

# Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions

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## INTRODUCTION

Leo Barajas was a thirty-four-year-old American contractor from Texas working for the U.S. government managing reconstruction projects in Iraq.<sup>1</sup> Though not particularly religious at home, he called on the Almighty often enough during his time in Baghdad. “I had to wake up by faith, sleep by faith and do my job by faith,” he said.<sup>2</sup> In August 2003, Leo met a striking young Iraqi woman named Mariam Ghadeer. In a short time, she had stolen his heart. By the end of 2003, wedding plans were underway. It was not until this time that Mariam told Leo he would have to convert to Islam. Leo refused. After many tears, Mariam concluded, “I guess we can’t get married.”<sup>3</sup>

This Note explores the rules in Islam governing marriage, specifically those restricting marriages in which one spouse is non-Muslim. The rules for Muslim women who wish to marry outside the faith are more restrictive than the rules governing Muslim men wishing to marry a non-Muslim.<sup>4</sup> Some modern Islamic scholars and commentators argue that the pluralistic nature of modern society justifies a reevaluation of these rules, and that such action is not precluded by Islamic law. Muslim women, they contend, should have marital choice similar to that of their male counterparts.<sup>5</sup>

Many Islamic countries are facing the challenges of modernity and social change.<sup>6</sup> Interfaith marriage is one of many issues currently pitting staunch traditionalists against modern reformists within the Muslim community. The goal of this Note is to identify the sources from which Islamic law is derived and the processes through which it is

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1. The story of Leo Barajas and Mariam Ghadeer is told in Christopher Dickey & Jessica Ramirez, *Love and War*, NEWSWEEK, Oct. 22, 2007, at 28.

2. *Id.* at 33.

3. *Id.* Ultimately, Leo agreed to convert to Islam, at least temporarily, so the couple could marry.

4. *See infra* Parts II.A, II.B.

5. *See infra* Part III.A.

6. In many ways, forces in the Muslim world are pulling in opposite directions. On one hand, advocates of reform, modernism, and freedom are making gains in many otherwise conservative Islamic countries. *See generally* Scott MacLeod, *Signs of Freedom*, TIME (EUROPE), May 14, 2006, at 54, *available at* <http://www.time.com/time/europe/html/060522/story.html> (noting that “freedom seekers” across the Middle East are coming forward with “unprecedented determination to demand change”). On the other hand, hard-line traditionalists advocate for a worldwide conservative Islamic Revolution similar to the one that occurred in Iran in 1979. *See generally* Ramita Navai, *President Invokes New Islamic Wave*, TIMES (London), June 30, 2005, at 37.

interpreted.<sup>7</sup> Readers will then be able to analyze this issue using the principles of Islamic jurisprudence, and engage in the rich debate already taking place. Radwan Masmoudi, the president of the Center for the Study of Islam and Democracy in Washington, D.C., noted: “Western societies and policymakers . . . should appreciate that Muslim societies and lawmakers have every right to reconcile their legal system with their moral values. Instead of voicing alarmist condemnations . . . , Westerners should pay closer attention to the lively debate on law and morality within Muslim societies.”<sup>8</sup>

As John L. Esposito, professor of Islamic Studies and director of the Prince Alwaleed Talal Center for Muslim-Christian Understanding at Georgetown University, observed, effective reform is dependent upon acceptance by the greater Muslim community. Such reforms must be rooted in a “consistent Islamic rationale,” and sound Islamic legal principles in order to ensure both “inner consistence” and “historical continuity” with Islamic tradition.<sup>9</sup> Part I of this Note will discuss the role of religious law in Islamic society and the sources from which that law is derived. Next, Part II examines the rules governing interfaith marriage in Islam, including the origins of those rules and the problems they create for modern Muslims. Part III explores methodology for interpreting Islamic law and looks at the ways some modern scholars have tried to reform Islam’s interfaith marriage rules. Finally, the Note concludes by examining the feasibility of both the traditional and reformist positions, ultimately suggesting that there is room in Islamic jurisprudence for differing opinions.

#### I. SOURCES OF LAW IN ISLAM

“Law, in classical Islamic theory, is the revealed will of God, a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society.”<sup>10</sup> In Islam, law originates from God. The faithful, in turn, seek to discover and understand that law, not to create it themselves.<sup>11</sup> To comprehend the role of government and the process for affecting change in Islam-based legal systems, it is

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7. This Note specifically follows the jurisprudential principles of Sunni Islam, to which the vast majority of Muslims adhere. See BBC News Quick-Guide: Islam, [http://news.bbc.co.uk/2/hi/middle\\_east/5238014.stm](http://news.bbc.co.uk/2/hi/middle_east/5238014.stm) (stating that ninety percent of the world’s billion-plus Muslims adhere to the Sunni sect). However, much of this analysis is also applicable to other Islamic sects.

8. DAVID SMOCK, U.S. INST. OF PEACE, *APPLYING ISLAMIC PRINCIPLES IN THE TWENTY-FIRST CENTURY* 5 (2005), available at <http://www.usip.org/pubs/specialreports/sr150.pdf>.

9. JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 127 (2001). Wisely, former U.S. ambassador to Israel and Syria Edward P. Djerejian observed: “The struggle to determine the balance between tradition and the forces of modernity and change in the Muslim world will have to come from within the framework of their own culture and societies.” EDWARD P. DJEREJIAN, *ANGER AND OPPORTUNITY: AN AMERICAN AMBASSADOR’S JOURNEY THROUGH THE MIDDLE EAST* 15 (2008).

10. N.J. COULSON, *A HISTORY OF ISLAMIC LAW* 1–2 (1964). See, e.g., AFG. CONST. art. 3 (stating that no law may “contravene the tenets and provisions of the holy law of Islam”); BASIC LAW OF SAUDI ARABIA [Constitution] art. 7 (“The rule in the Kingdom depends on the holy Quran and the Prophet’s Sunnah.”).

11. See COULSON, *supra* note 10, at 75.

necessary to understand the sources of Islamic law. This Part presents the generally accepted sources of Islamic law, and explains the hierarchy of those sources.<sup>12</sup>

Most modern Western countries have a utilitarian view of the role of government in society. The purpose of government is to serve the people. If people in the United States, for example, wish to see a law enacted, they appeal to their elected legislature, which may then enact the law as they see fit. While certain “inalienable rights”<sup>13</sup> are recognized, the vast majority of laws governing society are citizen-made, created for specific purposes, and reflective of the overall opinions and values of the people. Society may enact, amend, or repeal its laws, as it deems necessary.<sup>14</sup>

Additionally, modern Western societies typically draw a bright line between things sacred and secular, allowing government to regulate public matters while fiercely protecting an individual’s prerogative regarding his own religious beliefs and practices.<sup>15</sup> While many Western countries are predominantly Christian,<sup>16</sup> they neither require nor endorse individual belief in Christianity.<sup>17</sup>

Such is not the case in many Islamic countries. The broad body of Islamic Law, known as *Shari’a*, draws no distinction between sacred and secular.<sup>18</sup> In addition to setting forth God’s laws for prayer, fasting, and professing faith, *Shari’a* also deals with politics, economics, banking, trade, family law, evidence and procedure, sexuality, dress, hygiene, dietary laws, and criminal laws.<sup>19</sup> To devout Muslims, the

12. The author acknowledges that this is a very simplified exposition of the sources of Islamic law. However, for the purposes of this Note, it is sufficient to establish a foundation for the divine origin of *Shari’a* and demonstrate the hierarchy and interplay of the sources of Islamic law.

13. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14. See J.N.D. ANDERSON, *ISLAMIC LAW IN THE MODERN WORLD* 2–3 (1959).

15. See Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. SUPP. 101, 103 (2002) (“Of course, modern Western states generally guarantee that . . . parties may by and large do or not do what they wish or what their religion requires or allows. . . . [T]he doctrine of separation of church and state—generally accepted in the Western World, even in states with nominally ‘established churches’—prohibits state endorsement of one religion over another.”). For more examples, see U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”); Elisabeth Zoller, *Laïcité in the United States or The Separation of Church and State in a Pluralist Society*, 13 IND. J. GLOBAL LEGAL STUD. 561, 563 (2006) (citing France’s December 9, 1905 Law Concerning the Separation of Church and State as stating “the Republic . . . recognizes no association of worship.”). *But cf.* KONGERIGET NORGES GRUNDLØV [Constitution] art. 2 (Nor.) (declaring that all inhabitants of the Kingdom of Norway have the right to free exercise of their religion, but also that the Evangelical Lutheran religion is the official religion of the State).

16. According to Adherents.com, the United States, for example, is approximately eighty-five percent Christian, the United Kingdom is approximately eighty-eight percent Christian, and France is approximately ninety-eight percent Christian. Adherents.com, *Christian Statistics: The Largest Christian Populations*, [http://www.adherents.com/largecom/com\\_christian.html](http://www.adherents.com/largecom/com_christian.html).

17. See, e.g., *supra* notes 13–15 and accompanying text.

18. NOEL J. COULSON, *CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE* 3 (1969) (“The comprehensive system of personal and public behavior which constitutes the Islamic religious law is known as the *Shari’a*.”).

19. COULSON, *supra* note 10, at 18; MARK SEDGWICK, *ISLAM & MUSLIMS: A GUIDE TO DIVERSE EXPERIENCE IN A MODERN WORLD* 26, 91–92, 120–22, 125–26 (2006); SMOCK, *supra*

divine origin of *Shari'a* effectively negates the authority of any human legislature to enact any law contradicting *Shari'a*.<sup>20</sup> In short, “[l]aw . . . does not grow out of, and is not moulded by, society as is the case with Western systems . . . . In the Islamic concept, law precedes and moulds society; to its eternally valid dictates the structure of State and society must, ideally, conform.”<sup>21</sup>

As a divine system of laws, *Shari'a* is “a rigid and immutable system, embodying norms of an absolute and eternal validity, which are not susceptible to modification by any legislative authority.”<sup>22</sup> Additionally, *Shari'a* represents a “standard of uniformity” which protects against the inconsistent and contradictory systems that would inevitably result if people were left to legislate according to their local circumstances.<sup>23</sup> Although there is some disagreement among scholars as to which parts of *Shari'a* are legal (and thus must be enforced by the state) and which parts are moral (and thus fall into the realm of voluntary compliance),<sup>24</sup> to the devout Muslim the distinction is largely irrelevant.<sup>25</sup>

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note 8, at 2.

20. See COULSON, *supra* note 10, at 5.

21. *Id.* at 85.

22. *Id.* at 5.

23. *Id.*

24. SMOCK, *supra* note 8, at 4.

25. SEDGWICK, *supra* note 19, at 28 (“For observant Muslims, what the Sharia says on a particular issue matters more than what national law says.”); Majid Khadduri, *Nature and Sources of Islamic Law*, 22 GEO. WASH. L. REV. 3, 7 (1953) (stating that under the Muslim legal theory, the believer remains obligated to observe the divine law, even if the State fails to enforce it); see also U.S. INST. OF PEACE, *IJIHAD: REINTERPRETING ISLAMIC PRINCIPLES FOR THE TWENTY-FIRST CENTURY* 3 (2004), available at <http://www.usip.org/pubs/specialreports/sr125.pdf> (“Muslims are obliged to abide by the rules of Allah in every aspect of their lives, always and wherever they live.”). Following *Shari'a* is not only a religious obligation for Muslims. For many, it is a choice and preference. Even in localities where Muslims have legal rights that go beyond what *Shari'a* would allow, many Muslims seek out alternative dispute resolution avenues that will strictly follow *Shari'a* law. See Emily L. Thompson & F. Soniya Yunus, *Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts*, 25 WIS. INT'L L.J. 361, 369 (2007) (noting that some Muslims in the United States attempt to assert their Islamic legal rights in secular courts because they are unwilling to give up that part of their identity); Ayesha Khan, *Comment & Debate: Sharia Sensibilities: Protecting the Rights of Women Who Need Help Must Include Respect for Their Religious Practices*, THE GUARDIAN (London), Feb. 11, 2008, at 30 (noting that many Muslim women in the United Kingdom are committed to *Shari'a*-based arbitration, even though they enjoy fewer rights under *Shari'a* than they would under the British legal system). An illustration of one Muslim's loyalty to religious law is found in the case *Freeman v. Department of Highway Safety & Motor Vehicles*, wherein a Muslim woman unsuccessfully sued for the right to have her face veiled in her driver's license photo. 924 So. 2d 48 (Fla. Dist. Ct. App. 2006).

Governments in Islamic countries have codified *Shari'a* law to differing degrees.<sup>26</sup> Regardless, Muslims are bound by faith to adhere to all *Shari'a* laws. For example, although commentators have noted a slow trend in some Islamic countries toward recognizing the right of a woman to choose her marital partner regardless of his faith,<sup>27</sup> such decisions affect national laws only. They have no effect on religious tenets, and cultural acceptance follows slowly, if ever.<sup>28</sup> For this reason, this Note examines the capacity for reform within Islam itself, rather than the mechanisms for reforming secular government laws.

Despite perceptions that *Shari'a* encompasses the complete Islamic legal code, it is not a written legal code as Westerners might imagine one. Rather, *Shari'a* is a system of law—a compilation of (or system of compiling) the word of Allah gathered from Islam's recognized sources of law: the Qur'an, the *Sunnah*, *ijma*, and *qiyas* and *ijtihad*.<sup>29</sup> Each source fits within a set hierarchy and plays a specific role in arriving at

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26. Turkey, for example has a constitution and laws that are largely secular. See Elizabeth Stewart, *Q&A: Sharia Law*, THE GUARDIAN (London), Feb. 7, 2008, <http://www.guardian.co.uk/uk/2008/feb/07/religion.world1>. Saudi Arabia and Iran have codified *Shari'a* to a great degree. *Id.* Indonesia, Nigeria, and Malaysia are among a group of nations that have a dual court system that allows Muslims to bring civil actions in a *Shari'a* court, and non-Muslims to use a secular court system. *Id.*; see also *Apex Court Rules on Jurisdiction in Civil Divorce Involving Muslim Convert*, BERNAMA NAT'L NEWS AGENCY (Malaysia), Dec. 27, 2007 (describing Malaysia's dual court system, where *Shari'a* courts and civil courts have equal standing under the Malaysian Constitution).

Recently, the topic of *Shari'a* courts has been at issue in the United Kingdom. In Britain, many Muslims choose to have family law matters arbitrated privately according to *Shari'a* law. This has led some of Britain's Islamic scholars, and recently the Church of England's Archbishop of Canterbury, to suggest that it might be appropriate for Britain to adopt a dual court system. See Jimmy Burns, *Shari'a Law in UK 'Unavoidable'*, FIN. TIMES (London), Feb. 8, 2008, at 7. A dual court system in the United Kingdom inched a step closer to reality recently when a system of *Shari'a* courts began operating in five British cities. Taking advantage of a provision of the United Kingdom's Arbitration Act of 1996, rulings of the *Shari'a* courts may now be enforced by the full power of the British judicial system. Abul Taher, *Revealed: UK's First Official Sharia Courts*, TIMES (London), Sept. 14, 2008. The British government has quietly sanctioned the use of *Shari'a* courts for matters ranging from divorce and financial disputes to domestic violence. In fact, the *Shari'a* courts have worked in tandem with police investigators in settling at least six cases of domestic violence between married couples. *Id.*

27. See generally Courtney P. Erwin, *Reconciling Conflicting Identities: How National and Religious Identities Influence the Decision to Marry in Egypt*, 3 SEATTLE J. SOC. JUST. 675, 676 (2005) ("The once incontestable social condemnation against interfaith relationships is slowly beginning to suffer small cracks in its construction."); Wassila Ltaief, *International Law, Mixed Marriage, and the Law of Succession in North Africa: ". . . But Some Are More Equal than Others"*, 57 INT'L SOC. SCI. J., 331, 334–35 (2005).

28. Erwin, *supra* note 27, at 676 ("Any substantive change in the area of marriage in Egypt must occur through a process of religious introspection . . . [T]he Egyptian government and the national legal system cannot create this change alone."). Erwin argues that national laws can encourage religious reform, but provide little basis for reform itself, suggesting that religious practice must change first. See *id.* at 695–96.

29. See RODOLPHE J. A. DE SEIFE, THE SHARIA: AN INTRODUCTION TO THE LAW OF ISLAM 25 (1994).

the concept of *Shari'a*. The Qur'an and *Sunnah* are generally recognized as irrefutable, occupying a superior position to *ijma*, *qiyas*, and *ijtihad*,<sup>30</sup> whose primary role is to speak and expound where the Qur'an and *Sunnah* are ambiguous or silent.<sup>31</sup>

*A. The Qur'an—The Word of God Himself*

The Holy Qur'an is the principal and highest source of law in Islam. Muslims believe the Qur'an to be revelation from God, received directly by the Prophet Mohammed over a period of twenty-three years.<sup>32</sup> Unlike the Bible, which purports to contain the divine will of God as written and taught by his prophets and apostles, Muslims regard the Qur'an as the direct utterance of God himself.<sup>33</sup> To Muslims, the Qur'an is timeless and comprehensive, containing "the foundation of an entire system of life, covering a whole spectrum of issues."<sup>34</sup>

Given the complete and all-encompassing nature of the Qur'an, the absence of detailed rules and regulations in its text may come as a surprise. Describing *Shari'a* as the "law of the Qur'an" would be like describing the United States Code as the law of the U.S. Constitution. That is, while the Constitution certainly serves as the foundation of the U.S. Code, one would be hard pressed to find many of the detailed rules and regulations of the Code within the words of the Constitution.<sup>35</sup>

Muhammad Farooq-i-Azam Malik, introducing his English translation of the Qur'an, explained that for a reader to get the most out of his study of the Qur'an, the reader must understand the nature in which the Qur'an was given to humankind.<sup>36</sup> Not only did Allah send the book, but he also appointed his Prophet to demonstrate its teachings and put them into practice. Thus, both studying the contents of the Qur'an and following the example and teachings of the Prophet will provide an understanding of Allah's will.<sup>37</sup>

30. A.D. AJJOLA, INTRODUCTION TO ISLAMIC LAW 51–52 (1981).

31. *See id.* at 73, 78. The various schools of Islamic jurisprudence also recognize several minor sources of law and understanding, and differ from one another as to details of how these minor sources and the latter principal sources are to be used. Nevertheless, it is virtually universal that the Qur'an and *Sunnah* are the ultimate, superior sources, and deference is to be given them.

32. ESPOSITO, *supra* note 9, at 3.

33. *See* DE SEIFE, *supra* note 29, at 26 (stating that each and every word of the Qur'an is from Allah); AHMAD BIN MOHAMED IBRAHIM, SOURCES AND DEVELOPMENT OF MUSLIM LAW 10 (1965).

34. MUHAMMAD FAROOQ-I-AZAM MALIK, ENGLISH TRANSLATION OF THE MEANING OF AL-QUR'AN 105 (2006).

35. This analogy was drawn from a similar comparison made by J.N.D. Anderson: [T]here are comparatively few verses in the Koran that are of any strictly legal significance. To describe the Shari'a as the "law of the Koran," therefore, is somewhat analogous to describing Roman law as the "law of the Twelve Tables," except that it is certainly true that some of the rules of Islamic law can be traced straight back to this fundamental source.

ANDERSON, *supra* note 14, at 11.

36. MALIK, *supra* note 34, at 103.

37. *Id.*

Malik's direction helps clarify the role of the Qur'an and the other sources of law in Islam. Although the Qur'an is thought to be complete and immutable, it does not claim to provide express, detailed solutions to all the legal problems of society. N.J. Coulson observes that by the Qur'an, "[t]he principle that God was the only lawgiver and that his command was to have supreme control over all aspects of life was clearly established. But that command was not expressed in the form of a complete or comprehensive charter for the Muslim community."<sup>38</sup> Rather, the greater portion of the Qur'an is a "code of Divine exhortation and moral principles."<sup>39</sup>

The Qur'an, however, does contain some specific directives. For example, the Qur'an directly prohibits consuming alcohol and gambling.<sup>40</sup> Ahmad bin Mohamed Ibrahim, like many Muslim scholars, suggests that the specific legal rules that do appear in the Qur'an were revealed as needed to deal with problems facing the Muslim community and often in response to questions from the believers.<sup>41</sup> Because of the practical nature of these revelations, there are even instances where a later verse abrogates an earlier directive.<sup>42</sup>

The notion that the Qur'an provides edicts intended to address specific circumstances is significant because it opens a door through which reformists argue for new interpretations of Qur'anic principles.<sup>43</sup> Since the specific rules in the Qur'an deal with particular circumstances, some reformists argue that as circumstances change, so should the rules.<sup>44</sup> So long as new interpretations are in harmony with the Qur'an's greater principles, they should be allowed.<sup>45</sup>

#### *B. The Sunnah—The Divinely Inspired Conduct and Teachings of Mohammad*

The second source of law in Islam is the *Sunnah*—essentially a record of the divinely inspired life of the Prophet Mohammed. As Coulson points out, "[f]or those who pledged to conduct their lives in accordance with the will of God, the Qur'an itself did not provide a simple and straightforward code of law."<sup>46</sup> Mohammed, on the other hand, served as a "concrete implementation of the Divine guidance"<sup>47</sup> through his own living example.

38. COULSON, *supra* note 10, at 20.

39. IBRAHIM, *supra* note 33, at 11.

40. *Id.* at 9.

41. *Id.* at 9–10; see AJIJOLA, *supra* note 30, at 58; THE QUR'AN 2:219 (M.H. Shakir trans., 9th ed. 2004) [hereinafter QUR'AN] ("They ask you about intoxicants and games of chance. Say: In both of them there is a great sin . . ."). My research has shown no substantial difference between the various English translations of the Qur'an as to the verses quoted in this Note. For consistency, each quotation is taken from Shakir's 2004 translation.

42. See IBRAHIM, *supra* note 33, at 9–10.

43. See *infra* Part III.A.

44. See, e.g., *infra* text accompanying notes 124–29 (arguing that interfaith marriages may be allowed where the reasons for their historical prohibition are no longer present).

45. See IBRAHIM, *supra* note 33, at 9–10 (suggesting that if a mixed-faith couple agrees to raise the children in Islam, their marriage is permitted).

46. COULSON, *supra* note 10, at 17.

47. IBRAHIM, *supra* note 33, at 12.

The *Sunnah* has three components: the sayings of the Prophet, the doings of the Prophet, and the doings of others in the presence of the Prophet without his objection.<sup>48</sup> When the Qur'an is silent or inelaborate on a matter, Muslims look next to the *Sunnah* where the Prophet supplies the details by his example or explanations.<sup>49</sup> For example, while the Qur'an directs the faithful to pray, it does not specifically explain the form or number of prayers to be offered. Mohammed demonstrated the complete manner of prayer, and faithful Muslims have observed his example since that time.<sup>50</sup>

While there is some authorization for the *Sunnah* found in the Qur'an,<sup>51</sup> Mohammed never directed others to record his life for future reference. In fact, for fear of confusing his words with the ultimate authority of the Qur'an, Mohammed is said to have specifically not encouraged his followers to record his actions and sayings.<sup>52</sup> The authenticity of the records that make up the *Sunnah* is typically established by tracing their transmission through history, usually to an actual companion of the Prophet and first-hand observer of the event recorded.<sup>53</sup> A few modern scholars claim that much of the *Sunnah* is actually apocryphal fiction based on customary practice that has been attributed to the Prophet to make it more authoritative.<sup>54</sup> Nevertheless, the vast majority of Muslims look to the *Sunnah* as an authoritative example for living in perfect harmony with Allah's will.

In sum, the *Sunnah* primarily functions to help Muslims understand and apply the meaning of the Qur'an, and to lay down rules for some matters not addressed within the Qur'an.<sup>55</sup> Recognition of the *Sunnah* as a source of law is important because it indicates an acceptance within Islam that the Qur'an requires supplementation and interpretation. This is so even though the Qur'an is said to reveal the complete and immutable word of God.<sup>56</sup> The compilation of the *Sunnah* shows that even at the time of Mohammad, Muslims recognized a gap between the Qur'an and day-to-day life. Accordingly, early Muslims immediately felt the need to bridge that gap by following

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48. AJJOLA, *supra* note 30, at 63.

49. *Id.* at 62.

50. *Id.* at 61. Although the Qur'an frequently directs the faithful to pray to Allah, it never specifies how to do so. Mohammed demonstrated precisely when, how, and how often to pray, and this tradition has been carried to the present day in the *Sunnah*. ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD 667 (Richard C. Martin ed., 2004). Prayer, or *salat*, is performed at five specific times each day, and consists of distinct movements and words acted out in a specified manner. *See id.* at 330.

51. *See* QUR'AN, *supra* note 41, at 4:80 ("Whoever obeys the Apostle, he indeed obeys Allah . . ."); *Id.* at 33:21 ("Certainly you have in the Apostle of Allah an excellent exemplar for him who hopes in Allah and the latter day and remembers Allah much.").

52. IBRAHIM, *supra* note 33, at 12, 13. Although Mohammed did not encourage his followers to record his words and actions, he appears to have at least tolerated the practice. *Id.*

53. ENCYCLOPEDIA OF ISLAM AND THE MODERN WORLD, *supra* note 50, at 285. The actual narrative or writing communicated through history is called a *hadith*.

54. *See* ESPOSITO, *supra* note 9, at 138.

55. IBRAHIM, *supra* note 33, at 19.

56. How could the Qur'an be complete, but still require supplementation? Malik reminds readers that the Qur'an and Prophet were sent together, with the Qur'an supplying general principles and essential instructions, and the Prophet filling in the details. MALIK, *supra* note 34, at 105. Although the Qur'an contains a complete "code of life," humankind cannot understand its contents without the example of the Prophet. *See id.* at 105–06.

the example of someone they believed had a more perfect understanding of Allah's will.

### C. Ijma—Consensus of the Muslim Community

Muslims believe that Mohammed was the last prophet appointed by God.<sup>57</sup> Thus, when Mohammed died, Islam was left with no authoritative source for interpretation of the Qur'an. Justified by a statement attributed to Mohammed that "my people shall never be unanimous in error," and by a rather vague verse of the Qur'an which suggests that the "believers" will all follow a similar path,<sup>58</sup> *ijma*—the consensus of the Muslim community—became recognized as a source of law supplementing the Qur'an and *Sunnah*. In effect, the Muslim community ratifies new laws and interpretations, and agrees that such laws are in harmony with the Qur'an and *Sunnah*.

The concept of *ijma* is rooted in the exercise of judgment and reason, a practice endorsed by the Qur'an.<sup>59</sup> In classical Islamic theory, "[i]jma . . . is the agreement of the qualified legal scholars in a given generation and such consensus of opinion is deemed infallible."<sup>60</sup> One seeking to understand divine law should "first seek the solution of legal problems in the specific terms of the Qur'an and the *sunna* . . . ."<sup>61</sup> Where a question remains, *ijma* is the next most authoritative source.<sup>62</sup>

Ironically, "[t]he very validity of *ijma*[]" is not a matter of consensus among Muslims.<sup>63</sup> The various schools<sup>64</sup> of Islamic jurisprudence recognize the authority of *ijma* to different degrees and have diverse opinions as to who constitutes the community that must agree.<sup>65</sup> For example, all schools hold that there must be "uniformity of opinion among all the jurists of the age" for an *ijma* to come into being.<sup>66</sup> However, some allow a small number of dissenters to be overridden by the

57. ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 50, at 554.

58. Khadduri, *supra* note 25, at 14 (referring, in part, to QUR'AN, *supra* note 41, at 4:115). Notably, recognition of *ijma* makes Islamic law compatible with the concept of democratic government. Tassaduq Hussain Jilani, *Democracy and Islam: An Odyssey in Braving the Twenty-First Century*, 2006 BYU L. REV. 727, 738 (2006).

59. Azim Nanji, *Islamic Ethics*, in A COMPANION TO ETHICS 106, 107 (Peter Singer ed., 1993).

60. COULSON, *supra* note 10, at 77. Some scholars define *ijma* as a consensus of the whole community of Muslims. See AJIJOLA, *supra* note 30, at 75. Generally, however, *ijma* is recognized as a consensus of those who are "learned doctors of theology." *Id.* at 73.

61. COULSON, *supra* note 10, at 76.

62. See IBRAHIM, *supra* note 33, at 20.

63. *Id.* (quoting SAID RAMADAN, ISLAMIC LAW 85 (1961)).

64. Following the death of Mohammed, "schools" of jurisprudence emerged to take on the role of interpreting and expounding on the Qur'an and *Sunnah* in an effort to help Muslims conform their lives to the dictates of *Shari'a*. DE SEIFE, *supra* note 29, at 35. The four main schools of Sunni Islamic jurisprudence, Hanafi, Maliki, Shafi'i, and Hanbali, each developed a systematic approach for dealing with areas of law not explicitly covered by the Qur'an and *Sunnah*. *Id.* at 36. While each school emphasizes the sources of Islamic law differently, they tend to agree on most fundamental principles. *Id.* at 36–37.

65. See IBRAHIM, *supra* note 33, at 20–22.

66. See *id.* at 21.

majority,<sup>67</sup> and others refuse to recognize an *ijma* unless the entire Muslim community agrees, “lawyers and lay members alike.”<sup>68</sup>

*Ijma* also suffers from procedural defects. Whether *ijma* is defined as a consensus of the Muslim community at large or only an agreement among certain recognized scholars, Dr. Majid Khadduri notes that no adequate scheme exists for the community to arrive at a consensus.<sup>69</sup> Further, no means exist for verifying that a consensus has been reached.<sup>70</sup> To remedy this, some jurists argue that if a few scholars reach an agreement and no one objects, or if a majority reaches agreement over objection, then *ijma* has occurred and the consensus should become law.<sup>71</sup> Others suggest that the Muslim community at large should reach consensus on fundamental principles, leaving scholars to agree on the details.<sup>72</sup>

Despite its imperfections, *ijma* is recognized in some form by each school of Islam.<sup>73</sup> And despite its technically subordinate role to the Qur’an and *Sunnah*, in practice *ijma* has largely become “the ultimate mainstay of legal theory and of positive law” in Islam.<sup>74</sup> *Ijma* gains further traction when coupled with the concept of *taqlid*, or deference by faithful Muslims to the authority of Islamic scholars.<sup>75</sup> According to Coulson, when the duty of *taqlid* was formally recognized sometime after the tenth century, it bound each jurist thereafter to recognize and follow the doctrine established by his predecessors.<sup>76</sup> Because *taqlid* required later scholars to follow the established path, a consensus of earlier scholars—even an initially tenuous one—gained real and lasting authority.

For modern reformists, *ijma* is a regular target of criticism. The most common attack on any unpopular doctrine rooted in *ijma* involves simply denying that any true

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67. *Id.*

68. COULSON, *supra* note 10, at 59. Additionally, the schools differ in their opinions of when or whether a person disputing the authority of an *ijma* would be considered an apostate. *Id.* at 22. Lastly, the Hanafi and Hanbali schools recognize *ijma* when one scholar pronounces an opinion and no one else disagrees. MAWIL IZZI DIEN, ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE 48 (2004). The Shafi’i and Maliki schools reject this concept of tacit *ijma*, arguing that a silent person cannot be considered to have consented. *Id.*

69. Khadduri, *supra* note 25, at 16.

70. *Id.*

71. *Id.*

72. *Id.* at 15.

73. See *supra* notes 66–68 and accompanying text.

74. IBRAHIM, *supra* note 33, at 23. Coulson suggests that, in fact, *ijma* is the source that guaranteed the authority of the Qur’an and *Sunnah*. COULSON, *supra* note 18, at 23 (“The whole process of Muslim jurisprudence, from the definition of the sources of law to the derivation of substantive rules therefrom, was a speculative effort of the human intellect. And it was the *ijma*, and the *ijma* alone, which gave the necessary authority to this process. . . . [I]t was the *ijma* which guaranteed the authenticity of the Qur’an and the *sunna* as the material of divine revelation . . .”).

75. COULSON, *supra* note 10, at 80–81. *Taqlid*, or “imitation,” requires jurists to follow the established interpretations of their predecessors rather than seek their own interpretations through the exercise of *ijtihad*. *Id.*

76. *Id.*

*ijma* ever existed.<sup>77</sup> With no real system for verifying consensus, such claims are at least plausible. Others argue that an *ijma* only binds the generation in which it is reached,<sup>78</sup> enabling a reformist to show by his own dissent that no similar *ijma* exists today.

#### D. *Ijtihad and Qiyas—Personal Interpretation and Reasoning by Analogy*

Perhaps the most controversial source of Islamic law is that of *ijtihad*—the exercise of one’s own judgment and opinion in arriving at a personal interpretation of *Shari’a*. *Ijtihad* appears in Islamic jurisprudence in many forms. By definition, *ijtihad* means “‘effort’ or ‘exercise’ of one’s own judgement [sic] . . . .”<sup>79</sup> The act of *ijma* involves the exercise of *ijtihad* by the individual scholars in arriving at their initial conclusions.<sup>80</sup> Ibrahim even suggests that Mohammad exercised his own individual opinion as he applied the Qur’an to daily life, putting *ijtihad* at the heart of the *Sunnah*.<sup>81</sup> Lastly, it is well established that the practice of *ijtihad* was central to the founding of each of the major schools of Islamic jurisprudence.<sup>82</sup>

The exercise of personal opinion is traditionally thought to have been formally endorsed by the Prophet himself, based on the story of Mu’adh bin Jabal.<sup>83</sup> Mohammed appointed Mu’adh to be a judge in Yemen. As tradition holds, their conversation follows:

[T]he Prophet asked him “According to what will you judge?”. He replied: “According to the book of God”. “And if you find nought therein?”. “According to the *Sunnah* of the Prophet of God.” “And if you find nought therein?”. “Then I will exert myself to form my own judgment”. And thereupon the Prophet said: “Praise be to God who has guided the Messenger of His Prophet to that which pleases His prophet”.<sup>84</sup>

Accepting this tale as true, Mohammad clearly endorsed the concept of exercising one’s personal opinion in interpreting the law.<sup>85</sup> Disagreement arises in determining to what extent Muslims today may practice *ijtihad* on their own, as classical scholars assert that the “door of *ijtihad*” was closed sometime after the tenth century.<sup>86</sup>

*Qiyas* is a restricted form of *ijtihad*, and limits personal interpretation to reasoning by analogy.<sup>87</sup> The distinction between *ijtihad* and *qiyas* is that *qiyas* only allows a

77. AJJOLA, *supra* note 30, at 76.

78. See ABDULLAH SAEED, *ISLAMIC BANKING AND INTEREST: A STUDY OF THE PROHIBITION OF RIBA AND ITS CONTEMPORARY INTERPRETATION* 138 (1996).

79. COULSON, *supra* note 10, at 59–60.

80. AJJOLA, *supra* note 30, at 73–75 (stating that *ijma* is an “exercise of judgment and reason” and an exercise of *ijtihad*).

81. IBRAHIM, *supra* note 33, at 26 (“The concept of individual opinion was recognized and applied by the Prophet with reference to himself.”).

82. See ESPOSITO, *supra* note 9, at 128.

83. IBRAHIM, *supra* note 33, at 25.

84. *Id.* (punctuation errors in original).

85. See AJJOLA, *supra* note 30, at 91; DIEN, *supra* note 68, at 4.

86. COULSON, *supra* note 10, at 81.

87. ESPOSITO, *supra* note 9, at 6.

believer to apply established interpretations of *Shari'a* to new circumstances, whereas *ijtihad* allows the believer to conceive his or her own individual interpretations altogether.<sup>88</sup> “*Qiyas* . . . is a particular form of *ijtihad*, the method by which the principles established by the Qur’an, *sunna*, and consensus are to be extended and applied to the solution of problems not expressly regulated therein.”<sup>89</sup> Such analogical deduction must have its starting point in a principle of the Qur’an, *Sunnah*, or *ijma* and “cannot be used to achieve a result which contradicts a rule established by any of these three primary material sources.”<sup>90</sup> The majority view in Islam allows for the restricted exercise of *qiyas*,<sup>91</sup> but not unrestrained *ijtihad*, arguing that the “door of *ijtihad*” has been closed.<sup>92</sup> Conversely, many modern reformists call for the exercise of new *ijtihad* as the primary method of reforming established Islamic law.<sup>93</sup>

## II. INTERFAITH MARRIAGE

Marriage (*nikah*) in Islam is a sacred covenant, essential to realizing the “essence of Islam.”<sup>94</sup> In form, however, Islamic marriage is a basic civil contract involving an offer of the woman by herself or her guardian and acceptance by the man who pays a dower as consideration.<sup>95</sup> Though *Shari'a* contains certain default rules concerning maintenance, inheritance, and divorce, the contracting parties are free to specifically negotiate the terms of their union.<sup>96</sup> While some scholars have begun to argue for new

88. Compare IBRAHIM, *supra* note 33, at 23 (stating that *qiyas* is “merely an application or extension of the law established by a binding authority to a particular case and not a new rule of law”), with Rachel Anne Codd, *A Critical Analysis of the Role of Ijtihad in Legal Reforms in the Muslim World*, 14 ARAB L.Q. 112, 113 (1999) (describing *ijtihad* as “[i]nterpretation of the Quran and the Sunna of the Prophet to extract a necessary rule or principle”). Often, however, the distinction between *ijtihad* and *qiyas* is not so clear. IBRAHIM, *supra* note 33, at 23–24 (answering that the difference between *qiyas* and *ijtihad* is that “[t]hey are two expressions of one meaning”). Some scholars group them together as a single source. See Ulil Abshar-Abdalla, *Avoiding Bibliolatry: The Importance of Revitalizing the Understanding of Islam*, JARINGAM ISLAM LIBERAL, Aug. 2, 2003, <http://islamlib.com/en/article/avoiding-bibliolatry> (“In the classic hierarchy regarding the sources of law in Islam, there are four sources: Qur’an, Sunnah, Ijma’, Qiyas/Ijtihad.”).

89. COULSON, *supra* note 10, at 60.

90. *Id.* Consistent with this view, Dr. Dien suggests that *qiyas* is not really a source of law at all. Rather, it is a tool of logic, employed to discover a “relevant injunction” in the Qur’an and *Sunnah* and to apply to the individual’s circumstance. DIEN, *supra* note 68, at 53.

91. See DE SEIFE, *supra* note 29, at 33–34, 39–40.

92. COULSON, *supra* note 10, at 202.

93. See, e.g., *id.* (noting the opinion of one jurist who believes that *ijtihad* is necessary to adapt Islam to the modern world); ESPOSITO, *supra* note 9, at 128–30. The reformist argument is addressed in detail *infra* Part III.B.2.

94. ESPOSITO, *supra* note 9, at 15; SEDGWICK, *supra* note 19, at 101 (“Marriage, it is often said, is ‘half of religion’—by which it meant that it is a very important part of religion.”).

95. See ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 50, at 431; SEDGWICK, *supra* note 19, at 98–99.

96. See ESPOSITO, *supra* note 9, at 21–23 (stating that clauses of the marriage contract may be “drawn up at the time of the marriage or afterward, and are valid and enforceable” so long as “they are not contrary to the object of marriage”).

interpretations of interfaith marriage rules, the principal schools of Islamic jurisprudence all share the same basic conception of the marital relationship.<sup>97</sup> This conception adheres to classical *Shari'a* regulations: a Muslim man may marry a Christian or Jewish woman but no other unbeliever; a Muslim woman may not marry a non-Muslim under any circumstances.<sup>98</sup>

Traditional Muslim scholars and clerics contend that the Qur'an both directly and inferentially restricts marriage outside the faith.<sup>99</sup> However, even a casual reading of the Qur'an reveals that its passages leave room for interpretation. The following discussion explores the traditional view of interfaith marriage in Islam in greater detail.

#### *A. A Muslim Man and a Non-Muslim Woman*

Three passages in the Qur'an are often cited as regulating interfaith marriage for Muslim men:

And do not marry the idolatresses until they believe, and certainly a believing maid is better than an idolatress woman, even though she should please you . . . .<sup>100</sup>

This day the good things are allowed to you . . . ; and the chaste from among the believing women and the chaste from among those who have been given the Book before you (are lawful for you); when you have given them their dowries, taking (them) in marriage, not fornicating nor taking them for paramours in secret . . . .<sup>101</sup>

O you who believe! . . . ; and hold not to the ties of marriage of unbelieving women, and ask for what you have spent, and let them ask for what they have spent. That is Allah's judgment; He judges between you, and Allah is Knowing, Wise.<sup>102</sup>

In general, then, a Muslim man may not marry a non-Muslim woman. However, the Qur'an does allow a Muslim man to marry a woman from among the "People of the Book" (Christians and Jews),<sup>103</sup> provided she is chaste.

Islam recognizes two classes of "unbelievers."<sup>104</sup> People of the Book are not followers of the true faith of Islam but do follow recognized prophets of Islam: Abraham and Jesus.<sup>105</sup> While Muslims believe that Christians and Jews have "deviated from the pristine teaching of [the] true religion," they nevertheless follow some amount

97. ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 50, at 430–31.

98. Fazlur Rahman, *A Survey of Modernization of Muslim Family Law*, 11 INT'L J. MIDDLE E. STUD. 451, 455 (1980).

99. See AJJOLA, *supra* note 30, at 150; JAMAL J. NASIR, *THE STATUS OF WOMEN UNDER ISLAMIC LAW AND UNDER MODERN ISLAMIC LEGISLATION* 29–30, 44–45 (2d ed. 1994).

100. QUR'AN, *supra* note 41, at 2:221.

101. *Id.* at 5:5.

102. *Id.* at 60:10.

103. People of the Book, *ahl al-kitab*, are generally identified as Christians and Jews. ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 50, at 452. Islam considers the Jewish Torah and the Christian Bible among the holy books revealed by God. *Id.* at 554–55.

104. *See id.* at 452.

105. *See id.* at 554.

of truth.<sup>106</sup> As one modern scholar explains, “their disbelief is less serious than that of others, in general, and . . . they are followers of a previous divine message, even though it has been distorted . . . .”<sup>107</sup>

While Islam takes a tolerant position with People of the Book, it does no such thing with the second class of unbelievers: atheists, idolaters, and polytheists (essentially all others).<sup>108</sup> The Qur’an states that these unbelievers will be the “inmates of the fire.”<sup>109</sup> As a result, “a Muslim man cannot enter into a valid marriage . . . to a non-Muslim woman who is not a Christian or a Jewess . . . .”<sup>110</sup>

Even marriage to a Christian or Jewish woman should proceed with caution. Some Muslim clerics have instructed that the couple must agree ahead of time that they will raise their children as Muslims, and that the wife will face restrictions on the practice of her faith.<sup>111</sup> Others have discouraged interfaith unions altogether, citing differences in cultural values and family background.<sup>112</sup>

### *B. A Muslim Woman and a Non-Muslim Man*

Unlike Muslim men, Muslim women cannot marry outside the faith at all. This prohibition—nearly universally accepted among traditional Islamic scholars<sup>113</sup>—is rooted in the following passages from the Qur’an:

106. Humayun Kabir, *Minorities in a Democracy*, in *LIBERAL ISLAM* 145, 152–53 (Charles Kurzman ed., 1998).

107. Islam-QA.com, A Sikh Girl Wants to Marry a Muslim Man, <http://www.islam-qa.com/index.php?ref=26885&ln=eng>.

108. This second class of unbelievers is frequently referred to by the Arabic word *mushrik*. *ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD*, *supra* note 50, at 452. Marriage to *ahl al-kitab* is expressly permitted for a Muslim man, but neither a man nor a woman can marry *mushrik*. *E.g.*, Shaykh Khaled Abou El Fadl, On Christian Men Marrying Muslim Women, <http://www.scholarofthehouse.com/oninma.html>.

109. QUR’AN, *supra* note 41, at 3:113–16.

They are not all alike; of the followers of the Book there is an upright party; they recite Allah’s communications in the night time and they adore (Him). They believe in Allah and the last day, and they enjoin what is right and forbid the wrong, and they strive with one another in hastening to good deeds, and those are among the good. And whatever good they do, they shall not be denied it, and Allah knows those who guard (against evil). (As for) those who disbelieve, surely neither their wealth nor their children shall avail them in the least against Allah; and these are the inmates of the fire; therein they shall abide.

*Id.*

110. NASIR, *supra* note 99, at 45.

111. *See, e.g.*, S. Abdullah Tariq, *Marriage with Jews and Christians*, *ISLAMIC VOICE*, June 1997, available at <http://islamicvoice.com/june.97/dialogue.htm#CHR> (“A Muslim’s marriage to a Catholic woman is permitted only if she does not practise [sic] idolatry and amends her belief of sonship of the Christ to the Prophethood of Jesus.”); A.S. Khan, *Marriage Between Muslims and Non-Muslims*, <http://www.zawaj.com/articles/between.html> (explaining that if a Muslim man agrees to allow his children to be raised non-Muslim, he is considered “one who has denied Islam”).

112. *Cf.* A.S. Khan, *Issues to Consider in an Inter-Faith Marriage*, <http://www.zawaj.com/articles/interfaith.html>.

113. *See* AJIJOLA, *supra* note 30, at 150; NASIR, *supra* note 99, at 29–30, 44; Abou El Fadl,

[A]nd do not give (believing women) in marriage to idolaters until they believe, and certainly a believing servant is better than an idolater, even though he should please you . . . .<sup>114</sup>

O you who believe! when believing women come to you flying, then examine them; Allah knows best their faith; then if you find them to be believing women, do not send them back to the unbelievers; neither are these (women) lawful for them, nor are those (men) lawful for them . . . .<sup>115</sup>

These passages are traditionally interpreted as a general prohibition on marriage outside Islam for Muslim women.<sup>116</sup> Similar passages<sup>117</sup> forbid Muslim men from marrying non-Muslim women. However, another verse specifically authorizes Muslim men to marry women from the People of the Book.<sup>118</sup> The Qur'an offers no such express allowance (or prohibition) for Muslim women.<sup>119</sup> Although the Qur'an contains no clear prohibition against marrying People of the Book, traditional scholars have reasoned: "If men needed to be given express permission to marry a [non-Muslim], women needed to be given express permission as well, but since they were not given any such permission then they must be barred from marrying a [non-Muslim]."<sup>120</sup>

Others argue that the prohibition derives from different considerations. "Marriage in Islamic law is based on a strong patriarchal ethos . . . ."<sup>121</sup> Men are widely considered the head of the household, with authority over their wives. Some argue derivatively that Sura 4, Verse 34 of the Qur'an entitles the husband to exercise authority over his wife,<sup>122</sup> and that Sura 4, Verse 141 directs that a non-Muslim may never exercise authority over a Muslim.<sup>123</sup> Thus, "it follows that a man from the People of the Book, such as a Christian or Jew, may never marry a Muslim woman."<sup>124</sup> Mashood Baderin, a professor of law at the University of London, explained:

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*supra* note 108.

114. QUR'AN, *supra* note 42, at 2:221.

115. *Id.* at 60:10.

116. AJJOLA, *supra* note 30, at 150; NASIR, *supra* note 99, at 29–30, 44.

117. *See supra* notes 100–02.

118. *See supra* text accompanying note 103.

119. It should be noted that both of the passages cited for Muslim women prohibit marriage to *mushrik*, not *ahl al-kitab*. Therefore, while the Qur'an does not expressly allow Muslim women to marry People of the Book, it does not expressly prohibit it either. *See* Abou El Fadl, *supra* note 108.

120. *Id.*; *see, e.g.*, Khan, *supra* note 111 ("There are NO conditions mentioned under which a Muslim woman IS allowed to get married or remain married to a non-Muslim husband after she has accepted Islam. Therefore, even if she has freedom to practise [sic] Islam after marriage, she is NOT allowed to enter into an inter-faith marriage." (emphasis in original)).

121. ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 50, at 430.

122. *See* QUR'AN, *supra* note 41, at 4:34 ("Men are the maintainers of women because Allah has made some of them to excel others and because they spend out of their property; the good women are therefore obedient, guarding the unseen as Allah has guarded . . . .").

123. *Cf. Id.* at 4:141 ("[A]nd Allah will by no means give the unbelievers a way against the believers.").

124. Abdullahi Ahmen An-Na'im, *Shari'a and Basic Human Rights Concerns*, in LIBERAL ISLAM, *supra* note 106, at 222, 231 n.45; *see also* About.com: Islam, Interfaith Marriage in Islam, <http://islam.about.com/blinterfaith.htm> ("As head of the household, the husband provides leadership for the family. A Muslim woman does not follow the leadership of someone who is

[U]nder Islamic law a Muslim man who marries a Christian or Jewish woman has a religious obligation to honour and respect both Christianity and Judaism. Thus the woman's religious beliefs and rights are not in jeopardy through the marriage, because she would be free to maintain and practice her religion as a Christian or Jew. Conversely, a Christian or Jewish man who marries a Muslim woman is not under such an obligation within his own faith, so allowing a Muslim woman to marry a Christian or Jewish man may expose her religious beliefs and rights to jeopardy.<sup>125</sup>

Regardless of the reasoning for the prohibition, Dr. Abou El Fadl, a professor of law at the University of California, Los Angeles, notes, "I am not aware of a single dissenting opinion on this, which is rather unusual for Islamic jurisprudence because Muslim jurists often disagreed on many issues, but this is not one of them."<sup>126</sup>

Abou El Fadl's observation is significant because the Qur'an is not unambiguously clear on this issue. Therefore, construing Islamic law to prohibit interfaith marriage for Muslim women requires an appeal to some extra-Qur'anic source to supplement Qur'anic verse. Each verse that prohibits interfaith marriage specifically refers to *mushrik*, the class of unbelievers that includes polytheists, idolaters, and atheists.<sup>127</sup> These verses do not prohibit marriage to People of the Book.<sup>128</sup> The *ijma* of the scholars has interpreted the lack of a specific authorization for marriages to People of the Book as disapproval of marriage outside the faith.<sup>129</sup> If indeed a valid consensus on this issue exists, then that consensus would effectively settle the debate.<sup>130</sup>

### C. What if Religion Changes After Marriage?

Interfaith marriages for Muslim women are wholly unrecognized under Islamic law and considered void *ab initio*. "The marriage of a Muslim woman to a non-Muslim man shall be void unconditionally, regardless of being consummated or not."<sup>131</sup> Moreover, traditional scholars interpret the rules governing interfaith marriage to

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not a Muslim."). Though frequently cited as justification for the interfaith marriage prohibition, these verses provide only weak support for the position. Following the same interpretation, verse 4:141 would seem to prohibit a Muslim from working for a non-Muslim supervisor, serving in the military under a non-Muslim commander, or perhaps even living in a country with a non-Muslim president. Alternatively, a plain reading of verse 4:141 reveals that the statement refers to the "day of resurrection," indicating that Allah will not give unbelievers any advantage over believers at that time. See QUR'AN, *supra* note 41, at 4:141.

125. MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 144 (2003).

126. Abou El Fadl, *supra* note 108.

127. See *supra* notes 114–15, 119.

128. See *supra* note 119.

129. Understanding-Islam.com, Muslim Woman Marrying a Non-Muslim Man, <http://www.understanding-islam.com/related/text.aspx?type=question&qid=605> ("This silence of the Qur'an regarding marriage between a Muslim woman and a Christian/Jewish man, has generally been construed as a disapproval of the Qur'an regarding the particular issue.")

130. In reality, several scholars disagree with the prevailing interpretation asserted by Abou El Fadl, as this Note discusses. See *infra* Part III.

131. NASIR, *supra* note 99, at 30; see also AHARON LAYISH, WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE 172 (1975) ("Such a marriage is illicit, and if the spouses do not themselves effect a separation, the court will do so.")

regulate the marital relationship throughout its duration.<sup>132</sup> Thus, a change in one partner's religious status may effect a change in their marital status.

As explained by the Jamiatul Ulama (Council of Muslim Theologians in South Africa), if both spouses were non-Muslims and both simultaneously accept Islam, or if both spouses simultaneously leave Islam, their marriage remains intact.<sup>133</sup> However, this is not the case in other scenarios. For example, if both spouses are married as non-Muslims, but one later converts to Islam, the conversion may threaten the marriage. If the husband accepts Islam but the wife remains a non-Muslim, the marriage remains intact so long as she is a Christian or Jew.<sup>134</sup> If the wife is not a Christian or Jew, she will be invited to join Islam. If she refuses, the marriage will be annulled.<sup>135</sup> If the wife accepts Islam and the husband remains a non-Muslim, he will also be invited to convert. If he refuses, the marriage will be annulled.<sup>136</sup>

Another scenario arises when a couple marries as Muslims, but one later leaves the faith. Under the classical Islamic doctrine, the marriage contract is immediately void if either spouse leaves Islam.<sup>137</sup> If only the wife turns from Islam, certain traditions alternatively hold that the marriage is unaffected, or that upon apostasy the woman becomes a slave.<sup>138</sup> It should also be noted regarding a Muslim leaving the faith that *Shari'a* law and even the state laws of some Islamic countries reserve severe punishment for apostasy, up to and including the death penalty.<sup>139</sup> While this sentence is imposed very rarely, a person converting from Islam is likely to at least be rejected by his or her family and community.<sup>140</sup>

#### *D. The Consequences of Breaking from Tradition*

In the modern world, the pluralistic nature of society makes interfaith marriage issues increasingly common and complicated. Overall, Muslim communities in the West are likely more accepting of interfaith marriages than communities in predominantly Muslim countries.<sup>141</sup> Nevertheless, Muslim women who find themselves

132. See NASIR, *supra* note 99, at 103–04; Jamiatul Ulama (Kwazulu-Natal), Marriage Outside Islam, <http://www.zawaj.com/articles/outside.html>.

133. Jamiatul Ulama, *supra* note 132. Jamiatul Ulama (Kwazulu-Natal) is the Council of Muslim Theologians of the Kwazulu-Natal province of South Africa. See Jamiatul Ulama Kwazulu Natal, <http://www.jamiat.org.za/>; see also NASIR, *supra* note 99, at 103–04 (explaining how Kuwaiti law handles changes in religion after marriage).

134. Jamiatul Ulama, *supra* note 132.

135. *Id.*

136. *Id.*

137. See Rudolph Peters & Gert J. J. De Vries, *Apostasy in Islam*, 17 DIE WELT DES ISLAM 1, 8 (1977).

138. See *id.* at 9. Peters and De Vries note that in several Muslim countries laws have been enacted to modify the classical effect of apostasy, although not always in an apostatizing wife's favor. For example, to prevent "fraudulent apostasy on the part of the wife with the sole aim of obtaining a divorce," apostasy of a wife is sometimes held not to dissolve a marriage. *Id.* at 18 n.54, 19–20; see also NASIR, *supra* note 99, at 103–04.

139. SEDGWICK, *supra* note 19, at 45–46, 97–98.

140. *Id.*

141. At the very least, Muslims in the West appear to be more curious about the idea of interfaith marriage. Mohamed Magid, imam of one of Washington, D.C.'s largest mosques,

in love with non-Muslim men face difficult decisions. Aside from the obviously distressing prospect of defying a tenet of one's faith, women who marry non-Muslims may face being disowned by their families and ostracized by the community.<sup>142</sup>

This situation is particularly problematic for Muslim women living in the West. Marriage is considered a religious duty of Muslims.<sup>143</sup> For Muslim women living in predominantly non-Muslim communities, the pool of prospective husbands is small. Unfortunately, as authors Yvonne Haddad, Jane Smith, and Kathleen Moore have noted, different marriage rules for men and women amplify this problem.<sup>144</sup> Muslim men may marry outside the faith, leaving even fewer potential spouses for the remaining Muslim women.<sup>145</sup>

In predominantly Islamic countries, women are less likely to face the problem of being unable to find a Muslim suitor. However, women who choose to pursue relationships outside the faith potentially face grave consequences. Fear from persecution due to an interfaith marriage is a common reason listed on asylum applications to the United States from many Islamic countries.<sup>146</sup> Hostility from the traditional Islamic community has led to minority-view scholars being branded apostates,<sup>147</sup> and even, in rare cases, to so-called "honor killings" of youth who disregard the interfaith relationship regulations.<sup>148</sup> This hostility has led even pro-

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recently observed that whenever he holds a program at the mosque on interfaith marriage, "it's completely packed." Michelle Boorstein, *Muslims Try to Balance Traditions, U.S. Culture on Path to Marriage*, WASH. POST, May 27, 2008, at B05. In addition, a 2007 Pew Research Center poll of Muslims in America revealed that fifty-four percent of women and seventy percent of men say interfaith marriage is acceptable. *Id.*

142. See, e.g., Heather Al-Yousuf, *Negotiating Faith and Identity in Muslim-Christian Marriages in Britain*, 17 ISLAM & CHRISTIAN-MUSLIM RELATIONS 317, 322 (2006) (describing the experience of a British Muslim woman who married a Christian man, and consequently faced "isolation from her family" and separation from her community). Alternatively, the husband may convert to Islam. See Dickey & Ramirez, *supra* note 1, at 33 (telling the story of a few American service members who have married Iraqi women); SEDGWICK, *supra* note 19, at 97-98. Even "nominal" conversions are typically acceptable, *id.* at 97, and the sincerity and motive of conversions will generally not be investigated or evaluated. See NASIR, *supra* note 99, at 104.

143. See *supra* text accompanying note 94.

144. See YVONNE YAZBECK HADDAD, JANE I. SMITH & KATHLEEN M. MOORE, *MUSLIM WOMEN IN AMERICA: THE CHALLENGE OF ISLAMIC IDENTITY TODAY* 85 (2006).

145. *Id.*; SEDGWICK, *supra* note 19, at 98.

146. Mohamed Mattar, Adjunct Professor of Law and Executive Dir. of the Prot. Project at the Johns Hopkins School of Advanced Int'l Studies, *Islamic Law in U.S. Courts*, Address at Islamic Law Forum (Oct. 3, 2005) (transcript on file with the Indiana Law Journal); see also Dickey & Ramirez, *supra* note 1, at 34 (noting that although Iraqis who associate with Americans already face danger, those who marry Americans often have to leave Iraq altogether).

147. See Imam Mohammed Imam, *Asharq Al-Awsat Interviews Sudanese Islamist leader Dr. Hassan Turabi*, ASHARQ AL-AWSAT, Apr. 24, 2006, available at <http://www.aawsat.com/english/news.asp?section=3&id=4678>.

148. See *Father Gets Life for 'Honour' Killing*, DAILY TELEGRAPH (London), Sept. 29, 2003 (describing how a sixteen-year-old Iraqi girl in the United Kingdom, Heshu Yones, was stabbed to death by her father for planning to run away with an eighteen-year-old Lebanese Christian boy). Although increasingly a topic of concern for Western commentators, "honor killings" are more of a cultural phenomenon than a tenet of Islam. See Chris McGreal, *Murder in the Name of Family Honour*, THE GUARDIAN (London), June 23, 2005, available at

reform scholars to suggest that perhaps liberalized interfaith marriage rules should only apply to Muslims living in the West.<sup>149</sup> Even then, such decisions may be difficult for early adopters. So long as entering into an interfaith marriage is thought to be contrary to God's law, women who marry outside Islam risk being branded apostates.<sup>150</sup>

Herein lies the importance of approaching the interfaith marriage question from a doctrinally Islamic point of view. If the recognized sources of Islamic law provide a foundation for reform of the interfaith marriage rules, there is at least a chance that such reforms will have the ability to substantively change the circumstances of Muslim women. If Muslim reformists succeed in showing that the Qur'an allows certain interfaith marriages, the Muslim community's ultimate deference to the Qur'an may lead to acceptance of women who marry outside the faith.

### III. REINTERPRETING ISLAMIC LAW

Despite the seemingly impenetrable dogma concerning interfaith marriage, a growing movement of Islamic scholars is taking a new look at traditional *Shari'a* interpretations.<sup>151</sup> In keeping with the principles of Islamic law, many reformists attempt to use established and approved methodologies of deriving meaning from the sources to arrive at new conclusions. As expected, the orthodox majority frequently greets these efforts with considerable hostility.

Esposito suggests that perhaps a Qur'anic prescription should be understood on two levels: first, "the specific injunction or command, the details of which may be relative to its space and time context," and second, "the ideal or Qur'anic value, the realization

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<http://www.guardian.co.uk/world/2005/jun/23/israel/print> (reporting on the murder of twenty-three-year-old Faten Habash, a Christian living in Palestine, who was killed by her Christian father for her desire to marry a Muslim man). McGreal noted that father's Catholic priest called him "Christian by faith and Muslim by culture" as if to insinuate that the "honor killing" was based on Islam, as he noted, "in this community it is forbidden for Christians to marry Muslims." The priest probably more accurately also attributed the murder to the community's "tribal mentality." *Id.*

149. See Imam, *supra* note 147. Reinterpretation of the interfaith marriage rules will be discussed in more detail *infra* Part III.A.

150. It should be noted that restrictions on marrying outside the faith are by no means unique to Islam. Indeed, for various doctrinal and cultural reasons, many faiths at least discourage interfaith marriage. See, e.g., Alan Feuer, *Vatican Frowns on Muslim Inter-marriage*, DESERET NEWS (Utah), May 15, 2004, at A4 (reporting on the Vatican's reaffirmation of its position that Catholics should marry within the faith); Symposium, *Symposium on Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud*, 16 LOY. L.A. INT'L & COMP. L. REV. 9, 72 (1993) [hereinafter *Symposium on Religious Law*] (response of Michael J. Broyde) (stating that interfaith marriages are forbidden under the Jewish tradition).

151. Christopher Dickey & Owen Matthews, *The New Face of Islam*, NEWSWEEK, June 8, 2008, at 30, 31 ("Momentum is building within the Muslim world to re-examine what had seemed immutable tenets of the faith, to challenge what had been taken as literal truths and to open wide the doors of interpretation (*ijtihad*) that some schools of Islam tried to close centuries ago."). Dickey and Matthews made this observation while chronicling the work of Turkish scholars who are in the process of publishing new editions of *hadith* in an attempt to provide many of the stories of Mohammed with a cultural and historical context. *Id.*

of which the specific regulation intends to fulfill.”<sup>152</sup> This suggestion allows for flexibility in interpreting the Qur’an’s passages today.

*A. Modern Interpretations of the Marriage Rules*

As discussed in Part II of this Note, most traditional Islamic scholars reason that interfaith marriage for Muslim women is prohibited on two grounds: (1) no specific authorization is given to women to marry People of the Book and other passages clearly frown on women marrying outside the faith<sup>153</sup> and (2) the male is the head of the household and a Muslim woman married to a non-Muslim would face oppression in the practice of her religion.<sup>154</sup> This reasoning raises some interesting questions in the modern world. What if the woman is considered equal in her particular household? What if her husband agrees (even by Islamic marriage contract) not to impose his religion upon her or restrict her religious practice? Additionally, is the absence of an affirmative condition allowing a Muslim woman to marry a non-Muslim properly interpreted as a complete prohibition?

Some modern scholars advocate a new interpretation of the interfaith marriage rules, based on the argument that some Qur’anic rules address the specific situation into which they were revealed.<sup>155</sup> One such scholar, Dr. Khaleel Mohammed, claims that the traditional interpretation of the Qur’an banning interfaith marriage for women is based on the historical assumption that a woman must accept the religion of her husband.<sup>156</sup> Dr. Mohammed asserts that Muslim women today live in “a different time and a different place.”<sup>157</sup> Acknowledging “that women are equals of men, that women have legal rights, and that those rights include placing conditions on the marriage,” he argues that “an inter-faith marriage can take place on condition that neither spouse will be forcibly converted to the other’s religion.”<sup>158</sup>

Dr. Mohammed’s reinterpretation is based in large part on changes in the social conditions of women today. He also notes that in the classical period during which the

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152. ESPOSITO, *supra* note 9, at 132.

153. *See supra* notes 113–19.

154. *See supra* notes 121–25.

155. There are indications that some Qur’anic passages were addressed to specific circumstances. This point is central to many reformists’ arguments. If it is conceded that the particular Qur’anic rule prohibiting interfaith marriage was intended to address a specific situation, then a change in circumstances today may justify a change in the rules. *See supra* text accompanying notes 43–45.

156. Khaleel Mohammed, Imam Khaleel Mohammed’s Defense of Inter-Faith Marriage, <http://www.muslim-refusenik.com/news/interfaith-marriage.html>. Dr. Mohammed is an assistant professor of religion at the Center for Islamic and Arabic Studies and the MS Homeland Security Program at San Diego State University. San Diego State University Religious Studies Department, Khaleel Mohammed, [http://www-rohan.sdsu.edu/~khaleel/biography\\_khaleel\\_mohammed.htm](http://www-rohan.sdsu.edu/~khaleel/biography_khaleel_mohammed.htm).

157. *Id.*

158. *Id.* It is important to point out that even in the classical model, a couple could place conditions upon the marriage contract. *See* ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 50, at 431; NASIR, *supra* note 99, at 45; *see also supra* note 96. Perhaps Dr. Mohammed believes that a woman living at the time of the Qur’an’s revelation would have been culturally unable to assert this particular condition, but today she would be.

consensus formed its prohibition on interfaith marriage for women, no laws existed to protect women's rights.<sup>159</sup> He opines that if a couple contracts that the wife "will in no way be forced to accept a religion other than Islam, that the children will be brought up according to her [Islamic] beliefs, and that no negative image of Islam will be presented to her . . ." then such a marriage contract is allowable.<sup>160</sup> Similarly, Abdullahi Ahmed An-Na'im, an Islamic family law expert at Emory University, recently noted the effect of modern gender dynamics and argued that "[i]n social reality today, men are not dominant in the marriage relationship. The rationale of historic rule is no longer valid."<sup>161</sup>

Sudanese Islamist leader Dr. Hassan al-Turabi also recently issued a fatwa authorizing marriages between Muslim women and Christian and Jewish men.<sup>162</sup> In so doing, Dr. al-Turabi specifically rejected the traditional position that the absence of a specific authorization in the Qur'an makes these marriages illegal. To the contrary, al-Turabi declared that he "could not find a single word that prohibited such marriage in either the Quran or the Sunnah."<sup>163</sup> This is a bold statement, considering the Qur'an's general prohibition of marriages to unbelievers. Al-Turabi argues that marriages between Muslim women and Christian or Jewish men warrant a case-by-case evaluation, and rejects the idea that consensus among Islamic scholars made the interfaith marriage prohibition universally binding. He insists that "marriage between a Muslim woman and a non-Muslim man is valid since nothing in the Quran or Sunnah dictates otherwise."<sup>164</sup>

Al-Turabi's statement is compelling, but one must make an inferential leap before concluding that the Qur'an does not forbid interfaith marriage for Muslim women. Dr. Mohammed notes that the Qur'an is generally sympathetic to the idea of marriage with Christians or Jews, evidenced by explicit permission given to Muslim men to marry

159. Marriage to Non-Muslims, [http://www.forpeoplewhothink.org/Answers/Marriage\\_to\\_non-Muslims.html](http://www.forpeoplewhothink.org/Answers/Marriage_to_non-Muslims.html). Dr. Khaleel Mohammed maintains the Web site at <http://www.forpeoplewhothink.org> under a culturally Arabized version of his name, Abu Yusuf Khaleel Al-Corentini. See Khaleel Mohammed, Resources, [http://www-rohan.sdsu.edu/~khaleel/resources\\_khaleel\\_mohammed.htm](http://www-rohan.sdsu.edu/~khaleel/resources_khaleel_mohammed.htm); Qualifications, <http://www.forpeoplewhothink.org/Misc/Qualifications.html>. In some predominantly Muslim countries, there are still no laws protecting women's rights. However, many Muslims live in nations where such laws have come into being. Considering the importance Dr. Mohammed places on the circumstances into which the Qur'an was revealed, the author questions whether Dr. Mohammed would only repeal the interfaith marriage ban in certain places.

160. Marriage to Non-Muslims, *supra* note 160.

161. Boorstein, *supra* note 141.

162. See Imam, *supra* note 147. This declaration from a leader like al-Turabi shows that reform of interfaith marriage is not merely a phenomenon of fringe liberal reformists. The 9/11 Commission Report called al-Turabi a "longtime hard-line ideological leader." THE 9/11 COMMISSION REPORT app. B at 437 (2004), available at <http://www.gpoaccess.gov/911/index.html>.

163. Imam, *supra* note 147.

164. *Id.* But see *Symposium on Religious Law*, *supra* note 150, at 66–67 (response of Azizah Y. al-Hibri) (responding to a fact pattern presented by the symposium, accepting the extra-Qur'anic origin of a prohibition on non-Muslim husbands, but maintaining the prohibition is part of Muslim law nonetheless).

from these groups.<sup>165</sup> The inference, then, is that the only reason the Qur'an does not contain a similar exception for women is because the cultural circumstances of the day did not allow it. If God had revealed the Qur'an to the present day, the exception allowing marriage between Muslims and People of the Book would have surely applied to both sexes.

Other scholars find intentional ambiguity within the Qur'an's passages. For example, Mahdi Zahraa, a professor in the School of Law and Social Sciences at Glasgow Caledonian University in Scotland, believes that in revealing the Qur'an, Allah "undoubtedly made firm and conclusive" those matters central to Islam, and left other matters ambiguous "so that educated jurors will interpret them flexibly according to the needs of time and space."<sup>166</sup> Following Zahraa's reasoning, the lack of a specific and clear prohibition against Muslim women marrying People of the Book actually speaks strongly in favor of allowing such marriages in certain circumstances.

The idea that *Shari'a* may at least partially be a product of historical context is not unique to the interfaith marriage debate. Currently, a group of Turkish scholars is in the process of compiling roughly 170,000 narrations of the Prophet's words and deeds as part of a plan to publish new editions of *hadith* later this year. Led by Turkey's former minister of state for religious affairs, Mehmet Aydin, the goal of the project is to put many of Mohammed's teachings in their proper historical and cultural context.<sup>167</sup> In the words of Mehmet Gormez, a theology professor at the University of Ankara who is involved with the project, "Every *Hadith* narration has . . . a context. We want to give every narration a home again."<sup>168</sup>

Gormez explained that many of the stories and teachings of Mohammed relied upon by Muslims today may not have been reliably transmitted over time. Sometimes they confuse "universal values of Islam with geographical, cultural and religious values of their time and place."<sup>169</sup> The scholar's project is an attempt to "rethink[]" and "re-understand[]" the sacred texts "according to modern concepts like democracy, human rights, women's rights and universal values."<sup>170</sup>

The ultimate question is whether the prohibition of marriage between a Muslim woman and a non-Muslim man was a universal principle applicable to all times and places, or a localized rule applicable to the circumstances into which it was revealed. Absent a *Sunnah* expounding upon these Qur'anic verses,<sup>171</sup> we are left to the

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165. Mohammed, *supra* note 159. Dr. Mohammed also points out that Christians and Jews are regarded differently from general unbelievers, and even have the ability to enter heaven if they do good deeds. *Id.*

166. See Mahdi Zahraa, *Characteristic Features of Islamic Law: Perceptions and Misconceptions*, 15 ARAB L.Q. 168, 174 (2000).

167. See Dickey & Matthews, *supra* note 151. *Hadith* is the Arabic term for the actual narratives or writings that communicate Mohammed's life and teachings through history. *See id.* at 30.

168. *Id.* at 31 (omission in original).

169. *Id.*

170. *Id.*

171. My individual research, including the study of numerous writings by scholars and commentators on both sides of this issue, did not reveal anything in the *Sunnah* addressing the issue of interfaith marriage.

secondary sources, each rooted to some extent in the exercise of *ijtihad*,<sup>172</sup> to interpret the rule's applicability to modern times.

### B. *Ijma and Ijtihad*

In order for any attempt at reforming *Shari'a* law to be successful, new ideas must derive from sound principles of Islamic jurisprudence in order to “ensure both inner consistency and historical continuity with the Islamic tradition.”<sup>173</sup> Islam already has in place a structural mechanism for “modernizing” Islamic law: *ijtihad*—the process of independent judgment and interpretation. A growing number of Muslim scholars recognize the need to exercise *ijtihad* in applying Qur'anic principles to a modern context, rather than relying on ancient interpretations whose relevance has changed over time.<sup>174</sup>

Given the procedural challenge of arriving at and confirming the existence of an *ijma*, it is difficult to determine exactly what role this source should play in settling the issue of interfaith marriage. Those who subscribe to the prevailing opinion that the Qur'an prohibits interfaith marriages for women tend to hold that there is no dissent on the matter.<sup>175</sup> However, as we have seen in the previous section, this is not an accurate assessment of the opinions of all Muslim scholars today. Since *ijma* in any era is based to some extent upon the exercise of personal opinion by individual scholars, a discussion of reform must begin with a discussion of *ijtihad*.

#### 1. The Origin and Closure of *Ijtihad*

Following the death of the Prophet Mohammad in 632, followers of Islam widely recognized and practiced the principle of *ijtihad*.<sup>176</sup> Doing so helped integrate new peoples and cultures into the quickly growing realm of Islam by allowing for individual interpretation of Islamic law to new circumstances.<sup>177</sup> To many early jurists, *ijtihad* was essentially the process of exercising their personal opinion of what the law ought to be based on the guidance of the Qur'an and the example of the Prophet.<sup>178</sup>

The problem with a similar appeal to *ijtihad* today is that traditional Islamic scholars claim that the “door of *ijtihad*” was closed in approximately the tenth century.<sup>179</sup> The jurists and scholars of the time believed “the work of interpretation and

172. See AJJOLA, *supra* note 30, at 73–75, 77 (stating that *ijma* is based on the exercise of judgment and reason through *ijtihad*); ESPOSITO, *supra* note 9, at 6 (stating that *qiyas* is a restricted form of *ijtihad*).

173. ESPOSITO, *supra* note 9, at 127; see also COULSON, *supra* note 10, at 6–7 (“If the law is to retain its form as the expression of the divine command, if indeed it is to remain Islamic law, reforms cannot be justified on the ground of social necessity *per se*; they must find their juristic basis and support in principles which are Islamic in the sense that they are endorsed, expressly or impliedly, by the divine will.”).

174. ESPOSITO, *supra* note 9, at 130.

175. See *supra* text accompanying note 126.

176. AJJOLA, *supra* note 30, at 89.

177. See *id.*

178. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 69 (1982).

179. COULSON, *supra* note 10, at 80.

expansion had been exhaustively accomplished,” and *Shari’a* had effectively been fashioned “into its final and perfect form.”<sup>180</sup> In a kind of circular reasoning, once a consensus of the scholars was reached that *ijtihad* was closed, the consensus effectively made it so.<sup>181</sup>

Although some schools of Islam have continued to reserve a role for *ijtihad*, it is most often in the restricted form of *qiyas*, and is relegated to a place inferior to that of *ijma*.<sup>182</sup> Only when there is “neither written law, nor concurrence of opinions,” is an individual allowed to exercise his or her own private judgment.<sup>183</sup> Indeed, some consider it apostasy to practice *ijtihad* in place of following established *Shari’a*.<sup>184</sup>

## 2. An Argument for *Ijtihad* Today

S.M. Zafar, the current executive director of the Human Rights Society of Pakistan and a former justice on the Supreme Court of Pakistan, wrote, “If the purpose of *ijtihad* is the application of wisdom and learning, then to say the *ijtihad* is no more, is a negation of Islam.”<sup>185</sup> One need not look far to find a host of Islamic scholars and commentators arguing for modern *ijtihad*. In the words of Yousef Al-Qaradawi:

My worst fear for the Islamic Movement is that it opposes the free thinkers among its children and closes the door to renewal and *ijtihad*, confining itself to only one type of thinking that does not accept any other viewpoints. . . . The end result will be for the Movement to lose the creative minds among its ranks and eventually fall prey to stagnation. . . .<sup>186</sup>

180. *Id.* at 81.

181. As discussed in *supra* Part I.C, *ijma*, or consensus, is a recognized source of law in Islam based on Mohammed’s statement that “My community will never agree on an error.” ESPOSITO, *supra* note 9, at 128. In other words, the scholars agreed that *ijtihad* was closed, and because they agreed, it was.

182. ESPOSITO, *supra* note 9, at 157.

183. AJIJOLA, *supra* note 30, at 91.

184. See KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST 176 (1991) (Quoting Mohammad Charfi, formerly the president of the Tunesian Human Rights League and professor emeritus at the University of Tunis, as saying: “[I]f you suggest an *ijtihad* that goes against establishment thinking, and if your right to express and argue for your *ijtihad* isn’t guaranteed, you may be accused of apostasy, of no longer following Islam. . . . [T]hey will say, ‘under the pretext of reflecting on your religion, you have in fact changed your religion, what you’re saying is no longer Islam.’”).

185. S.M. Zafar, *Accountability, Parliament, and Ijtihad*, in LIBERAL ISLAM, *supra* note 106, at 67, 70. Moroccan scholar Sa’id Binsa’id has argued “that a proper understanding of the principles of Islamic jurisprudence enjoins dialogue” and that radicals who “coerce their opponents into silence seek to ‘worship God in ignorance.’” Dale F. Eickelman, *Islamic Liberalism Strikes Back*, 27 MESA BULL. 163, 167 (1993).

186. Charles Kurzman, *Liberal Islam and Its Islamic Context*, in LIBERAL ISLAM, *supra* note 106, at 3, 17 (quoting YOUSEF AL-QARADAWI, PRIORITIES OF THE ISLAMIC MOVEMENT IN THE COMING PHASE 143–44 (1992) (footnote omitted)). Mehmet Gormez, a professor of theology at the University of Ankara, observed that “In its first three centuries Islam was interacting with Greek, Iranian and Indian cultures and at every encounter [scholars] reinterpreted Islam according to new conditions. . . . They were not afraid to rethink Islam then.” Dickey & Matthews, *supra* note 151.

If the door of *ijtihad* was closed by an act of consensus, does the lack of consensus today re-open the door of *ijtihad*? Traditional scholars claim that the only way an *ijma* can be repealed is by another *ijma*.<sup>187</sup> In this way, *ijma* tends to preserve the status quo. On the other hand, the classical definition of *ijma* is that of an “agreement of the jurists of a particular age.”<sup>188</sup> Following this characterization, any *ijma* reached centuries ago may be inapplicable now unless it is still a matter of consensus today.

Reformists frequently argue that the Qur’an and *Sunnah* provide no basis for ending the practice of *ijtihad*. In fact, from the earliest stages of Islam, the principle of *ijtihad* was alive and well.<sup>189</sup> It was only by later consensus of the scholars that the door of *ijtihad* was closed, a consensus that was the result of a belief that the jurists had already fashioned *Shari’a* to answer every question.<sup>190</sup> This justification for ending the practice of *ijtihad* is often criticized. Dr. Rudolphe J.A. de Seife, formerly a professor of law at Northern Illinois University, compared the decision to close the doors of *ijtihad* to the story of the United States Commissioner of Patents, who at the end of the nineteenth century advised the President “that there was no further need for a Patent Office since all conceivable inventions had been made.”<sup>191</sup> While the belief that *Shari’a* addressed all the problems of Islamic society may have been plausible in the tenth century, the ensuing 1000 years have certainly raised questions the scholars of the tenth century could not have imagined.

*Ijtihad* is not a simple no-risk solution to the problem of modernization. One undertaking *ijtihad* with the intent to arrive at a predetermined result could probably find a way to justify almost any position. As the former Indonesian ambassador to Pakistan, Mohammad Rasjidi, has written, “Unchecked, *ijtihad* might even lead to disagreement concerning such basic ideas as right and wrong, good and bad!”<sup>192</sup> It was this very concern that Zafar believes led scholars to close the gates of *ijtihad* centuries ago.<sup>193</sup> Zafar, a proponent of exercising *ijtihad* today, states that to preserve the Muslim community, Islamic theoreticians curtailed even their own exercise of *ijtihad*, concluding that “for the benefit of the community . . . *ijtihad* should be left alone for

187. See, e.g., AJJOLA, *supra* note 30, at 76.

188. ESPOSITO, *supra* note 9, at 7.

189. It is often asserted that Mohammed himself approved of his followers practicing *ijtihad* when the Qur’an and *Sunnah* were silent on a point of doctrine. See AJJOLA, *supra* note 30, at 91; DIEN, *supra* note 68, at 4; IBRAHIM, *supra* note 33, at 26; see also *supra* notes 83–85.

190. See COULSON, *supra* note 10, at 80. It should also be noted that some scholars argue that the door of *ijtihad* was never closed at all, and that the activity of scholars after the supposed closing was “no less creative . . . than that of their predecessors” during the time of *ijtihad*. SCHACHT, *supra* note 178, at 73. C.G. Weeramantry notes that not all scholars agreed with the position of closing the doors of *ijtihad*. C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE 42 (1988). If not all scholars agreed, was the *ijma* that closed the door of *ijtihad* legitimate? Moreover, as Zahraa notes, “a jurist cannot establish a rule or principle without relying on evidence found in or which can be traced back to the primary sources: the Qur’an and *Sunnah*.” Zahraa, *supra* note 166, at 185. Since the Qur’an and *Sunnah* support the practice of *ijtihad*, how could the jurists properly outlaw it?

191. DE SEIFE, *supra* note 29, at 40.

192. Mohammad Rasjidi, *Unity and Diversity in Islam*, in ISLAM THE STRAIGHT PATH 403, 408 (Kenneth W. Morgan ed., 1987) (emphasis added).

193. Zafar, *supra* note 185, at 70.

the time being.”<sup>194</sup> To avoid the slippery slope of unfettered individual interpretation, Zafar notes that scholars have set stringent standards for the practice of *ijtihad*—standards that he believes no one person could meet.<sup>195</sup> Instead, he suggests an assembly of religious scholars and representatives of the public take up the challenge.<sup>196</sup>

Zafar made his proposal in the context of arguing for legal reform in Pakistan.<sup>197</sup> Obviously, applying his suggestion to worldwide Islam would be exponentially more difficult. With no centrally recognized body of scholars or unified cultural background,<sup>198</sup> it would be nearly impossible to institute worldwide reform of *Shari’a* using Zafar’s model. His model might work in local settings where a community could more easily pinpoint recognized scholars and issues, but this could have the unintended consequence of causing Islam to fracture as a religion with Muslims in one locale following different *Shari’a* from Muslims elsewhere. Fragmentation of the greater Muslim community is exactly what Zafar claims led scholars to stop the practice of *ijtihad* 1000 years ago.<sup>199</sup>

Despite its logistical problems, many modern commentators believe that *ijtihad* is exactly what Allah expects believers to do. Muqtedar Khan, the director of Islamic Studies at the University of Delaware, said, “I don’t take other people’s opinions as divine. They are opinions, and reasoning can be faulty. I say, let’s have a debate. I’m not afraid of offending God by using my mind.”<sup>200</sup> Other scholars point directly to the words of the Qur’an to justify the practice of *ijtihad*. For example, Rasjidi wrote that the Qur’an teaches that “those who make use of their brains” find evidence of the existence of God in nature and avoid becoming inhabitants of hell.<sup>201</sup>

### 3. Could Contemporary *Ijtihad* Lead to Interfaith Marriage for Muslim Women?

Coulson states that “*Shari’a* law originated as the implementation of the precepts of divine revelation within the framework of current social conditions.”<sup>202</sup> In order to correctly understand the true prohibitions of *Shari’a*, one must pinpoint the dividing

194. *Id.*

195. *Id.* The standards include a complete memorization of the Qur’an (plus a knowledge of the background and circumstances of the revelation of each verse), a complete mastery of the science of the *hadith*, familiarity with every school of Islamic jurisprudence, devout and pious character, complete mastery of sociology and psychology, and familiarity with the science and issues of the current period ranging from economics to atomic energy. *Id.*

196. *Id.* at 71.

197. *See id.* at 67.

198. *See* Rasjidi, *supra* note 192, at 424 (noting that Islam has “no master organization” requiring religious conformity and, consequently, experiences a certain level of “interplay” with “the various cultures of the world”).

199. Zafar, *supra* note 185, at 70.

200. Gary Soulsman, *Soft Voice, Strong Message*, THE NEWS JOURNAL (Wilmington, Del.), Apr. 2, 2006, at 1G, available at <http://www.ijtihad.org/Soft%20Voice%20Strong%20Message.htm>.

201. *See* Rasjidi, *supra* note 192, at 407; *see also* QUR’AN, *supra* note 41, at 2:164, 67:10.

202. COULSON, *supra* note 10, at 7; *see also* IBRAHIM, *supra* note 33, at 10 (“[T]he legal teachings of the Holy Quran were practical and related to the situation for which it was revealed . . .”).

line between historical context and divine revelation. For example, if the ban on interfaith marriage for women has its roots in the social conditions of Mohammed's time, then in a modern world where societies recognize and respect the rights of women, the need to prohibit interfaith marriage may no longer exist in some places.<sup>203</sup> There is nothing in the Qur'an or *Sunnah* that expressly conflicts with such an interpretation.<sup>204</sup> All that stands in its way is the opinions of traditional Islamic scholars, who assert the authority of a consensus that no longer appears to exist.

Nevertheless, the reformists' logic also argues for a continuation of the interfaith marriage ban in some places. Where women's rights are not protected or where a Muslim woman's ability to practice Islam might be put in jeopardy by marriage outside the faith, no repeal of the interfaith marriage rules could be allowed. The reformists' own cause-and-effect argument provides perfect justification for the traditional rule.

There is a legitimate concern that new *ijtihad* could water down the Islamic faith and destroy the unity among Muslims that is revered in the Qur'an.<sup>205</sup> The reality of such a concern may depend on the source from which Muslims derive their unity. If Islamic unity relies on absolute homogeneity in the practice of Islam, then the unity of Islam has been in peril for centuries. However, if Muslims draw their sense of unity from adherence to similar principles, different interpretations of interfaith marriage rules will do no damage.<sup>206</sup>

In fact, the finest tribute to the principles held dear by early jurists may be to reopen the door of *ijtihad* and support modern scholars in reinterpreting the interfaith marriage prohibition where it is in harmony with Qur'anic principles to do so.<sup>207</sup> As

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203. See Kurzman, *supra* note 186, at 22 for a similar analysis concerning polygamy. Kurzman cited the argument of Isa Wali, who stated that the practice of polygamy was socially necessary to rectify the problem of a surplus of unmarried women due to war, and now that this problem no longer exists, there is no justification for polygamy.

204. See *supra* Part III.A.

205. See QUR'AN, *supra* note 41, at 3:103 ("And hold fast by the covenant of Allah all together and be not disunited, and remember the favor of Allah on you when you were enemies, then He united your hearts so by His favor you became brethren; and you were on the brink of a pit of fire, then He saved you from it; thus does Allah make clear to you His communications that you may follow the right way.")

206. Rasjidi posits that the unity of Islam is shown in more general factors such as "acceptance of the six articles of belief, the fundamentals of Islam—belief in God, Angels, revealed scriptures, prophets, the Day of Judgment, and the destiny of man for good or evil." Rasjidi, *supra* note 192, at 408; see also Jamal Badawi, *The Concept of Unity in Islam and Its Application to Muslim Unity*, in LEADERSHIP & UNITY IN ISLAM 13 (Alpha Mahmoud Bah ed., 2002) ("The concept of unity in Islam is broad. Its foundation is the belief in the unity of God (Allah, in Arabic)."). Badawi also lists belief in the prophets, the Qur'an, the object of the human endeavor on earth, and the recognition of common challenges facing Muslims. *Id.* at 14–15.

207. Islamic scholars have followed this suggestion in at least one recent major decision regarding interfaith marriage. In 1980, the Indonesian Council of *Ulama* (Islamic scholars) issued a *fatwa* in response to growing concern over interfaith marriages leading to the apostasy of Muslims. Acting contrary to clear Qur'anic verses, they forbade both male and female Muslims from marrying non-Muslims. Simon Butt, *Polygamy and Mixed Marriage in Indonesia: The Application of the Marriage Law in the Courts*, in INDONESIA: LAW AND SOCIETY 122, 139 (Timothy Lindsey ed., 1999).

new technological and social conditions have brought forth new issues, the pure Islamic tradition may be best preserved “by taking up again the attitude of the earliest jurists and reviving a corpus whose growth had been artificially arrested and which had lain dormant for a period of ten centuries.”<sup>208</sup> The modernist call for *ijtihad* may actually constitute a call to return to the original traditions of classical Islam.

#### CONCLUSION

There are three fundamental characteristics of Islamic Law agreed upon by nearly all classical Muslim scholars. First, *Shari'a* is universally valid. Thus, “[t]he believers, even if they reside outside the territory of Islam, are bound by the law.”<sup>209</sup> Second, *Shari'a* is given for the benefit of the community as a whole, not the individual believers.<sup>210</sup> The interests of the individual may be sacrificed for the common interests of Islam.<sup>211</sup> Third, “the law must be observed with sincerity and good faith.”<sup>212</sup>

Although the interests of the individual are protected only inasmuch as they conform to *Shari'a*, the “sincerity and good faith” standard allows for the relaxation of certain rules “under exonerating and exceptional circumstances.”<sup>213</sup> For example, although fasting is required for all Muslims during the month of Ramadan, those unable to fast due to health concerns are exempted.<sup>214</sup> *Shari'a* allows for the ability of the individual to follow the law.<sup>215</sup> This feature of *Shari'a* serves as precedent for the idea that Islam allows for the existence of two different yet equally valid and acceptable standards for Muslims living in different circumstances. Along similar lines, Muslims regard all four major schools of jurisprudence “as correct and true,” despite their doctrinal differences.<sup>216</sup> Discussing efforts by the schools to expound on areas where the Qur'an and *Sunnah* are silent, De Seife notes that “[c]omplete unanimity [is] not required . . . for a solution to be accepted as part of Muslim law.”<sup>217</sup>

Coulson also notes that “differences of doctrine” are insignificant compared to the schools’ “essential agreement.”<sup>218</sup> However, he then asserts that the differences between the schools are not as superficial as many think.<sup>219</sup> Noting significant

208. COULSON, *supra* note 10, at 7.

209. Khadduri, *supra* note 25, at 9.

210. *Id.*

211. *Id.*

212. *Id.* at 9–10.

213. *Id.* at 10. Khadduri characterizes circumstances that would allow relaxation of the law as those which would subject a believer to “extreme peril” or the threat of death. Convenience is not a good enough reason. *Id.*

214. *Id.* Ramadan is a holy month marked by fasting during daylight hours. ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD, *supra* note 50, at 331.

215. Khadduri, *supra* note 25, at 10 (“The law takes into account the ability of the person to fulfill the obligation.”); Zahraa, *supra* note 166, at 176 (stating that “the total application of Islamic law is beyond the capability of ordinary people,” and that therefore included in Islamic law is that idea that each Muslim should practice it “in as much as his or her capability makes it possible”).

216. DE SEIFE, *supra* note 29, at 37.

217. *Id.* at 36.

218. COULSON, *supra* note 10, at 96.

219. *See id.* at 97.

divergence between the schools' doctrine and legal process in certain areas, Coulson ultimately cites a classical Islamic source for explanation. According to *Mizān*, an exposition of Islamic law written by Egyptian scholar ash-Sha'rani around the year 1530, differences between the schools are simply the result of legitimate exercise of *ijtihad*.<sup>220</sup> Coulson explains, "God permitted a wide scope in the elaboration and interpretation of his basic precepts . . . ."<sup>221</sup> Thus, ash-Sha'rani "prefers to speak of 'latitude of interpretation'" rather than of disagreement.<sup>222</sup>

The issue of interfaith marriage for Muslim women offers the opportunity to explore the evolution of a tenet of Islamic law from its origins in Qur'anic verse to its ultimate application around the world and across centuries of time. While the traditional interpretation of this rule certainly appears well grounded and doctrinally defensible, so do the views of modernists when considered in the modern Islamic context. Muhammad Shahrour explains:

The ways in which humankind acquires knowledge in the 20th century influence how it reads and understands divine revelation. . . . Recognizing these distinctions gives us new perspectives on jurisprudence, adding to our adjustment of earlier rulings . . . while adhering to the text and essence of the revealed verses. What has happened here is that our understanding of these verses has changed in accordance with changes in our objective knowledge.<sup>223</sup>

It is not unreasonable to conclude that social conditions of the time underlie the Qur'an's interfaith marriage prohibition for Muslim women. Unfortunately, humanity has not yet universally eliminated many of the concerns that existed at the time God revealed the Qur'an. When asked to consider the jurisprudential validity of either the traditional or the reformist interpretation of the interfaith marriage rules, the most accurate conclusion may propose that both are equally valid, and perhaps each is more valid than the other in certain conditions and cultures.

There are circumstances where the reformists' arguments work, where the reasons for forbidding interfaith marriage no longer exist. Yet there are also certainly circumstances where the traditional position is more applicable, even following the reformists' reasoning. The Prophet Mohammed is reported to have said, "Difference of opinion among my people is a sign of the bounty of God."<sup>224</sup> Perhaps this is just the "difference of opinion" he envisioned.

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220. *Id.* at 102.

221. *Id.*

222. *Id.*

223. Muhammad Shahrour, *Islam and the 1995 Beijing World Conference on Women*, in LIBERAL ISLAM, *supra* note 106, at 139, 142.

224. COULSON, *supra* note 10, at 182.

