

Article

Contract Customization, Sex, and Islamic Law

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Common law has historically deemed marriage and sex outside the right to contract. Yet, couples increasingly use contracts to provide legal rights to the unmarried in a variety of contexts ranging from same-sex relationships to surrogacy. Islamic law, on the other hand, has always conceived of marriage and sexual relationships as exclusively under the realm of contract law governed by private actors. This Article brings Islamic law into the larger conversation on the use of contracts for sexual and relationship agreements. It further proposes that Islamic law has something to offer Muslims and non-Muslims alike by empowering individuals to use contracts to develop romantic, sexual relationships.

Islamic law requires formalized consent to sexual relationships by way of contracts that include duties, rights, and termination provisions. This Article examines the contract options under Islamic law that allow for licit sex between parties, such as urfi (customary), misyar (pleasure), and mut'a (temporary) contracts. This Article then explores the options couples have in customizing contracts, such as adding specific termination provisions, to best meet their relationship needs. Islamic law allows for the private termination of a marriage without a governmental

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actor. Rather than requiring a governmental actor to terminate the relationship or presuming marriage to be a nearly or completely irrevocable commitment, spouses can contract to allow both parties to unilaterally end the relationship. Finally, this Article discusses the ways contemporary reform proposals could reshape the way couples use contracts. Specifically, couples may want to structure their contracts as a partnership agreement, and in doing so, they may more easily capture the type of relationship they want to create rather than modifying default provisions to traditional contracts.

In short, options exist in Islamic law for individuals to create legally binding contracts that reflect the relationships they intend to co-create in accordance with their moral and legal commitments.

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INTRODUCTION

Rather than considering it taboo or anathema to religion, Islamic law discusses sex and sexual desire frankly. The options under Islamic law to enter sexual relationships with clear consent and within relationship parameters are numerous. Islamic law conceives of entering and exiting romantic, sexual relationships vis-à-vis customizable contracts. This Article primarily examines options within Islamic law to customize contracts to meet the specific needs of parties wanting to enter into a sexual relationship. It brings Islamic law into broader legal conversations on sexual agreements¹ and consent.² Parties may enter into an Islamic marriage contract for a whole host of reasons, including wanting to create a family or to obtain greater financial stability. Likewise, entering into a contract “purely for pleasure *is* permissible” under Islamic law.³

Islamic theology considers sexual desire as part of the *fitrah*, or natural essence of each human.⁴ This essence is “constantly yearning for closeness and connection to God.”⁵ Theologically, “[s]exuality, desire, and relationships are all parts of ourselves that, when fulfilled appropriately” through an Islamically legal contract “can bring us closer to God.”⁶ Marriage contracts are a

1. See, e.g., Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807 (2022); Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571 (2022); Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479 (2001).

2. See, e.g., Aya Gruber, *The Complexity of College Consent*, in ADJUDICATING CAMPUS SEXUAL MISCONDUCT AND ASSAULT 25 (Claire M. Renzetti & Diane R. Follingstad eds., 2020). The ideas discussed in this Article may also contribute to developing understandings of consent within the university context. Student conduct is often regulated by university rules and enforced in extrajudicial proceedings. Contract customization provides an additional lens to understand consent and sexual relationships between young people.

3. Shereen Yousuf & Nousheen Yousuf-Sadiq, *Temporary Pleasure, Permanent Effects: Practical Advice on Mut'a Marriage*, in TYING THE KNOT: A FEMINIST/WOMANIST GUIDE TO MUSLIM MARRIAGE IN AMERICA 43, 50 (Kecia Ali ed., 2022) (providing advice and information for those considering a *mut'a* marriage contract and noting that pleasure is a legally sanctioned motivation to pursue such a contract).

4. *Id.*

5. *Id.* Arabic terms are defined in the glossary addendum *infra* pp. 1950–53.

6. Yousuf & Yousuf-Sadiq, *supra* note 3.

means for Muslims to “acknowledge that desire, love, and sex are important parts of our whole existence [important enough to solemnize via contract], and that fulfilling those needs can strengthen our well-being” and relationship to God.⁷ Indeed, Muslim jurists held that marriage moves from a recommended act to an obligatory act for those individuals who find their sexual desire “uncontrollable or nearly so.”⁸ Likewise, it can be inferred that classical Islamic jurists considered sex for pleasure alone permissible and directly addressed the permissibility of birth control.⁹

The Quran states, “God intends ease for you and does not want difficulty for you.”¹⁰ For young Muslims in the United States, entering into a permissible sexual relationship likely feels anything but easeful. Faced with conflicting social, religious, and legal standards, they often do not have a clear path as to how to enter a sexual relationship that is considered licit from a religious, legal perspective. Muslims are simply told that Islam does not allow for pre-marital sex.¹¹ Part of the difficulty Muslims face in navigating the path to an Islamically sanctioned sexual relationship is that the term “marriage” or “marital” conflates an Islamic legal standard with American cultural and civil marriage. This Article outlines the options Muslims have in drafting a contract to enter into an Islamically legal sexual relationship without the barriers to entry and exit of American civil and cultural marriage.¹² The Article proposes phased stages of

7. *Id.*

8. WAEL B. HALLAQ, SHARĪĀ: THEORY, PRACTICE, TRANSFORMATIONS 272 (2009); *see also* Ibn Qudama, *Mughni*, VII, 334–37.

9. *See* Dariusch Atighetchi, *The Position of Islamic Tradition on Contraception*, 13 MED. & L. 717, 719–20 (1994) (discussing history of Islamic legal thought concerning contraceptives and noting general approval for use to prevent pregnancy based on practical and economic motivations); HALLAQ, *supra* note 8, at 271 (noting that quasi-legal Islamic literature includes sexual fulfillment of both men and women as among the goals of Islamic marriage).

10. QURAN 2:185 (in context of fasting during month of Ramadan). This concept is repeated throughout the Quran. *See* QURAN 2:286 (“God does not burden a soul more than it can bear . . .”); *id.* at 22:78 (“God has chosen you and has not laid upon you in religion any hardship.”).

11. *See, e.g.*, HALLAQ, *supra* note 8, at 271 (noting that sex outside marriage is regarded as the primary cause of social discord and must be avoided at virtually any cost).

12. *See* Antognini & Appleton, *supra* note 1, at 1812 (“[T]he way sex figures into agreements is more complicated than this blanket bar . . . suggests. While

relationship, wherein a couple may start their sexual relationship with the clear consent and parameters of a customized Islamic contract, and then may choose to enter into civil marriage with the state and cultural marriage at a later stage when the couples deem appropriate.

Islamic law's regulation of sex unapologetically focuses on the legality of sexual relationships and the legal recognition of any children that may ensue.¹³ This is not to suggest that normatively Islam as a religion is only concerned about marriage in regard to sex. Indeed, there are many examples from the life of the Prophet Muhammad on how to achieve marital happiness and lasting bonds.¹⁴ The Quran exhorts the purpose of marriage as a means of establishing love and mercy between two people.¹⁵ While these aspects of marriage are of course theologically, sociologically, and psychologically important, the focus of the law is on the Islamic legal permissibility of sexual acts between people. Although marriage as a social institution "became key to maintaining social harmony, the cornerstone of the entire Islamic order," from a solely legal perspective, marriage is a contract with a defined scope—"one that did not pretend to regulate the entirety of relationships that normally existed within marital

contracts cannot provide for sex as a matter of stated doctrine, sex does form an important part of certain agreements, which the law explicitly acknowledges.”).

13. See Kecia Ali, *Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines*, in *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 11, 11 (Asifa Quraishi & Frank E. Vogel eds., 2008) (“According to Muslim jurists, marriage is a contract (*‘aqd*), established by bilateral agreement. Some considered marriage to be in part an act of worship (*‘ibāda*) and not purely a worldly transaction (*mu‘āmala*). The Qur’an has much to say about marriage that is not purely regulatory in effect, and the Prophet Muhammad reportedly stated that those who marry have fulfilled half of their religion. In legal writings, however, the contractual dimensions of marriage take precedence over its broader religious significance or ethical merit.” (footnotes omitted)); HALLAQ, *supra* note 8, at 271 (“Since the only conceivable way of bringing children into this world and of raising them properly was through marriage, and since sexuality was equally inconceivable outside a lawful framework (which included lawful concubinage), the marriage institution thus became key to maintaining social harmony, the cornerstone of the entire Islamic order.”).

14. Ali, *supra* note 13, at 11.

15. QURAN 30:21 (“He created for you spouses from among yourselves, that you might live in peace with them, and planted love and kindness in your hearts.”).

life.”¹⁶ At its core, Islamic law conceives of Muslims entering and exiting romantic, sexual relationships vis-à-vis contracts.

While religiosity is not in and of itself a problem, Muslim youth growing up in North America must navigate a conflicting and confusing sexual landscape that often includes “conflicting messages regarding sexuality from Islam, from their [or their parents’] cultures of origin, as well as the mainstream culture.”¹⁷ This conflicting sexual landscape can have a detrimental effect on “Muslims’ sexual health, especially psychological sexual health.”¹⁸ Sociological research has found that “Muslims living in Western countries . . . are more sexually conservative when compared to those of other religions, finding Muslims report engaging in significantly less premarital sex, being less tolerant of premarital sex, and being more likely to believe premarital sex is wrong than non-Muslim individuals.”¹⁹

However, solutions aimed at simply encouraging young Muslim adults to disregard their religious commitments and “engage in more sexual activities or sex before marriage as a means of reducing sexual guilt and anxiety levels would not only be unreasonable and unrealistic, it may also be offensive to many.”²⁰ The literature, thus far, has proposed greater sexual health

16. HALLAQ, *supra* note 8, at 271.

17. Sobia Ali-Faisal, *What’s Sex Got to Do with It? The Role of Sexual Experience in the Sexual Attitudes, and Sexual Guilt and Anxiety of Young Muslim Adults in Canada and the United States*, 10 J. MUSLIM MENTAL HEALTH 27, 28 (2016) (citations omitted).

18. *Id.*; see, e.g., *id.* at 30 (citing Catherine Griffiths et al., ‘Always Between Two Cultures’: Young British Bangladeshis and Their Mothers’ Views on Sex and Relationships, 10 CULTURE, HEALTH & SEXUALITY 709, 713 (2008)) (“Bangladeshi British young women and men interviewed in a qualitative study generally felt that engaging in premarital sex was un-Islamic, but not all chose to adhere to what they felt were Islamic teachings regarding premarital sex. Although some of the young men favored following religious recommendations, many participants, both men and women, felt that the choice to have premarital sex was personal and doing so did not mean one lacked faith.”). These contradictions contribute to sexual guilt and anxiety. *Id.* at 29; see also Alyssa Wooden, *Why Are We Having Less Sex Today than Ever Before?*, JOHNS HOPKINS NEWSL. (Feb. 14, 2019), <https://www.jhunewsletter.com/article/2019/02/why-are-we-having-less-sex-today-than-ever-before> [<https://perma.cc/FPY8-KLPX>] (noting that sexual activity among youth and young adults is declining).

19. Ali-Faisal, *supra* note 17, at 29 (citations omitted).

20. *Id.* at 37. Many Western Muslim youth accept Islamic prohibitions on premarital sex as the norm. *Id.* at 30.

education in religious spaces and between families.²¹ However, the literature has not proposed greater education on Islamic law or the use of Islamic law outside the sphere of the state as a means of facilitating permissible sexual relationships. This Article proposes that Islamic law is an important additional tool for those seeking solutions to improve American Muslim sexual and psychological health.

This Article builds upon the work of Professor Anita Bernstein's *The Common Law Inside the Female Body*, wherein she argues that the common law serves to liberate women.²² Similarly, this Article is situated within a "*sharia*-mindful" approach, which takes as its starting point Islamic law as agreed upon by most Muslims, including those with a more conservative or traditional approach.²³ Rather than "dismissing all Islamic law as patriarchally biased," this Article seeks to work with "established rules that already have persuasive weight with the vast majority of practicing Muslims"²⁴ and proposes means by which classical legal rulings (equivalent to the common law) can provide "immediately effective tools for empowerment."²⁵ This Article also acknowledges the limitations of that approach²⁶ and

21. See, e.g., HEART TO GROW, <https://hearttogrow.org> [<https://perma.cc/754Q-QGGM>]

22. ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* (2019). Bernstein argues that advocates for gender progress should look to the common law for existing solutions to contemporary problems. *Id.* Likewise, this Article argues, in part, that solutions exist within classical Islamic jurisprudence to the problems facing Muslims living in North America today.

23. Asifa Quraishi, *What if Sharia Weren't the Enemy?: Rethinking International Women's Rights Advocacy on Islamic Law*, 22 COLUM. J. GENDER & L. 173, 202 (2011) (discussing the benefits of accepting and using *Sharia* law to achieve pro-human-rights outcomes in jurisdictions that adhere to *Sharia* law); Asifa Quraishi-Landes, *A Meditation on Mahr, Modernity, and Muslim Marriage Contract Law*, in *HALF OF FAITH: AMERICAN MUSLIM MARRIAGE AND DIVORCE IN THE TWENTY-FIRST CENTURY* 52, 54 (Kecia Ali ed., 2021) (discussing the pros and cons of *sharia*-based women's rights activism in Islamic contexts).

24. Quraishi-Landes, *supra* note 23, at 54.

25. *Id.*

26. See, e.g., *id.* at 55 (warning of negative side effects that come with only emphasizing the aspects of Islamic law that empower women); cf. Lolita Buckner Inniss, *(Un)Common Law and the Female Body*, 61 B.C. L. REV. 1-95, 1-99 (2020) (noting some limits to Anita Bernstein's theory that the common law embraces the positive liberation of women).

discusses contemporary legal reform proposals to classical doctrine.²⁷

While this Article does not directly address same-sex or polyamorous relationships, non-Muslims and Muslims may find some elements of this Article helpful in thinking through those types of relationships as well. Aspects of consent, relationship defining through contracts, and the proposal for partnership agreements all apply regardless of the number or sexual orientation of the parties. Other scholars have also recognized the potential benefit of contracts in a variety of sexual relationships.²⁸ That said, some aspects of the Article focus on the ways parties can modify and opt for alternatives to the classical gendered obligations of couples under Islamic law. Therefore, the Article often discusses the contractual rights and obligations within a monogamous, heterosexual framework, as that is the default relationship dynamic presumed by classical Islamic law.²⁹

This heterosexual framework involves gendered elements some of which are modifiable and others that are not. Even in the instance of non-modifiable terms, a range of options may exist. As such, dependent on the school of thought, the barrier to entry into a marriage contract may be higher or lower for men versus women. For instance, some of the Sunni schools of thought require the permission of the woman's guardian (typically her father) for her to enter into a first marriage (whereas most schools agree that a woman does not need a guardian for

27. See *infra* Part III.

28. See, e.g., Note, *Nonbinding Bondage*, 128 HARV. L. REV. 713 (2014) (discussing contracts in BDSM relationships).

29. Classical Islamic law does, however, permit polygamous relationships within certain contexts. See HALLAQ, *supra* note 8, at 534 (noting that traditional Islamic jurists interpreted having up to four wives as permissible). Additionally, there are contemporary scholars addressing the possibility of same-sex Muslim marriage contracts. For instance, Imam Daayiee is a gay Imam and scholar who advocates for same-sex marriage in Islam. See Elizabeth Arif-Fear, *Saying Yes to Same Sex Marriage and No to Exclusion: Meet Imam Daayiee Abdullah*, VOICE OF SALAM (Aug. 31, 2018), <https://voiceofsalam.com/2018/08/31/saying-yes-to-same-sex-marriage-meet-imam-daayiee-abdullah> [<https://perma.cc/3XL8-JYKE>] (transcribing a journalist's interview of Imam Daayiee); see also Aisya Aymanee M. Zaharin, *Reconsidering Homosexual Unification in Islam: A Revisionist Analysis of Post-Colonialism, Constructivism and Essentialism*, 13 RELIGIONS 702 (2022) (providing a comprehensive understanding of theological, historical, and sociological discourses to demonstrate some of the challenges facing contemporary sexual ethics in relation to Muslim homosexuality).

subsequent marriages).³⁰ Under those schools, the male guardian's approval is non-modifiable. However, the Hanafi school allows all women to represent themselves without a guardian's approval.³¹ Additionally, the *mahr* (bridal gift given by the male party) is one of the pecuniary rights of a wife that is recognized across all Sunni and Shia schools.³² While all schools of thought recognize that the groom can provide a gift to the wife, some schools allow that the gift can be nominal, such as the groom agreeing to teach the wife verses of the Quran.³³

Furthermore, the heteronormative standard of Islamic law is distinct in certain ways from other historical heteronormative standards. For instance, Islamic law recognizes the right of parties to have sex for the purpose of pleasure and not procreation.³⁴ Islamic law also has default obligations of male and female parties that primarily place obligations of child rearing and financial support upon the male party.³⁵ Although these default provisions exist, the requirement of male financial support of the female party is modifiable, and Islamic law allows for

30. Muhammad Jawad Mughniyya, *Matrimonial Guardianship*, AL-ISLAM, <https://www.al-islam.org/marriage-according-five-schools-islamic-law-muhammad-jawad-mughniyya/matrimonial-guardianship#wilayah-over-mature-and-sane-girl> [<https://perma.cc/94S4-RJEP>] (noting that the Shafi'i, the Maliki, and the Hanbali schools require guardian consent, whereas the Hanafi and Imamiyyah schools regard women who have reached the age of maturity as competent to consent to their own marriage contracts).

31. *Id.* ("The Hanafis regard a sane, grown-up female as competent to choose her husband and to contract marriage No one has authority over her, nor any right to object, provided she chooses one her equal and does not stipulate less than a proper dower . . . for the marriage.").

32. Muhammad Jawad Mughniyya, *Al-Mahr*, AL-ISLAM, [<https://perma.cc/SMH7-PL3R>] (noting that that *mahr* is not an essential ingredient (*rukn*) of a marriage contract, as price is in a contract of sale, but rather is one of the effects of a marriage contract, and even without its stipulation the contract is valid).

33. Quraishi-Landes, *supra* note 23, at 64 (detailing that the *mahr* need to be monetary and can instead be "anything of value").

34. *See supra* note 9 and accompanying text.

35. Hoda Yasser, *The Rights of Children on Parents in Islam*, ISLAMONLINE, <https://islamonline.net/en/the-rights-of-children-on-parents-in-islam> [<https://perma.cc/7VK2-C65U>] (noting that mothers are primarily tasked with feeding and providing for children, whereas fathers are tasked with guaranteeing children the resources necessary for them to live well).

customized contract terms to allow for greater parity between the parties.³⁶

Islamic relationship contracts fall into several categories: traditional contracts with no change to the default provisions; *misyar* contracts, which modify the traditional contract in regards to the financial obligations of the husband to the wife; *urfi* contracts, which are often a subset of *misyar* contracts and are essentially contracts not registered with a governmental authority; and *mut'a* contracts, which are only permissible in Shia jurisprudence, and are a marriage contract with a pre-established termination date.³⁷ Classical Islamic law conceived of all of these relationships agreements as existing outside of the context of the state and, almost wholly, as a product of private law.³⁸ With some limitations to the contract itself (such as the requirement of a gift), classical Islamic law provides a means by which parties can enter and exit sexual relationships without the involvement of the state.³⁹ Entry is facilitated via contract and exit can happen via unilateral termination requiring no state involvement.⁴⁰ Parties can contract for the relationship they intend to create and can contract how to leave those relationships.⁴¹ Contemporary jurisprudence also proposes a means for couples to choose the form their relationship contract takes.⁴²

This Article will use the terms “marriage contract” and “relationship contract” interchangeably throughout. This is to capture that, while Islamic law considers all of the contracts as marriages, the term “marriage” may not necessarily reflect a couple’s complete understanding of their relationship. For instance, a

36. See, e.g., Zahra Ayubi, *Pre-Marital Counseling and Nikah Contract Writing Guide*, in TYING THE KNOT: A FEMINIST/WOMANIST GUIDE TO MUSLIM MARRIAGE IN AMERICA, *supra* note 3, at 55, 60 (suggesting potential contract provisions to customize, including responsibility for finance).

37. See *infra* Part II, for a discussion of the different types of marriage contracts.

38. Ali, *supra* note 13, at 11 (noting that Muslim jurists define marriage as a contract (*aqd*), established by bilateral agreement).

39. HALLAQ, *supra* note 8, at 280–86 (noting permissible forms of unilateral divorce permitted under classical Islamic jurisprudence).

40. *Id.*

41. See, e.g., Yousuf & Yousuf-Sadiq, *supra* note 3, at 45 (discussing possible provisions of a temporary (*Mut'a*) marriage contract, including definite termination).

42. *Id.* (highlighting “how readily the contract can be modified with stipulations,” making it suitable for the needs of the parties).

couple may consider themselves Islamically married, and thus in an Islamically licit sexual relationship, but may concurrently not have a civil marriage or understand themselves to be married within the larger American cultural understanding of the word. The focus of this Article is on the use of contract within Islamic law to enter sexual and romantic relationships, without the burdens and barriers to entry and exit involved in American cultural and civil marriage. Part I of this Article situates this scholarship within the literatures on sexual agreements, legal pluralism, and Muslim sexual health, describing the importance of Islamic law as a tool and framework for American Muslims in navigating their sexual and romantic lives. Part II then focuses on the technicalities of Islamic law, providing a primer on Islamic law that describes the different schools of thoughts, the essential elements of marriage contracts, and the required and default provisions of marriage contracts. It highlights the importance of diversity of opinion within Islamic law and the ways in which that diversity can lead to contract customization, with an extensive discussion of *urfi* (customary), *misyar* (pleasure), and *mut'a* (temporary) contracts. Part III then shifts the discussion from classical Islamic law to modern proposals for marriage contract reform. This Article concludes by describing some of the limitations of the proposals herein and provides additional areas of consideration for those negotiating their sexuality in complex, sometimes conflicting, environments.

I. SEX AND ISLAMIC MARRIAGE CONTRACTS IN CONTEXT

American Muslims' legal and social identities frequently include "complex and overlapping affiliations"⁴³ that are not necessarily in conflict with each other. This is often because the American legal conception of marriage differs significantly from Islamic legal understandings of marriage. Notably, American legal marriage confers rights and obligations vis-à-vis the state, while Islamic law conceives of rights and obligation originating out of private law. As a result, Islamic law provides a rich array of contract customization options, currently unavailable under American conceptions of marriage. These overlapping understandings of marriage and sex can leave American Muslims,

43. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 5 (2001).

especially youth, confused and uncertain of what path to take in developing sexual and/or romantic relationships. Yet, understanding Islamic law in the United States within the framing of subaltern cosmopolitan legality⁴⁴ can help foster “resistance and legal innovation by those most excluded and marginalized within the new global order.”⁴⁵ This Article suggests that the adoption of Islamic legal understandings of marriage as customizable contracts can not only help strengthen American Muslims’ romantic and sexual relationships, but can also contribute to the continued development of post-modern marriage within American law.

A. SEX, MARRIAGE, AND CONTRACTS IN THE AMERICAN LEGAL LANDSCAPE

While American jurisprudence has increasingly come to recognize sex-adjacent contracts, such as surrogacy agreements, courts still severely limit the enforceability of contracts involving sex.⁴⁶ This is in part because “[m]arriage has long been a recognized limit on the right to contract.”⁴⁷ Historically, marriage also limited the right of women to contract, due to the doctrine of coverture, which viewed the husband and wife as a single legal entity, controlled entirely by the man.⁴⁸ Although marriage in the United States “no longer entails the complete erasure of a woman’s legal identity,” it still defines marriage and non-marital relationships in “very traditional ways.”⁴⁹ As a result, scholars

44. See Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in *LAW AND GLOBALIZATION FROM BELOW 1* (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005). The meaning and application of the subaltern is discussed in Part I.B below.

45. See Rachel Sieder, *Subaltern Cosmopolitan Legalities and the Challenges of Engaged Ethnography*, 75 *UNIVERSITAS HUMANÍSTICA* 221, 226 (2013).

46. Antognini & Appleton, *supra* note 1, at 1810 (noting that contract case law “refus[es] to recognize as contracts agreements that entail sex in both non-marital and marital relationships”).

47. Albertina Antognini, *Nonmarital Contracts*, 73 *STAN. L. REV.* 67, 67 (2021).

48. See Antognini, *supra* note 1, at 2142. William Blackstone defines coverture as: “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything” 1 *WILLIAM BLACKSTONE, COMMENTARIES* *430 (footnotes omitted).

49. Antognini, *supra* note 1, at 2142, 2146.

find that “courts restrict the right to contract outside of marriage in precisely the same ways it is restricted within marriage.”⁵⁰

Courts not only restrict contracts involving sex, but all contracts involving “services provided during the marital relationship, like child-rearing or housecleaning.”⁵¹ Parties that want to define their relationships vis-à-vis contract have few options under American law. Rather, a cookie-cutter legal understanding of marriage is applied universally.⁵² Because of this, “the law neither reflects nor accommodates the partners’ diverse experiences.”⁵³ Scholars have called for a “postmodern marriage law” that “explicitly contemplates varied, changing, contextualized forms of marriage, [which] may in fact be more compatible with contingent, problematic, but nevertheless enduring human love, than the reified abstractions we now call ‘marriage.’”⁵⁴

The marital habitus of the United States drives the perpetuation of traditional American legal norms around marriage.⁵⁵ “Marital habitus” is the idea that “[m]arriage is not just a legal status that one chooses to enter; it is not just a collection of laws; it is not merely an outcome toward which the law channels people. It is *the* framework through which people structure their personal relationships and comprehend all adult intimacy.”⁵⁶ Islamic law operates under a very different marital habitus than American law.

The Islamic marital habitus conceives of marriage as a contractual commitment that is customizable, with rights and obligations that are determined through private law, and not the state.⁵⁷ Although Islamic law has strict prohibitions on

50. Antognini, *supra* note 47, at 67.

51. *Id.* at 72; *see also* Kaiponanea T. Matsumura, *The Marital Habitus*, 99 WASH. U. L. REV. 2033, 2037 (2022) (noting that courts refuse to enforce contracts between non-married cohabitants in the majority of cases).

52. *See* Stark, *supra* note 1, at 1482 (“Before they marry, few couples have any real alternative to one-size-fits-all marriage.”).

53. *Id.* at 1485.

54. *Id.* at 1491.

55. *See* Matsumura, *supra* note 51, at 2034–35 (describing how deeply rooted marriage is in American society, which makes it difficult to conceptualize relationships beyond marriage).

56. *Id.*

57. *See supra* notes 38–39, 41 and accompanying text.

prostitution,⁵⁸ similar to the common law, the very nature of marriage as a contractual commitment under Islamic law lends it to a type of postmodern marriage. Although American Muslims operate within dual marital habitus that can lead to confusion, such overlapping legal systems can also contribute to legal innovation and progressive development.⁵⁹

B. LEGAL PLURALISM AND SUBALTERN COSMOPOLITAN LEGALITY

The American legal system is pluralistic in a variety of ways ranging from the federalist system to Indian law, and this pluralism impacts the way Islamic law is practiced in the United States. Legal pluralism is “generally defined as a situation in which two or more legal systems coexist in the same social field.”⁶⁰ Scholars have increasingly come to recognize that “plural normative orders are found in virtually all societies.”⁶¹ Although calls for “one law for all”⁶² have been used as an Islamophobic rallying cry against any accommodation for Islamic law in Western states, it is normal for more than one ‘legal’ system to co-exist in the same social arena.⁶³ Islamic law operates within the American legal context in a variety of ways ranging from individual observance to private law.⁶⁴ For instance,

58. See James E. Baldwin, *Prostitution, Islamic Law and Ottoman Societies*, 55 J. ECON. & SOC. HIST. ORIENT 117, 117–18 (2012) (“The basic position of Islamic law towards sexual relations is straightforward: intercourse outside of marriage or concubinage . . . is illegal and subject to punishment . . .”).

59. See Boaventura de Sousa Santos, *Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality*, in LAW AND GLOBALIZATION FROM BELOW 29, 43 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) (discussing the formulation of a new model of social emancipation based on the recognition of the plurality of emancipatory agency and social transformative goals).

60. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 870 (1988) (citation omitted).

61. *Id.* at 873.

62. See, e.g., ONE LAW FOR ALL, <https://onelawforall.org.uk> [<https://perma.cc/DD3H-DLA6>].

63. BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 116 (2001) (“Under a functional view of the law as the maintenance of social order within groups, it [makes] sense . . . that there [are] other ‘legal’ systems operat[ing] in the same social arena.”).

64. See, e.g., Rabea Benhalim, *The Case for American Muslim Arbitration*, 2019 WIS. L. REV. 531, 551 (noting that an informal version of Islamic

American Muslims may utilize Muslim arbitration, applying Islamic law to resolve private disputes, including commercial and personal disputes.⁶⁵

Within the field of legal pluralism, Boaventura de Sousa Santos and César Rodríguez-Garavito developed the theory of “subaltern cosmopolitan legality,” which serves as the theoretical underpinning of this Article.⁶⁶ This term refers to “locally grounded forms of resistance and legal innovation by those most excluded and marginalized within the new global order.”⁶⁷ de Sousa Santos and Rodríguez-Garavito highlight “the importance of comprehending and giving due analytical and political weight to non-hegemonic or non-Western constructions of rights and human dignity.”⁶⁸ This Article is fundamentally concerned with facilitating the dignity of people through meeting their sexual needs within an Islamic legal framework. This understanding of sexual rights is distinct from American legal and cultural hegemonic constructions.

Subaltern cosmopolitan legality also emphasizes the importance of understanding law and legal reform as including legal structures outside the formality of the state. So, while Islamic law is not formally part of the American legal paradigm, it is still meaningfully understood as law to Muslims living in the United States. Furthermore, Islamic law and American law interact in important ways when individuals choose to incorporate Islamic law into their contracts. Specifically, the American legal system does recognize choice of law provisions in private law and in arbitration.⁶⁹ Indeed, scholars have previously argued that

arbitration in the United States does exist); Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1243 (2011) (noting that there are Islamic institutions providing a fora for religious arbitration); Lee Ann Bambach, “That Ye Judge with Justice”: Faith-Based Arbitration by Muslims in an American Context 205 (2014) (Ph.D. dissertation, Emory University) (on file with author) (detailing cases that demonstrate the existence of Islamic arbitration tribunals in the United States and states’ abilities to deal with cases arising from such tribunals easily).

65. See sources cited *supra* note 64.

66. See de Sousa Santos & Rodríguez-Garavito, *supra* note 44, at 5.

67. See Sieder, *supra* note 45, at 226.

68. *Id.* (citing de Sousa Santos & Rodríguez-Garavito, *supra* note 44, at 15).

69. See Federal Arbitration Act, 9 U.S.C. §§ 1–16; MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS 21–24 (2017)

American Muslim Arbitration would often be the best forum for Muslims to resolve their private legal disputes,⁷⁰ thereby helping Muslim navigate conflicting cultural and legal orders.⁷¹

C. NORTH AMERICAN MUSLIM MENTAL AND SEXUAL HEALTH

North American Muslims experience a wide range of sexual values and standards in their social, communal, familial, and legal environments. Scholars are beginning to study the psychological distress Muslims living in Western countries face around entering sexual relationships. Muslims tend to adhere more to religious sexual ideals than their non-Muslim counterparts and are provided little guidance on their physical and psychological health. Muslim feminists have been doing important work to better protect Muslim women entering and exiting marriages, but this work is primarily focused on meeting the needs of women. One thing is clear—Muslims need greater guidance and support, including legal knowledge, on how to navigate the complex legal, social, and cultural environment they find themselves in.

Sociological and psychological research of Muslims living in Western countries indicates that American Muslims are generally more sexually conservative compared to their peers with lower approval and rates of premarital sex.⁷² Furthermore, Muslim youth often receive less sexual health education, particularly related to “the areas of intimate relationships and pleasure,” than their peers.⁷³ The lack of sexual health knowledge among Muslim youth extends into a lack of knowledge about a range of STI issues, including STI symptoms and transmission.⁷⁴ The perspectives and knowledge of Muslim youth can be attributed,

(describing what religious arbitration organizations must do to follow the requirements of the FAA).

70. See *supra* note 64 and accompanying text.

71. Helfand, *supra* note 64, at 1249–52 (describing Muslim arbitration in the United States).

72. Ali-Faisal, *supra* note 17, at 29.

73. Josephine Pui-Hing Wong et al., *Understanding the Sexuality and Sexual Health of Muslim Young People in Canada and Other Western Countries: A Scoping Review of Research Literature*, 26 CANADIAN J. HUM. SEXUALITY 48, 50 (2017) (citations omitted).

74. *Id.*

at least in part, to the sex education they receive at home and within their religious communities.⁷⁵

While Muslim youth often report receiving sexual education within public schools, “they also critiqued it for not taking into consideration Muslim students’ religious and cultural beliefs on sex and marriage.”⁷⁶ Students noted that the education received at school “marginalized the experiences of students who did not plan to engage in pre-marital sex.”⁷⁷ Muslim youth also reported difficulty reconciling the mixed, and sometimes conflicting, “moral values about sexuality that they received at home and in their religious or cultural communities” and those of larger society.⁷⁸

Part of the struggles for Muslim youth certainly stems from the lack of sex education within their homes. Compared to their peers, Muslim youth are less likely to have talked to their parents about sex and their sexuality.⁷⁹ Youth describe the need for more family conversations on the topic.⁸⁰ Some youth indicate that they had received indirect parental messaging that highlighted “personal responsibility, reputation and warnings about the ramifications of non-marital pregnancy.”⁸¹ While indicating that they “considered schools to be in the best position to provide ‘scientific’ information about sexuality,” these youth felt that their parents should be responsible for educating them on the emotional and moral aspects of sex.⁸² Some youth also identify religious centers as important providers of information about sex, especially in providing them guidance about sexuality and marriage.⁸³ Finally, youth are diverse in their interpretations on Islam and sexuality, holding a wide range of beliefs on topics

75. *Id.* at 50 (“Muslim youth’s perspectives and experiences of sex education at school, at home and in the community also helped to explain, to some extent, their lower level of sexual health knowledge.”).

76. *Id.* at 53.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Celia McMichael & Sandra Gifford, “*It Is Good to Know Now . . . Before It’s Too Late*”: Promoting Sexual Health Literacy Amongst Resettled Young People with Refugee Backgrounds, 13 *SEXUALITY & CULTURE* 218, 224 (2009).

82. Wong et al., *supra* note 73, at 53.

83. *Id.*

such as premarital sex, masturbation, and same-sex relationships.⁸⁴

Many youths accept Islamic prohibitions on premarital sex as the norm.⁸⁵ Generally, religiosity among Muslim youth in Western countries is highly correlative with negative views on pre-marital sexual activity. That said, studies on the sex lives of Muslim youth are limited and dependent on geographic location. One study of “religiously diverse students in the UK showed that 30.9% . . . of Muslim young men and 9% . . . of Muslim young women in the study had engaged in pre-marital sexual intercourse.”⁸⁶ This rate of sexual activity for Muslim young women was comparatively lower than any other group.⁸⁷ Another study found a higher rate with “53.8% of never-married Muslim college students in the United States reported engaging in sexual intercourse, with no significant difference between men and women,”⁸⁸ although this rate is still lower than non-Muslim college students.⁸⁹

Muslim youth living in the West consistently report “conflicts and contradictions between the value-laden messages about sexuality received at homes and in their ‘cultural’ communities versus the value-laden messages they encountered at school and in the ‘mainstream’ culture.”⁹⁰ These contradictions contribute to sexual guilt and anxiety.⁹¹ Although related, sexual guilt and anxiety are two distinct conditions. Sexual guilt relates to the self-referential feelings and punishment of an individual’s experiences for a perceived “violation of one’s standards of proper

84. *Id.*

85. *Id.* at 53–54 (“Many Muslim young people in this review accepted virginity until marriage as the norm and the expectation of their parents and religious/cultural communities.”).

86. *Id.* at 55 (citing Lester M. Coleman & Adrienne Testa, *Sexual Health Knowledge, Attitudes, and Behaviours: Variations Among a Religiously Diverse Sample of Young People in London UK*, 13 *ETHNICITY & HEALTH*, 55, 63 (2008)).

87. *Id.*

88. Ali-Faisal, *supra* note 17, at 30 (citing Sameera Ahmed et al., *Prevalence of Risk Behaviors Among U.S. Muslim College Students*, 8 *J. MUSLIM & MENTAL HEALTH* 5, 14 (2014)).

89. *Cf.* Wooden, *supra* note 18 (reporting that 66% of all college students reported sex in the past year).

90. Wong et al., *supra* note 73, at 56.

91. *See* Ali-Faisal, *supra* note 19, at 32–34 (discussing the results of the study that reveal correlations of sexual attitudes with sexual guilt and anxiety).

sexual conduct.”⁹² Sexual anxiety, on the other hand, is “an expectancy for external punishment for violating, or anticipating violating, perceived societal normative standards of acceptable sexual behavior.”⁹³ Sexual anxiety can lead to extreme levels of sexual dysfunction that can require clinical or therapeutic treatment.⁹⁴ Likewise, sexual guilt has been directly linked to the sexual dysfunctions of decreased sex drive and decreased sexual satisfaction.⁹⁵

1. Limits of Current Research

The current sociological and psychological research on Muslim sexual practices in the West is limited in several regards. First, it focuses entirely on Muslim youth (most often in college) and does not engage in longitudinal studies of Muslim sexual health and practices. For instance, the studies fail to address the ways in which delayed sexual intercourse, decades after puberty, among Muslims can lead to specific dysfunctions. Anecdotal accounts and research from other religious communities indicate that porn addiction, lack of sexual intimacy within marriage, and vaginismus may all arise due to decades-long abstinence.⁹⁶ Current sociological and psychological research also fails to account for the ways sexual dysfunctions may or may not resolve in the case of divorce and subsequent remarriage (and, thus, more sexual experience).

Finally, the literature presumes a definition of pre-marital sex from a Western, and largely Christian, lens. The literature fails to account for the ways in which marriage in Islam is conceived differently than marriage in predominately Christian, Western societies. None of the recommendations of the current literature include the difficulties created by a conception of

92. *Id.* at 29 (citing Donald L. Mosher & Herbert J. Cross, *Sex Guilt and Premarital Sexual Experiences of College Students*, 36 *J. CONSULTING & CLINICAL PSYCH.* 27 (1971)).

93. *Id.* (citing Louis H. Jandy & Kevin E. O’Grady, *Development of a Sex Anxiety Inventory*, 48 *J. CONSULTING & CLINICAL PSYCH.* 169 (1980)).

94. *Id.* (discussing how sexual anxiety can have a significant impact on a person’s sexual health).

95. *Id.*

96. See, e.g., Umm Ayoob, *Lack of Sexual Intimacy in a Marriage: Raising Awareness in the Muslim Community*, MUSLIMMATTERS (Oct. 25, 2017), <https://muslimmatters.org/2017/10/25/69715> [<https://perma.cc/7ST6-LVFX>] (providing a personal account of one couple’s experience with abstinence within their marriage).

marriage that conflates Islamic legal marriage, Western cultural marriage, and the legal marriage of the state into one idea of marriage. The term “marital” itself creates a standard that typically involves the government; a large, often expensive ceremony; life-long commitments; and resulting high-barriers to entry and exit from a marital relationship. This Article proposes that such standards are contributing to the sexual anxiety, sexual guilt, and resulting sexual dysfunction of Muslims living in the West.

2. Current Recommendations

Recommendations from sociological and psychological researchers tend to focus on educational “resources created by Muslim community workers”⁹⁷ and “culturally inclusive and socially just sex education at school, and empowering parent-youth dialogue about sexuality at home and in the community.”⁹⁸ One of the conundrums facing sociological and psychological researchers is that while the acceptance of pre-marital sex is correlated with liberal attitudes and lower sexual guilt and anxiety, simply promoting Eurocentric or Western-based sex education does not meet the needs of many Muslim youth.⁹⁹

Researchers conclude that “these studies [on the sexual practices and beliefs of Muslim youth living in Western countries] speak to the importance of developing accessible comprehensive sexual health programming that considers the cultural contexts and worldviews of diverse young people.”¹⁰⁰ Recommendations also tend to emphasize that “providing community programs that support parents and community leaders to talk openly with young people about sexuality would contribute to improved parent-youth communication about sexuality and sexual health at home.”¹⁰¹

These recommendations are certainly important tools in addressing the sexual, mental, and physical health of Muslims

97. Ali-Faisal, *supra* note 17, at 37.

98. Wong et al., *supra* note 73, at 56.

99. *Id.* (“Current mainstream sex education, often Eurocentric or Western-based, heterosexist and gendered, does not meet Muslim young people’s need for inclusive education.”).

100. *Id.*

101. *Id.* (citing Miya Narushima et al., *Sustainable Capacity Building Among Immigrant Communities: The Raising Sexually Healthy Children Program in Canada*, 29 HEALTH PROMOTION INT’L 26 (2013)).

living in Western countries. However, none of the current recommendations include Islamic legal education on the legal and moral requirements of entering into sexual relationships. Comprehensive sexual health programming in a Muslim context would benefit from education on the options for permissible sexual relationships under Islamic law.

This Article is the first to argue that providing Muslims with in-depth education on the requirements of Islamic law is an important tool in helping improve Muslim sexual health. Such education would include the following: (1) the different types of permissible sexual relationships available under Islamic law through contract; (2) the ways in which those contracts can be modified to reflect the financial and social needs of the couple; (3) and how entering into an Islamic relationship contract differs significantly from Western cultural and legal marriage. This is not to suggest, however, that this is the first piece to address North American Muslim marriage and divorce. Rather, the contribution of this Article is to center a conversation specifically on how Islamic marriage contracts can be used to help facilitate entry and exit out of legitimate, consensual, sexual relationships for practicing Muslims.

D. RECENT PUBLICATIONS

Research also indicates that Muslims seem especially inclined to marry, although Muslim women seem to have particular difficulty doing so. A 2017 study showed that “Muslims (controlling for relevant demographic variables) are actually more likely to be married than any other major faith group or the non-affiliated.”¹⁰² The same research also shows that American-born Muslim women are twenty-five percent “more likely than their foreign-born counterparts to have never married.”¹⁰³ On average, single Muslim women are both “more educated, and more religiously inclined than single Muslim men.”¹⁰⁴

Two other recent publications have focused on American Muslim marriage and divorce—*Half of Faith: American Muslim Marriage and Divorce in the Twenty-First Century* and *Tying the*

102. Youssef Chouhoud, *All the Single Ladies*, INST. FOR SOC. POL’Y & UNDERSTANDING (Oct. 25, 2017), <https://www.ispu.org/all-the-single-ladies> [<https://perma.cc/9TVD-73JU>].

103. *Id.*

104. *Id.*

Knot: A Feminist/Womanist Guide to Muslim Marriage.¹⁰⁵ Both publications make significant contributions to understanding the state of marriage and divorce among Muslims in America today. *Tying the Knot* especially focuses on how traditional Islamic law can be used to best serve women, and on potential reforms to better protect women.

The book skillfully poses the question: “What is the purpose of Muslim marriage in contemporary America?”¹⁰⁶ The answer to which includes, “to make sex lawful in the eyes of God To gain family or community recognition of a relationship To obtain legal or social legitimacy for children [To create] a bond between spouses — an interpersonal affirmation of commitment.”¹⁰⁷ All of those are potential reasons a couple might decide to enter into an Islamic marriage contract. This Article specifically seeks to address the needs of those couples who want to have sex and do so in the context of relationships that they believe are lawful in the eyes of God.

Other benefits may be conveyed, such as communal and familial acceptance of the relationship, although not necessarily so. Likewise, a couple may want to ensure Islamic legality or social legitimacy for children, should they arrive, but a couple may also enter into an Islamic marriage contract without intention to have children and may take precautions against pregnancy. Additionally, depending on the context of the relationship, the couple may seek different types of commitments, such as a commitment to build a healthy, God-conscious relationship, but not necessarily a life-long commitment. Islamic law allows for such a contractual commitment through contract customization.

II. TYPES OF RELATIONSHIP CONTRACTS UNDER ISLAMIC LAW

Contract customization under Islamic law can take a number of different forms. First, Islamic law is not a monolith. It is a dynamic body of laws which recognizes diversity of opinion, including recognition of different types of relationship contracts

105. HALF OF FAITH: AMERICAN MUSLIM MARRIAGE AND DIVORCE IN THE TWENTY-FIRST CENTURY, *supra* note 23; TYING THE KNOT: A FEMINIST/WOMANIST GUIDE TO MUSLIM MARRIAGE IN AMERICA, *supra* note 3.

106. TYING THE KNOT: A FEMINIST/WOMANIST GUIDE TO MUSLIM MARRIAGE IN AMERICA, *supra* note 3, at 3.

107. *Id.*

such as traditional contracts, *urfi* relationships (customary marriage), *misyar* relationships (pleasure marriages), and *mut'a* (temporary marriages).¹⁰⁸ A Muslim's ability to utilize these different types of contracts depends on their commitment to a specific jurisprudential school. Furthermore, all of these contracts include universally agreed upon elements that all Muslims must meet for the contract to be considered Islamically legitimate.

A. ISLAMIC LAW PRIMER—LEGAL DIVERSITY

In order to discuss what Islamic law does or does not allow, it is necessary to first establish what is meant by “Islamic law” and how it is distinct from “Sharia.” “Sharia law” is often used to refer to the laws Muslims throughout the world follow.¹⁰⁹ However, this usage does not accurately reflect the meaning of Sharia within Muslim jurisprudence, theology, and philosophy. Sharia can more broadly be understood as the divine will itself.¹¹⁰ Within traditional Islamic law, scholars understood that they would never know whether they correctly interpreted and applied the Sharia, as this knowledge belongs to God alone.¹¹¹ They recognized that their knowledge was a human endeavor, and the nomenclature reflected that.¹¹²

Scholars' attempts to interpret Sharia are called *fiqh*, and the term is used to differentiate between God's actual divine will and the human attempt to understand it.¹¹³ Linguistically the root of the word *fiqh* refers to understanding and comprehension,

108. For a more in-depth discussion of the different types of Islamic relationship contracts, see Shahreena Shahrani, *The Social (Re)Construction of 'Urfi Marriage* (2010) (B.A. thesis, Ohio State University) (on file with author).

109. See KHALED ABOU EL FADL, *REASONING WITH GOD: RECLAIMING SHARI'AH IN THE MODERN AGE* 356, 380 (2014); see also FRANK E. VOGEL, *ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA* 4–5 (2000).

110. ABOU EL FADL, *supra* note 109, at 380 (“Shari'ah is the ideal, immutable, and eternal laws of goodness, justice, beauty, and ultimately, divinity as conceived in God's mind. And . . . *fiqh* is the human effort to reach the ideal.”).

111. *Id.* at xl–xli (“While Shari'ah was seen as an abstract ideal, every human effort at understanding or implementing this ideal was considered necessarily imperfect.”).

112. *Id.* at xxxvii–xl (describing the nature and purpose of Islamic law and the persistent effort humans will have to make to strive to fulfill the objectives of Shari'ah).

113. *Id.* at 380; see also Anver M. Emon, *On Reading Fiqh*, in *THE OXFORD HANDBOOK OF ISLAMIC LAW* 45, 45–74 (Anver M. Emon & Rume Ahmed eds., 2018) (detailing various studies regarding *fiqh* sources and the production and analysis of *fiqh*).

whereas the root of the word Sharia refers to a wide path to water, i.e., a source of knowledge.¹¹⁴ For the purposes of this Article, the term “Islamic law” is used to refer to *fiqh*, and the term Sharia will be used in reference to divine knowledge and in reference to the official title of courts. *Fiqh* is also sometimes translated as jurisprudence to reflect the human contribution to the Islamic legal system.

The distinction between the Sharia and *fiqh* is an important one. As one American Imam put it: “If no distinction is drawn between *shari’a* and *fiqh*, change in the law becomes both impermissible and unthinkable.”¹¹⁵ When *fiqh* is properly understood “as a human intellectual endeavor, guided by divine sources, there is plenty of potential for development and change.”¹¹⁶ Some scholars assert that “Islamic jurisprudence is explicitly designed to allow for constant adaptation as the consequence of diaspora.”¹¹⁷ In short, “Islam is an intellectual tradition that allows people to find themselves in a new social space.”¹¹⁸

Islamic law today is broadly found within five schools of jurisprudence (four Sunni and one Shia).¹¹⁹ The four Sunni schools of thought are Maliki, Shafi’i, Hanafi, and Hanbali.¹²⁰ The Jafari or Twelver school of thought is the predominate Shia school of jurisprudence.¹²¹ Each jurisprudential tradition has its own

114. HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC (J. Milton Cowan ed., 3d ed. 1976); *see also*, ABOU EL FADL, *supra* note 109, at xxxii (“[T]he broad meaning of Shari’ah is the way or path to well-being or goodness, the life source for well-being and thriving existence, the fountain or source of nourishment, and the natural and innate ways and order created by God.”).

115. JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A *SHARI’A* PATH IN A SECULAR SOCIETY 26 (2012).

116. *Id.*

117. *Id.*

118. *Id.*

119. Other minority denominations of jurisprudence also exist, such as the Zaydi and Isma’ili denominations. There have also been calls for the revival of the Mu’tazila denomination, which was known for its reliance on reason and rationalism. For the purposes of the Article, the jurisprudence of the schools that reflect the following of the majority of Muslims will be discussed throughout.

120. ABOU EL FADL, *supra* note 109, at xliii.

121. Throughout Islamic history many schools of jurisprudence have existed, with at least nineteen schools existing in the historical record. However, due to various historical circumstances the five major schools dominate almost all of Islamic law today. *See* Mona Rafeeq, *Rethinking Islamic Law Arbitration*

“body of law and a legal methodology, as well as an extensive literature produced by a robust community of dedicated students.”¹²² Furthermore, intra-school differences exist, which result in majority and minority opinions among historical and contemporary scholars of a particular school that can lend flexibility to the application of Islamic law.

As a result, Islamic law is a pluralistic legal system that also takes into context the differing realities of time and place.¹²³ In practice, this means that jurists must have a “grasp of both local custom and colloquial expression”¹²⁴ and issue rulings accordingly. Historically, jurists “employed their creative interpretations of the *sharī‘ah* to grapple with the major continuities and changes in Muslim life.”¹²⁵ “This pluralism [of Islamic law] allows the divine sharia ‘recipe’ to be tangible enough for everyday Muslim use, yet flexible enough to accommodate personal choice.”¹²⁶ Essentially, Islamic legal schools have approached the “sharia (Divine Law) as a recipe that is meant to be made (with all the natural diversity that results from that process), not one frozen in pristine condition decorating a kitchen bookshelf.”¹²⁷

The discussion below highlights important differences between the five major schools of legal thought in their understandings of Islamic law. Significant differences include whether a previously unmarried woman can enter into an Islamic marriage contract without the consent of her male legal guardian (*wali*, typically her father).¹²⁸ Other differences include

Tribunals: Are They Compatible with Traditional Notions of American Justice?, 28 WIS. INT’L L. J. 108, 118–19 (2010).

122. Mariam Sheibani et al., *The Classical Period: Scripture, Origins, and Early Development*, in THE OXFORD HANDBOOK OF ISLAMIC LAW 403, 420 (Anver M. Emon & Rumea Ahmed eds., 2018).

123. See Brinkley Messick & Joseph A. Kéchichian, *Process and Function*, in THE OXFORD ENCYCLOPEDIA OF THE ISLAMIC WORLD (John L. Esposito ed., 2009); see also Quraishi-Landes, *supra* note 23, at 32.

124. Messick & Kéchichian, *supra* note 123.

125. *Id.*

126. Quraishi-Landes, *supra* note 23, at 32; see also Messick & Kéchichian, *supra* note 123 (“The basic recommendation is that the questioner follow the advice of a single just person In some settings, questioners dissatisfied with a *muftī*’s response could seek out a second *muftī* for another *fatwā*.”).

127. Quraishi-Landes, *supra* note 23, at 32.

128. Judith E. Tucker, *Questions of Consent: Contracting a Marriage in Ottoman Syria and Palestine*, in THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 123, 124–25 (Asifa Quraishi & Frank E. Vogel eds.,

witnessing, publicizing requirements, and pre-determined termination dates of the contract.¹²⁹ These differences of opinion demonstrate the diversity of legal perspectives that exist under the “Islamic law” umbrella. These differences between the schools, and an individual’s adherence to a particular school, will significantly impact the ease or difficulty they might have in entering a marriage contract and their ability to customize contract terms.

1. Respecting and Accepting Different Legal Opinions

Understanding the difference of opinion between the legal schools may also be useful to Muslims applying the doctrine of *takhayyur*. *Takhayyur* is “a jurisprudential principle” that allows for a jurist’s adoption of a competing opinion of another school to be adopted “if the latter is more practical and conforms most to the needs of the time.”¹³⁰ The principle of *takhayyur* has allowed “the follower of one of the four Sunni schools or *madh-habs* to opt for the ruling of another in situations where this alternative ruling offers a preferable option” for the particular issue at hand, although jurists contend that such selection should be done under the advisement of a religious scholar.¹³¹

Similar to the common law, majority and minority opinions exist in Islamic law. These differences exist both within and between schools. Under *takhayyur*, a Muslim may select the opinion most appropriate to their individual circumstance.¹³² *Takhayyur* allows Muslims to adopt minority opinions within the

2008) (noting that “the Hanafi view that women have freedom in the contract of marriage just as in other contracts was not shared by other legal schools”).

129. Kecia Ali, *Muslim Sexual Ethics: Marriage Contracts in Islamic Jurisprudence*, BRANDEIS UNIV. (June 19, 2003), <https://www.brandeis.edu/projects/fse/muslim/marriage.html> [<https://perma.cc/A6DM-XQLF>] (discussing Muslim marriage contracts in general).

130. Muhammad Tahir Mansoori, *Is “Islamic Banking” Islamic? Analysis of Current Debate on Shari’ah Legitimacy of Islamic Banking and Finance*, 50 ISLAMIC STUD. 383, 403 (2011).

131. MOHAMMAD HASHIM KAMALI, *SHARIAH AND THE HALAL INDUSTRY* 190 (2021).

132. See AHMED FEKRY IBRAHIM, *CHILD CUSTODY IN ISLAMIC LAW: THEORY AND PRACTICE IN EGYPT SINCE THE SIXTEENTH CENTURY* 21 (2018). Most scholars hold that *takhayyur* is the scholar’s prerogative and not a tool to be used by the laity. However, there are instances that allow for any Muslim to adopt a different opinion, provided they have sufficient knowledge in their own school of thought and the school from which they are selecting the opinion.

school they follow, but also positions from different schools of thought (provided they are a scholar well versed in the schools).¹³³ The principle of *takhayyur* can provide greater flexibility for couples, as the different schools have different contracts requirements.¹³⁴

Islamic law broadly contains contrasting legal opinions, and the principle of *takhayyur* represents the understanding that this diversity of opinion is a feature and not a bug of Islamic law. Traditionally, Islamic judges issued opinions from one specific school, such that a Muslim would seek out a judge from the specific school they followed—Hanafi, Maliki, Shafi'i, Hanbali, or Jafari.¹³⁵ That said, forum shopping historically existed; a party might seek out a judge from a specific school of thought, given the school's preferential opinion on a certain matter.¹³⁶ This type of forum shopping continues to exist both within Islamic courts and in Muslim arbitration.¹³⁷

Within the context of Islamic marriage contract, the principle of *takhayyur* can also help parties determine which contract provisions might best serve their specific needs. In particular, *takhayyur* can help a party in two ways. First, it can help them determine the fundamental requirements of a legitimate contract. Second, it informs their decisions regarding permissible modifications to the default provisions of an Islamic marriage contract. As a fundamental starting point, however, parties must have a basic understanding of the agreed upon requirements of

133. KAMALI, *supra* note 131, at 190 (noting that *takhayyur* applies both outside one's own school and within it, allowing them to also adopt minority opinions of their school when they are preferred).

134. Furthermore, several other legal principles exist within Islamic law that provide flexibility. These principles include: "*tarjih*, *tatabbu' al-rukhas*, *takhayyur*, and *maşlahā*." See Shehnaz Haqqani, *Islamic Tradition, Change, and Feminism: The Gendered Non-Negotiable* 56 (May 2018) (Ph.D. dissertation, University of Texas at Austin) (on file with author) (introducing terms within Islamic law that provide flexibility for the law); see also IBRAHIM, *supra* note 132.

135. Rabea Benhalim, *Religious Courts in Secular Jurisdictions: How Jewish and Islamic Courts Adapt to Societal and Legal Norms*, 84 BROOK. L. REV. 745, 769 (2019) (describing the approach of Muslim judges to issue opinions based on the legal reasoning of a specific school).

136. See *id.*

137. Benhalim, *supra* note 64, at 574 ("American Muslim arbitration tribunals could facilitate forum shopping where Muslims can determine for themselves the direction Islamic law should take on questions such as . . . forum shopping based on doctrinal preferences.").

a marriage contract under all schools if they are to consider making an informed decision between schools. Furthermore, the requirements of *takhayyur* are such that couples must maintain coherence in their choices, meaning that a marriage contract would need to conform in all respects to the school of choice.

B. ISLAMIC MARRIAGE CONTRACT RULES

Islamic law views marriage contracts as a moral imperative and binding “legal” contract, which legitimizes sexual intercourse. The contract, per classical scholars, “has three essential elements: *ijab*, the offer made by the woman or her guardian or the husband or his guardian; *qubul*, acceptance by the second party; and *mahr*, a gift from the husband to the bride.”¹³⁸ A contract which meets the requirements of Islamic law is the basis on which a sexual relationship is begun. The linkage between sexual intercourse and relationship contract is explicit in the Arabic terminology used. For instance, the Shafi’i, Hanafi, and Jafari schools require that the offer and acceptance use “derivatives of the terms ‘marriage’ or ‘espousal’ (*nikah* or *tazwij*).”¹³⁹

Historically, jurists understood and defined marriage “not as a sacrament but as a contract of exchange that places a woman under the authority and protection (*qiwamah*) of her husband.”¹⁴⁰ Those jurists decided to model Islamic marriage contracts on “the contract of sale (*bay*),¹⁴¹ [and] was called ‘*aqd al-nikah* (the contract of coitus).”¹⁴² *Nikah* is very commonly used and has come to mean marriage.¹⁴³ The literal meaning of *nikah* is sexual intercourse.¹⁴⁴

As a result, both husbands and wives have sexual rights access and pleasure.¹⁴⁵ The centrality of sex to the marriage contract is reflected in the terminology used to refer to husband’s

138. Ziba Mir-Hosseini et al., *Who Provides? Who Cares? Changing Dynamics in Muslim Families*, MUSAWAH 11 (2018), https://campaignforjustice.musawah.org/wp-content/uploads/2023/05/WhoProvidesWhoCares_En-1.pdf [<https://perma.cc/C8HV-QXLQ>].

139. Ali, *supra* note 13, at 14.

140. *Id.*

141. Discussed in further detail in Part III.C, *infra*, of this Article.

142. Mir-Hosseini et al., *supra* note 138, at 11.

143. Ali, *supra* note 13, at 12.

144. *Id.* at 14.

145. The sexual rights of wives are discussed more extensively in Part II.B.1, *infra*.

contractual rights; the rights of the husband under the contract are often “referred to as *milk al-nikah*, *milk al-‘aqd*, or *milk al-bud’*.”¹⁴⁶ The term *milk* in Arabic means possessor, and in this context means “having legal access to,” such that *milk al-nikah* means “having legal access to sexual intercourse,” *milk al-‘aqd* means “having legal access to [a relationship] contract,” and *milk al-bud’* means “having legal access to the wife’s vulva.”¹⁴⁷ While children may result from such a relationship, the creation of children is not a required element or necessary aim of a Muslim marriage.¹⁴⁸ Furthermore, sexual intercourse (with or without the intention to create children) between parties under an Islamic marriage contract is considered to accrue the blessings of prayer.¹⁴⁹

Although marriage in and of itself is not a sacrament under Islamic law, a marriage contract carries import as to the holiness (or lack thereof) of sex acts. Committing sexual acts outside of a contract is considered sinful.¹⁵⁰ That is not to say, however, that sex in and of itself is considered sinful or dirty.¹⁵¹ Rather, the legal standing of sex, within or outside of a contract, is what changes the nature of a sex act. Sex outside of a contract is sinful; sex within a contractual relationship carries the reward of doing an act that pleases God.

The primary grounds for this are based in a *hadith* (narrations of the Prophet Muhammad which are primary source documents for Islamic law). In this narration, the Prophet Muhammad said: “A [Muslim] having sexual intercourse with his spouse is rewarded for it [by God].”¹⁵² The companions of the Prophet Muhammad then sought to clarify this statement, asking: “Oh messenger of God! A person would be rewarded [for satisfying

146. Ali, *supra* note 129.

147. *Id.*

148. See Nurdeen Deuraseh, *Is Birth Control Permissible by Islamic Law (Shari‘ah)?*, 18 ARAB L.Q. 90, 95–96 (2003) (noting the instances where prevention of pregnancy would be permissible in Islamic law).

149. *See id.*

150. Nargis Virani, *Marriage in Islam*, in 3 VOICES OF ISLAM 57, 59 (Vincent J. Cornell & Virginia Gray Henry-Blakemore eds., 2007).

151. Sahih Muslim 1006, Book 12, Hadith 66 (recording a statement of the Prophet Muhammad that describes satisfying sexual needs with one’s spouse as a good deed with a reward before God).

152. *Id.*

his sexual need]?”¹⁵³ The Prophet Muhammad then replied: “Yes. Isn’t it that he would be punished had he engaged in sexual intercourse illegally [i.e. outside of contract]? The same applies if a Muslim engages in lawful sexual intercourse with his spouse. As such, he is rewarded [for having legal sex with his spouse.]”¹⁵⁴ This narration underpins that in Islamic law sexual intercourse is an act that can transition from impermissible outside of marriage to not only permissible, but indeed an act that incurs the blessings of God when contractually consented to.

The utilization of contract as a means of legitimizing sexual relationships differs from American law, however, Islamic marriage contracts do not differ hugely from the necessary elements of American contract law. The essential elements of contracts—offer, acceptance, and consideration—apply in both contexts. Indeed, under Islamic law, marriage contracts are a type of civil contract.¹⁵⁵

Provided the bride and groom do not have any legal impediment, such as certain types of kinship, the only requirements universally agreed upon in Islamic law to create a legally valid relationship contract are offer, acceptance, and *mahr* (dower, although a nominal dower is permitted).¹⁵⁶ Although differences of opinion exist among the Islamic legal schools, other strongly preferred elements of a traditional Islamic marriage contract include signing of the marriage contract before two witnesses and publicizing the marriage.¹⁵⁷

The schools agree on the essential elements described above, but there are important differences between the schools regarding the specifics. For instance, the legal scholars “differ over whether witnesses must observe the contracting event.”¹⁵⁸ Three of the Sunni legal schools, the Shafi’i, Hanafi, and Hanbali schools, “concur that the presence of witnesses is a necessary

153. *Id.*

154. *Id.*

155. Maha Alkhateeb, *Islamic Marriage Contracts: A Resource Guide for Legal Professionals, Advocates, Imams & Communities*, PEACEFUL FAMS. PROJECT 16 (2012), <https://api-gbv.org/wp-content/uploads/2017/07/Islamic-Marriage-Contracts-Resource-Guide-2012.pdf> [<https://perma.cc/YV3R-S8NX>] (stating that marriage contracts fall under civil contract laws in Islamic law).

156. Ali, *supra* note 13, at 13.

157. Alkhateeb, *supra* note 155, at 6.

158. See Ali, *supra* note 13, at 13.

condition for a valid contract.”¹⁵⁹ Malikis do not require witnesses at the time of contracting but require witnesses to the contract prior to consummation of the marriage.¹⁶⁰ The Jafari school does not require witnesses to a marriage contract.¹⁶¹ The issue of witnessing is a major contemporary issue, especially as it can result in lateral denial of a marriage.¹⁶² Although Malikis do not initially require witnesses, the Maliki school is especially insistent on the public nature of the relationship prior to consummation, as a means of protecting vulnerable parties, i.e., pregnant women and any resulting children.¹⁶³

Scholars also disagree over other possible elements to the contract, such as whether the consent of the bride’s male legal guardian (*wali*) is required, whether the bride must give her verbal assent, and what type of dower (*mahr*) must the groom give to the bride. Typically, the practice is for the bride’s party to make the offer and the groom’s party to accept (the opposite of standard American cultural engagement practices), although such an order of events is only a requirement in the Hanbali school.¹⁶⁴ The Hanafi, Maliki, Shafi’i, and Jafari schools do not require this specific order of the parties’ offer and acceptance as a condition to the enforceability of the contract.¹⁶⁵

The scholars of the Maliki and Hanafi schools permit the use of other terms in the offer and acceptance, such as metaphorical terminology, such as gift (*hiba*) and free will offering (*sadaqa*).¹⁶⁶ Given the nature of the contract, a gift (often monetary) given in

159. Mughniyya, *supra* note 30.

160. *Id.*

161. AS-SAYYID ABDUL HADI AL-HAKIM, A CODE OF PRACTICE FOR MUSLIMS IN THE WEST 202 (Najim al-Khafaji ed., as-Sayyid Mohammad Rizvi trans., n.d), <https://www.sistani.org/files-new/book-pdf/english-book-46.pdf> [<https://perma.cc/9G93-Q8HL>].

162. Emma Green, *The Debate over Muslim College Students Getting Secret Marriages*, NEW YORKER (Sept. 9, 2022), <https://www.newyorker.com/news/annals-of-education/the-debate-over-muslim-college-students-getting-secret-marriages> [<https://perma.cc/ZPK5-D4JE>] (discussing how young Muslims are engaging in “secret” marriages as opposed to traditional public ceremonies with multiple witnesses).

163. See Mughniyya, *supra* note 30 (“According to the Malikis, the presence of witnesses is not necessary at the time of the contract but their presence is necessary at the time when marriage is to be consummated.”).

164. See Ali, *supra* note 13, at 13.

165. See Mughniyya, *supra* note 30.

166. Ali, *supra* note 13, at 14.

exchange for legitimate sexual access, jurists are wary of terminology that might liken a relationship contract to prostitution, which all schools of thought completely prohibit. For instance, Hanafi jurists do not allow the use of the term hire (*ijara*) in the offer and acceptance.¹⁶⁷ All schools encourage linguistic clarity in the contract, such that the contract should be entered into the native tongue of the parties, and translations of the above terms will suffice.¹⁶⁸

As noted earlier, three of the five major Islamic schools of law (Shafi'i, Hanbali, and Maliki) require that a previously unmarried woman who has reached the age of majority must have her male guardian's consent.¹⁶⁹ Typically, the male guardian is the woman's father, or in the absence of her father, a close male relative, such as a grandfather or uncle.¹⁷⁰ Amongst the Sunni schools, requiring the consent of a previously unmarried woman's guardian is the majority position.¹⁷¹ However, this is not the universal opinion. Both the Hanafi and Jafari schools allow for an adult woman of mental competence to consent to marriage without the consent of her guardian, regardless of whether she has been married before.¹⁷²

Although not as permissive as the Hanafi and Jafari schools, Maliki doctrine provides that a previously unmarried, mature woman may marry without her guardian's consent, if her male guardian has previously "emancipated" her needing his consent.¹⁷³ Such an emancipation is irrevocable.¹⁷⁴ Across all schools, men who have reached the age of majority are free to marry without any parental consent. Modern scholars have

167. See Mughniyya, *supra* note 30 ("The Hanafi's [sic] say: . . . [T]he contract will not conclude if the word used are [sic] derived from *al-'ijarah* (hiring) and *al-'i'arah* (lending) . . .").

168. See Ali, *supra* note 13, at 14.

169. Mughniyya, *supra* note 30 ("The Shafi'i, the Maliki and the Hanbali schools are of the opinion that the wali (guardian) has the sole authority with respect to the marriage of his sane and major female ward if she is a maiden.").

170. *Id.*

171. *Id.*

172. *Id.* ("The Hanafis regard a sane, grown-up female as competent to choose her husband and to contract marriage, irrespective of her being a maiden or a thayyib [a girl who has had sexual intercourse].").

173. See Ali, *supra* note 13, at 18–19.

174. *Id.* at 19 ("In such a case, he loses his power to compel her to marry, and her spoken consent is necessary for any marriage he wishes to contract for her.").

argued for the expansion of the Hanafi position that previously unmarried women can enter into a valid relationship contract without the consent of their male guardian.¹⁷⁵ They argue that North American Muslim women today have often attained educational achievement and financial independence indicative of the maturity and understanding necessary to undertake a marital contractual commitment.

As the ability to independently enter into a marriage can be dependent on gender, the default contractual obligations under an Islamic relationship contract can differ depending on the gender of the parties.¹⁷⁶ That said, both parties have mutual obligations of sexual availability to each other. For instance, the Jafari school prohibits a husband from neglecting sexual relations with a wife for a period of longer than four months.¹⁷⁷ According to the Jafari school, “it would not be permissible for [a husband] to prolong his journey, (without valid reason), if it entails depriving the wife of her right, more so when the journey is not regarded as essential”¹⁷⁸ Indeed, lack of sexual satisfaction can be grounds for a woman to divorce her husband.¹⁷⁹

175. See, e.g., Muhammad ibn Adam, *What Is the Ruling in the Hanafi School Concerning a Woman Who Marries Herself Without Her Wali's Permission?*, ISLAMQA, <https://islamqa.org/hanafi/daruliftaa/7744/divorced-woman-marrying-without-her-guardians-approval> [<https://perma.cc/88U8-JKSF>] (“The marriage of a free and legally responsible (i.e. adult and sane) woman is valid (even) without the permission of her guardian (wali)....and the Fatwa issued in her marrying someone who is not her legal match is of invalidity, and this is the chosen Fatwa due to corrupt times.” (citing *Radd al-Muhtar ala al-Durr* 3/56-57)). This is the majority position in the Hanafi school. That said, many Hanafi jurists still recommend that the woman marry with the permission of her male guardian.

176. See Ali, *supra* note 13, at 12 (“Marriage . . . gives rise to a variety of gender-differentiated but interdependent claims . . .”).

177. *Laws of Permanent Marriage: Ruling 2436*, SISTANI, <https://www.sistani.org/english/book/48/2369> [<https://perma.cc/476X-8LZJ>] (“A husband cannot refrain from having sexual intercourse with a young wife of his for more than four months unless sexual intercourse is harmful or excessively difficult . . .”).

178. Al-Sayyid Ali Al-Husseini Al-Sistani, *Marriage: General Rules*, SISTANI, <https://www.sistani.org/english/book/46/2062> [<https://perma.cc/H7DF-7954>].

179. *Her Husband Has Forsaken Her in Bed for a Year and a Half*, ISLAM QUESTION & ANSWER (June 3, 2015), <https://islamqa.info/en/answers/218686/her-husband-has-forsaken-her-in-bed-for-a-year-and-a-half> [<https://perma.cc/E2L8-J2GR>]. Indeed, Ibn Taymiyah stated:

1. Contraception and Parental Obligations

A wife's right to sexual pleasure is also linked to reproductive rights. For instance, according to some jurists, male ejaculation is an essential element to female pleasure and may be necessary for some women to orgasm.¹⁸⁰ Therefore, these jurists held that men seek their wives' consent prior to practicing withdrawal as a means of birth control.¹⁸¹

Under a marriage contract, a wife has the right not only to sexual pleasure but also to reproduction.¹⁸² Islamic law generally allows the use of contraception provided both parties consent, and contraception was historically the wife's prerogative.¹⁸³ Medieval jurists expanded contraceptive doctrines to allow men to use contraception without a wife's consent due to "bad times" of the society.¹⁸⁴ These jurists "accepted contraception especially to avoid excessive progeny with all its economic problems."¹⁸⁵ In some instances, scholars considered contraception a religious

It is obligatory for the man to have intercourse with his wife on a reasonable basis, and this is one of the most important rights that she has over him; it is more important than feeding her. With regard to obligatory intercourse, according to one view, it is obligatory (at least) once every four months; according to another view, it should be according to her need and his ability, just as he should feed her according to her need and his ability. The latter is the more correct of the two opinions.

Id.

180. Farzaneh Roudi-Fahimi, *Islam and Family Planning*, POPULATION REFERENCE BUREAU 3 (Aug. 2004), <https://www.prb.org/wp-content/uploads/2004/09/IslamFamilyPlanning.pdf> [<https://perma.cc/VNL9-M67M>].

181. *Id.* ("Some jurists would argue that ejaculation is essential for a woman to have orgasm, and therefore it is necessary to have prior consent from a wife before practicing withdrawal.")

182. *Id.*

183. Zulie Sachedina, Comment, *Islam, Procreation and the Law*, 16 INT'L FAM. PLAN. PERSPS. 107, 108 (1990) ("Initially, the practice of coitus interruptus was only permitted with the consent of the woman.")

184. *Id.*

185. Atighetchi, *supra* note 9, at 719–20. These scholars also favored the use of contraception for the following reasons:

- (a) Protection of the precedent child. According to a belief during the Islamic Middle Age, a new pregnancy would deprive the mother of her milk, which would endanger the living child.
- (b) The impossibility of ensuring an education for the children.
- (c) The preservation of the mother's property, beauty and wealth.
- (d) The fear of facing difficult periods because of wars, famines, epidemics, etc.

duty if a family found itself in a situation where future children might become enslaved.¹⁸⁶

The legal rulings on contraception were based on verses of the Quran and sayings of the Prophet Muhammad (*hadith*).¹⁸⁷ The Quranic verse most relied upon states for this legal ruling: “God wants ease for you, and God does not want difficulty for you.”¹⁸⁸

During the time of the Prophet Muhammad, the primary mode of birth control was withdrawal, also known as *coitus interruptus*, or *al-'azl* in Arabic.¹⁸⁹ Numerous narrations of the Prophet Muhammad indicate the permissibility of withdrawal including:

We (the Companions of the Prophet) used to practice [withdrawal] during the time of the Prophet (s.a.w.) while the *Qur'an* was being revealed;¹⁹⁰

We used to practice [withdrawal] during the time of the Prophet (s.a.w.). The Prophet (s.a.w.) came to know about it, but did not forbid us;¹⁹¹

The Prophet was queried about [withdrawal] and he said: “Not of all semen is a child formed, and if God willed to create something nothing would stop him from doing so.”¹⁹²

A man came to the Prophet (s.a.w.) and said: “I have a mate and I practice [withdrawal] with her.” The prophet said: “This will not prevent something that God wills.” The man came back (after a time) and said “Messenger of God! The mate I mentioned to you has conceived.” The Prophet said: “I am the servant and messenger of God.”¹⁹³

186. *Id.* at 721 (“In past times, the Hanbali school recommended contraception as a religious duty when a family found itself in an infidel’s land, because of the risk that future babies could become slaves or be converted.”).

187. See Deuraseh, *supra* note 148, at 90 (explaining how scholars examined both Quranic verses and express sayings of the Prophet Muhammad “to derive legal injunctions” about contraception).

188. QURAN 2:185.

189. Bukhari, *Sahih Bukhari*, Kitab al-Nikah, Bab al-'azl; Muslim, *Sahih Muslim*, Kitab al-Niah Bab hukm al-'azl, hadith no. 1440, p. 12; Ibn Majah, *Sunan Ibn Mahaj*, Kitab al-Niah, Bab al-'azl, Vol.1, hadith. No. 1927.

190. Muslim, *Sahih Muslim*, Kitab al-Niah, Bab hukm al-'azk, hadith no. 1440.
ukm al-'azl, hadith no. 1440.

191. Bukhari, *Sahih al-Bukhari*, Kitab al-Maghzai, Bab gazwah al-mustalaq; Fuwad 'Abdul Bai *Al-Lu'lu' wal-Marjan*, Kitab al-Niakh, Bab hukm al-'azl, hadith no. 913-14.

192. Muslim, *Sahih Muslim*, Kitab al-Nikah: Bab al-'azl, hadith no. 1439.

193. Al Hakim, *al-Mustadrak*.

Furthermore, the advent of modern contraceptive methods led jurists to issue legal opinions permitting them.¹⁹⁴ For instance, the Rector of Al-Azhar (one of the oldest and leading religious institutions of the Muslim world) issued a legal opinion (*fatwa*) in 1964, as did the Grand Mufti (chief religious leader) of Jordan. The opinion from the Rector of Al-Azhar reads:

Islam, as the religion of pristine nature, has never been opposed to what is good to man. Indeed, it has been always ahead in the effort towards the achievement of this good so long as it is not in conflict with the purposes of God's law.

I see no objection from the Shari'ah point of view to the consideration of family planning as a measure, if there is need for it, and if the consideration is occasioned by the people's own choice and conviction, without constraint or compulsion, in the light of their circumstances, and on the condition that the means for effecting this planning is legitimate.¹⁹⁵

The Grand Mufti of Jordan, Shayk Abdullah Al-Qalqili states that: “[t]here is agreement among the exponents of jurisprudence that coitus interruptus, as one of the methods for the prevention of childbearing, is allowed. Doctors of religion inferred from this that it is permissible to take a drug to prevent childbearing, or even to induce abortion. We confidently rule in this *fatwa* that it is permitted to take measures to limit childbearing.”¹⁹⁶ Both of these *fatwas* are representative of the modern Islamic legal position that the use of contraception is permissible between spouses.

Although contraception is permissible, if a couple has children, the financial obligation of children falls entirely on men.¹⁹⁷ This is a non-modifiable obligation, as the right to financial support is the right of a child.¹⁹⁸ A man is obligated to provide maintenance—that is, housing, clothing, and food—for his wife

194. Sachedina, *supra* note 183, at 109 (discussing a *fatwa* that permitted measures to limit childbearing).

195. *Id.*

196. *Id.*

197. See *Maintenance*, ISLAMIC FIQH, <https://islamicfiqh.net/en/articles/maintenance-245> [<https://perma.cc/9JAC-KKAB>] (“Imam Ahmad says that if a son is of age and has no income, he is entitled to be supported by his father.”).

198. *Id.* (“Just as support for a poor parent is obligatory to a son who has adequate means, it is incumbent on a parent who has the means to support his son who is poor.”).

and children.¹⁹⁹ Even in the event of divorce, women are under no obligation to clothe, feed or house their children, as these financial responsibilities are entirely the legal obligation of the father.²⁰⁰ For example, while women have a right to breastfeed and care for their children, some scholars hold that a woman is under no obligation to breastfeed her children.²⁰¹ In the event that spouses divorce while a wife is breastfeeding their child, the man would be required to financially compensate the wife for breastfeeding the infant.²⁰² Jafari scholars even hold that a married woman is entitled to compensation from her husband for breastfeeding their children.²⁰³ Furthermore, there is no context in which a woman would be required to pay child support or alimony to a divorced spouse.²⁰⁴

Marital property is conceived very differently under Islamic law than in most American jurisdictions. Under Islamic law, women maintain sole ownership of all property they bring into a marriage, notably the dower (*mahr*), and any property or finances they contribute to the marriage.²⁰⁵ Any financial contribution a woman makes to the familial household is considered a gift.²⁰⁶

199. ABDEL RAHIM OMRAN, FAMILY PLANNING IN THE LEGACY OF ISLAM 51 (1992) (“Men are the ones who are responsible for the financial and social welfare of the household . . .”).

200. *Id.* at 41 (“She is also responsible for her family but the man has the primary responsibility.”).

201. RONAK HUSNI & DANIEL L. NEWMAN, MUSLIM WOMEN IN LAW AND SOCIETY 59 (2007) (“[T]he woman may also dispense with the right to breastfeed her children.”).

202. *Id.*

203. JAMAL J. AHMAD NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 158 (3d ed. 2009) (“Only the [Jafaris] rule that the mother is entitled to receive payment for nursing her own infant during the continuation of marriage . . .”).

204. Yasser, *supra* note 35 (“Even in cases of divorce, fathers are asked to be fully responsible for their children regarding food, clothing, schooling, and health expenses according to the father’s standard of life.”).

205. Imani Jaafar-Mohammad & Charlie Lehmann, *Women’s Rights in Islam Regarding Marriage and Divorce*, 4 MITCHELL HAMLINE J. L. & PRAC. 1, 8 (2011) (“Whatever a woman earns or is given before and during the course of the marriage remains her property if the marriage ends.”).

206. Maryam Akram, *The Marital Rights of Women in Islam*, AMALIAH (July 4, 2022), <https://www.amaliah.com/post/65081/rights-of-muslim-women-in-marriage> [<https://perma.cc/M2YD-JDJS>] (“If a wife wishes to contribute financially or if she wishes to cook, she can and this will be a great act of charity. This must however be her own wish, she must not be pressured or forced into doing so.”).

These default provisions can lead to a high barrier for men to enter into a relationship contract and, consequently, an Islamically-legal sexual relationship. Although these default provisions exist in standard Islamic marriage, couples can choose to modify their marriage in several important ways.²⁰⁷ A contract may be modified to not require a man to provide financial maintenance of his wife, although it cannot be modified regarding the financial obligation of children.²⁰⁸ Three types of contracts that often include such modifications to these standard provisions are the *urfi* (customary), *misyar* (pleasure), and *mut'a* (temporary) marriage contracts.²⁰⁹

Deviations from the standard contracts are not without criticism. Indeed, such contracts have been used by unscrupulous parties to take advantage of vulnerable parties, especially young women.²¹⁰ Such contracts have also been used to facilitate

207. See Muhammad ibn Adam, *What Is Nikah Misyar, and Is This Kind of Marriage Permitted According to Shari'a?*, DARUL IFTAA (Feb. 22, 2008), <https://daruliftaa.com/nikah-marriage/what-is-nikah-misyar-and-is-this-kind-of-marriage-permitted-according-to-sharia> [<https://perma.cc/AUT8-M3FB>] (describing ways that parties can mutually agree to change the default provisions for their own marriage).

208. *Id.* (explaining that a misyar marriage can include giving up “the wife’s right to housing (sukna) and financial support (nafaqa)”).

209. *Id.*

210. Annelies Moors, *Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands*, in *APPLYING SHARI'A IN THE WEST: FACTS, FEARS AND THE FUTURE OF ISLAMIC RULES ON FAMILY RELATIONS IN THE WEST* 141, 141 (Maurits S. Berger ed., 2013) (“In Muslim majority countries, . . . the state authorities often consider the women involved [in these marriages] to have been duped by unscrupulous men who want to engage in sexual relations and then simply leave them, or deny that a marriage ever took place.”); see also *Between Matrimony and Something Else*, N.Y. TIMES (Dec. 4, 2007), <https://www.nytimes.com/2007/12/04/world/africa/04iht-letter.1.8580685.html> [<https://perma.cc/3ZRR-WSD8>] (stating that a “husband usually keeps the document and may tear it up at the first sign of trouble,” and that “Egyptian courts are considering 14,000 contested paternity cases”). Young women are often discussed as especially vulnerable for several reasons: (1) their lack of sexual experience and knowledge about sexuality; (2) the risk of pregnancy, especially if the marriage is subsequently denied by the husband; (3) the potential lack of familial social and financial support if a secret marriage is subsequently discovered; and (4) divorce stigma and loss of virginity that may exist within some families and cultures. Furthermore, because some of these contracts are not state sanctioned, the wife may struggle to win alimony and/or child support in court.

prostitution.²¹¹ These abuses can in “large measure . . . be traced to the refusal of people to observe the letter of the law.”²¹² Such abuses often happen within the context of secrecy, with at best the man’s friends serving as witnesses.²¹³

It is possible that the scholars who understood *urfi*, *misyar*, and *mut’a* contracts as permissible “had too high an opinion of human dignity, self-respect, and fear of God.”²¹⁴ But when the letter *and* spirit of the law are observed, in the very least, these contracts “can be said to provide a legal structure which . . . prevents most of the well-known problems and abuses connected with unregulated sexual relationships,” and at best preserves human dignity through the recognition of sexual desire and facilitation of sexual relationships.²¹⁵

C. *URFI* CONTRACTS (CUSTOMARY MARRIAGE)

Urfi marriages are best understood as the execution of an Islamic relationship contract without governmental involvement, i.e., no state license is sought, and the marriage is not registered with the state.²¹⁶ Prior to European colonization, *urfi* contracts were in fact the norm in Muslim-majority countries, and no special nomenclature was used to demarcate them as a special kind of contract.²¹⁷ European colonialism and the subsequent rise of the nation state led to the codification of Islamic law and the creation of institutionalized certification of marriage

211. See, e.g., *Too Young to Wed: Child ‘Brides’ in Egypt Rented for Summer*, MOROCCO WORLD NEWS (Aug. 16, 2013), <https://www.moroccoworldnews.com/2013/08/101310/too-young-to-wed-child-brides-in-egypt-rented-for-summer> [<https://perma.cc/87N9-3UB8>] (describing the use of one-day marriage contracts as “a form of child prostitution in the guise of marriage” (quoting Azza el-Ashmawy, director of the Child Anti-Trafficking Unit at the National Council for Childhood and Motherhood)).

212. ABU’L-QASIM GOURJI, *TEMPORARY MARRIAGE (MUT’A) IN ISLAMIC LAW* 4 (Sachiko Murata trans., 1991).

213. See Seyyed Abolhasan Navvab, *The Problem of Customary Marriage and the Solution of Temporary Marriage*, 9 RELIGIOUS INQUIRIES 215, 229 (2020) (describing how some instances of customary marriage involve “taking close friends as witnesses without a public announcement”).

214. GOURJI, *supra* note 212, at 4.

215. *Id.*

216. See Navvab, *supra* note 213, at 219 (“For although an official registration of marriage in judicial courts is a condition of a legitimate marriage, it does not constitute a pillar of marriage and thus can be waived.” (citation omitted)).

217. *Id.* (“Official registration is indeed a recent requirement of today’s life, without any precedents in early Islam.”).

and divorce with state entities.²¹⁸ Pre-colonial legal sexual relationships in Muslim-majority countries were a matter of private law, conducted exclusively through contract. Contract disputes were often resolved through private familial arbitration or private courts.²¹⁹

Strikingly, the current practice of Islamic law in the United States more closely resembles the pre-colonial state of Islamic law than the legislated Islamic law typically found in Muslim-majority countries today.²²⁰ For instance, the actual issuance of an Islamic divorce is often extra-judicial such that it is dissolved entirely between the parties of the contract themselves or involves an imam (Muslim religious leader, similar to a preacher or minister) or arbitrator without the involvement of a court.²²¹ As such, some North American Muslims may find that an *urfi* (customary) marriage best suits their purposes for entering into an Islamically legal sexual relationship.

That said, just because a couple has entered into an *urfi* marriage, does not necessarily mean that they cannot change the American legal status or Islamic contractual provisions of their relationship in the future.²²² Additionally, *urfi* relationships share some similarities to common law marriage. Under an *urfi* contract, parties have a religiously legal relationship without state registration. The use of *urfi* marriage contracts contests “modern state requirements that attach the licitness of a marriage with its written documentation and registration with state officials.”²²³ This exists in opposition to the solemnization of the marriage between the parties themselves without the need for the involvement of the state.

218. HALLAQ, *supra* note 8, at 127 (“What the twentieth-century state accomplished in this respect was to systematize [through state, centralized action] the right to these inclusions [of extra protections for wives], thereby raising the scale minima of women’s rights.”).

219. *Id.* at 159 (“[I]n pre-modern Islamic societies, disputes were resolved with a minimum of legislative guidance, the determining factors being informal mediation/arbitration and, equally, informal law courts.” (footnote omitted)).

220. Benhalim, *supra* note 135, at 769.

221. *Id.* at 782–83 (“[M]otivations for utilizing religious arbitration and mediation often derive from a religious conviction that a religious divorce is necessary to remarry, and that civil divorce alone is insufficient.”).

222. *Id.*

223. FRANCES S. HASSO, CONSUMING DESIRES: FAMILY CRISIS AND THE STATE IN THE MIDDLE EAST 33 (2011).

The term “*urfi*,” or customary, is not a term of classical Islamic law, but rather a means of differentiating between “classically Islamic [legal] understandings of licit marriage contracts and the documentary practices and legal requirements of [the] state[].”²²⁴ Registration of marriages with the state is a recent phenomenon in Islamic history. Such registration originated in 1931, when Egyptian legislators passed mandatory legislation “for purposes of dispute prevention.”²²⁵

Thus, parties wanting to avoid the implications and requirements of state marriage may utilize an *urfi* contract, which may in term violate state requirements of marriage but facilitate licit sexual relationships for Muslims.²²⁶ In addition to operating outside of state marriage, *urfi* contracts are often *misyar* contracts (discussed below²²⁷), which include provisions to contract around default provisions of traditional marriage contracts.²²⁸

Muslims living in the United States may want to have a sexually legal relationship without involving the barriers to entry and exit that state law entails. In some instances, forgoing a state license to marry also means forgoing the protections that the state provides.²²⁹ That said, the convenience of entering into a relationship via contract and exiting a relationship via oral termination may hold some appeal, as divorce vis-à-vis the state is often dramatically more costly and drawn-out than an Islamic divorce.²³⁰

For some couples, the comparative ease of entry and exit of an Islamic contractual relationship may supersede their interest in the protections state marriage may afford. As scholars have noted, some Muslims may wish to “follow religious laws that differ from the law of the land,” and in doing so, those individuals

224. *Id.*

225. Navvab, *supra* note 213, at 219.

226. *See id.* at 217 (discussing the waiver of certain marriage requirements in *urfi* marriages).

227. *See infra* Part II.D.

228. HASSO, *supra* note 223, at 89 (“[C]ontemporary *misyār* contracts are based on unwritten or written clauses between the potential wife and husband in which the wife ‘concedes’ . . . her rights to visitation, housing, maintenance, and in rare cases, bearing a child . . .”).

229. Navvab, *supra* note 213, at 224 (discussing marriage registration as a prerequisite to “protect the wife’s rights and their children’s identity”).

230. *See, e.g., id.* at 228 (“When the specified duration [of a temporary marriage] expires, . . . the man and the woman will officially separate without the need for divorce.” (citation omitted)).

may simply be exercising their religious freedom as they understand it.²³¹

However, the ability to forgo state involvement in a Muslim marriage may be unappealing for some and simply not feasible for others. For instance, couples that plan to have children may wish for state protections from the outset or some later date in their relationship. Parties may desire the increased oversight, protection, and difficulty of termination of the relationship that state-based divorce provides.

Furthermore, common law marriage in some jurisdictions may result in the involvement of the state, regardless of whether the couple intended to involve the state from the outset.²³² Likewise, the dissolution of the relationship, if children are involved, will typically involve the state and the best interest of the child, regardless of the couple's marital status with the state.²³³ Motivations for opting out of state marriage and instead seeking an *urfi* contract in the United States likely parallel the motivations of Muslims in Muslim-majority countries.

Urfi marriage contracts have become increasingly popular in different Muslim-majority countries.²³⁴ “[D]ifferent social, environmental, economic, and cultural factors” certainly contribute to the use of *urfi* contracts in various locations.²³⁵ That said, scholars have predominately attributed the increased use of *urfi* contracts to promotion in popular media and the desire to satisfy sexual needs while avoiding the “burdens of a permanent marriage.”²³⁶ To understand the motivations of parties to *urfi*

231. Asifa Quraishi-Landes, *Sharia and Diversity: Why Some Americans Are Missing the Point*, INST. FOR SOC. POL'Y & UNDERSTANDING 6 (Jan. 2013), https://www.ispu.org/wp-content/uploads/2016/08/ISPU_Report_ShariaDiversity_Final_web.pdf [<https://perma.cc/7GSW-ZSPL>].

232. *See id.* at 17 (“American judges have generally adjudicated Muslim marriage contracts not as religious law, but simply according to the rules of American contract law.”).

233. *Id.* at 18 (“[In American courts,] *fiqh* rules of child custody and guardianship that follow strict gendered and patriarchal social presumptions are often rejected as conflicting with the public policy seeking the ‘best interests of the child’ standard, now prevailing in all states.” (citation omitted)).

234. Navvab, *supra* note 213, at 217 (discussing the modern popularity of this type of marriage among tourists and university students).

235. *Id.* at 218.

236. *Id.*

contracts, researchers have focused on the experiences of young college-aged students in Egypt.²³⁷

1. Motivations to Enter *Urfi* Marriage

Given the financial obligations required of men under a traditional relationship contract and increased housing costs, young people in Egypt have sought ways to use contracts as a means of having sexually licit relationships under Islamic law without undertaking the full financial burden of a traditional contract. *Urfi* contracts in Egypt have been part of the cultural and academic conversation for at least the last twenty-five years.²³⁸ Mona Abaza has argued that young college-aged Egyptians at university have used *urfi* contracts as a means to alleviate “growing sexual tensions in a society that idolizes marriage and is rigid in conventions regarding the financial requirements of the institution.”²³⁹

That is not to suggest that *urfi* contracts are without issues, especially when the contract is undertaken secretly. Instances certainly exist of men “duping” women into a sexual relationship under a guise of legitimacy. Young women in these instances often believe they are entering into a lasting relationship, only to have the men then “simply leave them, or deny that the marriage ever took place.”²⁴⁰ However, scholars argue that “the portrayal of the women who engage in such marriages as victims of irresponsible men is, at best, only part of the story.”²⁴¹

237. HASSO, *supra* note 223, at 33. Hasso’s research included “fieldwork stints in Egypt and the UAE in 2003 and 2008” where the author conducted a variety of interviews with “young people, state officials, religious authorities, intellectuals, leaders in women’s associations, and social movement activists,” while also analyzing a variety of primary sources (including “family status laws[,] . . . government-sponsored and independent social science research,” and “material (cassettes, brochures, and so forth) produced by intellectuals, religious authorities, and state officials and organizations”). *Id.* at 22–23. Hasso also examined “newspaper and magazine articles and programming from Arabic satellite television programs concerned with marriage, divorce, and sex.” *Id.* at 23. All field work was conducted in Arabic and then later translated and transcribed. *Id.*

238. *Id.* at 81 (describing a 1970s marriage controversy in Egypt as one of the precursors to contemporary *urfi* contracts).

239. *Id.* at 94 (citing Mona Abaza, *Perceptions of ‘Urfi Marriage in the Egyptian Press*, ISIM NEWSL., Mar. 2001, at 20, 21).

240. Moors, *supra* note 210, at 141.

241. *Id.*

Egyptian students interviewed in 2003 and 2008 expressed uncertainty around *urfi* contracts, citing potential abuses and lack of cultural acceptance.²⁴² However, they also expressed views that *urfi* contracts could have been a “uniquely Egyptian middle path—neither wholesale Western cultural importation in which one ‘adopts open sexual relationships’ nor ‘holding on tight to customs and traditions and being judgmental toward people who make the other choice.’”²⁴³

The practice of *urfi* marriages in the Netherlands also lends insight into how young Muslims may use *urfi* contracts as a stepping stone into a civil marriage. For Muslims from more conservative families, parents may expect a short timeline from the initial stages of the relationship to marriage.²⁴⁴ As such, young people may feel familial and communal pressure to formalize their relationship in some capacity. Therefore, they may enter into an Islamic marriage contract to address the concerns of their families and communities, using the period of time between the Islamic marriage contract and the registration of a civil marriage “as a ‘try-out’ period that is quite similar to dating.”²⁴⁵

North American Muslims similarly live in a situation where the cultural norms of the larger society towards open sexual relationships, i.e., sexual relationships without commitment or obligations, stand in juxtaposition to the cultural standards Muslims may find within their nuclear families and in their religious centers. Given that North American Muslims live in a political reality where there is no state sanction or license needed to enter into a marriage contract, *urfi* contracts are by default the reality of Islamic marriage contracts in North America.²⁴⁶ Even still, of

242. HASSO, *supra* note 223, at 95 (characterizing “most” of the interviewed students as “disapproving of customary [*urfi*] marriages”).

243. *Id.*

244. Moors, *supra* note 210, at 155 (“Once some sort of relationship becomes apparent, the [conservative] parents expect that marriage will soon follow.”).

245. *Id.*

246. Islam Uddin, *Nikah-Only Marriages: Causes, Motivations, and Their Impact on Dispute Resolution and Islamic Divorce Proceedings in England and Wales*, 7 OXFORD J.L. & RELIGION 401, 409 (2018). That said, some scholars believe “a legal marriage conducted in Western countries is a valid marriage in the eyes of the Shariah and can be accepted by Shariah courts in Muslim countries.” *Id.* at 408. However, research indicates that Muslims themselves tend to believe that a formal Islamic marriage contract is required for the legitimacy of a relationship. *Id.* at 409 (describing the “reality” that many Muslims view the

course, Muslim marriages often include registration with the state.²⁴⁷

D. MISYAR CONTRACTS (PLEASURE MARRIAGE)

A related type of relationship contract to the *urfi* (customary) contract is the *misyar* contract. While individuals and news media may conflate *urfi* and *misyar* contracts, *misyar* contracts are generally a subset of *urfi* contracts.²⁴⁸ One major difference is that in some countries, such as the UAE, *misyar* contracts are registered with the state.²⁴⁹ *Misyar* contracts in the public sphere of Muslim-majority countries are often described as “pleasure contracts,” “travelers’ marriage,” or “marriage of convenience,” because these contracts typically create conditions that alleviate some of the financial obligations on men to provide maintenance for their wife, may allow for separate residences, and generally focus on creating a licit sexual relationship without the full duties found under a traditional contract.²⁵⁰

Provided a *misyar* contract fulfills the basic requirements of a marriage contract under Islamic law (discussed above²⁵¹), then Islamic law considers the parties to the contract in a permissible sexual relationship.²⁵² The basic requirements are “[o]ffer (ijab) from one party and acceptance (qabul) from the other”²⁵³ Other possible requirements (depending on the Islamic legal school of thought) include witnesses, the consent of the woman’s guardian, and a dower (*mahr*).²⁵⁴ Although a *misyar* contract

religious contract as “the actual contract that sanctifies their marital relationship”).

247. *Id.* at 411 (describing the “unanimous” view of interviewed imams that, in addition to religious marriage, they recommend “Muslims also have a civil marriage to gain legal recognition, rights, and protection”).

248. HASSO, *supra* note 223, at 12 (describing the similarities between *urfi* and *misyar* contracts).

249. *Id.* (going further to say that *misyar* contracts, on their face, “appear to be regular marriage contracts”).

250. *Id.*

251. *See supra* Part II.B,

252. ibn Adam, *supra* note 207 (“[I]f the . . . necessary factors are met, the marriage is valid according to Shar’a, even if it is a ‘Misyar’ marriage.”).

253. *Id.*

254. *Id.* (explaining the various views regarding each of these possible requirements).

may fulfill all the conditions of a marriage contract, there is not complete social acceptance of *misyar* contracts.²⁵⁵

Perhaps the greatest social argument against *urfi* and *misyar* contracts is that parties often conduct these contracts privately (although with witnesses), such that the relationship may remain secret from family, friends, and community.²⁵⁶ On social media, *urfi* marriages are often referred to as “surreptitious,” “secret,” “illegitimate,” or “free of charge,” as they do not involve registration with the government.²⁵⁷ Of particular concern is when a couple “embark[s] on a married life without going through Sharia and legal procedures,” such as not involving witnesses.²⁵⁸

Scholars who argue against the legality of such contracts typically do so on the grounds that such contracts are not made public.²⁵⁹ Islamic law does not necessarily require that marriage contracts be made public—only the Maliki school requires publicizing marriage—but all schools consider keeping a marriage contract secret at a minimum as a disliked or detestable act (*makruh*).²⁶⁰ Thus, while a secret marriage may be technically permissible under Islamic law, it may be socially inadvisable, and the law strongly discourages it.

Obtaining a marriage license from the government is one means of publicizing that a marital relationship exists but is by no means the only method. Marriages that fulfill the requirements of Islamic law without official registration are generally considered legitimate marriages in the eyes of Islamic legal

255. *Id.* (arguing that, despite the validity of a *misyar* marriage, such marriage would not be seen as “appropriate according to Shari’a, . . . since it goes against the spirit and objectives of marriage”).

256. *See* Navvab, *supra* note 213, at 217.

257. *Id.*

258. *Id.*; *see also* Moors, *supra* note 210, at 145 (categorizing the main issues with such contracts as “not fulfil[ling] the statutory conditions for a valid Islamic marriage” and “transgress[ing] social norms of deference to one’s parents”).

259. *See* Navvab, *supra* note 213, at 229 (noting that one of the “negative aspects” of a customary marriage is its surreptitiousness); HASSO, *supra* note 223, at 91 (stating that the controversy with a *misyar* marriage is its secrecy).

260. HASSO, *supra* note 223, at 124 (discussing the view that such secrecy reflects cowardice in the men who choose these types of marriages); *see also* Navvab, *supra* note 213, at 221 (discussing the view that such a marriage “is deemed sinful because of its negative legal and genealogical repercussions, rendering it a suspicious kind of marriage”).

scholars.²⁶¹ Simply sharing with friends and family that the couple has an “*aqd azziwaj*” (Islamic marriage contract) is sufficient.²⁶²

Misyar contracts have particularly been a topic addressed socially and legally over the last twenty-five years in Egypt and Saudi Arabia.²⁶³ In 1998, the mufti (religious leader) of Egypt, Nasr Farid Wasil, issued a legal opinion that *misyar* contracts are legal and might provide a practical solution to meet the sexual needs of those not in a financial situation to fully financially provide for a household.²⁶⁴ This was preceded in 1996 with a *fatwa* from the grand mufti of Saudi Arabia, Shaykh ‘Abdel Aziz Ibin Baz, who declared *misyar* marriages licit, provided the contract met the following conditions: “presence of the woman’s male guardian, consent of both parties to the marriage, two witnesses, lack of physical disability in the woman to prevent consummation, and not keeping the relationship ‘secret.’”²⁶⁵ The ruling specifically allowed for the parties to mutually incorporate stipulations modifying default provisions of Islamic marriage contracts. Other legal opinions likewise based rulings on practicality for the parties. For instance, Sheikh Yusuf al-Qaradawi, chairman of the International Union of Muslim scholars,²⁶⁶ declared *misyar* contracts legal.²⁶⁷ His opinion on the legality of *misyar* contracts reads:

Misyar marriage should be viewed as a form of legal relationship between man and woman regardless of any description attached to it. This is pursuant to the juristic rule: “What matters most in contracts are motives and meaning, not the wording or structure.”

261. Navvab, *supra* note 213, at 221.

262. See, e.g., Moors, *supra* note 210, at 152.

263. *Id.* at 147 (describing the recent conversations in Saudi Arabia and Egypt regarding *misyar* marriages); HASSO, *supra* note 223, at 81, 89.

264. HASSO, *supra* note 223, at 92.

265. *Id.* at 91–92.

266. THE 500 MOST INFLUENTIAL MUSLIMS IN THE WORLD 38 (John Esposito & Ibrahim Kalin eds., 1st ed. 2009). Shaykh Yusuf al-Qaradawi is perhaps best known for his show discussing Islamic law on *Al Jazeera*, which is estimated to have an international audience of forty million viewers and has been listed as one of the most influential Muslims in the world. *Id.*

267. *Misyar Marriage from an Islamic Perspective*, ISLAM AWARENESS, https://www.islamawareness.net/Marriage/Misyar/fatwa_01.html [https://perma.cc/3VLC-9YZG].

Therefore, in determining the legal nature of this marriage, we should not judge things according to names, for as we know, people feel free in naming or describing something.

There is nothing new about this kind of marriage. It is in one way or another very similar to what is known as 'Urfi marriage or non-documented marriage.

Stipulating certain details in the marriage contract on both sides is acceptable. . . .

Therefore, based on what has been mentioned, we can state that Misyar marriage, or something in similar form, has been in practice from time immemorial. It also serves the purpose of some women, who, for instance, may be rich but happen to be unable to marry at the proper time. So, such women can opt for this kind of marriage.

But I do have to make it clear that the aforementioned statement does not make me a protagonist of Misyar marriage. In all my Fatwas and sermons, it is not mentioned anywhere that I give any support for such marriage.

The point is that when I was asked by a journalist to state my opinion regarding this marriage, I found it a pressing religious duty to give a clear-cut opinion on something that does not make unlawful what Almighty Allah has made lawful for His servants.

Therefore, if anyone seeks my opinion on this marriage, I must reply him saying: What do you mean by Misyar marriage. However, if I get an explanation that shows that in Misyar marriage, all the Islamic legal requirements are met, then the marriage is valid. . . .

Thereby, no one has the right to brandish it as unlawful.

There is no doubt that such marriage may be somehow socially unacceptable, but there is a big difference between what is Islamically valid and what is socially acceptable. . . .

This issue, therefore, needs a cautious approach. One should not feel free to condemn an act as absolutely forbidden, merely on social repugnance. Rather, one needs to have convincing evidence to determine the legal nature of each particular act.²⁶⁸

This legal opinion contains several important features. The opinion highlights the difference between social perception and legality. In doing so, it focuses the inquiry on the requirements of a valid marriage, and thus sexual relationship, under Islamic law. This inquiry holds *misyar* contracts to the same standard of any marriage contract under Sunni Islam (although clearly relying on the non-Hanafi positions regarding male guardian consent).²⁶⁹ Al-Qaradawi also makes the important point that, while

268. *Id.*

269. See SACHIKO MURATA, *Permanent Marriage, in MUTA'*, TEMPORARY MARRIAGE IN ISLAMIC LAW (1986) (ebook) [hereinafter MURATA, *Permanent*]

misyar contracts have become a point of modern debate, the historical reality is that Muslims have been modifying standard marriage contracts throughout Islamic legal history.

Muslims, especially women, have added modification and conditions to standard marriage contracts throughout Islamic history as a means of creating legal relationships that better served them.²⁷⁰ The legal opinion also highlights that *misyar* contracts may better serve certain types of parties than the default provisions of a traditional marriage contract. The opinion focuses on independently wealthy women who may have had difficulty finding a marriage partner. As noted within the Egyptian context, it is also easy to imagine that a *misyar* contract might also benefit young parties who would like to be sexually active but are not yet in a position to independently support a family.

Particularly with advances in contraception, it is easily conceivable that young people in their late-teens or twenties may want to enter into a *misyar* contract with mutually agreed upon provisions regarding contraception. Assuming parties want children at a later date, they might enter into a *misyar* contract that stipulates timelines around family planning that might include certain conditions around spousal financial maintenance (e.g., the husband agrees to become a sole income provider at the birth of their first child). Furthermore, given changing modern expectations in North American society around joint household incomes versus men serving as sole income providers (as the default provisions of an Islamic marriage contract would provide),²⁷¹ some couples may choose to create provisions in their contracts allowing for a joint household income for the entirety of the relationship. Finally, some couples may wish to enter into a *misyar* contract and then choose to modify the contract at a later date.

(“Marriage as a legal institution is defined and described in terms of a number of ‘pillars’ (*arkan*) and ‘statutes’ (*ahkam*) The pillars are those elements of the marriage contract whose absence nullifies the contract. The statutes are the rules and regulations that govern the contract Marriage has a set number of pillars . . . three according to the Malikis and Hanafis, and four according to the Hanbalis and Shafi’is.”).

270. SACHIKO MURATA, *The Legitimacy of Mut’a, in MUTA’, TEMPORARY MARRIAGE IN ISLAMIC LAW*, *supra* note 269 [hereinafter MURATA, *Legitimacy*].

271. MURATA, *Permanent*, *supra* note 269 (“Once the woman has taken up residence with her husband, he must support her Support includes things as food, clothing, shelter, and other necessities.”).

E. *MUT'A* CONTRACTS (TEMPORARY MARRIAGE)

A common social argument against *misyar* contracts is that they are too similar to *mut'a* contracts, which are impermissible under all schools of Sunni Islamic law and permitted in all *Shia* schools. All Sunni schools require that any marriage contract must be open ended.²⁷² Under Sunni law, a party to an Islamic marriage contract cannot enter the contract with a pre-established termination date in mind.²⁷³ Therefore, a Sunni marriage contract cannot state when the parties will end the contract. Although parties may delineate what circumstances would cause the relationship to end, the parties must go into the relationship without a specific intention to terminate it.²⁷⁴

Mut'a contracts, on the other hand, specifically state a termination date, which the couples can choose to renew or not.²⁷⁵ Historically, *mut'a* contracts were a means for men to have legal relationships for short periods of times while traveling.²⁷⁶ Ibn Battuta is perhaps the most famous Muslim to practice *mut'a* marriage.²⁷⁷ He said of his travels and marriage that:

It is easy to marry in these islands because of the smallness of the dowries and the pleasures of society which the women offer When the

272. MURATA, *Legitimacy*, *supra* note 270 (“The four Sunni schools of law all agree that temporary marriage is invalid.”).

273. *Id.* (“That which invalidates the contract is the stipulation of a time period.”).

274. MURATA, *Permanent*, *supra* note 269 (“It is permissible to include a condition of divorce in the marriage contract in certain cases. Hence, for example, a wife may stipulate that if her husband should marry a second wife, she will have the right to be divorced.”).

275. SACHIKO MURATA, *The Four Pillars of Mut'a*, in *MUTA', TEMPORARY MARRIAGE IN ISLAMIC LAW*, *supra* note 269 [hereinafter MURATA, *Pillars*] (“The time period of a temporary marriage must be delineated in a manner which allows no possibility of increase or decrease.”).

276. Shabnam Mahmood & Catrin Nye, *I Do. . . for Now. UK Muslims Revive Temporary Marriages*, BBC NEWS (May 13, 2013), <https://www.bbc.com/news/uk-22354201> [<https://perma.cc/X6J9-PXKG>] (“The temporary marriage, or nikah mut'ah, is an ancient Islamic practice that unites man and woman as husband and wife for a limited time. Historically it was used so that a man could have a wife for a short while when travelling long distances.”).

277. See *The Travels of Ibn Battuta*, BERKELEY ORIAS, <https://orias.berkeley.edu/resources-teachers/travels-ibn-battuta> [<https://perma.cc/LT79-V4L5>] (detailing the travels of Ibn Battuta, a fourteenth-century Muslim who journeyed “for around 29 years and . . . covered about 75,000 miles visiting the equivalent of 44 modern countries”).

ships put in, the crew marry; when they intend to leave they divorce their wives. This is a kind of temporary marriage.²⁷⁸

Mut'a historically was primarily used in the context of travel; however, Muslims today have expanded the use as a means to have an Islamically licit sexual relationship in contexts outside of travel.²⁷⁹

Contemporarily, *mut'a* can be an attractive means to get to know a prospective partner while still complying with the strictures of Islamic law.²⁸⁰ One British Muslim woman, Sara, described the benefits of using a *mut'a* contracts as follows: "It allowed us to meet without breaking the bounds of Sharia [Islamic law]. We both wanted to date, to go out for dinner or go shopping and just get to know each other better before getting married, which we wouldn't have been able to do otherwise."²⁸¹ She also described the ease of entering into such a relationship: "It's basically a contract. You sit down and stipulate your conditions We stipulated the duration, my father's conditions, and I requested what you would call a dowry where the guy gives a gift to the girl. It's simple, straightforward and doesn't take long at all."²⁸²

Like a *misyar* contract, a *mut'a* contract may precede a traditional relationship contract.²⁸³ The woman described above entered into a *mut'a* contract for six months before entering into a full marriage.²⁸⁴ A contemporary American Muslim blog describes *mut'a* as "essentially allow[ing] for consensual relationships between genders who want to get to know each other

278. *Escape from Dehli to the Maldive Islands and Sri Lanka: 1341 - 1344*, BERKELEY ORIAS, <https://orias.berkeley.edu/resources-teachers/travels-ibn-battuta/journey/escape-delhi-maldive-islands-and-sri-lanka-1341-1344> [<https://perma.cc/9JV8-67HA>].

279. See Laila Khan, *Let's Talk About Mutah, or Temporary Marriage in Islam*, MUSLIM GIRL (Jan. 13, 2017), <https://muslimgirl.com/lets-talk-mutah-temporary-marriage-islam> [<https://perma.cc/TFR8-QKXV>] ("People who get engaged will perform Mutah first so they can speak to each other, hang out and get to know each other with conditions set by the woman and her family.")

280. *Id.* ("Mutah essentially allows for consensual relationships between genders who want to get to know each other and/or become mahram (lawful) to one another.")

281. Mahmood & Nye, *supra* note 276 (alteration in original).

282. *Id.*

283. See Khan, *supra* note 279 ("A divorced woman can engage in relationships through Mutah before deciding if she does or does not want to remarry another man.")

284. Mahmood & Nye, *supra* note 276.

and/or become mahram (lawful) to one another. When used with correct knowledge and abiding by the rules, [*mut'a*] makes sense and can even be empowering for some.²⁸⁵ While there are indications that *mut'a* contracts are gaining popularity among youth in the U.S. and the U.K.,²⁸⁶ the legality of such contracts is limited to Shia jurisprudence for historical reasons.

1. History of *Mut'a* Jurisprudence

The Sunni-Shia divide on *mut'a* marriage originates from a difference of opinion on the meaning of the Quranic verse 4:24²⁸⁷:

Lawful for you is what is beyond all that [the prohibitions listed in the prior verse], that you may seek, using your wealth, in wedlock and not in license. So those of them whom you enjoy, give them their appointed wages; it is no fault in you in agreeing together, after the due apportionate [sic]. God is All-Knowing, All-Wise.²⁸⁸

This verse was revealed during an early period of Islamic history, when early-Muslims sought refuge in Medina.²⁸⁹ During that period, the geographic custom was for men to give women a dowry as a part of licit sexual relationship for a specified and mutually agreed upon period of time.²⁹⁰ The revelation of this verse confirmed the permissibility of such agreements.²⁹¹ At that time in Medina, “this custom was looked upon as one kind of temporary marriage and was referred to by the term *istimta'*, the same word employed in the Qur'anic verse.”²⁹² On the basis of these verses and the interpretation of the early Muslim community, Shia scholars concluded that marriages of a limited duration are permissible under Islamic law.²⁹³

285. Khan, *supra* note 279.

286. Mahmood & Nye, *supra* note 276 (“Because of the informal nature of the union there are no official statistics to show how many temporary marriages there are in the UK. But a number of senior Shia Muslim scholars and Muslim student organisations told BBC Asian Network there is something of a revival.”).

287. MURATA, *Legitimacy*, *supra* note 270. See generally GOURJI, *supra* note 212 (detailing status of *mut'a* in Islamic law throughout the four schools of thought).

288. MURATA, *Legitimacy*, *supra* note 270 (quoting QURAN 4:24).

289. *Id.*

290. *Id.* (“At that time the men of Medina used to ‘seek enjoyment’ from women for a limited period of time in exchange for a specified sum of money.”).

291. *Id.* (noting that the verse “confirmed an existing situation” of men giving women a dowry as a part of a licit sexual relationship).

292. *Id.*

293. *Id.*

Specifically, Imam Ja'far, the founder of the dominant Shia School (the Jafari School), ruled on the permissibility of *mut'a* contracts.²⁹⁴ He "considered *mut'a* a divine mercy by means of which people were saved from the sin of fornication and delivered from God's retribution."²⁹⁵ Imam Ja'far referenced the Quranic verse "[w]hatsoever mercy God opens to men, none can withhold"²⁹⁶ when stating that "[*m*]*ut'a* is part of that mercy."²⁹⁷ Furthermore, Imam Ja'far also relies on the authentic narration of Imam Ali, the cousin of the Prophet Muhammad and one of the first Muslims, that "[i]f 'Umar had not prohibited *mut'a*, no one would commit fornication except the wretched."²⁹⁸

Furthermore, Shia scholars agree that the use of a *mut'a* contract does not create any question regarding the legitimacy of any children that may issue.²⁹⁹ From a Shia legal position, the "bed" of the *mut'a* contract is a licit bed, therefore any resulting children are legitimate.³⁰⁰ The following question of children's legitimacy was directed to Imam Ja'far: "If the wife becomes pregnant as a result of *mut'a*, to whom does the child belong?" He replied: "To the father", i.e., the child is legitimate."³⁰¹ While Shia legal opinions confirm the permissibility of *mut'a* contracts and the legitimacy of resulting children, Sunni scholars reached a very different conclusion.

Sunni scholars, on the other hand, agree that *mut'a* contracts were initially permissible, but rely heavily on the Caliph 'Umar's ban of *mut'a* as grounds for its impermissibility.³⁰² The ban occurred after the death of the Prophet Muhammad, and Sunnis claim that the ban met nearly universal agreement among the other companions of the Prophet Muhammad, although not with Ali and not initially with Ibn 'Abbas.³⁰³ Scholars

294. *Id.*

295. *Id.*

296. THE KORAN INTERPRETED 35:2 (A.J. Arberry trans., 2003).

297. MURATA, *Legitimacy*, *supra* note 270.

298. *Id.*

299. *Id.*

300. *Id.* ("In *mut'a* the 'bed' is legitimate, so the offspring is also legitimate.")

301. *Id.*

302. GOURJI, *supra* note 212, at 57–62 (discussing differing interpretations between Sunni and Shia of 'Umar's sermon).

303. MURATA, *Legitimacy*, *supra* note 270 ("There are many sayings of the Shi'i Imams and the Companions which indicate that *mut'a* was permitted up

rely on the Caliph ‘Umar’s ruling and the claimed nearly-universal agreement at the time as the strongest grounds for universally banning *mut’a* marriages under Sunni jurisprudence.³⁰⁴ Sunni scholars further argue that the verse that Shia scholars rely on (Quran 4:23) was “subsequently abrogated (*naskh*) by other Qur’anic verses. They offer three arguments to prove their point: other Qur’anic verses, the sermon of ‘Umar banning *mut’a*, and *hadith* of the Prophet transmitted by the Companions.”³⁰⁵

The famous thirteenth-century scholar, Ibn al-‘Arabī, addressed the unique vacillating legal status of *mut’a* during the time of the Prophet Muhammad.³⁰⁶ Ibn al-‘Arabī describes *mut’a* as “one of the most remarkable statutes in Islamic law, since it was permitted at the beginning of Islam, then forbidden at the Battle of Khaybar, then permitted again at the war of Awtas. Finally it was forbidden and remained forbidden.”³⁰⁷ Other scholars claim that the ruling on *mut’a* changed seven times, and that, when permissible, *mut’a* was permissible only under the condition of doing so while traveling.³⁰⁸ Sunni scholars conclude that at the time of the death of the Prophet Muhammad, the *hadith* (statements) of the Prophet Muhammad indicate that *mut’a* was prohibited.³⁰⁹ They further conclude that the Caliph ‘Umar banned *mut’a* on the basis of these final statements of the Prophet Muhammad.³¹⁰

until the time of ‘Umar’s prohibition. Three of the most famous are those of ‘Ali, Ibn ‘Abbas, and ‘Umran b. al-Hasan.”).

304. GOURJI, *supra* note 212, at 58 (analyzing Al-Rāzī’s argument that there must have been agreement *mut’a* was forbidden because no one contradicted ‘Umar at the time).

305. MURATA, *Legitimacy*, *supra* note 270.

306. GOURJI, *supra* note 212, at 66; *see also* MURATA, *Legitimacy*, *supra* note 270 (detailing the “voluminous[]” writings of Ibn ‘Arabī on the evolution of *mut’a* permissibility).

307. MURATA, *Legitimacy*, *supra* note 270.

308. *Id.* (“Al-Qurtubi quotes Abu Ja’far al Tahawi to the effect that none of the *hadith* which are quoted as referring to the permissibility of *mut’a* in unconditional terms are in fact unconditional, since they specify that *mut’a* was permitted only during journeys.”).

309. *Id.* (“In Sunni sources *hadith* have been transmitted from the Prophet showing that he banned *mut’a* during his lifetime. In most of the Sunni ‘sound collections’ (*sihah*), it is related from ‘Ali that he said: ‘Verily the Prophet of God banned the *mut’a* of temporary marriage and the eating of the meat of domesticated asses.”).

310. *Id.*

It is unsurprising that Shias do not give weight to the ruling of Caliph ‘Umar, as dispute of his mantle of leadership contributed in part to the initial Sunni-Shia divide.³¹¹ Shias do not view his caliphate as legitimate and therefore do not rely on his legal rulings in determining Islamic law.³¹² Regarding the statements of the Prophet Muhammad that the Caliph ‘Umar used in his ruling, Shia scholars determined that the “*hadith* demonstrating that *mut’a* is forbidden are in conflict with those that show it is permitted. They also conflict with *hadith* that show that *mut’a* continued to be permitted during the times of the Prophet, Abu Bakr, and ‘Umar, up until the time that ‘Umar banned it.”³¹³

Furthermore, regarding the *hadith* on the permissibility and impermissibility of *mut’a*: “Everyone agrees that the *hadith* indicating that *mut’a* was permitted at certain times are authentic, but this is not the case concerning those which indicate that it was banned.”³¹⁴ Therefore, rather than rely on the near consensus among companions of the Prophet Muhammad at the time of Caliph ‘Umar, Shias argue that consensus only exists “in the sense that all Muslims at one time agreed that *mut’a* was permitted.”³¹⁵

This history is representative of the diversity of opinion that exists within Islamic law and the differing approaches to the concept of consensus. While a *mut’a* is permissible for a Muslim that adheres to Shia schools of thought, it would not be for a Muslim who adheres to any of the Sunni schools.³¹⁶ That said, even a *mut’a* contract must meet the required elements of a Muslim’s

311. *See id.* (“In general the Shi’a argue that if ‘Umar’s prohibition had been based upon the words of the Prophet, then other Companions would have known about it.”).

312. *Id.* (stating the Shia arguments against the validity of ‘Umar’s remarks: “[O]ne of the contemporary *Shi’i ulama*’ argues as follows: ‘Umar may have made his judgment completely on his own initiative and in direct contradiction to the words of the Prophet; or he may have based his judgment on a prohibition issued by the Prophet himself. If the first case is true, then ‘Umar’s judgment is groundless, as noted above. And the second case cannot be true, since a number of the Companions have given witness to the fact that *mut’a* was permitted during the lifetime of the Prophet and up until the time of his death.”).

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* (reviewing the different perspectives of the Shia and Sunni schools regarding a *mut’a*).

marriage contract.³¹⁷ Namely, offer, acceptance, and a *mahr* (dower).³¹⁸ All the contracts described above also share in common that they assume certain default provisions, which may or may not then have been modified. This is reflective of how classical Islamic jurisprudence as a whole understands marriage in a gendered framework.

III. CONTRACT CUSTOMIZATION

This gendered framework leads to default provisions creating gender-dependent rights and duties for parties to a relationship contract. Islamic law allows for contract customization via the modifications of some these default provisions.³¹⁹ In particular, it allows for the modification of the male party's financial obligations to the female party (although not to any resulting children).³²⁰ It also allows for modification of the default termination provisions, which provide greater ease for the male party.³²¹ Such a modification can allow for gender parity in unilateral termination (divorce) of the contract.

These can be important modifications for Muslims who are either not ready for the financial obligations the default provisions require of the male party or who do not envision such a financial dynamic between themselves. Couples may also find the idea that women do not have equal rights to end the relationship under default provisions anathema to their values and customize their contract accordingly. Other Muslims may reject the default gendered framework of classical Islamic jurisprudence entirely. They may choose modern reform proposals to Islamic law that structure marriage contracts on the laws of partnership agreements. Whether working within classical jurisprudence or adopting modern reforms, Muslims have options to customize their relationship contracts.

317. MURATA, *Pillars*, *supra* note 275 (“Shi’i jurisprudence discusses temporary marriage with all the care it bestows upon permanent marriage. Like permanent marriage, *mut’a* has ‘pillars’ and ‘statutes.’”).

318. *Id.*

319. *See supra* Part II.B.

320. ibn Adam, *supra* note 207.

321. *See infra* Part III.B.

A. CONTRACTUAL RIGHTS AND DUTIES—GENDERED AND
EGALITARIAN IDEALS

From a classical perspective, the default provisions of Islamic marriage contracts create certain rights and duties for each party that differ depending on gender. The default duties for a husband include payment of the *mahr* (dower) to the wife, “and to provide financial maintenance (*nafaqah*) to his wife [and any resulting children].”³²² All schools of thought agree that a dower is an essential component to an Islamic marriage contract, but schools differ as to the required amount or type of dower.³²³ The *mahr* within marriage contracts run the gamut from property or cash to education of some kind (such as being taught a verse of the Quran) to travel (such as a trip to Mecca).³²⁴ Although the *mahr* is often translated as the “dower” or “brideprice” it is often perhaps best understood as an insurance policy.³²⁵ The *mahr* is “Quranically-required of every valid Muslim marriage contract.”³²⁶ Thus, this is a non-modifiable contractual provision, although the couple can negotiate what *mahr* the contract will require.³²⁷

From a classical perspective, the duties of a wife generally are sexual availability (*tamkin/ta'ah*), i.e., the wife is sexually available to her husband in their marital home.³²⁸ Classical scholars framed this sexual availability in terms of obedience, i.e., wives had a “duty of obedience [that] was limited to the wife’s sexual availability, as long as it did not interfere with her religious duties or health (e.g., he cannot interfere with her

322. Mir-Hosseini et al., *supra* note 138, at 11.

323. MURATA, *Permanent*, *supra* note 269 (noting differences among the schools about the payment of the dower).

324. Mir-Hosseini et al., *supra* note 138, at 64 (defining *mahr* and providing examples).

325. Asifa Quraishi-Landes, *Secular is Not Always Better: A Closer Look at Some Woman-Empowering Features of Islamic Law*, in *HALF OF FAITH*, *supra* note 23, at 126 (“For many Muslims, the *mahr* is a woman-empowering tool, a sort of insurance policy that facilitates female financial independence upon marriage.”).

326. Quraishi-Landes, *supra* note 23, at 53.

327. Quraishi-Landes, *supra* note 325, at 127.

328. Mir-Hosseini et al., *supra* note 138, at 11 (“[T]he wife is required to submit (*tamkin/ta'ah*) to her husband, which includes being sexually available to him in the marital home.”).

fasting during Ramadan, during menstruation, after childbirth, etc.).”³²⁹

Some scholars limited a wife’s obligations to this narrow definition of sexual availability, i.e., “a wife had no obligation to do housework or to care for the children – even to breastfeed her babies. She could demand ‘wages’ if she did these tasks.”³³⁰ For some Muslims, the historical interpretations of marital rights and obligations may be antithetical to how many Muslims aspire to live their lives and to the kind of relationship they desire to foster with God through marriage.

Other scholars have called for more egalitarian understandings of the relationship that an Islamic marriage contract creates.³³¹ These scholars base their proposed legal reforms on Quranic verses speaking on the relations between spouses. These verses include, “And among God’s signs is that God created for you mates from among yourselves, that you may dwell in tranquility with them, and God has put love and mercy between your (hearts); Indeed, in that are signs for those who reflect.”³³² This verse highlights that the Quranic “objective of marriage is for spouses to provide for one another *sakinah* (tranquility and repose), *mawaddah* (affection and love) and *rahmah* (mercy and compassion).”³³³ Other Quranic verses speak to the “additional core Qur’anic ethical principles in relation to marriage and gender relations, including ‘*adl* (justice, 4:3), *qist* (fairness, 4:3), *ihsan* (kindness, 2:229-230; 2:236-237), *tashawur wa taradi* (consultation and mutual consent, 2:233); and *ma’ruf* (that which is commonly known to be good, 2:228; 2:229-230; 2:231; 2:233; 2:236; 65:2).”³³⁴ Based on these Quranic verses, some contemporary scholars call for interpretations that “reflect the more egalitarian needs and realities of Muslims today, while continuing to embody the justice central to the Qur’anic message.”³³⁵

329. *Id.* at 11–12.

330. *Id.* at 12.

331. *Id.* at 13 (detailing a model for egalitarian relationships based on Quranic ethical principles).

332. QURAN 30:21.

333. Mir-Hosseini et al., *supra* note 138, at 14.

334. *Id.*

335. *Id.*

The proposed changes to traditional interpretations of Islamic law to include more egalitarian relationships between spouses is not merely hypothetical. Indeed, “reforms in Tunisia in 1993, Morocco in 2004, and Algeria in 2005 sought to equalize spouses’ statutory rights and responsibilities, shifting from the idea that men and women should have distinct, gendered roles and rights to the idea that rights and responsibilities should be mutual.”³³⁶ Some of these legislative reforms also allow for contractual modifications.

For instance, reforms in Morocco continue to conceptualize that a husband and wife will have separate property throughout their marriage, however, the law also “provides that the couple may conclude a document . . . in which they agree on a framework for the management, investment, and distribution of assets that are acquired during the marriage.”³³⁷ While these reforms occurred on a legislative level, North American Muslims can memorialize such an egalitarian approach in their own contract provisions without the involvement of the state.

Other recommendations for reconceptualizing the rights and duties of Islamic marriage contracts suggest moving away from a contractual model that conceptualizes duties and responsibilities broken down by gender. Rather, the contract would speak to mutual responsibilities of the parties to the partnership or the “responsibility of a household.”³³⁸ These recommendations reference the Quranic commandments of verse 9:71: “The Believers, men and women, are protectors one of another; they enjoin what is just, and forbid what is evil”³³⁹ These recommendations also build upon the example of the Prophet Muhammad.³⁴⁰

For example, it is well documented and widely accepted that the Prophet Muhammad and his first wife “Khadija together managed her business and mutually cared for and protected each other during times of hardship.”³⁴¹ Additionally, Khadija

336. *Id.* at 44.

337. *Id.* at 48.

338. *Id.* at 56.

339. QURAN 9:71 (A. Yusuf Ali trans.). Other Quranic verses also support this understanding. *Id.* at 2:30, 4:135, and 4:8.

340. Mir-Hosseini et al., *supra* note 138, at 56–57 (“Spouses should work to share decision making in all aspects of family life, including matters related to sexual relations, finances, and how to raise and care for children, as demonstrated by the Prophet and taught in the Qur’an.”).

341. *Id.* at 56.

was fifteen years older than the Prophet Muhammad, was a widow, and had children from her prior marriage.³⁴² They were monogamously married for twenty-five years and remained married until Khadija's death.³⁴³

The Prophet Muhammad's subsequent marriages also provide examples for egalitarian relationships between spouses. For instance, the Prophet Muhammad's wife, Aisha, reported that the Prophet Muhammad would "keep himself 'busy serving his family' and would 'sew his garment, milk his sheep and participate in household chores.'"³⁴⁴ The Prophet Muhammad's marriages provide an example of marital relations that both meet the traditional understandings of contractual duties, while also demonstrating a great degree of egalitarianism in the marital relationship itself.

The call for interpretations of Islamic law that meet the contemporary understandings and ideals of many people today may not appeal to all. For some Muslims, there will be a greater sense of security with strict adherence to historical understandings and rulings. Even for Muslims who wish to adhere to traditional interpretations of Islamic law there may be an inability to fulfill those duties. For instance, traditional interpretations expect that men will be the primary financial providers, and by default, women "are primarily expected to perform unpaid labour and caregiving in the home."³⁴⁵

However, macroeconomic forces may not result in a husband being able to fulfil the role of primary financial provider, nor may it be what the couple desires. For instance, the couple may want the lifestyle made possible via two-income household, and a wife may have a higher earning potential than her husband. She may also have "valuable educational and vocational skills" that she wishes to use.³⁴⁶ Women may also wish to contribute financially to help ensure the financial security of her family and herself.³⁴⁷

342. *The Mother of the Faithful Khadijah bint Khuwaylid* (رضي الله عنها), AL-FURQAN, <https://al-furqan.com/the-mother-of-the-faithful-khadijah-bint-khuwaylid> [<https://perma.cc/L8MY-HFJR>].

343. *Id.*

344. Mir-Hosseini et al., *supra* note 138, at 57.

345. *Id.* at 36.

346. *Id.* at 41.

347. *See id.* at 42 ("[Women's] salaries are one source of financial security in case they face problems individually or as a family.").

In Muslim-majority countries, women do often contribute financially to the household.³⁴⁸ However, this contribution “does not necessarily lead to the couple rethinking gendered spousal roles, and often the spouses have a sense of anxiety or unease about such contributions because they have not resolved the disconnect between the legal and societal norm and the reality.”³⁴⁹ Customizing contracts in accordance with Islamic law and a couple’s lived realities may help resolve anxieties about their roles in and contributions to the relationship. Indeed, the late-Ottoman Empire provides abundant examples of ways that Muslims traditionally customized marriage contracts to best meet their needs.

1. Lessons from the Ottoman Empire

During the late Ottoman Empire, the Ottoman legal system developed to require the registration of marriage contracts with a governmental authority. The court archives from this time provide a wealth of information on what Muslims historically understood as Islamically permissible customizations in their marriage contracts.³⁵⁰ These archives demonstrate a breadth of diversity in how Islamic marriage contracts were enacted and that the “time, place, and social conditions of the parties” played significant roles in contract negotiation and formation.³⁵¹ Parties to these contracts met the basic requirements of Islamic law, but the “administration and execution [of marriage contracts] differed not only from place to place but also from case to case.”³⁵²

Parties had no legal difficulty including specific conditions in their contracts, provided “the main outlines of the *shari’a* were followed.”³⁵³ In particular, parties could contract around default duties and ensuing rights.³⁵⁴ Although the default provisions of Islamic law created duties for the male party to provide the female party with “support, including food, housing, and clothing,

348. *See id.* at 41 (describing circumstances in which women of Muslim countries have taken on larger financial roles within their families).

349. *Id.* at 40.

350. Abdal-Rehim Abdal-Rahman Abdal-Rehim, *The Family and Gender Laws in Egypt During the Ottoman Period*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY* 96, 96 (Amira El Azhary Sonbol ed., 1996).

351. *Id.* at 102.

352. *Id.*

353. *Id.*

354. *See id.* at 102–03.

such conditions could be waived or amended in the contract when” the female party agreed.³⁵⁵

Similarly, the default provisions of Islamic law allow the male party to enter into up to four marriage contracts at one time; however, parties often agreed to waive that right as a condition upon entering into the contract.³⁵⁶ Thus, parties frequently modified contracts to limit the male party’s right to polygamy.³⁵⁷ Generally, such provisions would modify the contract such that if the male party entered an additional marriage contract, then the pre-existing marriage contract would be automatically terminated.³⁵⁸

Conditions to marriage contracts could also be entered into during the executory period of a contract. For instance, if parties had not finalized a divorce but had only entered into a separation or the initial phase of divorce, then the female party might set additional contractual stipulations to continue in the relationship.³⁵⁹

Local custom also played a significant role in how parties entered and exited relationships. For instance, in Egypt, parties would often execute the marriage contract, at which time a “betrothal period” would begin.³⁶⁰ The parties would then use this betrothal period as a means for themselves and their families to determine their compatibility prior to consummation of the marriage and cohabitation.³⁶¹

This practice has continued into the modern period, with couples using a marriage contract to “date” without necessarily engaging in sexual intercourse, although doing so would be technically permissible.³⁶² This practice is based in part on the way Islamic law differentiates between the termination of a marriage

355. *Id.*

356. *Id.* at 103 (“[T]he shari’a may allow the husband to take four wives, but that right was often waived as a wife’s condition for marriage.”).

357. *Id.* (noting that wives will waive the condition that would normally allow their husband to marry multiple people).

358. *Id.* (“It was understood that if either party did not abide by the conditions detailed in the contract, then the other member of the party was free to seek divorce . . .”).

359. *See infra* Part III.B.1.

360. Abdal-Rehim, *supra* note 350, at 103.

361. *Id.*

362. Mahmood & Nye, *supra* note 276 (describing ways UK Muslims use temporary marriage contracts to date and get to know a potential spouse).

contract that is consummated versus unconsummated. Specifically, if the male party terminates the contract prior to consummation, he can ask for the return of half the *mahr* (assuming the *mahr* is of monetary value).³⁶³ Termination provisions are also a very important area for contractual modification, as Islamic law's default provisions conceive of different kinds of contractual termination (divorce) dependent on the party's gender.

B. TERMINATION PROVISIONS—DIVORCE AND RECONCILIATION

1. Types of Termination

Unlike American culture and law, multiple types of divorce exist under Islamic law. The default provisions of Islamic law allow for both men and women to initiate divorce, however, "there are significant differences between their procedural rights."³⁶⁴ Islamic law broadly contains the following varieties of divorce:

Talaq: the husband's unilateral right to declare divorce with no judicial proceeding;

Faskh: a third-party judge issues a divorce based on a wife's claim of maltreatment in which she retains the *mahr*;

Khula: negotiated divorce where the husband consents to divorce in exchange for payment (generally a return of the *mahr*); and

Talaq al-tafwid: "delegated divorce"—a wife-initiated divorce where the husband grants his consent to his wife being able to initiate a *talaq* divorce as a term of the marriage contract.³⁶⁵

Further permutations of these rules exist between the doctrinal schools, depending upon the grounds for the divorce, i.e.,

363. MURATA, *Permanent*, *supra* note 269 ("[I]f [the male party] should divorce [the female party] before consummation and she has not yet taken the dower, he only has to pay her one-half.").

364. MACFARLANE, *supra* note 115, at 35.

365. See Asifa Quraishi-Landes, *Islamic Family Law in American Courts*, YALE L. SCH. (Feb. 13, 2018), <https://law.yale.edu/yls-today/yale-law-school-videos/asifa-quraishi-landes-islamic-family-law-american-courts> [<https://perma.cc/88NJ-N3J2>]; Kaniz Fatma, *What Is Delegated Divorce (Talaq-e-Tafweez or Talaq-e-Tafwid)?*, NEW AGE ISLAM (Sept. 7, 2019), <https://www.newageislam.com/islamic-q-a/kaniz-fatma-new-age-islam/-delegated-divorce-talaq-e-tafweez-talaq-e-tafwid/d/119683> [<https://perma.cc/3VGR-BKWL>] (describing what *talaq-tafwid* is).

adultery, abuse, failure to pay a contractual provision, apostasy, etc.³⁶⁶ The *talaq* divorce is both simpler and more complicated than any corollary under American law. *Talaq* divorce involves the husband making an oral repudiation of the wife.³⁶⁷ Today, many Muslim-majority countries have passed legislation that requires court involvement; however, traditional Islamic law allows for the dissolution of a marriage entirely as a private matter.³⁶⁸

In a *talaq* divorce, a husband does not need to justify or “produce a valid reason for the dissolution of marriage.”³⁶⁹ In order to begin the process of a *talaq* divorce, the husband needs to pronounce, “I divorce/emancipate you,” preferably in Arabic.³⁷⁰ This pronouncement in and of itself does not effectuate termination of the marital agreement.³⁷¹ Rather, it initiates the start of a temporary separation period, in which the couple may reconcile.³⁷²

This period of separation (the *'idda*) “for a menstruating woman . . . is three menstrual cycles or around three months.”³⁷³ The pronouncement cannot be made while the woman is menstruating, and the couple cannot have sexual intercourse during

366. Kecia Ali, *Muslim Sexual Ethics: Divorce*, BRANDEIS UNIV. (July 1, 2003), <https://www.brandeis.edu/projects/fse/muslim/divorce.html> [<https://perma.cc/7CQM-BBZZ>] (“Acceptable grounds for divorce vary widely around the legal schools. In the Hanafi school, for example, a woman has almost no grounds for obtaining a divorce provided her husband has consummated the marriage Maliki law, by contrast, allows her to seek divorce for non-support, abandonment, and the broad charge of ‘injury’ (*darar*), which can be physical or otherwise.”).

367. *Id.* (“*Talaq* is a unilateral repudiation of the wife by the husband, and does not require the wife’s consent.”).

368. *Equal Divorce Rights in Muslim Family Laws*, MUSAWAH 5 (2021), <https://arabstates.unwomen.org/sites/default/files/Field%20Office%20Arab%20States/Attachments/2021/09/ENG-Policy-Brief-4-Equal-Divorce-Rights-in-Muslim-Family-Laws.pdf> [<https://perma.cc/K4GE-32ZQ>] (describing that many Muslim-majority countries have reformed their laws and now require divorce to be effectuated through a court).

369. PAULINE KRUIGNER, *ISLAMIC DIVORCES IN EUROPE: BRIDGING THE GAP BETWEEN EUROPEAN AND ISLAMIC LEGAL ORDERS* 121 (2015).

370. *Id.* at 76 (clarifying that the literal translation is closer to “you are repudiated”).

371. MURATA, *Permanent*, *supra* note 269 (describing the process of divorce).

372. *Id.*

373. MACFARLANE, *supra* note 115, at 35.

the separation period.³⁷⁴ For the divorce to become final, the husband must make the same pronouncement three times.³⁷⁵ The schools of thought differ as to whether the three pronouncements can be concurrent or whether a month/menstrual cycle must separate each pronouncement.³⁷⁶ The implications of this are as follows:

All schools agree that divorce does not become irrevocable until the husband has pronounced *talaq* three times. This means that even after the end of the *iddat* [three-month separation period], if only one or two *talaqs* have been given, the divorce is still revocable—that is, the couple may reconcile and live together again as man and wife without the need for a new *nikah* [marriage contract]. The divorce only becomes irrevocable once *talaq* has been pronounced a total of three times; and effective once the couple has not been sexually intimate for a total of three months, with this time running from the first pronouncement of *talaq*. After a third and irrevocable *talaq*, the husband cannot change his mind and remarry his former wife unless she marries another man, and then gets divorced or becomes widowed. The device of the *iddat*, and the requirement for three pronouncements of *talaq*, are intended to ensure that decisions are not made hastily and that *talaq* is not pronounced simply as a bluff, or to punish or traumatize the wife.³⁷⁷

Any requirement for spousal maintenance ends upon the separation period.³⁷⁸ Women in this type of divorce will keep their *mahr* given at the time of entering the marriage contract, and if the couple included a deferred *mahr* in their contract, then the wife would receive a deferred *mahr* at the end of the separation period.³⁷⁹

2. *Talaq Al-Tafwid*

As noted earlier, *talaq al-tafwid* is a delegated right of *talaq* (unilateral, no-fault, extra-judicial divorce) from the husband to the wife, which enables her to dissolve the marriage as if he had done so.³⁸⁰ If the husband delegates this right to the wife, he does

374. MURATA, *Permanent*, *supra* note 269.

375. *Id.* (“The man must pronounce the formula on three separate occasions . . .”).

376. *Id.*

377. MACFARLANE, *supra* note 115, at 35 (footnote omitted).

378. *Id.* at 36.

379. *Id.*

380. HALLAQ, *supra* note 8, at 283; *see also* Muhammad Ifzal Mehmood & Normi bt Abdul Maleks, *A Study of Talaq Al-Tafwid in Islamic Law and Contemporary Legislations: Should Malaysia Follow Suit?*, 4 SHARIAH L. REPS. 1, 1–4 (2019), http://irep.iium.edu.my/89016/1/shlra2019_4_0001%20%281%29

not lose his right to do so.³⁸¹ Rather, the inclusion of such a provision in a marriage contract results in both parties having the unilateral right to terminate the contract without cause.³⁸² *Talaq al-tafwid* is based on a verse from the Quran that narrates an incident when the Prophet Muhammad “told his wives that they were at liberty to live with him or to get separated from him as they chose.”³⁸³ *Tafwid* provisions are the “great equalizer” when it comes to termination of a marriage contract under Islamic law.³⁸⁴ A husband cannot later revoke such a provision, and a woman is only limited to the same extent she would be if her husband had issued the *talaq*.³⁸⁵

This is particularly important regarding the financial well-being of a woman. Because a *talaq al-tafwid* provision operates as if the husband had issued the divorce pronouncement, the woman is entitled to any deferred *mahr* (compensation) included in the contract.³⁸⁶ Unlike divorcing via *khul'* wherein women generally must return the *mahr* (and forgo any deferred *mahr*),³⁸⁷ a *talaq al-tafwid* provision can enable a woman to

.pdf [<https://perma.cc/PGN5-DASJ>] (explaining Quranic basis and practical mechanics of *talaq al-tafwid*).

381. Lucy Carroll, *Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife*, 16 MOD. ASIAN STUD. 277, 279 (1982).

382. *Id.* (“Like the husband’s pronouncement of *talaq*, the wife’s pronouncement under authority delegated to her by the husband (*talaq-i-tafwid*) dissolves the marriage without the intervention of a Court.”).

383. Mehmood & Maleks, *supra* note 380, at 2 (citing QURAN 33:28); *see also Talaq-i-Tafwid in the Quran*, in TALAQ-I-TAFWID: THE MUSLIM WOMAN’S CONTRACTUAL ACCESS TO DIVORCE: AN INFORMATION KIT 11 (Lucy Carroll & Harsh Kapoor eds., 1996) (“It is explained by the Muslim jurists that the Prophet (peace be on him) had . . . empowered his wives to choose either him or a separation, that is, they might either get their marriages dissolved or prefer to choose their continuation.”).

384. HALLAQ, *supra* note 8, at 283.

385. *Talaq-i-Tafwid in Texts and Textbooks*, in TALAQ-I-TAFWID, *supra* note 383, at 17 (“Delegation of divorce is the assignment of a power . . . ; it is not agency, and therefore the husband can not [sic] retract from it” (first alteration in original) (citing MUHAMMAD ALA-UD-DIN HASKAFI, DURR-UL-MUKHTAR 11 (B.M. Dayal trans., 1913))).

386. Lucy Carroll, *Drafting a Marriage Contract with a Tafwid Clause: Practical Considerations and Information*, in TALAQ-I-TAFWID, *supra* note 383, at 90 n.7 (“All unpaid *mahr*, both prompt and deferred, is payable on divorce by *talaq*, whether pronounced by the husband or by the wife under authority delegated by her husband.”).

387. Quraishi-Landes, *supra* note 365.

divorce and have the financial protection the contract envisioned in the event of *talaq*. Furthermore, because a woman's invocation of a *talaq al-tafwid* provision is as if the husband has divorced her, she is also entitled to financial support during the *'idda* (a period of three menstrual cycles or an equivalent time if she does not menstruate, prior to remarriage).³⁸⁸

Talaq al-tafwid provisions are not merely a hypothetical tool that a woman might negotiate in her contract. Rather, *talaq al-tafwid* provisions have been used by Muslim women throughout Islamic history, and women today continue to include them in their contracts.³⁸⁹ For instance, in a 1919 case from Calcutta, a couple included a conditional *talaq al-tafwid* provision that read as follows: "Be it noted that if I violate any of the aforesaid conditions or any portion therefore, I delegate to you my own power of giving three *talaqs* such as is possessed by males. Whenever you choose you may *talaq* or repudiate [yourself] three times and then take another husband."³⁹⁰ The husband subsequently took a second wife and she repudiated herself three times.³⁹¹ The husband brought a suit challenging the dissolution of the marriage, but the "Court accepted the validity of her dissolution of the marriage and dismissed the husband's suit."³⁹² One of the challenges to the *talaq al-tafwid* provision that the husband raised was that the "document relied upon by the wife was executed and registered about five years after the marriage and . . . [therefore] such a post-nuptial delegation of *talaq* was void."³⁹³ Regarding this challenge, the Court "observed that most of the examples of [*talaq al-tafwid*] found in the classical texts concern post-nuptial delegations and held the agreement and the delegation valid."³⁹⁴

388. HALLAQ, *supra* note 8, at 283; *see also* Sufia Khanam, *Talaq-I-Tafwid and Its Application in Context of Bangladesh: An Analytical Approach*, 21 J. HUMANS. & SOC. SCI. 34, 40 (2016) ("Divorced women get maintenance only for iddat period . . .").

389. *Introduction to TALAQ-I-TAFWID*, *supra* note 385, at 9 ("*Talaq-i-tafwid* has a long and well documented history in South Asia . . .").

390. Carroll, *supra* note 381, at 283 (citing *Sainuddin v. Latifannessa Bibi*, (1919) 46 ILR Calcutta 141 (India)).

391. *Id.* at 284 ("The wife thereupon 'gave herself three divorces in accordance with Muham-madan law under the authority given to her by her husband,' and pleaded in defence to her husband's suit that she was no longer his wife.").

392. *Id.*

393. *Id.* at 283 n.9.

394. *Id.*

As indicated in the above story, *talaq al-tafwid* can be conditional, such that the wife gains the ability to divorce if certain conditions are met. Commonly conditional *talaq al-tafwid* provisions, both historically and contemporarily, are provisional on the husband taking a second wife.³⁹⁵ However, they are certainly not limited to that scope. They also included the financial deficiencies, such as the husband's inability to provide a designated clothing allowance.³⁹⁶

Conditional *talaq al-tafwid* provisions are a part of the colonial legacy of some areas. For instance, "the Courts of the British-India period, staffed by judges obviously influenced by English ideas of marriage, were uncomfortable with such a concept."³⁹⁷ The Courts allowed for *talaq al-tafwid* provisions, provided the provision was conditional and that "the specified conditions under which the wife was authorized to pronounce *talaq* were 'reasonable' and not contrary to 'public policy.'"³⁹⁸ Islamic law has no such limitations on a *talaq al-tafwid*.³⁹⁹

For contemporary purposes, an unconditional *talaq al-tafwid* is likely to best reflect the desires of the parties and empower women to easily leave relationships (at least from an Islamic legal perspective). The ability to easily enter *and* exit a relationship for both parties can be easily accomplished vis-à-vis the inclusion of a *talaq al-tafwid* provision. Achieving gender parity is the most important and obvious benefit to a *talaq al-tafwid* provision and, additionally, it can provide couples more comfort in entering into an Islamic relationship contract. For young couples unsure of whether they are ready to commit themselves to a life-long partnership, a *talaq al-tafwid* provision is especially helpful in reflecting the stage of relationship the couples find themselves in.

The ability to religiously divorce is important to many North American Muslims. A *talaq al-tafwid* provision can significantly ease the ability for women to access religious divorce.⁴⁰⁰ Among

395. See, e.g., *supra* note 390 and accompanying text.

396. Carroll, *supra* note 381, at 301 (describing a marital contract in which the husband promised to never give the wife "troubles in feeding and clothing" herself).

397. *Id.* at 279.

398. *Id.*

399. *Id.* ("There is no reason in Muslim law why the delegation to the wife of the right to pronounce *talaq* should not be unconditional . . .").

400. See *supra* note 384 and accompanying text.

North American Muslims, “desire for religious divorce is both widespread and common.”⁴⁰¹ The motivations and benefits of Islamic divorce vary. For some Muslims, the desire for an Islamic divorce is motivated by a sense of religious duty.⁴⁰² Following the procedures for an Islamic divorce seems to play an important role in satisfying their conscience and their inner sense of peace. For others, meeting familial and communal expectations may motivate the desire for a religious divorce.

Communal and familial relationships are also often reinforced through following the procedures of Islamic divorce.⁴⁰³ For divorcing North American Muslim women (both religiously-observant and culturally Muslim) Islamic divorce plays an important role in finding closure. They found this closure in their former husbands accepting that the relationship had ended and the women having a sense of freedom to seek a new relationship, free from the obligations of their marriage contract with their former husband.⁴⁰⁴

Some couples never formalize their relationship with the state, in part because Islamic divorce provides a more convenient means of ending a relationship. Islamic divorce can be very attractive from both a cost and time savings perspective. Under Islamic law, a relationship can be fully dissolved in as short as three months (the *'idda* or required waiting period).⁴⁰⁵ This is in sharp contrast to “most common law jurisdictions[, which] require a period of physical separation, usually six months to one year, before a petition for divorce can be brought.”⁴⁰⁶ Furthermore, Islamic divorce is typically a free or low-cost process. If an Imam is involved, they typically offer their services for free. This is again in contrast to a civil divorce, which often involves

401. MACFARLANE, *supra* note 115, at 148.

402. *Id.* at 149 (“For some respondents, obtaining an Islamic divorce is clearly and strongly related to meeting their religious obligations.”).

403. *Id.* at 154 (noting that a religious divorce eliminates speculation among family and friends that the couple is not really divorced which helps them find closure).

404. *Id.* (highlighting women’s concerns that their husbands would still act as though they were married unless they obtained a religious divorce).

405. *Id.*

406. *Id.*

lawyers and is a costly process.⁴⁰⁷ That is not to say that utilizing such a “divorce” provision will carry no social or cultural stigma, but that does not necessarily need to be the case. Case studies from Mauritania and Libya discussed in the following Subsection show examples of societies that adhere to Islamic law and have normalized divorce within society.

3. Muslim Acceptance of Divorce

Although divorce is culturally stigmatized in some Muslim-majority cultures, such as South Asia, this is not universally true, nor is it legally stigmatized.⁴⁰⁸ In both North and sub-Saharan Africa, “divorce appears to be relatively socially acceptable, and informal marriage and divorce systems are widely practiced.”⁴⁰⁹ For instance, in Libya (at least historically), divorce was widespread and men and women alike experienced little social stigma when divorced.⁴¹⁰ In particular, divorced women who desired to remarry could easily do so.⁴¹¹

Within Libya and Mauritania, mothers often educate their daughters on their rights to divorce.⁴¹² These women often pass down “principles and provisions of jurisprudence as understood in the Mālikī school. This understanding enables them to take initiatives to protect their wishes and interests when contracting and dissolving a marriage.”⁴¹³ This empowerment of women by women is “not the result of any local [or Western] feminist movement but rather a careful balancing of their knowledge of the

407. *Id.* at 155 (“Some respondents said that they hoped that an Islamic divorce facilitated by an imam would reduce the costs of hiring separate lawyers and fighting a protracted legal battle . . .”).

408. *Id.* at 141 (noting that while divorce is viewed more negatively in South Asia, there is less stigma across Africa, the Middle East, North Africa, and North America).

409. *Id.*

410. Abdullahi A. An-Na'im, *North Africa*, ISLAMIC FAM. L. (2015), <https://scholarblogs.emory.edu/islamic-family-law/socialcultural-information-by-region/north-africa> [<https://perma.cc/Q74B-4P4E>] (“In Libya, divorce is widespread and can be done simply through repudiation . . . There is little, if any, social stigma attached to divorce, either for the man or the woman.”).

411. *Id.*

412. Corinne Fortier, *Divorce and Custody: Contemporary Practices: Mauritania and Egypt*, in *ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURES* (Suad Joseph ed., 2016) (“Mothers instill in their daughters an awareness of their rights, especially with respect to divorce.”).

413. *Id.*

relevant Islamic jurisprudence related to divorce and of their culture's social realities."⁴¹⁴ These women "can be seen to engage in daily acts of feminism or 'everyday feminism,' without the label or necessarily a 'feminist consciousness.'"⁴¹⁵ Fundamental to this empowerment are two things: (1) women's knowledge of Islamic law and (2) familial and societal support of divorcing and divorced women.⁴¹⁶

Women divorcing in Mauritania usually do so via *khul'*.⁴¹⁷ *Khul'* is a wife-initiated divorce that allows for a woman to divorce a man without cause, although with his consent, provided that the husband "accepts the financial compensation offered by his wife to end their marriage."⁴¹⁸ Upon acceptance of the financial compensation, the divorce is complete with no need for a judge to certify the divorce.⁴¹⁹

According to classical Maliki jurisprudence, the compensation amount should not exceed the *mahr*, and it is more favorable for the husband to release the wife from the marriage without requiring her to pay.⁴²⁰ A woman who chooses to divorce via *khul'* does not need to provide any reason for divorcing her husband, although it does require the consent of the husband.⁴²¹ Within Mauritania, the return of the *mahr* is viewed as a means for a woman to maintain familial honor by demonstrating "that she is not economically dependent on her husband's family."⁴²² The immediate return of all possessions given to her by her husband is

414. *Id.*

415. *Id.*

416. *Id.* ("The knowledge of [classical Islamic judicial] sources and local gender relations are the main factors that determine how these legal texts are used and applied in social practice.").

417. *Id.* (showing that, by giving up all of their possessions in a *khul'* divorce, women in Mauritania affirm their own dignity and their family's honor).

418. *Id.*

419. *Id.* ("According to Islamic jurisprudence, if the husband accepts the financial compensation offered by his wife to end their marriage, the marriage is dissolved immediately.").

420. *Id.* ("The sum given to the husband by the wife in this type of divorce is not specified in Mālikī jurisprudence, but it is suggested that it might be equal to the amount of the bridewealth. In this matter, many jurists cite the Prophet's reply to a woman seeking a divorce; he approved her decision on the condition that she returns to her husband the garden she had received as bridewealth.").

421. *Id.* ("[T]he woman who initiates divorce by *khul'* is not obligated to state the reasons for her action.").

422. *Id.*

viewed as “evidence of her autonomy and the prestige of her family.”⁴²³

The societal acceptance of women in Mauritania to divorce is rooted in part in the underlying justification for divorce. Unlike in other Muslim-majority countries (such as Egypt), where women’s right to divorce arose out of relatively recent state laws, women in Mauritania have long justified their right to divorce on grounds from classical Islamic jurisprudence.⁴²⁴ Mauritanian women also do not suffer from the stigma found in some other Muslim-majority societies.⁴²⁵ A woman who divorced via *khul’* in Mauritania “is celebrated by her family and courted by new suitors without her reputation suffering.”⁴²⁶ Mauritians generally view a woman’s recourse of *khul’* as indicative of “her strong character, a feminine quality appreciated in Moorish society, unlike many societies that promote the idea of a submissive woman.”⁴²⁷

Furthermore, Mauritanian society does not view virginity or the lack thereof as indicative of a woman’s societal value.⁴²⁸ Indeed, Mauritanian men “often prefer to marry an experienced divorced woman rather than an inexperienced virgin.”⁴²⁹ Mauritanian men, both single and married, also play an important role in welcoming divorced women back into society. In some parts of Mauritania, “[a]ll of the men of the same age as the woman . . . offer her gifts and recite poetic quatrains in her honor.”⁴³⁰ These gifts help her in securing the divorce payment to her husband and affirm her as a desirable woman.⁴³¹

Mauritania and Libya serve as important examples of the ways in which Muslim women with an educated understanding

423. *Id.*

424. *Id.* (“The right to divorce initiated by women (*khul’*), while generally little known or practiced in Muslim societies, is found in the classical texts of Islamic law (*Sharī‘a*) which form the legal basis of these societies.”).

425. *Id.* (“*Khul’*, far from representing some sort of infamy for the woman, is cause for a ritual of liberation in certain regions of Mauritania.”).

426. *Id.*

427. *Id.*

428. *Id.* (“In contrast to men of other societies, Moorish men do not attach much importance to virginity . . .”).

429. *Id.*

430. *Id.*

431. *Id.* (“The men in her age group, by offering her these gifts, help her to regain her freedom, and show her that she has not lost her powers of seduction.”).

of Islamic law can use Islamic law to divorce in a way that carries little to no stigma. These societies demonstrate repeated instances where divorced women are celebrated for their strength of character and are viewed as desirable partners for remarriage. The right to divorce in these societies is found within Islamic law itself and contributes to the societal acceptance and celebration of divorced women.⁴³² Familial and societal acceptance of the legitimate application of Islamic law combined with women's awareness of their Islamic rights contributes to an environment where women can divorce and remarry with relative ease.⁴³³

Furthermore, the Prophet Muhammad modeled behavior consistent with a cultural paradigm that does not stigmatize divorce.⁴³⁴ The Prophet Muhammad married divorced women and encouraged others to do so.⁴³⁵ He also contemplated divorce (although did not ever divorce).⁴³⁶ During the time of the Prophet Muhammad, divorce was universally understood as an undesirable, yet permitted option, which is reflected in Islamic jurisprudence.⁴³⁷

432. *Id.* (“[T]he woman’s right to initiate divorce is found in the texts of Islamic law to which these societies refer [and] Moorish society practices it openly . . .”).

433. *Id.* (“Analysis of the situation reveals that the differential use of the same right is essentially a function of the gender relations peculiar to each society.”).

434. Fazlul Haq Meryaniwal & Sanaa Talwasa, *Muslim Women Seeking Divorce: An Analysis on Socio-Religious Practice*, 4 ANTAKIYAT J. SOC. & THEOLOGICAL STUD. 1, 5 (2021) (“Accordingly, many Islamic scholars protecting Muslim women from post-divorce stigmas, point out the fact that rather than *Hazrat Aysah*, the rest of Prophet Muhammad’s [wives] were either divorced or widows.”).

435. *Id.* (“Prophet Muhammad married divorced and widowed women, receiving the title of *Ummuhatul Muslimin*.”).

436. Richard Bell, *Muhammad and Divorce in the Qur’an*, 29 MUSLIM WORLD 55, 55 (1938) (discussing that while Muhammad offered to divorce his wives, “he divorced none”).

437. Meryaniwal & Talwasa, *supra* note 434, at 5 (“[B]eing a divorcee and marrying a divorced woman with several kids was a normal scenario and unreservedly acceptable in society back then. These cases declare the normal status of divorce and lack of any social stigma around the divorce concept at the beginning of Islam.”).

C. ALTERNATIVES TO DEFAULT PROVISION MODIFICATION—
PARTNERSHIP MODELS

This Article has discussed the potential for contract customization—modifying the default provisions of traditional Islamic marriage contracts (which was historically modeled on a sales contract)—as a potential solution for young Muslims who desire to have Islamically licit sex. Professor Quraishi-Landes has called for a framing of Islamic marriage contracts that is entirely different than traditional Islamic marriage contracts by proposing the use of partnership agreements as the model contract in lieu of a sales contract model.⁴³⁸ She is the first scholar to do so within the context of Islamic law, and her proposal has initiated conversation and debate on the future legal development of Islamic marriage contracts.⁴³⁹

Other scholars have also called for the use of partnership agreements in North American marriage, but have noted that “it is difficult to fit [North American] marriage neatly in to the legal construct called contract.”⁴⁴⁰ Islamic law, however, very neatly fits marriage into contract with the possibility of modeling those contracts on partnership agreements, typically found in the commercial realm. Professor Quraishi-Landes argues that Muslims are not obligated to perpetuate these specific contractual models (and the rights and duties they create), “especially when their historical contexts have so little in common with how we now think about marriage, women, and sexuality.”⁴⁴¹

Historically, Islamic marriage contracts were based on sales contracts, and the “inherent problems [of that model] were further exacerbated by the development of Islamic law in a historical context where slavery (especially concubinage) was socially

438. Quraishi-Landes, *supra* note 23, at 63 (“A partnership model of marriage contracts would facilitate a clear break from the destructive outdated idea of sexual licitness based on male ownership and exclusive control, looking instead to mutuality and consent.”).

439. See New Books in Islamic Studies, *An Interview with Kecia Ali*, NEW BOOKS NETWORK (Mar. 18, 2022), <https://newbooksnetwork.com/kecia-ali-ed-half-of-faith-american-muslim-marriage-and-divorce-in-the-twenty-first-century-open-bu-2021> [<https://perma.cc/257T-SKUT>] (discussing whether it is “possible to re-imagine the Islamic marriage contract as a partnership contract rather than a sales contract”).

440. Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1256 (1998).

441. Quraishi-Landes, *supra* note 23, at 53.

acceptable.”⁴⁴² Classical scholars of Islamic law “demonstrated a self-perpetuating analogy between a husband’s status as master and a wife’s as a slave, even as jurists instated on the dignity of free women.”⁴⁴³ However, the sales and slavery model were not scripturally dictated but rather predominately a product of the historical realities of the time in which they emerged.⁴⁴⁴

Professor Quraishi-Landes proposes that a partnership agreement would better serve as a contractual model for how Muslims today conceive their marital agreements.⁴⁴⁵ The principles of Islamic partnership law are well established (and used within many contemporary contexts) and would eliminate rules that have emerged under traditional rules that have been especially harmful to women. Although not universally agreed upon, some of the traditional rules have led to interpretations of Islamic law that harm women in some contexts.⁴⁴⁶ Some of these harmful outcomes that would “disappear under a partnership model include: the lack of mutuality between husband and wife, legal tolerance of marital rape, and a husband’s exclusive right to unilateral divorce.”⁴⁴⁷ A partnership agreement may also better reflect contemporary understandings of the rights and obligations of parties to a marriage contract.⁴⁴⁸

Couples opting to use a partnership model may feel that such an approach more effectively addresses their understanding of their proposed marital relationship. They may feel more comfortable with an agreement whose default provisions accurately reflect their understanding, rather than modifying the

442. *Id.* See generally KECIA ALI, MARRIAGE AND SLAVERY IN EARLY ISLAM (2010) (analyzing how Islamic jurists conceptualized marriage in light of the traditional and historic rhetoric of slavery and concubinage).

443. ALI, *supra* note 442.

444. See Quraishi-Landes, *supra* note 23, at 53 (“[T]he slavery framework and its resulting doctrine are not dictated by scripture, so we are not obligated to perpetuate them today . . .”).

445. *Id.* (“In a nutshell, I think a workable alternative would be to use partnership, rather than sales, as the framework for Islamic marriage contract law.”).

446. See *id.* (“Even more disturbing, in order to work out the doctrinal details of Islamic marriage law, early Muslim jurists often analogized marriage contracts to slavery, and especially to contracts for the purchase of a female slave.”).

447. *Id.* at 54.

448. *Id.* (“A scheme of Islamic marriage law based on partnership contracts would also fit better with modern attitudes about marriage, mutuality, women, and individual agency.”).

default provisions in a traditional Islamic marriage contract. They may feel such modification to default provisions “require[s] uncomfortably stretching and pulling outdated doctrines to fit modern sensibilities.”⁴⁴⁹ That said, couples run the risk that other Muslims (and Muslim-majority jurisdictions) may not accept the legitimacy of their marriage contract, due to the departure from traditional jurisprudence.⁴⁵⁰

Another primary reason to consider a partnership agreement model for Islamic marriage contracts today is that “[v]irtually all the presumptions that formed the jurisprudential backdrop for Islamic marriage law are no longer held today.”⁴⁵¹ Today, Muslims nearly universally agree upon the abolishment of slavery.⁴⁵² Muslims today are often stunned and disturbed to learn of the analogy classical Islamic jurists drew between marriage and slavery.⁴⁵³ At the time traditional Islamic contractual models were formed, this analogy “seemed to be a natural, almost self-evident one.”⁴⁵⁴ Similarly, while what an egalitarian marital relationship looks like is contested among Muslims, “Muslims around the world nevertheless speak of marriage in terms of reciprocal and complementary rights and duties, mutual consent, and with respect for women’s agency.”⁴⁵⁵

Therefore, a partnership contract would potentially best serve the modern Muslim marriage when compared to the traditional sales contract model.⁴⁵⁶ Similar to common law, Islamic law classically conceived of partnership agreements within a

449. *Id.*

450. *Id.* at 55–56 (finding that “women face surprising disappointment when they attempt to enforce their understandings of their rights” within more conservative settings).

451. *Id.* at 58.

452. *Id.* (“There is now a near universal consensus against slavery among the world’s Muslims, as is evident from the absence of substantial Muslim resistance to laws abolishing it throughout the world.”).

453. *Id.* at 58 (“Muslims today seem uncomfortable with the analogy between marriage and slavery . . .”).

454. *Id.* at 59; *see also* ALI, *supra* note 442, at 29–65 (discussing the slavery analogy in relation to the requirements for transacting marriage).

455. Quraishi-Landes, *supra* note 23, at 59.

456. *Id.* at 62 (“I can imagine one possible approach that modern Muslim jurists could pursue to create an alternative scheme of Islamic marriage law, one that is not based upon an analogy to slavery and concubinage. The alternative, as I see it, lies in the Islamic law of partnership contracts.”).

business context.⁴⁵⁷ However, there is nothing inherent to the development of marriage contracts that would preclude the use of partnership model in lieu of a sales contract.⁴⁵⁸

Many different types of partnership contracts are permissible under Islamic law. The schools differ on the exact rules governing these agreements. For instance, the Hanbali school

requires that partners agree 1) to assume relations of mutual agency and at times suretyship [the legal principle under which parties in a contractual relationship are liable for the debt or default on a debt of the other party], 2) to contribute work, credit, or capital, or combinations of all three, and 3) to share profits in predetermined percentage shares.⁴⁵⁹

Across the schools, partnership agreements are revocable at will by either party and terminate upon the death of either party.⁴⁶⁰ Across Islamic law three elements are required for a valid partnership agreement and cannot be modified even by mutual agreement of the parties.⁴⁶¹ These three requirements are: “1) they are revocable at will, 2) losses are borne by partners in proportion to their shares of ownership of capital, and 3) profits must be shared by percentage, not in fixed sums.”⁴⁶² These requirements largely reflect the prohibition against interest and speculative transactions in Islamic law.⁴⁶³

Although these requirements cannot be modified, Islamic partnership contracts can be customized. These customized partnership arrangements include:

a limited partnership (*inan*) . . . where each of the partners contributes both capital and work, whereas in a silent partnership (*mudaraba*), some of the partners contribute only capital and the others only work; in a labor partnership (*abdan*), the partners contribute only work, and

457. *Id.* (describing Islamic partnership agreements in their typical business context).

458. *Id.* at 60–61 (“[N]ew *ijtihad* (Islamic jurisprudential reasoning) on Islamic marriage law that does not presume an analogy to slavery is possible, and could create different doctrinal rules . . . [that] would carry just as much validity.”).

459. *Id.* at 62.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.* (“[T]he underlying purpose being to prevent unfair advantage by capitalizing on future uncertainties.” (citing FRANK E. VOGEL & SAMUEL L. HAYES, ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN (Brill Acad. 1998)).

in a credit partnership (*wujuh*), the partners pool their credit to borrow capital and transact business with it.⁴⁶⁴

These arrangements can be combined to create complex agreements that accurately reflect the desired partnership.

For instance, parties might opt for an *inan* (limited) partnership agreement wherein each party agrees to contribute both capital and labor, for example, both parties may plan to earn income but perhaps in different amounts. Under an *inan* agreement “the spouses need not contribute equal amounts of capital and they may determine the profit shares as they like, but losses should be borne in proportion to the capital contributions.”⁴⁶⁵

The *mudaraba* (silent) partnership, “where one partner contributes labor and the other contributes capital,”⁴⁶⁶ might better serve a couple wherein one party is a “stay-at-home” parent. Under the *mudaraba*, “the spouse who provides the capital is liable for all losses, and the non-capital-providing spouse bears no losses . . . and is not entitled to any capital profit until the capital-providing spouse has recouped his or her investment, and then only in the agreed percentage.”⁴⁶⁷ Effectively, this arrangement would allow for one spouse to provide the financial maintenance of the household and family, and the other spouse would provide the unpaid labor, such as household maintenance and childrearing. The financially-contributing spouse would bear the financial risk, but the labor-contributing spouse would not receive any profit (such as in the purchase and sale of the family home), until the financially contributing spouse had recouped their investment into the household.

Couples might find even greater flexibility in an *abdan* partnership, which envisions that each party only contribute labor and “partners are free to agree upon their relative shares of ownership of the partnership capital, and are obliged to share losses accordingly.”⁴⁶⁸ These types of partnerships can be combined to create complex agreements with conditions that meet the potential needs of the parties into the future.⁴⁶⁹

464. *Id.* at 62.

465. *Id.* at 65.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.* (“[A]ll these simple models could be combined to create more complex combinations of marriage arrangements.”).

One distinct difference between a traditional marriage contract and a partnership-based contract is the default provisions regarding spousal maintenance.⁴⁷⁰ A traditional marriage contract requires that a husband financially provide for his wife and children, with no reciprocal obligation on the wife.⁴⁷¹ While parties to a *misyar* contract can contract around these default terms, such terms are modifications to standard provisions.⁴⁷² Under a partnership agreement model, the distributed obligation of spousal, household, and family maintenance would be mutually negotiated terms under the contract.⁴⁷³ This is more likely to reflect the realities of the unique financial positions that couples today find themselves in. A couple may prefer to alternate or share financial responsibilities. For instance, if a husband is finishing schooling while the wife has already entered the workforce, it may be preferable for her to support them for that time. Likewise, a couple may envision a variety of scenarios that best serve them regarding childcare. A partnership model contract “allows spouses to negotiate these roles rather than operate against default presumptions that do not fit their lives.”⁴⁷⁴

Significantly, a partnership agreement model would also significantly impact the default provisions of Islamic marriage contracts.⁴⁷⁵ As noted above, under Islamic law, partnership contracts are “based on the fundamental principle of all parties’ continuous concurrent consent to the continuation of the partnership, this means that . . . *both* spouses would have the right to end the marriage at will.”⁴⁷⁶ This could be achieved in a traditional sales-based marriage contract with the inclusion of a *talaq al-tafwid* (delegated divorce) provision, but it would require a modification to default provisions.

470. *Id.* at 64 (showing that a partnership-based contract can account for the “reality that every marriage is different, and each spouse may have different skills that don’t always translate well to the husband-as-breadwinner default model”).

471. *Id.* (illustrating that there is a clear presumption for men to financially provide for their wife).

472. *Id.*

473. *Id.* (“Spousal maintenance would instead be a mutually bargained for provision of each marriage contract.”).

474. *Id.* at 65.

475. *Id.*

476. *Id.* While this is true for most of the legal schools, the Maliki school requires mutual consent to terminate. *Id.*

Such a doctrinal change to default provisions “would honor modern sensibilities about women’s agency and correct the uneven, often manipulative power that . . . husbands . . . wield against their wives in a time of divorce.”⁴⁷⁷ Rather than only automatically allowing men the unilateral right to divorce and requiring women to negotiate a delegate right, both parties would automatically have default rights of unilateral termination of the relationship.⁴⁷⁸ The impact would be that Islamic law would no longer have multiple kinds of divorce (currently there is male initiated (*talaq*), female initiated (*khul’* usually requiring some return of the *mahr* to the husband), and judicial divorce (*faskh*)).⁴⁷⁹ To the extent that judicial divorce applied, for instance via arbitration or before a civil court applying Islamic law, the court “need not focus on fault or grounds for divorce committed by the husband,” as currently happens under traditional Islamic marriage contracts, but “rather, could become more like third-party mediation of asset division and other logistical needs of divorcing parties, whenever a couple is in need of such assistance.”⁴⁸⁰

1. Licitness of Sexual Relationships Under Partnership Agreements

The use of partnership agreements instead of sales contracts would transition the underlying reasoning of the permissibility of sex between the parties from payment to consent.⁴⁸¹ While consent is a required element of traditional Islamic marriage contracts, the consent is required for the validity of the offer and acceptance of the contract.⁴⁸² The consent in and of itself is not

477. *Id.*

478. *Id.* (“Thus, both husband and wife would have a unilateral right of divorce . . .”). It’s important to note again that under the Maliki schools the parties would be limited to terminating the partnership agreement only upon mutual agreement to terminate. *Id.*

479. *Id.* at 66 (showing the irrelevancy of the different forms of divorce under a partnership contract model).

480. *Id.*

481. *Id.* at 63 (“In a partnership model of marriage contract, marital support would no longer be a payment in exchange for the sexual availability of the wife, but rather, a bargained-for negotiation reflecting an agreement of mutual financial and labor responsibilities within a marriage.”).

482. *Id.* (“Even in established Islamic marriage law, the idea of consent of the parties is a crucial factor in establishing the validity of offer and acceptance

the underlying grounds of the licitness of the sexual relationship.⁴⁸³ Rather, classical jurists spoke of the *mahr* and maintenance payments as what make a husband's sexual access to his wife legal.⁴⁸⁴ A partnership agreement would have consent as the legal basis on which a sexual relationship is licit.⁴⁸⁵ In short, utilizing partnership agreements in lieu of the traditional sales model "would facilitate a clear break from the destructive outdated idea of sexual licitness based on male ownership and exclusive control, looking instead to mutuality and consent."⁴⁸⁶

If a party decided to use a partnership agreement instead of a sales contract model, the question remains as to whether or not a *mahr* would be required. Traditional scholars understood the *mahr* as a payment to the woman to access her sexually.⁴⁸⁷ Under a partnership agreement, the *mahr* would play a different role.⁴⁸⁸ The requirement of the *mahr* to a marriage contract is in both the Quran and in narrations of the Prophet Muhammad.⁴⁸⁹ That said, these sources do not explain the reason for the *mahr*.⁴⁹⁰ Traditional jurists speculated "based on their own social context and analogies that seemed appropriate at the time" that the *mahr* was consideration for sexual access.⁴⁹¹ This may be the traditional legal reasoning behind the *mahr*, however, it is not in fact how many Muslims understand it today.

Contemporary conversations on *mahr* usually frame it in terms of creating financial security for women within

of a marriage contract, and the payment of *mahr* and maintenance are only additional (required) components of that contract.").

483. *Id.* (finding that while "mutual agreement could be considered the core element to the validity of a marriage contract, and thus the basis of the licitness of sexual activity within that marriage," this has not been the traditional view).

484. *Id.* ("[S]ex is made licit in marriage by a husband's payment (initially the *mahr*, and over time, marital support) by which he acquires exclusive 'ownership' over the wife's sexual parts.").

485. *Id.* ("Sexual rights would be based on mutuality, respect and companionship, rather than male ownership and payment.").

486. *Id.*

487. *Id.* at 64 ("The idea that the *mahr* is payment for licit sexual access in established jurisprudence is one speculation by classical jurists . . .").

488. *Id.* (showing that the *mahr* could counteract some of the "financial disadvantages that women regularly face").

489. *Id.* ("The *mahr* is specifically designated in the Quran and Prophetic narrations as important . . .").

490. *Id.* ("[T]he scriptural sources are silent . . . on the reasons behind the *mahr*, so we are left to speculate on this question.").

491. *Id.*

marriage.⁴⁹² Women are generally viewed as potentially more vulnerable parties to a marriage (hence the requirements of a guardian's consent to marriage), and the *mahr* can be conceived akin to "fair labor statutes and rules of consumer protection in American law in that these are legislated [by God in this case] to automatically attach clauses to some routine contracts in order to protect parties likely to be vulnerable."⁴⁹³ Islamic activists have well chronicled the disadvantages women often face in marriage, and especially in divorce.⁴⁹⁴

Conceived in a similar frame to consumer protection law, the *mahr* could be understood as "a higher legal principle that must be respected by the contracting parties."⁴⁹⁵ This may be preferable to couples who find themselves disturbed by the traditional jurisprudence of scholars that frame the *mahr* in terms of the "price" of a husband's sexual access to his wife.⁴⁹⁶ The jurisprudence behind using partnership agreements as the model for marriage contracts could help eliminate any perception or feeling that women are "selling themselves" in negotiating and accepting the *mahr*.⁴⁹⁷

This could also lead women to more effectively negotiate their *mahr*. Some women today have a "knee-jerk rejection" of the *mahr*, as based on a sales contract and opt for a non-monetary *mahr*.⁴⁹⁸ That said, the *mahr* can serve as a "powerful tool for [the] financial independence [of women]."⁴⁹⁹ A well-negotiated *mahr* could be the difference between a woman becoming financial imprisoned in an abusive or unhappy marriage and her ability to create a different life.⁵⁰⁰

492. *Id.* (showing that the Quran takes into "account the biological and social realities that can put women at a financial disadvantage").

493. *Id.*

494. *Id.* ("[T]he historical realities of gender discrimination in the marketplace, many of which are still true today, and the gendered power imbalances that cause women specific financial disadvantages are hard to ignore.").

495. *Id.*

496. *Id.* at 67.

497. *Id.* at 64.

498. *Id.* at 67 ("[M]any Muslim women opt out of including a substantial *mahr* in their marriage contracts.").

499. *Id.*

500. *Id.* at 54 ("[A] well-calculated *mahr* could give an otherwise financially-dependent wife the ability to initiate divorce or survive life on her own.").

That said, not all women are vulnerable parties. Indeed, a woman going into a marriage may have more financial security than her husband. She might negotiate a *mahr* without monetary value. Indeed, non-monetary *mahrs* are well documented from the time of the Prophet Muhammad and include examples like a husband teaching his wife a chapter of the Quran.⁵⁰¹ Parties can observe the legal formality of the *mahr*, while also customizing the *mahr* to their particular needs.⁵⁰²

Some couples may find a deferred *mahr* particularly helpful.⁵⁰³ For instance, a couple may have a deferred *mahr* that is either a one-time or installment payment in the event of husband-initiated divorce. A woman with a *talaq al-tafwid* provision may also want to have a deferred *mahr* if she initiates the divorce (although this may be a more difficult provision to negotiate). A couple may also want to have a deferred *mahr* in other contexts. For instance, if a couple marries while still completing their education, they may want to have a deferred *mahr* for such time as the couple anticipates the husband's earning capacity to increase.

Proponents of the partnership model recognize that some Muslims will remain more comfortable with the traditional sales model contract, as it is what is familiar and long recognized.⁵⁰⁴ Rather than proposing that a partnership model of marriage contract replace the traditional sales model, proponents suggest that it become an option in the pluralistic regime of Islamic law.⁵⁰⁵ Proponents also recognize that, like any proposal to shift

501. *Id.* at 64 (“The substantive content of each *mahr* is highly negotiable—it can be anything of value, ranging from a substantial financial sum to a symbolic token. (The Prophetic traditions mention several creative, non-monetary *mahrs*, including one man's conversion to Islam, and another's teaching his wife a chapter of the Quran.)”).

502. *Id.* (“[T]he *mahr* requirement allows for individualized tailoring to respond to each woman's unique circumstances.”).

503. *See, e.g., id.* at 54 (“[A] large *mahr* deferred to the time of divorce could also be used to deter a husband from exercising his established Islamic legal right to unilateral divorce (*talaq*) against his wife's will.”).

504. *Id.* at 66 (“[A] new partnership model of Islamic marriage law will only ever appeal to a part of a given Muslim audience.”).

505. *Id.* (“That new scheme would simply exist alongside the existing scheme in the marketplace of *fiqh*, and modern Muslims would have the freedom to choose between them.”).

dominant legal paradigms, such proposals may simply not take hold.⁵⁰⁶

While the partnership model creates a legal clarity to default provisions, many of the outcomes that a partnership model achieves, can also be done vis-à-vis conditions and modifications to the default provisions of the traditional contract model. Couples who want their contract to achieve the outcomes of gender parity in divorce, including their own determinations regarding distribution of household and family financial maintenance, can choose between venturing with the newly proposed partnership agreement model and modifying the default provisions of the traditional sales model.

CONCLUSION

Whether utilizing a traditional marriage contract or a partnership agreement, North American Muslims may also want to think about marriage in phases or stages. The first phase would entail the establishment of a committed, sexual relationship under a marriage contract. This would provide couples an opportunity to begin sharing secluded time together and engage in acts of sexual intimacy (which may or may not include sexual intercourse). Then they could determine if they want to begin living together or not. Later, they could decide whether to have a cultural wedding ceremony that may include some version of vows (whether traditionally “American” or composed by the couple themselves). At some point, they might register their marriage with the state. In jurisdictions that recognize common law marriage, the state may recognize the couple’s relationship as a legal marriage, regardless of filing with the state.⁵⁰⁷

One of the struggles that Muslims face is that all these stages share the same name—marriage. Yet, couples may not be entirely comfortable using all the terminology of marriage at every stage. For instance, it is easy to imagine close friends being upset at not coming to a couple’s wedding, which was in fact a contract signing and not necessarily considered a life-long commitment by the couple. Likewise, friends may be dismayed to

506. *Id.* (“[I]t may not be considered legitimate according to the jurisprudential boundaries of acceptable Islamic law reform, and thus would not be respected by religious authorities with the strongest influence on the general Muslim public.”).

507. *See supra* note 232 and accompanying text.

hear that the couple “divorced,” when the couple themselves did not necessarily commit themselves to a lifelong arrangement. In these instances, using terms such as “partners” may be useful to more accurately reflect how the couple themselves understand the religious commitments they have made. Likewise, couples may want to clarify that they have entered into an Islamically sanctioned romantic relationship, *vis-à-vis* contract, and later clarify when they have gotten married by the government, and perhaps a later date may host a wedding party with vows.

It is also important to note that a contractual commitment, *vis-à-vis* an Islamic marriage contract, does not necessarily imply a complete rejection of civil marriage. Rather, a couple may view a civil marriage as a pragmatic matter.⁵⁰⁸ As noted regarding the practices of young Muslims in the Netherlands, “[a]t some point in time, they may well conclude a civil marriage, because it is the most convenient way to safeguard financial rights, such as entitlements to one’s husband’s pension, inheritance rights, and the relationship with their children.”⁵⁰⁹ Likewise, a contractual agreement detailing the nature of a romantic partnership, prior to civil marriage, may also benefit non-Muslims seeking greater clarity and intentionality in their relationships. Relationship contracts might serve couples in a variety of context, whether those seeking unconventional relationships (such as polyamory) or as an antidote to informal, hook-up culture. Such individuals may not yet be ready for the cultural or legal implications of civil marriage (or have it available to them) but do seek greater commitment and formality to their relationships. Formalized contracts may also be helpful in circumstances where unmarried couples purchase property or have children together.

Muslims are not alone in these considerations regarding civil marriage. For non-Muslims, the benefits of civil marriage may be a consideration in deciding whether to transition a relationship from dating to marriage. For Muslims, this consideration may likewise arise with a change in relationship dynamic whether because of pregnancy or desire for increased commitment to and commensurate protections within the relationship.

508. See Moors, *supra* note 210, at 157 (stating that Muslims “deal with civil marriage in a pragmatic manner”).

509. *Id.*

Additionally, the use of Islamic marriage contracts need not necessarily be limited to instances where both contracting parties are Muslim. Examples from the Netherlands demonstrate that Muslim men may also enter into an Islamic marriage contract with non-Muslim women out of a desire to adhere to Islamic law.⁵¹⁰ Non-Muslim women may also be hesitant to enter into a civil marriage, as they would consider it far too early in the stage of relationship.⁵¹¹

The private nature of the Islamic marriage contract better reflects their understanding of the stage of the relationship, whereas they may conceive of civil marriage as appropriate at a later stage in the relationship. Although traditional Islamic law only permits Muslim men to marry non-Muslim women, contemporary Muslim scholars have called for a rethinking of the law to also permit Muslim women to marry non-Muslims.⁵¹² Based on whether a Muslim woman adheres to these contemporary understandings, she may understand Islamic law to also permit her to enter into an Islamic marriage contract with a non-Muslim.

Furthermore, traditional Islamic jurisprudence prohibits same-sex relationships, and there is evolving jurisprudence around the legal ability of transgender people to marry.⁵¹³ Given

510. *Id.* (“Many of these marriages are concluded between Shia men and ethnic Dutch women, who are non-Muslim at the time of marriage.”).

511. *See id.* at 158 (“In fact, many of the women involved would not agree to conclude a more formal form of marriage, let alone a civil marriage, as it would be far too early in the relationship for them.”).

512. *See* Shehnaz Haqqani, *Gendered Expectations, Personal Choice, and Social Compatibility in Western Muslim Marriages* 6 (2013) (M.A. thesis, University of Texas at Austin), <https://repositories.lib.utexas.edu/bitstream/handle/2152/22208/HAAQQANI-THESIS-2013.pdf>? [https://perma.cc/4XDF-LL2G] (“[S]ome Imams and other religious authorities are starting to permit women to marry non-Muslim (Christian and Jewish) men in the West today.”); *see also* Asma Lamrabet, *What Does the Qu’ran Say About the Interfaith Marriage?*, ASMA LAMRABET (Jan. 18 2013), <http://www.asma-lamrabet.com/articles/what-does-the-qur-an-say-about-the-interfaith-marriage> [https://perma.cc/Z6ND-DMPS] (showing that the “Qur’anic order applies to Muslim men and women equally”); Junaid Jahangir, *Muslim Women Can Marry Outside the Faith*, HUFFPOST (Mar. 21, 2017), https://www.huffpost.com/entry/muslim-women-can-marry-outside-the-faith_b_6108750fe4b0497e670275ab?ncid=engmodushpimg00000003 [https://perma.cc/VS2K-LA29] (giving examples of expert opinions that support Muslim women being able to marry outside of the faith).

513. Arguably, classical Islamic law better accommodates marriage contracts for intersex and transgender individuals than it does for same-sex

the heteronormative standard of sexual relationships conceived of in traditional Islamic jurisprudence, many of the issues raised in this Article may not be applicable to the LGBTQ+ community. That said, contemporary scholars have begun conversations around how that jurisprudence might be rethought.⁵¹⁴ The proposal herein for the use of partnership agreements may be especially pertinent to those in the LGBTQ+ community. Indeed, same-sex marriages are a part of the North American Muslim landscape.⁵¹⁵ Those couples also need to customize their contracts to best capture the rights and obligations they intend to have towards one another.

Fundamentally, traditional and contemporary understandings of Islamic law provide means for parties to create contracts that represent the intentions and desires they bring to a relationship. For some, this may look like wanting to have a means to begin having a sexual relationship to see what kind of relationship they might be able to build together. An Islamically legitimate contract will not resolve all of the issues of social and familial acceptance such a couple might face. Cultural stigmas in certain Muslim families and communities around interfaith marriage, divorce, and virginity will not resolve overnight simply because the couple uses an Islamic marriage contract. Yet, Islamic contracts are an important tool for couples seeking

couples. Scholars generally allow for the marriage of an intersex person, and some scholars allow for transgender marriage based on the heteronormative standard of the couple's respective genders. See M. Alipour, *Islamic Shari'a Law, Neotraditionist Muslim Scholars and Transgender Sex-Reassignment Surgery: A Case Study of Ayatollah Khomeini's and Sheikh al-Tantawi's Fatwas*, 18 INT'L J. TRANSGENDERISM 91, 91 (2017) ("It seems that these fatwas should initially be considered as a tolerant attitude of Islam toward transgender Muslims."); see also Mubasher Bukhari, *Pakistani Clerics Declare Transgender Marriages Legal Under Islamic Law*, REUTERS (June 27, 2016), <https://www.reuters.com/article/us-pakistan-transgender-idUSKCN0ZD1IZ> [<https://perma.cc/8GLN-LL6L>] ("A group of clerics in Pakistan has declared marriage between transgender individuals permissible in Islam . . .").

514. See, e.g., SCOTT SIRAJ AL-HAQQ KUGLE, *HOMOSEXUALITY IN ISLAM: CRITICAL REFLECTION ON GAY, LESBIAN, AND TRANSGENDER MUSLIMS* (2010) (paving the way for conversations discussing how Islamic jurisprudence can be renewed to accept the LGBTQ+ community).

515. Emily Wax, *Imam Daayiee Abdullah Welcomes Gay Muslims to Worship, Marry*, WASH. POST (Apr. 17, 2013), https://www.washingtonpost.com/lifestyle/style/imam-daayiee-abdullah-welcomes-gay-muslims-to-worship-marry/2013/04/17/3ebcab3a-a5db-11e2-b029-8fb7e977ef71_story.html [<https://perma.cc/C9VD-HA39>] (showing the progressive movement of gay Muslims in the United States).

Islamically licit sexual relationships. Whether a family and community accept a couple will depend on a couple's individual circumstances, but in the very least, a couple can move forward with greater confidence that their relationship is sanctioned by Islamic law, and, hopefully, by God.

GLOSSARY OF ARABIC TERMS

abdan: Type of customized partnership arrangement where the partners contribute only work, also known as labor/silent partnership (p. 1938)

‘adl: justice (p. 1919)

‘aqd al-nikah: “The contract of coitus”; a contract which meets the requirements of Islamic law for a licit sexual relationship, also commonly used to refer to a marriage contract. (p. 1889)

aqd azziwaj: An Islamic marriage contract. (p. 1908)

bay’: A contract of sale. (p. 1889)

faskh: A judicial divorce issued by a third-party judge. (p. 1924)

fatwa: An Islamic legal opinion. (p. 1897)

fiqh: Scholars’ attempts to interpret the Sharia. Term used to differentiate between God’s actual divine will and the human attempt to understand it. (p. 1884)

fitrah: The natural essence of a human. (p. 1864)

hadith: Narrations of the Prophet Muhammad which are primary source documents for Islamic law. (p. 1890)

hiba: Literally meaning “gift”; Metaphorical terminology used by the scholars of the Maliki and Hanafi schools to mean offer and acceptance. (p. 1892)

‘idda/‘iddah/‘iddat: A temporary period of separation between husband and wife initiated by a husband’s statement of “I divorce/emancipate you.” For a menstruating woman, this period lasts three menstrual cycles, or roughly three months. (p. 1925)

ihсан: Kindness, beauty, excellence; a core Quranic ethical principle of marriage and gender relations. (p. 1919)

ijab: The offer made by a woman or her guardian; one of the three essential elements of an Islamic marriage contract. (p. 1889)

ijara: Term meaning “hire;” not allowed by Hanafi jurists during the offer and acceptance portion of the marriage contract due to the potential association with prostitution. (p. 1893)

‘inan: A customized, limited partnership arrangement where both parties plan to earn income but perhaps in different amounts. (p. 1938)

istimta: A kind of temporary marriage utilized in an early period of Islamic history where men gave women a dower as a part of a licit sexual relationship for a specified and mutually agreed upon period of time. (p. 1913)

khul’/khula: A wife-initiated divorce that allows for a woman to divorce a man without cause in exchange for payment. (p. 1924)

ma’ruf: That which is commonly known to be good; a core Quranic ethical principle of marriage and gender relations. (p. 1919)

mahr: The dower (bridal gift) given by the male party to the female party, which remains her separate property, which serves as consideration under an Islamic marriage contract. Some schools allow a nominal gift. (p. 1870)

makruh: A disliked or detestable act. (p. 1907)

mawaddah: One of the Quranic objectives of marriage and gender relations, meaning affection and love. (p. 1919)

milk al-nikah/al-'aqd/al-bud: The rights of the husband under the marriage contract, meaning to have legal access to sexual intercourse/the wife's vulva. (p. 1890)

misyar contracts: Also known as "pleasure marriage," generally a subset of *urfi* contracts that create conditions that alleviate some of the financial obligations of men to provide maintenance for their wife, creating a licit sexual relationship without the full duties that a traditional contract requires. (p. 1871)

mudaraba: Also known as a "silent partnership," where one partner contributes labor and the other contributes capital, such as when one partner is a stay-at-home parent. (p. 1938)

mut'a contract: Also known as a "temporary marriage," where the contract specifically states a termination date, where couples must choose to renew or terminate the marriage contract. Only permissible under Shia jurisprudence. (p. 1871)

nafaqah: A default provision of an Islamic marriage contract which requires that the husband provide maintenance to the wife and any resulting children. (p. 1918)

naskh: To repeal or do away with. (p. 1915)

nikah: A term which has come to mean marriage, the literal meaning of which is sexual intercourse. (p. 1889)

qist: One of the Quranic objectives of marriage and gender relations, meaning fairness. (p. 1919)

qiwamah: Authority and protection. (p. 1889)

qubul: Acceptance. (p. 1889)

rahmah: One of the Quranic objectives of marriage and gender relations, meaning mercy and compassion. (p. 1919)

sadaqa: Meaning “free will offering”; metaphorical terminology permitted by the Maliki and Hanafi schools in the offer and acceptance. (p. 1892)

sakinah: One of the Quranic objectives of marriage and gender relations, meaning tranquility and repose. (p. 1919)

sharia: Often used to refer to laws followed by Muslims, also more broadly understood to mean the divine will itself. (p. 1884)

takhayyur: A jurisprudential principle suggesting that jurists following a specific school may follow an opinion of a different school if it makes more practical sense given the circumstances of the parties. (p. 1887)

talaq: A husband’s unilateral right to declare divorce with no judicial proceeding. (p. 1924)

talaq al-tafwid: Meaning “delegated divorce,” a wife-initiated divorce where the husband grants his unilateral right to divorce to his wife as a term of the marriage contract. (p. 1924)

tamkin/ta’ah: The duty of a wife to be sexually available to her husband during a marriage. (p. 1918)

tashawur wa taradi: One of the Quranic objectives of marriage and gender relations, meaning consultation and mutual consent. (p. 1919)

urfi marriage/contracts: The execution of an Islamic relationship contract absent a state license or state registration, a customary marriage. (p. 1871)

wali: A bride’s male legal guardian, usually her father. Schools differentiate whether the consent of such a guardian is needed for the contract to be official. (p. 1886)

wujuh: A customized partnership, also known as a “credit partnership,” where the partners pool their credit to borrow capital and transact business with it. (p. 1939)