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Maintaining Relations

Aḥmad b. ʿUmar al-Khaṣṣāf (d. 261/874), an early Ḥanafī, devoted an entire treatise to the subject of maintenance.[1] His *Kitāb al-Nafaqāt* discusses a man's duty to support his wife alongside his obligation to maintain relatives and slaves, and also his obligation to feed animals. Most dependents' claim to support was contingent on need, and the obligation to pay support was conditional on financial capacity. This was the case for slaves, offspring, and parents and other relations. Not so with spouses: a husband owed his wife support regardless of her need or his ability to pay. Indeed, "a married woman does not claim maintenance from anyone other than her husband," even if her kin are wealthy and her husband is poor.[2] Her claim to support was not subject to the logic governing kin support because it arose from a different source. It was part of the marital bargain, due in exchange for her making herself available to him *(tamkīn)*.[3] Shāfiʿī explains the wife's claim to support in slightly expanded terms: "He maintains his wife whether she is rich or poor, for keeping her to himself in order to enjoy her *(biḥabsihā ʿalā nafsihi li ʾl-istimtāʿi bihā)*."[4] Shāfiʿī's formulation neatly ties together the two elements constituting the wife's sexual availability: she provides enjoyment to the husband and acquiesces to the restriction of her mobility.[5] Although these aspects of the wife's duty were linked, they received varying emphasis. Abū Ḥanīfa and his followers generally stressed restrictions on the wife; Mālik and Shāfiʿī and their followers devoted more attention to the husband's right to take pleasure with her.[6]

The maintenance obligation—which broadly included food, clothing, and lodging—was part of a scheme of interdependent spousal claims. These included inheritance, dower, sex, and companionship. The marriage contract itself initiated mutual inheritance rights (save where either party was enslaved or the wife was non-Muslim), but both the full dower obligation and the commencement, suspension, and cessation of maintenance rights were tied to milestones in the couple's married life, consummation being the most notable. On an ongoing basis, maintenance was linked to other spousal rights and duties. Intimacy was at the center of these rules, though its regulations were strongly gendered. If a man had more than one wife, he was obliged to divide his time among them. A wife had to be sexually available. A husband could control his wife's movements and determine the marital domicile. Could these rights be modified by stipulations to the marriage contract? Although Ibn Ḥanbal (among others) thought so in keeping with his generally positive view of stipulations, the jurists studied here did not believe that spouses were free to set basic terms when it came to what husbands and wives owed one another.[7]

I begin with the case of an enslaved wife, whose situation—though in certain respects more complicated than that of a free wife—provides a lens through which to view the various dimensions of a wife's responsibilities and rights, as well as those of a husband (and, in the case of a slave, her master). In allocating rights, it made no difference whether the husband of an enslaved woman was free or himself enslaved. Next, I address the beginning of a wife's claim to maintenance, which generally arises when she becomes available for consummation. This raises a series of issues about female sexual maturity and its relation to majority. The third section discusses maintenance during an ongoing marriage, which hinges on whether her husband has continued sexual access to her; the jurists disagree, though, as to whether her willingness is required or only her physical presence. Here, the wife's *nushūz*—her disobedience, insubordination, or sexual refusal—is addressed. Minor differences in doctrine turn out to be predicated on diverging views of the source of the husband's obligation of maintenance: is it restrictions on mobility or sexual rights? This distinction is even more clearly visible in the case of divorcees. Mālik and Shāfiʿī link a divorced woman's maintenance rights to her sexual availability, while Abū Ḥanīfa and his disciples grant her support in recognition of the continuity of restric-

tions on her during her waiting period. Despite the basic agreement between Mālikī and Shāfiʿī jurists, they also have slightly different rationales governing postdivorce maintenance, as becomes clear from an investigation into the exceptional cases of divorced, pregnant slave women and invalid marriages resulting in pregnancy.

The quid pro quo logic of support for sexual access governs regulations surrounding maintenance in an ongoing marriage, but what if a husband cannot hold up his end of the bargain? The final section of this chapter considers the sharp disagreement between Abū Ḥanīfa and his disciples on the one hand, who refused to dissolve a marriage for nonsupport no matter how long it persisted, and Mālik, Shāfiʿī, and their students on the other, who were willing to do so, although they disagreed about the length of time required before dissolution was permissible. Divergent views on whether a woman could obtain divorce from a nonsupporting husband show different understandings of the link between ongoing spousal claims and the validity of the marriage contract itself: was the marriage still binding if ongoing duties were neglected? The variety of views on this point shows independent human reasoning. The extensive polemics over maintenance helped refine legal doctrines, as jurists honed their arguments in dispute with one another both within and across school lines. At the same time, they affirm the shared nature of the presumption that dissolving a marriage by a husband was a matter of individual choice, while a wife needed either her husband's agreement or a judge's intervention.

An Enslaved Wife

Juristic concerns over the wife's capacity and willingness for sex were inseparable from issues of physical access and control, as Shāfiʿī's definition makes clear. These dual elements of sexual availability are easier to separate for analytic purposes in the case of a married female slave. Her master had fewer rights over her than he would have had over an unmarried female slave; in particular, he lost his right of sexual access, though he would own any children born as a result of her marriage. (If she were his own concubine, her children would be free and legitimate; they would not be his property. I will say more about concubines in Chapter 5.) Her husband had less authority over her than he would have had over a free wife since her master controlled her living arrangements

and determined when she could leave the premises. Control of a wife's domicile was an expected element of marriage to a free woman; contractual stipulations whereby a wife could determine her own domicile were roundly rejected. A husband could restrict himself only with his own oath attached to a divorce pronouncement or a financial penalty for violating an agreement not to relocate his wife. It is a notable abridgement of masculine privilege that an enslaved woman's husband cannot demand that she live with him. Yet insofar as these husbands were also enslaved—which was not necessarily the case, but texts often refer to such marriages—to even think of them as having masculine privilege already assumes things about masculinity that would not have been possible, for instance, in Roman society, where to be a male slave was to be in some essential sense emasculated. Where her husband was free (and in some views he could take an enslaved wife only if he were too poor to afford a free woman's dower),[8] this would merely be another inconvenience associated with having to share her time.

An enslaved wife combines aspects of the figures that are usually contrasted: the free wife and the enslaved concubine. Because she is married to a man other than her master, her situation poses a number of conceptual and logistical difficulties. Two men have claims over her that may conflict. Sexual exclusivity is the easiest to resolve, at least in theory: when her master gives consent for her marriage, he forfeits his own sexual access to her. Masters likely did not always restrain themselves. Some anecdotes suggest that owners sometimes failed to respect the husband's exclusive right to access; the jurists point out, in those cases, that the slave woman herself bore no blame for adulterous encounters.

More difficult are the ongoing questions of control over the female slave's time, her physical presence, and her performance of services. Moreover, these claims are attached to certain responsibilities, such as support. The *Mudawanna* devotes a long passage to assessing these conflicting claims.

> I said: What if a man marries a slave woman and the husband says, "Lodge her with me in my house and allow me to have privacy with her," and the master says, "I will not allow privacy between you and her and I will not lodge her with you in your house"; or if the husband comes [to her master] and says, "I want to have intercourse with her immediately," and her master says, "She is occupied *(mashghūla)* now

> with her work," may the husband keep *(manaʿa)* her from her work, or have privacy in order to have intercourse with her immediately, or is it lawful for her to forgo her work for her master to have intercourse with her husband? He said: I have not heard Mālik define this, except that Mālik said: Her master may not forbid her to her husband if he wants to have sex with her and her husband may not lodge her in his house except with the master's consent. The slave woman remains with her household *(ahlihā)* to serve them and [to do] what they need, but they may not harm [the husband by withholding] what he needs in terms of intercourse with her. I think that she remains with her household, and if her husband needs her, they grant privacy to him [in order to fulfill] his need for her. If the husband intends to harm them [by interfering excessively with her work], he is prevented from doing so.[9]

The use of *ahl,* which I have translated as "household," to describe the female slave's owners or employers is noteworthy. The term is semantically flexible. It means "family," or "people," though these English terms carry connotations of relationship by blood or marriage that do not apply here. But the Latin root of family is illuminating. The term *familia* in its classical Roman usage "had the primary meaning of a body of slaves (not wife and children)."[10] In fact, "the Romans rarely used it to mean family in the sense of kin."[11] The Arabic term *ahl* can encompass people connected only by a bond of servitude as well as those connected by "family ties." In this passage, it is used for the slave girl's superiors, rather than (as in the Roman case) subordinates. But *ahl* also frequently appears in Muslim texts euphemistically to refer to wives. The clearest example is the hadith where the Prophet declared, regarding the treatment of wives: "The best of you is he who is best to his *ahl*." The *Mudawwana*'s use of a term with kinship connotations rather than ownership connotations reinforces the integration of the enslaved woman into a household economy of reciprocal, if unequal, obligations. As Ehud Toledano argues for the Ottoman period, slavers and enslaved had human relationships.[12] *Human* does not necessarily mean egalitarian; hierarchy even within the family was taken for granted, as discussions of consent in the previous chapter showed. Family is not necessarily a refuge from hierarchical society but a reflection of and model for it.

A legal text, of course, cannot account fully for the complexities of interpersonal relationships but this excerpt from the *Mudawwana* attempts to mediate competing demands on the enslaved woman. In doing

so, it prioritizes male rights to sex. The wife's master may not prevent the husband from having sex with his wife, but the husband is not entitled to lodge her with him (as he would be able to do with a free wife) without her master's permission. A female slave's master retains much control over her mobility that would belong to her husband if she were free. The husband's only true claim on an enslaved wife, for the Mālikīs, was to have his desire—or rather, "his need"—for intercourse fulfilled.[13] In this attempt to ensure that neither husband nor master interferes with the other's legitimate claims, Ibn al-Qāsim treats the husband's need for a sexual outlet as urgent; it will brook no delay while the slave completes her duties.

In treating male desire as incapable of restraint once ignited, this anecdote echoes various hadith. In one, a woman whose husband calls her to bed even if she is at the oven cooking (or, in a variant version, mounted on a camel—that is, ready for an excursion) must go to him.[14] Another declares that a man who becomes attracted to a woman he sees while in public ought to go home and have sex with his wife.[15] Female desire makes no appearance in these reports, and if a wife's disinclination appears, it is quickly rendered irrelevant. In one example, discussed by Ze'ev Maghen in his study of sexuality and ritual purity in Islamic law, ʿUmar ibn al-Khaṭṭāb wakes his sleeping wife for sex one night during Ramadan. He then worries that he has violated a rule against having sex once one has fallen asleep during Ramadan.[16] ʿUmar expresses regret only for a possible violation of divine prohibition, not for running roughshod over his wife's objections. The report does not tell us whether she resisted his advances because she was sleepy or not in the mood, or whether she also feared violating God's command. Her feelings are irrelevant, both to the legal point at issue and also to the men involved, including ʿUmar, those who transmit the anecdote, and even Maghen, who glosses over the androcentric nature of this and similar accounts. Our authors assume that a wife would be available to satisfy her husband's urges and that male passion, once roused, must be satisfied. In its discussion of the sexual claims of a man married to a female slave, the *Mudawwana*'s accommodation of the husband's need affirms this view of the male libido.

Notably, for Mālik, a slave's husband had to support her, even if she lodged with her master; the right to have sex with her made him responsible for maintaining her. The link between lodging and support

in the case of the married female slave must be understood within the basic framework for maintenance between free spouses. In marriage to a free woman, a husband controlled both the right of sexual enjoyment *(istimtāʿ)* and the right to restrict the wife's mobility (*ḥabs,* later *iḥtibās*), and determined her domicile. (He did not have an enforceable claim on her domestic service, though she might have some moral responsibility to perform those tasks that were customary for a woman of her class.) In the case of a slave woman, these claims were bifurcated: her husband had the right to sexual enjoyment, and her master had the right to restrict her movements and determine her domicile, as well as the right to her domestic labor. The relationship between restriction and enjoyment as sources of the obligation of support remains a subject of disagreement, separable in the case of a slave and but trickier to discern in the case of a free wife. A husband's ability to derive enjoyment from his wife and his control over her physical mobility were inextricably linked if she was free, but these rights were divided between a married slave's husband and her master. Rulings about the maintenance of enslaved wives help clarify the legal reasoning applicable to the marriages of free persons. The jurists place varying emphases on enjoyment and restriction as rationales for support: the Ḥanafīs, and to a lesser extent the Shāfiʿīs, stressed control over domicile and mobility, while the Mālikīs considered the enjoyment of sexual intimacy the overriding factor in obligating a husband to maintain his wife.

The *Mudawwana* stakes out two clear domains: "Her master may not forbid her to her husband if he wants to have sex with her and her husband may not lodge her in his house except with the master's consent."[17] Ḥanafī and Shāfiʿī texts concur.[18] But because rights to sex and to physical control over the slave were separated, the jurists disagreed over who was obligated to maintain her. Mālik held that it was the husband's duty, because of his access to sex. A master retains the right to use his slave's services at any time he needs them, even revoking previously granted permission to reside with her husband. Despite the master's clear control over the slave's mobility, the husband was always responsible for her support, regardless of where she lived: "She is a wife, and she is due dower and she must observe a waiting period [when the marriage ends] and she is due maintenance."[19] The husband's right to seek enjoyment, rather than any ancillary restrictions imposed on her, obligated him to support her, in Mālik's view.

Abū Ḥanīfa linked the duty to maintain with the right to have her dwell with and hence be continuously available to him.[20] Only a husband who controlled his wife's domicile and mobility was obliged to support her. The Ḥanafī jurists stressed a wife's physical presence with her husband; physical presence implied, as with a free wife, sexual access. Early Shāfiʿī texts were less categorical about the relationship between cohabitation and support. The *Umm* simply affirms that a husband must maintain his enslaved wife.[21] Al-Muzanī's *Mukhtaṣar* qualifies this general rule: the husband must maintain his enslaved wife only "if she is lodged with him in his house." Both affirm, though, that "if her master needs her service, he may [take her]." If he thereby impedes the husband's sexual access, "she is not due maintenance [from her husband]."[22] Of course, the master himself is then obliged, as in al-Khaṣṣaf's text, to provide her with sustenance.

Stipulations in Marriage Contracts

Discussions of lodging arise in jurists' treatments of maintenance. In the case of enslaved wives, lodging might be negotiable, in which case parties to the contract might stipulate terms. But apart from the case of enslavement, some elements of marriage—including male control of female mobility and male exemption from sexual exclusivity—were sacrosanct. Mālik, Abū Ḥanīfa, and Shāfiʿī concurred that spouses were not permitted to alter core marital rights through stipulations (*shurūṭ,* singular *sharṭ*). They uniformly rejected the most common stipulations— those preventing the husband from marrying additional wives, taking concubines, or moving his wife away from her town or domicile. The *Umm* addresses a contract that stipulates all three of these conditions:

> If he marries a virgin or a non-virgin with her approval *(bi amrihā)* for 1,000 on [the condition] that she may go out of his home whenever she wishes, and that he will not take her from her hometown, and that he will not marry [another wife] alongside her, and that he will not take a concubine alongside her . . . the marriage is binding, and the stipulation is void *(al-nikāḥ jāʾiz wa ʾl-sharṭ bāṭil).*[23]

Shāfiʿī voids these stipulations because they interfere with a scripturally sanctioned division of marital rights and duties that cannot be modified to suit the whims of individuals. These stipulations, according

to what the Prophet said, are not found in "the book of God." Thus, the *Umm* argued, "God, Exalted and Majestic, made it lawful for a man to marry four [wives] and [to take concubines from] what his right hand possesses. If she stipulates that he may not marry [additional wives] and may not take concubines she is restricting God's largesse to him."[24]

As with the husband's right to take additional sexual partners, his right to restrict his wife's mobility and unilaterally determine her domicile was not subject to limitation. The *Mudawwana* relates that "[A] man married a woman in the era of ʿUmar b. al-Khaṭṭāb and stipulated to her that he would not take her away from her hometown *(arḍihā).* ʿUmar set aside that stipulation for him and said, A woman [goes] with her husband."[25] This report of ʿUmar's actions did not state whether the husband wished to take her away before or after consummation, nor did it suggest that there was a possibility of an annulment for this condition or a choice for the wife. The caliph simply affirmed that a woman must go where her husband goes, and disallowed the stipulation. The *Muwaṭṭaʾ* quotes the concurring opinion of Medinan authority Saʿīd b. al-Musayyab, voiding any stipulation that prohibits a husband from taking his wife out of her town: "He takes her away if he wishes."[26] Related to the husband's right to determine the marital domicile was his right to demand that his wife remain in the marital home. The *Umm* reports the Prophet's statement that "it is not lawful for a woman to voluntarily fast a day if her husband is present except with his permission."[27] Shāfiʿī argues that if a husband could prevent his wife from performing a voluntary act of devotion to God because it might interfere with part of his rights over her, then a fortiori he could restrict her in other ways, including removing her from her town or her domicile and prohibiting her from going out of the house.

Rejection of stipulations was not a strategy to impoverish or denigrate women, but rather to insist on a core minimum of marital rights. Less frequently discussed but equally void were stipulations that the husband need not maintain his wife, visit her regularly, or pay her any dower. Just as a woman had to remain in the marital domicile wherever her husband chose to establish it, and to accept that she had no claim to sexual exclusivity with her husband, men had to support their wives and allocate their time equally between them. Spouses were not free to eliminate the wife's claims against the husband for support, dower, or a portion of his time—though she might waive them later.[28]

They also could not be monetized: a wife could not give up her claim to a share of her husband's time for a larger dower, increased maintenance, or a one-time payment.

Ḥanafī and Shāfiʿī jurists held strictly to the principle that stipulations, no matter whether void themselves, never invalidated a marriage contract.[29] Illustrating both the significance of consummation in their thought and their greater concern for men's sensibilities, Mālikīs allow some void stipulations to result in dissolution of the marriage before consummation has taken place, but only at the behest of the spouse who would have benefited by the stipulation. For example, if a husband and wife had agreed that she would not receive maintenance but learned before consummation that this stipulation was unenforceable, the husband could choose either to remain married with the obligation to maintain her or to have the marriage annulled. If consummation had occurred, however, he had no option: the stipulation was void and the marriage endured. By contrast, Mālik and his followers allowed the wife no option to annul or dissolve an unconsummated marriage if she discovered the unenforceability of stipulations preventing polygyny, concubinage, or relocation. Even if the husband contravened the stipulation by contracting another marriage or taking a concubine before the original marriage was consummated, as one sample problem in the *Mudawwana* provides, that marriage would stand unaffected.[30] Gendered power differentials manifest themselves in doctrine here. Women have few options for marital dissolution if they find their husbands cannot be held to their agreements; husbands have greater latitude to withdraw without penalty from unions they find undesirable. Mālik's thought also provides a critical role for chronological priority: annulling certain marriages if unconsummated, but confirming them once consummation has occurred, shows that the social weight of consummation can supersede the validity of other considerations.

Though stipulations that altered basic marital rights and duties were unenforceable as contractual obligations, a man could bind himself to adhere to a promise by declaring a conditional divorce *(ṭalāq).* For instance, he might state, "If I take another wife, you are divorced." A man's promise not to marry an additional wife "means nothing unless there is an oath of divorce or manumission attached to it." But if he does make such an oath, keeping his word "is obliged and required of him."[31] Should he breach the oath, divorce would result automatically.

A wife, then, could not force her husband to remain monogamous, but she could guarantee herself an exit from her marriage rather than tolerate a co-wife. Conditional divorce worked because pronouncements of *ṭalāq* were regulated by mechanisms that were not contractual stipulations.[32] The effectiveness of divorce oaths owed to the husband's absolute discretion over the power of divorce rather than to any actual change to the marital obligations of the spouses. In practical circumstances this distinction seems to have mattered little. Women in many times and places wrote such stipulations with enforcement provisions into their marriage contracts, as notarial formulae and court records attest.[33] Nonetheless, for these jurists the difference was vital.

The Duty to Maintain

Early Muslim jurists distinguished between the contracting of a marriage and its consummation. Some marriages were consummated immediately but others only after a delay. Months or even years could separate the marriage contract from *dukhūl* (literally, entrance; metaphorically, consummation), since one or both spouses could be married off during childhood, as in the case of Musayyab's son and Qurayʿa's daughter, whom we met at the beginning of Chapter 1. A marriage in which consummation was being postponed was nonetheless valid and fully binding, not merely a promise or betrothal. Certain effects came into force immediately: the bride could not be married off to another man, inheritance rights prevailed, and a full or partial dower payment became obligatory in most circumstances even if divorce or one spouse's death dissolved the marriage before consummation.[34] However, other spousal rights and duties remained in abeyance, including maintenance. The maintenance obligation could be triggered, once the wife attained sufficient maturity to consummate the marriage, by an invitation to consummate the marriage, the occurrence of valid privacy *(khalwa ṣaḥīḥa)* between the spouses, or consummation itself.

The bride's readiness for sex was a prerequisite, in the juristic imagination, for the support obligation. This makes sense, given that maintenance compensates the wife for her sexual availability rather than for household chores or any other duties. An extended discussion in the *Kitāb al-Nafaqāt* distinguishes a wife's duties from those of a servant *(khādim).* A man is obligated to support his wife's servant, whether

a female slave *(mamlūka)* that she herself owns, one lent by her father, or a free servant engaged by the husband. Even if she does not have a servant, her husband cannot compel her to bake bread or cook for herself if she refuses to do so. As al-Khaṣṣāf puts it, "his claim on her is her making herself available to her husband *(tamkīn al-nafs min al-zawj)* and not these tasks."[35] A servant who refused to perform these services could be denied maintenance and ejected from the house, but "[a wife's] maintenance is obliged because of her availability *(tamkīn)* not because of her service *(khidma)*."[36]

A husband need not support a wife too young for intercourse, but how young was too young? Readiness to consummate a marriage did not necessarily depend on a girl's attainment of *bulūgh*, majority. It was permissible to consummate a marriage with a minor if one has sex with those like her. The *Umm* discusses a case where "a man controlled *(malaka)* the [marriage] tie of a woman with the like of whom one may have intercourse, even if she is not in her majority *(bāligh)*," noting that he would be obligated to maintain her.[37] The *Kitāb al-Ḥujja* acknowledges the permissibility of sex with a minor when it refers to a man's "minor daughter who has matured so that one may have intercourse with her."[38] Al-Khaṣṣāf mentions a wife who "is an adolescent and is not in her majority *(kānat murāhiqa wa lam takun bāligha)* and her father delivers her to her husband and he goes in to her *(dakhala bihā)*."[39]

Rather than having a strict age-based limit, or one dependent on menarche, the determination of female readiness for sex (and thus cohabitation and support) hinged on physical sturdiness and appeal to men.[40] Age is occasionally mentioned, however. The age of nine appears sporadically as a minimum for consummation, majority, or both. This is presumably tied to the hadith, quoted by Shāfiʿī, that put ʿĀʾisha's age at nine when Muḥammad consummated their marriage. It is possible, though I think highly unlikely, that the causal link goes the other way— that is, that the hadith are an attempt to justify consummation from the age of nine.

Assuming that the wife was fit for intercourse, Mālik holds that expressed willingness on her behalf to consummate the marriage set in motion her husband's obligation to maintain her. In the *Mudawwana*, Saḥnūn asks Ibn al-Qāsim whether the maintenance obligation commences with the contracting of a marriage or with its consummation. His answer? Neither. According to Mālik, the wife's availability was the

impetus for a husband's obligation to maintain her. The invitation might come from the wife herself or, as in many of the cited examples, from her family.[41] The texts treat as unremarkable, even usual, that the invitation to consummate the marriage would be issued by the bride's kin. Occasionally, we see that a bride's kinsmen are reluctant to hand her over to the groom, arguing that she is not yet ready for the rigors of conjugal life.

Our sources cannot tell us how frequent marriages of minor girls were as opposed to how frequent marriages of adult women were during the first centuries of Islam. We have little firm biographical data on which to base such attempted comparisons. One obvious sample would be the women in Muḥammad's household: he is reported to have had nine wives when he died. This number does not include his first wife, Khadīja, who is traditionally said to have been forty when he married her at the age of twenty-five. In addition to ʿĀ'isha, whom we have already discussed, Ṣafiyya (a captive turned bride) was probably in her late teens, as was Ḥafṣa, the daughter of ʿUmar ibn al-Khaṭṭāb.[42] Muḥammad's other wives, including Sawda and Umm Salama, were somewhat older. Apart from ʿĀ'isha (and probably Māriya, Muḥammad's concubine, a gift from the Christian governor of Egypt), all had been previously married, some twice; several were mothers. Although the reliability of these biographical sources has been contested, they tell us that marriage in one's teens was not unusual, perhaps even par for the course, and that remarriage after divorce or widowhood was common. As to whether Muḥammad's wives apart from ʿĀ'isha had been married to their first husbands as minors, there is no way to know.

Assuming that she is ready for the rigors of conjugal life, for Shāfiʿī, a private encounter between husband and wife (not hampered by Ramadan fasting or other impediments to intercourse) normally sets her claim to support in motion. However, should a man refuse an offer—likely from her family—to have a private encounter with his bride, he would still be required to commence his support of her. Formative-period Ḥanafī sources are silent on what is necessary for the commencement of the maintenance obligation, though one Shāfiʿī source attributes to them the view that the right to maintenance begins only after consummation except under exceptional circumstances.

Much rarer in the texts and presumably in the societies that gave rise to them was the case where the wife had reached majority while

the husband remained a minor. In the *Mudawwana*'s discussion of this possibility—which presents the wife herself and not her kin issuing the invitation for consummation—Mālik's view is that "there is no maintenance due to her from him and she may not take possession of the dower until the youth *(ghulām)* is ready for intercourse."[43] This rule accords with the Mālikī stance that if any contract is made while its basic aim cannot not be fulfilled, then its provisions do not take effect until it can be; in the case of marriage, this basic aim was lawful intercourse.[44] Shāfiʿī and the Ḥanafī authorities argue instead that it is unfair to penalize the woman for the husband's incapacity due to his minority: "Her maintenance is due from him because the restriction is on his part."[45] In a similar vein, Shāfiʿī decides that if the husband is in his majority and the wife fit for intercourse, but the husband delays or refuses an offered consummation, then he must maintain her.[46]

If, despite both spouses' fitness for conjugal life, instead of inviting or acceding to consummation the wife or her family refuses to allow it, she loses her claim to maintenance, with one noteworthy exception. Any wife may refuse consummation and claim support as long as she has demanded, but not yet received, any portion of her dower that the parties agreed would be paid promptly.[47] The lack of payment constitutes an obstacle on the husband's part, as if he were refusing to consummate the marriage. Yet if the wife consents to consummation before receiving the dower, only Abū Ḥanīfa allows her to subsequently withhold herself without losing her right to maintenance.[48] Abū Ḥanīfa held that even after consummation the wife could refuse intercourse on the basis of her unpaid dower claim while still keeping her right to support. Shaybānī, Abū Yūsuf, Mālik, Shāfiʿī and their followers disagreed: she could continue to press her claim for dower but could not legitimately refuse further sexual encounters.

After the commencement of the maintenance obligation, support was predicated on the wife's continuing availability as a sexual partner. What mattered was her willingness, not whether sex actually transpired. If a man somehow made sex with her impossible or illicit—for instance, if he traveled, got imprisoned, or found himself required to abstain for any other reason—his wife retained her claim. Two thoroughly improbable scenarios illustrate the jurists' logic. If a man had sex with his wife's sister by mistake, she would be obliged to observe a waiting period

to ascertain pregnancy. As a man could not have simultaneous access to two sisters, he would have to abstain from sex with his wife during the waiting period.[49] Or if a man with four wives divorced one of them absolutely, but did not know which (this is possible because oaths can be effective despite certain types of uncertainty), he would have to refrain from intercourse with all of them until he determined which one he had divorced; all, though, were due maintenance from him in the meantime.[50] Similar rules applied if he vowed to abstain from intercourse with his wife for a certain period (forswearing, *īlāʾ*) or swore an oath that made her forbidden to him *(ẓihār)* until he expiated it. These acts did not affect a wife's right to maintenance because she had kept her part of the bargain.[51] The same was true when the husband's physical separation from his wife made intercourse impossible. If a man got imprisoned, or fled from his wife, Abū Ḥanīfa and his followers argued that he had to continue to maintain her, asking rhetorically, "Is her [claim to] maintenance from him void when he is the one at fault, and he did it or it was done to him?"[52] The wife's availability meant that the husband's maintenance obligation continues.

On the other hand, when the wife's unavailability was her own fault (or more precisely, not her husband's fault), she forfeited maintenance. This forfeiture could occur either through her departure, with or without permission, from the conjugal domicile or her refusal *(imtināʿ)* to permit intercourse or other sexual intimacies. The formative-period authorities differed significantly in their treatment of these actions, some of which fell under the rubric of *nushūz. Nushūz* is often glossed as wifely disobedience, but jurists seldom discussed obedience per se. This is not because they found the notion of wifely obedience objectionable; to the contrary, they took it for granted. But the specific actions with which they were concerned related to the fulfillment of the marital obligations to which maintenance was linked: accepting restriction and making herself physically available. Even actions that did not constitute *nushūz,* such as travel with the husband's permission, could nonetheless lead to loss of maintenance.

Appearing twice in the Qurʾan, once (4:34) with reference to women and once (4:128) with reference to a husband, the term *nushūz* is central to contemporary debates over gender politics and spousal rights and roles. The first scriptural use of *nushūz* is generally taken to refer to

wives, though the verse specifies only "women." My translation here reflects the usual understanding of the verse's meaning, to the extent that there is a shared perspective among exegetes and jurists.[53]

> Men stand over women *(al-rijāl qawwāmūn ʿala ʾl-nisāʾ),* with what God has favored some over others, and with what they expend *(bi mā anfaqū)* from their wealth. Righteous women are obedient (*qānitat,* "devout"), guarding [in the husband's] absence what God has [ordered to be] guarded. Those women whose *nushūz* you fear, appeal to them, and abandon them in bed *(wa ʾhjurūhunna fī ʾl-maḍājiʿ),* and strike them *(wa ʾḍribūhunna).* If they obey you, do not seek a way against them. Indeed God is Most High, Great. (4:34)

In its second appearance, the Qurʾan mentions rejection along with *nushūz:*

> If a wife fears *nushūz* or rejection *(iʿrāḍ)* from her husband *(baʿlihā),* there is no blame on them if they settle on a settlement, and such settlement is best, even though people's souls are swayed by greed. But if you do good and practice self-restraint, God is well-acquainted with all that you do. (4:128)

Drawing on these verses, but not circumscribed by them, the jurists understand *nushūz* in the context of marriage in varied ways.

Nushūz is a difficult term to pin down precisely. In the case of the wife, it may be used for one who refuses her husband sexually or disobeys him by leaving the home without his permission; in one case, it refers to her refusal to travel with him, or sometimes unspecified recalcitrance. In the case of the husband, it refers to a general dislike of, or rude behavior toward, the wife.[54] Although men can commit *nushūz,* only the wife who commits *nushūz* is designated by the term *nāshiz.* Though the husband's behavior can also constitute *nushūz,* the term *nāshiz,* despite being grammatically masculine, always refers to the wife. (*Nāshiza* sometimes appears, mostly in Ḥanafī texts, with no difference in meaning.) *Nushūz* may characterize the husband's behavior at times, but it cannot define him. *Nushūz* is used symmetrically in reference to either a wife's or husband's "antipathy" toward the other as a motive for divorce.[55]

Though the term *nushūz* rarely appears in these works, the concepts it encompasses are of vital importance to jurists' vision of spousal claims. While exegetes focus on the specific measures that the Qurʾan

dictates for *nushūz* (admonition, abandonment, and striking, in the case of women's *nushūz;* settlement, in the case of a man's *nushūz*), when jurists discuss it they are more interested in other juridical consequences. Mālikī texts from the formative period do not discuss *nushūz* or its consequences extensively; indeed, the *Muwaṭṭaʾ* does not discuss it at all. The *Mudawwana,* broaching the subject in a discussion of divorce for compensation, records the view of Medinan authority Ibn Shihāb al-Zuhrī on attitudes and behaviors that make it lawful to accept compensation from a wife in exchange for divorce, including "attach[ing] no importance to her husband's right(s)," committing *nushūz* against him *(nashizat ʿalayhi),* going out without his permission, or permitting into his home someone that he dislikes, and "show[ing] repulsion toward him *(aẓharat lahu al-bughḍ).*"[56] Another declares that a woman's refusal to relocate with her husband qualifies as *nushūz:* "Bukayr said: [If] a woman refuses to move to one place from another *(ilā balad min al-buldān)* with her husband, I do not consider her anything but *nāshiz.*"[57] Neither Ibn al-Qāsim nor these authorities clarify the relationship between *nushūz* and the other types of misbehavior listed, nor do any of them define specific consequences for these actions, other than making it acceptable for the husband to take compensation in exchange for divorcing her. The *Muwaṭṭaʾ* and the *Mudawwana* are silent on the suspension of maintenance for *nushūz.* This omission might mean that it was not yet a widely shared view or, conversely, that it was taken for granted. Although suspension of support for *nushūz* becomes the authoritative school position, eleventh-century Mālikī authority Ibn ʿAbd al-Barr (d. 463/1071) states that Ibn al-Qāsim considered it obligatory to maintain a *nāshiz* wife.[58] David Santillana makes no mention of this purported view of Ibn al-Qāsim's in his classic study of Mālikī doctrine, where he summarizes as follows: "The woman may not refuse her conjugal duty without incurring the loss of maintenance."[59]

Shāfiʿī, concerned as always with hermeneutics—especially the possible contradictions between Qurʾan and sunna as sources of law—discusses the loss of maintenance for *nushūz* and other infractions at some length. He equates the wife's sexual refusal without cause *(imtināʿ)* to *nushūz;* a wife who rejected her husband's advances forfeited her claim to support. Absence from the conjugal home—including unauthorized departure and travel, with or without permission—also resulted in loss of maintenance. Otherwise, the husband's obligation to

maintain his wife continued whether she was sick or well, even if menstruation, illness, or a defect prevented actual intercourse, so long as she allowed him other intimacies.[60] A wife who became ill or whose vagina became obstructed could still claim support, as "this is an unfortunate malady, not withholding by her."[61] In contrast, if she did not permit the sexual intimacies for which she was fit, then her refusal led to loss of maintenance.

Because the wife's accessibility was exchanged for her maintenance, her absence from her husband caused her to lose support.[62] Abū Ḥanīfa and his followers held to this rule stringently: a wife lost her maintenance if she were kidnapped or "imprisoned for a debt," or if she went on pilgrimage without her husband, even if she had his permission.[63] (Shāfiʿī authorities agreed about voluntary travel, except for pilgrimage. If a husband permitted his wife to go, she would keep her maintenance.)[64] Pilgrimage was an exceptional circumstance in any case, as once a person donned pilgrim garments *(iḥrām),* he or she was not permitted to have intercourse. Nonetheless, for the Ḥanafīs, "if her husband goes [on pilgrimage] with her she is due maintenance."[65] According to al-Khaṣṣāf, he should go with her, in which case "he is obligated to maintain her, because it is possible for him to make use of (or benefit from) her."[66] Al-Khaṣṣāf does not further define "making use" *(al-intifāʿ bihā),* though it cannot mean penetrative sex once she is in the state of pilgrim sanctity. Nevertheless, subsequent passages affirm a clear sexual component to "making use." Al-Khaṣṣāf declares that, outside the context of pilgrimage, the husband of a woman too ill for sex or with a vaginal obstruction preventing intercourse is obligated to maintain her "because of the lawfulness of making use of her." In the latter case, such use included "kissing and non-vaginal intercourse *(al-jimāʿ fīmā dūn al-farj)*."[67] In the former, it included looking at her.[68] In both cases, "intimacy" was established. When penetrative sex was impossible or forbidden due to illness or physical impediment, other forms of gratification constituted sufficient basis for maintenance.

Ḥanafī texts extend the ruling on loss of support for physical absence to also uphold its converse: physical presence in the marital home suffices for support. This leads them to treat a wife's disobedience or refusal differently from their counterparts in other juristic traditions. *Nushūz* becomes neither sexual refusal nor willful recalcitrance but rather the wife's unauthorized departure from the marital home: "I

said: If a woman goes out of her husband's home to her family's home without his permission there is no maintenance due to her, because she is *nāshiza* . . . and the *nāshiza,* there is no maintenance due to her."[69] A wife who remained in her husband's home but refused him sexually retained her claim to maintenance. Sexual refusal did not constitute *nushūz,* because it did not, in this view, make her sexually unavailable; as long as she remained physically present, he could have sexual access to her even against her will.

Where the wife had legitimate grounds for sexual refusal, the situation was more complex. Abū Ḥanīfa and his disciples disagreed as to what constituted legitimate grounds and, moreover, what the line was between enforceable rules and ethical guidelines. When a wife refused sex in order to claim an unpaid dower, Abū Ḥanīfa supported her actions even after consummation.[70] In this case, he held that "it is not lawful and he sins [if he forces her]." According to Abū Yūsuf and Muḥammad al-Shaybānī, who did not grant her the right to withhold herself for nonpayment of dower after consummation, the husband's forcing her "is lawful and he does not sin." A variant manuscript reads, "It is lawful and he sins," making a distinction between the legality and morality of the husband's action.[71] Even where the two characterizations coincided—lawful / not sinful; not lawful / sinful—the attention to the ethical quality of a husband's forcing himself on his wife is noteworthy; the case is clearer still where there was a disjunction between the two: lawful *yet* sinful.[72] Still, while forcible intercourse might or might not be sinful if the wife had the moral high ground because of unpaid dower, if an unpaid dower was not at issue then the husband's right "to have sex with her against her will" went unquestioned. In this case, they agreed: "It is lawful, because she is a wrongdoer *(ẓālima).*"[73] The wife's reproachable behavior justifies the husband's action. Al-Khaṣṣāf, who reports these views, did not even raise the possibility that forced intercourse in these circumstances might be a sin.

Divorce

Like temporary impediments to sexual intercourse such as absence or refusal, divorce also suspended or ended the sexual relationship between two spouses. How divorce affected a woman's claim to maintenance depended on the type of divorce, whether she was pregnant, and

whether the spouses were free or enslaved. Substantial differences between Ḥanafī doctrines, which granted all divorcees the right of support, and Mālikī and Shāfiʿī doctrines, which restricted support to pregnant women or those divorced revocably, illustrate again the importance of human interpretive choices in the development of legal rules. These differences involved varying interpretations of one Qur'anic verse.

Apart from the death of one spouse, there were several ways of ending a marriage. Divorce could be unilateral or consensual, and unilateral divorce could be revocable or irrevocable. *Ṭalāq,* a repudiation of the wife by the husband, was the paradigmatic form of divorce. It was revocable at the husband's discretion if the marriage had been consummated, unless it was the third such repudiation or the husband had pronounced a formula tantamount to a triple repudiation. If the divorce was revocable, the husband was said to possess (or control, or own) the [right to] return *(yamliku al-rajʿa; lahu milk al-rajʿa),* meaning he could choose to take back his wife during the waiting period *(ʿidda),* usually three menstrual cycles, that followed the dissolution of any consummated marriage to determine whether the wife was pregnant and thus fix paternity.[74] *Khulʿ* occurred when a husband accepted his wife's offer of compensation in return for his divorce of her; he did not then have the right to return to her during her waiting period. *Firāq,* or judicial separation, was also generally irrevocable. Chapter 4 treats certain aspects of divorce more extensively; I outline the basics here because a husband's prerogative to resume his marital-sexual relationship with his wife affected her claim to maintenance.

The jurists also address the wife's right to lodging *(suknā)* in conjunction with their discussions of maintenance during the waiting period.[75] A free wife had a right to lodging while a marriage endured, in a domicile designated by her husband. If she had co-wives, she was legally entitled to separate lodging from them. She could claim a separate residence from her in-laws as well. It was when a marriage ended, though, that legal issues arose. If her husband had the right to take her back, all agreed, he had to support and lodge her, pregnant or not, during her waiting period, just as he had had to during the marriage. If the divorce was irrevocable, however, Mālik and Shāfiʿī held a husband responsible for maintaining a wife only if she was pregnant. Their basic agreement was predicated on competing rationales, though, which

means that they differed on certain special cases involving slaves and invalid marriages.

The Ḥanafī rule on maintenance during the waiting period was, by contrast, exceedingly simple: "She is due lodging and maintenance until her waiting period is completed," whether the divorce is irrevocable or not and whether she is pregnant or not.[76] As certain restrictions related to the marriage persisted, so did the claim to support. Al-Khaṣṣāf opined that after an irrevocable divorce, the woman could continue to collect her regular maintenance during her waiting period, "because her maintenance is guaranteed while the marriage continues to last, and an aspect of marriage lasts *(al-nikāḥ bāqin min wajh)*."[77] After an irrevocable divorce, the husband no longer had any sexual rights to his wife. The marriage could be said to last only in its restrictions and prohibitions. The constraints on the divorcee's mobility were more severe than the constraints placed on a widow in mourning. A widow could go out during the day "for a legitimate reason that absolutely requires her to do so," so long as she returned to the marital home to sleep, but an irrevocably divorced wife was not to go out even during the daytime, "either with or without a legitimate reason."[78] A widow, it should be noted, was not entitled to maintenance during her waiting period; this lack of support correlated with the relatively lighter restrictions placed on her movements.

Women did not bear these lingering restrictions alone. Ḥanafī authorities also placed strictures on the divorcing husband—not on his mobility, which marriage never restricted in any case, but on his ability to remarry. They prohibited him from marrying anyone whom it would not be lawful for him to combine in marriage with the woman he had just divorced, such as her sister.[79] If a man with four wives divorced one irrevocably, he could not marry another until her waiting period expired.[80]

For Mālik and Shāfiʿī, irrevocable divorce ended all of these restrictions just as it ended the wife's claim to maintenance.[81] In contrast to the Ḥanafī view that the continuation of an aspect of marriage during the waiting period obliged continued maintenance, Mālikī and Shāfiʿī texts link a man's responsibility to maintain his wife during the waiting period to his ability to enjoy her sexually, as with a revocably divorced wife—if and when he took her back. For the Mālikīs, "she retains her status [as his wife] *(hiya ʿalā ḥalihā)* until her waiting period ends."[82] The *ṭalāq* introduced no real change before the end of the waiting

period. It did not matter "whether his wife is pregnant or not" because she was due maintenance for the same reasons she had a claim to it before the divorce. When her waiting period ended, she ceased to be a wife, and her claim to support also ended.[83] For Shāfiʿī, a revocably divorced wife did not retain exactly the same status. However, because she was available to her husband if he chose to return to her, "her maintenance is due from him in the waiting period, because nothing prevents him from lawfully deriving enjoyment from her except his own [actions]."[84]

In the case of irrevocably divorced wives, Mālikī and Shāfiʿī authorities differentiated between one who was pregnant and one who was not; only the former could claim support.[85] The rationale in the case of a revocably divorced wife was (the possibility of) continued sexual access (with revocation of the divorce); there could be no lawful sexual access to an irrevocably divorced wife, so maintenance was due only if there was a pregnancy.

Though Mālikīs and Shāfiʿīs agreed on this basic rule, their rationales differed, as an exploration of the exceptional cases of enslaved spouses and invalid marriages shows. For Mālik, the father's duty to support his offspring necessitated support of the woman carrying his child, while Shāfiʿī attended to the Qurʾanic command in 65:6 to maintain pregnant divorcees until they gave birth, without reference to paternal obligations.

Source texts from Qurʾan and *sunna* figure prominently in these controversies, even as the use made of them is sometimes counterintuitive. Abū Ḥanīfa justified his view that all divorced women could claim support during their waiting periods (against his Kufan rival Ibn Abī Laylā's contrary view) by partially quoting Q. 65:6 ("God, Great and Majestic, said in his Book: "Expend on them until they deliver their burden") and by citing the precedent of ʿUmar ibn al-Khaṭṭāb, who "granted lodging and maintenance to the thrice-divorced woman."[86] Abū Ḥanīfa's choice of Qurʾanic reference is puzzling. Though the verse mentions lodging for all divorced women ("lodge them where you dwell"), it was interpreted by most to limit maintenance to pregnant women: *"and if they are pregnant,* expend upon them until they deliver their burden."[87] Further, ʿUmar's precedent as presented here opposes extremely well-known traditions about Fāṭima bint Qays, an irrevocably divorced woman to whom the Prophet reportedly denied both lodging and main-

tenance. In other versions of this report, including one recounted in Abū Yūsuf's *Kitāb al-Āthār,* ʿUmar explicitly discredits Fāṭima.[88]

The Mālikī jurists interpreted Q. 65:6 to apply to free spouses only, applying different rules when either spouse was enslaved. The maintenance of a pregnant, irrevocably divorced woman was based on the obligation to support minor children. Mālikī and Shāfiʿī doctrine on maintenance holds that slaves are not obligated to maintain their children, whether the children are free or enslaved.[89] Nor are free fathers obligated to maintain enslaved children. The support of relatives *(aqārib),* a category that includes children but excludes wives, takes means and necessity into account.

Two distinct cases presented in the *Mudawwana* exemplify this rule: that of a male slave who divorces his wife, who might be either free or a slave, and that of a free man who divorces his enslaved wife. (It is implicit in this passage that the divorces were irrevocable; otherwise, the general Mālikī rule that men must maintain their wives during their waiting periods would apply.) In the first case, Ibn al-Qāsim reported Mālik's view that when a slave divorced his pregnant wife, "there is no maintenance due from him unless he is manumitted while she is pregnant. Then, he maintains the free woman and does not maintain the slave woman unless the slave woman is manumitted after he is manumitted while she is pregnant. Then, he maintains her during her pregnancy because the child is his child."[90] The paternal obligation to maintain emerged only when all relevant parties became free. (This does not mean, as it does in Roman law, that slaves did not have recognized paternity, merely that filiation did not necessarily convey paternal rights and obligations.)[91]

When a slave man divorced a pregnant free (or freed) woman, the child in her womb would be free, because children born in marriage followed the mother's status. The husband did not have any obligation to maintain her during pregnancy so long as he remained enslaved, but his manumission while his free wife was pregnant obligated him to maintain her. The rationale behind his duty of support was his obligation to maintain his offspring (in this case, still in the mother's womb). If a slave man irrevocably divorced a slave woman, he did not become obligated to maintain her during her pregnancy when he was freed if she remained a slave, as the child was her master's slave.[92] However, if she was afterward manumitted while pregnant,

the child in her womb also became free. The man then became the free father of a free (though not yet born) child and had to maintain the child—and by extension, the child's mother while she was carrying it. The same rationale applied to the free man who irrevocably divorced a slave woman, because "she and what is in her belly [belong] to her master and maintenance is due from the one to whom the child [belongs]."[93] The father became obligated to maintain her during pregnancy only if she was manumitted and the child in her womb also became free.

An additional comparison between the way Mālikī texts treat two types of pregnancies in free women confirms that maintenance of an irrevocably divorced pregnant woman was based on her ex-husband's obligation to support the child she was carrying. A woman absolutely separated from her husband through mutual imprecation *(liʿān)*—a presumably rare but Qur'anically described ritual through which a man denies paternity of a child in his wife's womb—is not due maintenance during the pregnancy.[94] Mālik opined that he was not obligated to maintain her because the child was not "linked" to him. By contrast, where the pregnancy occurred in a marriage that had to be dissolved because of a previously unrecognized impediment to valid marriage between the spouses (a heretofore unknown relationship of milk fosterage, perhaps), paternity was legally established and maintenance therefore due during the pregnancy.[95]

Shāfiʿī considered pregnancy a necessary precondition but thought that the validity of the marital tie rather than the spouses' status determined whether maintenance is compulsory. In a departure from the Mālikī principle that the man to whom a child is attributed by paternity (if the child is free) or ownership (if enslaved) must support the irrevocably divorced woman carrying it, Shāfiʿī and his followers applied the provisions of Q. 65:6 to all spouses.[96] Further, the Shāfiʿīs hold that maintenance is not due when pregnancy results from an erroneous or invalid marriage. Though the child is attributed to the father, who must support it after birth, he bears no obligation to support its mother during her pregnancy because no valid marriage tie existed. An example clarifies the matter: if a woman married (unlawfully) during her waiting period from another husband, the later marriage was invalid and therefore dissolved. Pregnancy in this case might be attributed to either "husband." If the child was linked to the first husband,

Shāfiʿī ruled that he must maintain her throughout her pregnancy. However, if the child was attributed to the second, this man had no obligation to support her. Because no valid marriage tie ever existed, the second "marriage" did not oblige maintenance during the waiting period following its dissolution. The same rule applied to the wife of a missing man *(al-mafqūd)* if she remarried after he had been declared dead. If her first husband reappeared after she had become pregnant by her second husband, she had no claim to maintenance from the latter during the pregnancy. As al-Muzanī states, "none of the rules *(aḥkām)* for spouses apply between them except linking the child [to the father]."[97] In direct contrast, in the case of *liʿān,* Mālik points to precisely this link between father and child as the rationale for support.

Failure to Maintain

Just as the Ḥanafīs were distinctive in their insistence that all divorced women could claim support during their waiting periods, so too they differed from Shāfiʿī and Mālik on the question of a wife's right to be separated from a husband who could not maintain her, adhering steadfastly to the principle that nonsupport never justified judicial divorce. The Mālikī authorities gave her this out, but remained vague about specifics. Shāfiʿī and his followers, eschewing both of these alternatives, established a strict deadline of three days of nonsupport before giving the wife an option to be divorced. The ways in which the texts treat this issue clearly show the role of dispute and polemic in the evolution of legal thought and illustrate the significance of jurisprudential variation. To argue simply that the schools agreed on the husband's obligation to maintain his wife is insufficient; the disagreement on the wife's options if he failed to meet his obligations reveals the existence of crucial interpretive differences. The differences in eventual application were minimized, as later Ḥanafī judges consistently found ways out of the impasse through judicial maneuvering.[98] In legal logic, though, they are striking, illustrating the human factors that went in to making doctrinal determinations.

Mālikī texts treated the case of a woman whose husband was unable to support her with their usual pragmatism. The authority would be charged to investigate the matter and grant the husband an appropriate delay or delays, perhaps a month or two. The *Mudawwana*'s cited

authorities were reluctant to proclaim a universal standard; every man's situation was different.[99] After the husband had been given ample opportunity to maintain his wife and failed to do so, judicial divorce was a valid solution. His marital rights persisted, though: "he has more right to return to her *(huwa amlaku bi rajʿatihā)* if his situation improves during the waiting period."[100] Taking her back despite unimproved financial circumstances would have no legal effect.[101] Here we see an attempt to balance the wife's right to support with consideration of extenuating circumstances that might affect a husband. They granted the husband as much leeway as possible, while ultimately ruling that prolonged nonsupport justified divorce.

Arguing vehemently against Mālik and the Medinan authorities, the Ḥanafī *Kitāb al-Ḥujja* declares that lack of maintenance was never grounds for divorce.[102] According to Shaybānī, no separation occurred when a man "does not find the means to support his wife."[103] He might have a legitimate reason, aside from incapacity, for being unable to maintain his wife. To allow her to seek divorce would breach his marital prerogatives. Shaybānī observes that the Medinans did not set a strict time limit after which a wife had the right to divorce, as various circumstances could temporarily interfere with a husband's fulfillment of his duty. Taking this logic further, Shaybānī constructs a scenario to illustrate that a man otherwise capable of supporting his wife might be prevented, through no fault of his own, from doing so. A wealthy man traveling on pilgrimage might be robbed. Because he would not know anyone to borrow from, he would temporarily be unable to maintain his wife, "though he is among the wealthiest in Iraq." "Are he and his wife separated?" Shaybānī demands.[104] It would not be fair to such a man to allow a wife who disliked or hated him *("takrahuhu imraʾatuhu")* to take advantage of his predicament to obtain a divorce. The possibility that her dislike of him might itself justify divorce was so far outside Shaybānī's frame of reference that he did not even entertain it.

He proceeds to argue, though, that a woman is not entitled to divorce from even a husband utterly incapable of maintaining her. To justify his view, he presents a famous account of the Prophet marrying a man to a woman for a dower of what the groom could teach her from the Qurʾan. This anecdote appears frequently in legal discussions of dower as an exception to standard rules. Here, Shaybānī ingeniously

draws a different lesson: the Prophet married the couple knowing full well that the husband had nothing with which to support his wife. The Prophet would not have done this if poverty were grounds for divorce.[105] Here, as is often true when the *Ḥujja* draws on prophetic example, the tone shifts from legal hairsplitting to pious moralizing. Lack of support becomes an opportunity for the wife to exercise patience and piety.[106] The Companions of the Prophet were poor, and their families (i.e., wives), like those of the Prophet, suffered hunger. If lack of support entitled a woman to seek a divorce, then "each of these [men] would have been obligated to separate from his wife if she requested it of him."[107] Shaybānī counts on his audience's abhorrence of that notion. His rhetorical strategy depends on their identification with these exemplary men of Islam's first generation. For the jurist, and presumably for his audience as well, it was inconceivable that these respected forbears could be challenged in this way.

Shāfiʿī rejects both approaches and allows a wife to opt for an irrevocable separation after only three days of nonsupport. The rapidity and ease with which she could gain divorce stands in contrast to both the vague Mālikī affirmation of her right and the intransigent Ḥanafī denial that any such right existed. It modifies and strengthens the Mālikī view, in the face of Ḥanafī critique, that divorce for nonsupport was permissible. In systematizing doctrines on this point, Shāfiʿī renders spousal claims interdependent in a way that they are not in either Mālikī or Ḥanafī texts: a husband's right to continue the marriage was tied inextricably to his control over his wife's movements and rendered contingent on his performance of his duty of support. Shāfiʿī argues that a husband could not fairly "detain" (or retain, or constrain) his wife while he failed to provide for her. So, "if he cannot find the means to maintain her that she should be given the option between staying with him or separating from him." During those days when he did not provide for her, he could not prevent her from leaving the dwelling to work or seek sustenance. His control over his wife's mobility depended on his provision of support. After three days of nonsupport, a wife could seek the authority to have her marriage judicially and irrevocably dissolved. Should she choose to remain with him, she was not bound to endure poverty forever but could have a new three-day deadline set whenever she wished. This rule contrasts sharply with two other cases where Shāfiʿī allowed her to seek judicial divorce: when the husband's

impotence prevented consummation of the marriage and when the husband proved unable to pay dower in an unconsummated marriage. In these cases, the wife had a one-time right to choose separation. A more detailed exploration of dissolution for impotence will help in understanding the Shāfiʿī arguments on dissolution for nonsupport.

Sunni authorities were united in the view that a wife was entitled to dissolution of her marriage if her husband failed to consummate it.[108] In the absence of any explicit text of Qurʾan or sunna on the matter, they drew on a precedent from ʿUmar ibn al-Khaṭṭāb. When a wife complained to the authority of her husband's impotence, he was to set a deadline of one year during which the husband had to consummate the marriage. If he failed to consummate it, at the end of the year the marriage could be dissolved. Mālikī texts imply that the marriage would automatically dissolve when the term expired, whereas Ḥanafīs and Shāfiʿīs gave the wife an option, when the year was up, between separation and remaining married. Her choice was definitive. If she stayed, she had no further option to separate as a result of her husband's impotence, even if the marriage was never consummated. As the *Jāmiʿ al-Ṣaghīr* puts it, "If she chooses him, she has no option after that."[109]

This agreement on the proper way to handle claims of impotence becomes central to Shāfiʿī's argument against Abū Ḥanīfa's views on dissolution for nonsupport. In the *Umm*, Shāfiʿī reports a conversation with an interlocutor who expresses the view that nonsupport is not grounds for divorce. Shāfiʿī acknowledges that no scriptural text (for him, Qur'an or sunna) explicitly requires dissolution, but argues that the husband's obligation to maintain his wife is clear. It can be "inferred" from the sunna "that he may not, and God knows best, retain her for himself, deriving enjoyment from her and keeping others away from her, [compelling her] to make do with him alone, while he denies to her what is assigned to her from him, because he is incapable of fulfilling it, and the lack of maintenance and clothing ruins her so that she dies from hunger, thirst, and exposure."[110] Having dramatically outlined the harm that would befall women in such cases, he moves on to ʿUmar's precedent. At one point in his career, ʿUmar had ordered soldiers to either support their wives or divorce them. The citation of ʿUmar's view here serves a dual function. First, it serves as evidence, acceptable in instances for which there is no explicit scriptural text, for

dissolving marriages in cases where husbands cannot support their wives. Second, and more important, it provides an opening for Shāfiʿī to attack the Ḥanafī position as inconsistent. Ḥanafī rejection of ʿUmar's precedent in the matter of nonsupport appears capricious in light of Ḥanafī acceptance of ʿUmar's precedent as authoritative on the impotent husband.

Shāfiʿī then proceeds to argue on the basis of the relative importance of the wife's rights in these two cases. His imaginary Ḥanafī mouthpiece had stated that "intercourse is one of the contractual claims" established by marriage *(al-jimāʿ min ḥuqūq al-ʿuqda).* When pressed as to whether the wife's rights were to regular intercourse, as was customary *(kamā yujāmiʿ al-nās),* or to one act of intercourse, he first states that she has an ongoing right to regular intercourse. However, Shāfiʿī forces the admission that she was not entitled to divorce for lack of sex after consummation. Shāfiʿī seizes on this concession to compare the wife's right to (one act of) intercourse to her right to food, and to argue that the former was far less important: "Loss of sexual intercourse is nothing more than loss of pleasure and offspring, and that does not destroy her self; but leaving off maintenance and clothing leads to the destruction of her self."[111] He notes that in extreme need God permits people to eat forbidden things; however, overpowering desire for sex never permits anything that God has forbidden. Thus, Shāfiʿī argues, to dissolve a marriage for failure to consummate it but not for something that threatens the wife's physical survival was to allow separation for the lesser of two harms and not the greater.

Two elements of Shāfiʿī's argument deserve emphasis. First, he appeals to an audience of educated legal thinkers who share his perspectives on textual evidence, precedent, and consistency. If his audience did not care if one was consistent in one's use of sources, there would be no point calling up the competing precedents from ʿUmar. We may assume that if this portion of the *Umm* reflects an actual encounter, the debate was more balanced than it might appear, and that it is only in Shāfiʿī's recollection that he so easily gets the better of his opponents. Nonetheless, the disputants share certain points of departure. Second, and deeply revealing of shared gendered assumptions, the success of this argument hinges on a view of wives' enforceable sexual rights being so restricted as to be essentially meaningless.

Conclusion

For the Muslim jurists, sex is a husband's right and support is a wife's right. Many things about marriage flow from this simple exchange. A brief comparison between Muslim and rabbinic treatments of maintenance in marriage reveals the Muslim configuration of expectations about sex, money, and domestic service to be distinctive. A Jewish husband maintained his wife in part because of the marriage portion that she brought with her into the marriage and that remained with him during the marriage, much as dowry did in Roman marriage.[112] Although Muslim women frequently brought wealth and household goods into marriage, the model of dower and *milk* shared by formative-period authorities neither requires such transfers nor is entirely capable of assimilating them; they do not fit into the formulation of marriage as or like a sale. Similarly, though most Muslim women presumably did a fair amount of housework in practice, the contrast between a wife's sexual duty and a servant's duty of service differs from rabbinic formulations, where a wife's work and that of her servant were aggregated: a wife who brought a certain number of servants to her husband's home was exempted from performing some (though not all) domestic duties.[113]

The most obvious difference between rabbinic and Muslim jurisprudential discussions of spousal rights is in regard to sex: who has the right to claim it and who has the duty to perform it. Though the rabbis occasionally discuss recalcitrant wives, and what a man whose wife repeatedly refuses him may do (generally, fine her), they frame marital sex in terms of the husband's obligation to have intercourse with his wife. The frequency of this duty (called *onah*) depended on his occupational status, but the notion that it was the husband's duty shifts the entire frame of reference.[114] For the rabbis, marriage still essentially consisted of gender-differentiated claims; the key differences were that the wife's duties were domestic rather than sexual and that her support was not exchanged for her sexual availability. This does not mean that the rabbis did not presume a patriarchal and androcentric framework for sexuality. "Male dominance," Judith Plaskow argues, "shapes every aspect of sexual relations, from the basic structures of marriage, to the expectations surrounding sexual relations within it, to the regulation of sexual interactions outside the marital bond."[115] My point in discussing "the marital debt rabbinic style"[116] is not to set it up as an ideal against

which the Muslim model can be measured. I mention it to highlight the internal coherence of a legal model that contrasts sharply with that of the Muslim jurists. Sex, support, reproduction, and household labor are common concerns for the rabbis and their Muslim counterparts, but what they do with them differs considerably.

In the Muslim case, a wife's sexual availability was vital and the extent to which it was intertwined with support varies only when other legal-methodological principles are brought into the mix. The Shāfiʿī and Ḥanafī agreement that only the wife's availability to the husband matters in determining when she may claim maintenance highlights the one-sided nature of this right. The Mālikī position that a husband not yet capable of intercourse need not maintain a grown wife reflects a different legal principle that supersedes the standard rule about the wife's availability. It is not so much that the rules are incompatible as that the jurists draw on different principles in order to make their rulings.

For all, the commencement of maintenance payment clearly depends on the wife's sexual availability. Dower payment correlates to a woman becoming sexually lawful to her husband, but maintenance is linked to his ongoing right to exercise power over her movements and to enjoy her physically and sexually whenever he wishes. The wife's support was either premised on the husband's right to derive enjoyment from her or compensated her for the restrictions placed on her mobility and behavior. During a marriage, these were linked: to be sexually available to her husband, a wife had to remain at home and not rebuff her husband's advances or do anything that would prohibit intercourse, such as undertake a voluntary fast, without his permission. After an irrevocable divorce, only the restrictions on her mobility (and remarriage) persisted. The Ḥanafīs alone considered these sufficient reason to continue the wife's right to maintenance during her waiting period if she was not pregnant.

The wife's right to maintenance was contingent on her satisfactory performance of her duties, but a husband's right to derive enjoyment from his wife and to restrict her movements depended less on his performance of his financial obligations. And yet, though the formative-period jurists construed a Muslim husband's marital obligations as primarily financial (he paid dower and gained legitimate sexual access to a wife; he paid maintenance and could expect sexual availability in return), one of a man's marital duties concerned his behavior rather

than his expenditures: he was required to apportion his time among his wives, if he had more than one. The wife's claim to regular visits from her husband shifted marriage from a commercial logic based on dominion toward an intimately personal one grounded in reciprocity. The next chapter will explore how the jurists' discussions of apportionment *(qasm)* mediated these two realms.[117]