



Transacting Marriage

IN SEVENTH-CENTURY Arabia, a daughter was born to a Muslim named al-Musayyab ibn Najaba. He hastened to visit his cousin Quray‘a bint Ḥibbān at her home to share the good news. Her innocuous reply—“May God bless you”—led Musayyab to an impetuous declaration: “I have married her to your son.” Without hesitation, she responded: “I have accepted.” The visit continued, but after a while Musayyab reconsidered his offer of marriage between his newborn daughter and his cousin’s son, and he stated, “I was not serious; I was only joking.” Quray‘a, though, rejected his attempt to renege. “You offered marriage,” she pointed out, “and I accepted.” Unable to convince her to free him from his promise, Musayyab tried a new tack. Despite having originally viewed his cousin’s consent as sufficient, he insisted that he would take the matter up with her husband, the father of the son whose marital fate was being arranged: “[It is] between me and ‘Abd Allāh ibn Mas‘ūd.” Not long thereafter, Ibn Mas‘ūd returned home and learned what had transpired in his absence. On ascertaining that Musayyab had really made the offer of marriage, Ibn Mas‘ūd rejected his claim that a proposal made in jest could be withdrawn, repeating a prophetic dictum: “In marriage, seriousness and joking are the same, as in divorce seriousness and joking are the same.”¹ When Musayyab remained unconvinced, Ibn Mas‘ūd delivered the clincher: “Quray‘a’s word is valid, and she accepted.”²

This story defending a woman’s right to contract a valid marriage appears in the *Kitāb al-Ḥujja*, a ninth-century work whose full title translates as “The Book of Refutation of the People of Medina.” It is attributed,

with some debate, to Muḥammad al-Shaybānī, one of the two main disciples of eighth-century Iraqi jurist Abū Ḥanīfa. The *Hujja* defends Abū Ḥanīfa's views against his detractors, "the people of Medina," a group comprising that city's prestigious legal authorities, including Mālik ibn Anas. Abū Ḥanīfa held that women could contract marriages for their minor or enslaved charges, as agents for others, and on their own behalf. Other Sunni thinkers, including even Shaybānī elsewhere, hotly contested the notion that women could contract valid marriages. Rather, a woman had to be represented by her father or another marriage guardian (*walī*) drawn from her agnatic kin. Such was female incapacity that in the absence of a kinsman able or willing to act for her, a woman was obliged to seek out a public official, such as a judge, to act in her *walī*'s stead.

The incident with Musayyab's daughter and, more to the point, the way the *Hujja* draws upon it invite us into the prevailing culture of jurisprudential dispute. They also show how heated disagreements on specific points of law—here, an aspect of women's legal capacity—coexisted with crucial shared assumptions about marriage and kinship. A mother's guardianship was controversial, but neither the parties involved in the original incident nor the jurists whose views are explored in the *Hujja* question the legitimacy of marrying off infants. In examining the disputes we must not neglect the consensus over broader social arrangements. In texts that explore legal disputes, arguments often concerned issues that were relatively small compared to the universe of unspoken agreements. At the same time, seemingly minor disputes could hinge on major differences in jurisprudential methodologies.

This chapter treats consent to marriage and dower, areas around which formative-period Muslim authorities agreed and disagreed. I highlight assumptions about kin and household networks as well as about the legal personhood of free and enslaved males and females, both minors and majors. I discuss the marriage contract, considering who had the power to contract it and whose consent was necessary. Then, I turn to dower, the compensation due from a husband to a wife at marriage. I show significant points of agreement between the jurists and also their differences in method and approach. I argue for the significance of jurisprudential dispute to the formation and honing of doctrines and for the role of analogy—especially the linked analogies between wife and slave, and marriage and purchase—in shaping jurisprudence on marriage.

Consent and Coercion

Marriage was necessarily consensual. It required an agreement, expressed in terms of offer and acceptance, by the two contracting parties.³ But these were not necessarily the bride and groom. Guardians and proxies abound in the legal sources, especially for brides. As with the case of Musayyab and his newborn daughter, the agreement of the spouses was not always required. Marriage was very much a family matter, and involvement of kin in arranging and concluding women's and girls' marriages was assumed. But parental—usually paternal—involvement was not limited to the marriage of daughters. Quray'a and Ibn Mas'ūd's son was married off with no more say in the matter than Musayyab's daughter. In trying to weasel out of the impulsive marriage he had contracted for his daughter, it never occurred to Musayyab to challenge it on grounds that the infant groom could not give his consent. Rather, everyone agreed that fathers had the power of compulsion, *ijbār*, over children of both sexes. Yet the term *compulsion* gives a false impression of constraint; though occasionally the jurists discussed the permissibility of contracting such a marriage over a son or daughter's objections, for the most part minors were presumed too young to have any opinion.

Marrying off a minor child was not a Muslim innovation. It has parallels in other ancient legal systems and precedent in pre-Islamic Arabia, where parents might arrange marriages for their young children. Sometimes, as with Musayyab's daughter, both spouses were infants. At other times, one spouse was a child and the other an adult. The life of 'Ā'isha, daughter of Abū Bakr and later wife of Muḥammad, reflects both practices. She was originally promised as a young child to a boy about her own age. That agreement was eventually dissolved by the two sets of parents—with apparent relief on the would-be groom's side, since 'Ā'isha's family had converted to the new faith and they had not.⁴ She was then, at age six or seven, married to the Prophet, though the marriage was not consummated for a few years. I will say more about this marriage shortly and return to it in the next chapter; for now, suffice it to note that it has since been invoked as precedent for topics ranging from when girls attain majority to whether compulsion of minors is permissible.

For free males, legal capacity was a simple matter: before majority they were subject to paternal compulsion; after it, they were not. As

minors, they could not contract their own marriages; as majors, they could. (*Bulūgh*, majority, was usually constituted by puberty, normally menarche for a girl and first nocturnal emission for a boy, though other signs of physical maturation could be taken into account.) A father's right to marry off his minor sons was taken for granted, as was the cessation of this right when they attained majority. Any free male in his majority and of sound mind had free rein over his marital affairs, but the Muslim jurists did not think of this in terms of obtaining his consent. That would have implied assent to someone else's decision or actions, which was antithetical to their notion of the male agent. Instead, it is only with regard to enslaved males and females that serious discussion of consent, or lack thereof, occurs.

Even setting aside, for the moment, the argument in the *Hujja* over female capacity to contract marriage, free females' consent—that is, whether their consent was necessary in order for a valid marriage to be contracted for them—was a complicated subject. Virginity, not a consideration with regard to males or enslaved females, factored into decisions about compulsion of free females. The terms *thayyib* (previously married, non-virgin) and *bikr* (never married, virgin) are occasionally applied to males in connection with the application of more or less severe *ḥadd* punishments for illicit sex.⁵ In connection with marriage, however, they are relevant only to females; for males, the key distinction is majority. Legal texts seldom discuss a female slave's virginity in the context of marriage, whether because of the presumption that she was unlikely to have remained a virgin until such time as she might be married off or because it was entirely irrelevant to her legal standing: she never had a say in her own marriage arrangements. For free females, both virginity and majority were of concern. Fathers could compel marriage of daughters who were both virgins and minors. On the flip side, those who were neither virgins nor minors could not be compelled but had to give their spoken assent to any proposed marriage. The intermediate categories—daughters who were either minors or virgins but not both—were the subject of disagreement. Never-married (and thus presumably virgin) daughters in their majority generated the most significant debate surrounding consent. Mālik and Shāfi'ī affirm the father's right to compel her, while Abū Ḥanīfa and his disciples reject it forcefully. I will turn to their rationales below.

The (marriageable) minor non-virgin appears seldom in these texts and is likely to have been rare in practice. A girl could be married then divorced or widowed before reaching majority since, as Chapter 2 shows, majority was not a criterion for consummation. Because it was theoretically possible, the jurists considered it. Mālik allowed the compulsion of a minor non-virgin while both Shāfiī and the Ḥanafīs rejected it, though for different reasons.

For Mālik, either virginity *or* minority allowed compulsion, so a minor non-virgin could be compelled.⁶ A previous marriage, if unconsummated, did not remove a father's power of compulsion. A passage from the *Mudawwana* explores the limits of a father's authority over a previously married (but not minor) daughter: "[Saḥnūn] said: If a man marries off his virgin daughter and her husband divorces her or dies before consummating [the marriage] with her (*yabtanī bihā*), may the father marry her off [again] as he would marry off a virgin according to Mālik? [Ibn al-Qāsim] said: Yes."⁷ Because this marriage ended before consummation, the bride remained subject to paternal compulsion.⁸ If the husband had consummated the marriage, however, "then she has more right to herself." A wife gains control of her own affairs ("*malakat amrahā*") through consummation.⁹

Abū Ḥanīfa rejects compulsion at majority for all females, both virgin and non-virgin. Formative-period texts do not record his opinion or that of his major disciples on the case of the minor non-virgin, though later Ḥanafī texts explicitly state that majority is determinative: a *bāligh* female could not be coerced even if she was a virgin, but a minor could be, even if she was *thayyib*.¹⁰ Shāfiī, though, objects not only to compelling the minor non-virgin into marriage but to marrying her off at all. A non-virgin could not be married off without her consent, and a minor could not give valid consent. Thus, a once-married minor could not be married again until she came of age.¹¹ One glimpses the particular preoccupations of the jurists in their treatment of this issue: Mālik's focus on paternal power, Abū Ḥanīfa's attention to female as well as male majority, and Shāfiī's concern for not voiding an individual's consent when that person has any characteristic requiring consent.

The disagreement over a virgin in her majority receives a great deal more attention. One hadith text takes center stage in the jurists' discussions of consent and compulsion. It declares that "a virgin is asked for

her permission for herself, and the non-virgin has more right to herself (*aḥaqqu bi nafsihā*) than her marriage guardian." In exploring the jurists' use of this prophetic declaration as a proof text, it bears repeating that the question of bridal consent in marrying off virgin daughters generates dispute only when majority is brought into the equation: a father's power of compulsion over his virgin daughter is unquestioned so long as she is a minor. The application of the concept of majority to marriageable females competed with the categories of virgin and *thayyib* found in the hadith sources. The authorities mentioned in 'Abd al-Razzāq's *Muṣannaf* under the heading "What is reprehensible in marriage and not permitted" touch on whether the father must consult virgins, non-virgins, or both; how their consent is expressed; and whether he can compel them over expressed objections.¹² Though several authorities 'Abd al-Razzāq cites allowed the marriage of minors without consent, only two suggested that compulsion of *bāligh* virgins was permitted. Dozens took the view that a *bāligh* female, whether virgin or non-virgin, could not be married against her wishes.¹³

For Mālik and Shāfiʿī, the relevant issue was virginity, not minority. Unlike Abū Ḥanifa, they held the permission hadith to be compatible with paternal compulsion in marriage (though their interpretive strategies vary), even when the bride had arrived at her majority, so long as she remained virginal. Let us compare the treatment of this hadith in the *Muwattaʿ* and the *Mudawwana*. Where the permission hadith appeared in the *Muwattaʿ*, Mālik did not take it to mean that a father was bound to seek his virgin daughter's consent. Instead, the *Muwattaʿ* followed the hadith with an account of two companions who married off their virgin daughters without consulting them. Mālik affirmed that such contracts were binding and justified them as Medinan practice: "This is the way we do things."¹⁴

The *Muwattaʿ* here expresses a characteristic stance about the living example of the Medinan community: it constitutes an authoritative proof of correct practice. Rather than viewing the acts of ordinary Muslims as a potential competitor to the spoken transmission of Muḥammad's words and deeds, the customary practice of Medinans, passed down from many to many, is more reliably authentic than any individual hadith could be.¹⁵ Thus, Mālik feels no need to reconcile these actions with the apparent sense of the Prophet's declaration that a virgin's permission must be sought. The *Mudawwana*, by contrast, prefaces

these accounts with an explanation: when the Prophet ordered the marriage guardian to ask a virgin's permission to marry her off, he was referring only to a fatherless virgin girl (*al-bikr al-yatīma*).¹⁶ The term *walī*, "marriage guardian," was understood to exclude reference to fathers who served in this capacity.¹⁷ In addition to repeating the anecdotes given in the *Muwattaʿ*, the *Mudawwana* presented further evidence of a father's right to marry off his daughters without their consent. It cites Ibn Wahb's report, ultimately depending on a narration from al-Ḥasan al-Baṣrī, that "the Messenger of God, may God's blessings and peace be upon him, married two of his daughters to 'Uthmān b. 'Affān and did not consult them."¹⁸ The *Mudawwana*'s provision of evidence and rationales, we may surmise, implicitly responds to competing Ḥanafī views; the assertion that such marriages were the practice in Medina was insufficient as a rebuttal, since Ḥanafī authorities did not recognize Medinan customary usage as a proof.

Both the *Mudawwana* and the *Umm* describe a father's power over his daughter in terms of her virginity rather than her age or maturity. The *Umm* characteristically seeks to reconcile the doctrine of compulsion with the seemingly obvious sense of the permission hadith.¹⁹ As a first step, Shāfi'ī argues that exemplary Prophetic practice (*sunna*) granted a father the power of compulsion over his virgin daughters. Though the *Muwattaʿ* and *Mudawwana* presented anecdotes about Companions and the Prophet marrying off their daughters, the *Umm* focused on the Prophet's own marriage to 'Ā'isha, concluded when she was six or seven (Shāfi'ī admits to uncertainty about her exact age) and consummated when she was nine.²⁰ In Shāfi'ī's view, she was still a minor when consummation occurred.²¹ The binding nature of Muḥammad and 'Ā'isha's union establishes fathers' power to contract binding marriages for their minor virgin daughters: "Abū Bakr's marrying 'Ā'isha to the Prophet, may God's blessings and peace be upon him, when she was a girl of six and [the Prophet's] having sex with her when she was a girl of nine indicates that the father has more right over a virgin than she has over herself."²²

This right of compulsion, Shāfi'ī claims, continues to apply when the daughter attains majority. Mālikī texts never explicitly argue that the father's power of compulsion continues, while the Ḥanafīs, discussed below, contend vigorously that it does not. Shāfi'ī directly enters the fray, explicitly engaging with the Ḥanafī view on majority, but insisting that

the relevant categories are those of the Prophet, who distinguished between the virgin and the *thayyib* rather than between the minor and the *bāligh*. For him, there was no real difference between a minor and a *bāligh* female so long as she remained a virgin.²³ Shāfiʿī must then reconcile the potential contradiction between Muḥammad’s reported speech (asking a virgin’s permission) and his exemplary action (marrying someone whose permission was not sought). He does so by differentiating, as the legal theory he outlines in the *Risāla* calls for, between obligatory actions and recommended ones: the Prophet’s “command to ask the virgin’s permission for herself expresses a preference (*amr ikhtiyār*), not an obligation (*fard*). If it were the case that if she objected he could not marry her off, she would be like the non-virgin.”²⁴ In his commentary on the *Ikhtilāf al-ʿIraqiyayn*, Shāfiʿī resolutely sides with Ibn Abī Laylā as to the validity of compulsory marriages by fathers: “he contracts the marriage for the *bāligh* virgin, and it is not rescinded even if she objects.”²⁵ His logical rules dictate that he do so, especially where juridical disagreements are at stake and a dissenting view must be clearly articulated.

Nonetheless, in the *Umm*, where he has more scope to enlarge on his views, Shāfiʿī recommends strongly that daughters who have reached majority be consulted. He appeals to both ethical and pragmatic considerations in an attempt to modulate the exercise of patriarchal power.²⁶ Similarly, in Ḥanafī texts, the much later *Hidāya* suggests that though it is legally unnecessary, it is a sign of good breeding for a woman to use a *walī* to contract marriage on her behalf.²⁷ We might attribute the absence of this caveat from the formative-period sources to the fact that where they discuss women’s agency in contracting marriage, they do so in arguments against others who hold divergent positions. Shared ideals about the nuances of good behavior are less salient in disputation than evidence and proof. When female capacity to contract marriage is not at issue, though, these same Ḥanafī texts frequently posit a male contracting marriage on behalf of a related female. It is impossible to ascertain what this indicates about customary practice, but it certainly demonstrates juristic comfort with the involvement of male kin.

Like Shāfiʿī’s view in the *Ikhtilāf*, the Ḥanafī stance on noncompulsion of females in their majority appears already in tension with existing procompulsion views, primarily those of Mālikīs.²⁸ Once a male or female child matured, according to Abū Ḥanīfa, the father had to ob-

tain consent for any marriage he wished to contract. A virgin daughter's arrival at *bulūgh* exempted her from forced marriage. Quoting the Prophet's words about consultation, Abū Ḥanīfa noted, "If she dislikes it (*in karihat*) the marriage is not permitted, because she has reached majority and taken control of her affair (*malakat amrahā*) and she is not coerced (*la tukrahu*) in [marriage]." ²⁹ For Mālik, a woman took "control of her affair" after she had consummated a marriage, while for Abū Ḥanīfa her majority triggered this control.

The language with which the jurists addressed a female's control over her marriage merits attention. A female who cannot be compelled to marry is said to be "*aḥaqqu bi nafsihā*," having more right to herself, or to have "*malakat amrahā*," taken control of/owned her affair." In both cases what she has "more right to" or "controls" is her marital fate—the right to grant or withhold consent to a proposed match. And yet, as Gail Labovitz points out with regard to rabbinic discourse, "the fact that a woman who is becoming independent of male control is still linguistically and lexically subject to ownership, even if by her own self, is significant and telling. The moment at which a woman becomes a possessor, she does not entirely escape being the possessed."³⁰ We will see later that this language of rights and control plays out with slight variation in discussions of divorce.

Let us return to the *Kitāb al-Ḥujja* for another scenario. In this case, rather than a mother marrying off her infant son, here a father marries off his mature virgin daughter (*imra'a bikr*) "against her will (*wa hiya kāriha*)."³¹ This unwilling bride complains to the Prophet, who separates her from her husband. Prophetic precedent shows that once a female reaches majority any marriage that takes place against her will is ineffective. Consent may be—as another hadith on 'Ā'isha's authority avers—silent acquiescence, but spoken objections vitiate the marriage. The Ḥanafī divergence does not stop here. The *Ḥujja* also defends Abū Ḥanīfa's view that a *bāligh* female could contract her own marriage. Though Abū Ḥanīfa held females, like males, to be both free from compulsion at majority and capable of contracting marriage for themselves, he and his followers still considered it normal for a bride to be represented by a guardian from among her agnates.

The authority of kin, especially fathers, was critical for these thinkers. Paternal authority was not unique, but rather one instance of a broader phenomenon that encompassed other marriage guardians and

slave owners. Mālik explicitly likens a father's power to that of a master: "No one may compel anyone to marry except the father in the case of his virgin daughter and his minor son, and [the master] in the case of his female slave and his male slave and the marriage guardian in the case of his fatherless ward (*yatīmihi*)."³² Shāfi'ī similarly conjoins fathers and masters: "Any marriage guardian of a non-virgin or a virgin woman who marries her off without her permission, the marriage is void, except for the fathers of virgins and the masters of slaves (*mamālīk*)."³³ These statements do not equate children to slaves or paternal power to ownership so much as they frame all social relationships within hierarchical and patriarchal kinship structures.

Though most of the analogies under discussion here relate slavery to marriage, the "slaver/enslaved relationship"³⁴ is sometimes compared to a paternal/filial relation. The absence, probably inadvertent, of the word *master* in the *Mudawwana's* discussion places the owner in a paternal relationship to his slaves: "the father in the case of . . . his female slave and his male slave." Just as a father may be like a master in the control he wields over his offspring's marital unions, a master is also something like a father: slaves are at least partially assimilated into an economy of kinship. Fluid and imprecise boundaries between kinship and ownership ties characterized other relationships in the Abbasid era, including those of clientage. As Paul Forand writes for that era, "one of the categories of symbolic thought in which the slave or freedman appears is that of offspring begotten by the master, their figurative father."³⁵

Juxtaposing the control over marriage wielded by a father and that wielded by an owner can help us better understand the rules governing consent to marriage as well as the jurists' varying views on female legal capacity. First, though, we must make clear the crucial effect—at least theoretically—in the Muslim slave system of allowing slaves to marry, albeit with their masters' consent.³⁶ The ethos of sexual morality binding all believers, including slaves, was vital. A contrast to Roman marriage helps make the case more clearly. If "the purpose of Roman marriage was the production of legitimate citizen children,"³⁷ the purpose of Muslim marriage was licit sex. Roman marriage was limited to citizens or those who were granted "*ius conubii*, the right to contract a valid Roman marriage with Roman citizens."³⁸ For the Muslim jurists, procreation was an aim of marriage, to be sure, but neither licit sex nor

legitimate offspring were limited to marriage. Concubinage—in a form quite different from its Roman practice—made sex lawful and legitimized any resultant children.

Muslim law allowed slaves of both sexes to marry with their owners' permission, and anecdotal evidence shows that they did. They could validly marry either other slaves or free persons, though never their own masters or mistresses. Men could have sexual access to their female slaves only as long as these slaves were unmarried. This attempt to impose sexual exclusivity for female slaves was rare in antiquity; in fact, to be a female slave was generally to have no claim to sexual exclusivity.³⁹ But for the Muslim jurists, slaves' liaisons fell under divine purview: marriage for slaves was a way of ensuring that they did not transgress the boundaries of moral conduct set forth by God. Allowing slaves to marry, however, risked jeopardizing their owners' authority and prerogatives to use their labor and oversee their movements. Owners' control was reaffirmed through regulating the formation and dissolution of marriages and by insisting on the rights of masters to control slaves' labor regardless of marital status.

In keeping with the integration of slavery into a hierarchical framework of kin relations, the supervisory role played by agnatic kin in marriages of free persons (especially females) was played by enslaved people's owners. Owners' scope of authority differed, like that of parents, depending on the slaves' characteristics. As with rules governing marriages of free people, regulations for slave marriage varied by gender and, in some cases, age. Slavery and femaleness were both legal disabilities. Merged in the person of the female slave, they aggravated one another; the disability could be mitigated by maleness in the case of the former or freedom in the case of the latter.

For free males, majority determined their scope for legal action in marriage, but majority might or might not make a difference for enslaved males. The nonconsensual marriage of minor male slaves, like minor sons, was universally accepted, though seldom discussed and presumably rare. A master would gain little by marrying his male slave off before maturity, whereas marrying off a female slave would give him the right to the dower thereby garnered, as well as ownership of any offspring she bore to her husband. Could an adult male slave be compelled to marry? On this point, jurists disagreed. An adult slave's maleness, which would have given him full and sole control over his marital

destiny if he were free, stood in tension with his status as a slave. Mālik and his followers allowed an owner to marry off his male slave without the slave's consent; in this matter, slave men were like female slaves, virgin daughters, and minor sons.⁴⁰ Enslavement either feminized or infantilized the male with regard to consent. Formative-period Ḥanafī texts do not discuss explicitly whether male slaves could be married off without their consent, and later texts are split, though the dominant view favors compulsion.⁴¹ Both Ḥanafī and Mālikī authorities held that though the owner's permission was required for the valid marriage of a male slave just as for a female slave, if a male slave married before obtaining permission, his master could either dissolve the marriage or authorize it after the fact.⁴²

Shāfi'ī—concerned, as with the minor non-virgin, with making sure every legal claim was respected—diverged on both points. He disallowed the master's after-the-fact ratification of a slave's marriage. But not only was the master's permission vital for a valid contract, so was the slave's explicit consent: the contract was null if either had not consented in advance.⁴³ Gender interacted with enslavement to define a male slave's agency for Shāfi'ī. As a slave, he could not marry without his master's permission, but as a man, he could not be compelled to marry. A certain irreducible masculinity prevented an adult male slave from losing the right to sexual self-determination for Shāfi'ī; he explicitly contrasts the male slave with a female slave, who was perpetually subject to coercion.

In contrast to the male slave and the free female, sexual and marital self-determination was never available to an enslaved female. Her master's right of possession granted him licit sexual access to her, and if he married her off that right passed to her husband.⁴⁴ Occasional passages suggest that certain enslaved women had forceful opinions on the selection of their husbands. Ḥanafī authorities even countenance after-the-fact ratification of a slave woman's marriage.⁴⁵ The ultimate decision, however, rested with her master: as a matter of law, a female slave had no choice, regardless of whether she was in her majority or had been previously married. In contrast to free women, female slaves' virginity is seldom discussed in connection with their marriages, and where it does appear, its irrelevance is clear: "He may marry off his female slave without her permission whether she is a virgin or a non-virgin."⁴⁶

The transition from virgin to *thayyib*, legally irrelevant in matters of marriage for female slaves and all males, was momentous for free females. *Thayyib* free women past the age of majority had to give their spoken assent to any marriage contracted on their behalf.⁴⁷ Sexual experience gave the bride a voice, as al-Shaybānī notes: “A virgin’s permission is her silence, but a non-virgin’s consent is spoken [*bi lisānihā*].”⁴⁸ The bride’s speech acts not merely as token acquiescence but might potentially reflect a take-charge attitude: Ibn al-Qāsim states in the *Mudawwana*, in response to Saḥnūn’s query as to whether silence on the part of a *thayyib* constitutes assent, “No, rather she must speak and delegate her *walī* to marry her off.”⁴⁹

The paradigmatic case for this type of female consent is that of Khansā’ bint Khidhām. Having been previously married, Khansā’ objected to a marriage concluded for her by her father. According to the *Muwatta’*’s account, “She went to the Messenger of God, may God’s blessings and peace be upon him, and he rescinded the marriage.”⁵⁰ Mālikī and Shāfi’ī texts cite her case as proof that a man loses the power to compel his daughter’s marriage once she is a *thayyib*. Ḥanafī authorities stretch the lesson of Khansā’’s case further, concluding that *any* woman who has reached majority escapes her father’s power of compulsion. Muḥammad al-Shaybānī follows Khansā’’s case in the *Muwatta’ Shaybānī* with the declaration that “[neither] the non-virgin nor the virgin if she has reached majority should be married off except with her permission”; this is the case “whether her father or someone else is marrying her off.”⁵¹ Though she need not consent verbally, a mature virgin’s implicit assent through silence is required. If a mature virgin expresses opposition, she cannot be considered to have consented to the marriage. The *Kitāb al-Ḥujja* recounts further instances in which a *bāligh* virgin was married off “without her consent (*bi ghayri riḍāhā*)”⁵² or “against her will (*kāriha*).”⁵³ In each case, the Prophet revokes the marriage or declares it null.

Abū Ḥanīfa takes his view about females in their majority further still. Like his teacher Ja’far al-Ṣādiq, he holds that women can conclude marriage contracts. In Khansā’’s case, as retold in the *Kitāb al-Ḥujja*, the Prophet separated her from the man to whom she did not wish to be married and “commanded her to marry” the man she wanted to marry. Abū Ḥanīfa interprets the prophetic grammatical imperatives to include

the actual conclusion of the marriage contract.⁵⁴ (“*Ja‘ala ilayhā ‘uqdat al-nikāh.*”) Later Ḥanafī texts point to the use of the active verb form in Q. 2:232 to describe women “marrying” spouses as evidence for their position.⁵⁵ The *Hujja* restricts itself to sunna evidence, suggesting that Qur’anic grammatical arguments about women’s legal agency had not yet become part of the debates on this topic.

Though he departs from the view of the other jurists in ruling that women may conclude marriage contracts, Abū Ḥanīfa assumes, like his contemporaries, that families have a special stake in the marriage arrangements of their female members and that women should not marry beneath themselves. He permits women to contract their own marriages, though with restrictions that do not apply to men. For Abū Ḥanīfa, a woman must marry a man who is at least her social equal (*kuf*²). Though various criteria for suitability are given, the text notes pragmatically that “he is not an equal for her in any way if he cannot find the means for her dower or maintenance.”⁵⁶ Indeed, the bride must specify the full dower appropriate to a woman of her family, status, and, where relevant, personal qualities. “If she selects a suitable match and does not settle for a reduced dower,” Abū Ḥanīfa declares, “then the marriage is allowed.”⁵⁷ Abū Ḥanīfa appeals to a statement attributed to the caliph ‘Umar ibn al-Khaṭṭāb: “A woman is not married except with the permission of her marriage guardian, someone of her family with sound judgment, or the constituted authority (*al-sulṭān*).”⁵⁸ If the marriage she contracts meets these criteria, she could herself be considered a “member of her family with sound judgment.”⁵⁹ If it does not, her marriage guardian could challenge the marriage. Mona Siddiqui has suggested that the cosmopolitan and stratified society of Iraq was influential in the development of the Ḥanafī concept of suitability (*kafā’a*), which has a more prominent place than in the jurisprudence of more egalitarian Medina.⁶⁰ Reflection also suggests a legal rationale: granting women the power to contract marriage without the involvement of a guardian raises the need for a more extensive check than would be the case under Mālik’s or Shāfi‘ī’s view, where no marriage can be contracted except through a guardian.⁶¹

Women’s capacity to conclude marriage contracts divided the Ḥanafī authorities. The *Kitāb al-Hujja* defends Abū Ḥanīfa’s view without dissent; in the *Muwatta’ Shaybānī*, though, Shaybānī reports Abū Ḥanī-

fa's view but sides with Mālik, declaring, "There is no marriage without a marriage guardian."⁶² A prophetic statement affirming that "if a woman marries without a marriage guardian, her marriage is void, her marriage is void, her marriage is void" serves as proof here, as similar statements do in Mālikī and Shāfiī texts. Many versions of this sentiment are found in the *Muṣannaḥs* as well, though they do not appear in Ḥanafī texts apart from Shaybānī's *Muwatta'*. Thus, the Prophet's words about the non-virgin having "more right to herself" meant only that she could withhold her consent for any marriage and not be coerced, al-Shaybānī says, not that she could contract a marriage independently.⁶³

At stake in all of these arguments is a basic question of female capacity, or rather incapacity. For the majority of these thinkers, a previously married woman might take a more direct role in the selection of potential grooms, perhaps "delegat[ing] to her marriage guardian,"⁶⁴ but she still required his permission to marry and he had to conclude the contract for her. If he was unwilling to do so despite the groom's suitability, a woman could seek intervention from a public authority or, perhaps, bypass a father's authority by having another (male) agnatic relative such as a brother marry her off—with her consent, of course.⁶⁵ Some Medinan authorities were willing to fudge the guardian issue in the case of "lowly" women, retroactively authorizing publicly celebrated marriages.⁶⁶ Shāfiī jurists objected; all marriages must have guardians, regardless of the economic and social status of the parties involved.⁶⁷ This is, in a way, an egalitarian stance. But if social class is irrelevant here for Shāfiī, gender is not: maleness is a prerequisite for contracting a marriage. As Shāfiī puts it, a woman "does not conclude a marriage contract (*lā ta'qīdu 'aqd al-nikāḥ*)"—or, more poetically, "does not tie the marriage knot."⁶⁸ In other words, a woman is bound by a tie she can neither establish nor sever of her own accord: she is tied up in the marriage in a way that her husband is not.

The case of female owners and their female slaves can help us see what is at stake in women's (in)ability to contract marriage as well as how marriage was different from other transactions. Free women in their majority could own and manage assets (*māl*), just as free men could. A wife's legal personality was not subsumed by her husband's. Control over property was independent of marital status for women just like it was for men, except that Mālikī jurists granted a husband the right to

oversee certain of his wife's transactions.⁶⁹ Cristina de la Puente argues that, in addition to the requirement for the husband's "express consent" to be given for certain acts, the husband's right to forbid his wife from leaving the home also amounts to an indirect restriction on her legal capacity.⁷⁰ But, in formal terms, marriage did not generally interfere with a woman's legal capacity to own, buy, sell, or manage property. Substantial evidence for economic activity by Muslim women of all social classes and marital statuses attests to the importance of these rules in practice, but my concern here is with the jurists' treatment of these rights.

The property over which women wielded control included both male and female slaves for whose marriages a free woman's consent was required. (Being married was a "defect" that could reduce the slave's commercial value, as the owner had to accommodate the slave's marital rights.) None denied the female owner's proprietary interest even as they disagreed over the scope of her powers over her slaves' marriages.⁷¹ But could a woman marry off her own female slaves? The jurists' answers to this question show three distinct approaches to women's legal capacity and the nature of marriage as a contract and also illustrate the give-and-take process through which doctrines were refined. Mālik and his followers held that female owners had to appoint or delegate someone to contract the actual marriage. The agent had to be male, adult, Muslim, and not subject to restrictions on his legal capacity. Agnatic kinship was not required—that is to say, the agent need not be eligible to be the woman's own marriage guardian. In contrast, Abū Ḥanīfa believed that "there is no harm in a woman marrying off her female slave (*amatahā*) or her male slave (*ʿabdahā*)."⁷² Because it was her consent as owner that was necessary, there is no point in making her delegate the actual contracting to a male. Shāfiʿī insists that both of these positions were flawed. He concurs with the Ḥanafī critique of Mālik's doctrine: "If she is not the slave girl's marriage guardian, no one can be a marriage guardian on her [i.e., the slave-owner's] account."⁷³ Delegation is a flimsy end run around the issue of female capacity to contract marriage. Shāfiʿī finds Abū Ḥanīfa's solution equally unpalatable. To avoid the pitfalls inherent in both opposing positions, Shāfiʿī declares that a female slave must be married off by her female owner's own marriage guardian. This effectively renders the slave woman's sexuality an extension of her owner's sexual capacity; it

must be subject to the control of a responsible male, and not just any responsible male. If this guardian is unavailable or unwilling, the role defaults to the constituted public authority, as in the owner's own marriage.⁷⁴

Jennifer Glancy, discussing Roman slavery, notes that slave bodies can serve as surrogates for their owners.⁷⁵ Here, in a sense, the female slave owner serves as a kind of body double for her slave. It is neither that her own status is reduced to that of slave, nor that the slave's status is elevated to hers. The simplest explanation is that when it comes to marriage, femaleness trumps other legal considerations. But the identification of the slave with her mistress is intriguing. Shāfi'i does not, to my knowledge, address the parallel case of a woman marrying off her male slave. Must the owner's own guardian marry him off too? That one cannot formulate a model that answers this precisely points to some of the difficulties of women owning other persons but not having the capacity to conclude transactions that result in sexual legitimation.

Shāfi'i's rationale for prohibiting a female owner from delegating the contracting of her female slave's marriage boils down to an unspoken difference between marriage and other contracts. Delegation itself posed no problem. A male slave owner, he says, could delegate the contracting of his slaves' marriage, "except that he may not appoint a woman as an agent," or a slave, a minor, someone who was not completely free, who was under interdiction,⁷⁶ or who had lost his reason, "because such people cannot be marriage guardians under any circumstances."⁷⁷ This list likens a free woman to individuals with restricted legal capacity, including unfree persons who cannot own property at all under Shāfi'i doctrine and others who, because of interdiction, loss of rationality, or minority status, are temporarily unable to conclude any property transactions.⁷⁸ Neither the restriction on ownership nor that on making contracts normally applies to a free woman, but when marriage enters the equation, the female owner's legal capacity shrinks. Marriage of slaves thus poses a dilemma for Shāfi'i. Otherwise at pains to insist on the inalienability of female property rights regardless of agnatic authority over female bodies, here Shāfi'i restricts them in the same way he restricts women's ability to marry themselves off. In this instance, property rights and control over bodies intersect. He restricts a woman's property rights over her enslaved female in order to remove her possible role in any transfer of sexual rights. (Interestingly, she

could sell her unmarried female slave to a man, and sexual rights would belong to the new master. One explanation for this potential contradiction is that these rights are somehow in abeyance when the owner is female. The slave woman's sexuality is not actually under the owner's control, precisely; the woman cannot use it herself nor does she really have dominion over it. She can sell it, but she is selling a potential along with the actual ownership of the slave. This is symbolized in the lack of *istibrā'*, a one-menstrual-period ban on sex with a newly purchased slave woman to make sure she is not pregnant, if sold by a trustworthy woman.)

For Shāfi'i—though not for Abū Ḥanīfa—marriage is fundamentally distinct from the transactions involving purely commercial property that women were free to conclude, because marriage chiefly functioned to establish the sexual lawfulness of a woman who would otherwise be forbidden. The broader scope for involvement of women in their own marriages and that of others in Ḥanafī doctrine was not limited to contracting it, but also to witnessing it. Ḥanafī authorities allowed women as witnesses to marriage (albeit at a two-to-one ratio, as with sales, and only so long as one man was present), suggesting a view of marriage as similar to (other) property transactions. Others treated marriage as being unlike sales but rather like areas where women's testimony was uniformly forbidden, where God's claims were at stake, as with transgressions involving prescribed (*ḥadd*) punishments.⁷⁹ Marriage was intimately bound up not only with transfers of money but also with potentially dangerous sexual rights.

Those who believed that a woman could not conclude a marriage contract on her own behalf or for someone else linked this incapacity to the woman's inability to convey licit sexual access to herself or another woman through marriage. According to the *Mukhtaṣar* of al-Muzanī, "The [woman's] sexual organ is forbidden (*al-farj muḥarram*) before the contract and it is never made lawful except that the marriage guardian says 'I have married her to you.'"⁸⁰ The *Mudawwana* phrases its concern differently; a woman's marriage is valid only when concluded by her marriage guardian because the marriage guardian has a "share" in, or authority over, her *bud'* (vulva, also the initiation of her marriage) and thus has an interest in seeing it properly transferred to a fit spouse.⁸¹ He must prevent her from "marrying someone whose lineage (*nasab*) is deficient in comparison to her lineage."⁸² Mālik's half-measure in the

case of a female slave perhaps recognizes that lineage is not a concern in her case; this may parallel the relative unimportance of marriage guardians for “lowly” women. Despite their differences, then, all accepted a kin-based patriarchal system that invested free women’s agnates with significant control over their bodies. Indeed, though his view on women’s ability to conclude marriage contracts differed, Abū Ḥanīfa’s shared concern for lineage was reflected in his opinion that a woman’s marriage guardian could have her marriage annulled if she married beneath her station.

Gender was, then, the most enduring aspect of legal personality. Both slavery and minority were legal disabilities of a sort, as was—in a different respect—being non-Muslim. However, only femaleness permanently limited a person’s legal capacity. A slave might be manumitted, a non-Muslim could convert, a child would reach maturity. A woman, however, would remain female, with the “whiff of disability” attached to her legal capacity.⁸³ In many respects, Muslim women were less constrained legally than their other near-Eastern counterparts, and certainly less than their later European sisters. Even though sweeping statements about premodern European women’s low legal status have been substantially qualified or outright contradicted by archival research, the fully independent legal personality enjoyed by married Muslim women stands out as unusual, historically. With regard to the management of property in particular, despite the lingering restrictions under Mālikī thought, women retained capacity for many types of transactions. Marriage, however, was not one of them.

Gail Labovitz has pointed out that under Jewish law women, minors, and slaves had a different “relationship to commandedness” with regard to religious obligations.⁸⁴ She writes that “women and slaves are differentiated from children—and associated with each other—by their shared, paradoxical status as adults with conscious control over their activities who are nonetheless excluded from full religious participation.”⁸⁵ The nexus differs somewhat in Muslim thought with regard to religious obligations: husbands and masters must allow the fulfillment of obligatory devotions precisely because wives and slaves, if Muslim, are required to fulfill them. On the other hand, they are allowed to prohibit supererogatory acts of worship if they might interfere with the performance of duties. Interestingly, no one ever seems to ask whether a parent can forbid a child from performing acts of worship: discussion

centers on the parental obligation to teach children appropriately so that they are both capable of and willing to fulfill their obligations, especially prayer, once they reach the appropriate age.

Early Christian thinkers discussing maleness make a different connection between slavery and minority. Though in some respects slaves were treated like minors, Glancy notes that a minor “expects that he will eventually attain the status of manhood, but the slave does not.” In first-century “Greco-Roman systems of gender” “the slave could not grow into the full status of a man.” Because of his “subordinate status” he could not claim “the position or the prerogatives of manhood.”⁸⁶ A comparison with Muslim law illustrates significant commonalities but also crucial differences. A male slave was most like a minor in the exercise of property rights (though minors could not transact property but could own it), and least like one in connection with marriage. The most characteristic element of enslavement—the inability to truly own property—was not, in the Islamic understanding, gendered. Because free women as well as free men have the legal capacity to own and transact movable and immovable property of virtually all types, property ownership never became a distinguishing criterion of manliness.

The enslaved male was infantilized insofar as his master controlled his marriage—at a minimum having to grant permission, and at a maximum being able to force a marriage over the slave’s objections, as a father could with his minor sons. But, as later chapters will show, once he became a husband, he gained the full “prerogatives of manhood,” which were not coextensive with those of freedom. Glancy notes that for the apostle Paul’s first-century audience, the “sexual vulnerability of the slave” would have been assumed: “A slave’s inability to master the borders of his own body was a corollary of his subordinate status and his permanent exclusion from the category of manhood into which the heir would grow.”⁸⁷ Muslim jurists, by contrast, soundly insisted on the male slave’s status as sexual agent, not sexual object. Despite abundant historical and literary evidence for the sexual use of male slaves in courtly and other contexts, early legal discourse firmly distinguished enslaved men from enslaved women—and indeed all women—through granting to them uniquely masculine prerogatives.

Dower

Bodies and sexual rights were not the only things transacted in marriage; money figured too. As in most societies through history, marriage transferred wealth. Dower—*mahr* or *ṣadāq*—was the primary male obligation resulting from marriage. Wealth given from the groom to the bride became legally her sole property, unless she was enslaved, in which case it belonged to her master.⁸⁸ Dower has historically served as an important source of economic capital for women, as well as a bargaining chip in negotiations with spouses and kin. The practical patterns of financial transactions associated with marriage did not always conform precisely to legal norms governing dower, in which the payment from groom to bride was the single necessary monetary transfer associated with marriage. Yossef Rapoport and Amalia Zomeño have shown that in both early Egypt and later Andalusia, reciprocal wealth transfers from the bride's family to the new household in the form of trousseaux were the norm.⁸⁹ Further, Rapoport has shown that early jurists opposed the deferral of part or all of the dower to death or divorce, although they eventually capitulated to this common practice.⁹⁰ Precisely because their doctrines did not merely replicate practice, the jurists' preoccupations with dower allow us to see it as a key part of the logical system of marital rights. Early legal authorities said little about its practicalities. They were concerned instead with dower's role in legitimizing sexual intercourse and justifying *milk*. Beyond the social function of dower in marriage, a strong link is established in legal thought between financial compensation and sexual legitimacy, making clear connections between bodily and financial claims.

Discussions of dower depended on and furthered the conceptual relationship between marriage and sale. Juristic disagreement existed over whether a marriage could be contracted using terms for transferring ownership, giving a gift, purchasing, or selling. Mālik and Abū Ḥanīfa validated some or all of these figurative expressions. Shāfi'i, though, allowed only the use of terms relating to *nikāḥ* or *tazwīj*. The latter, "espousal," has forms that relate both to marrying and to causing someone else to be married. The former, whose literal meaning is intercourse, takes on the legal meaning of a contracted marriage. (There is no parallel here to the "acquisition" of a woman through intercourse

found in rabbinic literature; though a claim that the parties *thought* they were married can divert the punishment for illicit sex, such a claim can never establish a marriage without the proper offer and acceptance.)

Whether the terminology of sales can validly contract a marriage or not, the vocabulary of sale or purchase was already used metaphorically for other relationships, including those between human beings and the divine. A late nineteenth-century essay by Charles Torrey points out that “the theological terminology of the Koran contains a number of words which are primarily used to express some commercial relation.”⁹¹ Such usage neither trivializes nor concretizes the human-divine relationship. For instance, God is said to buy human souls, but no one understands this as a literal purchase. Likewise, the language of slavery is also applied to the human-divine relationship. The word for a male slave, *‘abd*, also means a male worshipper: human beings are God’s slaves. Indeed, in the profession of faith, Muslims bear witness that Muḥammad is God’s *‘abd* and messenger. Servitude of this form carries positive value. Yet to be enslaved to another human being is to be abased. When a wife is compared to a slave, or the marriage contract analogized to purchase, questions emerge about which connotations are most apt.

The jurists employ overlapping linguistic, conceptual, and legal parallels between marriage, slavery, and ownership. The contracting and dissolving of a marriage gave rise to the clearest parallels between matrimony and slavery or purchase. The centrality of *milk* (ownership, control, dominion) emerges as the tie joining the two parties is established or dissolved. These parallels “between the condition of servility and the condition of marriage in Islam” center on the sexual claims established by the marriage contract. In the words of John Ralph Willis, “A comparison is drawn between the dominion imposed by the husband through which his wife is caused to surrender her sexual self, and the sovereignty established by the master whereby the slave is compelled to alienate his right to dispose.” Willis notes that marriage is “likened to a sale”: “it is said that in the market the master buys his slave, whereas in marriage, the husband purchases his wife’s productive part.”⁹² Yet the fact that the wife does not lose her “right to dispose”—that is, her control over property—distinguishes the transactions even as it highlights the sexual character of the ownership conveyed through marriage. More obvious even than parallels between marriage and purchase of a slave are jurists’ frequent analogies be-

tween unilateral divorce (*ṭalāq*) and manumission.⁹³ Marriage, Willis says, enslaves a “woman’s sexual self”⁹⁴ through the dower, as a slave comes to be owned through purchase; repudiation frees her just as manumission frees the slave

Despite these formal similarities, other scholars have focused on critical discontinuities between marriage and sale to argue that marriage is *not really* a sale and the wife is *not really* owned. Using Transoxanian Ḥanafī texts from the tenth through the twelfth centuries, Baber Johansen presents the most cogent defense of this position. Marriage, he argues, is a social rather than a commercial transaction.⁹⁵ In commerce (*tijāra*), property (*māl*) is exchanged for property. In “social exchange,” a symbolic status or relation is transferred in exchange for property. In the marriage contract, “an article of commerce”—that is, the dower—“serves as a means to acquire a social relation or a social status.”⁹⁶ A wife, Johansen argues, grants certain rights in exchange for the dower she receives, meaning marriage cannot be understood as a commercial exchange. Most saliently, the husband does not, by paying dower, come to own his wife: he cannot sell her to someone else. But against Johansen we may note that the inability to alienate something is not, by itself, dispositive: Islamic law forbids masters to sell certain slaves (including female slaves who have borne them children) and landowners to dispose freely of certain real estate; the slaves and the land are, nevertheless, property in a very real sense.

The vexed question of marriage and ownership is not unique to Muslim legal sources. The question of whether—and to what extent—wives are property in rabbinic tradition has received a great deal of scholarly attention, most famously in Judith Romney-Wegner’s *Chattel or Person?* as well as in numerous responses to her arguments. Labovitz, who surveys this literature, has argued that the “very direct and specific question: are women property in the rabbinic system of marriage?” is unanswerable as formulated.⁹⁷ Instead, she suggests that exploring the metaphors associated with acquisition (“the central model by which the rabbis construct their system of marriage and gender relations”) and ownership provides a better way to think about rabbinic understandings of women and marriage.⁹⁸ She writes, “The metaphor of marriage as ownership and women as ownable is present and critically significant for the construction of gender and gender roles throughout the strata of rabbinic literature.”⁹⁹

Although a series of overlapping metaphorical associations between women, slaves, and (other) property characterizes Muslim legal discourse as well, the central presence of enslaved women alters the dynamic: we move beyond metaphor to analogy. Johansen's analysis, persuasive in key respects, fails to account for the way that the actual commodification of slave women's bodies prevents any simple bifurcation of commercial and social exchange in both concubinage and the marriage of enslaved women, who are both wives and property, albeit of different men. Marriage and slavery require tandem analysis. A "pervasive process of simultaneous assimilation and distinction"¹⁰⁰ between women and slaves, as well as between marriage and concubinage, structures legal discourse.

The frequent resort to analogy facilitates and furthers the association between marrying a wife and purchasing a female slave. Early controversies over the use of analogical reasoning aside, analogy became one of four basic sources of Sunni jurisprudence. The others are Qur'an and sunna, the two textual sources of the law, and consensus. Although consensus came to serve a key legitimating function, it did not play a prominent role for the early jurists. Analogy, however, filled a significant need. Many situations were not directly addressed by revelation or prophetic precedent. By allowing the extension of a ruling from one case to another via a shared underlying rationale (*'illa, ratio legis*), analogy extended the jurists' reach far beyond the texts while allowing them to conceptualize their project as applying revelation to life.

An analogy requires an essential similarity that allows for comparison, but it also requires difference: if things were actually the same, analogy would be unnecessary, as there would be *identity*. In this respect, analogy is much like metaphor. But the legal domain of analogy requires a more precise mapping of one decision onto another, often to the exclusion of other possible "targets." The fact that things are analogous in some respects does not mean that they are so in every respect. An example from the realm of divorce can clarify this. In a Ḥanafī discussion of a wife's option of divorce, beginning or resuming travel causes her to lose her right to choose. The jurists affirm, in their discussion of various modes of travel, that "a boat is like a house."¹⁰¹ That is, the forward motion of the boat does not constitute a deliberate progression on the woman's part that implies a rejection of her choice.

To take this analogy to mean that a boat *is* a house or that all the regulations applying to houses also apply to boats would be ludicrous.

With marriage and sales, the question of how far the analogy stretches is trickier, in part because of the jurists' consistent recourse to comparisons. Despite the likening of marriage to purchase and a wife to a concubine, a wife was not—and could by definition never be—her husband's slave. Not only was she due marital rights far beyond those due to enslaved persons from their owners, though different from and lesser than those granted to her husband, but the two types of *milk* could not be combined. (This will be addressed further in Chapter 5.) Yet marriage and slavery both made a woman sexually lawful. Of particular significance is payment associated with a husband or master's dominion. Both dower and the purchase price of a female slave compensate for exclusive licit access to and control over a particular woman's sexual capacity. The obligation to pay dower correlates to sexual lawfulness in marriage, just as the purchase of a slave conveys sexual lawfulness—provided that other necessary criteria, such as proper consent and the absence of impediments, are also fulfilled.

Given the ubiquity of commercial terminology and the notion of sale as the paradigmatic transaction, comparisons between dower and price were practically inevitable. An outline of the basic rules governing dower will help clarify the underpinnings as well as the limits of legal parallel between dower and a purchase price. The jurists accepted a crucial distinction: marriage contracted for an unspecified dower was valid, whereas sale contracted without a fixed price was void. Nonetheless, they drew heavily on the regulations established for sales (especially of female slaves) to remedy this and other irregularities with dowers. In the frequent analogies made between marriage of a woman and purchase of a slave, the jurists likened the wife to a slave, the husband to the master, and the dower to the purchase price.

In one scenario reported in the *Mudawwana*, a man sends a representative to marry him to a woman for a dower of 1,000 dirhams. The representative dutifully contracts the marriage, but for twice that amount. Saḥnūn asks Ibn al-Qāsim whether in Mālik's view the husband owes the entire 2,000 dirhams.¹⁰² Ibn al-Qāsim answers, in accordance with Mālik's logic, that the husband must pay the entire amount if he consummated the marriage despite knowing that his representative had set a higher dower. To justify his view, he makes a comparison to the

purchase of a female slave. “Can you not see,” he presses, “that if a man ordered [another] man to purchase so-and-so’s slave girl for him for 1,000 dirhams, and [the representative] bought her for him for 2,000, and he knew [that his representative had paid 2,000] and he took her and had sex with her and had privacy with her, then he did not want to pay anything except the 1,000 for her, he could not do that?”¹⁰³ Ibn al-Qāsim clearly expects his questioner to accept his logic in the case of the female slave. He assumes that once the rule has been clarified for the purchase of a slave, its application to marriage will be self-evident. Al-Muzanī applies the same principle in reverse in his *Mukhtaṣar*, quoting a verdict in the case of marriage, which “indicates that” the same rule applies to the purchase of a female slave.¹⁰⁴

Dower was both like and unlike (other) prices and, by extension, marriage was and was not like (other) commercial transactions. In an ideal scenario, a bride received a dower of a specific item or amount, agreed on in advance, of value equal to or greater than her fair dower (*mahr al-mithl*), which was calculated with reference to her female relatives as well as the standards of her premarital place of residence, and adjusted upward or downward to account for her personal qualities, such as beauty, virginity, and wealth. As usual, though, the legal texts deal mostly with departures from the ideal.

Three scenarios follow in which some legal flaw with the dower required remedy—the parties failed to specify a dower, the dower was set below the bride’s fair dower, or the fixed dower was invalid. The varying treatments of these irregularities reveal hermeneutical strategies and assumptions, the limits of parallels between marriage and slavery, and the crucial connection between money and *milk* over the marriage tie.

The first type of irregularity—the lack of a fixed amount—presents the clearest contrast between marriage and sale. Failure to specify a dower at the time of contract had no bearing on the validity of the marriage contract.¹⁰⁵ (The spouses could either come to an agreement later or, if they could not agree, the wife would be due her fair dower if the marriage were eventually consummated; if they parted before consummation with no dower set, she would not receive anything except a “consolation” gift.)¹⁰⁶ In direct contrast, in the case of a sale, the lack of a specified price caused the transaction to be canceled. In characterizing marriage as *not* a sale, Yves Linant de Bellefonds seizes on Shāfi‘ī’s

assertion that marriage is not like a sale because dower is not like a price: a sale without a specified price is always null and void, whereas a marriage that leaves the dower unspecified is generally valid.¹⁰⁷

Though de Bellefonds is correct in saying that this is a clear instance of how marriage was not like sales (or *other* sales), juristic discussions began from the presumption of similarity rather than difference. Though “the marriage is permitted and she is due her fair dower,” the *Kitāb al-Ḥujja* proclaims that had it been “a sale or some other type of pecuniary transaction (*wa law kāna fī bayʿ aw ghayrihi min al-ijārāt*) and a man purchased [something] without a price or leased [something] without a fixed compensation (*ajr*), that [would] not be permitted.”¹⁰⁸ For Shāfiʿī also, the sameness of dower and price needed no justification; rather, any departure from the application of the rules governing sales to marriages required explanation. Shāfiʿī defends his stance on the validity of marriage without a specified dower to an imagined interlocutor who points out that “you [i.e., Shāfiʿī] generally apply rules for sales to marriage (*wa anta taḥkumu fī cāmmat al-nikāḥ aḥkām al-buyūʿ*).” He explains his reasoning precisely when commercial rules are not applied.¹⁰⁹

The second case, marriages contracted where the specified dower was too small, had no parallel in standard sales. Although some ordinary commercial transactions were restricted or regulated, such as those deemed speculative or potentially usurious, for the most part no attempt was made to set a minimum (or maximum) price for any goods or services. Any compensation satisfactory to both parties was adequate. Not so with dower. Though the agreement of the contracting parties, and possibly of the wife herself even if she was not making the contract, was important, the jurists disagreed as to whether such agreement also sufficed to determine a legally valid dower. Both Mālik and Abū Ḥanīfa considered a minimum dower necessary. Mālik, following earlier Medinan authorities, held that the minimum acceptable dower was one-quarter of a dinar, or three dirhams, while Abū Ḥanīfa and his followers fixed the minimum at ten dirhams.¹¹⁰ In a notable difference between Islamic and rabbinic reasoning, there is no differentiation between virgin and non-virgin brides with regard to minimum dower amount. This minimum dower amount is sometimes linked to the lowest amount for which a thief’s hand will be amputated. The rationale seems to be that there is an irremediable loss that occurs through consummation, for

which the minimum dower compensates; however, the lack of differentiation between virgin and non-virgin brides means that this loss cannot be defined as the loss of an intact hymen.¹¹¹

Against Mālik and Abū Ḥanīfa, Shāfiʿī opposed a minimum dower. Asked in the *Ikhtilāf Mālik wa ʿl-Shāfiʿī* about “the smallest permitted dower,” Shāfiʿī’s rebuttal to Mālik drew on a parallel to sale: “The dower is a price (*thaman*) among prices, so whatever they consent to as a dower that has a value (*qīma*) is permitted, just as whatever a buyer and seller (*mutabāʿiʿān*) of anything that has a value [agree to] is permitted.”¹¹² Elsewhere, he directly compares marriage and the purchase of a female slave for sex: “Some of the companions of Abū Ḥanīfa said: We find it objectionable that a [woman’s] sexual organ (*farj*) be made permissible so cheaply (*bi shayʿ yasīr*). We said, What is your view if a man buys a slave girl for a dirham, is her sexual organ lawful to him? They said: Yes. We said: You have permitted a sexual organ and added [ownership of] the [slave girl’s] body for a trifle.”¹¹³ Shāfiʿī’s answer here relies on the sameness and the difference between a wife and a slave girl. The essential similarity between two otherwise different women hinges on the transaction conveying sexual licitness for compensation. Shāfiʿī’s overt point in his argument against Abū Ḥanīfa is that there is no minimum amount for licit access to a woman’s sexual organ. There is nothing inherently wrong with conveying sexual dominion cheaply if one can buy a slave girl for a dirham and be entitled to sex with her. But to accept his argument requires one to conclude that one acquires something more valuable in buying a slave girl than in marrying a wife. A slave’s purchaser comes to own her entire body; a husband acquires substantially more limited access rights over his wife. If one pays only one dirham for a slave girl and gets not only rights to sex but also ownership of her body, access to a wife ought to be worth less than that. If one presumes that access to a wife is worth more than access to a slave, Shāfiʿī’s argument does not hold up. In the last analysis, the success of this comparison rests on the interchangeability of women as sexual outlets.

Exchange marriage (*shighār*), an irregular type of marriage specifying a “nondower,” confirms a dower’s legitimating function with regard to sex at the same time as it shows the jurists’ concern with ensuring brides’ property rights over and above their bodily rights. Apparently an accepted pre-Islamic practice, exchange marriage consisted of two

men marrying their charges, usually daughters or sisters, to each other without a dower being paid to either woman.¹¹⁴ Repeated references to exchange marriage in historical and anthropological literature in Turkey, Jordan, Israel, and Iran, spanning the period from the Ottoman era to the late twentieth century, suggest that exchange marriage has been both widespread and persistent, despite its clear illegality from the perspective of religious law.¹¹⁵ It may be helpful to read the jurisprudential treatment of exchange marriage as a critique of social practice. At the same time, jurists offer specifically jurisprudential rationales for the prohibition, not limiting themselves to repeating that the Prophet forbade *shighār*. Jurists agreed that it was forbidden by the Prophet and that it constituted a legal basis for annulling either or both of the marriages since, as al-Shaybānī put it, “the marriage of a woman is not a dower” (*lā yakūnu ṣadāq nikāḥ imraʿa*).¹¹⁶ The jurists frame their objections to exchange marriage in terms of how it does or does not meet the legal criteria for valid marriages, focusing first on faulty dower and, as a distant second, the possibility of improper consent. The lack of appropriate compensation is the key problem: as the *Mudawwana* put it in another context, a free woman “is due her dower, and her *buḍʿ* is not made lawful by anything except it.”¹¹⁷ One Medinan authority quoted in the *Mudawwana* stated, “Exchange marriage is that a man marries [another] man to a woman and that other man marries him to a woman, the *buḍʿ* of one of them for the *buḍʿ* of the other, without a dower, and [other practices which] resemble that.”¹¹⁸ In the *Umm*, the fact that “the dower of each of them will be the *buḍʿ* of the other and no [other] dower is set for either of them” defines exchange marriage.¹¹⁹ Mālik objects to such marriages even if dowers are assigned to each woman, particularly if the dowers are identical; he refers to the cases of daughters as well as slaves. In addition to the general parallel between father and master here in terms of broad authority, these are both instances where the men in question would have access to the money involved; Mālik grants fathers extensive power to draw from their offspring’s property holdings at will.¹²⁰

Jurists explained the forbidding of exchange marriage in terms of its failure to fulfill the requirement of proper dower. In doing so, they raised the question of how consent to marriage relates to control over financial rights. There was a complicated relationship between bodily integrity and financial integrity. Exchange marriage involved the nonconsensual

waiver of the bride's financial rights. However, even guardians with the right to marry women off without their consent did not necessarily have the right to waive the women's financial claims. This conflict sometimes arose outside of exchange marriage, when a proposed dower fell beneath the bride's fair dower (but above any necessary minimum). A female in her majority could accept a less-than-fair dower, though this might require the approval of her guardian or guardians.¹²¹ But if a bride did not control her own assets because of minority or other incapacity, could her guardian marry her off for less than her fair dower? Mālik and Abū Ḥanīfa allowed a minor girl's father to do so, and Mālik extended this to a virgin in her majority who was married under compulsion: compulsion and financial control were coterminous. Mālik's treatment of a daughter's financial rights coheres with his overall stance granting fathers extensive rights to appropriate the property of their offspring—male or female, minor or major—at will. It also assumes goodwill on the father's part: any reduction of dower should be out of concern for the daughter and should not result in harm to her.¹²²

Abū Ḥanīfa's disciples and Shāfi'i object: a minor ought never be contracted in marriage for less than her fair dower.¹²³ The *Umm* argues that no one else has control over a female's property, regardless of her age, and so no marriage guardian can forgo her claim on her behalf. When she attains majority she can consent to a reduced dower, but as a minor she is not legally capable of making financial decisions and is thus unable to consent validly. (Shāfi'i's argument here parallels his stance on the marriage of the minor non-virgin: her consent was necessary but she was incapable of giving it, so no marriage could take place.) Shāfi'i's zealous defense of female property rights stands against his seemingly cavalier treatment of bodily integrity. A never-married woman's father could marry her off even over her objections, but could not alienate any portion of the compensation due her for the marriage.

The previous two types of dower irregularity—either failing to specify the dower or falling below a minimum amount—were problematic because of their potential interference with the wife's rights. The third and final type related to the dower itself. What happened if the particular goods specified as dower could not be delivered? If the goods were discovered to be unlawful, turned out to be defective, or were damaged before the handover, two remedies were possible. The husband could either pay the wife's fair dower or give her the goods'

fair price. Both approaches draw heavily on the rules for the regulation of commercial transactions. At times, these comparisons point up differences, but more frequently they show similarities.

As with the case of the doubled dower, Ibn al-Qāsim appeals to another case involving the purchase of slaves in order to explain a verdict with regard to marriage. This explicit calling of attention to the fact of the parallel is noteworthy. More usually, the parallel is alluded to and the analogy drawn with the presumption that its relevance will be understood. But here the *Mudawwana* states that a man may marry a woman “for whichever of my two slaves” *she* wants, but if he specifies that she receive whichever of two slaves *he* wants, “there is no good in it.” Justifying this decision, Ibn al-Qāsim offers, “Can you not see that if he sold one of the two [slaves] to a man for ten dinars and let [the buyer] choose [which one he wanted], there would be no problem with it, but if he says ‘I will give you whichever of the two I want,’ there would be no good in that?”¹²⁴ The commercial rule self-evidently applies to the negotiated dower. Ibn al-Qāsim’s approach to this problematic dower, like his approach to the case where the husband’s representative doubled the dower, illustrates the vitality and usefulness of commercial analogues in the property transfer associated with marriage. The parallel between dower and price may be effective only up to a point, but up to that point it is useful.

Where the strict correspondences break down, however, we see instability in the jurists’ categories. In the case of the doubled dower confronted by Ibn al-Qāsim earlier, the wife is a seller and maybe also the object of sale. Where her role is parallel to that of a purchaser of one of two slaves, she is a buyer. Barter systems lead to these uncertainties: if one is not exchanging cash for goods, then a strict demarcation between buying and selling becomes impossible. The dower sometimes functions as a method of purchasing rights over the wife’s sexuality. At other times, it appears as an asset that the wife acquires, paying for it with her *budʿ*. This fluidity of categories—the bride is sometimes akin to buyer, and her sexual capacity is the thing transacted or the object of the transaction—stands in the way of facile characterizations of marriage as a purchase of a woman’s sexual capacity or a woman “selling herself.”

Treatment of a similar issue, where dower goods were destroyed before a bride took possession of them, reveals diversity of opinion,

change, and legal development. Dower, like any other salable good, had to consist of “ritually and legally clean” items with “legal value.”¹²⁵ Salable goods were either fungible (*dayn*), such as cash or produce, or unique (*ʿayn*).¹²⁶ Problems with a fungible dower could be fixed simply by substituting its equivalent. With unique items such as real estate, livestock, and—most often—slaves, substitution was an inadequate remedy. In an ordinary purchase, destruction or damage to unique goods would cancel the transaction. If the defective goods were specified for dower, however, the marriage would not be invalidated. Rather, if a slave specified as dower turned out to be defective or free, the problem could be resolved in two ways, which we can term the *fair price approach* and the *fair dower approach*. In the former, the wife would collect the monetary equivalent of the invalid dower. In the latter, the specified dower would be ignored in favor of the wife’s fair dower, whether that turned out to be more or less than the specified dower. The *Jāmiʿ al-Ṣaghīr* takes the example of a dower of a particular slave who turns out to be free. Because the wife may not, of course, take possession of the free man, Abū Ḥanīfa and Muḥammad al-Shaybānī resort to her fair dower.¹²⁷ Abū Yūsuf instead awards her the amount the man would have been worth as a slave, an approach shared by Mālik and his followers.¹²⁸

Shāfiʿī texts express both views but ultimately favor the use of fair dower instead of the fair price model of Abū Yūsuf and Mālik. In one instance of the fair price approach, the *Umm* states that in the case of a defective slave fixed as dower, the wife is to receive his value “as in sales.”¹²⁹ This view was not authoritative, however; al-Muzanī criticizes it as “an error (*ghalaṭ*)” in his *Mukhtaṣar*, which draws on a slightly different, and presumably earlier, body of Shāfiʿī doctrine than that preserved in the present-day text of the *Umm*.¹³⁰ Al-Muzanī’s solution, the one ultimately adopted by Shāfiʿī, is that she “is due her fair dower instead.”¹³¹ One text in the *Umm* explicitly acknowledges both views in a case where the dower was destroyed before the wife took possession. The analysis lays bare the logic of the marital transaction: the wife barter her *buḍʿ* for a consideration (*ʿiwad*) in the form of a dower. Shāfiʿī argues that the wife should get her own fair dower: “Rather than claiming the thing [i.e., the dower] that she came to own by her *buḍʿ*, she claims the *buḍʿ*’s price (*thaman al-buḍʿ*).”

At the liminal moment of the marriage, the wife is a purchaser, using her *budʿ* as payment. “This is,” Shāfiʿī continues, “as if she bought something for a dirham and that thing was destroyed [before she took possession of it].” Her *budʿ* is equivalent to the dirham; the husband is the seller, and the dower the item being sold. As the goods sold (the dower) for the dirham (her *budʿ*) were destroyed, the wife is entitled to “claim what she gave him because he did not give her the consideration for the [one] dirham price.” Once the marital transaction has been finalized, though, and payment must be corrected, the wife’s *budʿ*—unlike a dirham—cannot be refunded. Instead of claiming her *budʿ* back from her husband, she can only claim back its value. In an analogous case, where the specified dower was a slave who turned out to be defective, Shāfiʿī states, “If she returns it, she claims her fair dower from him, because she has sold him her *budʿ* for the slave (*bāʿathu budʿahā bi ʿabd*).”¹³² Seen retrospectively, the marital transaction positions the wife as the seller, even if what she has sold (i.e., her *budʿ*) was, in strict terms, a noncommodity.

With this example, we return to Johansen’s model of commercial versus social exchange. He explains marriage as an exchange of a commodity (the dower) for a noncommodity, which is reasonable when the bride is free. But though what is being exchanged on the wife’s part is noncommodified, the transaction can be understood in commercial terms. It differs from ordinary sales in that, with a few very limited exceptions, problems with the dower do not justify voiding a marriage.¹³³ Rather than view this as evidence that marriage is unlike sales, though, we see that it is like a sale in which the sold item perishes and hence cannot be returned. As Shāfiʿī puts it, “Marriage is not rescinded; it is like the sale of a consumable.”¹³⁴ This view was implicit in the Mālikī view already presented, where “a man marries a woman for a specific slave,” but, when the woman takes possession, “she discovers a defect in the slave.” According to Mālik, “She returns [the slave] and she is due his price, and this is the same as in sales (*mithl al-buyūʿ sawāʾ*).”¹³⁵ A cash sale of a defective slave would have been entirely canceled and the purchase price refunded to the buyer. In marriage, though, the wife cannot claim back what she had paid (or traded to) the husband. Defective dower cannot cancel the marriage because transfer of authority or control has irrevocably taken effect with the contract, even

before consummation. (This is also the case for Mālik, despite the fact that in other cases he admits some significance to consummation.) With regard to dower here, consummation merely finalizes some aspects of the husband's control and establishes the wife's right to the full amount of her dower.

Conclusion

The early jurists' treatment of issues such as kin involvement in marriages, the consent of brides, and the role and regulations surrounding dower have been transmuted, and in some cases radically transformed, over the centuries. Guardianship and dower still play key symbolic, and sometimes legal, roles in most Muslim marriages. In two key respects, though, modern discourses about contracting marriage depart significantly from their premodern juristic counterparts. The first main shift has to do with consent and the second with the use of commercial language to describe the contracting of marriage.

Contemporary conventional wisdom about Islamic law holds that female consent is always necessary for marriage. In modernity, Muḥammad's words in the permission hadith are commonly taken to forbid any marriage without the bride's consent. It is a truism among both lay thinkers and some scholars that "Islam requires" a woman's consent to marriage and forbids all compulsion. This use of the hadith reflects a broader tendency among many Muslims to take hadith texts and Qur'anic texts as literal guidelines wherever possible, not interpreting them through the lens of legal assumptions.¹³⁶

Such interpretations are furthered by the near disappearance of marriages conducted before puberty among educated Muslims and in urban areas. Both the rising age of marriage required by national bureaucracies and the shifting social patterns that increase the usual age at marriage have led to a decline in marriages of minors. These reforms can also be the result of deliberate policy shifts, as with the Aga Khan's twentieth-century reforms raising the minimum marriage age for girls to fourteen in 1925 and sixteen in 1962.¹³⁷ Changing conceptions have linked legal majority not to puberty but to a "coming of age" that hovers around eighteen in most nations with a Muslim majority, though a slight disparity between boys and girls is often present. Even with such reforms, earlier marriage is often possible with parental consent and

does occur, despite its illegality, in some regions and social strata.¹³⁸ Where the marriage age has been lowered, as it was in the Islamic Republic of Iran, it has been to the disapprobation and sometimes bewilderment of many. The documentary film *Divorce Iranian Style*, by legal anthropologist Ziba Mir-Hosseini and filmmaker Kim Longino, captures a telling moment. A girl married in her midteens argues to a judge that she was too young to get married and demands that he tell her the minimum age for marriage. His response of “nine” renders her speechless.

Like the marriage of minors, the framing of marriage in transactional terms sits uncomfortably with Muslims today. Commercial and slavery-related terminology rarely appears in discussions of marriage. One reason for the shift is the universal abolition of legal slavery. Another is the sidelining of analogy from the legal process. As legislated codes have replaced jurisprudence as the main way law is made, substantive rules have been adopted in isolation from the methodological and discursive frames in which they were originally embedded.

For the formative-period jurists, marriage was formed by consent—not necessarily the bride’s and groom’s—and invoked certain claims, especially dower, in the form of compensation, in ways that render it both like and unlike other transactions. The analogy between the contracting of a marriage and the purchase of a slave operated at several levels to render marriage intelligible. The analogy made possible the translation of legal rulings from one arena to the other. If a matter was clear for purchase, it was clear for marriage, and vice versa. Additionally, the transfer of control or ownership (*milk*) that occurred in both the sale of a slave and the contract of marriage made sex licit, when the object of the “purchase” is female and the “purchaser” male. When slavery is no longer part of the functioning legal framework, there are no relevant provisions to apply across categories.

For the formative-period jurists, on the other hand, slavery was essential. Ottoman historian Ehud Toledano has argued for understanding enslavement (a term he prefers to *slavery*) as “a form of patronage relationship, formed and often maintained by coercion, but requiring a measure of mutuality and exchange that posits a complex web of reciprocity.”¹³⁹ Without discounting the necessary inequality—he refers to “an involuntary relationship of mutual dependence between two quite unequal partners”¹⁴⁰—he situates enslavement and the “slaver-enslaved

relationship" within existing social forms. The family and the household are both hierarchically constituted relationships based on unequal but reciprocal exchanges. Toledano's insights about the relationship between slaver and enslaved also apply to the marital relationship: wives were legally subordinate to a lesser extent than slaves, but they were constrained by, and yet still capable of responding within the constraints of, the unequal legal and human relationships they had with their husbands. These relationships and the claims and counterclaims that constitute their basic framework are the subject of the next two chapters.