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Legal Paths to Justice for Female Survivors under Islamic Law: How Hanafi and Maliki Zinā Jurisprudence Fail to Protect Women's Sexual Rights

I. Introduction

Sexual violence against women is a worldwide, cross-cultural phenomenon. According to the United Nations, it is estimated that "35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner at some point in their lives."[1] Moreover, when it comes to human trafficking, "more than four out of every five trafficked women . . . are trafficked for the purpose of sexual exploitation."[2] Also, researchers have found that around "15 million adolescent girls (aged 15 to 19) worldwide have experienced forced sex . . . at some point in their life."[3] These statistics suggest that much of the political rhetoric surrounding the equitable and just treatment of women worldwide is negligently misleading at best and intentionally deceptive at worst.[4] In fact, since power is what underlies perpetrators' motivation to commit sexual assault, sexual violence against women is a clear expression of men's power over women and male dominance in society at large.[5]

Nevertheless, sexual violence against women has raised the consciousness of women globally (as evidenced by recent women's marches in major cities around the world).[6] Consequently, many people have a heightened interest in the sexual rights of women, which includes the promotion of women's

]1 *Facts and Figures: Ending Violence Against Women*, UN WOMEN (Nov. 2019), https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures.
2 *Id.*
3 *Id.*
4 *See Id.*
5 *See* WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 149 (Etienne G. Krug et al. eds., 2002).
6 Susan Chira, *The Women's March Became a Movement. What's Next?* N.Y. TIMES (Jan. 20, 2018), https://www.nytimes.com/2018/01/20/us/womens-march-metoo.html.

sexual safety, health, and pleasure.[7] These rights necessitate that women engage in sexual activity voluntarily and on their own terms.[8]

Some consider the West to have a monopoly on the development of women's rights.[9] Consequently, many political and social commentators frame Islam (which is commonly viewed as an "Eastern" religion) as being in opposition to the advancement of women's rights.[10] Such critics point to cases like Zafran Bibi's criminal case in Pakistan as an example of how Islam oppresses women.[11] In that case, Bibi accused her brother in law, Jamal Khan, of raping her.[12] Instead of Khan being investigated and charged with a crime, Bibi's statements were considered as evidence of adultery against her.[13] After Bibi was convicted, she was sentenced to death by stoning.[14] Her story received international media coverage which elicited broad pushback against the Pakistani government from around the world.[15] Eventually, after experiencing intense international pressure, Pakistan's president, General Pervez Musharraf, addressed the outrage over sexual assault victims facing execution in the following statement: "It has never happened and it will not happen."[16] Soon after those remarks, an appeals court acquired exonerating evidence in Bibi's favor and she was vindicated.[17] Nevertheless, stories like this one have distorted Westerners' perspectives on how Islamic law is equipped to address some of the women's rights issues the world faces.

What happened to Bibi was just a single case in a single legal jurisdiction, and is not necessarily representative of how Islamic law is applied in other jurisdictions; Islamic law can come in many forms

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[7] Jennifer Gaboury, *Sexual Rights as Human Rights: Resituating Feminist Analysis of Sexual Violence in Wartime*, *in* WOMEN & POLITICS AROUND THE WORLD: A COMPARATIVE HISTORY AND SURVEY 101 (Joyce Gelb & Marian L. Palley eds., 2009).
[8] *See Id.*
[9] Donna L. Bowen, *Islamic Law and the Position of Women*, *in* ISLAM AND SOCIAL POLICY 45 (Stephen P. Heyneman ed., 2004).
[10] *Id.*
[11] Seth Mydans, *Sentenced to Death, Rape Victim is Freed by Pakistani Court*, N.Y. TIMES, June 8, 2002, at A4.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*

and differ across factions and schools.[18] Within the Sunni denomination of Islam, the Hanafi school and Maliki school take distinct approaches to the substance, procedure, and rules of evidence for the crime of *zinā* (adultery) and these differences have profound consequences for how rape is punished under those schools of thought.[19]

Under classical Islamic jurisprudence, there is no "true equivalent to our modern concept of 'rape,' which is based on the firm notions of individual autonomy and the inviolability of the (female) body."[20] Nonetheless, scholars can still examine *zinā* jurisprudence under the Hanafi and Maliki schools as potential legal avenues for combating rape and determine how effectively each approach protects women's sexual rights. Since Islamic law provides jurists an array of legal theories, it may be the case that alternative legal approaches may be better suited for litigating sexual assault cases compared to traditional *zinā* jurisprudence. Although modern Islamic countries have secular legal codes to a large extent, classical Islamic law still influences their legal systems, which makes this analysis valuable for rape victims in those jurisdictions.[21]

II. History of Sexual Violation in Pre-Islam Arabia

Prior to the rise of Islam in the Middle East, Arabian men treated female sexuality primarily as a commodity.[22] Under this proprietary system, men acquired ownership over women in primarily two ways.[23] First, men could acquire women in a bargained for exchange where monetary payment was exchanged for sexual rights over a woman.[24] This payment could occur between men, where a groom would pay the women's father (referred to as the *mahr* at the time), or between a groom and a bride (referred to as the *ṣadāq*).[25] Bride capture or abduction (*ghasb*) was a second method for attaining

[18] *See* Farooq A. Hassan, *The Sources of Islamic Law*, 76 PROC. OF THE ASIL ANN. MEETING 65 (1984).
[19] HINA AZAM, SEXUAL VIOLATION IN ISLAMIC LAW: SUBSTANCE, EVIDENCE, AND PROCEDURE 113 (2015).
[20] *Id.* at 16.
[21] *Id.* at 6.
[22] *Id.* at 53.
[23] *Id.*
[24] *Id.*
[25] *Id.*

ownership over a woman's sexuality.[26] Often men from one tribe would take women from another tribe to demonstrate their power and superiority.[27] Hence, although these two methods are distinguishable, under both methods, men controlled women's sexuality, treated it as economic resource, and a symbol of social status.

III. Moralization of Sexuality in Islam

Islam fundamentally altered the sexual landscape in Arabia: "Muhammad and the message he conveyed in the Qu'ran inaugurated a radical shift in Arabian religion in the direction of ethical monotheism and sought to recast sexual matters in theocentric terms."[28] The Holy Qu'ran is explicit: "And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way."[29] Ultimately, Muhammed's message moralized sexuality.[30] Now, men could no longer treat sexual activity with women as solely a property transaction and a symbol of status, but as an activity which has moral implications and consequences.[31]

Specifically, the Holy Qu'ran stipulated that men who engage in sexual activity have moral obligations to Allah that they must adhere to, which is described in the following excerpt: "And they who guard their private parts, [e]xcept from their wives or those their right hands possess, for indeed, they will not be blamed–-[b]ut whoever seeks beyond that, then those are the transgressors."[32] In this passage, the term "transgressors" implies *zinā* violates Allah's boundaries and constructs a duality between virtuous conduct (conduct in accordance with Allah's will), which must be followed, and sinful conduct (conduct against Allah's will), which must be avoided.[33]

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[26] *Id.* at 54.
[27] *Id.*
[28] *Id.* at 61.
[29] Qu'ran 17:32 (Sahih Int'l).
[30] *Id.*
[31] *Id.*
[32] *Id.* at 23:5-7.
[33] AZAM, *supra* note 19, at 70.

IV. The Agency of Women in Islam

Also Islam recognizes the moral agency of every individual human being—including women—because the "individual subject is the unit of God's moral command and judgment."[34] For example, the following Qu'ranic passage extends the benefits of leading a good life to women as well as men: "Whoever does righteousness, whether male or female, while he is a believer - We will surely cause him to live a good life, and We will surely give them their reward [in the Hereafter] according to the best of what they used to do."[35] However, Allah also applies punishment to all human beings based on their own conduct: "Whoever is guided is only guided for [the benefit of] his soul. And whoever errs only errs against it. And no bearer of burdens will bear the burden of another."[36] Despite the theological connotations of these passages, pursuant to *qiyas* (analogical reasoning), they are a relevant analogy for the status of women under Islamic jurisprudence; women are moral agents who can legally benefit from their actions and legally suffer from their actions just as they will face consequences in the afterlife for their actions on earth.[37] Hence, women can be liable for *zinā* and other sexual violations, just as men can be.[38]

On a similar note, women were recognized under Islamic law as independent decisionmakers. Contrary to the practice of forced marriage in pre-Islamic Arabia, all marital arrangements under Islamic law require the consent of the woman. The Qu'ran is unambiguous on this issue: "O you who have believed, it is not lawful for you to inherit women by compulsion."[39] The actions of Muhammed himself verified this legal stance; Muhammad allowed a matron to receive an annulment when her father forced her into marriage.[40] Hence, a women's individual moral value under Islamic law translates into an understanding that "consent and coercion (broadly understood to include force, duress, and invalid

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[34] *Id.* at 62.
[35] Qu'ran 16:97 (Sahih Int'l).
[36] *Id.* at 17:15.
[37] AZAM, *supra* note 19, at 62.
[38] *See Id.*
[39] Qu'ran 4:19 (Sahih Int'l).
[40] Sahih al-Bukhari 7:62:69, https://sunnah.com/bukhari/67.

consent) [are] legally meaningful" and necessitate the prohibition of forced marriage.[41] In short, under Islamic law, free women own their sexuality.[42] For example, take a woman's right to receive the *mahr*. As a result of the tide of Islam across the Middle East, Muslim women are now the sole recipients of the dower (*mahr*), unlike in pre-Islamic Arabia.[43] This new legal regime in marriage was a merger of the theocentric view of self-ownership and the proprietary view of sexuality; it made women the primary decisionmakers and proprietors in matters concerning their sexuality. In short, women's sexuality still had a market value, but now women could choose if they wanted to form a sexual relationship with a man. Overall, men not only had legal obligations to God but also to women. Hence, men's moral obligations to God and to women provide the foundation for the protection of women's sexual rights under Islamic jurisprudence.

V. Zinā Jurisprudence

Even though Islamic law shifted in Islam's formative years, eventually Islamic scholars settled on several aspects of *zinā* jurisprudence which are generally accepted across the Muslim world.[44] First, for most schools of thought, there must be penile penetration of the vagina.[45] Other forms of penetration, such as digital penetration, are generally not considered *zinā*, however, this does not mean such acts cannot constitute a crime given the proper circumstances.[46]

Second, to constitute as *zinā*, an act of genital penetration must happen outside of the permissible sexual relationships set forth in the Qu'ran. The Qu'ran delineates two relationships in which sexuality can occur: one, when there is a marital relationship; two, when there is a slave relationship (also known as

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[41] AZAM, *supra* note 19, at 62.
[42] *Id.* at 85.
[43] Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization Contracts in Context: Identity, Power, and Contractual Justice*, 45 WAKE FOREST L. REV. 579, 580 (2010) (explaining the *mahr* requirement in Islamic Marriage Law).
[44] AZAM, *supra* note 19, at 114.
[45] Hina Azam, *Rape as a Variant of Fornication (Zina) in Islamic Law: An Examination of The Early Legal Reports*, 28 J.L. & RELIG. 441, 459 (2013).
[46] *Id.* at 459- 460.

a concubine or a "right hand" in the Qu'ran).[47] In both cases, the relationships are legitimized by a bargained for exchange where money is exchanged for sexual rights.[48] These contracts are a remnant of the proprietary regime in Arabia prior to the rise of Islam. Although, Islam departed from prior traditions in the Middle East, Islam also incorporated some of the customs from the local preexisting legal structures; one of the which is the practice of payment for sexual rights and the extension of property rights into the sexual realm.

Third, *zinā* is a *hadd* crime (known in the plural form as a "*hudud*" crimes), meaning, a violation of Divine Law; the commission of these crimes, in particular, "endanger[s] [the] higher values" set forth in the Qu'ran.[49] *Hudud* crimes include, "apostacy; the drinking of wine; adultery; false accusation of fornication or slander against women; minor theft; major theft (plundering and highway robbery); and insurrection against a lawful Muslim authority."[50] Due to the severity of these crimes in the eyes of Allah and their detriment to the Muslim community, punishments for hudud crimes are fixed; when someone is convicted of a hudud crime, there is no judicial discretion in sentencing.[51] The punishment for *zinā* can vary based on two dimensions: one, whether a person is married or not; two, if the person is a slave or not. If a free married person commits *zinā*, then they must be stoned to death.[52] If a free unmarried person commits *zinā*, then they must flogged (receiving exactly one hundred lashes).[53] However, if the guilty party is a slave, then they also must be flogged (but should only receive fifty lashes for their first two or three *zinā* convictions, but on third or fourth conviction the slave must be sold).[54]

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[47] Qu'ran 23:5-7 (Sahih Int'l).
[48] AZAM, *supra* note 19, at 85.
[49] Saeed Hasan Ibrahim & Nasir bin Ibrahim Mehemeed, *Basic Principles of Criminal Procedure under Islamic Shari'a*, *in* CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHARI'A 18-19 (Muhammed Abdel Haleem, et al. eds., 2003).
[50] *Id.* at 19.
[51] *Id.*
[52] Sunan Abi Dawud 39:4425 (explaining why Ma'iz bin Malik, a man convicted of *zinā*, was at first flogged because the authorities thought he was unmarried, but when he was discovered to be married, he was subsequently stoned), https://sunnah.com/abudawud/40.
[53] Qu'ran 24:2 (Sahih Int'l) (asserting the punishment of *zinā* for an unmarried person).
[54] Sahih al-Bukhari 8:82:822 (declaring the punishment of *zinā* for an "unmarried slave girl"), https://sunnah.com/bukhari/86.

In the Muslim community, a judge issuing a *hadd* punishment is not desirable, and an act of last resort due to its negative theological connotations. In Islamic criminal law, the presumption of innocence for defendants is central.[55] However, the threshold for finding a person guilty of a *hadd* crime is higher, arguably to the level of "absolute certainty."[56] In addition, due to the serious implications of *zinā* in the Islamic legal system, there is a tendency for courts to construe cases and legal arguments so that a *hadd* punishment can be avoided if possible.[57] This tendency is clearly displayed in the actions of the Prophet himself.[58] When a married man approached the Prophet and confessed that he committed adultery, the prophet turned away from him multiple times as he repeated his confession.[59] After his fourth confession, before stoning him, the Prophet checked to make sure he was not insane.[60] Based on the Prophet's actions we see that in the context of hudud crimes, comes caution; hence, it is common practice that hudud punishments have rigorous evidentiary standards to ensure accuracy. The high threshold for proving the commission of *zinā* is generally satisfied across factions and schools of Islam in the two following ways.

First, four male Muslim witnesses are needed to testify and corroborate the commission of *zinā*.[61] Otherwise, if only some witnesses come forward, then they will be punished pursuant to slander, which is a hudud crime in of itself.[62] Pursuant to the Qu'ran, as slanderers, the witnesses would receive eighty lashes each.[63] Typically, having only two Muslim males is sufficient to establish guilt in Islamic criminal law, but due to the severity of hudud crimes, the stakes are greater so the evidentiary threshold is higher as well.[64] Moreover, witnesses testimony must meet strict requirements to be accepted in an Islamic court.

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[55] Gamil Muhammed Hussein, *Basic Guarantees in the Islamic Criminal Justice System*, *in* CRIMINAL JUSTICE IN ISLAM: JUDICIAL PROCEDURE IN THE SHARI'A 45 (Muhammed Abdel Haleem, et al. eds., 2003).
[56] AZAM, *supra* note 19, at 77.
[57] *Id.*
[58] Jami` at-Tirmidhi 3:15:1429, https://sunnah.com/tirmidhi/17.
[59] *Id.*
[60] *Id.*
[61] Sunan Abi Dawud 39:4437 (providing the evidentiary requirement of four witnesses for a *zinā* conviction via witnesses), https://sunnah.com/abudawud/40/102; Muwatta Malik 36:7 (providing the requirement for *hadd* crimes that only male testimony is permissible), https://sunnah.com/urn/414500.
[62] *Id.*
[63] Qu'ran 24:4 (Sahih Int'l).
[64] Ibrahim & Mehemeed, *supra* note 49, at 22.

Witness testimony must be unambiguous, unanimous, and all the witnesses need to come forward at once.[65] More specifically, the testimony must begin with the following phrase: "'I testify . . .." Other verbal formulations such as "'I know . . .'" or "'I am certain that . . .'" will not be admissible as evidence in court.[66] Nonetheless, it is important to note that women's testimony is completely inadmissible for determining whether a person is guilty of *zinā* or any other *hadd* crime; hence, their voice is absent in this process.[67]

The second method requires that the accused confess four times to the act of *zinā*.[68] The judge will typically resist and question the circumstances of any confession made and actively seek reasons to send a confessor home or convince them to retract their confessions.[69] A confession can be retracted at any time before the execution of a sentence and once a retraction is made, all the confessions will effectively be invalidated.[70] Moreover, the confessions are only admissible under certain circumstances.[71] A confession is only considered reliable if the confessor has four characteristics: one, they must be an adult; two, they must have wisdom; three, they must have intention; and four, they must have authority.[72] Hence, respectively, confessions are not admissible if the person is a minor, insane, under duress or coercion, or needs the assistance of the judge to confess (including, but not limited to, the pronunciation of words or articulation of thoughts).[73] Circumstantial evidence, such as evidence of struggle or penetration, may verify the credibility of testimony, but will not be considered as sufficient for conviction.[74]

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[65] Hajar Azari, *Assessment of Capabilities and Inadequacies of Evidence in Rape under Islamic Law*, 12 US-CHINA L. REV. 244, 253 (2015).
[66] AZAM, *supra* note 19, at 189.
[67] *Id.* at 79.
[68] Sunan Abi Dawud 39:4452 (providing the evidentiary requirement for a *zinā* conviction via confession), https://sunnah.com/abudawud/40.
[69] Azari, *supra* note 65, at 251.
[70] Azari, *supra* note 65, at 251; *See* Muwatta Malik 41:13 (explaining that once a confession of *zinā* is made, if it is retracted at any time before the *hadd* is imposed, the *hadd* punishment will not be administered), https://sunnah.com/malik/41.
[71] Azari, *supra* note 65, at 251.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 253.

Fourth, to be convicted of *zinā*, an act of genital intercourse must occur between a living man and a living woman; hence, genital intercourse with a dead corpse may be sinful, but not a *hadd* crime.[75] Fifth, the man must be engaging in sexual intercourse consensually to constitute *zinā*.[76] Consequently, a man engaging in intercourse under duress or due to coercion will not face the *hadd* punishment.[77] Sixth, the act must happen on "Muslim land."[78] Therefore, someone cannot be held liable for *zinā* based on sexual activity that has occurred outside a country that recognizes Islamic law.[79]

As previously mentioned, an individual's actions can determine their benefit or punishment under Islamic law, nonetheless, people can lose their legal agency which is relevant in deciding whether someone is liable for *zinā*.[80] The Qu'ran stipulates that people who are coerced into sin are absolved of moral liability in the following passage: "Whoever disbelieves in Allah after his belief . . . except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment."[81] Hence, under Islamic law, rape victims should not be held liable for *zinā* because "there is no blame upon you for that in which you have erred but [only for] what your hearts intended."[82] Since Allah is willing to absolve rape victims of moral culpability, it follows that humans are required to absolve them of legal liability as well.[83] In accordance with the provisions of the Qu'ran, when Muhammad was presented with a rape victim who faced punishment for *zinā*, he waived the *hadd* punishment for her.[84] Although there a number of ways a person can lack legal agency, including, but not limited to, being a minor, insane, or unconscious; this paper will primarily target applicable law when a woman is forced to have intercourse

[75] AZAM, *supra* note 19, at 172.
[76] *Id.*
[77] *See Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 80.
[81] Qu'ran 16:106 (Sahih Int'l).
[82] *Id.* at 33:5.
[83] AZAM, *supra* note 19, at 101.
[84] Sunan Ibn Majah 3:20:2598, https://sunnah.com/ibnmajah/20.

against her will.[85] Although there is some uniformity in how Islamic law is applied in Muslim-majority countries around the world, the doctrinal split among the Hanafi school and the Maliki school on a number of legally relevant matters—but first and foremost, on whether rape should be treated as merely a hadud crime or as a property crime in addition to hadud crime—is relevant.[86] From this ideological division follows different punishments for a convicted rapist in each school.

VI. Hanafi School Variation

Although both schools share concerns about sexuality both as a spiritual matter and a property matter, the Hanafi school approaches *zinā* from a primarily theocentric perspective.[87] Hence, Hanafi jurists primarily referred to the rape of free women as "coercive fornication" (*al-istikrāh 'alā al-zinā*) as opposed to using terms with property connotations—like *ghasb* (an abduction of property) or *ightisāb* (the sexual misappropriation of slave women)—that were typically applied only to slave women.[88] Therefore, when a rape occurs, under Hanafi jurisprudence, no monetary compensation is given to the victim; the ethical concerns implicated by illegal sexual activity are paramount.[89] As Muhammad al-Shaybānī put it: "[I]f the *hadd* is imposed on him, the *ṣadāq* is void."[90] The Hanafis provide several justifications for their position.

First, the Hanafis argue that it would be incoherent for an act of sexual intercourse to be both legal and illegal.[91] Since *zinā* is a *hadd* crime, it is illegal by definition; while monetary compensation (like the *mahr*) is a representation of a legitimate sexual transaction, not just an exchange of property.[92] Hence, Hanafi jurists assert requiring a rapist to pay a victim is contradictory.[93] In the Hanafi view, if a fornicator pays a woman this legal distinction breaks down and effectively represents an attempt to

[85] AZAM, *supra* note 19, at 82.
[86] *Id.* at 113.
[87] *Id.* at 153.
[88] *Id.* at 128, 153.
[89] *Id.* at 154.
[90] *Id.* at 155.
[91] *Id.* at 157.
[92] *Id.* at 157, 159.
[93] *Id.* at 157

legitimize illegal sexual activity after the fact, which is unacceptable to them.[94] As a result, some Hanafi scholars compare monetary exchange corresponding to an act of a *zinā* as analogous to the payment of a prostitute.[95] Since Muhammad referred to prostitution (which is prohibited) as "purchase *zinā*," any monetary payment in the context of *zinā* is inappropriate and illegal for Hanafi jurists.[96]

However, if sexual activity occurred but there is doubt (*shubha*) concerning the capacity of a participant or the legality of the act, then the act should be placed into an "intermediate category," where the man must pay the woman an "equitable dower value."[97] Hence, Hanafis do not dichotomize sexual activity, but provide a gray-area so that a *hadd* punishment can be avoided if any uncertainty exists.[98]

Second, the Hanafis argued that divine rights (which are signified by the *hadd* crimes) should trump interpersonal rights.[99] Consequently, when there is an act that invokes both the divine rights of Allah and personal rights, the *hadd* punishment should be carried out and the other punishment should be set aside.[100] Hanafi scholars may also take this approach to avoid double punishment for a single act of cohabitation.[101] In conclusion, since Allah's rights are supreme, they should be enforced, even at the expense of a woman's right to be compensated.

Third and finally, Hanafi jurists put forth concerns about the expansion of *ijtihad* (legal reasoning) in this area of jurisprudence.[102] Put simply, Hanafi scholars found a lack of precedent in the Qu'ran and Sunnah for compensating rape victims.[103] Consequently, many Hanafis considered a monetary punishment to be outside the boundaries of the clear meaning (*zāhir*) of their religious texts, and

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[94] *Id.*
[95] *Id.* at 160.
[96] Sunan an-Nasa'i 3:23:2524, https://sunnah.com/nasai/23.
[97] AZAM, *supra* note 19, at 157.
[98] *Id.*
[99] *Id.* at 163.
[100] *Id.*
[101] *Id.* at 157.
[102] *Id.* at 164.
[103] *Id.*

therefore, not a compelling basis for law.[104] In conclusion, for the aforementioned reasons, the Hanafis take a *hadd*-only stance on the punishment for *zinā*.

VII. Maliki School Variation

On the other hand, the Maliki school took a dual approach to punishing rape; coercive adultery not only constituted an offense against Allah, but also, a "property usurpation."[105] Unlike Hanafi jurists, Maliki jurists often referred to *zinā* with property-related terms, such as *ghasb* (which refers to an abduction of living property, whether human or animal) or *ightisāb* (which refers the "sexual misappropriation of slave women, specifically").[106]

The Maliki's property outlook on human sexuality can be explained most effectively by looking at how marriage is conducted among Malikis. For Maliki jurists, the property-aspect of a marriage contract—which represents a transfer of sexual rights—is essential and cannot be circumvented (even with the consent of the bride).[107] In contrast to followers of the Hanafi school, followers of the Maliki school do not divide their marriage and the *mahr* payment into two separate contracts, but prefer to have them interwoven into the same contract.[108] On the other hand, the Hanafis treat marriage and *mahr* agreements as two separate contracts that correspond with one another, but do not necessarily rely on one another.[109] Consequently, the Hanafis are more accommodating if a bride chooses to forgo her right to a *mahr*; while the Malikis will nullify a marriage if the *mahr* is not received and restrict freedom of contract accordingly.[110] Overall, the Maliki attitude is that monetary payment must coincide with sexual intercourse, hence, for men who have sex but do not pay the woman upfront, they must be forced to pay retroactively.

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[104] *Id.*
[105] *Id.*
[106] *Id.* at 128.
[107] *Id.* at 122-23.
[108] *Id.* at 122.
[109] *Id.*
[110] *See Id.* at 123

The Maliki perspective on monetary compensation for free women versus slave women who were victims of coercive *zinā* is summarized as follows: "Both were commodities, both could be usurped, and the usurpation of both constituted a loss of real wealth."[111] Therefore, for Malikis, dual punishment is required because a fornicator (or rapist) has violated two separate obligations: an ethical obligation to God, which results in a *hadd* punishment within the context of criminal law; and an interpersonal obligation to the rape victim, who was torted (and effectively, has a lower sexual market value).[112] Hence, from the Maliki perspective there is no hierarchy requiring that Allah's claim preempts the woman's claim because both claims are independent of one another since they address two separate obligations that were violated in the same action.[113] Similarly, since one punishment is for a tort and the other punishment is a crime, there is no concern about double punishment for the same crime in the Maliki School.[114]

However, in the tort context, the level of compensation differed for free women and slave women; respectively, free women received a bride price (what they would have received had the rapist purchased her sexual rights lawfully) while slave women received merely a depreciation amount (the difference between their sexual value before and after the assault).[115] Since this legal rule is codified in the Sunnah, Maliki scholars do not consider this rule an example of judicial activism and an extension of *ijtihad* beyond its appropriate limits.[116] In addition, unlike the Hanafis, the Malikis distinguish prostitution payments from equitable dowry in a rape trial since the Sunnah, in regard to prostitution, does not reference rape victims.[117] Moreover, the Malikis mention that when a woman engages in prostitution she is willingly diminishing her sexual market value, while during rape, a woman's sexual market value is being reduced against her will, which raises legal concerns because a fundamental principle in the

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[111] *Id.* at 130.
[112] *Id.* at 130-131.
[113] *See Id.* at 163.
[114] *See Id.*
[115] Muwatta Malik 36:14 (describing the legal rule for compensating free rape victims versus slave rape victims), https://sunnah.com/malik/36.
[116] *See Id.*
[117] AZAM, *supra* note 19, at 145-46.

marketplace is that property is traded and rented voluntarily; only coercive acts should be legally punishable.[118]

An equitable dower (or bride price) is computed by the several following factors: beauty, intelligence, wealth, virginity, and refinement.[119] Nevertheless, there is evidence that a bride's health may also be considered.[120] For example, if a bride's guardian misleads or withholds information about a bride's health conditions, such as insanity or leprosy, then the guardian is liable to the husband for the difference between the amount paid for the bride and her actual worth in light of the ailments discovered after marriage.[121] Hence, we should expect a woman's health to be considered in a payment for *mahr* or an equitable dowry in a legal proceeding in addition to the aforementioned variables.[122] In short, Maliki jurisprudence extends the concept of women's sexuality as a commodity and free women as the proprietors of their sexuality to rape jurisprudence and punishes perpetrators accordingly.[123]

VIII. Comparative Analysis

a. Substance

The Hanafi and Maliki schools both largely adopted the substantive provisions of *zinā* laid out above, nonetheless, they disagreed on which acts constitute *zinā*. Overall, Hanafi jurisprudence provides a very narrow path for rape victims to receive justice in court through a criminal trial.[124] "Hanafi *fiqh* identified sex acts as belonging to one of three categories: clearly illicit, questionably or ambiguously illicit, or clearly licit; *zinā* fell into the clearly illicit category."[125] The Hanafi school treats both anal and oral sex, outside of sexual ownership, as criminally punishable, but not *zinā*.[126] On the other hand, the

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[118] *Id.*
[119] *Id.* at 125.
[120] Muwatta Malik 28:9 (describing how a woman's guardian is liable to her husband if he misleads the husband or withholds information about her health so that the daughter will receive a greater dowry), https://sunnah.com/malik/28.
[121] *Id.*
[122] *See Id.*
[123] AZAM, *supra* note 19, at 121.
[124] *Id.* at 170.
[125] *Id.* at 171.
[126] *Id.* at 174.

Maliki school expanded the definition of *zinā* to include anal sex, but distinguished sodomy as even more sinful than *zinā* (resulting in stoning regardless of the sexual relationship between the participants).[127]

Moreover, the Hanafi school, unlike the Maliki school, treats men and women who commit *zinā* with a person who lacks agency differently based on assumptions about gender.[128] For instance, the Hanafis do not apply the *hadd* punishment to a woman who has sex with a minor, nonetheless, they would apply the *hadd* punishment to a man who had committed the same act.[129] For Hanafi thinkers, all acts of sexuality are initiated by men, hence, a finding of *zinā* is based solely on the legal status of the man in the interaction; it is assumed the woman is merely the "follower" in sexual matters.[130] In contrast, the Malikis appear less interested in upholding this gender-biased approach to punishment, and consequently, are more likely to hold women liable for sexual acts in such circumstances.[131] Nonetheless, that does not mean the Malikis are committed to the same punishment for all perpetrators who have sex with people who lack agency, only that Malikis are probably more open to a position based on gender equality.[132]

b. Evidence

Nonetheless, arguably a larger chasm exists between the Hanafi and Maliki schools in evidentiary and procedural matters. In the Hanafi school, rape is exclusively categorized as a subset of *zinā*, and only eye witness testimony (specifically, four witnesses) and confession (specifically, four confessions) are permissible sources of evidence, which is consistent with the Hanbali and Shiite approaches to *zinā*.[133] On the other hand, the Maliki school streamlines conviction of *zinā* via confession; only one confession from a perpetrator is needed to establish guilt.[134] In addition, if an unwed woman becomes pregnant, her

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[127] *Id.* at 174-75.
[128] *Id.* at 183.
[129] *Id.*
[130] *Id.*
[131] *See Id.*
[132] *See Id.*
[133] Ziba Mir-Hosseini, *Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts*, 15 INT'L. J. ON HUM. RTS. 7, 14 (2011).
[134] *Id.* at 14.

pregnancy is "prima facie evidence of *zinā*," and to avoid the *hadd* punishment, she must provide additional evidence to show she was coerced or should be exonerated for some other reason.[135] For example, a raped woman can bring forth four witnesses to testify that the sexual encounter was nonconsensual or provide outside evidence of coercion, including, proof of vaginal bleeding (if she was a virgin), bringing forth witnesses who heard her cries for help, or other physical damage to her body and genitals.[136] Other Sunni schools, including the Hanafi school, are critical of this stance because they claim that although pregnancy does prove genital intercourse occurred, it does not indicate the specific circumstances under which a woman became impregnated.[137] More specifically, merely being pregnant does not indicate a woman had the necessary state of mind or legal agency to commit *zinā*.[138]

In addition, the Maliki school categorizes acts of *zinā* as a violation of a woman's property too. The threshold for establishing civil liability for the violation of a property right is significantly lower because it is merely a tort as opposed to a crime against God.[139] To prove an *ightisāb* claim, a plaintiff must produce two male eyewitnesses who can testify to her *ghasb* (forcibly moving her) or present circumstantial evidence including, information regarding "bleeding, screaming, calling for help, traces of struggle or coercion, and timely reporting of the event."[140] Nonetheless, it is essential that the witnesses circumscribe their testimony to avoid describing specific sexual acts, otherwise, they may risk committing slander or suggesting the plaintiff herself committed a crime.[141] In conclusion, under Maliki jurisprudence women can initiate legal proceedings to receive justice.

c. Procedure

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[135] Asifa Quraishi, *Who Says Shari'a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 163, 168 (2008); *See* Muwatta Malik 41:8 (explaining that pregnancy is "clear proof" of *zinā*).
[136] AZAM, *supra* note 19, at 207.
[137] Quraishi, *supra* note 135, at 168.
[138] *Id.*
[139] AZAM, *supra* note 19, at 202.
[140] *Id.* at 225-26.
[141] *Id.* at 255.

As a procedural matter, this is significant because the right to petition (initiate litigation) is vital for rape victims because it amounts to whether they are seeking justice on their behalf or facing serious criminal charges as a defendant. The right to petition is determined based on whether litigation involves interpersonal rights or the rights of God.[142] "The *hadd* is a right of God to which no [individual] claimant" is entitled to assert; hence, the sovereign must commence a criminal proceeding for hudud crimes.[143] Since coercive *zinā* is a *hadd* crime, female rape victims are excluded from their rapist's trial (assuming they are not on trial themselves) for the two following reasons: first and foremost, only their government can initiate criminal proceedings against their rapist (meaning, they are not a plaintiff); and two, women's testimony is invalid for hudud crimes.[144] Here, the evidentiary rules and the procedural rules for *zinā* interact in way that removes victims from the legal process.

On the other hand, for property disputes (torts), which involve interpersonal rights, an individual claimant can initiate a suit.[145] Therefore, for a trial concerning a woman's sexuality, she will be present and advocate for her own interests in court (not necessarily as a *pro se* petitioner, but more simply, as a party to the litigation).[146]

The Maliki school provides two procedural options for rape victims pursuing justice.[147] First, if a rape victim files a complaint with the government, the government can initiate joint proceedings in which the *zinā* claim is merged with the rape victim's property claim.[148] However, if this approach is taken, *zinā* rules of evidence and procedure apply to both claims, meaning, the rape victim will only be able to collect her dowry if the perpetrator is convicted of *zinā*.[149] This approach may conflict with Maliki legal philosophy, because the Maliki understanding of coercive *zinā* is that it constitutes two separate offenses:

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[142] Anver M. Emon, *Huquq Allah and Huquq Al-lbad: A Legal Heuristic for a Natural Rights Regime*, 13 ISLAMIC L. & SOC'Y 325, 360, n.115 (2006).
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] AZAM, *supra* note 19, at 224-25.
[148] *Id.* at 224.
[149] *Id.*

a civil offense and a *hadd* offense. If the Malikis, in effect, apply *hadd* evidentiary and procedural standards to a property claim, then it will be litigated as if it there is only a divine right at issue, which may create problems for maintaining the supremacy of Allah's rights and applying excessive scrutiny to property claims. While, the second option allows rape victims to pursue compensation for the violation of their property rights with a smaller evidentiary hurdle to overcome.[150] Overall, the first option offers a victim justice to the fullest extent of the law, but may be difficult to prove in court, which makes it a risky approach for person who wants their accusations to be validated in a legal forum; on the other hand, the second option provides an accuser with a greater likelihood of victory, but may be letting a perpetrator off the hook due to its lack of severity. While the Hanafi school provides a single difficult path to justice, the Maliki approach provides multiple paths to prevailing in court. As a result, the Maliki approach requires rape victims to weigh difficult options and consider the likelihood of success for each legal option (based on the substance, evidentiary rules, and rules of procedure for each claim) and which punishment is appropriate for the act the perpetrator committed.

IX. Analysis

To summarize, Islamic law will take different shapes and forms depending on how which school of thought is applied to a legal system and how this jurisprudence is interpreted within the confines of a school. Consequently, when it comes to delivering justice for female rape victims and promoting the sexual rights of women, different applications of Islamic law will have different consequences for victims.

One method for an Islamic government to provide justice for victims of sexual assault is to initiate a *zinā* proceeding. Nonetheless, there are several aspects of *zinā* legal doctrine that make it difficult for rape victims to rely on as a source of justice.

[150] *Id.* at 225.

First off, *zinā* itself is not intended to protect the sexual rights of women, only the rights of God.[151] Hence, the Hanafis, who support a *hadd*-only approach, acknowledge God's rights but not women's sexual rights in their *zinā* jurisprudence.[152] While, on the other hand, the Malikis acknowledge women's rights to some extent, but only as far as a woman's property interest lies; hence, the Maliki property-based approach does not protect a woman's moral value, but rather, how much money she would lose in the marketplace if she got married after her rape.[153] Neither school takes an approach centered on protecting the human dignity or moral value of women. Since, according to the Qu'ran, women are morally valuable, independent decision-makers, the Qu'ran likely requires a more woman-centered approach to punishing rape that is not reflected in the Hanafi or Maliki jurisprudence.[154]

Second, the substantive provisions of *zinā* tend to narrow and restrict the types of sexual assault claims a court will consider. Although coercive *zinā* is punishable under Islamic law, coercive sex between those in a marital relationship is not.[155] Muslims cannot rely on *zinā* to counteract spousal rape because there must be an illegitimate relationship between the people who engage in sexual intercourse before either party can be found liable for *zinā*. *Zinā* is designed to punish intercourse outside of legitimate relationships, not litigating how sexual relations must occur within a legitimate relationship. As a result, *zinā* law does not protect wives who have been sexually abused by their husbands, and therefore, another legal claim is needed to affirm women's rights in this area.

Moreover, the Hanafi school, in particular, perpetuates negative gender stereotypes in their substantive *zinā* jurisprudence that deviates from the ethos of gender equality outlined in many places throughout the Qu'ran.[156] The Hanafi position that jurists should only consider the legal agency of the men in sexual encounters infantilizes women and can potentially provide safe harbor for female predators

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[151] Ibrahim & Mehemeed, *supra* note 49, at 18-19.
[152] AZAM, *supra* note 19, at 153.
[153] *See Id.* at 164.
[154] *See Id.* at 62.
[155] *See* Qu'ran 23:5-7 (Sahih Int'l).
[156] *See* AZAM, *supra* note 19, at 183; Qu'ran 17:15 (Sahih Int'l).

that take advantage of male minors and others.[157] Although this argument appears to depart from the main focus of this paper, women's sexual rights; it is important to note that everyone is entitled to the protection of their sexual rights, hence, both men and women have an obligation to reinforce and uphold the rights of the other sex. Moreover, there is a collective benefit to this reciprocity; when women and men open their minds to the struggles and hardships of the opposite sex, they can form cross-gender alliances that will foster mutual empathy and support going forward. Hence, if women seek refuge in gender stereotypes where some can avoid meeting justice, then they undermine their interest in protecting their own sexual rights.

In addition, although *zinā* only refers to a very specific act (genital intercourse), both the Hanafis and Malikis punish other sexual acts such as digital penetration and sodomy generally.[158] This across the board prohibition is a feature of both schools; substantively, coercive sexual acts are legally merged with consensual sexual acts.[159] Nevertheless, since voluntariness (freedom of coercion) is a vital concept in the Qu'ran and other sources of *fiqh*, the incentive to punish coercive sexual activity in Islam is particularly strong.[160] Consequently, if coercive sex that does not meet the elements of *zinā* is prosecuted under a lesser charge, then it is likely that more lenient rules of evidence and procedure will be available to rape victims for two reasons. One, outside the *hadd* context there is more freedom to shift jurisprudence and two, because Muslims are more inclined to penalize coercive activity because coercion is viewed in such a negative light in Islam. Ideally, this alternate jurisprudence would provide lower evidentiary and procedural standards for prosecuting coercive sex, however, the high *zinā* standards would remain for instances of alleged coercive sex that reach those thresholds. Hence, treating sexual assault that falls outside of *zinā* jurisprudence as a separate substantive crime could interact with the rules for evidence and procedure and make them better suited for rape victims.

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[157] *See* AZAM, *supra* note 19, at 183.
[158] *See Id.* at 174-75.
[159] *See Id.*
[160] *See Id.* at 62.

Third, *zinā* is a crime affirming an obligation to God in Islamic criminal law, making it a grave offense that Muslims prefer to avoid if at all possible.[161] As a result, a *zinā* conviction requires an overwhelming amount of evidence against a perpetrator that may not be realistic in many cases. The private nature of sexual affairs is a thoroughly-documented problem for reaching criminal convictions for sex crimes.[162] Often the only witnesses to a sexual encounter are those who are present in the sexual encounter.[163] Consequently, the expectation that four witnesses will come forward on a woman's behalf is unlikely.[164] Moreover, since a woman's testimony and circumstantial evidence, such as physical harm or indirect corroboration are not admissible as evidence, constructing a path to victory for a rape victim is exceedingly difficult.

In addition, the active enforcement of slander as a *hadd* offense strengthens this line of reasoning. For example, if an insufficient number of witnesses comes forward or if the witnesses who do come forward produce inconsistent testimony, then the witnesses may face a slander conviction themselves.[165] Hence, coming forward as a witness to *zinā* can be intimidating, even if a person clearly saw an unmarried couple engaging in genital penetration. Although a witness may be certain he or she saw a criminal act take place, his or her fate depends on whether other witnesses decide to come forward and what those witnesses say when they come forward. Hence, it may be preferable for a witness to remain silent and avoid exposing themselves to criminal liability based on the decisions and testimony of others. Also, since the judge is tasked with avoiding a *hadd* punishment whenever possible, the judge will actively seek to undercut any confession, testimony, or legal arguments which necessitate imposing the *hadd* punishment.[166]

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[161] Ibrahim & Mehemeed, *supra* note 49, at 18-19.
[162] NATALIE TAYLOR, AUSTRALIAN INSTITUTE OF CRIMINOLOGY, JUROR ATTITUDES AND BIASES IN SEXUAL ASSAULT CASES 1 (2007).
[163] *See Id.*
[164] *See* Taylor, *supra* note 162, at 1; Sunan Abi Dawud 39:4399, https://sunnah.com/abudawud/40.
[165] *See* Sunan Abi Dawud 39:4399, https://sunnah.com/abudawud/40.
[166] Azari, *supra* note 61, at 251.

Moreover, since the Maliki school considers the pregnancy of an unwed woman to be evidence of *zinā* on its face, this policy can put rape victims who were impregnated by their rapist in a defensive posture and a more vulnerable position.[167] Although there are numerous sources of proof a woman can provide to shield herself from prosecution, the Hanafi critique of this position is accurate.[168] In this respect, Maliki jurisprudence does not take into account the multitude of reasons a woman could be become pregnant.[169] Since *hadd* crimes are only to be imposed in cases of near certainty, the Maliki perspective appears to deviate from the evidentiary standards typically associated with *hadd* jurisprudence and lowers the bar to such an extent that rape victims, and the innocent, are at risk for conviction.[170] Consequently, if *zinā* alone is used as the sole avenue to seek justice for female rape victims, the structure of evidentiary rules will be operating against their interests in a variety of ways. Hence, outside of the pregnancy context, more lenient evidentiary rules are needed to protect rape victims.

Fourth, procedural practices determining who may petition (or initiate litigation) can be detrimental to rape victims. Since *zinā* is a criminal proceeding initiated by the government and women are banned from testifying for *hadd* crimes, women are completely excluded from the trial process.[171] This process, unique to *hadd* crimes, is problematic for providing rape victims visibility and promoting their well-being.

In fact, experts argue that "the most important factor in determining the well-being of victims is not whether they were involved in the criminal justice system—the impact is determined by the types of response they received from criminal justice professionals and others."[172] Consequently having an inclusive legal proceeding that is responsive to sex assault victims may be helpful for a victim's recovery

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[167] *See* Muwatta Malik 41:8 (explaining that pregnancy is proof of *zinā*), https://sunnah.com/malik/41.
[168] Quraishi, *supra* note 135, at 168.
[169] *See Id.*
[170] *See* AZAM, *supra* note 19, at 77.
[171] Emon, *supra* note 142, at 360, n.115.
[172] KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L (EVAWI), VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND 34 (2019).

and health.[173] If given access to testify at a trial, victims of sexual assault can share their experiences, pain, and suffering, which can inform the public of the destructive effects of sexual assault. To be specific, victims of sexual assault may have a range of painful experiences, including, "psychological disorganization, nightmares, flashbacks to their sexual assault, reliving their sexual assault, thoughts of suicide, depression, shame, and permanent changes in their ability to function."[174] Nonetheless, some may be skeptical of this approach due to legitimate concerns about how law enforcement can mismanage sexual assault cases by doubting a victim's experiences, not treating the claim seriously, and blaming the victim for their own sexual assault.[175] However, since sexual assault victims tend to recover on an individualized basis and cope with the impact of sexual assault in a different ways, a legal option may be beneficial for some female victims.[176] In addition, creating a legal framework that is more accommodating to sexual assault victims may make rape victims feel more comfortable reporting what happened to them; since underreporting of rape is common in Muslim countries (as it is around the globe), procedural changes may allow Islamic courts to deliver more justice for these victims.[177]

The Maliki perspective is much more compelling than the Hanafi perspective in this regard. In the Maliki school, a female rape victim can initiate litigation *sua sponte* as a property claim and share her own beliefs, feelings, and perspectives on her experience.[178] On the other hand, the Hanafi approach can effectively shut women out of the legal process.[179] In short, the Maliki perspective on rape may be preferable to the Hanafi perspective because it is more victim-centered.

Fifth, another feature of *zinā* jurisprudence is that the *hadd* punishment imposed upon conviction is nondiscretionary, and consequently, Islamic judges must impose a specific sentence.[180] The prescribed

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[173] *Id.*
[174] *Id.* at 10-28.
[175] *Id.* at 35.
[176] *Id.* at 32.
[177] See Meera Senthilingam, *Sexual Harassement: How it Stands Around the Globe*, CNN HEALTH (Nov. 29, 2017, 6:51 PM), https://www.cnn.com/2017/11/25/health/sexual-harassment-violence-abuse-global-levels/index.html.
[178] Emon, *supra* note 142, at 360, n.115.
[179] *See Id.*
[180] Ibrahim & Mehemeed, *supra* note 49, at 19.

punishments for *zinā*, including, stoning and flogging, have important consequences for convicted male rapists, because they serve both as a general deterrent (to prevent the general public from committing *zinā*) and a means of retribution (inflicting suffering) on behalf of society.[181] Flogging, in particular, may yield benefits from specific deterrence (to prevent a particular convict from committing *zinā* again), however, stoning eliminates the possibility of any future harm by the defendant.[182] Nevertheless, if a male rapist is only flogged, then he is not incapacitated (restrained) or rehabilitated, which are important public policy goals of criminal sentencing that are not considered in *hadd* punishments.[183] Hence, without judicial discretion to impose prison time, a dangerous sexual predator may remain in society and receive no treatment to address his or her antisocial propensities. In short, Islamic jurists are restrained from exercising discretion based on certain theories of punishment; hence, as a policy matter, Muslim societies who rely on *hadd* jurisprudence to counteract rape may find it more difficult to further goals of rehabilitation and incapacitation in their legal system in instances where the accused is unmarried.

Overall, *zinā* jurisprudence as an instrument to punish rape is ineffective; this area of law has theoretical, substantive, evidentiary, and procedural characteristics that make it a difficult pathway to justice for rape victims. *Zinā* is both difficult to establish in a court room and dangerous for rape victims and witnesses because the process can backfire on them. Hence, Islamic scholars who are interested in enhancing protections for victims may want to pursue a new legal pathway when *zinā* is not satisfied that targets specifically coercive sexual intercourse, has lower evidentiary and procedural barriers, and provides more judicial discretion in punishment.

The Maliki approach satisfies some of these interests because (1) property usurpation has lower evidentiary standards compared to the standards for *hadd* crimes and (2) female rape victims can initiate

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[181] Emmanuel Melissaris, *Theories of Crime and Punishment*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 373 (Markus D. Dubber & Tatana Hörnle eds., 2014).
[182] Erik Luna, *Sentencing*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 965 (Markus D. Dubber & Tatana Hörnle eds., 2014).
[183] *Id.*

litigation on their terms.[184] Nonetheless, as previously mentioned, this approach does not uphold women as morally valuable human beings, rather, it only treats victims as a sexual commodity who suffered damaged in an illegal property transaction.[185] Moreover, as a civil claim, the payment of monetary damages is not harsh enough to demonstrate the seriousness of rape, and if a woman asserts that she was raped, then she may be liable for adultery herself.

X. Proposal

On the other hand, if a case involving coercive sexual conduct falls outside of *zinā's* rigorous requirements then the defendant should be charged with a *ta'zir* crime (maybe called "coercive penetration" or "sexual misconduct") so that many of the previously mentioned obstacles can be addressed. Put simply, a *ta'zir* crime "refers to [an] offense mentioned in the Quran or the Hadiths, but where neither the Quran [n]or Hadiths specify a punishment."[186]

First off, although in theory, *ta'zir* offenses are supposed to mirror crimes set forth in Islamic religious sources, in practice, this requirement is flexible; as social norms evolve and develop, *ta'zir* doctrine often adapts too.[187] Compare the state of women's rights now—particularly women's sexual rights—to women's rights when *zinā* jurisprudence settled hundreds of years ago, the contrast is likely stark. Hence, having a legal mechanism that can evolve as legal expectations of conduct shift is important. For example, the #MeToo movement has dramatically altered the tectonic plates of sexual interactions around the globe, specifically, how men treat women is being scrutinized in a way that is unprecedented.[188] With changing attitudes about what constitutes inappropriate sexual activity, there should be a corresponding legal shift so that the laws of a society reflect the moral values of that society.

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[184] *See* AZAM, *supra* note 19, at 225-26; Emon, *supra* note 142, at 360, n.115.
[185] AZAM, *supra* note 19, at 164.
[186] WIKIPEDIA, https://en.wikipedia.org/wiki/Tazir (last visited Apr. 25, 2020).
[187] *See* Azari, *supra* note 65, at 248.
[188] Meighan Stone & Rachel Vogelstein, *International Women's Day: Celebrating #MeToo's Global Impact*, FOREIGN POLICY (Mar. 7, 2019, 7:40 PM), https://foreignpolicy.com/2019/03/07/metooglobalimpactinternationalwomens-day/.

In short, a *ta'zir* offense that mitigates the failings of *zinā* jurisprudence may help Muslims adapt their society to shifting norms, however, it may also give Muslim women an opportunity to shape the development of Islamic law which has historically been written from an exclusively male perspective.

Unlike *hudud* crimes, which are specifically aimed at preserving God's rights on earth, *ta'zir* crimes often protect individual rights, which can include women's sexual rights.[189] Hence, ideally there will be an alignment between the right that the crime is designed to protect—a woman's right to bodily autonomy—and the right we are focused on protecting in the wake of a sexual assault, which is, again, a women's right to bodily autonomy. In contrast, where a *zinā* proceeding must occur, there may be a fundamental misalignment between the rights protected in *zinā* jurisprudence—Allah's rights—and the purpose of litigating rape—to defend women's rights. In conclusion, a *ta'zir* punishment for sexual assault may be essential for protecting rape victims because that punishment is designed to protect rape victim's rights.[190] To be clear, the punishment for *zinā* is mandatory, however, pursuing a *ta'zir* claim may be useful if the high legal standards associated with *zinā* are not met, which is frequently the case.

The numerous hurdles throughout *zinā* jurisprudence for rape victims do not apply to *ta'zir* crimes, hence, the pathway to delivering justice for a sexual assault under a *ta'zir* approach can be less burdensome. For example, the substantive elements of a *ta'zir* offense can extend beyond what is laid out in *zinā* jurisprudence, and include digital penetration or marital rape, just as Pakistan's rape statute does.[191] However, the doctrine can become less stringent in other areas as well. For instance, this *ta'zir* crime provides less restrictive evidentiary requirements compared to what is found in *zinā* jurisprudence; under the *ta'zir* method, "charges can be brought and a case proven based on the sole testimony of the victim, providing that circumstantial evidence supports the allegations."[192]

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[189] Azari, *supra* note 65, at 248.
[190] *See Id.*
[191] Rubya Mehdi, *The Offence of Rape in the Islamic Law of Pakistan*, *in* DOSSIER 18 103 (Marie-Aimée Hélie-Lucas & Harsh Kapoor eds., 1997).
[192] OLIVER LEAMEN, CONTROVERSIES IN CONTEMPORARY ISLAM 78 (2014).

Nonetheless, the array of punishments available for a *ta'zir* conviction can also be attractive for those concerned about the policy implications counteracting sexual violence. *Ta'zir* sentences can be diverse and range in severity based on judicial discretion, such as, "a prison term, flogging, a fine, banishment, a seizure of property."[193] Hence, policy concerns goals related to rehabilitation and incapacitation can also be pursued under a *ta'zir* approach.

However, the discretion judges are granted for *ta'zir* crimes may also pave the way for restorative justice in Islamic law, which also has public policy benefits. The following is a brief introduction to restorative justice. To start, there is no single formal definition of restorative justice, however, restorative justice tends to have distinct features.[194] In general, restorative justice "focuses on the harmful effects of offenders' actions and actively involves victims and offenders in the process of reparations and rehabilitation."[195] This notion of justice primarily treats crimes as private matters between individuals instead of public matters, hence, government involvement is intended to be minimal.[196] Overall, this process is more victim-centered than traditional criminal proceedings because it is focused on the victim's relationship to the perpetrator.[197] However, restorative justice also has a significant community component since all stakeholders in the community join the proceedings.[198]

Since restorative justice is fundamentally personal, it involves direct communication between the stakeholders, accusers, and the accused, which often manifests in conferencing and mediation.[199] In these gatherings, all are invited to speak about harm they experienced or inflicted and its effects on them.[200] This process is best described as community healing, because, ideally, the group engages in an

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[193] WIKIPEDIA, *supra* note 186 (outlining discretionary punishments judges can issue in accordance with *ta'zir* conviction).
[194] DANIEL W. VAN NESS & KAREN H. STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE 23 (4th ed. 2010).
[195] *Id.* at 22.
[196] *See* Mutaz M. Qafisheh, *Restorative Justice in the Islamic Penal Law: A Contribution to the Global System*, 7 INT'L. J. CRIM. JUSTICE SCI. 487 (2012).
[197] VAN NESS & STRONG, *supra* note 196, at 22-23.
[198] *Id.*
[199] *Id.* at 23.
[200] *Id.* at 49.

collaborative process where perpetrators are held accountable, community standards are reinforced, wrongs are remedied and resolved (by punishment, confession, or some other method), and victims are empowered because they control the fate of the perpetrator to some extent and, influence the trajectory of the community going forward.[201] In addition to the public policy benefits of restorative justice for promoting individual healing, Muslim legal scholars may find restorative justice particularly attractive because the notion of group healing and reinforcing community values resonates with concept of *maslahah* (public interest).[202] Hence, Muslim judges may use their discretion not only to impose their own beliefs of what is an appropriate punishment for defendants but explore creative ways to empower victims and stakeholders to promote community solidarity.

XI. Conclusion

In conclusion, although *zinā* jurisprudence may erect formidable barriers for rape victims seeking justice, a *ta'zir* crime designed for instances where *zinā* legal thresholds are not met would likely reduce the risk and hardship of rape victims who come forward and share their stories. Put simply, *zinā* jurisprudence is not designed to protect rape victims; the problem with addressing rape through *zinā* jurisprudence exists, to a large extent, because Islamic scholars did not construct the *zinā* prohibition with rape victims in mind, but rather, with Allah in mind. From that theoretical basis, followed substance, evidence, and procedure that burdened rape victims to avoid punishing rapists for committing a severe crime against God. Nonetheless, since the instances where a *zinā* conviction can be carried out are so narrow, Islamic judges can fill this legal void with a *ta'zir* crime that is better suited to protect women who have experienced sexual violence.

Contrary to what some feminists may posit, classical Islamic jurisprudence does have some legal instruments to shift sexual assault jurisprudence so that it is more favorable to victims. Described throughout this paper are several Qu'ranic passages that affirm and uphold the rights of women. The

[201] *See Id.*
[202] *See Id.*

problem is that stories, such as Bibi's, can dominate news coverage and drive a narrative that Islamic law is always hostile to the interests of female sexual assault victims. Although there are serious women's rights issues in many countries that adhere to Islamic law, it is important for Westerners to recognize the flexibility inherent in Islamic jurisprudence so that they do not overstep in their criticisms of Islam.

As a global community, we should understand that differences across religion and culture can influence how women's rights progress around the world.[203] Although it may make sense for women to unite and form a single front on certain cultural and social issues, women's cultural and religious context will lead to diverse approaches to human rights progress. If feminists formulate their opinions on how Islam protects women based on how Muslim societies are depicted in the media, they incorrectly may assume that convicting rapists under *zinā* jurisprudence is the only available method for delivering justice to rape victims in Islam. Moreover, due to the long-lasting trauma of colonialism, feminist critiques of Islam often alienate Muslims and entrench immoral attitudes instead of creating an environment that fosters progress.

Finally, it is important to emphasize that Islam can come in a variety of forms and it can be used as a tool to improve the position of women in some ways. Hence, as Islam is judged by the rest of the world for its record on women's rights moving forward, it is important to be critical when Muslim-majority societies fall short, but note that a news story about adultery in an Islamic country may not be representative of all Muslim societies and it does not reflect the best application of Islamic law for women. In conclusion, as expectations for the protection of women's rights are raised globally, it is important to keep in mind that different religions, cultures, and societies may address the worldwide sexual assault crisis differently. Hence, instead of a monolithic global women's rights movement, we

[203] Fatima Seedat, *Islam, Feminism, and Islamic Feminism: Between Inadequacy and Inevitability*, 29 J. OF FEMINIST STUD. IN RELIGION 25, 28 (2013).

should expect diverse approaches to improving the condition of women based on the legal system and cultural context in which they exist.[204]

[204] See *Id.* at 28.