khadduri, *The Islamic Conception of Justice*, pp. 41, 108) both reflects a repeated Qur'anic sentiment (see chapter 7) and exists in tension with views about God's omnipotence, again raising the question of why God allows *zulm* to exist in the first place, and whether doing so makes God unjust.
51. Khadduri, *The Islamic Conception of Justice*, p. 106.

### Notes to Chapter 4

1. Nomani, *Standing Alone in Mecca*, p. 295.
2. See, e.g., Q. 23:5–6. The Qur'an describes *zina* as "lewdness (*fahisha*) and an evil way," and prohibits believers from even approaching it (Q. 17:32); in Q. 33:35, parallel praises are given of Muslim men and women who embody a range of virtuous behaviors including chastity.
3. The lowest age seems to be that of nine for girls (and fourteen for boys) in post-revolutionary Iran. On nine as the age of majority for females, see chapter 8.
4. Archard, *Sexual Consent*, p. 1.
5. A variety of historical and anthropological studies demonstrate that "the norms were not always followed." However, as one ethnographer notes for Morocco, "deviation from norms was more limited in the past;" further, "there has recently been some change in the norms themselves" regarding conduct. David, "Changing Gender Relations in a Moroccan Town," p. 210. For a succinct assessment of the contemporary Moroccan situation, see Dialmy, "Moroccan Youth, Sex and Islam."
6. *Nikah*, the term used by the jurists for the marriage contract, literally refers to sexual intercourse, so closely is marriage linked to sex. The treatment of this term in a passage from Haskafi's *Durr-ul-Mukhtar* (pp. 2–3) reflects this ambiguity: according to the Hanafi view cited, in some instances the Qur'an refers to marriage when it uses *nikah*; in others, it refers to any sexual intercourse.
7. From a punishment perspective the "who" is generally more important than the "what" – a disapproved act such as anal intercourse or sex with a menstruant who is a lawful partner is much less serious than an approved act with a forbidden partner.
8. *Sahih Muslim*, K. al-Nikah, "He who sees a woman, and his heart is affected, should come to his wife, and should have intercourse with her," trans. Siddiqi, vol. 1–2, pp. 704–5. One account includes, in his subsequent advice to his Companions, the Prophet's declaration that "The woman advances and retires in the shape of a devil."
9. Translated as "The first look is yours but the second is to your loss," in Mutahari, "The Islamic Modest Dress," where it is cited to al-Hurr al-Amili, *Wasa'il al-Shi'ah* (no further publication data provided). See also "Prophet Muhammad (s.a.w) said, '... do not let a second look follow the first. The first look is allowed to you but not the second.' [Ahmad, Abu Dawood, at-Tirmidhi]" Quoted in *Islam for Today's* article "The Girlfriend-Boyfriend Relationship."
10. For discussion of Greek and Roman attitudes toward male/male sex, see chapter 5.

11. Yalom, *A History of the Wife*, p. 22, continues: "Although heterosexual marriage was the only legally recognized form of couplehood in ancient Greece, husbands were by no means restricted to sexual relations with their wives. They could find supplemental sex beyond the marriage bed with concubines, male and female slaves, male and female prostitutes, and male and female lovers." (See Dover, "Classical Greek Attitudes to Sexual Behavior," p. 22, for a slightly broader definition of *moikheia*, including seduction of other free women under a male relation's guardianship.) Yalom notes that "Wives, on the other hand, were segregated from men other than their husbands, and severely punished if caught with a lover." (p. 23) Yalom does not specifically address the possibility of married women taking female lovers or making sexual use of their female slaves. See Skinner, *Sexuality in Greek and Roman Cultures*, pp. 139–40, on an Athenian adultery case.
12. Treggiari, *Roman Marriage*, pp. 312–3. Notably, Treggiari attributes the later European double-standard in sexual matters to the influence of Islam, not Rome. Yalom (*A History of the Wife*, pp. 31 ff.) also addresses the issue of adulterous wives in Rome. Skinner (*Sexuality in Greek and Roman Cultures*, pp. 206–7) uses the term adultery to describe non-marital sex by or with a married woman without interrogating the presuppositions of her definition.
13. Yalom summarizes: "[T]he ancient Hebrew law proscribing adultery applied exclusively to women, requiring them to limit their sexual activity to only one man. There was no such requirement for married men, who were allowed to have sex with unattached women. ... Men committed adultery if they had sex with another man's wife." Yalom, "Biblical Models," p. 23. See also Davies, *The Dissenting Reader*, p. 3.
14. Q. 24:2, used in this chapter's epigraph, for the number of lashes; see Q. 4:25 for enslaved women who commit "lewdness."
15. See discussion of the word *ihsan* as it relates to the permissibility of marrying enslaved women from *ahl al-kitab* in chapter 1, n. 46. Note again here the ambiguity in the term *muhsan* as it relates to the *hadd* penalty: it refers to both freedom and marital status.
16. See Deuteronomy 22:21–7. Stoning is mentioned numerous times elsewhere in the Hebrew bible for a variety of non-sexual offenses (e.g., Leviticus 20:2 and 20:27).
17. Q. 24:4.
18. In one tradition reported on the authority of Abu Huraira, the Prophet discourages the man from persisting with his confession of *zina* by turning his head repeatedly, until the man confessed four times, equaling the testimony of four witnesses. Abu Huraira is the prime reporter of several traditions denigrating toward women discussed in chapter 1. *Sahih Bukhari* (K. al-Nikah, "A divorce given in a state of anger, under compulsion, drunkenness, or insanity," trans. Khan, vol. 7, pp. 147–8) reports the event on the authority of another witness as well. A similar account appears in *Sahih Muslim*.
19. Tirmidhi, as quoted and translated by Rizvi in "Adultery and Fornication in Islamic Jurisprudence," pp. 271–2.
20. The theoretical writings of the jurists were not always followed in practice; courts were more willing to entertain claims regarding *zina* and

individuals concerned with family honor occasionally acted extrajudicially when confronted with suspicious behavior. According to Leslie Peirce, in her study of the Ottoman court of Aintab, “The law of the jurists did not seriously envision active prosecution of illicit sex; rather, it was concerned with maintaining social harmony in the face of what was tacitly acknowledged as the inevitability of *zina*.” See Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab*, for interesting discussions about how charges of sexual misconduct might play out in practice. The quote is from p. 354. She goes on to note, though, that though it might not be expected, based on the doctrines of the jurists, “Deliberation about *zina* in court was possible because in practice judges were able to relax the stringent rules of witness set out in juridical treatises and manuals, admitting circumstantial and hearsay evidence.” (p. 355)

21. Q. 24:6–9.
22. Additionally, whether consummation has validly occurred is important in determining when a woman who needs to consummate another marriage before she can remarry a man who repudiated her three times, has “tasted the sweetness of intercourse.” Occasionally, other issues arise such as whether a woman who has illicit intercourse is counted a virgin or *thayyib* (non-virgin, previously married) for the sake of determining her consent to a subsequent marriage.
23. This approach is not limited to premodern texts. Kamal, *Everyday Fiqh*, vol. 1, pp. 79–80, discusses the necessity of ablution after sex with males of any age and minor girls. The only concession to concerns about lawfulness comes in a footnote: “One should bear in mind that Islam forbids the males to insert the organ into any part of anybody except in the genital part of the wife.” (p. 79)
24. *Sahih Bukhari*, K. al-Fara’id, “The child belongs to the owner of the bed,” trans. Khan, vol. 8, pp. 489–90; *Sahih Muslim*, K. al-Nikah, “The child belongs to the bed and one must avoid suspicion” (my modification of Siddiqi’s translation), trans. Siddiqi, vol. 1–2, pp. 744–5. See also Rubin, “‘Al-walad li-l-firash’;” and Van Gelder, *Close Relationships*, p. 91, who cites this story as it appears in al-Razi.
25. Legal fictions also have limits; the story appears in Ibn Hanbal’s responsa (see Spectorsky, ed. and trans.) *Chapters on Marriage and Divorce*, p. 102 in a context where it serves as an argument for individuals to act in accordance with the actual, not “legal,” status of things. There, it refers to whether a father can marry the daughter born of an illicit union with a woman. While some – al-Shafi‘i is known to hold this view – hold that there is no legal relationship between the man and his biological daughter that would prohibit such a union, Ibn Hanbal briefly alludes to the case of Sawda discussed above. See Van Gelder’s summary of this debate in *Close Relationships*, pp. 90 ff.
26. The opposition to the test from some contemporary Egyptian jurists stems from precisely this distinction. On the relationship between “pater” and “genitor” in pre-Islamic Arab custom, see Van Gelder, *Close Relationships*, pp. 19–20. He makes the point that in “traditional Islam” “biological parenthood” took on a greater importance than “dominance and possession” which were key components of paternity. However, the continuing importance of the dictum that “the child belongs to the bed”

- suggests that he may be overstating the relevance of biology.
27. Of course, there is still the social issue of imputations surrounding honor.
  28. Moosa, "The Child Belongs to the Bed," on illegitimacy in South Africa, p. 174.
  29. Nomani, *Standing Alone in Mecca*, p. 295. This "Bill of Rights" was republished (pp. 155–6) along with an essay by Nomani, "Being the Leader I Want to See," in Abdul-Ghafur, *Living Islam Out Loud*. For the mosque Bill of Rights, see *Standing Alone in Mecca*, p. 293 and "Being the Leader I Want to See," pp. 153–4.
  30. See chapter 6 for discussion of another example where a self-identified religious authority makes a declaration that ignores the dominant stance of all Sunni *madhahib* even as it echoes majority Muslim sentiment.
  31. Coulson makes the point that the Islamic "law concerning sexual behavior is based upon an entirely different, almost diametrically opposite, approach" to that adopted by "most Western legal systems" which do not concern themselves "with sexual relations between consenting adults in private." ("Regulation of Sexual Behavior under Traditional Islamic Law," p. 64) Leaving aside the question of whether Coulson's characterization of "most Western legal systems" is accurate, he is certainly correct with regard to the theory: consensual relationships are a matter of divine regulation, though if they do not come to anyone's attention, they are not a matter for government intervention.
  32. AmericanMuslim, in "Comments: The Fatima Incident," comments page to Mohja Kahf, "Sex and the Umma: The Fatima Incident," at [http://www.muslimwakeup.com/sex/archives/2004/11/the\\_fatima\\_incident\\_1.php#more](http://www.muslimwakeup.com/sex/archives/2004/11/the_fatima_incident_1.php#more), last accessed 04.19.06.
  33. On these categories and their use, see Abou El Fadl, *Speaking in God's Name*, p. 97.
  34. Of course begging the question of how they were expected to apply across the board even in previous centuries.
  35. Peirce, *Morality Tales*, p. 353.
  36. Michael Cook addresses this problem, along with a number of related issues, in *Forbidding Wrong in Islam*.
  37. And in any case, "legal coercion is a flawed instrument for securing moral persuasion." Sanneh, "Shari'ah Sanctions and State Enforcement," p. 161. Unlike Ramadan, who acknowledges discrimination in the application of *hadd* punishments, Sanneh ignores women's vulnerability and the disparities in punishment. These are highlighted by Sidahmed, "Problems in Contemporary Applications of Islamic Criminal Sanctions."

### Notes to Chapter 5

1. Keller, *Reliance of the Traveller*, p. 986. This translation is mine, based on Keller's presentation of the Arabic text, and differs in several aspects from Keller's English rendering. For Keller's biographical sketch of Ibn Hajar, see p. 1054.

2. On the genre, see Rowson, "The Categorization of Gender and Sexual Irregularity in Medieval Arabic Vice Lists."
3. Al-Dhahabi, *Al-Kaba'ir*; for biographical information on al-Dhahabi, see *al-Kaba'ir*, pp. 9–14 and Keller, *Reliance of the Traveller*, p. 1045. Discussion of enormities occurs in mainstream modern circles as well.
4. Al-Dhahabi, pp. 60–70.
5. Al-Dhahabi, pp. 105–6. On *qadhif*, and the Qur'anic connection to *zina*, see chapter 4.
6. Al-Dhahabi, pp. 155–6.
7. Al-Dhahabi, pp. 157–9. A *muhallil* is a man who agrees to marry a woman then divorce her after consummation in order to make it possible for her to remarry a husband who has divorced her absolutely.
8. Al-Dhahabi, *Al-Kaba'ir*, pp. 201–9. On *nushuz* more generally, see chapter 7 and works cited there.
9. Keller's note, Keller, *Reliance of the Traveller*, p. 990. See Keller, p. 1033, for a biographical sketch of Abu Talib Makki.
10. Keller, *Reliance of the Traveller*, p. 991. My translation.
11. Keller, *Reliance of the Traveller*, p. 991. My translation. Keller translates as "Two are of the genitals: (12) adultery; (13) and sodomy."
12. Keller, *Reliance of the Traveller*, p. 966.
13. Keller, *Reliance of the Traveller*, p. 986; my translation here differs from that in the epigraph by leaving *zina* and *liwat* untranslated.
14. Ibn Hajar specifically condemns a man having sex with his *wife's* corpse, making clear that it is the act of intercourse with a dead body that constitutes an enormity. If the text referred to any woman's corpse, one might mistakenly attribute the prohibition of intercourse to the lack of the legal tie between the parties required for any touching, let alone sex, to be licit. Of course the deceased wife is no longer really a person, and so the marriage does not actually exist after her death, but most jurists grant a man the dispensation to see and touch his dead wife's body in order to wash her corpse. If intercourse with the wife's corpse is forbidden, though touching her for purposes of final ablution is permitted, intercourse with another woman's corpse is even more strongly forbidden, given that an unrelated man may not touch a woman even to perform the pre-burial washing.
15. I use "same-sex" as a neutrally descriptive term, sidestepping important controversies over the appropriateness of terms such as lesbian, gay, homosexual, and queer that are largely beyond the scope of this essay. Recently, some have advocated use of the Arabic phrase *al-mithliyya al-jinsiyya* ("homosexuality" in its literal sense of sexual sameness), while others have suggested that *shudhudh jinsi* (sexual queerness) is a useful phrase. In any case, I will use the term "sex" to denote the categories male and female, while recognizing that there is a debate over whether the use of sex to denote biology and gender to denote socially and culturally determined aspects of behavior takes account of the constructed nature of seemingly natural "sex." On this, see the discussion of hermaphrodites and sex-change operations, below.
16. See, e.g., Dunne, "Power and Sexuality in the Middle East." On the attribution of "deviant" behavior to the Other, and particularly the attribution of deviant sexual practices to Muslims by Westerners, see Uebel, "Re-Orienting Desire." "The vice of sodomy," according to

Crusader literature of the time, was “not only tolerated in Muslim society, but actively encouraged and openly practiced.” (p. 241) Although Uebel does not ask this question, it occurs to me to wonder in what ways the current scholarship positing a “homosexual-friendly” Islamic past draws on, and contributes to, the same type of generalizations.

17. Duran, “Homosexuality and Islam,” p. 183. Even more recently, none of the twenty-one chapters in Thumma and Gray’s *Gay Religion* discusses Muslims, and the only mention of Islam is in passing in a footnote (p. 6, n. 1). The founding of several organizations in the 1990s and the first years of the twenty-first century (al-Fatiha, the Yoesuf Foundation, Queer Jihad) by Muslims living in the West both signaled and furthered a shift in the discussion. The emergence of the Internet as a vital educational and organizational resource has contributed to the increased social and intellectual presence of gay and lesbian (and, to a far lesser extent, bisexual and transgendered) Muslim individuals and groups. Most likely, if research on a similar volume were to begin today, at least one organization would be mentioned.
18. Kugle, “Sexuality, Diversity, and Ethics,” p. 198. Of course, as Kugle goes on to argue, homosexuality is an anachronistic term.
19. Kugle, “Sexuality, Diversity, and Ethics,” pp. 197–8.
20. Malti-Douglas, “Tribadism/Lesbianism,” p. 124. This begs the question of who gets to be a “man” – how maleness and masculinity were constructed is a crucial issue. See also Rowson, “Gender Irregularity as Entertainment.”
21. Al-Rouhayeb, *Before Homosexuality in the Arab-Islamic World, 1500–1800*.
22. The term *sihaq* is sometimes considered to be derogatory, as *liwat* clearly is. Neutral descriptive terminology adopted by some contemporary Arab activists includes masculine and feminine variants of “homosexual.” Helem, “Fihrist al-‘ibarat al-‘arabiyya.” Thanks to Ariel Berman for sharing the magazine reference with me.
23. On mundane consequences of even illicit sex, see chapter 4. However, marital prohibitions could be engendered, in some views, by sexual touching falling far short of intercourse; in such a case, the same rules could apply to same-sex contact between women, making their omission notable.
24. And this, of course, returns us to the question of how to define what is “Islamic” – discussed in chapter 6.
25. My modification of Abdullah Yusuf Ali’s translation. On this matter, see Malti-Douglas, “Tribadism/Lesbianism,” p. 123.
26. One may also infer that the verse addresses two men if one accepts that it addresses an exclusively male audience; Q. 4:16’s “from among you” could theoretically be inclusive of women, but it stands in contrast to Q. 4:15’s “from among your women.”
27. Duran, “Homosexuality in Islam,” p. 181.
28. Kugle, “Sexuality, Diversity, and Ethics,” p. 219. See also Hidayatullah, “Islamic Conceptions of Sexuality,” pp. 277–9.
29. Jamal, “The Story of Lot.”
30. Kugle, “Sexuality, Diversity, and Ethics,” p. 204.
31. See, for example, the website of a South African organization called

- "The Inner Circle." [http://www.theinnercircle-za.org/index\\_files/page0002.htm](http://www.theinnercircle-za.org/index_files/page0002.htm), last accessed 06.27.05.
32. Biblical comparisons might be fruitful, both with reference to the story of Lot and also the parallel story of the Levite's concubine in Judges, chapters 19–21. I was made aware of this latter parallel through Azam, "Sexual Violence in Islamic Law."
  33. Kugle, "Sexuality, Diversity, and Ethics," p. 215. See also p. 224.
  34. Q. 23:165–6.
  35. Halperin, *How to do the History of Homosexuality*, p. 41; italics in original.
  36. What Martha Nussbaum and Juha Sivola argue for the Greeks holds just as true for medieval Muslims: "Seeing that it was possible for the Greeks to think differently of things that many moderns have regarded as natural or even necessary helps us to remove the false sense of inevitability of our own judgments and practices." Nussbaum and Sivola, "Introduction," in *idem*, eds., *The Sleep of Reason*, p. 10.
  37. See, e.g., Dover, *Greek Homosexuality*. As David Halperin has argued, with respect to the ancient Greeks, "The physical act of sex itself presupposed and demanded ... the assumption by the respective sexual partners of different and asymmetrical sexual roles (the roles of penetrator and penetrated), and those roles in turn were associated with social distinctions of power and gender – differences between dominance and submission as well as between masculinity and femininity." Halperin, *How to do the History of Homosexuality*, p. 147. See also Brooten, *Love Between Women*, p. 2, for the remark that "Roman-period writers presented as normative those sexual relations that represent a human social hierarchy. They saw every sexual pairing as including one active and one passive partner, regardless of gender, although culturally they correlated gender with these categories." Quoted in Halperin, p. 56. See also Walters, "Invading the Roman Body," esp. p. 31; Dover, "Classical Greek Attitudes to Sexual Behavior;" and, on Muslim discussions of male desire to be penetrated, Rowson, "Gender Irregularity," p. 53; and Rosenthal, on *ubnah*, "passive male homosexuality," (p. 45) in "Ar-Razi on the Hidden Illness."
  38. Published as "The Pleasures of Girls and Boys Compared," in Colville, trans., *Sobriety and Mirth*, pp. 202–30. This essay also appears as "Boasting Match over Maids and Youths," in *Nine Essays of al-Jahiz*, trans. Hutchins, pp. 140–66. See also, in the same volume, "The Superiority of the Belly over the Back," pp. 167–73. Hutchins' translation should be used with caution; see A.F.L. Beeston's detailed review in the *Journal of Arabic Literature*, pp. 200–9. On the genre, see also Rosenthal, "Male and Female: Described and Compared."
  39. See Rowson, "Gender Irregularity," p. 60 and, for comparison, Dover, "Classical Greek Attitudes to Sexual Behavior," p. 25. The difference between the two settings is not the naturalness of men's attraction to younger males but the illicitness of this desire in a Muslim context.
  40. Keller, *Reliance of the Traveller*, p. 512. See also Maghen, *Virtues of the Flesh*, p. 261 on ablation after touching boys.
  41. Boudhiba, *Sexuality in Islam*, p. 200.
  42. Murray, "Woman-Woman Love in Islamic Societies," p. 102.
  43. Debra Mubashshir Majeed, who describes herself as a "recovering

- homophobe,” writes insightfully on certain parallels between same-sex marriage and polygamy in “The Battle Has Been Joined.” Like others who write on this topic, Majeed drafts her categories in such a way as to assume the question of gay marriage does not apply to Muslims.
44. Muslim Canadian Congress press release, “Human Rights for Minorities not up for Bargain: Muslim Canadian Congress endorses Same-Sex Marriage legislation.”
  45. See, for a brief personal account, Saed, “On the Edge of Belonging.”
  46. Muslim Women’s League, “An Islamic Perspective on Sexuality.”
  47. As Kugle puts it, “[C]ontemporary Muslim moralists are not insulated from modernity, even as they depict gay and lesbian Muslims as corrupted by modernity.” Kugle, *Sexuality, Diversity, and Ethics*, pp. 197–8.
  48. Murad, “Fall of the Family.”
  49. Rather, a desire that arises in relation to an unlawful source should be channeled in a lawful direction, as reflected in the Prophet’s counsel that a man who is aroused by a woman he sees should go home and have sex with his wife.
  50. Rainbow Crescent, “Consider the Following: Logic and Reason.” Capitalization in original.
  51. Jakobsen and Pellegrini, *Love the Sin*, use the phrase “born that way” to describe the essentialist position on sexual orientation and identity. I choose “just created that way” to emphasize the external, divine intentionality of the creation of a human being with a particular set of desires.
  52. “One effect of (mis)understanding the history of sexuality as a history of the discourses of sexuality has been to preserve the notion of sexuality as a timeless and ahistorical dimension of human experience, while preserving a notion of discourse as a neutral medium of representation. A second effect has been to draw a deceptively simple and very old-fashioned division between representations, conceived as socially specific and historically variable products of human culture, and realities (sexual desire, in this case, or human nature), conceived as something static and unchanging. Foucault, I argue, was up to something much more novel, a radically holistic approach that was designed to avoid such hoary metaphysical binarisms. His aim was to foreground the historicity of desire itself and of human beings as subjects of desire.” Halperin, *How to do the History of Homosexuality*, p. 9.
  53. Weeks, *Invented Moralities*, pp. 98–9. See, for a brief survey of modern American views as to whether same-sex or same-gender desire is innate or chosen, the essays by Jeannine Gramick and Robert Gordis, along with associated materials, under the heading “Are Homosexual and Bisexual Relations Natural and Normal?”
  54. Jeffrey Weeks, “The Rights and Wrongs of Sexuality,” p. 21.
  55. Hidayatullah, “Islamic Conceptions of Sexuality,” p. 279 points out that “the notion that Islam tolerates homosexual tendencies but not behaviors points to an inconsistency in Islamic allowances for the satiation of ‘natural’ sexual desire.”
  56. On the “macrocosmic” dimensions of sex, gender, and marriage, see Murata, *The Tao of Islam*, pp. 143–202.
  57. Of course, I do not mean to imply that promiscuity is in any way characteristic of same-sex sexual activity; I am merely making the point for contrast.

58. Abdul-Ra'uf, *The Islamic View of Women and the Family*, p. 35. Quoted in Smith, "Women in Islam," p. 532, n. 14. Abdul-Ra'uf elaborates on the "inherently indisputable evil and filth of homosexuality for its own sake" in his *Marriage in Islam: A Manual*, pp. 71–2.
59. Notably, even sources that discuss non-consensual crimes such as rape seem to be virtually silent about "incest in the normal English sense, whereas the 'milk-incest' peculiar to Islam is a recurrent preoccupation." Van Gelder, *Close Relationships*, p. 83.
60. That is, women who are too closely related to be potential marriage partners.
61. Haskafi, *The Durr-ul-Mukhtar*, trans. Dayal, pp. 1–2. In the style of many commentaries, the words of the commented-upon text are incorporated into the commentary. Dayal keeps them distinct through the use of bold-faced type, but I have not retained that feature here, considering it an unnecessary distraction.
62. Music, *Queer Visions of Islam*, p. 4. While I agree with Music on this point, I am not convinced of the prospects for success of his "search for queer-affirmative Qur'anic messages that have been hidden by centuries of biased interpretations." (p. 5) Rather, I think this topic is analogous in an important way to that of male privilege and patriarchy in the Qur'an. One cannot simply blame everything on bad interpretation. See chapter 7. On hermaphrodites, see Sanders, "Gendering the Ungendered Body;" and Cilardo, "Historical Development of the Legal Doctrine."
63. On this point, see Najmabadi, "Truth of Sex." The article's summary reads: "While trans-sexuality in Iran is made legitimate, homosexuality is insistently reiterated as abnormal."
64. Skovgaard-Petersen, *Defining Islam for the Egyptian State*, pp. 319–34; Harrison, "Iran's Sex Change Operations." See Najmabadi, "Truth of Sex," for a cogent critique of this celebratory discourse. See also Music, *Queer Visions*, p. 10.
65. Skovgaard-Petersen, *Defining Islam*, p. 334. Dupret summarizes this case, presents further developments, and considers its implications in "Sexual Morality at the Egyptian Bar."
66. Skovgaard-Petersen, *Defining Islam*, p. 321.
67. Skovgaard-Petersen, *Defining Islam*, p. 326.
68. In a marriage between two males, would each spouse retain the right to marry three additional husbands? Imagine the chaos that would result if Husband A and Husband B each independently married Husband C. Presumably, in a lesbian marriage, both women would have to remain monogamous – but if pregnancy is not a possibility, and there would be no need for determinations as to paternity, then what would be the rationale for female monogamy? I raise these questions not to be flippant or absurd, but because thoroughly working through their implications can give insights not only about same-sex intimacy but also about expectations in male/female marriage.
69. Kugle wonders eloquently about this at the same time he *assumes* that it goes without saying that consent is vital for good (in the sense of ethical, divinely approved) intimate relationships.
70. Schmitt, "*Liwat* im *fiqh*."
71. BBC News, "Saudi sets sights on 60th bride."

*Notes to Chapter 6*

1. McLoughlin, "Swedish Imam says Islam forbids female circumcision."
2. This translation is mine, from the Arabic text included in Keller, *Reliance of the Traveller*, p. 59. I will discuss Keller's translation, which differs in substantial respects, below.
3. I agree with Mahmood that "any social and political transformation is always a function of local, contingent, and emplaced struggles whose blueprint cannot be worked out or predicted in advance. And when such an agenda of reform is imposed from above or outside, it is typically a violent imposition whose results are likely to be far worse than anything it seeks to displace." Mahmood, *Politics of Piety*, p. 36. Mahmood is not writing about FGC here, but her remarks apply.
4. Historian Jonathan Berkey has suggested that rather than focus on the seemingly endless "polemical debate as to whether female excision is or is not 'Islamic,'" one can analyze the ways in which various actors understand the practice "within the broader Islamic framework." Berkey, "Circumcision Circumscribed," pp. 20–21. The polemical debate is relevant, though, to the questions about religious authority and authoritarianism that I raise in this chapter.
5. Kassamali, "When Modernity Confronts Traditional Practices," p. 40. For her explanation as to why she prefers "female genital cutting" to other terms, see n. 1, p. 58.
6. Brooks, *Nine Parts of Desire*, pp. 53–4, has criticized Muslims who "turn their wrath on the commentators criticizing the practices [of clitoridectomy and honor killings], and not on the crimes themselves. The *Progressive Muslims* volume edited by Omid Safi reflects a determination not to be silenced by the thought of giving ammunition to what Muzammil Siddiqi refers to as "the enemies of Islam" (see chapter 8, n. 24). See also miriam cooke's concept of "multiple critique," in *Women Claim Islam*.
7. Kassamali, "When Modernity Confronts Traditional Practices," p. 42.
8. However, among African Christians, Protestants seem to be more opposed to the practice than Catholics, Orthodox, or Copts. Salecl, "Cut in the Body," p. 35, n. 2, notes that "The Catholic Church never officially distanced itself from clitoridectomy; the missionaries, in Africa, for example, did not condemn this practice. Only the Anglican Church, in the 1920s, denounced this ritual and advised its missionaries to prevent it." See also Gollaher, *Circumcision*, p. 196–7.
9. See Berkey, "Circumcision Circumscribed," pp. 21–2, for a discussion of pre-Islamic Egyptian practices.
10. According to Toubia, "The transmission route of FGM helps to clarify it as a nonreligious practice. When Islam entered Asian countries from Arabia to Iran, it did not carry FGM with it, but when it was imported to Asia through Nile Valley cultures, FGM was part of it. This was the case with the Daudi Bohra of India, whose religious beliefs are derived from an Egyptian-based sect of Islam." (Toubia, *Female Genital Mutilation*, p. 32.) Toubia does not discuss Southeast Asian Muslim practices.
11. See, for instance, Little, "Female Genital Mutilation: Medical and Cultural Considerations," pp. 30–34.

12. U.S. Department of State, "Indonesia: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)." The medicalization of the procedure – promoted in some African nations as an ameliorative measure – seems to be leading in Southeast Asia to actual "cutting" of some type, as sharp implements such as scissors are used. Moore and Rompies, "In the Cut."
13. "Claiming Our Bodies and Ou[r] Rights: Exploring Female Circumcision as an Act of Violence," quoted in Toubia, *Female Genital Mutilation*, p. 30.
14. Toubia, *Female Genital Mutilation*, p. 31. More recent Western scholarship tends to repeat this dismissal of any relationship between Islam and FGC. For example, one recent introductory text declares "Female circumcision is neither an Islamic practice nor is it widespread among Muslims. Rather, it appears to be an African tradition that remains in practice in countries like the Sudan and Egypt, among Muslims and non-Muslims alike." Esposito, *What Everyone Needs to Know about Islam*, p. 102.
15. Berkey discusses the Shi'a on p. 26. For one example of a matter-of-fact reference to female circumcision in another context, see Ruxton, *Maliki Law*, p. 155.
16. Berkey, "Circumcision Circumscribed," p. 25.
17. On al-Ghazali, see Roald, *Women in Islam*, p. 241, and chapter 11, "Female Circumcision," pp. 237–53 more broadly; see also her brief discussion in the conclusion, p. 299.
18. Toubia, *Female Genital Mutilation*, p. 43.
19. Abou El Fadl, *Speaking in God's Name*, pp. 144–5; 62–3.
20. Even Shaikh Muhammad al-Tantawi of Al-Azhar, who has opposed female circumcision, makes this point. The Qur'an itself does not say anything about circumcision, of males or females. However, it is universally acknowledged that male circumcision is an Islamic custom – virtually all Muslim males are circumcised – and it is attributed to the covenant between God and Abraham. According to Gollaher, "when a retired Libyan judge, Mustafa Kamal al-Mahdawi, published a book that questioned the legitimacy of the ritual [of male circumcision], he came under furious attacks from the clergy and the press." A swift response from a prominent Saudi cleric accused him of apostasy for rejecting the consensus view that circumcision of males was obligatory. *Circumcision*, pp. 51–2. See also Abu-Sahlieh, "Jehovah, His Cousin Allah, and Sexual Mutilations," p. 47. Gollaher bases his discussion of this case on Abu-Sahlieh's "To Mutilate in the Name of Jehovah or Allah." See also Barlas, "*Believing Women*" in *Islam*, p. 65.
21. Berkey, "Circumcision Circumscribed," p. 30: "[T]he few medieval sources which discuss female excision in any detail routinely direct their primary attention to the question of sexuality, and in particular women's sexuality and its control."
22. Kassamali, "When Modernity Confronts Traditional Practices," claims that Qur'an 4:1 grants Muslim women "the right to sexual satisfaction within the context of a marriage" as well as the right "to initiate sexual intercourse." (This famous verse recounting the creation of humanity does not actually mention sex at all, except in its reference to the creation of "many men and women" from the original pair.)

23. Muslim Women's League, "An Islamic Perspective on Sexuality." See also Abusharaf, "Virtuous Cuts," on women's sexual responsiveness after excision and/or infibulation.
24. El-Saadawi, *The Hidden Face of Eve*, p. 42, quoted Abu-Sahlieh, "Jehovah, His Cousin Allah, and Sexual Mutilations," p. 46.
25. Abu-Sahlieh ("To Mutilate in the Name of Jehovah or Allah") has argued that "Juridical logic cannot acknowledge the distinction between male and female circumcision, both being the mutilation of healthy organs and consequently damaging the physical integrity of the child, whatever the religious motivations lying underneath."
26. Abu-Sahlieh, "Jehovah, His Cousin Allah, and Sexual Mutilations," p. 54.
27. In his discussion of "female genital mutilation" and male circumcision under United States law, James McBride suggests that differential treatment "may be required for equal protection of men and women," posing one potential strategy for avoiding the problems with attempts to treat the practices in the same way. McBride, "To Make Martyrs of Their Children," p. 235.
28. Trans. by Ahmad Hasan, as quoted in Ahmad, "Female Genital Mutilation." See *Sunan Abi Dawud*, K. al-Adab, "Ma ja'a fi'l-khitan," vol. 2, p. 657.
29. Roald, *Women in Islam*, p. 247.
30. Hoyland, *Arabia and the Arabs*, p. 129. Circumcising women appears alongside the eating of locusts as matters where tribes could differ.
31. Gollaher, *Circumcision*, p. 192; Abu-Sahlieh ("Jehovah, His Cousin Allah, and Sexual Mutilations," p. 48) extends the same criticism to hadith regarding male circumcision.
32. Ahmad, "Female Genital Mutilation."
33. Badawi, "The Issue of Female Circumcision," appendix to *Gender Equity in Islam*. In his footnote to this hadith, Badawi cites "Al-Tabarani, quoted in Al-Albani, Muhammad N., *Silsilat Al-Ahadeeth Al-Sahihah*, A1 Maktab Al-Islami, Beirut, Lebanon, 1983, vol. 2, Hadeeth no. 722, pp. 353–8 especially pp. 356–7" and also refers to Keller's translation of *Reliance of the Traveller*.
34. Lane's entry for "bazz" (*Arabic-English Lexicon*, Book 1, Part 1, p. 222) provides some material suggesting the term might have been understood to refer to the prepuce, but the preponderance of his material suggests it means clitoris. See also Faruqi, *Faruqi's Law Dictionary*, p. 76 (where he also gives two Arabic equivalents for "glans clitoris": *taraf* and *tarth*); and Berkey, "Circumcision Circumscribed," p. 28. Roald, *Women in Islam*, p. 243 briefly discusses Keller's translation.
35. See Berkey, "Circumcision Circumscribed," p. 28.
36. Kassamali, "When Modernity Confronts Traditional Practices," p. 51.
37. Abusharaf, "Virtuous Cuts." See also her forthcoming edited volume *Female Circumcision: Multicultural Perspectives*.
38. Kassamali, "When Modernity Confronts Traditional Practices," p. 54, suggests that FGC should "be presented as a violation of the right to good health," with particular emphasis on the consequences of infertility.
39. Abu-Sahlieh, "Jehovah, His Cousin Allah, and Sexual Mutilations," summarizes these debates on pp. 49–50.
40. Ahmad, "Female Genital Mutilation."

## Notes to Chapter 7

1. This translation is by ‘Abdullah Yusuf Ali. See also Q. 5:6.
2. Q. 2:187; my modification of ‘Abdullah Yusuf Ali’s translation. The word I have translated here as “your wives” is “nisa’ikum.” *Nisa’* is the Arabic word for women, but it is also used to mean wives. The Qur’an also uses the term *azwaj*, a masculine/inclusive plural of the word *zawj* (see Wadud, *Qur’an and Woman*, pp. 20–3), to mean both spouses in a general sense and also wives specifically (e.g., 33:28, with regard to the Prophet’s wives); see also Barlas, “Believing Women” in *Islam*, pp. 183–4.
3. See, e.g., Syed, *The Position of Women in Islam*, p. 57: “Thus, 2:187 tells us God has given the husband and the wife a complimentary [sic] role to each other neither one dominating the other.”
4. Wadud, *Qur’an and Woman*, 11. I first encountered this insight regarding the explicit audience for the text in Esack’s essay “Islam and Gender Justice: Beyond Simplistic Apologia,” especially pp. 195–6. Barlas makes reference to this phenomenon on a few occasions, though to very different effect.
5. Daniel Boyarin makes this distinction between androcentrism and misogyny (or gynophobia) with regard to rabbinic discourses in Boyarin, *Carnal Israel*, p. 94.
6. However, there do seem to be some places in the Qur’anic text where, despite the use of terms such as *nas*, the people addressed are male. See, e.g., Q. 3:14 which refers to “people”’s desire for women, progeny, and material wealth. The Qur’an condemns this commodity-lust, but not the implicit commodification of women. On this verse, see Wadud, *Qur’an and Woman*, pp. 53–4.
7. The most important verse discussing creation is Q. 4:1, occurring at the beginning of the Surah entitled “Women.” Rethinking androcentric accounts of creation has been one vital element of Muslim women’s scholarship. Even a work on modern Jordan contains a discussion of these points; see Sonbol, *Women of Jordan*, pp. 207–8 in her chapter on “Honor Crimes.” Al-Sheha, *Woman in the Shade of Islam*, p.10 is instructive as to how far the imperatives of modern discourse have affected conservative authors; while it asserts firmly that “Islam made both the male and the female equal in terms of humanity,” it translates 4:1 with parenthetical identification of “Adam” as the first creation, and “Eve” as secondary: “O mankind! Be dutiful to your Lord, Who created you from a single person (Adam), and from him (Adam) He created his wife (Eve), and from them both He created many men and women ...” For broader consideration of creation and the expulsion from the garden, see Calderini, “Woman, ‘Sin’ and ‘Lust’.”
8. The rules for plurals referring to non-humans and inanimate objects differ.
9. The same problem exists with regard to dual forms as well. The use of a masculine/inclusive dual form in Q. 4:16, describing illicit sexual activity, has given rise to disagreement among commentators as to whether the verse refers to two men or a man and a woman. See chapter 5.
10. Q. 4:124.
11. In agreement with the noun *man*, “whoever,” which is grammatically masculine.

12. For example, see Badawi, *The Status of Woman in Islam*, pp.12–13.
13. ‘Abdullah Yusuf Ali translation; see also Ahmed Ali’s explanatory note to his translation, p. 50. Barlas demonstrates that not all discussions of witnessing in the Qur’an privilege male testimony over female testimony. “*Believing Women*” in *Islam*, p. 190.
14. This verse proposes an equal division for parents of a decedent who has also left offspring, indicating that in some cases the gender of the heir is not the deciding criterion.
15. My understanding here differs from that of Barlas, who sees difference but not inequality in these regulations. “*Believing Women*” in *Islam*, pp. 197–200, and *passim*.
16. On which, in Muslim contexts more generally, see Marlow, *Hierarchy and Egalitarianism in Islamic Thought*. She puts the matter succinctly in her Introduction: “[W]hile the Qur’an frequently points out the meaninglessness of differences of rank in terms of the afterlife, it certainly does not attempt to abolish them in the present world. On the contrary, it might be observed that the Qur’an endorses several forms of worldly inequality. ... Its central point thus appears to be that such inequalities have no bearing on an individual’s moral worth and ultimate fate in the next world.” (p. 4) Marlow points out that the strong egalitarian trend was limited to “the equality of free Muslim males.” (p. 34)
17. Q. 49:13.
18. E.g., Q. 16:71, 75. See Barlas, “*Believing Women*” in *Islam*, p. 5.
19. Stowasser, “Women and Citizenship in the Qur’an,” p. 33.
20. Stowasser, “Women’s Issues in Modern Islamic Thought,” pp. 15–16, discusses this shift, which she sets in the middle of the twentieth century. Abugideiri, “On Gender and the Family,” p. 242 demonstrates that “the notion of marital complementarity, as conceptualized by twentieth-century Muslim thinkers has, ironically, reified the notion of hierarchical gender difference, and thus gender inequity. Complementarity, as interpreted by this discourse, provides the Islamic pretext to duly restrict female legal rights within the family and expect the wife-mother to sacrifice those rights in the name of family cohesion.”
21. Barlas, “*Believing Women*” in *Islam*, p. 199.
22. For an entirely different approach, focused on *taqwa*, autonomy, and pedagogy, see Barazangi, *Women’s Identity and the Qur’an*.
23. E.g., Q. 33:73.
24. These are the translations of, respectively, Ahmed Ali, Shakir, ‘Abdullah Yusuf Ali, Arberry, Pickthall, Dawud, and Asad.
25. Men’s duties were also emphasized by jurists, who focused on the pragmatic, enforceable components of interpersonal relationships.
26. Q. 4:34, *Al-rijal qawwamun ‘ala al-nisa’ bi ma faddala Allahu ba’duhum ‘ala ba’din wa bi ma anfaqu min amwalihim. Fa’l-salihah qanitat, hafizat li’l-ghayb bi ma hafiza Allaha. Wa allati tukhafuna nushuzahunna, fa ‘izuhunna wa’hjuruhunna fi’l-madaji’ wa’dribuhunna, fa in ata’nakum, fa la tabghu ‘alayhinna sabilan. Inna Allah kana ‘Aliyyan, Kabir.*
27. Barlas, “*Believing Women*” in *Islam*, pp. 185–6.
28. For discussion of the range of meanings of “bi ma,” see al-Faruqi, “Women’s Self-Identity in the Qur’an and Islamic Law,” pp. 82–7; al-Hibri, “Islam, Law and Custom,” pp. 28–33; and Wadud, *Qur’an and Woman*, p. 70.

29. For the reference to Mary, see Q. 66:12; for Abraham, see Q. 16:120. For further uses of these terms, see Q. 2:116, 238; 3:17, 43; 30:26; 33:31; 39:9; and 66:5.
30. Ali, "Women, Gender, *Ta'a* (Obedience) and *Nushuz* (Disobedience)."
31. The identification of "clear lewdness" with *nushuz* is supported by some versions of the Prophet's "Farewell Sermon" in which he outlined the measures mentioned in 4:34 as consequences for "clear lewdness" by women. His words on that occasion are also the source for the specification that any striking must be "*ghair mubarrih*," or "non-violent."
32. Abugideiri, "On Gender and the Family," p. 293 refers to Q. 4:34 as "the Qur'anic verse treating spousal lewdness," implicitly insisting on a particular definition of women's *nushuz*.
33. Mernissi, "Femininity as Subversion," p. 109.
34. Mernissi, "Morocco: The Merchant's Daughter," in *Women's Rebellion*, p. 13.
35. See Rispler-Chaim, "*Nuṣuz* Between Medieval and Contemporary Islamic Law;" Shaikh, "Exegetical Violence: *Nushuz* in Qur'anic Gender Ideology;" and Ali, "Women, Gender, *Ta'a* (Obedience), and *Nushuz* (Disobedience)."
36. Thomas Cleary's translation and a recent Saudi-financed version based on the translation by 'Abdullah Yusuf Ali.
37. Ahmed Ali, *Al-Qur'an: A Contemporary Translation*.
38. On Qutb's approach to *nushuz*, see Wadud, *Qur'an and Woman*, pp. 74–5.
39. Raines and Maguire, eds., Esack, "Islam and Gender Justice: Beyond Simplistic Apologia" and Engineer, "Islam, Women, and Gender Justice."
40. Engineer, "Islam, Women, and Gender Justice," p. 111. Ellipsis in original. Syed, *The Position of Women in Islam*, p. 56, calls this "complete equality" but clearly states that the "degree" portion of the verse relating to divorce is exempt from this characterization.
41. *Lahunna mithl alladhi 'alayhinna*.
42. *Wa li'l-rijal 'alayhinna daraja*.
43. Engineer, "Islam, Women, and Gender Justice," p. 111.
44. Esposito with DeLong-Bas, *Women in Muslim Family Law*, p. 134; see also Niazi, *Modern Challenges*, p. 11.
45. Nasr, "Manhood in the Qur'an and Sunnah."
46. Wadud makes this point (*Qur'an and Woman*, p. 68), while situating her discussion of Q. 2:228 within a larger discussion of "degrees" elsewhere in the Qur'an (ibid., pp. 66–9). See also Barlas, "*Believing Women*" in *Islam*, pp. 192–7; Syed, *The Position of Women in Islam*, p. 56. Syed does stress "equality" however, which he views as being reinforced by 2:187, the garment verse.
47. Barlas, "*Believing Women*" in *Islam*, p. 6.
48. My modification of 'Abdullah Yusuf Ali's translation.
49. My modification of 'Abdullah Yusuf Ali translation. Note that the "they" is in the masculine/inclusive plural, so it could mean if the husbands want to reconcile, or if *both* the husbands and wives want to reconcile. However, the former interpretation is more likely since the husbands are the ones said to have "more right."
50. Engineer, "Islam, Women, and Gender Justice," p. 112.
51. Engineer, "Islam, Women, and Gender Justice," p. 112.

52. Engineer, "Islam, Women, and Gender Justice," p. 118. He elaborates: "The normative pronouncements of the Qur'an are eternal and while rethinking issues in Islamic Shari'ah, particularly pertaining to women's rights, the normative pronouncements will have precedence over the contextual. But during the early centuries contextual often had precedence over normative and it was quite 'normal' then. And hence these formulations became widely acceptable in that society. These laws were thought to be normative then and hence struck deep roots in society as well as in the hearts and minds of the people. They came to acquire the status of immutability with the passage of time."
53. Engineer, "Islam, Women, and Gender Justice," p. 121.
54. Esack "Islam and Gender Justice," p. 190, quoting Q. 2:228 (mistakenly cited as 2:118): "And women shall have rights similar to the rights against them, according to what is equitable." He also quotes Q. 9:71: "Believers, men and women, are protectors, one of another: they enjoin what is just and forbid what is evil."
55. Esack, "Islam and Gender Justice," p. 188.
56. Esack, "Islam and Gender Justice," p. 195.
57. Q. 4:34 begins with references to both men and women in the third person ("Men are *qawwamuna 'ala* women"), but switches to second-person address to men when discussing female *nushuz*.
58. For example, if "they both fear that they will not observe God's limits." Q. 2:229
59. Barlas, *Believing Women in Islam*, p. 198, specifically with regard to Q. 4:34; Wadud, *Qur'an and Woman*, pp. 80–82.
60. My translation, drawing on Cleary.
61. Aisha Geissinger addresses the issue of how the Qur'an treats gender in this verse and others that discuss fasting in an as-yet unpublished paper, "Gendering the Communal Body: Fasting in the Qur'an and the Hadith."
62. One can thus understand Qur'anic injunction to perform ablution "if you have touched women," see this chapter's epigraph as well as Q. 5:6. The addressees ("you") are in the masculine/inclusive plural, but consensus holds that ablution is not merited by women touching women, as it would be if the command applied to both men and women. Rather, it is men touching women that generates the obligation of ablution, making men the addressees. There is disagreement as to what type of touching generates the requirement of ablution (whether mere skin contact is meant or specifically sexual touching) as well as whether the same requirements apply to women who touch men. See discussion in Maghen, *Virtues of the Flesh*, pp. 247–50. Maghen (p. 250) quotes Ibn Hazm's statement in the *Muhalla* that the Qur'anic provision "is binding for men if they touch women and for women if they touch men." (My translation, from the Arabic text presented by Maghen.)
63. My translation, drawing on Cleary and 'Abdullah Yusuf Ali.
64. The importance of this metaphor appears in a hadith where, with regard to the permissibility of performing coitus interruptus, someone says: "She is your field, if you wish, water it; if you wish, leave it thirsty."
65. Barlas, "Believing Women" in *Islam*, pp. 160–64. The summary by Kassis, *A Concordance of the Qur'an*, p. 548, shows a number of instances in which *harth* refers specifically to agricultural use (in addition to the

- verbal form in Q. 56:63, see 2:71, 205; 3:14; 3:117; 6:136, 138; 21:78; 68:22) and one verse, 42:20, where the term appears three times referring to the *harth* of this world or that of the hereafter.
66. The connotations of fertility also implicit in this reference to a woman as a tith have also been used to argue that *harth* implies productivity, and so it is vaginal intercourse that is meant, not anal intercourse. See, e.g., Ibn Taymiyya, *Al-Fatawa al-Kubra*, K. al-Nikah, “Fi rajul yankihu zawjatahu fi dubriha,” vol. 2, pp. 74–5.
  67. Sachedina, “Islam, Procreation and the Law,” p. 109.
  68. In *Sahih Muslim*, the source of the conflict is reported as a Jewish objection to intercourse from behind. K. al-Nikah, “Permissibility of having sexual intercourse with one’s wife from the front or from behind avoiding the anus,” trans. Siddiqi, vol. 1–2, pp. 731–2.
  69. For an interesting parallel discussion of sexual positions in rabbinic law, see Boyarin, *Carnal Israel*, pp. 110–11, 116–20.
  70. The one relevant verse possibly suggesting that a woman could reject male sexual control is in the command not to force female slaves into prostitution against their wills; see chapter 3.
  71. Barlas, “Believing Women” in Islam, p. 5.
  72. Barlas, “Believing Women” in Islam, p. 205.
  73. Halperin, *How To Do the History of Homosexuality*, p. 153.
  74. For a useful reflection on related questions, see Plaskow, “The Right Question is Theological.”

### Notes to Chapter 8

1. *Sahih Bukhari*, Book of Marriage, “A man marrying off his minor children,” no. 64 and nearly identical content with a different chain of transmitters under the next item, “The marrying of a daughter by her father to the ruler,” no. 65 (trans. Khan, vol. 7, p. 50). See also “Who consummated a marriage with his wife when she was a girl of nine years,” no. 88 reported on the authority of ‘Urwa by his son Hisham. All three versions mention that “she remained with him for nine years” – that is, until his death.
2. See, for example, Sachs, “Baptist Pastor Attacks Islam;” Cooperman, “Anti-Muslim Remarks Stir Tempest;” and Jones, “Baptist pastor’s words shock Muslim leaders.”
3. This point is made by Rev. Jerry Falwell in his comment on the matter, “Muhammad, a ‘demon-possessed pedophile?’” The sources cited by Vines can be found in Caner and Caner, *Unveiling Islam*, pp. 41, 56, 59–60, 135, 141, n. 4. The statement provoked additional comment in the Baptist press. Sources are more fully explored in Starnes, “Southern Baptist leaders affirm Vines in the wake of national attacks,” and Wingfield, “What are the facts behind Vines’ words?”
4. *Sahih Muslim*, K. al-Nikah, “It is permissible for the father to give the hand of his daughter in marriage even when she is not fully grown up” (trans. Siddiqi, vol. 1–2, pp. 715–16; the translator’s extended apologetic in the notes to these hadith is noteworthy on its own). Al-Nasa’i’s *Sunan* includes one cluster of reports positing ages at marriage of six,

seven, and nine; each of the three specifies that consummation occurred at age nine. Another adjacent report puts marriage at nine, but does not mention consummation. (K. al-Nikah, "Inkah al-rajul ibnatahu al-saghira," vol. 6, pp. 82–3.) Two other reports in al-Nasa'i, found in a section entitled "Consummation with a girl of nine," both provide an age of six at marriage and nine at consummation. (K. al-Nikah, "Al-bina'a bi ibnat tis'a," vol. 6, p. 131.) Ibn Hanbal provides a report in which Aishah was six or seven at marriage, nine at consummation, and eighteen at Muhammad's death. (*Chapters on Marriage and Divorce*, p. 97.) On al-Shafi'i's and Ibn Hanbal's treatment of this marriage, see Ali, "A Beautiful Example," pp. 280–82. Her age was not the only noteworthy information about Aishah's marriage; other reports in various hadith texts point out that her marriage and consummation took place during the month of Shawwal, previously considered inauspicious for such events.

5. *First Coast News*, June 13, 2002, [http://www.firstcoastnews.com/news/2002-06-13/islam\\_vines.asp](http://www.firstcoastnews.com/news/2002-06-13/islam_vines.asp), last accessed 11/26/04.
6. Cooperman, "Anti-Muslim Remarks Stir Tempest." This is apparently a possible feature of Arabic. However, it has not been a common interpretation. Furthermore, while the reports in Bukhari's *Book of Marriage* include only the additional information that she was with him for nine years (until his death, as all accounts are clear that she was his wife until that time); other accounts, including one in *Sahih Muslim* and one in Al-Nasa'i's *Sunan* state specifically that she was eighteen when Muhammad died; it is not possible to suggest that this meant twenty-eight. (This point was made eloquently by Christopher Melchert in an email to the Islam section of the American Academy of Religion after this was first drafted.) Notably, a press release from CAIR does not include any specific information about Aishah's age. See Islam-Infonet, "Baptists Call Prophet Muhammad Demon-Possessed Pedophile." Other less direct attempts to rebut the claim are quoted by Jones: "Syad Ahsani of Arlington, Southwest regional chairman of the American Muslim Alliance, said Muhammad was betrothed to the child, which was a common practice; however, such marriages weren't consummated until children reached adolescence. [Hodan] Hassan [a spokeswoman for the Washington-based Council for American-Islamic Relations,] said it is not known when Muhammad's marriage was consummated." Jones, "Baptist pastor's words shock Muslim leaders." For the Council on American-Islamic Relations, see CAIR, "President Bush asked to repudiate anti-Muslim remarks."
7. On these accusations, see Reeves, *Muhammad in Europe*, pp. 215–16, 236–40.
8. Malik, *Islam and Modernity*, p. 69.
9. For one example of an anti-Islam site making claims about Aishah's age at marriage, see Ex-Muslim.com, "Evidence that Aisha was 9 when her marriage to Muhammad was consummated."
10. On age of sexual consent, see Archard, *Sexual Consent*, pp. 116–29. Archard's discussion is helpful in what it says, and illuminating in what it does not. As is to be expected from a work concerned with sexual consent in the modern Western world, he does not discuss children and sex in the context of marriage, except to note (p. 117) that in contemporary

Europe “all jurisdictions set the age at which persons can marry some years higher” than the age of sexual “majority” – i.e., permissible sexual activity. See pp. 126–8 for a brief discussion of intergenerational sexual activity.

11. See Stowasser, *Women in the Qur'an, Tradition, and Interpretations*.
12. Aziz, “Age of Aisha (ra) at time of marriage,” from the website of Ahmadiyya Anjuman Isha‘at Islam Lahore Inc. U.S.A.
13. Submission.org, “Prophet Muhammad’s Marriage to Aisha.” Note that there is no explicit mention of Muhammad’s marriage to Aishah in the Qur’an.
14. He is identified as its vice-president in various online materials, but its website (<http://www.irfiweb.org/>) is not available as of 11.25.05.
15. Shanavas, “Ayesha’s Age: The Myth of a Proverbial Wedding Exposed.” Shanavas frames his comments as an “answer to [his] Christian friend.” He argues that “Based on the evidences presented above, the marriage of fifty-two-year-old Prophet (pbuh) with Ayesha (ra) at nine year of age is only a proverbial myth. On the contrary, Ayesha (ra) was an intellectually and physically mature Biker (virgin = adult unmarried woman with no sexual experience) when she married Prophet (pbuh).”
16. On one scholarly attempt to assess this corpus of material, see Schoeler, “Foundations for a New Biography of Muhammad.”
17. Nadvi, *Women Companions of the Holy Prophet and Their Sacred Lives*, p. 34.
18. Nadvi, *Women Companions of the Holy Prophet and Their Sacred Lives*, p. 35.
19. Spellberg, *Politics, Gender, and the Islamic Past*, p. 31.
20. Thompson, *The Wives of the Prophet Muhammad*, p. 15. Thompson includes parenthetical Arabic honorifics after the mentions of the Prophet and Aishah which are not reproduced here.
21. Syed explicitly declares, without citing any sources, what Thompson only implies: “The Prophet’s (pbuh) own marriage to Ayesha when she was nine years old was performed in Mecca long before the Islamic laws of marriage were revealed at Medina by the Qur’anic verses. However as the consummation of the said marriage of Ayesha and the Prophet (pbuh) was postponed for five years (some say seven years) to allow Ayesha to attain majority, in reality the marriage of Ayesha took place when she was either 14 or 16 years old.” *The Position of Women in Islam*, p. 40.
22. Moin, *Umm al-Mu’minin ‘A’ishah Siddiqah*, pp. 4–5.
23. Moin, *Umm al-Mu’minin ‘A’ishah Siddiqah*, p. 8.
24. Identified in the article as “Dr. Muzammil H. Siddiqi, former President of the Islamic Society of North America and Director of the Islamic Society of Orange County, Garden Grove, California.” He continues: “Her maturity, knowledge, intelligence, and contributions during the life of the Prophet and afterwards all indicate that she was either an exceptional nine-year-old or must have been older than that. Whatever the case may be about her age, one thing is certain: she was a most compatible spouse of Prophet Muhammad. None of the contemporaries of the Prophet, his friends or foes, are reported to be surprised by this marriage or made objections to it.” Siddiqi, “Would a 50-year-old ‘Prophet of God’ Have Sex with a 9-year-old Girl?”

25. Likewise, in one of three question-and-answer exchanges about Aishah's age posted at the Jamaat-e-Islami site, the respondent gives, without any textual citation, his own personal opinion that "consummation [occurred] at the age of 9 to 11."
26. Even a Jamaat-e-Islami response to a question as to whether Aishah was seven at her marriage is answered in the following way: "There are different reports and traditions regarding Umm-ul-Mo'mineen Aisha's age when she was betrothed. What every one agrees to is that while the promise/*nikah* happened in Makkah, she was delivered to the house of the Prophet (s.a.w.) (meaning her '*Rukhsati*') about *four* years later in Medina. Thus even according to the age you have quoted, she was about 11 years old when she entered the Prophet's *haram* in Madina. Some believe that she was above 13; some others reports say much older (17, 19). The generally quoted age is 9 years." Haq, "Marriage of Ayesha (RA) with Prophet Muhammad (p.b.u.h.)" In response to an earlier query, the same author makes clear that while "Some scholars do insist that she was older ... most agree she was either 6 or 7 when betrothed." He gives his "personal opinion" that "consummation [took place] at the age of 9 to 11."
27. Muhaddith.org, "Answers to Attacks Against Islam: Morality of marrying Aishah at an early age," emphasis in original.
28. See, for example, Osama Abdullah's "My response to the 'Child Molester' lie against our beloved Prophet, Muhammad peace be upon him," from answering-christianity.com, which contains sections from Talmud and references to biblical prophets. Similar materials are included under the heading "The Bible on marriage of young girls with much older men," in the Aziz, "Age of Aisha (*ra*) at time of marriage."
29. For a thorough discussion of the rabbinic issue at stake, see Meacham, "Marriage of Minor Girls in Jewish Law."
30. There are references to nine as the age of presumptive majority in some texts such as Ibn Hanbal's, but I have not come across any explicit reference to Aishah's menarche as trigger for consummation. Bukhari's chapter heading prefacing one of his reports on Aishah's marriage includes a discussion of the '*idda* (post-marital waiting period) for pre-pubescent girls, which presumes consummation of a marriage before menarche. K. al-Nikah, "A man marrying off his minor children," trans. Khan, vol. 7, p. 49; possibly also "A woman looking at Ethiopians and the like if it does not lead to bad consequences," trans. Khan, vol. 7, p. 119. In one fifteenth-century Cairo court case, the Prophet's marriage to Aishah was used as evidence for the permissibility of marrying off minor girls. Petry, "Conjugal Rights versus Class Prerogatives," p. 233.
31. See, e.g., Tucker, *In the House of the Law*, pp. 155–6; and Motzki, "Child Marriage in Seventeenth-Century Palestine."
32. See the entry on "Ayesha" in *The American Muslim*, "Answers to Questions Non Muslims Ask," an alphabetical list from "Abrahamic Faiths" to "Women's Issues." Interestingly, the compilers of this list make much the same distinction between articles aimed at dialogue and those aimed at polemic.
33. Islam Online.net, "Addressing Misconceptions about Prophet's Marriage to 'Aisha.'"
34. Haq, "Marriage of Ayesha (RA) with Prophet Muhammad (p.b.u.h.)."

35. Shanavas, "Ayesha's Age: The Myth of a Proverbial Wedding Exposed."
36. Haq writes, "So in this marriage with A'isha there was a desire to cement the bonds of friendship with Abu Bakr as well as the desire for propagating the teachings of Islam, particularly delicate matters relating to women folk." "Marriage of Ayesha (RA) with Prophet Muhammad (p.b.u.h)." See also Sabeel Ahmed, "Why Did Prophet Muhammad (pbuh) Married [sic] Young Aisha Siddiqa (r.a.)?," the first of which is "To reinforce the friendly relations already existing with Abu Bakr (his closest companion)." Interestingly, the notion that the marriage was a calculated strategic move is one point raised by polemicists as well; here, though, it has been given a different valuation and serves to deflect accusations of lechery.
37. Ahmed, "Why Did Prophet Muhammad (pbuh) Married [sic] Young Aisha Siddiqa (r.a.)?" The article identifies Ahmed as a student of famous polemicist Ahmed Deedat, and notes – without any apparent sense of irony – that "His main interest is in comparative religion."
38. Haq, "Marriage of Ayesha (RA) with Prophet Muhammad (p.b.u.h.)." The passage deserves to be quoted at length: "The issue of child marriage has come via West and is part of a whole 'package' that intends to dismantle Islam as a social code and state philosophy. Try to look at the components in that whole context. Let me give you a few tips: 'child marriage', 'gender equality', 'women empowerment', 'sex education', 'reproductive control', 'contraception', 'sustainable growth', — are among the few terms used in the gender context. Can you please tell me that you know enough about this 'UN sponsored shari'ah', that is being thrust as alternative to the Shari'ah of Islam? If you are not well aware, then kindly be careful about pushing too hard even some seemingly 'reasonable' issues like child marriage. The real intention (seems) not to stop this practice today (which is more a Hindu issue) but lead to the erroneous conclusion that Islam permitted a 'wrong' thing."
39. Squires, "The Young Marriage of 'Aishah."
40. <http://www.shiachat.com/forum/index.php?showtopic=42999&pid=538017&st=0&#entry538017>, last accessed 11/04/04. For an extended discussion with a number of Sunni perspectives, see also <http://www.ummah.org.uk/forum/showthread.php?t=7838>, last accessed 11/04/04, which takes off from Understanding-Islam.com's article "What was Ayesha's (ra) Age at the Time of Her Marriage to the Prophet (pbuh)?"
41. On this point, see Moosa, "The Debts and Burdens of Critical Islam," pp. 21–3.
42. These rules mostly relate to the greater number of his wives, restrictions on his ability to marry new ones, and his freedom from a strict schedule of turn-taking between them. See Ali, "A Beautiful Example," pp. 274–5.
43. I have heard anecdotal evidence, however, that marriages of girls of that age has continued into the modern era; one Saudi woman reported her grandmother's marriage at this age. Similarly, after the Iranian revolution of 1979, the age of marriage for girls (with parental consent) was lowered to nine, though it has since been raised.
44. Various sources report, for example, that 'Umar b. al-Khattab, the second caliph and father of the Prophet's wife Hafsa, later married the Prophet's granddaughter, born to 'Ali and Fatima.

45. Plaskow, "Decentering Sex."
46. After this was written, I came across a strikingly similar sentiment expressed by Stephanie Coontz (*Marriage, a History*, p. 19). She writes: "I don't believe that people of the past had more control over their hearts than we do today or that they were incapable of the deep love so many individuals now hope to achieve in marriage. But love in marriage was seen as a bonus, not a necessity."
47. Not that either wealth or wisdom was trivial, either in the Prophet's own marital history or Islamic history more broadly.
48. This is a radically oversimplified view of the medieval 'Ashari/Mu'tazili debate. Anderson provides a summary of the basic views of the Asharites and the Mutazilites in *Islamic Law and the Modern World*, pp. 9–10. This question is not just a Muslim one; C.S. Lewis sums up the Christian debate in strikingly similar terms, as "whether God commands certain things because they are right, or whether certain things are right because God commands them." *The Problem of Pain*, p. 99. These issues still have currency today, even if the debate remains largely unspoken. See Squires, "The Young Marriage of Aishah," for the claim that "According to Judaism, Christianity, and Islam, right and wrong are ordained by Almighty God. As such, morality does not change over time based on our whims, desires, or cultural sensitivities."
49. Q. 3:117, 9:70, 11:101, 16:33, 29:40, and 30:9. Rahman, *Major Themes of the Qur'an*, p. 25, states that "all injustice [*zulm*] is basically reflexive."

### Notes to Chapter 9

1. Sheila Briggs' remarks, Feminist Sexual Ethics Project colloquium II, Brandeis University, September 2004. See also Judith Plaskow, "Decentering Sex," "Authority, Resistance, and Transformation," and *The Coming of Lilith*.
2. Q. 30:21.
3. Working off Alasdair MacIntyre's discussion of tradition, Edward Curtis proffers a helpful definition: "tradition is not an historical product so much as an historical process in which human beings, interacting with each other in discrete social contexts, invent, embrace, and inherit *something* that they care about and argue over, whether explicitly or not." Curtis, *Islam in Black America*, p. 4.
4. Maghen, *Virtues of the Flesh*, p. 282.
5. See, e.g., Roded, *Women in Islamic Biographical Collections*, pp. 63–89.
6. Abou El Fadl, *The Authoritative and the Authoritarian in Islamic Discourses*, p. 13.

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# Index

*Note:* In alphabetizing entries, no notice is taken of the Arabic prefixes al- or el-.

- Abdallah, Osama 190  
Abdul-Ghafur, Saleemah 174  
Abdul-Rauf, Muhammad 91–2, 94  
ablutions 4, 64–6, 80, 105, 173, 175, 177, 186  
Abou El Fadl, Khaled xxiii, xxiv, 23, 24, 98, 103, 155, 159, 160, 163, 165, 174, 181, 192  
Abu Bakr 135  
Abu Dawud 50, 105, 106, 110  
Abugideiri, Hibba 184, 185  
Abu Hanifa 13, 16, 30, 32–3  
Abu Huraira 10, 12, 172  
Abu-Sahlieh, Sami Aldeeb 105, 181, 182  
Abusharaf, Rogaia 109, 182  
Abu Talib Makki 76, 175  
adultery xv, 46, 61, 64, 120, 172  
*see also zina*  
Afghanistan 42, 148  
Africa 2, 41, 42, 58, 97, 99, 101, 144, 161, 168, 169, 174, 180, 181  
A'Haleem, Asma 101, 110  
Ahmadiyya (Ahmadis) 138, 189  
Ahmed, Leila xix, 19, 20, 159, 161, 163  
Ahmed, Sabeel 145, 191  
Ahmed, Sheikh Omar 97–8, 101, 102, 103, 110  
Aishah 135–50, 156, 188–92  
*ahl al-kitab* 13, 163, 164, 172  
Allah *see* God  
Alalwani, Taha Jabir 17–19  
Algosaibi, Ghazi 47–8, 51  
Algar, Hamid 168  
'Ali b. Abi Talib xxvii–xxviii, 27  
Anderson, JND 192  
An-Na'im, Abdullahi 38  
Antoun, Richard 160, 161  
Archard, David 171, 188  
authoritarianism 23, 24, 98, 103, 165, 180  
Ayubi, Zahra x, 160, 166  
Azam, Hina 169, 177  
Aziz, Zahid 189, 190  
'azl (withdrawal) 7–8, 48  
Badawi, Jamal 19, 106, 107, 108, 182, 184  
Bailey, Sherwin xi, xviii, 160  
Barakat, 'Umar 15, 103, 107–8  
Barazangi, Nimat Hafez 184  
Barlas, Asma 116, 128, 132, 181, 183–7  
Bayman, Henry 46  
Beeston, AFL 177  
Berkey, Jonathan 102, 163, 180–2  
Boudhiba, Abdelwahab 85  
Bowen, Donna Lee 162  
Boyarin, Daniel 162, 183, 187  
Brockopp, Jonathan xxi, 159, 169  
Brooks, Geraldine 162, 180  
Brooten, Bernadette J ix, 177  
Brundage, James 163  
Bukhari *see Sahih Bukhari*  
Calderini, Simonetta 183  
Caner, Emir Fethi 187  
Caner, Ergun Mehmet 187  
Carstensen, Laura L 158  
chastity 60–6  
Cilardo, Agostino 179  
circumcision  
    female 97–111  
    male 101, 104–5, 108, 181, 182  
coitus interruptus *see* 'azl  
Collins, Robert 168, 169  
concubinage xvi–xvii, xxv, xxvi, 39–55, 57, 58, 61–2, 67, 74, 92, 96, 160, 163

- consummation 5, 22, 137, 140, 141, 143, 144, 161, 173, 175, 188, 189, 190
- contraception 51  
*see also 'azl*
- cooke, miriam x, 180
- Cook, Michael 174
- Coontz, Stephanie 192
- Cooperman, Alan 187, 188
- Coulson, Noel 166, 174
- Council on American-Islamic Relations 136, 188
- Curtis, Edward E IV 192
- Davies, Eryl 172
- Davis, David Brion 168, 169
- DeLong-Bas, Natana 167, 185
- al-Dhahabi 75–7, 175
- Dialmy, Abdessamad 171
- Diederich, Mathias 168
- divorce 24–38  
judicial 27  
triple 24, 26
- Doggett, Maeve E 163
- Doi, Abdul Rahman xv–xvi
- “don’t ask, don’t tell” xxiii, 69, 73, 75–96
- Dover, KJ 172, 177
- dower 1, 2, 3–5, 9, 12, 13, 22, 27, 28, 34, 35, 36, 37, 43, 59, 64, 65, 74, 80, 95, 118, 151, 161, 167
- Dunne, Bruce 175
- Dupret, Baudouin 179
- Duran, Khalid 79
- Egypt 29, 34, 41, 58, 68, 70, 100, 109, 181
- Eid, Talal 167
- Engineer, Asghar Ali 123–5, 185, 186
- Esack, Farid x, 123, 125, 126, 160, 183, 185, 186
- Esposito, John 124
- Europe 18, 22, 72, 85, 92, 168, 188, 189
- European Council for Fatwa 19, 165
- excision *see* female circumcision
- exegesis 54, 60, 82, 84, 90, 97, 113, 121, 122, 123, 129, 132, 133, 161, 165, 185
- Fadel, Mohammed 160
- Falwell, Jerry 187
- Faruki, Kemal 159
- Faruqi, Harith Suleiman 182
- Al-Faruqi, Maysam 184
- fatwa xiv, 18, 29–30
- female circumcision 97–111
- fitna* 9
- fornication 26, 46, 172  
*see also zina*
- Friedmann, Yohanan 161, 164, 165, 170
- Fyzee, Asaf AA 165
- gay Muslims 79, 81, 84, 86, 89, 92, 175, 176, 178  
*see also* homosexuality; lesbians
- Geissinger, Aisha 186
- al-Ghazali xxvi, 1, 7, 10, 12, 102, 161, 163, 181
- ghusl* 4  
*see also* ablutions
- God 11, 14, 20, 24, 30, 41, 53–5, 60, 86–8, 90, 115–16, 118–20, 127–9, 149–52, 170, 192
- Gollaher, David 180, 181, 182
- Gordis, Robert 178
- Gramick, Jeannine 178
- hadd* 59, 62, 63, 65, 66, 74, 77, 172, 174
- hadith 7, 11, 49, 64, 99  
*see also* *Sahih Bukhari*; *Sahih Muslim*; *al-Tirmidhi*; etc.
- Hallaq, Wael 160
- Halperin, David 132–3, 177, 178, 187
- Hanafi school 12, 13, 14, 16, 24, 27, 32, 33, 39, 92, 108, 161, 163, 167, 171
- Hanbali school 108
- al-Haq, Gad 102, 110–11
- Harrison, Frances 179
- Hasan, Zeeshan 170
- Haskafi, Muhammad ‘Ala al-Din 39, 41, 167, 171, 179
- Helem-Lebanon 176
- hermaphrodite 92, 93, 94, 175, 179
- Al-Hibri, Azizah 162, 163, 170, 184
- Hidayatullah, Aysha x, 160, 162, 168, 176, 178
- homosexuality 75–96, 162, 175, 176, 177, 178, 179, 187  
*see also* gay Muslims; lesbians; same-sex marriage
- Hoodfar, Homa 161
- Hourani, George 159
- Hoyland, Robert 182
- Hussaini, Mohammad Mazhar 159
- Ibn ‘Abidin 161

- Ibn Abi Shayba 166  
 Ibn Abi Sulayman, Hammad 19  
 Ibn Baz 52  
 Ibn Hajar 76, 77  
 Ibn Hanbal 32, 33, 173, 188, 190  
 Ibn Jibreen 9–10  
 Ibn Kathir 168  
 Ibn Naqib al-Misri 103, 107  
 Ibn Rushd 15  
 Ibn Taymiyya 26  
 illicit sex *see zina*  
 Imam, Ayesha M 189, 190, 191  
 impotence 12, 13, 64  
 India 24, 29, 34, 148, 158, 165, 180  
 Indonesia 100  
 intermarriage 1–3, 13–23  
 Internet 14, 138, 139, 142, 176  
 Islamic law  
   on marriage 61, 62, 64, 68, 71, 72, 160,  
   161, 162  
   and modern statutory law 24–38  
   on slavery 42, 43  
   in the United States 1–23, 25, 35, 36, 37,  
   70, 87, 99, 135, 152, 153, 155, 160, 182  
 ISNA (Islamic Society of North America)  
   17, 189  
  
 Jackson, Sherman A 159  
 al-Jahiz 84, 177  
 Jakobsen, Janet R 178  
 Jamaat-e-Islami 144, 146, 190  
 Jamal, Amreen 82, 176  
 Jennings, Ronald 167  
 Jones, Jim 187, 188  
  
*kaba'ir* (enormities) 75–6  
 Kahf, Mohja 160, 174  
 Kamal, Abdul Aziz 173  
 Karim, Jamillah x  
 Kassamali, Noor 99–100  
 Kassis, Hannah 186  
 Kazee Khan *see* Qadi Khan  
 Keller, Nuh 51, 52, 75, 76, 84–5, 107, 108,  
   162, 170, 174, 175, 177, 180, 182  
 Khadduri, Majid 160, 161, 170, 171  
 Khalifa, Rashad 139  
 Khan, Sir Sayyid Ahmad 43  
 al-Khudri, Abu Sa'id 50  
*khul'* 27, 34–5, 36, 161, 166, 167  
 Kugle, Scott x, 79, 82, 83, 84, 160, 162, 176,  
   177, 178, 179  
  
 lesbianism 75, 76, 77, 78, 79, 80, 81, 86, 87,  
   89, 175, 176, 178, 179  
   *see also* gay Muslims; homosexuality;  
   tribadism  
 Lewis, Bernard 168, 169  
 Lewis, CS 192  
*li'an* 25, 64, 69  
 Little, Cindy 180  
*liwat* 75, 76, 77, 81  
 Lovejoy, Paul 168  
 Lutfi, Huda 159, 162, 163  
  
 McBride, James 182  
 Mack, Beverly 168  
 McLoughlin, Patrick 180  
 Maghen, Ze'ev 154, 162, 177, 186, 192  
 Mahmood, Saba 180  
*mahr see* dower  
 Malaysia 24, 100  
 male circumcision 101, 104–5, 108, 181,  
   182  
 Malik ibn Anas 170  
 Malik, Iftikhar 161  
 Maliki school 19, 27, 63, 159, 160, 164,  
   169, 181  
 Malti-Douglas, Fedwa 163, 176  
 al-Marghinani 14, 164  
 Mariyya al-Qibtiyya (Maria the Copt) 46,  
   137  
   *see also umm walad*  
 Marlow, Louise 164, 184  
 marriage 1–23  
   same-sex 91–5  
   temporary *see mut'a*  
   age 57, 58 136–48, 171, 173, 188–91  
   contracts 12, 22, 25, 27, 28, 36, 166, 171  
 Mashhour, Amira 161, 167, 170  
 Mattson, Ingrid 40, 168, 169  
 Mauritania 42  
 Meacham, Tirzah 190  
 Mernissi, Fatima 54, 121, 170, 185  
 Miers, Suzanne 168  
*milk* (dominion, ownership) 5, 25, 35, 36,  
   40, 42, 53  
 Miller, Joseph C 169  
 Minaret of Freedom 106, 110  
 Mir-Hosseini, Ziba 161, 162  
 Moghissi, Haideh 158, 162  
 Moin, Mumtaz 141, 142  
 Moore, Matthew 181  
 Moors, Annelies 161

- Moosa, Ebrahim x, 69, 162, 174, 191  
 Morocco 161, 168, 171, 185  
 Motzki, Harald 190  
 Mubashshir Majeed, Debra 177  
 Muhammad (the Prophet) *see* Prophet Muhammad  
 Murad, Abdal-Hakim xxii, 87–8, 94  
 Murata, Sachiko 178  
 Murray, Stephen 85  
 Musallam, Basim 162, 169–70  
 Music, Rusmir x, 93, 179  
 Muslim [b. al-Hajjaj] *see* *Sahih Muslim*  
 Muslim Canadian Congress 86  
 Muslim Women's League 86, 87, 88, 104, 178, 182  
 Mutahari, Murtadha 171  
*mut'a* (temporary marriage) 58, 61  
 al-Muzani 161
- Nadvi, Syed Suleman 140, 142  
*nafaqa see* support  
 Nafi, Basheer xxiii, 23, 160  
 Najmabadi, Afsaneh 179  
 al-Nakha'i, Ibrahim 19  
 al-Nasa'i 187, 188  
 Nasr, Muhammad Musa 185  
 Nazer, Mende 42, 168  
 Niazi, Kausar 158, 185  
*nikah* 92, 141  
   *see also* marriage  
 Nomani, Asra Q 56, 57, 70–1  
*nushuz* 76, 118, 120–2  
 Nussbaum, Martha 177
- obedience 119–20  
 orgasm 7  
   *see also* sexual satisfaction  
 Ormsby, Eric 170
- Pakistan 34  
 paternity 46, 66–72  
 Pellegrini, Ann 178  
 People of the Book *see ahl al-kitab*  
 Petry, Carl F 190  
 Plaskow, Judith xviii, 18, 159, 187, 192  
 polygamy/polygyny xv, xvi, 53, 58, 156, 170  
 Prophet Muhammad 135–50  
   on celibacy 6  
   on concubines 39–40, 46–7  
   on divorce 24  
   as husband 39, 40, 60  
   on sex with war captives 47–51  
   *sunnah* xxi, 6, 47, 50, 57, 125, 147, 152  
   wives 39, 46–7, 60, 67, 135–50  
   *see also* hadith  
 puberty 58, 70, 143, 144
- qadhf* 62, 76  
 Qadi Khan 24, 29, 30–2, 37  
 Qaisi, Ghada 161  
 Al-Qaradawi, Yusuf 159  
 Qur'an xx, xxi, 5, 7, 13, 14, 17, 21, 25, 27, 40, 62, 63, 75, 83, 90, 103, 112–34, 151–3, 156, 159, 165, 166, 170, 171, 181, 183, 184, 185, 186  
 circumcision 103–4  
 concubinage 40  
 homosexuality 81–2  
 illicit sex 56  
 intermarriage 19–20  
 slavery 44, 45, 53–5
- Rafi' b. Khadij 121  
 Rahman, Fazlur 52, 122, 159, 170, 192  
 Ramadan, Tariq 74  
 al-Ramli, Khayr al-Din 31  
 rape 12, 30, 51, 57, 66, 92  
 Rapoport, Yossef 28–9  
 Reeves, Minou 188  
 Reinhart, Kevin x, xxiv, 24, 111, 159, 160  
 Rispler-Chaim, Vardit 185  
 Rizvi, Syed Aminul Hasan 172  
 Roald, Anne Sofie 181, 182  
 Roded, Ruth 192  
 Rompies, Karuni 181  
 Rosenthal, Franz 177  
 Al-Rouhayeb, Khaled 80  
 Rowson, Everett 175, 176, 177  
 Rubin, Uri 173  
 Ruxton, FX xix, 19, 159, 181
- el-Saadawi, Nawal 104  
 Sabbah, Fatna 162  
 Sachedina, Zulie 169, 187  
 Sachs, Susan 187  
*sadaq see* dower  
 Al-Sadlaan, Saalih ibn Ghaanim 163  
 Saed, Khaleida 178  
 Safi, Omid x, 167, 180  
*Sahih Bukhari* 10–11, 50–1, 64, 105, 135, 137, 139, 140, 141, 142, 143, 146, 147, 156, 163, 166, 172, 173, 187

- Sahih Muslim* xxv, 10–11, 51, 60, 64, 105, 139, 143, 146  
 Salafis xx, xxiii  
 Salecl, Renata 180  
 same-sex marriage 18, 91–5  
 Sanders, Paula 93  
 Sanneh, Lamin 174  
 Saudi Arabia 42, 52, 96  
 Schmidtke, Sabine 162  
 Schmitt, Arno 179  
 Schoeler, Gregor 189  
 sexual availability 2, 6, 11, 13, 15, 95  
 sexual satisfaction 6–13, 79, 104, 181  
 al-Shafi'i xvi, 4, 41, 158, 160, 161, 173, 188  
 Shafi'i school 15, 51, 75, 97, 100, 162  
 Shaham, Ron 166  
 Shaikh, Sa'diyya 8  
 Shanavas, TO 139  
 Shanely, Mary Lyndon 158  
*shari'a* law 21, 37, 38  
     *see also* Islamic law  
 Sharif-Clark, Asia 161  
 Al-Sheha, 'Abdul Rahman 158, 160, 162, 163, 167, 183  
 Shi'a 2, 16, 26, 42, 47, 58, 61, 102, 181  
 al-Shi'bi 19  
*shubha* 68  
 Sidahmed, Abdel Salam 174  
 Siddiqi, Muzammil 142, 189  
 Sikainga, Ahmal Alawad 168  
 Sivola, Juha 177  
 Skinner, Marilyn 172  
 Skovgaard-Petersen, Jakob 179  
 slavery xvi, xvii, xxv, 39–55, 57, 74, 116, 149, 152, 156, 160, 168, 169, 170  
     *see also* concubinage  
 Smith, Jane 179  
 Sonbol, Amira El-Azhary 159, 167, 183  
 Southern Baptists 135, 187, 188  
 Spector, Susan 167, 173  
 Spellberg, DA 189  
 Squires, Abdur Rahman Robert 146, 191, 192  
 Starnes, Todd 187  
 stipulations 28, 166  
 Stowasser, Barbara Freyer 116, 184, 189  
 Sudan 42, 101, 109, 168, 169  
*sunna* xxi, 6, 16, 25, 47, 48, 50, 54, 56, 57, 71, 99, 102, 105, 109, 125, 147, 148, 151, 152, 159, 169, 170, 185  
 support 5–6, 22  
 Syed, Mohammad Ali 53, 140, 159, 165, 170, 184, 185, 189  
 Taji-Farouki, Suha xxiii, 23  
*talaq* 25–9, 32–7, 165, 170  
     *see also* divorce  
 Thompson, Ahmad 140, 142  
 Thumma, Scott 176  
 al-Tirmidhi 165, 166, 171, 172  
 Toledano, Ehud 168, 169  
 Toubia, Nahid 109, 180, 181  
 Treggiari, Susan 172  
 tribadism 75, 76, 77, 176  
 triple divorce 24, 26  
     *see also talaq*  
 Tucker, Judith E 159, 161, 166, 190  
 Uebel, Michael 175, 176  
 'Umar b. al-Khattab 13, 191  
*umm walad* 46, 169  
 Van Gelder, GHJ 173, 179  
 Vines, Jerry 135, 136, 142, 146, 187, 188  
 virginity 58, 73, 140, 149, 173  
 Wadud, Amina xx, 128, 170, 183, 184, 185, 186  
 Walters, Jonathan 177  
 Wani, MA 158, 163  
 Weeks, Jeffrey 89–90  
 Wingfield, Mark 187  
 withdrawal *see 'azl*  
 witnessing 63, 87, 115  
     women's and men's testimony 115, 116, 184  
 Wolfe, Michael 158  
 women's status xii–xxviii  
 Wynn, Lisa 161  
 Yalom, Marilyn 158, 172  
*zawaj 'urfi* 67, 70  
*zina* (illicit sex) 56–74, 75, 76, 77, 81, 103, 171, 172, 173, 175  
 Zomeño, Amalia 161, 164