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## Sex and the Shari'a: Defining Gender Norms and Sexual Deviancy in Shi'i Islam

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# Sex and the Shari'a: Defining Gender Norms and Sexual Deviancy in Shi'i Islam

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## Abstract

This Article demonstrates that modern authoritative jurists working within the Shi'i tradition have developed their rules respecting sex regulation in order to serve three primary commitments. The first commitment is less a normative expectation and more a presumption of reality. It is that there is an intense and near debilitating desire on the part of human beings generally, though mostly men, for a great deal of sex. This desire must be satisfied, but it also must be tightly controlled. This is because of the second commitment, which is that excessive licentiousness is a form of secular distraction from a believer's central obligation to worship God. The final, and perhaps most interesting, commitment concerns maintaining and upholding gender differentiation in order to ensure the preservation of traditional gender roles within an established gendered hierarchy. That is, there must be clear delineations between men, on the one hand, and women, on the other, if hierarchies relating to the proper roles of men and women are to be maintained. This explains the rather curious discrepancy within Shi'i Islam, discussed toward the end of this Article, wherein change of gender is tolerated, to some extent, and homosexuality is not, to any extent.

**KEYWORDS:** Defining Permissible Sex; Sexual Limitations; Prohibited Sex; Gender Change; Paradigms

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## ARTICLE

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*INTRODUCTION*

Sex is regulated everywhere, all of the time. This is so obvious as to be uninteresting. What is interesting is precisely *how* it is regulated in different normative orders; *what that reveals* about the underlying values, biases, and presuppositions of those respective normative orders; and *whether and to what extent* such normative orders, and their rules on sex and sexuality, affect State law and social practice in any given society. The purpose of this Article is to address the first two of these questions in the context of modern Shi'i Islam. The third question, touched upon in the conclusion, will be the focus of a separate, subsequent paper.<sup>1</sup>

This Article demonstrates that modern authoritative jurists working within the Shi'i tradition have developed their rules respecting sex regulation in order to serve three primary commitments. The first commitment is less a normative expectation and more a presumption of reality. It is that there is an intense and near debilitating desire on the part of human beings generally, though mostly men, for a great deal of sex.<sup>2</sup> This desire must be satisfied, but it also must be tightly controlled. This is because of the second commitment, which is that excessive licentiousness is a form of secular distraction from a believer's central obligation to worship God.<sup>3</sup> The final, and perhaps most interesting, commitment concerns maintaining and upholding gender *differentiation* in order to ensure the preservation of traditional gender roles within an established gendered *hierarchy*.<sup>4</sup> That is, there must be clear delineations between men, on the one hand, and women, on the other, if hierarchies relating to the proper roles of men and women are to be maintained. This explains the rather curious discrepancy within Shi'i Islam, discussed

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1. If it is true, as it is often said, that the law is best studied through a thorough understanding of what it does, excising references to law and social practice in modern states may seem peculiar. That said, Shi'ism is dramatically understudied as a general matter, and as a religio-normative system, it has developed elaborate rules in the area of sex regulation that deserve greater attention than they have received. In light of this, there is no competent way in a single law review article both to outline that system and then to describe its effect in practice among the Shi'i populations across the globe. Even to attempt to do so would do injustice to one of the two themes. Accordingly, the system is described independently of praxis here, in the hope that in the near future I will be in a position to commit time and space to the important praxiological questions raised.

2. This is discussed in detail in Part I of this Article.

3. This is discussed in Part II of this Article.

4. This is discussed in Part III of this Article.

toward the end of this Article, wherein change of gender is tolerated, to some extent, and homosexuality is not, to any extent.

Part I begins with a definition of precisely what the sexual convention is in Shi'i Islam; namely, sex of virtually any conceivable variety as between a man and one of his wives, permanent or temporary.<sup>5</sup> This serves to demonstrate the first demand of which Shi'ism takes heed in its regulation of sex and sexuality; namely, that there is an intense human need for sex, mostly on the part of men, and that it requires broad recognition in any realistic social order.<sup>6</sup> The Part also shows the manner in which these sexual relationships are highly gendered, with the husband having the primary obligation to

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5. In fact, there is one other permissible sexual relationship discussed by the jurists, and this is sex between a master and his female slaves. Modern jurists writing compendia well into the twentieth century have spent considerable time on the rules respecting this particular form of permissibility and its limitations. See, e.g., 2 ABDUL MAJID AL-KHU'I, MINHAJ AL-SALIHEEN ¶¶ 1320-1340 (1992) [hereinafter KHU'I] (setting forth detailed rules on when sex with female slaves is permissible, and the consequences of such sex, including prohibitions against selling the female slave who has given birth to the master's child, and the setting of the status of the child as free); see also 14 MUHSEN IBN MAHDI TABATABA'I AL-HAKIM, MUSTAMSIK AL-URWA AL-WUTHQA 179-96 (1983) [hereinafter URWA] (setting forth rules, *inter alia*, respecting circumstances where sex between a female slave and a master's father or son might be permissible, and the consequences when it is not). However, these juristic discussions appear to be waning. Grand Ayatollah Sistani, the current *primus inter pares* of the juristic authorities in Najaf, does not discuss rules respecting sex with slaves at all beyond a footnote, indicating that it is not necessary to do so given the absence of slavery in contemporary society. See 2 ALI AL-SISTANI, MINHAJ AL-SALIHEEN 11 n.1 (2008) [hereinafter SISTANI]. This practice has been adopted by other high jurists operating in Najaf as well, among them Grand Ayatollah Muhammad Saeed al-Hakim. See 3 MUHAMMAD SAEED AL-HAKIM, MINHAJ AL-SALIHEEN 18 (2002) [hereinafter SAEED AL-HAKIM] (indicating that he will not address the rules respecting sex with female slaves because it is not relevant in our times). Moreover, even when the rules concerning sex with female slaves were the subject of significant discussion by earlier jurists of the twentieth century, the matter was more theoretical than it was legal. Slavery has been illegal in Iran since 1928, and in Iraq since 1924. See Behnaz A. Mirzai, *Emancipation and Its Legacy in Iran: An Overview*, UNESCO, 4 (2008), <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/dialogue/pdf/Emancipation%20Legacy%20Iran.pdf> (noting abolition of slavery in Iran in 1928); Cindy J. Smith & Kristiina Kangaspunta, *Defining Human Trafficking and Its Nuances in a Cultural Context, in HUMAN TRAFFICKING: EXPLORING THE INTERNATIONAL NATURE, CONCERNS, AND COMPLEXITIES* 19, 21 (John Winterdyk, Benjamin Perrin & Philip Reichel eds., 2012) (discussing the abolition of slavery in Iraq and Iran). Neither the Islamic Revolution in Iran nor the victory of Shi'i Islamist parties in Iraqi elections has resulted in any change to this. The fact that contemporary jurists have reacted to the banning of slavery by omitting their own rules of sex and slavery, rather than continuing to recite them, let alone exhorting their recognition into law, strongly suggests that they have acceded to this fundamental social change and no longer resist it. Accordingly, given the irrelevance of the rules of sex with female slaves, I do not discuss the subject herein except at the margins.

6. See, e.g., *infra* note 112 and accompanying quotation (taking the position that marriage to multiple women is recommended without limitation).

support his wife in most cases,<sup>7</sup> and pay her a sum known as the *mahr* in all cases,<sup>8</sup> and the wife having the primary obligation to enable the man to enjoy her sexually at virtually any time of his choosing.<sup>9</sup>

Part II then discusses the manner in which particular sexual practices are recommended and others are disfavored<sup>10</sup> so as to limit and control the same natural impulses, out of a desire to ensure the central place of God, and not sex, in the heart and mind of the believer.<sup>11</sup> Thus, for example, the preference in favor of the wearing of clothes during intercourse is meant to help limit excessive focus on sexual desire.<sup>12</sup> Similarly, rules concerning times and places of appropriate sex, and acts of worship in connection therewith,<sup>13</sup> help to reestablish the central role of the Divine in all aspects of life, including the performance of sex.

Part III deals with those sexual acts that are criminally prohibited, and for which severe punishment is mandated. Such prohibitions mainly concern any form of sex that takes place outside of the contract of marriage, where the role of the husband and the wife are strictly defined and controlled in the manner described in the first two Parts. The most well known of these is the prohibition on fornication, which is defined as vaginal sex between a man and a woman who are not married to one another.<sup>14</sup>

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7. SISTANI, *supra* note 5, at 3 ¶ 103-104; KHU’I, *supra* note 5, at 287. The obligation to support does not exist in a temporary marriage. KHU’I, *supra* note 5, at 2 ¶ 1318.

8. KHU’I, *supra* note 5, at 2 ¶¶ 1350-1354 (permanent marriage); SISTANI, *supra* note 5, at 3 ¶ 233 (temporary marriage). The Arabic term *mahr* is not easy to translate into English. The term “dowry” or “dower” is inexact because it usually refers to the obligation of a bride’s family to pay money to the groom, rather than the reverse. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 681, 683 (Grove ed. 2002). The term “bride price” is similarly inexact, as that is a sum paid by a groom to a bride’s *parents*, rather than the bride herself. *Id.* at 276. Given this, I have continued to use the original Arabic term rather than an inaccurate and potentially misleading translation.

9. *See infra* note 48 and accompanying text (describing wife’s obligation of “enablement”).

10. Islamic law traditionally divides acts into five categories—the obligatory, the recommended, the permitted (with neither favor nor disfavor), the disfavored, and the sinful. Mohammad Fadel, *Islamic Law and American Law: Between Concordance and Dissonance*, 57 N.Y.L.S. L. REV. 231, 233 (2013). Part II will focus on those matters that are either recommended or disfavored that are undertaken in connection with sex.

11. *See infra* notes 124-43 and accompanying text.

12. *See infra* notes 138-41 and accompanying text (quoting rules preferring that sex be undertaken while the parties remain clothed).

13. *See infra* note 142 and accompanying quotation.

14. KHU’I, *supra* note 5, at 3 ¶ 134.

Interestingly, even more categorically denounced than fornication within Shi'ism, to the contradistinction of the schools of Sunni Islam, is homosexuality on the part of either men or women.<sup>15</sup> The reason relates to the third of the demands that Shi'i Islam seeks to realize—the preservation of gender differentiation for the purposes of ensuring the continuation of traditional gender roles and hierarchies.<sup>16</sup> Having determined that the desire for sex must be recognized and strictly limited, and having decided to recognize and limit it exclusively through the relationship of husband and wife, with each of them having quite different roles in the relationship, the only way to preserve the continuation of gender hierarchies in the permitted sexual relationships would be to prohibit same-sex relationships altogether.<sup>17</sup> After all, recognizing such relationships would require the creation of gender-neutral rules for their sexual unions, which would upset the entire system of gender hierarchy already established in the male-female marriage contract. Hence, homosexuality is denounced and punished in the strongest possible terms.<sup>18</sup>

Part IV contrasts two commitments that play more significant roles in the regulation of sex in other normative orders and shows that

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15. While lesbian sex is an unambiguous sin within the classical traditions of Sunni Islam, it is not a scriptural crime that necessitates temporal punishment across its four primary schools. Thus, to the extent that lesbian sex was criminalized within Sunni Islam, it was as a sexual transgression that merited discretionary punishment delivered by state authorities, rather than a scriptural one that required punishment as an offense against God. See JUDITH E. TUCKER, *WOMEN, FAMILY AND GENDER IN ISLAMIC LAW* 190 (2008). As for male-to-male homosexuality, most jurists either proscribed it as part of the scriptural crime of fornication, or as a separate scriptural crime. In either case, it was strictly limited to actual anal intercourse. See Hassan El Menyawi, *Same-Sex Marriage in Islamic Law*, 2 WAKE FOREST J.L. & POL'Y 375, 398 (2012) (“The act of . . . sodomy[] is the only criminal act that is enunciated by the four early jurists . . . . Contrary to the statements of some members of the religious intelligentsia in the modern period, there is no criminalization or penalty for homosexuality per se. In fact, the term homosexuality is not itself contemplated or examined by the four early . . . jurists. [Sodomy] is solely restricted to the act of anal intercourse in which the penis of one man (known as the ‘active’) consensually or non-consensually penetrates the anus of another man (known as the ‘passive’).”). Moreover, a significant faction of the jurists within the Sunni Hanafi school did not deem anal intercourse between men to be a scriptural crime at all, but rather a discretionary one, as with lesbianism. It was, in other words, a sin that temporal authorities could punish, but were not obligated to. See CHRISTIAN LANGE, *JUSTICE, PUNISHMENT AND THE MEDIEVAL MUSLIM IMAGINATION* 199-214 (2008).

16. This observation is by no means unique to Shi'i Islam. Very similar arguments have been made respecting Sunni Islam. See, e.g., 1 SAMAR HABIB, *ISLAM AND HOMOSEXUALITY* 213-14 (2010); KECIA ALI, *SEXUAL ETHICS AND ISLAM: FEMINIST REFLECTIONS ON QUR'AN, HADITH, AND JURISPRUDENCE* 95-96 (2006).

17. See *infra* notes 185-89 and accompanying text.

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



they are in fact secondary in Shi'i Islam. The first of these relates to the procreative potential of sex. While this is central to sex regulation in many traditional normative orders, and while there are Shi'i rules that take it into account, procreation is largely viewed as an ancillary consequence of sex rather than a cause of its regulation.<sup>19</sup> This is important because of its implications on an individual's choice to undergo a simultaneous gender and sex change. Obviously, there is no procreative potential in a sexual relationship involving a person who has changed their sex and gender. Procreation, however, is not what the regulation of sex is fundamentally about in Shi'i Islam, and so this creates no real obstacle to the legal recognition of such a change. Moreover, unlike homosexuality, the changing of gender and sex does not challenge traditional gender differentiations and hierarchies. It does not force any change in the regulation of sexual relationships at all. It merely changes the rules pursuant to which the person undergoing the change must play. Therefore, some Shi'i jurists tolerate transgenderism to a large extent, with one important condition; it must be accompanied by a full anatomical sex change.<sup>20</sup> Any result that produced any sort of ambiguity respecting the resulting gender or sex of a person is not tolerated, nor could it easily be sustained within the gender hierarchy envisaged in the Shi'i system.<sup>21</sup>

The other secondary value addressed in Part IV lies at the other end of the spectrum—one that plays a large role in the regulation of sex in liberal societies—the protection of children from sexual harm. As with procreation, this value is recognized within Shi'i Islam, but it is secondary and focused nearly exclusively on physical harm, rather

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19. *See infra* notes 244-48 and accompanying text.

20. *See infra* notes 283-84 and accompanying text (pointing out that until an actual surgical operation takes place, a man has the duties of a man imposed upon him, and a woman has the duties of a woman imposed upon her, which include a strict prohibition against same sex relations).

21. This is a point that Ali makes in the context of Sunni juristic texts, in the following manner:

[T]he acknowledgment of the existence of transsexuals is not more of a challenge to the standard jurisprudential discourse of sex/gender than that of the hermaphrodite in classical and medieval discourses, nor is a person of ambiguous sex a challenge to the binary system once properly categorized.

ALI, *supra* note 16, at 94. Ali goes on to make the point that popular opposition only arises if the transgendered person is not viewed as "really" belonging to the sex to which they have changed, but only is doing so in order to have sex with persons of their original, actual sex. *See id.* As is discussed in Part IV.A, this appears to be Sistani's concern in the Shi'i tradition.

than any harm arising from the violation of bodily autonomy. A husband who has vaginal or anal sex with his minor wife has sinned, precisely because of the physical harm that could befall the girl.<sup>22</sup> However, if the rule is violated and the girl suffers physical injury from the intercourse, the consequences, while significant, are designed exclusively to compensate for the physical harm, in strong contrast to the rules in a liberal society, where the violation of the child's autonomy would alone be viewed as meriting not only compensation for harm, but also significant criminal punishment.<sup>23</sup>

Before continuing, it is important to note two important caveats. First, this Article concerns the regulation of sex among the authoritative jurists of Shi'ism in the modern era, beginning in the middle of the nineteenth century at the twilight of the Ottoman Empire,<sup>24</sup> and continuing through to this day. It takes no position on the evolution of Shi'i thought prior to this period. It emphatically does not engage with any alternative, progressive views that have been raised with increasing frequency during this time within the Shi'i community.<sup>25</sup> Such approaches are important and worthy of consideration, but are not the subject of this paper. Accordingly, it is absolutely not my purpose to suggest, by any means, that faith in Shi'i Islam *necessitates* the belief in the regulation of sex in the manner

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22. See *infra* notes 318-19 and accompanying text.

23. See *infra* notes 320-34 and accompanying text.

24. The Ottoman Empire's birth is commonly attributed to the date it conquered Constantinople and renamed it Istanbul, in 1453. ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 214-15 (1991). It came to an end with the signing of the Treaty of Lausanne in 1923. *Id.* at 316.

25. There are significant voices in favor of changing the received traditions and methods of the existing juristic seminaries. See, e.g., ABDULAZIZ SACHEDINA, ISLAM AND THE CHALLENGE OF HUMAN RIGHTS 115-46 (2009) (offering an Islamic position respecting women's rights that is far more consonant with modern progressive values than the traditional rulings herein described). See generally Hamid Mavani, *Two Shi'i Jurisprudential Methodologies to Address Medical and Bioethical Challenges: Traditional Ijtihād and Foundational Ijtihād*, 2 J. RELIGIOUS ETHICS 263 (2014) (laying out an alternative vision of "foundational *ijtihad*," advocated by Mohsen Kadivar, that would enable a broad reappraisal of past determinations, including those pertaining to women). It suffices to say that these approaches are met with fierce resistance from leading forces within the traditionalist camp that continue to hold sway with the devout masses. In 1998, Grand Ayatollah Sistani went so far as to order believers not to invite Sachedina to lecture at religious gatherings, nor to seek answers from him on religious questions. Akil M. Karim, *Implications of A. Seestani's Rulings on Dr. Sachedina (Follow-up)* 'AALIM NETWORK (Oct. 21, 1998, 9:50 PM), <http://www.al-islam.org/organizations/AalimNetwork/msg00807.html>; see also Abdulaziz Sachedina, *What Happened in Najaf*, [http://islam.uga.edu/sachedina\\_silencing.html](http://islam.uga.edu/sachedina_silencing.html) (last visited Oct. 15, 15) (describing encounter between Sistani and Sachedina, where Sistani offered to pay Sachedina his salary if he would cease propagating his allegedly false beliefs respecting Islam).

hereinafter contemplated. There may indeed be other ways to interpret Shi'i Islam's sacred texts. For reasons of space alone, this paper exclusively explores what might be termed Shi'i orthodoxy, leaving the consideration of heterodox approaches to different times and different places.

Secondly, this Article is unrelentingly realist in its orientation. Obviously, in developing rules, jurists do not claim to be realizing any moral and ideological commitments of the sort described above. Rather, they justify their positions as being the interpretation of primary authoritative texts, precisely as any US judge would do, with the only difference between them being the authoritative texts to which they turn. Those who actually believe that Islamic jurists (or US judges) actually do this, or indeed that they can possibly do it, in a neutral and antiseptic fashion, will no doubt find the approach this Article takes as excessively cynical and unduly dismissive of the interpretive task. Those more willing to contemplate the possibility that something other than apolitical and unbiased interpretation is taking place in juristic academies and judicial chambers alike—those, that is, who take to heart Llewellyn's famous adage that what the judge says is less important than what the judge does<sup>26</sup>—might find the approach more satisfying. In any event, I make no pretense of my own deep-seated belief that texts, and in particular religious texts over a millennium old, are ambiguous, contradictory, and capable of manifold interpretations. What the community of jurists ultimately decides is the correct approach is driven, by necessity, by the ideological commitments of that community. The purpose of this Article is to do no less and no more than reveal those commitments as they pertain to the regulation of sex.

## I. *DEFINING PERMISSIBLE SEX*

### A. *Marriage as Contract for Licit Sex*

The identification of marriage to sex is so close within Shi'ism that the terminology tends to overlap, and in a manner that causes some degree of confusion. Hence, Shi'i jurists most often refer to sexual intercourse through the transitive verbs *wata'a* or *jama'a*, or

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26. KARL LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 7 (2008).

the nouns derived therefrom, *wata'* and *jima'*.<sup>27</sup> When dealing with specifically contractual elements of the marriage, variants of the root verb *zawaja* are frequently used.<sup>28</sup> Finally, there is the more generic and broadly used juristic term *nikah*. Shi'i jurists invariably title the section of their juristic compendia that address the questions of marriage as *Kitab al-Nikah*, which would conventionally be translated as the "Book of Marriage."<sup>29</sup>

Yet *nikah* does not mean "marriage" in the same sense that *zawaj* does. For example, in defining the three types of *nikah*, the *primus inter pares* of the Najaf juristic academies until his death in 1992, Grand Ayatollah Khu'i, refers to them as "permanent, temporary and the ownership of the right hand."<sup>30</sup> The third of these refers to the historic dispensation of male owners to the sexual enjoyment of their unmarried female slaves.<sup>31</sup> While such concubinage is beyond the scope of this paper, it should be obvious that sexual permissibility of this sort does not arise out of any sort of marriage contract authorizing it.

A better translation of *nikah* might therefore be "permissible sex," as it encompasses not only the contractually arranged sex of *zawaj*, but also the licit sex that transpires between a master and his female slaves. Yet the term also can mean the act of sexual intercourse itself. To demonstrate the confusion, I provide below the opening passage of the Book of the *Nikah* from the juristic compendium that has proven to be the most markedly influential in modern times.<sup>32</sup> It is referred to as the *Jawāhir al-Kalam* (henceforth, *Jawahir*), written in the middle of the nineteenth century by

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27. See, e.g., Sistani, *supra* note 5, at 2 ¶ 8 (noting that it is not permitted to have intercourse with (*wata'a*) a wife before she reaches the age of nine lunar years); *id.* at ¶ 5 (explaining that intercourse (*jima'*) is disfavored on the night of a lunar eclipse).

28. See, e.g., *id.* at ¶ 26 ("If the guardian marries (*zawaja*) his ward to one who has a deficiency, then the contract is corrupt with respect to [the ward] . . .").

29. Tucker, for example, seems to translate the *nikah* as "contract of marriage." TUCKER, *supra* note 15, at 41.

30. Khu'i, *supra* note 5, at 258.

31. See *id.* at 2 ¶¶ 1320-1340.

32. See ABDULAZIZ SACHEDINA, THE JUST RULER IN SHI'ITE ISLAM: THE COMPREHENSIVE AUTHORITY OF THE JURIST IN IMAMITE JURISPRUDENCE 22 (1988) (describing the influence of the *Jawāhir*). For a less sober and academic account, one popular website describes the *Jawāhir* as "an indispensable companion of every [jurist] worth any name, since each line in it requires profound pondering and elucidation." See *Allamah Shaikh Muhammad Hasan Najafi 'Sahib-e-Jawāhir,'* Imam Reza (A.S.) Network, <http://www.imamreza.net/eng/imamreza.php?id=6934>.

Muhammad Hasan al-Najafi, a leading and highly respected scholar of the modern era.<sup>33</sup>

[*Nikah*] is linguistically sexual intercourse, by a significant majority [of jurists] and indeed according to various [sources], by consensus. This is the agreement of the linguists. [One source] says, “*Nikah* is sexual intercourse, but it can be used for the contract.” [Another source says], “the foundation of *nikah* is sexual intercourse, and then marriage is called permissible *nikah*, because it is the basis for the sexual intercourse.” This is not contradicted by [another source], which says, “it is sexual intercourse and the contract.” Thus, there is much that overlaps between the reality, the permissible, language, and the *shari’a*.<sup>34</sup>

The *Jawahir* later explains that jurists generally regard *nikah* as meaning intercourse linguistically, while it refers to the contract for intercourse for purposes of the rules comprising the *shari’a*.<sup>35</sup> To avoid mistranslation, I shall use the word *nikah* in untranslated form throughout while translating forms of the verb *zawaj* to refer to the actual contract of marriage.

### B. *The Permanent Marriage*

If the centrality of sex to marriage were not clear enough from the liberal use of a word, *nikah*, which seems to mean simultaneously sex, permissible sex, and marriage, it is rendered even clearer by virtue of the rules respecting the two forms of marriage recognized in Shi’i Islam.<sup>36</sup> This Section focuses on the first of these—the permanent marriage. The next Section addresses the temporary marriage.

Upon entering a permanent marriage, a husband must agree to pay his contracted wife a sum known as a *mahr*, agreed upon by the two of them, part or all of which may be delayed in payment to a future date.<sup>37</sup> If no future date is set, then it is due upon conclusion of the contract.<sup>38</sup> That this is a form of compensation for sex is made obvious enough by the fact that the wife is entitled to refuse sexual

33. SACHEDINA, *supra* note 25, at 22.

34. 29 MUHAMMAD HASAN AL-NAJAFI, *JAWAHIR AL-KALAM FI SHARH SHARA’I AL-ISLAM* 5 (Abbas al-Quchani ed., 7th ed. 1981) (ca. 1841) [hereinafter *Jawahir*].

35. *See id.* at 29:6.

36. *See* KHU’I, *supra* note 5, at 258 (describing two forms of marriage).

37. *See id.* at 2 ¶¶ 1350-1354.

38. *See id.* at 2 ¶ 1353.

intercourse until she is paid this agreed amount.<sup>39</sup> The *Jawahir* explains precisely why this is in clear enough terms:

She may refuse sex and the surrendering of her body until she receives her *mahr* by agreement, and the same is true for lifting her veil and other matters. This is because the *nikah* with the *mahr* is compensation for [those actions]. She is not alone using these appropriate means. Every party to be compensated may refuse to surrender until they receive the compensation. Based on the report of Zur'a bin Sama'a, "I asked him about a man who married a maiden and enjoyed her then she rendered him free of his *mahr*. May he have intercourse with her before he gives her anything? He said, 'Yes. If she rendered him free, then she has taken the *mahr* from him.'" But for embarrassment, difficulty, harm, or oppression, she should not deny him, because the vulva is compensation by consensus, and the *nikah* is compensation first. Based on plentiful texts [i.e. original source material], what the husband gives her enables him to have sex with her, and makes her vagina permissible to him.<sup>40</sup>

As the above makes clear, a wife may dispense with the *mahr* promised to her, and she may also agree to a negligible amount, or even to a *mahr* comprising nothing more than a simple service of no market value at all.<sup>41</sup> As with any contract, nobody is going to force the seller to demand a high price.

If, however, the parties for some reason fail to affix a price for a permanent marriage, then, as with a contract for sale under the Uniform Commercial Code, the law will fix a reasonable one for them.<sup>42</sup> The jurists refer to this as the "*mahr* of equivalence."<sup>43</sup> Taken into account are characteristics such as "age, virginity, nobility,

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39. While not every jurist explains the reason for this rule in the manner that the *Jawahir* does in the passage quoted in the main text, there is absolute unanimity respecting the rule itself. Jurists repeatedly make the point that a woman may refuse sexual intercourse until she receives whatever *mahr* is due to her immediately. *See, e.g., id.* at 2 ¶ 1362; SISTANI, *supra* note 5, at 2 ¶ 306; SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 157.

40. *Jawahir*, *supra* note 34, at 31:41.

41. SISTANI, *supra* note 5, at 2 ¶ 286 (indicating that the *mahr* may be anything that is possible for a Muslim to own, including a promised service, such as teaching the wife a chapter of the Qur'an).

42. U.C.C. § 2-305(1) (AM. LAW INST. & UNIF. LAW COMM'N 2002) ("The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . . nothing is said as to price . . .").

43. SISTANI, *supra* note 5, at 3 ¶¶ 294–295; KHU'1, *supra* note 5, at ¶ 1354.

modesty, intelligence, morals, honor, maturity and their opposites.”<sup>44</sup> All other things being equal, a young virgin commands a higher price than an elderly woman who has been married twice before. To make the commodification of specifically the intact hymen clear, jurists indicate, again without noticeable dispute among them, that one who rapes a virgin owes her a *mahr* of equivalence.<sup>45</sup> This is, after all, the closest approximation to the *mahr* she would have been able to receive in a contract for her marriage.

A husband’s other primary obligation in a permanent marriage is to financially support his wife, and in the manner to which she would have been accustomed in her father’s home, which would include food, clothing, medicine, shelter, servants, and the like.<sup>46</sup> This obligation, and what it entails, is described in painstaking detail in the *Jawahir*.<sup>47</sup>

In exchange for these forms of financial compensation, a woman has one core obligation, to which all others are ancillary. It is described with great frequency by modern Shi’i jurists in a single Arabic term—*tamkin*, or “enablement.”<sup>48</sup> Specifically, she must enable her husband to enjoy intercourse with her at any time of his choosing, with only the most limited of exceptions, relating primarily to illness<sup>49</sup> and the performance of obligatory acts of worship.<sup>50</sup> An ancillary obligation of the wife involves not leaving the home without the husband’s permission, again with a primary exception being the performance of obligatory acts of worship such as the pilgrimage to Mecca.<sup>51</sup> A primary reason seems to be that it would curtail a

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44. SISTANI, *supra* note 5, at 3 ¶ 295.

45. *See id.* at 3 ¶ 319; SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 161; KHU’I, *supra* note 5, at 2 ¶ 1351.

46. SISTANI, *supra* note 5, at 3 ¶ 103-104; KHU’I, *supra* note 5, at 287; *Jawahir*, *supra* note 34, at 31:330.

47. *Jawahir*, *supra* note 34, at 31:330-54.

48. *See, e.g., id.* at 31:303 (indicating that a condition for the husband’s obligation to support is “entire enablement, which is to cede to him entirely . . . setting neither time nor place where his enjoyment of her is permissible”); KHU’I, *supra* note 5, at 2 ¶ 1365 (“A wife is obligated to enable and to remove any repugnancy.”); SISTANI, *supra* note 5, at 3 ¶ 337 (“[T]he right of a husband against his wife is that she enable him to near her, and otherwise [enable him] for the enjoyments established for him as the [marriage] contract requires, at any time he wishes, and that she does not prevent him except for a legitimate reason . . .”).

49. *Jawahir*, *supra* note 34, at 31:312.

50. *Id.* at 31:314–315.

51. *See* SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 188; *see also* SISTANI, *supra* note 5, at 3 ¶¶ 337(1), 338 (noting, in addition to an ability to leave the house to perform an act obligatory

husband's right of enjoyment if she did leave without his permission.<sup>52</sup>

The *Jawahir* states that recommended acts of worship do not give a wife a right to refuse enablement. In other words, according to the *Jawahir*, a woman who wishes to say an additional prayer during a day or to fast for three days as an act of worship is not permitted to do so without her husband's permission, because it would limit his right to sexual enjoyment.<sup>53</sup> If he were to give her permission to fast, and then change his mind because he desired sex, she must break her fast so as to enable him.<sup>54</sup>

A husband's obligation to support his wife comes to an end if she does not enable him, though there is some dispute over how much she must refuse to enable before a husband is justified in cutting off support. Sistani indicates that if a wife only partially fails to enable her husband, then the husband may not cut off support, because of what in Shi'i parlance is referred to as "obligatory precaution."<sup>55</sup> Basically, this means that the possibility that the husband in fact owes the wife support despite her refusal to submit sexually on occasion is uncertain enough that out of precaution, it remains his obligation to pay support rather than risk falling into sin for failing to do so. Sistani acknowledges, however, that the more "widespread" opinion is that a woman who is failing to enable her husband, even on occasion, may have support cut off from her.<sup>56</sup> This certainly is the position of the *Jawahir*, which indicates that a condition of support is "complete

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on her, additional exceptions to visit relatives, offer support when they are sick, or attend their funerals).

52. See SISTANI, *supra* note 5, at 3 ¶ 337(1) ("The right of a husband against his wife is . . . that [the wife] not leave her home without his permission if this would deny his right to enjoyment; in fact, at all is the more manifest opinion."). As this quotation reveals, Sistani believes the "more manifest" opinion is that a wife is obligated never to leave the marital home without her husband's permission even if it does not curtail his right of sexual enjoyment. That type of expression of uncertainty (i.e. describing a position as a "more manifest" one than an unambiguously correct one) is common among Shi'i jurists, though it is notable that Sistani shows no similar doubt about a wife's obligation not to leave the marital home if it does curtail a husband's right to sexual satisfaction. *See id.* That said, the idea of imprisoning a wife in a home may extend for reasons beyond a wife's obligation of enablement and include the broader notion of secluding women from the potential gaze of others. Hence, for example, Grand Ayatollah Muhsen Hakim indicates that it is "recommended" for a husband to imprison his wife in the home and not let any man enter upon her. URWA, *supra* note 5, at 14:11.

53. See *Jawahir*, *supra* note 34, at 31:314-15.

54. *See id.*

55. See SISTANI, *supra* note 5, at 3 ¶ 351.

56. *See id.*



enablement,” wherein the husband is free to satisfy his sexual needs without restriction as to time or place.<sup>57</sup>

What is not disputed are the other actions that a husband may take against his wife if she fails to enable him. First, he may admonish her for her failings.<sup>58</sup> If this does not work, then he may turn his back on her in bed or avoid her bedside altogether in favor of other wives if he is polygamous.<sup>59</sup> If this does not work, he may use physical discipline and hit her to the minimum extent necessary to ensure her compliance with her obligation to enable him sexually.<sup>60</sup> The beatings may get stronger and stronger as she continues to refuse to comply,<sup>61</sup> but they may not reach the level of the breaking of bones or the bruising of flesh.<sup>62</sup>

Finally, a man is entitled to take no more than four permanent wives at any single time.<sup>63</sup> This restriction is mitigated by the fact that a man has an absolute power to terminate a marriage through a single oral pronouncement of what is known in Arabic as *talaq*.<sup>64</sup> That said, Shi’i rules attempt to limit divorce—through the medium of sex. Specifically, a husband is obligated to support his wife for three menstrual cycles following the pronouncement of *talaq*, and she is obligated to remain in the marital home.<sup>65</sup> She is permitted, and indeed it is recommended to her, to show him her “beauty” when in the marital home.<sup>66</sup> Were he to have sex with her again during this

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57. See Jawahir, *supra* note 34, at 31:303.

58. SISTANI, *supra* note 5, at 3 ¶ 353; KHU’I, *supra* note 5, at 2 ¶ 1365.

59. SISTANI, *supra* note 5, at 3 ¶ 353. Normally, a wife of a husband with other wives has a certain right to have her husband spend a certain number of nights with her to the extent he spends time with his other wives. KHU’I, *supra* note 5, at 2 ¶ 1363. That right is suspended for a wife who refuses to enable her husband.

60. SISTANI, *supra* note 5, at 3 ¶ 353.

61. *See id.*

62. See SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 190; KHU’I, *supra* note 5, at 2 ¶ 1365.

63. See URWA, *supra* note 5, at 14:93.

64. To be clear, there are formal rules for precisely how the *talaq* must be pronounced to protect against hasty or ill-conceived attempts to divorce. For example, the husband must use the term *talaq* specifically, so that “go back to your parents” is not, in fact, deemed an end to a marriage, no matter what the broader context. *See* SISTANI, *supra* note 5, at 3 ¶ 498. Two male Muslim witnesses must be present at the pronouncement. *See id.* at 3 ¶ 498. The husband must be of sound mind, which includes a requirement of sobriety. *See id.* at 3 ¶ 475. A wife cannot be menstruating or bleeding during childbirth at the time that the *talaq* is pronounced. *See id.* at 3 ¶ 485. While these rules can create temporary, procedural impediments to a quick divorce, they are no permanent obstacle to any husband sincerely wishing to be free of his marriage obligation to his wife.

65. KHU’I, *supra* note 5, at 2 ¶ 1474.

66. *See id.*

three-month period, which is plainly facilitated by these rules, they resume their marriage automatically.<sup>67</sup> A woman has no right to a similar type of divorce unless her husband has made her his agent for pronouncing it as part of the marriage contract.<sup>68</sup> She can, however, seek a judicially ordered dissolution of the marriage, if she has a religiously recognized cause to do so.<sup>69</sup>

It is perfectly obvious that these rules presume a great deal of sexual desire on the part of men that demands satisfaction. Women seem to be, in many ways, merely the vehicle through which this desire is satiated, rather than having such desire on their own. Even the means to describe the wife's obligation—enablement—is quite telling. The Arabic verbs used by the jurists to describe the sexual act as between husband and wife are transitive, and the woman serves always as object, never as subject.<sup>70</sup> Thus, a wife, in the discourse of the jurists, cannot have sex with her husband, but can only *enable* him to have sex with her.

That said, a woman's sexual desire is contemplated by the juristic rules, albeit in a far diminished form to that of a man. For example, a man has an obligation to have sex with his wife once every four months at least, and not to extend travel beyond that time.<sup>71</sup> He is religiously obligated to have sex with her more often than that if she cannot wait that long.<sup>72</sup> Some jurists will go so far as to permit a wife in some circumstances to raise a case to a judge if her husband refuses to have sex with her at least once every four months, as he is required to do. The judge will then direct the husband either to undertake this marital obligation and have sex with his wife, or pronounce a divorce.<sup>73</sup> If he refuses to do either, the judge can issue the divorce. This, however, seems to be limited to cases where the husband is refusing to have sex out of anger with his wife rather than because of travel or other absence.<sup>74</sup> Hence, for example, if a husband is involuntarily absent from his wife for a period of time (for

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67. See SISTANI, *supra* note 5, at 3 ¶ 531.

68. See *id.* at 3 ¶ 504.

69. See *infra* notes 74-79 and accompanying text (giving examples of causes which a woman can use to obtain a judicially ordered dissolution of her marriage).

70. To be clear, the verbs used to describe sex can take women as subject rather than object, but only when the description is of lesbian activity. See, e.g., Jawahir, *supra* note 34, at 41:387 (defining lesbianism as "a woman having sex with her like").

71. See SISTANI, *supra* note 5, at 3 ¶ 9.

72. See *id.* at 3 ¶ 341.

73. See SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 186.

74. See *id.*

example, if he is in prison), then a husband is recommended to divorce his wife if she claims she cannot wait for him without suffering harm due to unrequited sexual desire.<sup>75</sup> However, if he refuses, she must wait for him.<sup>76</sup>

Moreover, a woman may seek an annulment of her marriage if her husband proves to be impotent.<sup>77</sup> However, his impotence must be entire, meaning he is incapable of having sex with any woman, not just the wife making the complaint.<sup>78</sup> In sum, women are presumed to have sexual desire, and some effort is made to ensure that this desire is sated. However, quite plainly, their presumed desires and their rights arising as a result, are much diminished relative to that of their husbands.

By contrast, the Shi'i jurists take quite seriously the primary rights of a wife that are financial in nature. According to Sistani, a husband who does not support his wife can be brought to court, and he can be compelled to forfeit assets as necessary to support her in the manner to which she is entitled.<sup>79</sup> If the husband refuses to do so, and he will not divorce his wife, the judge may dissolve the marriage.<sup>80</sup> Similarly, as discussed above, all the jurists agree that a woman is entitled to claim her immediate *mahr* before she enables her husband.<sup>81</sup> A man who has promised deferred *mahr* in addition to an immediate *mahr* must pay it no later than the earlier of divorce or death. This means that if he promised a large sum (not uncommon among husbands certain they will never divorce and unconcerned with the financial consequences of their estates after death), a decision to pronounce *talaq* can entail significant financial consequences. If he dies, her *mahr* is a debt due and owing paid before any inheritance portions to other family relatives.

Perhaps the most obvious manner in which women's financial rights supersede their right to sexual satisfaction is revealed in the rules respecting missing husbands. If a husband is missing, and presumed dead, then jurists draw a sharp distinction between the missing husband who has assets to support his wife, and the one who

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75. See SISTANI, *supra* note 5, at ¶ 359.

76. *See id.*

77. *See id.* at 3 ¶ 267.

78. See KHU'Ī, *supra* note 5, at 2 ¶ 1346.

79. SISTANI, *supra* note 5, at 3 ¶ 355.

80. *See id.* at 3 ¶ 356.

81. *See supra* note 41 and accompanying quotation.

does not.<sup>82</sup> As to the former, the wife has no right to dissolution of the marriage.<sup>83</sup> As to the latter, she does have such a right if he does not return after four years and a search has turned up no sign of his whereabouts.<sup>84</sup> Plainly, this shows that while the jurists are not willing to countenance an unsupported wife to the extent that she is sexually obedient, they are less perturbed by the presence of a sexually frustrated woman with an absent husband.

### C. The Temporary Marriage

The previous section shows that a permanent marriage grants men the opportunity for a fair amount of licit sex with multiple partners. At the same time, the sex is hardly free. The man must support his wife entirely, and if he fails to do so, she can force him to sell his assets or divorce her.<sup>85</sup> This acts as an important, realistic limitation on the amount of sex a man can really have.

To address this problem, Shi'ism has developed a particular form of marriage, which is not recognized among the Sunni schools, known as the temporary marriage.<sup>86</sup> Jurists analogize this type of marriage to a lease contract, where, effectively, a woman leases, rather than sells, her sexual organs for a sum certain during a specified term. Thus, the parties need to agree on a lease rate, which takes the form of a *mahr*, and they need to agree on a lease term, which takes the form of an expiration date for the marriage. The *Jawahir* makes this comparison explicit in the following passage, using primary source material consisting of reports of the statements and conduct of Shi'a Islam's Infallible Imams:<sup>87</sup>

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82. *See id.* at 3 ¶ 589.

83. *See id.*

84. *See id.*

85. *See supra* notes 78-79 and accompanying text.

86. The traditional Shi'i account is that the temporary marriage was permissible during the era of the Prophet Muhammad, but that the Sunni schools prohibit it because the second caliph declared it prohibited. As the second caliph has no recognizable authority in Shi'i Islam at all, such a determination holds no weight within Shi'i jurisprudence. *See, e.g.,* *Jawahir*, *supra* note 34, at 30:139-40.

87. Gleave offers the best summary description of the role of the Imams in Shi'i jurisprudence:

Twelver Shī'ī belief is characterized by a conviction that during the Prophet's lifetime, 'Alī (his cousin and son-in-law) was designated as leader of the Muslim community, and Twelver Shi'ites, unlike other Shī'ī groups, consider there to have been twelve such leaders (Imams) descended from (and including) 'Alī who were the rightful leaders of the Muslims. These Imams shared some of the characteristics

The *mahr* is a special condition of the temporary marriage, and the contract is void without it, without disagreement and indeed by consensus. It is the basis [for the marriage] based on the statement of al-Sadiq [Shi'a Islam's Sixth Imam] 'there is no temporary marriage without two matters: a set time, and a set rent. . . .' And in other report, 'the women are leased,' as with the statement of al-Baqir [the Fifth Imam] 'she is leased.' From this the difference is known between the permanent, with whom one wishes offspring and the like, and the temporary, from whom one desires usufruct and pleasure and the like, as a result of which it resembles a lease, and thus the *mahr* is compensation for the lease and a condition for its validity.<sup>88</sup>

Later jurists, no doubt aware of how the matter might be perceived among the Shi'a masses, do not actually discuss the temporary marriage in such commercial terms. The rules, however, are the same—the temporary marriage requires a set price, meaning there is no “*mahr* of equivalence” as with a permanent marriage,<sup>89</sup> and it requires a set term, meaning the date at which the marriage contract ends must be specified.<sup>90</sup> As with a permanent marriage, there is no limitation on the *mahr* in terms of value so long as the parties agree.<sup>91</sup> It is supposed to be paid immediately, though it can be paid in installments if there is fear that the wife might not carry out her obligations of enablement during the specified period.<sup>92</sup>

Similarly, there is no limitation on the length of the time period, except at the margins. Sistani thus specifically indicates that an hour or less would be acceptable, as would a year or more.<sup>93</sup> The *Jawahir* indicates that there is some doubt over a period so short that sexual pleasure is not possible, comparing it to the transaction of an incompetent party trading for something for which there is no benefit or purpose.<sup>94</sup> The *Jawahir* reaches the same conclusion as to a

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of the Prophet Muhammad (such as sinlessness—*'isma*) and their words and actions are considered (along with those of the Prophet) by Twelver Shi'ites as sources of legal and religious guidance (Sunna).

ROBERT GLEAVE, *INEVITABLE DOUBT: TWO THEORIES OF SHI'I JURISPRUDENCE 1* (Studies in Islamic Law and Society Ser. No. 12, 2000).

88. *Jawahir*, *supra* note 34, at 30:162.

89. *See* SISTANI, *supra* note 5, at 3 ¶ 233; KHU'I, *supra* note 5, at 2 ¶ 272.

90. *See* KHU'I, *supra* note 5, at 2 ¶ 1302.

91. *See* SISTANI, *supra* note 5, at 3 ¶ 236; KHU'I, *supra* note 5, at 2 ¶ 1304.

92. *See* SISTANI, *supra* note 5, at 3 ¶ 239; *Jawahir*, *supra* note 34, at 30:164-165.

93. *See* SISTANI, *supra* note 5, at 3 ¶ 16.

94. *See* *Jawahir*, *supra* note 34, at 30:176.

contract that would extend beyond the life of either contracting party.<sup>95</sup> Later leading jurists make no mention of shorter time periods, though they do agree that a term longer than the expected life of either of the marrying parties is problematic. They are divided, however, over whether such a term would result in a void contract or a permanent marriage.<sup>96</sup>

Beyond this, there are other differences from a permanent marriage that limit obligations that the respective parties might find entangling. Most importantly, there is no support obligation imposed on a husband during a temporary marriage. While this obviously works to the advantage of the husband, it also leaves the wife comparatively unconstrained. There is no marital home for a wife to be obligated to remain in, after all, if the husband has no obligation to supply it. A temporary wife can thus leave her home any time she wishes, except to the extent that it interferes with her husband's right to sex.<sup>97</sup> This greatly increases her relative freedom, particularly when combined with the fact that she may contract to limit the enjoyments that a husband derives from her. This can include anything from the number of times that the husband may have sex with her,<sup>98</sup> to the times of day in which sex is to take place,<sup>99</sup> to sex acts that specifically exclude penetration.<sup>100</sup> She could, therefore, condition the contract on sex at night exclusively, and then be free to enter and leave the home as much as she wished during the day without her husband's permission.

Three additional distinctions deserve mention. First, neither party inherits from the other in the manner that a permanent spouse does.<sup>101</sup> Second, while Shi'ism does not permit a Muslim man to

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95. *See id.* at 30:175-176.

96. *Compare* KHU'I, *supra* note 5, at 2 ¶ 272, *and* SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 126 (indicating that a longer term results in a permanent marriage), *with* SISTANI, *supra* note 5, at 3 ¶ 244 (indicating that a longer term results in a void contract).

97. *See* SISTANI, *supra* note 5, at 3 ¶ 257.

98. *See id.* at 3 ¶ 250; SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 127 (indicating that supplying a number of times to have sex in place of a time period in a temporary marriage is not permissible as obligatory precaution, but that it can be a condition added to the contract in addition to a time period).

99. *See* SISTANI, *supra* note 5, at 3 ¶ 250.

100. *See id.* at 3 ¶ 337(1); KHU'I, *supra* note 5, at 2 ¶ 1314.

101. *See* Jawahir, *supra* note 34, at 30:190. Islamic law does not permit a party to devise more than a third of their estate by bequest. TUCKER, *supra* note 15, at 138. The balance is distributed to relatives according to an elaborate distribution system, the details of which lie far beyond the scope of this Article. *Id.* at 138-39. It suffices to note that Shi'ism grants spouses inheritance rights only when they are contracted in a permanent, rather than

marry anyone but a Muslim woman permanently,<sup>102</sup> it does permit Muslim men (but not women) to marry followers of Abrahamic faiths, such as Christians and Jews, in a temporary marriage.<sup>103</sup> Finally, a temporary marriage with a fornicator is permissible, though it is disfavored.<sup>104</sup> If the fornicator becomes particularly well known for her fornication, the marriage becomes impermissible.<sup>105</sup>

There are no limits on the number of temporary wives a husband can take. In the words of Grand Ayatollah Muhsen al-Hakim, even a thousand is permissible.<sup>106</sup> A woman may have only one partner at a time and she must wait two menstrual cycles before taking another.<sup>107</sup> No waiting period applies to women in menopause,<sup>108</sup> those too young to menstruate,<sup>109</sup> or where there has been no penetration.<sup>110</sup> This means that a woman who has stipulated a lack of penetration in her marriage contract, and holds to it, is free to conclude serial temporary marriages without restriction.

There are other differences that exist vis-à-vis the permanent marriage,<sup>111</sup> but this brief review helps to demonstrate the wide

temporary, marriage. See SISTANI, *supra* note 5, at 3 ¶ 954(1)-(2) (setting forth inheritance rights for permanent spouses).

102. SISTANI, *supra* note 5, at 3 ¶ 205; KHU'Ī, *supra* note 5, at 2 ¶ 1287(4). Generally, this is regarded as an obligatory precaution, meaning that the permissibility of marrying a person of the book is sufficiently uncertain that a believer is obligated to avoid it as potentially problematic. Sunnism has a very different rule, specifically permitting the marriage of Muslim men (but not women) to followers of Abrahamic faiths.

103. See SISTANI, *supra* note 5, at 3 ¶ 232; KHU'Ī, *supra* note 5, at ¶ 1287(4); Jawahir, *supra* note 34, at 30:155.

104. SISTANI, *supra* note 5, at 3 ¶ 261; KHU'Ī, *supra* note 5, at ¶ 1303; Jawahir, *supra* note 34, at 30:159.

105. See sources cited *supra* note 104.

106. See URWA, *supra* note 5, at 14:94-95; see also KHU'Ī, *supra* note 5, at 2 ¶ 1304 (“The temporary wife is not limited to a number, so a man is permitted to enjoy what he wishes among women [in temporary marriage].”).

107. See KHU'Ī, *supra* note 5, at ¶ 1310 (pointing out different rules for, *inter alia*, pregnant women, the widowed, those in menopause, and those who do not menstruate for medical or other reasons); SISTANI, *supra* note 5, at 3 ¶ 259.

108. See SISTANI, *supra* note 5, at 3 ¶ 259; KHU'Ī, *supra* note 5, at ¶ 1310.

109. See sources cited *supra* note 108.

110. See SISTANI, *supra* note 5, at 3 ¶ 259; see also Jawahir, *supra* note 34, at 30:196 (setting forth a waiting period of two months if there has been penetration). Notably, the *Jawahir* does indicate that the waiting period for a widow following a temporary marriage is four months and ten days, even if there has been no penetration. See Jawahir, *supra* note 34, at 30:200.

111. Most notably, a husband has no right to the unilateral *talaq* divorce in a temporary marriage. See Jawahir, *supra* note 34, at 30:188; KHU'Ī, *supra* note 5, at ¶ 1319. It is unclear precisely what the point of a divorce would be when the husband has no support obligation, nor is he limited in the number of wives he can take, meaning he is not freeing himself of any

variety of sexual arrangements that are rendered licit by virtue of the temporary marriage. Plainly, the relationships are of the sort where the man's primary objective would be sexual satisfaction and a woman's would be financial in nature, precisely as was the case for permanent marriage. Nevertheless, within this rubric, marriage is considerably more flexible as to form. It can include, for example, everything from manual masturbation of a husband by a temporary wife once for a ten-minute period for the *mahr* of US\$ 10, to three years of sex in exchange for law school tuition and an apartment, paid in installments over the life of the temporary marriage. Almost anyone could afford it, and almost anyone could engage in it.

#### *D. Marriage as Recommended*

The previous Sections highlighted the various forms of sex in which a person *may* engage in a permissible fashion within Shi'i Islam. The purpose of this Section is to show that the matter is not merely a question of permissibility. The *nikah* is recommended, in strong terms, as to all forms.

The following are from the opening pages of the Book of the *Nikah* of Grand Ayatollah Muhsen al-Hakim, the *primus inter pares* of the high scholars of the Najaf seminaries in the middle of the twentieth century:

The *nikah* is recommended on its own by consensus, by the Qur'an, and by the example of the Prophet according to numerous and indeed incontrovertible reports. God the Exalted has said, "Engage in *nikah* the unmarried among you, and the righteous among your male and female slaves. If they are poor, God will enrich them from his bounty, for God is bounteous and knowledgeable." And in the Prophetic tradition, "*Nikah* is my practice, and he who finds my practice distasteful is not my follower." And from the Commander of the Faithful, "Marry, for the Apostle of God said, 'whoever desires to follow my practice, my practice is marriage.'" And from the Prophet, "what is established is God's love for marriage. And from the Prophet,

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obligation by divorcing a temporary wife. That said, a husband is free to "gift" his wife the remainder of her time, which effectively works to dissolve the union in the same way that a divorce normally would. See SISTANI, *supra* note 5, at 3 ¶ 249 (indicating that a husband wishing to extend the time of a temporary marriage cannot do so during its existing term, so he must gift his wife the remainder of her time before concluding a second contract with her for the additional time); Jawahir, *supra* note 34, at 30:196 (referring to the waiting period of a woman where the contract has expired or where the time has been gifted by the husband).



“whoever marries has completed half of his religion, so let him be aware of God with the other half.”

What one learns from the sum of the reports is that the love of women is recommended . . . .

What is established from some of the reports is the disfavoring of bachelorhood . . . .

The recommendation [to marry] does not end with one woman, but rather polygamy is favored as well. God the Exalted has said, “Engage in *nikah* with those who are good for you among women—two or three or four.” And it is clear that the recommendation for the *nikah* is not specific to the permanent or temporary marriage, but rather broader than them, and includes the concubinage of female slaves.<sup>112</sup>

This notion that marriage is recommended, that the recommendation exists irrespective of whether the marriage is permanent or temporary, and that multiple marriage is favored over monogamy, is reinforced in other accounts. In offering its support for polygamy, the *Jawahir* specifically takes issue with the quite common progressive position that, in fact, the Qur’an either highly discourages polygamy or prohibits it outright because it conditions the practice on equal treatment in verse 4:3, and then indicates in verse 4:129 that such equal treatment is not possible.<sup>113</sup> The following is the relevant passage from that source:

More than one [wife] is favored if needed without doubt, and even if not needed, according to the stronger opinion in order to ease hardship according to some texts, because in the excess is the increase of offspring and the Muslim community, and to address needs when they cannot be addressed with a single wife, such as during her menstrual period or when she is sick or otherwise. It is said, as to the statement of God the Exalted, “engage in *nikah* with those who are good for you among

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112. URWA, *supra* note 5, at 14:3-5 (quoting THE HOLY QUR’AN 4:3, 24:32). Within Shi’ism, the term “Commander of the Faithful” refers to one person alone, and that is Ali b. Abi Talib, the first Infallible Imam, son-in-law of the Prophet Muhammad. See ROY MOTTAHEDEH, *IN THE MANTLE OF THE PROPHET* 186, 279 (2d. ed. 2007) (referencing Imam Ali as “Commander of the Faithful”).

113. Tucker summarizes this position in her discussions of modern Muslim debates concerning polygamy. TUCKER, *supra* note 15, at 77-79.

women,” that it is an authorization, the lowest level [of permission] as to the matter. But based on the research that follows, with the Will of God, you will learn that [the position] disfavoring more than one is clearly weak, in particular after what al-Iyasi reported from al-Sadiq [Shi'i Islam's Sixth Imam], “in all things there is immodest extravagance, except as to women,” among other reports.

As for the statement of God the Exalted, “you will not be able to deal equally, even if you strive,” what is meant by equal is not equality in support and intimacy, so that combining [the verses] leads to [polygamy] being abandoned. This is because it is a possible matter [i.e. polygamy is permissible], so it is not correct to deny the ability to [treat equally]. If it was going to be prohibited, [God] would not permit the combination of obligating equality and then rendering it impossible by necessity. In fact, what is meant by equality is as to all aspects, and love and compassion especially, as reports have stated. This is the equality that you will not be able to achieve, even if you strive. It cannot be combined with the statement of God the Exalted that, “if you fear you cannot treat [multiple wives] equally, then one,” with a meaning of equality that is impossible, because [polygamy] is recommended, even in poverty . . . .<sup>114</sup>

In other words, according to the *Jawahir*, verse 4:3 obligates polygamous husbands to treat their wives “equally” or to be monogamous. However, its meaning of “equally” must be different than that set forth in verse 4:129, where treating wives “equally” is described as impossible, or God would have prohibited in verse 4:129 that which he permitted in verse 4:3, a conclusion the *Jawahir* finds self-evidently absurd. The reconciliation, according to the *Jawahir*, lies in understanding the word “equally” to mean, in the first case, where it is a condition of polygamy, merely equal devotion of time and resources to each wife, while in the second case, where the Qu'ran indicates that equality is impossible, it means equal love for each spouse.<sup>115</sup>

In any event, jurists following Hakim, from Khu'i to Saeed al-Hakim to the current *primus inter pares* in Najaf, Grand Ayatollah

114. *Jawahir*, *supra* note 34, at 29:35.

115. That the verses are capable of other interpretations less embracing of polygamy, and that those less predisposed to the practice might read them differently as a result, seems rather obvious. As Tucker has described, the position that the *Jawahir* dismisses as absurd is adopted with some vigor by leading Muslim progressives today. TUCKER, *supra* note 15, at 78-79. This is a matter beyond the scope of this Article to address, however.

Sistani, have been far more circumspect in their exhortations. They do not challenge the earlier determinations, nor do they suggest that no matter how many women one has married, permanently and temporarily, it cannot possibly be immoderate extravagance, for there is no such thing when it comes to sex with women. Rather, at most, they repeat the earlier determinations that marriage is “recommended” and do not elaborate further.<sup>116</sup> This appears to be what I describe elsewhere as “strategic juristic omission,” or a means by which the jurists manage social expectations (which do not include men having as many permanent and temporary wives as possible) on the one hand, with juristic rules (which very much exhort this) on the other.<sup>117</sup>

Strategic juristic omissions aside, it can only be described as the clear position of the modern Shi’i juristic academies that not only *may* a man engage in sex with a substantial number of women, but rather that he *should*. The Christian notion of comparing marriage to the relationship of Christ to the Church is one that the jurists would find patently ridiculous.<sup>118</sup> The primary purpose of marriage is to render sex licit, not to create some sort of celestial union, and one should engage in a great deal of it with a large number of women to satisfy this intense earthly need. In Hakim’s words, God disfavors bachelorhood, and He recommends the *nikah*—with a permanent wife whom one supports, with a temporary wife to whom one has paid a *mahr* in advance, and with female slaves one owns.<sup>119</sup>

While the recommendation to marry certainly applies to women, the fact that a woman may only be married to a single man at any given time largely narrows the choices available to her, or to the guardian entitled to make marriage decisions for her, as the case may be.<sup>120</sup> She can enter or be entered into a permanent marriage, which grants her a right to a *mahr*, to support, and to a share of her husband’s inheritance, though her ability to exit that marriage is severely curtailed. In the alternative, she can enter or be entered into a

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116. See, e.g., SISTANI, *supra* note 5, at 7. In his own compendium, Khu’i does not even describe marriage as recommended, but omits all of the controversial portions of the Book of *Nikah*, and proceeds straight to rules concerning marriage.

117. See Haider Ala Hamoudi, *The Political Codification of Islamic Law: A Closer Look at the Draft Shi’i Personal Status Code of Iraq*, 33 ARIZ. J. INT’L & COMP. L. (forthcoming 2015).

118. See Patrick McKinley Brennan, *Of Marriage and Monks, Community and Dialogue*, 48 EMORY L.J. 689, 702 (1999) (citation omitted).

119. See *supra* note 113 and accompanying quotation.

120. The phenomenon of child marriage, and the corresponding power of a guardian to make marital decisions for his minor children, is described in detail in Part IV.A *infra*.

temporary marriage, which grants her only a *mahr*, but does not confine her in a marital bond indefinitely. There is some broad equivalence to the Western dichotomy of the virgin and the whore,<sup>121</sup> though it is important to note that both archetypes in the Shi'i model are contemplated by the normative system, and both are living within the confines of its rules.<sup>122</sup>

## II. SEXUAL LIMITATIONS

The previous Section demonstrates the manner in which the jurists of Shi'i Islam presume that human beings, and men in particular, have an intense need for a great deal of sex, ideally with multiple partners, and they have developed rules that satisfy that desire. On its own, this does little to prevent broad licentiousness in society. If anything, it seems to facilitate it. Yet a Prophetic statement broadly reported by jurists is that one who marries has completed *half* of his religion, and, with the other half, he is supposed to be aware of God.<sup>123</sup> The purpose of all of the sex of the *nikah*, then, is to satiate an intense human desire, for the purpose of freeing a person to be rendered more aware of the Divine.

The manner in which this is done in Shi'ism is quite interesting. Effectively, Shi'ism recommends the relief of sexual desire in a manner that distances sexual activity from the pursuit of licentious pleasure for its own sake. Or, to put the matter more directly, ideal sex is not intended to be fun so much as God-centered and satiating in a manner that enables the believer to get back to the business of worshiping God properly.

This is obvious as early as the wedding night. It is recommended that the marriage be conducted at night,<sup>124</sup> with a party,<sup>125</sup> and that before the consummation, both husband and wife pray a short

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121. For a general description of the virgin/whore dichotomy, and its relevance in cases involving rape, see Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 929-41 (1996).

122. It is worth noting that the juristic description of temporary and permanent marriage being equally favored is probably where the Shi'i normative system diverges from actual practice in at least some Shi'i societies the most dramatically. This is addressed in brief in the conclusion.

123. See URWA, *supra* note 5, at 14:3; Jawahir, *supra* note 34, at 29:13; see also SISTANI, *supra* note 5, at 3 ¶ 7 (quoting the first half of this report, but not the second).

124. See SISTANI, *supra* note 5, at 3 ¶ 4; Jawahir, *supra* note 34, at 29:41.

125. See SISTANI, *supra* note 5, at 3 ¶ 4; URWA, *supra* note 5, at 14:8-9.

prayer.<sup>126</sup> After this, the husband is to lay his hand on his wife's forehead and make a short invocation to God, the entirety of which is "God, on your Book have I married her, and in your trust I have taken her, and with your words I have rendered her vagina permissible, so if something comes from her uterus, let it be a devoted Muslim and not a polytheist of Satan."<sup>127</sup> Then he is to order her to do the same and ask God for a son.<sup>128</sup>

The *Jawahir* offers an explanation for this somewhat unusual prayer, and in particular its reference to polytheism and Satan:

When a man comes close to a woman, and he sits in his position, Satan is present. However, if he remembers the name of God, Satan turns away. If he does it without remembering the name, then Satan enters his penis. And it must be done by them both [i.e. the husband and wife], because the zygote is one.<sup>129</sup>

Later jurists such as Sistani and Khu'i, writing for more contemporary and rational audiences, do not invoke the image of Satan actually entering a man's genitalia. The references to Satan, however, continue to exist in the invocation itself, which is sufficient.<sup>130</sup> When it comes to performing the sexual act, Satan lurks, and it is important to invoke the name of God to keep him away.

The theme of God-centered sex used to ward off evil continues far beyond the wedding night. Hence, "it is recommended that one recite the names of God during sex, and that the parties have performed ritual ablution, in particular if the woman is pregnant, and that [the husband] ask God to grant him a blessed, devout, innocent and male child."<sup>131</sup> Again, the *Jawahir* (in contrast to more contemporary jurists) makes explicit mention of the fact that a failure to do so will cause Satan to come near, and this could result in the child being his spawn.<sup>132</sup>

By contrast, "the looking at the vagina of a woman, and especially inside it, during sex or otherwise" is disfavored, as is "talking during sex other than in the remembrance of God, and in

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126. SISTANI, *supra* note 5, at 3 ¶ 4; KHU'I, *supra* note 5, at 2 ¶ 1230; *Jawahir*, *supra* note 34, at 29:42.

127. *Jawahir*, *supra* note 34, at 29:44; *see also* SISTANI, *supra* note 5, at 3 ¶ 4; KHU'I, *supra* note 5, at 2 ¶ 1230.

128. *See* SISTANI, *supra* note 5, at 3 ¶ 4; KHU'I, *supra* note 5, at 2 ¶ 1230.

129. *See* *Jawahir*, *supra* note 34, at 29:44.

130. *See* sources cited *supra* note 127.

131. SISTANI, *supra* note 5, at 3 ¶ 5; *see also* URWA, *supra* note 5, at 14:9-10.

132. *See* *Jawahir*, *supra* note 34, at 29:45.

particular a great deal of it, especially from the man.”<sup>133</sup> The fear expressed by the *Jawahir* is that if the husband sees the vagina, the child will be rendered blind by what his father has seen, and if the father speaks during sex, the child will be rendered deaf by what he has heard.<sup>134</sup> Again, unsurprisingly, contemporary jurists recite the same prohibitions, but do not offer any justifications for them concerning the likelihood of future disabilities.<sup>135</sup>

But the most interesting expression of disfavor concerns the performance of sex when naked. After all, such an act would necessarily add an important licentious and sensual element to sex. As such, it is soundly disfavored as well.<sup>136</sup> Yet in laying out the rule, the *Jawahir's* characteristic reasoning, concerning risks to the future character of the child, appears to lose its coherence. The disfavoring of naked sex arises because, the *Jawahir* explains, “this is the act of donkeys, and the angels will depart from between them, and the child will be born an executioner.”<sup>137</sup> Unlike the examples involving looking at a wife’s vagina (where the child goes blind) or speaking to a wife during sex (where the child goes deaf), the connection as between naked sex and becoming an executioner is rather remote.<sup>138</sup> Even more bizarre is the reference to donkeys, which presumably never wear clothes, during sex or otherwise, and which are hardly alone in the animal kingdom in this regard. The need to disfavor enjoyable sex seems to have overtaken even the logic of superstition and fable. As for the modern jurists, in this case as with the others, they take the easier approach of merely repeating the same rule disfavoring naked sex without seeking to offer any sort of justification for it.<sup>139</sup>

In any event, whether or not the jurist actually indicates precisely *why* a particular act is disfavored, whether it be naked sex, talking during sex, or looking at a vagina, the fact remains that it is, by broad consensus of juristic authorities. What a person is supposed

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133. See *Jawahir*, *supra* note 34, at 29:59-60.

134. See *id.*

135. URWA, *supra* note 5, at 14:10-11; SISTANI, *supra* note 5, at 3 ¶ 5.

136. *Jawahir*, *supra* note 34, at 29:57.

137. See *id.* at 29:57.

138. The term used for executioner, *jallad*, arises from the root verb to “lash” or to “whip,” and it also means in another form “skin” or “leather.” ARABIC ENGLISH DICTIONARY: THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC 154 (Cowan ed. 4<sup>th</sup> ed. 1979) [hereinafter WEHR]. This may create a connection of sorts between naked sex (involving a great deal of visible skin), and an executioner, but it is hardly a direct or natural one.

139. See, e.g., SISTANI, *supra* note 5, at 3 ¶ 5; KHU’I, *supra* note 5, at 2 ¶ 1231.

to be doing when having sex is invoking the name of God to ward off evil and asking Him for a blessed and innocent son, while clothed and not speaking to his wife. It is difficult to imagine how sex could be rendered any more God-centered and less physically pleasurable than this.

Beyond these rules, there are a panoply of rules that are not about the performance of sex, but instead impose bewildering limitations on *when and where* it can be performed. The following representative example appears in Grand Ayatollah Hakim's compendium:

Disfavored is sex on the night of a lunar eclipse, or the day of a solar eclipse. During the day or night that there is a black, yellow or red windstorm. The day of an earthquake. Indeed on any day during which a fearsome event occurs. Similarly, it is disfavored:

at noon; from the setting of the sun until the midpoint of the night; on a moonless night; after dawn until the rising of the sun; on the first night of every month except Ramadan, when it is favored; at the midpoint of each month; during a trip where there is no water for washing; between the call to prayer and the start of prayer; on Eid al-Adha; on a boat; facing toward the direction of prayer [i.e. Mecca] or having one's back to it; on a road . . . ; after a wet dream but before ablution or washing; sex when the man or woman is dyed [i.e. with henna]; upon being full [from food and drink] when sex is taking place; under a fruit bearing tree; on the roofs of buildings; in the sun without a cover. . . .

Favored is sex on Monday, Tuesday, Thursday and Friday, and on Thursday at noon, and on Friday in the afternoon, and it is favored when the wife is inclined towards it. <sup>140</sup>

The *Jawahir* characteristically offers somewhat antiquated and unsatisfactory justifications for these rules that modern jurists do not mention. For example, a child conceived before the midpoint of the night might be a witch who prefers this world over the next; a child

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140. URWA, *supra* note 5, at 14:10-11. It should be noted that similar rules appear in Grand Ayatollah Sistani's compendium, and that of Grand Ayatollah Khu'i as well. See SISTANI, *supra* note 5, at 3 ¶ 5; KHU'I, *supra* note 5, at ¶ 1231. The rule respecting henna does not appear in the *Jawahir*, though earlier jurists suggest that a man who is wearing henna during sex will have a son who is *khuntha*, meaning that he carries both male and female genitalia, as further described in Part IV.A.2. See 20 SHAYKH AL HURR AL 'AMILI, TAFSIL WASA'L AL-SHI'A 124-25 (The Ahl ul Bayt Institute for the Preservation of Culture, Qum 1994) (d. 1693).

conceived at the start or the middle of the month might “miscarry, go insane or be a leper;” and a child conceived on a boat is in danger because the lack of stability in moving water.<sup>141</sup>

With or without justifications, not only are the rules rather burdensome, but, in addition, they are not coherent enough to be particularly easy to follow. It is one thing to establish a series of burdensome rules and procedures on how to slaughter an animal.<sup>142</sup> A butcher could readily internalize these procedures and then perform these duties without having to think about them each time. The same is not true for the rules set forth concerning intercourse. It would take quite high levels of attentiveness to follow all of them. It is not merely a matter of remaining clothed, removing henna and reciting God's name, which could be internalized. It is also a matter of ensuring that particular times of the day, particular days of the week, and particular times of the month, seemingly random ones, are avoided. Similarly, sex in particular places, such as boats, roads and roofs of buildings, must be avoided, and even during sex, excessive moving would probably not be a good idea, if a believer actually wanted to avoid facing, or having their back to, the direction of prayer. The amount of consideration that would have to be given to the matter during each and every sexual encounter would be significant.

But perhaps this is the very point. That is, the rules force one to think about permissible sex each time, and to organize one's sexual activity each time in a manner that accords with the preferences of the Divine. By so doing, the panoply of rules, even if not explicitly about the remembrance of God, effectively render it so by requiring such high levels of attentiveness. In this way, the profane and licentious world is left as far behind as possible.

There is one important limitation to this, however, that bears emphasis. All of the rules set forth above fall into the category of the *recommended* and the *disfavored*, rather than the required or prohibited. There is not much that Shi'i Islam absolutely mandates in terms of formalities of sex as between husband and wife. Even anal sex, which is generally prohibited among Sunnis,<sup>143</sup> is only strongly disfavored within Shi'ism.<sup>144</sup>

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141. See Jawahir, *supra* note 34, at 29:55-56, 60.

142. In fact, Shi'ism has such elaborate rules. See, e.g., SISTANI, *supra* note 5, at 3 ¶¶ 838-867.

143. Certainly modern Sunni opinion has trended strongly toward the position that anal sex between husband and wife is a major sin, so much so that it can be a cause for divorce.



In short, sex is *supposed to be* God-centered and free of anything that might increase sexual desire and with it licentiousness, including looking at a wife's genitalia or being naked during sex. Yet *it does not have to be*.<sup>145</sup> The fact is that a husband who engages in naked marital sex on a boat on the first day of the lunar month while facing Mecca, staring into his wife's vagina, and offering lewd comments that do not involve the recitation of the names of God, commits no sin. He merely fails to please God in the manner that God would prefer him to. The next Section addresses the limitations on sexual pleasure that constitute not merely recommendations or expressions of disfavor, but actual *sins*, and in fact *crimes*, meriting punishment not only in the afterlife, but in the life of this world as well.

### III. *PROHIBITED SEX*

#### A. *On Heterosexual Fornication*

As the previous Parts make clear, the main manner in which Shi'ism seeks to suppress licentiousness within society is not through significant restrictions on marital sex. Rather, the licentious society is avoided through strict prohibition of nonmarital sex and attendant rules designed to foreclose the very possibility of it.

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*See, e.g.,* Shaykh Muhammad Saalih al-Munajjid, *Does Anal Intercourse Cancel the Marriage Contract?*, ISLAM QUESTION AND ANSWER (Sept. 7, 2015), <http://islamqa.info/en/6792>; Personal Status Court, Karkh, Decision No. 5772 of December 31, 1998, *reprinted in* CASES OF THE PERSONAL STATUS COURTS 900-01 (Judge Rabi Muhammad al-Zahawi ed., 2013) (granting a wife a marital dissolution for her husband's anal penetration); *cf.* HABIB, *supra* note 15, at 214 (describing classical Hanafi opinion as deeming marital anal sex as a "minor indiscretion").

144. *See, e.g.,* URWA, *supra* note 5, at 14:61-62 ("The stronger opinion, in accordance with the majority, is the permissibility of penetrating the wife or the female slave anally, with strong disfavor. The more precautionary position is to avoid it, in particularly if she does not agree to it.").

145. It should probably be noted that there are some limitations on sex that can take place in the context of a marital union, but they lie very much at the margins. Most prominently, there is a prohibition against sex during a menstrual period or during bleeding accompanying childbirth. *See, e.g.,* KHU'1, *supra* note 5, at 1 ¶¶ 228, 257. Such rules appear to be more closely related to a general obsession over the ritual impurity of menstrual blood that is beyond the scope of this paper than they are to any sort of direct regulation of sexual intercourse to ensure that it remains God-centered. After all, women in these conditions also cannot be divorced, nor are they permitted to fast, pray, or stay in the mosque for long periods. *See id.* at 1 ¶¶ 227-230, 257.

The core of this lies in the Islamic crime known as *zina*, or “fornication.” It is the scriptural crime *par excellence*,<sup>146</sup> almost always appearing first in the Shi'i juristic manuals.<sup>147</sup> The *Jawahir* spends over one hundred pages on this crime alone.<sup>148</sup> To put it simply, “fornication is realized by the direct insertion of a person's penis beyond the point of circumcision in the vagina of a woman forbidden to him, in the absence of a contract, ownership, or doubt (concerning a lawful relationship).”<sup>149</sup> In other words, slavery aside,

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146. The general manner in which Islamic law divides criminal punishments—beyond those concerning retaliation for physical injury, which properly belong in the realm of private law—is into scriptural crimes, referred to as the *hudud*, and discretionary ones, referred to as the *ta'zir*. See, e.g., RUDOLPH PETERS, CRIME AND PUNISHMENT IN THE LAW OF ISLAM: THEORY AND PRACTICE FROM SIXTEENTH TO THE TWENTY-FIRST CENTURY 7 (Themes in Islamic Law Ser. No. 2, 2006). The scriptural crimes are commonly described as having fixed penalties, while the discretionary ones are not. See LANGE, *supra* note 15, at 216-17. The other frequent description of the scriptural crimes, at least among some schools, is that they are “entirely or predominantly” rights of God rather than men, and therefore cannot be waived by men. See TUCKER, *supra* note 15, at 184; PETERS, at 53. The basic problem is that at least within Shi'ism, neither distinction works particularly well. Clearly, some of the scriptural crimes can be waived by men. For example, the Imam can, in some circumstances, reduce or eliminate the punishment for fornication if the sole evidence for it is a confession. See KHU'I, *supra* note 5, at 3 ¶ 140 (taking the broader view that the Imam can completely pardon any fornicator, repentant or not, so long as the sentence was pronounced on the basis of a confession); *Jawahir*, *supra* note 34, at 41:293 (suggesting a repentant fornicator can have his sentence reduced to lashing by the Imam). Moreover, some crimes, such as two men being naked under the same blanket, are specifically described as discretionary, despite having fixed punishments established for them. Khu'i suggests that the proper punishment for this crime is ninety-nine lashes. KHU'I, *supra* note 5, at 3 ¶ 191. This would indicate the sole distinction between it and a scriptural crime is that it falls one short of the one hundred lashes that would characterize the related scriptural crime, imposed on the third offense according to the *Jawahir*. See *Jawahir*, *supra* note 34, at 41:385-386. There is thus some confusion in Shi'i juristic manuals as to whether a given act, such as apostasy, is scriptural or discretionary, and a wide level of variation among Shi'i jurists concerning how many scriptural crimes there are. See *Jawahir*, *supra* note 34, at 41:254-258 (describing the confusion and resulting variation). Therefore, I do not share Tucker's view that “no one” took the position that lesbianism was a scriptural crime, as both Khu'i and the *Jawahir* specifically describe it in those terms. See KHU'I, *supra* note 5, at 3 ¶ 194 (“The *hadd* for a lesbian if she is not married is one hundred lashes . . . and the more manifest opinion is that the married one is stoned.”); *Jawahir*, *supra* note 34, at 387 (“The *hadd* of lesbianism is sex of a woman by another . . .”). *Contra* TUCKER, *supra* note 15, at 190. I also, however, do not think the matter is terribly important. It suffices to note that lesbianism, along with male-to-male sex, “thighing,” and the other acts described in this section, are crimes set forth in the juristic manuals, with severe punishments established for them. Whether one wishes to classify them as “discretionary” or “scriptural” is purely a matter of taxonomy.

147. See KHU'I, *supra* note 5, at 3 ¶ 134; *Jawahir*, *supra* note 34, at 41:258.

148. See *Jawahir*, *supra* note 34, at 41:258-369.

149. KHU'I, *supra* note 5, at 3 ¶ 134.

any man who has vaginal sex with a person to whom he is clearly not married has committed the supreme crime of fornication.

Fornication may be divided within Shi'ism into four relevant categories. The first category is the rape of a woman by a man. The man is punished by death in such an instance, and the woman receives no punishment at all.<sup>150</sup> The second category is the consensual fornication of a person who is not what is known as a *muhsan*. Grand Ayatollah Khu'i provides a convenient and concise definition of the term *muhsan*, as follows:

A man is deemed *muhsan* upon two conditions: First, that he is free [i.e. not a slave], and the second is that he has a permanent wife with whom he has consummated a marriage or a female slave, and he is able to have sex with her whenever he desires and wishes. Thus, if his wife is away, such that he cannot enjoy her, or he is imprisoned where he cannot reach her, then the rules of the *muhsan* do not apply to him.

A woman is deemed *muhsan* if she is free and she has a permanent husband who has consummated his marriage with her . . . .<sup>151</sup>

Thus, in stark contrast to Sunni Islam,<sup>152</sup> the term *muhsan* broadly means one who has the ability to engage in permissible sex at the time that the fornication took place.<sup>153</sup> If one is not *muhsan*, therefore, one has something of a justification for the unlawful sex, or at least enough of a justification to merit a lighter penalty. Hence, the non-*muhsan* man is not killed, but only subject to a punishment of 100 lashes, one year exile, and the cutting off of all of his hair, and possibly his beard as well.<sup>154</sup> A woman is only lashed, without hair cutting, with the jurists divided over exile.<sup>155</sup>

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150. See *id.* at 3 ¶¶ 136, 153; Jawahir, *supra* note 34, at 41:265, 315.

151. KHU'I, *supra* note 5, at 3 ¶¶ 158-159.

152. Sunnism defines *muhsan* as one who is either currently married, or has been in the past. PETERS, *supra* note 146, at 61. Accordingly, the notion of mitigating the punishment because of the lack of existing availability of licit sex is not as pronounced within Sunnism. After all, one could be formerly married with no reasonable access to licit sex and yet such a person would still be deemed *muhsan*.

153. Admittedly, there is a curious exception in that a person who is engaged in a temporary marriage is not a *muhsan*, despite having access to sex.

154. See KHU'I, *supra* note 5, at 3 ¶ 157; Jawahir, *supra* note 34, at 41:323.

155. Compare Jawahir, *supra* note 34, at 41:328-329 (arguing against exile for a female fornicator), with KHU'I, *supra* note 5, at 3 ¶ 157 (stating that a female fornicator does not have her hair cut, but that while it is problematic, the better opinion is that she is exiled).

By contrast, the *muhsan* who fornicates—in other words, one who has permissible sex available to them and who nonetheless engages in impermissible sex—faces one of the harshest punishments available under the *shari'a*. They are stoned to death. The details are set forth in the *Jawahir* as follows:

It is obligatory to bury the one to be stoned in a hole, by all of the sources. . . . originating with the Prophet (God's blessings upon him and his progeny) and the Commander of the Faithful [the First Imam] (God's peace upon him), but he is not buried beyond his groin. Based on the statement of al-Sadiq [the Sixth Imam] (God's peace upon him), from a reliable source, "the woman is buried to her middle, then the Imam stones her, and the people do as well, with small stones, but the man is not buried when stoned except to his groin.

The woman is buried to her breast according to the more reliable of the reports . . . . Thus, [it is reported] from the Prophet, God's blessings upon him and his progeny, that he buried an older woman to her chest, and in other [report] from him, God's blessings on him and his progeny, that he stoned a woman, burying her to her nipples . . . .<sup>156</sup>

The death is obviously slow and painful, given the requirement of small stones referred to above. This is intentional. As the *Jawahir* explains:

It is a requirement that the stones are small . . . . What is really desired are stones of a moderately small size . . . . Thus it is said [the fornicator] is not stoned by extremely small pebbles that will torture him by the extent of the striking [of him] while remaining alive. And in any event it is not enough to throw one stone that is enough to finish him off and to kill him, because this takes it out of the meaning of stoning. And because it is in contradiction to the reports. The stoned person is not killed by a sword because this is inapplicable and is not expiation for his sin, which must be punished severely by an act which deters others and draws them away from similar deeds.<sup>157</sup>

The power of unlawful sex is so strong, in other words, that it is not sufficient merely to strike the person at his neck with a sword, thereby killing him. This may suffice for other crimes, but not for

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156. *Jawahir*, *supra* note 34, at 41:347.

157. *Id.* at 41:355.

fornication, where the need to deter, as well as the magnitude of the crime committed, mandate a stiffer penalty than death.

The final category of fornicators consists of those who are older, and who are *muhsan*. This is the group where the fornication is deemed the least justifiable. These are people with presumably reduced sexual appetites, given their age, and who have avenues to relieve any sexual frustration. As to them, they are given the two penalties laid out above, in order. First, they are lashed, and then they are stoned.<sup>158</sup>

The carrying out of the penalty is supposed to be public, so as to increase its deterrent effect, as the following passage from the *Jawahir* makes clear:

Without dispute or difficulty, it is incumbent on the Imam, or whoever stands in his place, if he wishes to fulfill the lashing, that he informs the people so they may be aware of it and make themselves present for it. Indeed it is also incumbent upon him to order them to it, as the Commander of the Faithful [the First Imam] (God's peace upon him) did. When he wanted to impose a punishment on a man who confessed, he called, "Assembly of Muslims! Come out for the execution of this punishment. Let none know his companion." And when he (God's peace upon him) wanted to execute the punishment on a woman who confessed to him, he ordered . . . a call to communal prayer and then he climbed the pulpit and said, "People! Before you I shall depart from this door with this woman to carry out the punishment of God. So the Commander of the Faithful invites you to leave early, disguised one from the other, and with you are your stones." There are other reports. What is in all of this is deterrence to the person and to others for actions like this . . .<sup>159</sup>

Notwithstanding the grisly details, it is extremely important to note that the imposition of any penalty for fornication, whether lashing or stoning, is nearly impossible as a realistic manner absent a confession. This is because of strict evidentiary requirements. Grand Ayatollah Khu'i sets forth the rules as follows:

Fornication is not established by the testimony of two just male witnesses. Indeed it requires four male witnesses, or three men and two women, or two men and four women, except stoning [as opposed to lashing] cannot be established by the latter, nor can

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158. See KHU'I, *supra* note 5, at 3 ¶ 154.

159. *Jawahir*, *supra* note 34, at 41:353.

any other [punishment for fornication] be established by the testimony of women alone, or by one man and six women, or by the swearing of an oath of one person.

It is deemed that for testimony for fornication to be accepted, it must be directly observed, and if they witnessed it other than visually, then the witnessed person is not punished, but the witnesses are punished. The witness testimony must be the same in time and place, so that if there is a difference in time, or in place, fornication is not established, and the witnesses are punished. If their differences are other than pursuant to different acts or multiple acts—for example, if some of them testified as to a certain woman who was fornicated upon from the House of Tamim, for example, and others testified that she was from the House of Asad, or something similar concerning disputes in details, then this does not affect the establishment of fornication without question. However, if their differences concerned details of the fornication—for example, if some testified that the fornicator forced the woman into fornication, and others testified as to the absence of force, and that the woman was obedient, then in the establishment of the fornication there are problems.<sup>160</sup>

Thus, the numerous witnesses must testify as to having themselves seen a man's penis enter a woman's vagina beyond the line of circumcision. They must testify as to it having taken place at the same time in the same location. Their failure to do so, or the inability to gather the requisite number of witnesses, in fact results in the witnesses being guilty of a crime known as *qadhf*, or unfounded accusation, pursuant to which a penalty of eighty lashes is imposed against them.<sup>161</sup>

Moreover, even pregnancy is not sufficient, in the absence of a confession from the woman. As Grand Ayatollah Khu'i notes:

If a woman is pregnant and has no lord, she is not punished because of the possibility that the pregnancy is for a reason other than sex, or on account of sex with doubt, rape, or something similar.<sup>162</sup>

Moreover, even if, somehow, the requisite number of witnesses could be gathered, excuses are readily available to avoid the imposition of punishment. A woman could always claim to have been

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160. KHU'I, *supra* note 5, at 3 ¶¶ 142-143.

161. This is referenced in the passage quoted in the main text. For more details on the idea of *qadhf* within Shi'ism, see Jawahir, *supra* note 34, at 41:402-431.

162. KHU'I, *supra* note 5, at 3 ¶ 141.

raped. By so doing, she avoids the punishment as to herself, though this is of little help to her paramour. Moreover, a man having sex with an unmarried woman could always claim to be married to her, at least in a temporary marriage. In this regard, it is particularly useful that Shi'ism requires no witnesses to make a marriage valid,<sup>163</sup> and that it is concluded orally, thereby making it virtually impossible to establish that a couple claiming a marriage somehow did not conclude one.<sup>164</sup> Given all of this, the historic reports in the juristic texts concerning the execution of the punishments for fornication are rare and invariably involve a confession made to expiate for the sin of fornication in the first place.<sup>165</sup>

Thus, the purpose of the fornication prohibition is not actually to stone very many people, if any at all. Rather, what it successfully demonstrates is the severity of the sin of nonmarital sex. This, in turn, reinforces the commitment of Shi'i Islam toward placing strict limitations on sex so as to ensure the central role of God in the life and mind of the believer. Surely the fact that stoning is the penalty for fornication would cause any sincere believer to pause before engaging in the act irrespective of the possibilities of punishment. One truly dedicated to the rules of the jurists would *not only* engage in sex exclusively in the context of a proper marriage contract, permanent or temporary, and *would not only* undertake those actions recommended by the jurists during sex (remaining clothed, reciting the names of God, avoiding sex on boats and during eclipses and the like), but that person would also almost surely not seek to have sex beyond the permissible bounds of marriage, either. This is even more likely given the severe punishments that are at least theoretically possible.

Along the same lines, and even more importantly, the strict penalties associated with fornication help to explain and justify other

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163. See SISTANI, *supra* note 5, at 3 ¶ 3 (indicating that witnesses are recommended rather than required).

164. See *id.* at 3 ¶ 30.

165. There are juristic passages that seem to promote the idea of confessing to fornication and to receiving expiation through the punishment of stoning. The following is a passage from the *Jawahir*:

When the stoning is complete, [the stoned person] is buried, after a prayer for him. Nor can [a prayer] be neglected without dispute . . . or question. It is necessary given that he is a Muslim. From the Prophet as to the stoned woman, "she repented in a manner that is equivalent to swearing to seventy people from Medina, and is there a better repentance than that she granted her soul to God?"

*Jawahir*, *supra* note 34, at 41:357-358.

rules in the Shi'i canon that limit intermixing between the sexes. Most, though not all, of these rules fall within the rubric of what are called the *Ahkam al-Nadhar*, or the Rules on Gazing. Notably, these appear early in the juristic manuals in the Book of *Nikah*.<sup>166</sup> In other words, where all of the rules on permissible sex appear, there are also a series of rules on segregating the sexes, phrased in terms of what parts of a body a person of the other sex is allowed to see (and, by logical extension, feel or touch).

Effectively, they create rules based on four categories of relationship as between adult men and women. The first concerns the intermixing of husband and wife, where, as we have seen, nearly everything is permissible.<sup>167</sup> Certainly, there is no prohibition against looking at or touching any part of the anatomy of a spouse.<sup>168</sup> The second category is as between a man and the women whom he is not permitted to marry. This would not only include parents, siblings, and children, but also the parent of an existing or former spouse, or one who has shared the same wet nurse.<sup>169</sup> In this case, the main prohibition is looking at what are known as the “private parts”, or ‘*awra*’, of the person in question. There is no other limitation on looking, so long as there is no suspicion of sexual attraction between the parties.<sup>170</sup> The third category is an interesting one, concerning looking at a person of the opposite sex whom one is considering marrying. Hakim sets out the basic rules, recited in the same basic form in other compendia,<sup>171</sup> as follows:

Whoever wishes to marry a woman may look at her face, her hands, her hair, and her beauty; indeed it is not too far to say it is permissible to look at her entire body except her private parts, though out of precaution this would be too much. It does not need to be conditioned on her permission and consent. It cannot be for a licentious purpose, or with knowledge it is being done by force. The look may be repeated if its purpose—knowing her condition—is not completed with the first look. . . . And it must potentially be by her choice, and if not, then it is not

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166. See, e.g., SISTANI, *supra* note 5, at ¶¶ 11-29; KHU'I, *supra* note 5, at 2 ¶¶ 1232-1234; URWA, *supra* note 5, at 14:12-61; Jawahir, *supra* note 34, at 29:63-102.

167. This is set forth in detail in Part I *supra*.

168. See SISTANI, *supra* note 5, at 3 ¶ 11; URWA, *supra* note 5, at 14:23-24.

169. See SISTANI, *supra* note 5, at 3 ¶ 13.

170. *Id.* at 3 ¶ 13; URWA, *supra* note 5, at 14:32-33.

171. See, e.g., SISTANI, *supra* note 5, at 3 ¶ 28; Khu'i, *supra* note 5, at 2 ¶ 1232.



permissible.<sup>172</sup> . . . It is not impossible that the woman may also look at the man who wants to marry her, but precaution dictates that this not be done. . . .<sup>173</sup>

Finally, as to women to whom one is not married, has no intention to marry, and is not related to in a manner that prohibits marriage, the rules are quite strict, in particular as to women. A man is not permitted to look at anything but a woman's face and hands according to some jurists,<sup>174</sup> or any part of her at all, out of precaution, according to others.<sup>175</sup> This creates a parallel obligation on her to cover those parts of her body.<sup>176</sup> A man has no parallel obligation to cover himself.<sup>177</sup>

The rules go well beyond mere looking. The shaking of hands is likewise forbidden.<sup>178</sup> Saeed al-Hakim declares that sitting on a chair where a woman has sat earlier is disfavored until the seat cools.<sup>179</sup> *The Jawahir even bans the sound of a woman from reaching the ears of a man* in the following notable passage.

The blind and the seeing are absolutely not permitted to hear the sound of an unrelated woman, if they have sensual desire or suspicion of it, out of fear of temptation. Without it [i.e. suspicion of sensual desire], what is clear in the texts, the principles, the writings, the commentaries, and the summaries is that it is prohibited also, for it is part of a woman's private parts, hence listening to it is forbidden. She is thus obligated to cover it in all circumstances. Indeed, it is said, this is the predominant opinion, and it is incontrovertible based on the statements of the consensus [of juristic authorities].<sup>180</sup>

It is a sign of the potential for change in religious jurisprudence, notwithstanding the apparent resistance thereto in many contexts, that

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172. The distinction the jurists appear to be making is between, on the one hand, conditioning the looking at the woman on her consent, which is unnecessary, and, on the other, looking at her when the viewer knows that this is being done against her will, which is not permissible. That is to say, to look at her without her knowing is presumptively acceptable. However, if it is known for a fact that she does not wish to be seen, that wish must be respected.

173. URWA, *supra* note 5, at 14:13-17

174. SISTANI, *supra* note 5, at 3 ¶ 18

175. KHU'Ī, *supra* note 5, at 2 ¶ 1233. Exceptions arising out of medical necessity or emergency circumstances exist. *See, e.g.*, Jawahir, *supra* note 34, at 29:87.

176. KHU'Ī, *supra* note 5, at 2 ¶ 1233.

177. *Id.*; SISTANI, *supra* note 5, at 3 ¶ 19; URWA, *supra* note 5 at 14:59.

178. URWA, *supra* note 5, at 14:49.

179. SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 20.

180. Jawahir, *supra* note 34, at 29:97.

this rule, despite the strong manner in which it is stated in an authoritative text from the mid nineteenth century, is universally rejected among more recent authorities. Nevertheless, the more contemporary rule still reveals the same discomfort over women's voices and the subsequent potential for sexual attraction. The following appears in Grand Ayatollah Sistani's compendium, and parallel provisions can be found in Khu'i,<sup>181</sup> Hakim<sup>182</sup> and Saeed al-Hakim,<sup>183</sup> respectively:

It is permitted to hear the voice of an unrelated woman, so long as there is no sensual desire or appetite, nor suspicion thereof, just as it is permitted for her to let her voice be heard by unrelated men except if there is fear of falling into the forbidden. However, it is not permitted to polish or beautify the sound in a manner that would normally be enticing for the listener, even if he is a relative of hers.<sup>184</sup>

The *voice*, let alone the hair, the body or the physical touch, is a potential source of danger. It can be revealed, but only to the extent that it does not entice unduly. Otherwise, there is temptation that lurks, the possibility that what will ultimately result is fornication—that deadly serious crime, and dangerous and damnable sin. Given the seriousness of that, and given the intense and near debilitating desire of human beings toward sexual pleasure, immense precaution must be taken to avoid excessive contact between the unmarried, as the Rules of Gazing demonstrate.

### *B. On Homosexuality*

To summarize the argument thus far, Shi'i Islam presumes that human beings, and men in particular, need a great deal of sex to function. Shi'i Islam's normative system is therefore committed to ensuring that such sex takes place in established contractual forms known as permanent and temporary marriage. These contractual forms result in the construction of highly gendered space, with clearly defined roles for men and women. That gendered space, and the hierarchies resulting therefrom, are thus directly threatened by any sort of sexual union that is not similarly gendered. Homosexuality is

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181. KHU'I, *supra* note 5, at 2 ¶ 1234.

182. URWA, *supra* note 5, at 14:48-49 (recommending out of precaution that a woman not let her voice be heard except where necessary).

183. SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 17.

184. SISTANI, *supra* note 5, at 3 ¶ 29.

precisely an example of such a union. As Kecia Ali notes in the context of Sunni Islam, and as is no less true of Shi'i Islam, "the legal structure of Islamic marriage is predicated on a gender-differentiated allocation of interdependent claims, which would be thrown into chaos by a same sex union."<sup>185</sup>

Moreover, homosexuality poses special dangers that fornication does not, because the precautionary measures that can be taken in the form of segregation of a person from their own sex are quite limited. Sistani reveals this in the following passage:

It is permissible for a man to look at all but the private parts of those of the same sex, whether the one being looked at is old or young, good looking or ugly, so long as there is no sexual desire or appetite, any suspicion of it, or any fear of falling into sin. It is similar for a woman . . . However, the private parts—meaning the front [genitalia], the buttocks, and the testicles . . . —looking at them is not permissible as for one of the same sex.<sup>186</sup>

These limited rules bear remarkable resemblance to the Rules of Gazing that exist between a person and those individuals so closely related that marriage to such people is never permissible.<sup>187</sup> The idea seems largely similar. On the one hand, the expectation is that there is less likely to be sexual attraction in such circumstances. However, it is not impossible for a person to feel sexual attraction to the parent of a spouse, for example, let alone someone of the other sex who shared a wet nurse with them decades earlier.<sup>188</sup> Hence, there is a prohibition against looking at genitalia of those one cannot marry, and a prohibition on seeing them at all to the extent that there is even the *suspicion* of sexual attraction and falling into sin. More than this is not demanded, nor is it particularly feasible to demand that mothers and adult children, for example, shield themselves from each other more than this.

The same considerations apply concerning same-sex relations. The expectation is that sexual attraction between members of the same sex is unlikely. However, *it is specifically contemplated as possible*, because the jurists indicate that if there is such attraction, then one must self-segregate from their own sex, and in any event,

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185. ALI, *supra* note 16, at 95.

186. SISTANI, *supra* note 5, at 3 ¶12.

187. For an example of such rules, *see* SISTANI, *supra* note 5, at 3 ¶13.

188. *See id.* at 3 ¶13, 106 (concerning child of wet nurse), 155-56 (concerning parents of spouses).

they cannot look at the genitalia of those of the same sex. Anything stricter, such as a rule that men cannot shake hands with one another, or that they need to cover their bodies before doing business with one another, is neither particularly feasible, nor would it be regarded in any real social space as sensible.

Accordingly, unlike fornication, which can be prevented through extraordinary precautions limiting mixing of the sexes, means other than extreme segregation need to be used to limit the possibility of homosexuality and thereby preserve the highly gendered *nikah* as the sole means through which to relieve sexual desire. These take the form of severe criminal punishment, as described below.

### 1. Male to Male Anal Penetration

It is difficult to overstate the extent of the abomination that male to male anal sex represents within the Shi'i juristic manuals.<sup>189</sup> The following representative passage is contained in the *Jawahir*:

As for *liwat*, it is sexual intercourse between two human males, through anal penetration or otherwise. [The word] derives from the actions of the people of Lot. Its prohibition is one of the necessities of the religion, in addition to what is said about it in the Clear Book [i.e. the Qur'an], the tradition of the Doyen of the Prophets [i.e. the Prophet Muhammad], and his progeny, the good and the pure. The Apostle of God, God's blessings on him and his progeny, said "whoever has sex with a boy, on the Day of Judgment he shall arrive in a state of uncleanness that no water of the world can purify. God is furious with him, curses him, and has prepared Hell for him, and his destiny is calamity." Then he said "the male who mounts a male shakes the Throne by this [act]. That man, even if I am at his side, God the Exalted will imprison him on the Bridge of Hell, until God finishes the accounting of His Creatures, then He shall order him to Hell, and He shall torture him on its levels, one by one, until he reaches the lowest of them, and he shall never leave there." The Commander of the Faithful [the First Imam], God's peace upon him, said, "if there is one who should be stoned twice, it is the homosexual man." . . . And from al-Sadiq [the Sixth Imam], God's peace

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189. I am not the first to make this observation. Commenting on the Islamic prohibition generally, Khaled el-Rouayheb notes the severe treatment of homosexuals in the Shi'i tradition, even as compared with the hardly tolerant Sunni juristic tradition. KHALED EL-ROUAYHEB, BEFORE HOMOSEXUALITY IN THE ARAB-ISLAMIC WORLD, 1500-1800, 121-22 (2005).

upon him, “the inviolability of the anus is greater than the inviolability of the vagina. God the Exalted destroyed a people because of the inviolability of the anus. But he has not destroyed anyone because of the inviolability of the vagina.”<sup>190</sup>

There is some level of dispute respecting the punishment, in particular if the homosexual man in question is not *muhsan*, given conflicting source material on the subject. The *Jawahir* indicates that the rule is death for all who are adult, sane and willing, whether master or slave, Muslim or non-Muslim, or *muhsan* or unmarried.<sup>191</sup> Grand Ayatollah Khu’i suggests that this conclusion, while widely held, is doubtful as concerns one who is not *muhsan* to the extent they are the person who is performing the anal penetration.<sup>192</sup> Such a person should be lashed rather than killed, according to the Grand Ayatollah, while the person penetrated should be killed.<sup>193</sup> This is also the position set forth in the new Iranian Penal Code.<sup>194</sup> The distinction is quite telling. An unmarried person who uses a man as one might a woman is understood to be engaging in behavior that, while sinful and indeed criminal, has some justification to it given the presumed intense need that men have for sex. The same is not true of the other partner, who, by acting out the role of the female, deserves greater punishment.

As for how the gay man is to be killed, again differences appear in modern texts. The *Jawahir*, for example, provides as follows:

The more widely held opinion . . . is that the Imam may choose between striking him with a sword, burning him, stoning him, throwing him from a high place, or toppling a wall onto him. . . . From al-Sadiq [the Sixth Imam], God’s peace upon him, Khalid wrote to Abu Bakr that he came with a man who gave of his anus.<sup>195</sup> He sought the advice of the Commander of the Faithful [the First Imam], God’s peace upon him, who said, “burn him in fire, because the Arabs do not regard killing as anything.” And as for what I have heard respecting stoning for the *muhsan*, it is understood from the statement of the Commander of the Faithful

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190. *Jawahir*, *supra* note 34, at 41:374-375.

191. *Id.* at 41:378.

192. KHU’I, *supra* note 5, at 3 ¶ 181.

193. *Id.*

194. Islamic Penal Code of Iran (amended 2013), art. 235.

195. The repeated references to “giving of the anus” is quite notable, and help to justify the conclusions of Grand Ayatollah Khu’i and the Iranian Penal Code, described above, differentiating between the punishment imposed on the penetrating male as opposed to the penetrated one.

[the First Imam], God's peace upon him, "if there is one who should be stoned twice, it is the homosexual man." Also from him, peace be upon him, that he stoned a man in Kufa who gave of his anus. Also from him, peace be upon him, that he said of *liwat*, "it is a sin that none have disobeyed God through except one community, so He made of them what he recites in His Book, respecting stoning, so stone them as God the Mighty and Exalted has done." Also from him, peace be upon him, if a man talks like women, and walks like women, and he enables of himself so that he engages in *nikah* as women, so stone him and do not leave him alive."<sup>196</sup>

For his part, Grand Ayatollah Khu'i describes the death penalty, when applicable, as being undertaken by the sword, stoning, burning, or tying the hands and feet together and rolling the man down a hill.<sup>197</sup> If he is killed by the sword, then, according to the Grand Ayatollah, the homosexual's body is to be burned, with no mention of a prayer.<sup>198</sup> This is powerful punishment indeed. Even the fornicator is given a proper Islamic burial, and a prayer said for his soul.<sup>199</sup>

This shows the extent to which modern Shi'i jurists condemn in the strongest possible terms male to male sex, even more strongly than they do nonmarital heterosexual sex. In so doing, they reference source material that describes the anus as more inviolable than the vagina, make broad use of the story of Lot as told in the Qur'an and call for as severe a series of punishments to be administered as can be imagined. This certainly works to create a normative and ethical framework wherein homosexuality is not merely shunned, but actively despised.

It does leave important gaps, however, that require consideration. The first, obvious one is that it does not cover women at all. This would leave women free to engage in lesbian sex as an alternative to the permitted *nikah*, a result which would be as destructive to the highly developed and elaborate rules on sex

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196. Jawahir, *supra* note 34, at 41:381-382. The passage then goes on to suggest this final report from Shi'i Islam's first infallible Imam is of weak provenance, but that it does not matter given its broad harmony with the other source material. In fact, while the general condemnation of homosexuality is identical, there is a potentially important difference as concerns transgenderism. The earlier reports did not seem to implicate much of anything concerning a person once a man who becomes a woman. The final one could be understood to do just that. This is the subject of the next Part.

197. KHU'I, *supra* note 5, at 3 ¶ 188.

198. *Id.*

199. Jawahir, *supra* note 34, at 41:357-358.

regulation in Shi'i Islam as the permission of male to male gay sex would be, and for the same reasons.

The second problem is that the evidentiary standards to prove *liwat* are even stricter than those necessary to prove fornication. There must be either four serial confessions, or four male witnesses to the act, with women's testimony being irrelevant in their entirety, unlike fornication.<sup>200</sup> As with fornication, the witnesses are punished with lashing if there are an insufficient number of them.<sup>201</sup> Moreover, as we have seen, the prohibitions on interactions *within* either sex are quite limited. Where fornication can be prevented because a man is not even allowed to look at, much less touch, an unrelated woman, men can obviously touch each other, thereby rendering the possibility of licit homosexuality all the more pressing.

Hence, while the crime of *liwat* does create an ethical framework that involves the shunning of homosexuality, it may not do enough to deter it in the minds of the Shi'i jurists, given how threatening it is to the regulation of sex in the normative system they have developed. The next two sections address the manner in which Shi'i Islam addresses these matters, in a manner that is quite distinct from the major Sunni schools.<sup>202</sup>

## 2. "Thighing"

Interestingly, the *Jawahir* does not even maintain that *liwat* requires anal penetration, defining it instead as sex between two men, "whether through anal penetration or otherwise."<sup>203</sup> It then divides the crime into two types, that involving anal penetration, discussed above, and that which does not "such as thighing or between the two buttocks."<sup>204</sup> Grand Ayatollah Khu'i offers the more common modern categorization, creating a separate crime known as "thighing," which he defines broadly as male to male sexual activity that does not

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200. *Id.* at 41:376-378 (noting that women's testimony is not admissible, unlike fornication); KHU'I, *supra* note 5, at 3 ¶ 180 (same).

201. *See, e.g.*, KHU'I, *supra* note 5, at ¶ 200.

202. For the position of the four Sunni schools, *see* ROUAYHEB, *supra* note 189, at 118-21. Suffice it to say, and as Rouayheb himself notes, non-anal sexual activity does not merit the same punishment in the Sunni schools as it does in Shi'ism. *Id.* at 121.

203. *Jawahir*, *supra* note 34, at 41:374.

204. *Id.* at 41:382.

involve anal penetration.<sup>205</sup> This is the approach taken in Iran's most recent Penal Code as well.<sup>206</sup>

In some ways, the distinction does not matter. In either case, the punishment for "thighing", however categorized, is one hundred lashes.<sup>207</sup> If the offense is repeated three times (according to some sources) or four times (according to others), the offender is put to death, according to the jurists, though not Iranian law.<sup>208</sup>

However, the apparent evolution from describing "thighing" as a form of *liwat* in the *Jawahir* to describing it as an independent *hadd* in Iranian law and Grand Ayatollah Khu'i's compendium has important evidentiary ramifications.

First, the crime of unfounded accusation discussed earlier only applies to *liwat* and fornication, meaning that if "thighing" is not in fact a form of *liwat*, a person is free to testify against an alleged offender without the threat of a lashing if a sufficient number of witnesses do not corroborate the testimony.<sup>209</sup> Moreover, no minimum number of witnesses is specified for "thighing" as opposed to *liwat*, which would almost surely mean that the requirement to establish "thighing" is the standard two male witnesses rather than four.<sup>210</sup> In other words, prosecuting homosexuality is becoming *easier* in the current age than it was a century ago. The trend is running in precisely the reverse of the direction one might expect.

That said, even if prosecutions are easier now, the notion of prosecuting for licentious same sex acts short of actual "thighing" was already very much set in place in the *Jawahir*. The following passage demonstrates this by introducing yet another crime, this one only involving the suggestion of sex between members of the same sex:

Two gathered together under a single blanket, for example, naked and there is no divider between them, and it is not necessarily limited to that, are punished by discretion by a whip from 30

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205. KHU'I, *supra* note 5, at 3 ¶ 189.

206. Islamic Penal Code of Iran (amended 2013), art. 235.

207. *Jawahir*, *supra* note 34, at 41:382; Khu'i, *supra* note 5, at 3 ¶ 189.

208. *Jawahir*, *supra* note 34, at 41:383 (noting both opinions but preferring the one that indicates four occurrences merit death); KHU'I, *supra* note 5, at 3 ¶ 190 (reciting a rule for death on the third occurrence).

209. *Jawahir*, *supra* note 34, at 41:402 (describing slander as "an accusation of fornication or *liwat*"); KHU'I, *supra* note 5, at ¶ 200 (same); Islamic Penal Code of Iran (amended 2013), art. 245.

210. See, e.g., KHU'I, *supra* note 5, at 3 ¶ 99 (setting forth two witness requirement with the exceptions of *liwat*, lesbianism and fornication). This is not the position taken in Iranian law, however. Islamic Penal Code of Iran (amended 2013), art. 199.



lashes to 99 lashes. [It is reported that] “some asked Aba Abdullah [the third Imam] (peace be upon him) ‘what is the punishment for a man who sleeps with another man under a single covering?’ He said, ‘was there a divider’, and they said ‘no’, and he said, ‘was it out of necessity?’ and they said ‘no’, so he said, ‘they are whipped thirty times.’<sup>211</sup>

Under the *Jawahir*, four such occurrences result in the death penalty.<sup>212</sup> Grand Ayatollah Khu’i, for his part, makes no mention of the death penalty for this crime, though after discussing the various opinions, he sets out a stricter rule of ninety nine lashes for each offense, rather than any sort of discretion on the number of lashes to impose.<sup>213</sup>

In any event, it should be obvious that as a criminal matter, homosexuality is policed much more stringently than fornication. There is no mandatory crime concerning “thighing” for anyone but gays, let alone a mandatory crime for a man and woman lying naked under a blanket without any thighing. Such heterosexual licentiousness is dealt with by declaring fornication to be a serious sin, describing the rather horrific punishment for it explicitly, and then relying on strict Rules of Gazing to limit contact. This encourages use of the *nikah* to relieve sexual frustration, rather than licentious conduct that would lead believers away from a God centered universe.

Where homosexuality is different is that it not only presents a greater threat to the highly gendered order that Shi’ism demands in its regulation of sex, but that it is much harder to take precautions to prevent given that one cannot exactly segregate a person from his or her own sex. Accordingly, additional crimes exist, ones that are much easier to police than any that are mandated for fornication.

### 3. Lesbianism

Just as Shi’ism found it necessary to prohibit same-sex male relationships in strident terms for the reasons already discussed, so it found equal reason to ban same sex female relationships. This renders Shi’ism quite distinct from the Sunni schools, where lesbianism was not a matter of juristic focus at all, let alone a mandatory, scriptural

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211. *Jawahir*, *supra* note 34, at 41:384.

212. *Id.*

213. KHU’I, *supra* note 5, at 3 ¶ 191.

crime.<sup>214</sup> The name of the crime is *sihq*. The *Jawahir* explains as follows:

The crime of lesbianism is sexual intercourse between a woman and another, called in the sources, the women with the women. God and the angels have cursed it, along with those who remain in the loins of men and the uteruses of women [i.e. the unborn]. The [women] are in hell, and upon them are seventy vestments on fire, and above those vestments is a thick dry skin of fire. They wear a belt of fire and a crown of fire above their vestments and slippers of fire. It is the greatest fornication which occurs among people. Laqis, the daughter of Satan, together with what her father did with *liwat* among men, caused men to be satisfied with men, and women to be satisfied with women. What shall befall the [women] on Judgment Day—they shall wear rags of fire, veils of fire, vestments of fire, and what shall enter their bellies to their heads are pillars of fire, and they shall be thrown into the fire. . . .<sup>215</sup>

Interestingly enough, though the *Jawahir* describes lesbianism in the passage above as the “greatest fornication,” it imposes a lighter punishment than ordinary fornication. Specifically, reviewing ambiguous source material, the *Jawahir* suggests that the proper punishment is one hundred lashes, with death imposed on the fourth offense.<sup>216</sup> More recent authorities are stricter. Grand Ayatollah Khu’i, for example, treats lesbianism the same as fornication, imposing one hundred lashes for the non-*muhsan*, and stoning for the *muhsan*, with the death penalty for the third offense.<sup>217</sup> Grand

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214. Ali notes the following respecting Sunni classical authorities:

Although literary, and to a lesser extent, legal texts include some discussion of sexual acts between women . . . most discussion of homoerotic acts focuses on male/male sexual activity. Several factors contribute to the silence regarding female same-sex activity. Perhaps the most important is that many legal effects depend on penetration of a penis.

ALI, *supra* note 16, at 80; *see also* TUCKER, *supra* note 15, at 190. Plainly there is significant legal effect within Shi’ism arising from penetration of a penis, including the important legal distinction between *liwat* on the one hand, and “thighing” on the other, described in Section III.B.1. However, as the crime of thighing demonstrates, Shi’i jurists were hardly reticent to identify and castigate particular sexual activity as necessarily criminal even if it did not involve penis penetration.

215. *Jawahir*, *supra* note 34, at 41:387.

216. *Id.* at 41:388-390.

217. KHU’I, *supra* note 5, at 3 ¶¶ 194-195 (noting that the majority of jurists hold a different view, and rejecting that view).

Ayatollah Sistani suggests the same.<sup>218</sup> As with same-sex male relations, the trend appears to be moving in the direction of increased strictness.

Lesbianism is in some ways easier to prosecute than either *liwat* or fornication. It is true that four male witnesses are required, and the testimony of women carries no weight, unlike fornication.<sup>219</sup> That said, as with “thighing,” there is obviously no penetration that must be witnessed. Moreover, perhaps more significantly, the crime of unfounded accusation does not apply against witnesses if an insufficient number of them testify, as it does with *liwat* and fornication.<sup>220</sup> This thus frees witnesses to testify against women without fear of a mandatory lashing against them if an insufficient number of witnesses appear. If this were not a sufficient deterrent, then as with men, a punishment is imposed against women who are naked under a blanket together without some sort of barrier between them. The punishment, again as with men, is between thirty and ninety nine lashes according to the *Jawahir*, and ninety nine lashes, according to Khu’i.<sup>221</sup> Unlike the case with men, however, the punishment is not raised to death with repeat offenses.<sup>222</sup>

#### IV. THE REJECTION OF ALTERNATIVE PARADIGMS—ON GENDER CHANGE AND SEX WITH CHILDREN

The previous sections have demonstrated the manner in which the regulation of sex in Shi’i Islam is designed, *first*, to permit human beings (though mostly men) an outlet for what is perceived to be an irresistible demand for sex, *second*, to satisfy that demand in a manner that keeps the believers focus fundamentally God-centered, and *third*, to ensure that this is done in a manner that preserves

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218. SISTANI, *supra* note 5, at 3 ¶ 380 (imposing stoning on a married woman who engages in lesbian sex with her husband’s slave). It should be noted, however, that the Iranian Penal Code adopts a comparatively more lenient position, imposing one hundred lashes for each act of lesbianism with no mention of a possible death penalty. Islamic Penal Code of Islamic Republic of Iran (amended 2013), art. 127-29.

219. KHU’I, *supra* note 5, at 3 ¶ 99; *Jawahir*, *supra* note 34, at 41:390-391.

220. *Jawahir*, *supra* note 34, at 41:402 (describing slander as “an accusation of fornication or *liwat*); KHU’I, *supra* note 5, at ¶ 200 (same).

221. *Compare* *Jawahir*, *supra* note 34 at 41:391 with KHU’I, *supra* note 5, at 3 ¶ 191.

222. *Jawahir*, *supra* note 34, at 41:393-394 (considering the position that repeated offenses merit death and rejecting it out of “a precaution against trespassing on blood,” meaning that there is sufficient doubt as to the merit of killing those naked under a blanket together, if women, that to kill them might very well result in an unjustified killing and therefore should be avoided).

elaborately constructed gender hierarchies established in the forms of permissible sex known as the *nikah*.

The purpose of this section is to demonstrate the manner in which alternative considerations that might play a more central role in other legal and normative systems are in fact of ancillary importance at best within the Shi'i paradigm. In so doing, I hope to demonstrate the fundamental distinctions between Shi'i Islam and these more familiar systems.

### A. Procreation, Sex and the Rights of the Transgendered

#### 1. On the Ancillary Role of Procreation in Sex Regulation

One potential form of sex regulation rests squarely on the idea of sex being solely for the purpose of procreation. It is not difficult to add to this the limiting conviction that women serve best as mothers, who care for the children and raise them, and men serve best as breadwinners, who provide for the household. Under this normative system, premarital sex would be forbidden because of the *possibility* of procreation without the stability that marriage affords, and same-sex marriage would be prohibited for the same reason. In addition, as a matter of logic, same-sex marriage would be inherently destabilizing under this approach, precisely because of the severe gender stereotyping involved in this sort of sex regulation. No child raised without a man and a woman could possibly be raised properly, almost by necessity. The child would either be lacking an adequate breadwinner, or an adequate caretaker with deep maternal instincts. One does not need to look very far in United States case law to find ample evidence of "family responsibilities discrimination" which is premised precisely upon such beliefs.<sup>223</sup>

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223. Williams and Bornstein open their article on family responsibilities discrimination with a series of examples in which men and women alike suffer due to these presumptions on the part of their employers. These include a woman fired so that she could spend more time with her children, and a man denied paternity leave because, in his supervisor's words, "God made women to have babies." Joan C. Williams & Stephanie Bornstein, *The Evolution of "Fred": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2007-08). For an example of the salience of some of these ideas in contemporary American society as concerns opposition to same sex marriage, see Brief for Defendant-Appellant at 2-3, *DeLeon et al. v. Perry*, No. 5:13-cv-982 (5th Cir. July 28, 2014), which reads as follows:

Texas marriage laws are rooted in a basic reality of human life. Two people of the same sex cannot, by themselves, procreate. . . . The State's recognition and encouragement of opposite sex marriages increases the likelihood that naturally

The approach has long had its advocates in the Muslim world and elsewhere.<sup>224</sup> Indeed, variations of this position that the purpose of sex is procreation are so common that scholars advancing the cause of gender equality in the specifically American context often connect in a rather intimate fashion access to reproductive rights on the one hand to the women's struggle for equal rights more broadly on the other. MacKinnon thus indicates that "[r]eproductive control is properly 'an integral part of modern woman's struggle to assert her dignity and worth as a human being.' In other words, it is a sex equality issue."<sup>225</sup> Siegel also describes a "sex equality" approach to reproductive rights, which, she indicates, "views the social organization of reproduction as playing a key role in determining women's status and welfare."<sup>226</sup>

There may well be cause to engage in this sort of conflation in the United States, given the traditional associations of sex regulation and procreation. However, such views receive broad international recognition as well. USAID describes its support for international family planning efforts as bringing forth the benefit of improved women's rights.<sup>227</sup> The United Nations Population Fund puts it even

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procreative couples will produce children, and they will do so in the context of stable, lasting relationships. By encouraging the formation of opposite sex marriages, the State seeks not only to encourage procreation but also to minimize the societal costs that can result from procreation outside of stable, lasting marriages.

224. Consider, for example, the stridently Islamist and militantly anti Western Sayyid Qutb, who says this to justify the rule that the testimony of two women is equivalent to that of one man:

[T]he explanation is . . . clear. By the nature of her family duties the growth of a woman's spirit is towards emotions and sentiments; just as in man it is towards contemplation and thought. . . . So when she is forgetful or when she is carried away by her feelings, the other is there to remind her.

Interestingly, while Qutb *relies* on the existence of maternal duties to justify a rule he considers divinely imposed, he nowhere *justifies* the imposition of those self-same maternal duties in the first place, nor does he seem to recognize how fundamentally colonial they are in origin. *See also* ALI, *supra* note 16, at 6 ("Modern Muslim authors, both clerics and laypeople, glorify female domesticity and maternal virtue. The family unit they idealize, with mother-housewife at its center, differs sharply from early jurists' visions of the normative family. Domestic duties of child rearing and housewifery serve as the rationale for support by the male husband-father-breadwinner.").

225. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1328 (1991).

226. Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *EMORY L.J.* 815 (2007).

227. *See, e.g., Family Planning and Reproductive Health*, USAID, (Sept. 29, 2015), <https://www.usaid.gov/what-we-do/global-health/family-planning> ("Increasing access to

more starkly, describing family planning as “central to gender equality and women’s empowerment.”<sup>228</sup>

The idea that the effort to provide reproductive rights is at heart and in all global contexts a fight for women’s equality is almost surely more limiting than many seem to believe. If Shi’i Islam’s rules on sex prove anything, it is that gender hierarchies that involve women’s subjugation are not at all difficult to achieve even in the absence of any sort of assumptions respecting a woman’s role as housewife and mother.

One need to look no further than the elaborate rules set forth by none other than Grand Ayatollah Sistani specifically concerning birth control to see how this is so.<sup>229</sup> Sistani prohibits certain methods of birth control, such as those that might cause harm to the wife,<sup>230</sup> anything that would “deny any part of the husband’s religious rights,” which presumably includes any method, such as condom use, that limits his right to sexual enjoyment in any way<sup>231</sup> and any method that would require a doctor (male or female) to examine a woman’s genitalia because it would violate the Rules of Gazing already discussed.<sup>232</sup> What is not forbidden, however, is using birth control without a husband’s permission.<sup>233</sup> A wife’s unwillingness to bear children for her husband is, it turns out, none of his business.<sup>234</sup> Withdrawal by a husband without a wife’s consent is similarly disfavored, but not forbidden.<sup>235</sup> Saeed al-Hakim goes so far as to

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reproductive health services, including voluntary family planning, has profound health, economic and social benefits for families and communities, such as . . . **Supporting women’s rights** and opportunities for education, employment and full participation in society”) (emphasis in original).

228. *Family Planning*, UNFPA, <http://www.unfpa.org/family-planning#sthash.Au3EhRrT.dpuf> (last visited Oct. 1, 2015).

229. See generally ALI SISTANI, *MASA’IL MUNTAKHIBA* (2001) 534-36 [hereinafter *MASA’IL*].

230. *Id.* at 534.

231. *Id.*

232. *Id.* (noting exception in cases of medical necessity).

233. *Id.*

234. Grand Ayatollah Saeed al-Hakim, a less prominent contemporary jurist relative to Sistani, takes a different approach. He indicates that any method of birth control that limits a husband’s right to enjoyment is absolutely forbidden, while one that does not is forbidden without a husband’s consent as a matter of precaution. SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 48. Even this more conservative approach, however, demonstrates the priority of sexual enjoyment over procreation.

235. SISTANI, *supra* note 5, at 3 ¶ 10.

indicate that the disfavoring is weaker if the wife has a “long and clamorous tongue” or uses “foul and base words.”<sup>236</sup>

Even the most central role ascribed to mothers in Western tradition, that of the nursing of children, is extremely limited in juristic accounts. The following is a passage from the juristic compendium of Grand Ayatollah Sistani:

A woman is not obligated to nurse her child, neither for free, nor for a fee, if her custody has not ceased. She is also not obligated to nurse the child for free if her custody has ceased, but she may demand a fee for nursing for two years, but not more, from the wealth of the child if the child has wealth, or from the father if the child does not have wealth, and the father is wealthy. If the child does not have wealth, and the father is not wealthy or is deceased, and so is the grandfather and other ascendants, then she must nurse the child for free, either on her own or through hiring a wet nurse, with the fee for her account based on the obligation to support the child, by precaution . . .<sup>237</sup>

Similar rules exist in Grand Ayatollah Khu’i’s compendium.<sup>238</sup> Thus, a mother’s obligation to nurse the child exists only when (i) the child is not in her custody, and (ii) either she is paid for the nursing or there is no money to pay her from the estates of the child, the child’s father or any male ascendants, respectively. In all other circumstances, there is no obligation on her. In particular, Sistani makes clear later that if she remains married to her husband, she has the right, but not the obligation, to nurse the child.<sup>239</sup> If she refuses to do it, or demands a fee for it, her husband has the right to find a wet nurse for a lesser fee, at which point the mother can accede to the wet nurse, or agree to nurse the child for free.

Along the same lines, Shi’i authorities nowhere impose a duty on a wife to take care of the home, or perform any household tasks, whether it be cooking, cleaning, laundry, sewing, or even that most important task necessary to run a household in a rural community—drawing water from a well. Most jurists do not mention any of these matters at all. The contemporary Grand Ayatollah Sistani does, but he only describes them as “recommended” for a woman to do.<sup>240</sup> Quite

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236. SAEED AL HAKIM, *supra* note 5, at 3 ¶ 46.

237. *Id.* at 3 ¶ 396.

238. See KHU’I, *supra* note 5, at 2 ¶ 1386.

239. SISTANI, *supra* note 5, at 3 ¶ 397; *see also* KHU’I, *supra* note 5, at 2 ¶¶ 1386-1387 (describing breast feeding as a right, but not an obligation, for a free woman).

240. SISTANI, *supra* note 5, at 3 ¶ 340.

plainly, this is not an ethical system that seeks to emulate the matronly virtues of the ideal Victorian woman.

This is not to say that procreation plays no role at all in the regulation of sex. Grand Ayatollah Hakim points out, for example, that marriage is recommended for all, even those whose sexual impulses are not necessarily as strong.<sup>241</sup> This is because it has benefits other than sexual enjoyment, including procreation.<sup>242</sup> While emphasizing the central importance of marriage to relieve sexual frustration, the *Jawahir* likewise indicates that the majority opinion still recommends it for those who do not have such intense sexual desires.<sup>243</sup> The *Jawahir* also indicates that the purpose of the temporary marriage is enjoyment, while the permanent marriage has other purposes as well, such as children.<sup>244</sup> Finally, as mentioned in Part II, the recommended invocation to God recited before sex involves a man asking for a pious and dutiful son, and then directing his wife to do the same.<sup>245</sup>

Yet none of this derogates from the fundamental principle that in regulating sex, procreation is an ancillary consideration. The fact is that at the very moment that the man is asking for a dutiful son, his wife could be taking birth control, unbeknownst to him,<sup>246</sup> and he could be planning on practicing withdrawal, unbeknownst to her.<sup>247</sup> Neither of these would be forbidden according to Grand Ayatollah Sistani.<sup>248</sup> Hence, while procreation might be deemed a benefit deriving from sex, it is not a fundamental one, and certainly not one that is the basis of regulation of sex.

It is probably important to mention in addition that the jurists were of course aware enough of the world to know that procreation was a frequent *consequence* of sex, and so they did develop an elaborate set of rules concerning the legitimation of progeny. Hence, for example, a permanent wife may not marry again after a termination of an existing marriage until three menstrual cycles have passed,<sup>249</sup> while a temporary wife must wait two menstrual cycles.<sup>250</sup>

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241. URWA, *supra* note 5, at 14:4.

242. *Id.*

243. *Jawahir*, *supra* note 34, at 29:13-15.

244. *Id.* at 30:162.

245. *See supra* note 127 and accompanying text.

246. MASA'IL, *supra* note 229 at 534; SISTANI, *supra* note 5, at 3 ¶ 10.

247. MASA'IL, *supra* note 229 at 534; SISTANI, *supra* note 5, at 3 ¶ 10.

248. *See supra* note 234 and accompanying text.

249. *See, e.g.*, SISTANI, *supra* note 5, at 3 ¶ 547.



However, prepubescent girls, menopausal women and those whose marriages were not consummated have no similar waiting period.<sup>251</sup> Plainly, the rules ensure that women who can become pregnant do not have sex in a manner that would raise any question as to paternity.

To further this goal, jurists have also laid out extensive rules establishing conclusive presumptions of paternity when a woman is married.<sup>252</sup> Even in areas where there would be little need to think of the consequences of procreation, for example lesbian sex, passages appear that lay out rules for what to do if a wife has sex with her husband, then with a virgin woman, in a manner that impregnates the virgin with the semen of the husband. (According to both Sistani and Khu'i, the child is treated as the legitimate issue of the "master of the sperm" (i.e. the husband) and the virgin, the wife is stoned, and the virgin is paid a *mahr* from the wife. After the virgin gives birth, she is lashed).<sup>253</sup>

However, these rules of legitimation arise only to address the possibility of progeny arising out of sex. They are not the reason that sex is regulated in the first place, except incidentally. It cannot be seriously contended that fornication and homosexuality are prohibited because of some Victorian era notion that it might lead to a child being raised in a home without a father and mother. The rules simply do not support this proposition.

## 2. On the Hermaphrodite in Shi'i Juristic Thought

The marginal role that procreation plays in the regulation of sex in Shi'i Islam offers significant possibilities for the transgendered that might not otherwise exist. That is, if the purpose of marriage is not to build families with a housewife as a mother and a breadwinner as a father, but to render sex licit within a gender defined contract known as the *nikah*, then the idea that a couple cannot procreate naturally presents no obstacle to their marriage. The only important matter is that the contract includes a man and a woman, each with clearly established and predefined obligations and expectations. That the woman used to be a man, or the man used to be a woman, is not in and of itself problematic.

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250. *Id.* at 3 ¶ 259.

251. *Id.* at 3 ¶ 542-544.

252. *See, e.g.,* Jawahir, *supra* note 34, at 31:222-238.

253. SISTANI, *supra* note 5, at 3 ¶ 380; KHU'I, *supra* note 5, at 3 ¶ 197.

In fact, related matters have been a source of juristic discussion for centuries. To quote Kecia Ali in the context of Sunni Islam, and as is no less true of Shi'i Islam:

The acknowledgment of the existence of transsexuals is not more of a challenge to the standard jurisprudential discourse of sex/gender than that of the hermaphrodite in classical and medieval discourses, nor is a person of ambiguous sex a challenge to the binary system once properly categorized.<sup>254</sup>

Ali's point respecting the hermaphrodite is an important one. Islamic law across schools and sects has long given a great deal of thought to the question of how to deal with those who did not fall neatly into either category of male or female because they had biological characteristics of both sexes, known in Islamic discourse as the *khuntha*.<sup>255</sup>

In such a highly gendered normative system, there is some sense to the attention given to the subject despite the relative infrequency of sex ambiguity as a biological matter. The questions raised, after all, are manifold. For example, the Rules of Gazing limit interactions between men and women who are unrelated, as Part III.A shows. How do these rules apply to the *khuntha*? Women generally inherit half of what a similarly situated man does in Islam's mandatory inheritance system, meaning that if a decedent leaves a son and a daughter, the son's portion would be twice that of his sister.<sup>256</sup> If one assumes that a couple has two children, one of whom is a son, and the other of whom is a *khuntha*, how would the estate be distributed? Perhaps most vexing of all, is it permissible for the *khuntha* to marry, and, if so, to a person of which sex?

The manner in which the jurists tried to address this was to categorize people of ambiguous sex into either a man or a woman. In fact, the operating presumption was that such a person *was* either a man or a woman, and the human task was to determine which one given the conflicting signs. Hence, the *Jawahir* defines the *khuntha* as "one who is male or female in reality, without a means to identify clearly [which] within the division of people, and indeed all animals, into male and female. This is how they are always characterized in the Book and the Tradition [of the Prophet] in a manner that cannot be

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254. ALI, *supra* note 16, at 94.

255. *Id.* at 93.

256. TUCKER, *supra* note 15, at 138-39.

denied.<sup>257</sup> Following this, the text refers to the *khuntha* as having the genitalia of both sexes.<sup>258</sup>

The jurists performed the necessary categorization by focusing primarily on the urinary tract. Specifically, if a person urinated from a penis, then the person was male, and if they urinated from female genitalia, then the person was female.<sup>259</sup> If they urinated from both, then the genitals from which the person originally urinated controlled the sex attributed to the person.<sup>260</sup> Other tests arise if the person urinated from both originally. These include the location of the later urination,<sup>261</sup> to, upon reaching puberty, the onset of menstruation, the presence of wet dreams, or the appearance of breasts, though in some cases these latter tests are described as problematic.<sup>262</sup> The details need not be recounted here.

However many tests are used, there is always the possibility that no gender can be ascribed to the *khuntha*, in which case the *khuntha* is referred to as *khuntha mushakkal*, or a mixed *khuntha*.<sup>263</sup> Various rules are developed throughout the juristic texts to deal with these individuals. In inheritance, for example, they receive half of the portion that a male would, and half of the portion that a female would.<sup>264</sup> The *khuntha mushakkal* cannot lead prayers, just as women cannot, though if they do so without the knowledge of those following, then the prayer need not be repeated.<sup>265</sup>

However, it is precisely in the area of sex regulation that the questions become the source of greatest juristic anxiety. Hence, where in inheritance the jurists used the sex ambiguity to grant the *khuntha*

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257. Jawahir, *supra* note 34, at 39:277-278.

258. *Id.* at 39:278; *see also* SISTANI, *supra* note 5, at 3 ¶ 1094; KHU'Ī, *supra* note 5, at 2 ¶ 1829.

259. Jawahir, *supra* note 34, at 39:278; SISTANI, *supra* note 5, at 3 ¶ 1094; KHU'Ī, *supra* note 5, at 2 ¶ 1829.

260. Jawahir, *supra* note 34, at 39:278; SISTANI, *supra* note 5, at 3 ¶ 1094; KHU'Ī, *supra* note 5, at 2 ¶ 1829.

261. Jawahir, *supra* note 34, at 39:279; SISTANI, *supra* note 5, at 3 ¶ 1094; KHU'Ī, *supra* note 5, at 2 ¶ 1829.

262. *See, e.g.*, Jawahir, *supra* note 34, at 39:280 (noting wet dreams, menstruation and breasts); *cf.* SISTANI, *supra* note 5, at 3 ¶ 1094; KHU'Ī, *supra* note 5, at 2 ¶ 1829 (both not mentioning post puberty signs, and further suggesting location of later urination is potentially problematic).

263. *See, e.g.*, Jawahir, *supra* note 34, at 29:101 (referencing the “mixed” *khuntha* as concerns the Rules of Gazing); ALI SISTANI, 1 COMMENTARY ON THE *URWA WUTHQA* ¶ 862 (2004) (discussing the “mixed” *khuntha* in the context of ritual washing of the dead).

264. Jawahir, *supra* note 34, at 39:283; KHU'Ī, *supra* note 5, at 2 ¶ 1829.

265. Jawahir, *supra* note 34, at 14:9.

half of what a man would receive and half of what a woman would receive, they operated at far higher levels of precaution as concerned the Rules of Gazing. Ever concerned about the possibility of illicit sex of either the homosexual or heterosexual variety, the jurists took the extraordinary step of obligating the segregation of the *khuntha* from both genders. Specifically, to quote Hakim, as concerns the Rules of Gazing, "the *khuntha* is as a man to a woman, and as a woman to a man."<sup>266</sup> Hence, a *khuntha* need not cover in front of other women, because deemed a man in such circumstances.<sup>267</sup> However, the prohibition against gazing at other women would apply, as would the obligation to cover as a woman in the presence of men.<sup>268</sup>

As concerns sex and the *nikah*, the rules are no less burdensome among modern jurists. The mid nineteenth century *Jawahir* contains a remarkable passage that, in a fashion characteristic of Shi'i jurists, obliquely criticizes the determinations of Sheikh Tusi, one of Shi'ism's great early clerics who made enormous contributions to Shi'i jurisprudential thought.<sup>269</sup>

The Sheikh said in his *Mabsut*, "if the *khuntha* are a husband or a wife," based on what is said in some reports, "they take half of the inheritance of the husband, and half of the inheritance of the wife." The basis for this is what we have recited respecting the possibility of being father or mother. But it is known that the marriage of the mixed *khuntha* is not permitted, on the basis of the prohibition of sex.

And if there is permissibility, then it comes with doubt. This is because if a *khuntha* undertakes a *nikah* with a *khuntha*, and we declared the contract between them valid, then they died simultaneously, before their estates were distributed, then we would not know which is the husband, and which is the wife. With the rule that we give half of the attributed portions of each, then as for the relatives whose inheritance we must distribute, the reality is that they will not give up their portions. And here it is possible that they were two men or two women, so there is no marriage and therefore no inheritance. And if there is a child

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266. URWA, *supra* note 5, at 14:24; *Jawahir*, *supra* note 34, at 101-02 (expounding upon the matter at some length).

267. *Jawahir*, *supra* note 34, at 102.

268. *Id.* at 101-02.

269. See SACHEDINA, *supra* note 25, at 10-11 (describing influence of Sheikh Tusi within Shi'ism).

between them, then we do not know which of them gave birth, and if we do know, it is only through hearsay.

What al-Qadhi has said is “if a *khuntha* marries a *khuntha*, it is dependent on one being a man and the other being a woman. Before their status is clarified, the marriage is suspended until it is known, and if one dies before it is known, they do not inherit.

I said, it is like this, because the marriage may be unsound due to their being both men or both women. What I read from the *Mabsut* does not differ after these two possibilities are refuted by the existence of a child between them. Perhaps what the Sheikh intended was that the *khuntha* if married to a wife known to be a woman, or a wife to a husband similarly known to be a man, then based on the soundness of that, or on the assumption that it might be sound, then in the first case [he] deserves an inheritance portion that is half of the inheritance of a husband. In the second case, half of the inheritance portion of a wife. This is because of the possibility of masculinity in the first case, and femininity in the second, in which case she deserves [an inheritance portion] and the possibility of the opposite, in which case she deserves nothing. So [the Sheikh] considered the two possibilities and gave inheritance taking both into account, which is half. It is similar as to property that is in doubt between two people and each of them claims it is his, so it is divided in half. And God knows best.<sup>270</sup>

Sheikh Tusi, in other words, appeared merely to extend the very same rules respecting inheritance that apply in other circumstances as concern the *khuntha* to a husband and wife who were both *khuntha*. In other words, where a son of a decedent inherits half of what a daughter does, then the well established rule is that a *khuntha* will inherit half of a son’s portion and half of a daughter’s.<sup>271</sup> This would mean an estate would be divided among a son, a *khuntha* and a daughter (assuming no other heirs) in a 4:3:2 ratio. Tusi merely adopted the same idea as concerned the married *khuntha*.

In the *Jawahir*, however, this is deemed problematic, because a husband and a wife are not as a son and a daughter. Specifically, *they have sex with each other*. And it is not clear if their sex is being validly undertaken in the context of a *nikah*, or if it is not, and is therefore homosexuality of some sort, undertaken illicitly. Even the

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270. See *Jawahir*, *supra* note 34, at 39:294-95.

271. See *id.* at 39:283; *KHU’I*, *supra* note 5, at 2 ¶ 1829.

existence of a child does not avoid this problem, the *Jawahir* notes, because while then there is a suggestion of opposite gender, nobody knows which of the two has the obligations of a husband, and which the obligations of a wife. The gender differentiation so painstakingly developed in the *nikah* is therefore put into jeopardy. To the *Jawahir*, this is intolerable, and no such marriage can be recognized.

Thus, to the modern jurists, ambiguity as to sex is extremely troublesome and anxiety inducing, and must be reduced as much as possible. It is perhaps for this reason that Grand Ayatollah Sistani has taken the position that the evidentiary rules respecting the determination of sex are *subject to change on the basis of scientific advancement*. That is, Sistani notes that if one is unsure as to sex, then the *first method to ascertain it* is by virtue of “recent scientific means.”<sup>272</sup> It is only where science is indeterminate that the urinary tract test described earlier becomes relevant.<sup>273</sup> In contrast, the Grand Ayatollah does not rely on science as concerns the determination of paternity, where the traditional juristic rules hold and where no mention is made, at all, of the possibility of DNA testing.<sup>274</sup>

Plainly, different standards are being used to address different circumstances. As concerns the legitimacy of children, the goal is less about achieving technical and scientific accuracy in attributing paternity than it is in avoiding the types of instability that would surely be generated by uncertainties concerning legitimacy and accusations of the serious sin of fornication. By contrast, with the *khuntha*, the preexisting presumption is that there *is*, somehow, a “true” sex to which the person belongs, and the goal is to find it, and then apply it. To the extent science can help make that determination, this is all to the better.

### 3. On the Rights of Transsexuals

The previous section lays out the theoretical framework that contemporary jurists use to address matters of ambiguous sex. This section demonstrates the manner in which they have come to quite different results concerning the application of this framework to the matter of sex change operations. For purposes of simplicity and clarity, I focus on two premier jurists of the past fifty years who have

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272. SISTANI, *supra* note 5, at 3 ¶ 1094.

273. *Id.*

274. *See id.* at 3 ¶¶ 367-385.

had tremendous influence on modern Shi'i thought. These are Grand Ayatollah Sistani, the jurist widely regarded as the most learned operating out of Najaf, and Ayatollah Ruhollah Khomeini, the leader of the Islamic Revolution in Iran.

Both jurists are of the view that if science can determine that a person clearly belongs to a particular sex, then there is no problem that arises as to an operation whose function is to make that sex more manifest.<sup>275</sup> Khu'i takes this position as well,<sup>276</sup> and it is perhaps not surprising. This is not really a "sex change" in the minds of the jurists, but rather an operation that makes a person's "true" sex clearer, a logical extension of the treatment of the *khuntha* described in the previous part to a world of scientific advancement. In this sense, it is no more controversial than surgery to cure a hearing impairment would be. Khomeini explains that such surgery is not obligatory.<sup>277</sup> Sistani, by failing to mention anything concerning an obligation on a believer, seems to agree.<sup>278</sup> Again this is not terribly controversial, as one is also not obligated to undergo surgery to address hearing impairments either.

There are exceptions to this idea of voluntariness that arise from the fact that, as Khomeini notes, a person who is scientifically a woman has all of the obligations of a woman imposed upon her, and a person who is scientifically a man has all of the obligations of men imposed upon him.<sup>279</sup> Thus, if a person cannot carry out their own obligations without a "sex clarifying" operation, or if there is some sort of fear that if they do not undertake the operation, they will fall into sin, then the surgery is mandatory.<sup>280</sup> Though Khomeini does not elaborate, the first situation might include an inability on the part of a person who is scientifically determined to be a man to pray a

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275. Grand Ayatollah Ali Sistani, *Fatwas (Change of Sex)*, THE WEBSITE OF HIS EMINENCE AL-SAYYID ALI AL-HUSSEINI AL-SISTANI, <http://www.sistani.org/arabic/qa/0407/> (last visited July 24, 2015) [hereinafter *Sex Change Fatwa*]; AYATOLLAH RUHOLLAH KHOMEINI, 2 TAHRIR AL-WASILA 567 (1998 edition). I am operating from the version of Khomeini's compendium as it was last edited by him. As has been noted by other scholars, Khomeini's position on the subject of sex change took place over the course of years. Farrah Jafari, *Transsexuality Under Surveillance in Iran: Clerical Control of Khomeini's Fatwas*, 10 J. MID. E. WOMEN'S STUD. 31, 31-32 (2014).

276. GRAND AYATOLLAH ABUL QASIM AL-KHU'I, 1 SIRAT AL-NAJAT ¶ 980 (Tabrizi ed. 2010) [hereinafter SIRAT].

277. KHOMEINI, *supra* note 274, at 2:567.

278. *Sex Change Fatwa*, *supra* note 274.

279. KHOMEINI, *supra* note 274, at 2:567.

280. *Id.*

mandatory communal prayer because he has breasts that make him appear as a woman, and the second situation might refer to one scientifically determined to be a woman tempted to remove her headscarf because she appears as a man and can therefore do so without repercussion.<sup>281</sup>

The more interesting question, and the one on which the jurists are divided, concerns a voluntary sex change operation for one whose biological characteristics are entirely one sex or the other. Remarkably, *neither jurist indicates that such a change is inherently prohibited*.<sup>282</sup> The problem, instead, is one that Kecia Ali discusses in the Sunni tradition as concerned a famous case of sex change in Egypt that was undertaken decades ago. Specifically, Ali notes, opponents of the sex change maintained that no change had actually occurred, only “mutilation” of a human body.<sup>283</sup> This very much seems to be Sistani’s opinion of what a sex change operation is. To quote him:

If what is meant by sex change of a man to a woman is a surgical operation to sever the penis and the testicles, and to place two openings, one for the urinal pathway, and the other for the practice of sex, and the giving of the person doses of feminine hormones which affect his outward appearance and give a feminine look, in the rise of breasts and the lack of beard hair, and the like, and

If what is meant by the change of a woman to a man is that an artificial penis is put on her and dosages of masculine hormones given to appear as a man, without the rise of breasts and [the establishment of] beard hair, and the like,

Then all of this does not affect or change a man to a woman at all, nor a woman to a man. . . .

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281. Other questions can arise from these disquisitions—for example, if a person believes themselves to be a woman for most of their life, and then science determines that in fact they are a man, are the obligations of a man really imposed upon them upon such determination, and vice versa? An affirmative answer leads to unmistakable hardship, and a negative one seems to permit someone who is “actually” a woman to marry another woman. Khomeini provides no answer to this, though given his generally permissive attitude toward sex change operations generally, as described in the main text, he does not need to. Other jurists seem to suggest that one who believed themselves a woman could remain a woman, despite the obvious problems as concerns the potential of homosexuality. See SIRAT, *supra* note 277, at 1 ¶ 981.

282. *Sex Change Fatwa*, *supra* note 274; KHOMEINI, *supra* note 274, at 2:567. Grand Ayatollah Khu’i appears to have taken a more conservative position, finding sex changes problematic more broadly. SIRAT, *supra* note 277, at 1 ¶ 904.

283. ALI, *supra* note 16, at 94.



However, if what is meant is that change of a man to a woman, or the opposite, as concerns the internal and external organs of reproduction which are the point of distinction between one sex and the other, then there is no objection to this by itself . . . , but what is apparent is that this is not done in our times, and what is done is the first of these.<sup>284</sup>

In some sense, it is true that Sistani is entertaining only a theoretical distinction in describing the two possibilities, and permitting one while prohibiting the other.<sup>285</sup> Nevertheless, the distinction is interesting, and revealing of Sistani's worldview. He is undisturbed by the theoretical possibility of a person moving from one sex to another in Shi'i Islam's deeply entrenched binary gender system. He is deeply disturbed by a person willing to mutilate themselves so that they can engage in prohibited homosexuality. Hence, he prohibits the sex change unless it somehow can change all internal and external features of a person's sex from one to the other in an absolute fashion.

For his part, Khomeini's views on homosexuality are no less forgiving than those of the other modern Shi'i jurists already discussed. Anal male to male sex is still punished with death, beheading, being thrown from a tall building, having a wall toppled on the offender, burning or stoning.<sup>286</sup> Lesbianism is still punished with one hundred lashes, and death on the fourth offense.<sup>287</sup> Yet Khomeini's attitude towards sex change is quite different. He seems unperturbed by the fact that there has been no complete biological overhaul of the sort demanded by Sistani. What Sistani views as mutilation, Khomeini views as an unambiguous change that he is willing to countenance, no different than the clarification of sex for one of the *khuntha*, even if the original sex of the person was clear. Specifically, he indicates:

What is clear is that the change of sex from a man to a woman, or the reverse, through an operation, is not prohibited, nor is the operation for a *khuntha* prohibited so that he is attached to one of

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284. *Sex Change Fatwa*, *supra* note 274.

285. The distinction is made even more theoretical by virtue of the fact that Sistani imposes the Rules of Gazing on any such operation. *Id.* Hence, even if a "real" sex change operation were possible, it is hard to see how it could be properly accomplished, because surely someone is looking at genitals they are not permitted to look at when performing this surgery.

286. KHOMEINI, *supra* note 274, at 2:428.

287. *Id.* at 2:429.

the two sexes. But is it obligatory on a woman who sees in herself tendencies that are in essence those of a man, or some masculine qualities, or a man sees in himself the tendencies or qualities of the opposite sex? What is clear is that it is not required if the person is truly of one sex, but he may change his sex to the opposite.<sup>288</sup>

A man with feminine tendencies, in other words, may remain a man if he wishes, and, in so doing, continue to have the obligations and duties of a man, including not gazing upon women he does not know, supporting his spouse, and, of course, not engaging in any sexual contact of any sort with other men. He may also undertake an operation to change to a woman if he wishes, at which point she will have the obligations and duties of a woman, including covering her body from the eyes of men, enabling her husband to have sex with her at any time of his choosing, and not engaging in any sexual contact of any sort with other women. The same applies in reverse. All of this, to Ayatollah Khomeini, is tolerable, as it presents no threat to the gendered order, but merely changes the rules to which any given individual is subject.

The remainder of Khomeini's rules deal with the implications of this permissibility given the binary system. Obviously, the previous marriage of any person who changes sex is thereby invalid, lest sex change be a means to practice homosexuality.<sup>289</sup> This creates implications as to the dower. Khomeini requires its return if the wife changes her gender and requires any deferred and unpaid dower paid in full if it is the husband who changes.<sup>290</sup> Similarly, there are inheritance implications. Does a transsexual upon the death of a child inherit as a father, which she was when the child was born, or as a mother, which she is at the time of death? Khomeini indicates the inheritance is as a father.<sup>291</sup> A man may not marry his daughter in law, but if a woman changes her gender, may she marry her daughter's husband? Khomeini indicates no.<sup>292</sup> Other, more remote issues are raised, such as how to treat the marriage of a couple who undergo simultaneous sex change operations.<sup>293</sup>

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288. *Id.*

289. *Id.* at 2:567.

290. *Id.*

291. *Id.* at 2:568.

292. *Id.*

293. *Id.* at 2:567.

At one level, the disquisitions into such highly improbable scenarios as a husband and wife who both change their sex, or a mother who changes her sex and then wants to marry a daughter in law, seem odd, and almost amusing. To Khomeini, however, these matters are deadly serious. As with some of the questions concerning the *khuntha*, no matter how esoteric, they must be resolved if the gender differentiation and gender hierarchy Shi'i Islam has long depended upon in its regulation of sex is to be maintained. The system, in many ways, depends on their satisfactory resolution.

Later Iranian jurists appear to continue to endorse Khomeini's position, though they do so while revealing some of the disquiet concerning the possibility, raised by Sistani, that the sex change is being used as a vehicle to practice the abominable sin of homosexuality.<sup>294</sup> Hence, for example, the late Grand Ayatollah Montazeri indicated that sex change operations are permissible so long as they are not for a "corrupt purpose."<sup>295</sup> Iran's current Supreme Leader, Ali Khamenei, indicates that sex change is permissible if it does not lead to a "forbidden or vile" act. In practice, the distinction between a person who genuinely wants to change sex and one who actually wants to remain one sex but is using the cover of sex change to engage in homosexuality is a nearly impossible one to police. It is perhaps for this reason that Iran has become, according to major media outlets, the "sex change capital of the world."<sup>296</sup> That this is the same place that imposes severe punishments for homosexuals may come as a surprise to some readers, but in fact is entirely consonant with the traditional Shi'i normative system endorsed by modern jurists. Quite simply, homosexuality threatens the gender hierarchies in a manner that transsexualism does not.

### *B. Sex and Children in Shi'i Islam and Liberal Society*

In my description of the manner in which sex is regulated within the normative framework constructed by modern Shi'i jurists, Shi'i Islam may appear punitive relative to advocates of the liberal society, demanding severe sanction for sexual activity that should be unproblematic. This may well be true in any number of respects, from fornication to homosexuality.

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294. See ALI, *supra* note 16, at 94.

295. Jafari, *supra* note 270, at 37-38.

296. See, e.g., Robert Tait, *A Fatwa for Freedom*, *The Guardian* (U.K.), July 27, 2005.

At the same time, it would be a mistake to describe liberal society, even in some sort of ideal form, as *not* calling for the imposition of harsh punishments against offenders of the liberal sexual order. Specifically, given the centrality of individual autonomy to liberal thought, including very much autonomy over the body, nonconsensual sex is punished in severe terms. This includes both the actual act of sex without consent or sex trafficking of unwilling victims.<sup>297</sup>

Shi'ism, by contrast, does not center its rules around individual autonomy and consent as concerns sex. In fact, there is not even a juristic term that could be reasonably translated as "rape."<sup>298</sup> There is "fornication by force" which a man can effect against a woman.<sup>299</sup> This functions as an excuse for the victim of the force, and enhances the punishment for fornication against the offender so that he is killed, whether or not married.<sup>300</sup>

But this is illicit sex rendered worse through the application of force, with the woman not so much a victim of a violation of her autonomy deserving of compensation so much as deemed not guilty of any criminal act because she did not voluntarily commit any such act. The idea of lawful sex somehow becoming unlawful by virtue of a lack of consent is peripheral at best. Thus, the rules contained in the juristic compendia of Grand Ayatollahs from the *Jawahir* to Muhsen al-Hakim to Khu'i respecting sex with female slaves are complex and elaborate, but they do not include consent as a defining feature, if

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297. David DeMatteo, Meghann Galloway, Shelby Arnold, Unnati Patel, *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y & L. 227, 235 (2015) (surveying federal and state statutes addressing sexual assault and concluding they do not always work particularly well in the context of on campus sexual assault); Dina Francesca Haynes, *(Not) Found Chained to A Bed in A Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 341 (2007) (criticizing the manner in which the Trafficking Victims Protection Act focusses on the prosecution of offenders of sex trafficking at the expense of protecting victims).

298. Modern Arabic has a term for rape, which is *ightisab*, taken from the root verb *ghasaba*, which is to usurp. HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC 790-91 (Cowan, 4<sup>th</sup> ed. 1979). This is a reflection of the liberal notion that to rape a person is to engage in a "theft of the most intimate kind." See Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and A Conflict of Laws*, 79 WASH. L. REV. 471, 500 (2004) (discussing sex with children). *Ightisab* is not, however, a term I have ever come across in thousands of hours reading juristic texts.

299. KHU'I, *supra* note 5, at 3 ¶¶ 136, 153; *Jawahir*, *supra* note 34, at 41:265, 315.

300. KHU'I, *supra* note 5, at 3 ¶¶ 153; *Jawahir*, *supra* note 34, at 41:315.

such a thing were even possible in the context of a master-slave relationship.<sup>301</sup>

That said, individual autonomy plays *some* role in regulating sexual relationships, but it is a limited one. Most obviously, an adult free woman must consent to a marriage in order for it to take place.<sup>302</sup> This means, of course, that no person whom an adult free woman would absolutely refuse to engage in sexual intercourse with could have sex with her without committing a capital offense in the process. However, if she is a virgin, she needs the consent of her father or grandfather as well, thereby vitiating the notion that somehow it is her right to consent that alone validates her sex acts.<sup>303</sup> Perhaps more importantly, once married, she has no right to refuse sex—indeed, her primary obligation is to enable it, and her refusal entitles her husband to exercise physical discipline against her.<sup>304</sup>

Thus, the regulation of sex is not as fundamentally concerned in the Shi'i normative framework with liberal notions of individual autonomy and consent so much as it is with its three commitments laid out above of (i) widely available sex, (ii) designed to be God-centered, and (iii) conducted exclusively within the confines of a gender hierarchy established by the rules of the *nikah*. It is only similar to liberalism in that it imposes severe punishments for violators, though the punishments contemplated by the jurists are more severe than those contemplated by liberals for those who break the rules.

In any event, the significant conceptual discrepancies do not work themselves into significant practical ones in large numbers of instances. That is, whether or not one wishes to describe a man who forces sex on a woman not his wife as a rapist, or as a person who has fornicated by force, the result is the same—the woman is blameless, and the man has violated the rules of sex regulation in a core fashion that deserves severe punishment. Obviously, the same is not true of marital rape. However, the more interesting case to contrast is one that lies very much on the extreme end of sanctionable behavior in the

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301. See Jawahir, *supra* note 34, at 30:204-317; KHU'I, *supra* note 5, at 3 ¶¶ 1320-1340 URWA, *supra* note 5, at 14:179-196. One potential exception is the suggestion by Hakim that out of precaution, a man should avoid engaging in anal sex with a wife or female slave, *in particular* if the wife or female slave does not consent. URWA, *supra* note 5, at 14:61, 64.

302. SISTANI, *supra* note 5, at 3 ¶ 41; KHU'I, *supra* note 5, at 2 ¶ 1237.

303. SISTANI, *supra* note 5, at 3 ¶ 67; KHU'I, *supra* note 5, at 2 ¶ 1237.

304. See *supra* notes 59-63 and accompanying text.

liberal scheme, and one viewed with relative equanimity in the Shi'i framework. This is sex with children.

There is obviously a broad consensus in liberal society that sex, or any sort of lewd or lascivious conduct, that takes place with minors, and in particular young children, deserves severe punishment. The worst cases can end with what are effectively life sentences for the convicted.<sup>305</sup> The US Congress requires all states as a condition of funding to adopt registries for sex offenders,<sup>306</sup> and this is to say nothing of the burgeoning civil liability that arises out of cases involving the sexual assault of children not only against offenders, but also those who fail to take measures to protect minors from harm.<sup>307</sup>

The reasons are obvious. Children lack the capacity to consent to sexual activity in the manner that adults do, and therefore, to have sex with a child is to rape the child.<sup>308</sup> Moreover, the psychological and physical harm that attends to children upon such a rape is presumed to be quite severe given their immature state.<sup>309</sup> Therefore, given the harm, and the assault on individual autonomy, sex with a child is a serious matter indeed.

Shi'i Islam takes a different approach, consistent with its own focus respecting the purpose of sex regulation. My focus here is on that subject that most preoccupies modern Shi'i jurists, which is sex between an adult man and a young girl to whom he is married.<sup>310</sup> It is worth noting as an initial matter that such a marriage is possible. A paternal father or grandfather has a right of guardianship that enables

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305. See, e.g., Ellen M. Bublick, *Who Is Responsible for Child Sexual Abuse? A View from the Penn State Scandal*, 17 J. GENDER RACE & JUST. 297, 297 (2014) (describing minimum thirty year sentence for the sixty eight year old Jerry Sandusky after being convicted of forty five counts of the sexual assault of children).

306. Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 19-20 (2010).

307. Bublick, *supra* note 306, at 301.

308. Drobac, *supra* note 299, at 500 (2004) ("If we accept that children cannot give informed consent because they lack capacity, the sexual taking of a child's body constitutes a theft of the most intimate kind—a rape. This violation . . . justifies the punishment").

309. See Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 244-47 (2011) (describing trauma suffered by children who are victims of violence, including sexual victimization).

310. See, e.g., Jawahir, *supra* note 34, at 29:414-419; URWA, *supra* note 5 at 14:78-82; SISTANI, *supra* note 5 at 3 ¶ 8; KHU'I, *supra* note 5, at 2 ¶ 1236.

him to marry his sons and daughters before they are adults.<sup>311</sup> Moreover, the age at which a girl becomes an adult is quite young—specifically, nine lunar years of age, which is approximately eight years and nine months.<sup>312</sup>

That Shi'i jurists allow child marriages is not in and of itself particularly surprising. If the foundation of sex is not the realization of any particular value of autonomy, but the establishment of gender hierarchies and the availability of plentiful God-centered sex within the context of the *nikah*, then the marriage of young girls is by itself unproblematic.

Of course, given her marital rights, it is important that the guardian exercising the right to marry his daughter do so with her best interests in mind. This would mean that he marry her to a respectable person with means to support her, who offers her a sufficient *mahr*. Thus, Shi'i jurists condition the right of the father or paternal grandfather to the absence of a corrupt purpose, and, in some cases, the perception of a benefit.<sup>313</sup> They further specifically disallow marriages that seem to be contracted with unsuitable husbands,<sup>314</sup> and do not permit any man in the absence of a living father or paternal grandfather (or any other direct lineal male ascendant) to marry off a minor ward, out of fear that such a guardian would not be acting in the ward's main interest.<sup>315</sup>

Thus, it is not as if there are no interests to consider on the part of a young girl—it is merely that her right to exercise sexual autonomy over her own body is not one of them. Hence, if the husband is suitable, offers a *mahr*, has the means to support his wife, and merely happens to enjoy sex with nine-year-olds, no particular problem arises. In fact, some of the jurists go so far as to *encourage* marriages at such a young age, quoting two different Imams to the

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311. URWA, *supra* note 5 at 14:453-454; Jawahir, *supra* note 34, at 29:170-172; KHU'I, *supra* note 5, at 2 ¶ 1236; SISTANI, *supra* note 5 at 3 ¶ 57; SAEED AL-HAKIM, *supra* note 5, at 3:¶ 63.

312. Jawahir, *supra* note 34, at 26:38; KHU'I, *supra* note 5, at 2:179; SISTANI, *supra* note 5, at 2 ¶ 1069. This appears to lie at the lower end of permissible ages relative to the Sunni schools. See ALI, *supra* note 16, at 32.

313. KHU'I, *supra* note 5, at 2 ¶ 1236; SAEED AL-HAKIM, *supra* note 5, at 14:455-456; SISTANI, *supra* note 5, at 3 ¶ 59.

314. See, e.g., URWA, *supra* note 5, at 14:456-457 (describing as problematic a marriage of a daughter undertaken by a father to a man who is less honorable or offers less *mahr* than another who proposes).

315. Jawahir, *supra* note 34, at 29:197.

effect that it adds to a man's happiness that his daughter not menstruate in his home.<sup>316</sup>

Modern jurists further describe as unproblematic sexual enjoyments with a child bride, including kissing, grasping with appetite, and even "thighing" (the same term as used to refer to the scriptural crime when two men engage in it).<sup>317</sup> There is no minimum age for this, and Hakim goes so far as to indicate it is permissible even if the child is still nursing.<sup>318</sup> Again, that some men enjoy sex with children is not a reason to deny it to them within this normative framework, so long as they engage in it in a God-centered fashion, avoid fornication, and make sure to fulfill their financial marital obligations to their wives in the process. In fact, there is some reason to permit it, precisely because otherwise men who enjoy sex with children might seek it outside of the confines of the *nikah*, and thereby engage in the highly impermissible act of fornication.

There is one obvious problem with all of this that the jurists recognized, and this is that the penetration of a young girl could cause obvious physical harm to her. They did as a result try to take account of this. First, they declared penetration of a girl anally or vaginally to be impermissible prior to her reaching the age of nine, and there is no dispute among them on this point.<sup>319</sup> The specific reason is the lack of a girl younger than this to handle such penetration.<sup>320</sup> Given how generally permissive Shi'i Islam is as concerns sexual enjoyment of a wife within the *nikah*, the restriction is considerable.

This leaves two obvious questions. First, precisely what happens to a husband who breaks this rule and penetrates his child bride before the age of nine? Second, is there any consequence if a husband causes his wife physical harm through penetration after the age of nine?

As to the first, because the sole problem is not violation of autonomy, but rather the causing of physical harm, modern jurists have broadly read the ambiguous source text to conclude there is no

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316. URWA *supra* note 5, at 14:11 (quoting Third Imam); SAEED AL-HAKIM, *supra* note 5, at 3: ¶ 33 (quoting Sixth Imam and indicating further that to delay the marriage after menstruation is disfavored).

317. Jawahir, *supra* note 34, at 29:416; SAEED AL-HAKIM, *supra* note 5, at 14:79-80; SISTANI, *supra* note 5, at 3 ¶ 8.

318. URWA, *supra* note 5, at 14:80.

319. Jawahir, *supra* note 34, at 29:414; SAEED AL-HAKIM, *supra* note 5, at 14:78-79; SISTANI, *supra* note 5, at 3 ¶ 8; KHU'I, *supra* note 5, at 2 ¶ 1230; SAEED AL-HAKIM, *supra* note 5, at 3 ¶ 45.

320. Jawahir, *supra* note 34, at 29:415.



earthly consequence to the husband's penetration if he does not cause severe harm.<sup>321</sup> In so doing, they have rejected an alternative interpretation, described by Grand Ayatollah Hakim as "majority," denying the husband the right to have sex with his wife again as a consequence of this sin.<sup>322</sup>

It would be fair to point out that jurists such as Sistani indicate the sin remains even if no harm ensues.<sup>323</sup> Thus, the rules seem to presume that there are believers who are willing to have sex with their wives while clothed, reciting the names of God, avoiding sex on boats, during eclipses and at the end of each month, all due to a series of rules that recommend some conduct and disfavor other conduct. Such believers are then not likely to engage in a form of sex that is not merely disfavored, but entirely prohibited. One less enamored of the rules, however—Holmes' proverbial "bad man," for example<sup>324</sup>—might feel less constrained.

In any event, there are legal consequences to a husband penetrating an underage wife if the penetration causes "ripping," which means the combination of one of the urinal, anal or menstrual pathways with another one of them.<sup>325</sup> In that case, the modern jurists take the position that, whether or not the man remains married to the girl, he must pay her what is known as blood money.<sup>326</sup> In taking this position, the jurists reject alternative source text that would suggest that no such amounts are due so long as the marriage remains intact.<sup>327</sup> Modern jurists are thus adopting positions subject to earlier

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321. *See id.* at 29:417-419; URWA, *supra* note 5, at 14:80-82; SISTANI, *supra* note 5, at 3: ¶ 8; SAEED AL HAKIM, *supra* note 5, at 3: ¶ 45.

322. *See* Jawahir, *supra* note 34, at 29:417-19 (describing the rule, and the texts which support a different conclusion); URWA, *supra* note 5 at, 14:80-82 (describing same in text and accompanying footnotes, and indicating alternative view is the majority one).

323. SISTANI, *supra* note 5, at 3 ¶ 8.

324. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conduct.").

325. *See* Jawahir, *supra* note 34, at 29:419-421 (describing precisely what constitutes "ripping" in some detail); SAEED AL-HAKIM, *supra* note 5, at 14:85-86; *see also* SISTANI, *supra* note 5, at 3 ¶ 8.

326. *See* Jawahir, *supra* note 34, at 29:422-423; URWA, *supra* note 5, at 14:83-84; SISTANI, *supra* note 5, at 3 ¶ 8.

327. Jawahir, *supra* note 34, at 29:422-423 (describing and rejecting the alternative position); SAEED AL-HAKIM, *supra* note 5, at 14:83-84.

debate that *both* enable sexual enjoyment on the part of husbands, *but also* impose financial consequences on them for doing so.

The concept of blood money arises in the case of the law of retaliation, whereby, upon an intentional injury inflicted by one person onto another, the victim (or his male relatives, if he dies) has the choice to inflict a retaliatory injury on the perpetrator *or* to receive blood money, but not both.<sup>328</sup> Within “intentional” injury is some notion of extreme recklessness, such that a person who digs a well in a public road in a manner that would ordinarily kill a person who fell in would be deemed subject to retaliation whether the purpose was to kill someone or not.<sup>329</sup> However, where the perpetrator inflicted the injury as a matter of ordinary recklessness or even mistake, then retaliation is not possible, and only blood money is due.<sup>330</sup> By declaring blood money due, and making no reference to the possibility of retaliation, the jurists seem to view the injury as akin to a mistake, even if a culpable one, rather than some sort of extreme recklessness.<sup>331</sup>

The amount the husband owes is the same amount that would be due to her relatives if he had killed her.<sup>332</sup> There are various standards that can be used to measure this amount, but the most common would probably be five hundred gold dinars, equal to 2.25 kg of gold, or about US \$75,000 in 2015.

Other important consequences attach if the husband causes a ripping of his wife. Specifically, many of the legal effects of marriage would remain his for his life even if he chose to divorce her.<sup>333</sup> Thus, he could not take four permanent wives in addition to her, she would be entitled to inherit as his wife, he could not marry her sister, and, perhaps most importantly of all to her, his obligation to support her

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328. KHU’I, *supra* note 5, at 3:83.

329. *Id.* at 3:60.

330. *Id.* at 3:59, 95.

331. Of course, there is a second problem with imposing retaliation that would give jurists pause. This is that it seems anatomically impossible to inflict the same injury on the husband as was inflicted on the wife. Hence, for example, a man who intentionally severs the labia of a woman is subject to payment of blood money, whereas a woman who does the same can have a retaliatory injury imposed against her. KHU’I, *supra* note 5, at 3:183. Interestingly, it does not seem to fall within the contemplation of Khu’i that a woman might sever the penis of a man, as opposed to a man severing the labia of a woman, because he does not discuss the consequences of this at all.

332. See URWA, *supra* note 5, at 14:83.

333. Jawahir, *supra* note 34, at 29:425-426; SISTANI, *supra* note 5, at 3 ¶ 8; URWA, *supra* note 5, at 14:84, 91.

would remain for life, even if he divorced her and she married someone else.<sup>334</sup>

As for sex with a girl nine lunar years or older, this constitutes no sin at all, because the girl is deemed an adult. Thus, if he causes the ripping referred to before, he need not pay blood money, as he has done no wrong, and only engaged in lawful sex. That said, the jurists plainly were aware that the harm done to the girl would effectively make it nearly impossible for her to remarry, and hence imposed upon him the same obligations as they did for the ripping of an underage girl, except for the blood money. Specifically, the legal effects of marriage, including support and a right to a portion of the inheritance, remain on the husband for life.<sup>335</sup>

To be clear, these obligations are not insignificant, and it would be unfair to describe them as such. The blood money is quite large—almost surely larger than any dower a husband would agree to pay except in the richest of families. Moreover, a lifelong support obligation means that the injured woman has some modicum of financial security that other women would lack, for no reason other than that the husbands of healthy women might divorce them and be free of all obligations to them after the waiting period.<sup>336</sup> The jurists are thus not indifferent to physical injury that can occur to young girls if they have premature sex.

What they do not seem to take into account is any other other harm arising from sex with minors that requires compensation, punishment or both. This is because there is no sense that the deprivation of autonomy over the body, among the greatest forms of deprivation imaginable in the liberal consciousness, and a key pillar around which much sex regulation is based in the liberal society, is in fact a recognizable harm that demands legal recognition. The key areas of concern are not ensuring autonomy and consent, but instead, preventing acts that will cause a breakdown of gender hierarchy, the seeking of sex outside of the bounds of the *nikah*, and excessive licentiousness due to the unquenchable desire for sex that would lead the believers away from a God-centered moral life. The fact is that

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334. Jawahir, *supra* note 34, at 29:425-426; SISTANI, *supra* note 5, at 3 ¶ 8; URWA, *supra* note 5, at 14:84-85, 91.

335. Jawahir, *supra* note 34, at 29:426 (noting that slaves were included as well in this obligation); SISTANI, *supra* note 5, at 3 ¶ 8; URWA, *supra* note 5, at 14:91.

336. See KHU'1, *supra* note 5, at 2 ¶ 1474 (pointing out that a divorced woman does not have a right to support from her husband except during the roughly three month period during which he can revoke the divorce).

marital sex with children, unlike homosexuality or fornication, constitutes none of these, and therefore need not be prevented in such strong terms.

### CONCLUSION

This Article has sought to demonstrate that there are three normative principles upon which orthodox jurists within Shi'i Islam seek to regulate sex. The first of these is that human beings, and men in particular, are driven by an intense and well-nigh debilitating need to engage in a great deal of sex. Secondly, the need must be satisfied—given its intensity it would be foolish to attempt any other course—but in a manner that does not allow it to become something of a secular distraction for a believer whose world should be centered around the worship of God. Finally, sex must be organized in a fashion that preserves a particular gender-driven differentiation and hierarchy as established in the licit sex forms set forth within the Book of *Nikah*. These commitments, the Article demonstrates, explain precisely why the rules of Shi'i Islam as concerns sex are both simultaneously so permissive, by granting to men the dispensation to have sex with a wide variety of different women, and so restrictive, in both the recommended and disfavored forms of sex, and also in limiting contact with women to whom a man is not related or married. It also explains why there are serious punishments imposed on those who seek sex beyond the confines of the *nikah*, and in particular on homosexuals, who not only challenge the norms of marital, God-centered sex, but do so in a fashion that challenges the gender differentiation and hierarchy so elaborately constructed. By contrast, transsexuals pose no similar threat, and hence some leading Shi'i jurists are on balance relatively tolerant of gender change, so long as it is accompanied by a simultaneous sex change. The Article also shows how these norms overlap with and yet are distinct from liberal principles of sex regulation, using the example of sex with minors as a fundamental point of differentiation.

While beyond the scope of this paper, some concluding words are in order respecting the manner in which sex regulation actually takes place in contemporary Shi'i social fields. This is because in important ways, the normative system contemplated by Shi'i Islam is not reflected in the manner in which many Shi'a actually live their lives. As one who has spent a great deal of time in the Shi'i-dominated state of post-Saddam Hussein Iraq, I have come to know a

large number of Shi'i Iraqis whose formal commitment to the Shi'i clerical authorities is quite strong. Indeed, as I have written elsewhere, their insistence on specifically mentioning those clerical academies in the Iraqi Constitution as it was being negotiated resulted in a great deal of tension with competing communities with different commitments.<sup>337</sup> Yet not one of these Iraqis would regard the idea of marrying his daughter at the age of four to a man who wished to grope her as anything short of horrific. Their attitudes toward the marriage of their own daughters were certainly conservative, but more represented by what one might expect among conservative elites in the United States in the middle of the twentieth century rather than anything reflected in the juristic texts. They expected their daughters to go to college, and then marry immediately afterwards, with absolutely no sexual experience prior of any kind to that marriage.

Moreover, not one of these same Iraqis would contemplate, or indeed tolerate, the widespread use of temporary marriage within their own social spaces.<sup>338</sup> This might explain why a draft Personal Status Code specifically designed to realize traditional Shi'i rules in Iraq for its Shi'i population, approved by Iraq's government but never enacted by its legislature, omitted references to the temporary marriage nearly entirely.<sup>339</sup> At the same time, at least one circulated draft for a Shi'i Personal Status Code for Bahrain's Shi'a, prepared by a prominent cleric, does include reference to temporary marriage in a rather unapologetic fashion.<sup>340</sup> Moreover, the institution seems to find more widespread use in Iran.<sup>341</sup> We have also seen how Iran both represses homosexuals in severe fashion while at the same time developing into something of a "sex change capital," very much in keeping with Shi'i theory on sex regulation.<sup>342</sup>

The point of these few words is only to demonstrate that the relationship between Shi'i social practice and the normative framework contemplated by Shi'i jurists is complex. It cannot be said

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337. HAIDER ALA HAMOUDI, *NEGOTIATING IN CIVIL CONFLICT: CONSTITUTIONAL CONSTRUCTION AND IMPERFECT BARGAINING IN IRAQ* 136-41 (2013).

338. *The Political Codification of Islamic Law*, *supra* note 117, at 33-34.

339. *Id.* at 34-37.

340. See Sheikh Muhsen al-Asfour, Rules of Personal Status, in accordance with the Ja'fari *Madhab*, An Initial Study for a Draft Personal Status Law in the History of Shari'a Courts in the Bahrain Monarchy, art. 40 (Dec. 2014) (on file with author).

341. See Amir Miri and Moosa Akefi Ghaziani, *Social Prevention of Crimes against Public Decency*, 4 J. NOVEL APPLIED SCIENCES 326 (2014) (arguing that use of temporary marriage reduces morality crimes).

342. See notes 295-97 *supra* and accompanying text.

that juristic rules control social practice entirely. Contemporary Shi'a are subject to no small number of influences beyond their own jurists, whether those be broader Islamic expectations, human rights discourse, economic imperatives, or anything else. All of these surely play a role in shaping Shi'i practice.

Yet it would also be a mistake to dismiss the juristic rules as irrelevant. It is hard to believe that in the absence of Khomeini's determinations respecting transsexualism that Iran would have embraced the possibility of sex change. It is equally hard to believe that the severe persecution of homosexuals in conservative Islamic societies generally, and conservative Shi'i ones in particular,<sup>343</sup> have no origins in traditional understandings of Islamic doctrine.

More than this cannot be said here. The matter deserves greater elucidation in a separate work devoted to the task. I shall endeavor to undertake the effort, in a different time and place.

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343. See Emine Saner, *Gay Rights Around the World: The Best and Worst Countries for Equality*, *The Guardian* (U.K.), July 30, 2013 (describing Middle East generally, and Iran in particular, as being hostile to homosexuality).

