



Claiming Companionship

RĀFI‘ B. KHADĪJ had been married to one woman for many years when he “married a young lady and favored the young one over” his older longtime wife, whose name the *Mudawwana* does not report.¹ Complaining of favoritism toward her new co-wife, she requested divorce. Rāfi‘ complied, pronouncing a single, revocable divorce. Before her waiting period expired, she regretted her decision. At her request, he took her back. Yet the favoritism still bothered her and she asked for divorce once more. Again she regretted it; again, he took her back. The favoritism continued, however, so she sought divorce a third time. Rāfi‘ replied that only one divorce remained and gave her a choice: she could remain despite the favoritism or be irrevocably divorced. She chose to stay. According to the Mālikī authorities who recount this case in the *Mudawwana*, Rāfi‘ did nothing wrong. In fact, he seems to have done everything right. He did not divorce her until she requested it. He did not take her back except at her behest. Rāfi‘’s wife had options, even if she found them unpalatable. Her predicament reveals the irresolvable tensions between ideals about fairness and good treatment and the messy realities of human emotions and behaviors.

The *Mudawwana*’s section “Apportionment between wives” affirms both the wife’s right to a share of her husband’s time and the lawfulness of her giving up this right. In one scenario, a woman stipulates at the outset of her marriage that her husband may favor a previous wife, giving up her claim to an allotment of his time. Mālik declares this agreement invalid; a woman’s portion of her husband’s time is “one of the obligations of marriage” and she has a right to her turn.² But in

another scenario, a woman is married to a man who “dislikes her and wants to divorce her.” What if, Saḥnūn asks, she says to him, “‘Don’t divorce me, and I give all my days to my co-wife (*ṣāḥibatī*); don’t allot anything to me’ or she says to him ‘Marry another in addition to me and I will give all my days to the one you marry in addition to me’?”³ Ibn al-Qāsim responds with Mālik’s matter-of-fact view that “there is no problem in that and he doesn’t allot anything to her.” The juxtaposition of these cases reveals a seeming contradiction at the heart of spousal intimacy. Providing for favoritism in a marriage contract vitiates an essential element of marriage, but allowing favoritism is acceptable later to avoid a divorce. This tension between the permissible and the desirable points to the limitations of law as a means to achieve fairness. On the one hand, an ideal of mutual companionship informs the jurists’ work. On the other, as with Rāfi’s wife, the looming presence of unilateral divorce and the possibility of polygyny undercut the ideal.

Wives’ sexual rights are an essential, if unstated, undercurrent to these discussions of polygyny. Just as the husband’s sexual claims over his wife come to the fore in discussions of the support obligation, the dismissal of women’s claims to regular sexual contact with their husbands emerges from discussions of a husband’s allocation of his time among his wives. But to see this, we must read those passages with a squint: a wife’s claim to sex does not emerge as a legitimate question within juristic rubrics, even as the differentiation between wives and concubines in this and other regards remains a significant concern of theirs. As Rachel Adler points out with regard to rabbinic texts, legal categories emerge from the priorities and interpretive preconceptions of the scholars who frame them.⁴ These categories in turn structure the types of answers that can be given but also, more basically, the types of questions that are asked. Certain questions (for instance, how does the permissibility of polygyny affect wives’ ability to negotiate equitable agreements with their husbands?) remain unaskable.

In the case of apportionment between women, differences in terminology among groups of jurists affect their rulings and also reveal a great deal about their visions of women’s sexual rights. Their conceptual language both reflects and shapes their views of what constitutes fairness between wives. In regulating the minutiae of allocating time, making up for lost turns, and the effect of various behaviors by either

spouse on the other's right or duty of apportionment, Shāfiī is concerned with ensuring justice (*ʿadl*), while Mālik focuses on avoiding partiality (*mayl*). Abū Ḥanīfa and his followers object to favoritism, but remain largely silent on questions of apportionment except for the question of the wedding nights due to a new bride, a topic that provides an important glimpse into the gendered division of spousal claims.

The second part of this chapter discusses what transpires during a woman's turn, focusing on how the right to ask for or decline sexual activity is gendered. Here, male sexual refusal leads to very different consequences from those of female refusal. Despite an underlying agreement about which obligations were enforceable (women's right to time and support, men's right to sex) and which were not (women's right to sex), the texts differ in the tone with which they address these points. Oaths of abstinence, discussed in the third section of this chapter, show that the jurists (though again varying in their approaches) ultimately agree that wives have few, if any, enforceable sexual claims after consummation. The final section of this chapter returns us to the case of Rāfi's wife and those like her who try to ward off divorce by forgoing their allocated time. The wife's claim to her allotted turn, and her right to demand a resumption of her turns at any time after she had agreed to forgo them, existed within an asymmetrical spousal relationship.

I will argue that the jurists' attempts to ensure fairness in marriage were limited by their adoption of a strongly gendered model of interdependent spousal rights and duties. Taken cumulatively, the regulations surrounding apportionment and abstinence demonstrate that even when individual jurists wanted to enforce wives' rights to marital intimacy, their insistence on a gendered division of marital claims prevented them from doing so. Moreover, the culture of legal disputation in which pressing arguments to their fullest extension became necessary to formulate logically defensible, internally consistent positions led to the systematic discounting of women's claims. Even basic considerations that should have been uncontroversial, given the jurists' stated commitments to wives' rights, became indefensible under these rules of engagement. Reading these texts only for the rules that they can enforce is, at one level, necessary (there is a bottom line when it comes to women's rights), but at another level deeply misleading.

Taking Turns

Perhaps the best example of the extent to which jurists' categories shape their reasoning is found in their discussions of apportionment. The choice to discuss cohabitation and the intimate relations of spouses as a matter of allocating time between co-wives has profound ramifications, including the treatment of polygyny as normative. Instead of orienting their discussions around the permissibility of polygyny or the rights of women to companionship from their husbands, the jurists' relevant category was apportionment. Though they did come to address issues such as women's claims to time and sex within the confines of the discussion of apportionment, the category itself was an androcentric one, concerned with male obligation.⁵ Polygyny itself merited no special reflection. Texts addressed stipulations against polygyny—usually void unless attached to an oath of divorce, except under Ḥanbalī doctrine—and which women could not be combined in marriage, concurrently or sequentially, but never questioned the basic premise that a man could be married to more than one woman at a time. Discussions of apportionment went one step further: polygyny appeared not only as permissible but normative. By defining husbands' duty as dividing time among wives, rather than as spending time with wives, polygyny became the norm and monogamy the exception. Cohabitation, as a husband staying with each wife in turn, presumes that spouses do not share a single residence full time. Under the rubric of apportionment, a lone wife appeared as an exception. Even in this instance the jurists accounted for the "monogamous" husband's sexual access to one or more female slaves. Whatever the demographic reality concerning multiple, concurrent lawful sex partners, the idea of polygyny fundamentally shaped the regulation of marital intimacy for everyone.⁶

Muḥammad's personal precedent emerged frequently in discussions of apportionment. His behavior was the basis for the commonsense standard in allocation. Assuming all wives were free, a husband ought to spend one night in turn with each wife. (A man married to both a free woman and an enslaved woman owed two nights to the free woman for every night spent with the slave, except according to Mālik, who consistently differentiated less between enslaved and free people than his counterparts. He seems to have held that both free and slave wives were to receive the same number of nights. Other Medinan au-

thorities, such as Saʿīd b. al-Musayyab, ruled that slaves received half the allocation of free wives.)⁷

Could a man modify the length of each turn without tampering with the overall proportion of nights granted to each wife? Abū Ḥanīfa does not state so directly, but in one report allows a man to choose even the length of turn granted to a new bride. Shāfiʿī thought it permissible. If a man with two wives “wants to allot his time two nights and two nights, or three and three, he may do so.”⁸ Mālik and the other Medinan authorities whom Ibn al-Qāsim cites disallow it. The *Mudawwana* focuses on the example of Muḥammad and his Companions:⁹

I said: If two women are under (i.e., married to) [one] man, is he permitted to allot two days to this one and two days to that one, or a month to this one and a month to that one? He said: I have not heard Mālik say anything except “A day to this one and a day to that one.” Ibn al-Qāsim said: What has been established from the Messenger of God, may God’s blessings and peace be upon him, and his Companions suffices for you in this [matter]. It has not reached us that any of them allotted [his time] except a day for her and a day for her.¹⁰

Ibn al-Qāsim proceeds to report an incident on Mālik’s authority that bolsters his view that a husband must alternate days. “‘Umar b. ‘Abd al-‘Azīz perhaps became angry with one of his wives, then he came to her on her day and slept in her room.” Ibn al-Qāsim deduced that “if it were permissible for him to allot two days to this one and two days to that one, or more, he would have stayed with the one with whom he was pleased until he was pleased with the other and then made up her days to her.”¹¹ The husband’s feeling toward his wife was irrelevant. He was obligated to allot her turn to her, even if he would prefer to stay with another of his wives. The basic formula of one night each for a man’s wives served to ensure fairness between them.

Implicitly, the minimum allocation of time for a free wife was one of every four nights—what she would get if married to a man with the legal maximum of four wives. This unofficial one-in-four standard recurs in various texts. Shāfiʿī’s two-and-two or three-and-three allocation would give each wife *at least* one of every four nights, though this would no longer be the case if more than two wives were involved. Mālik applied the one-in-four standard when a man with only one wife spent time with his concubines. He could stay one day with his wife and then spend two or three days with one or more of his concubines. One

Medinan judge with a favorite *umm walad*, a slave who had borne him a child, was known to do so, and Mālik saw “no problem” with this behavior.¹² The issue was not parity between a man’s wife and his concubine, as the latter, even if she were his *umm walad*, had no claim on his time.¹³ At stake, rather, was the husband’s freedom to spend his time as he chose as opposed to the wife’s right to a portion of his time. Shāfiī stated that a man could refrain from visiting his wife or wives completely, so long as the proportion of time spent with each wife relative to any other or others did not change. “The slaves do not have an allotted portion along with his spouses. He may visit them (*fa ya’tihunna*), and have intercourse [with them], however he wishes, more or less than he goes to his wives, during the days and the nights.” He must, though, abstain from all of his wives equally, “just as he may travel and be absent from his wives in [another] city.” When he resumes taking turns, “he does justice between them.”¹⁴ A wife’s allotted share was not a right to an absolute amount of time with her husband but only to fairness in relation to her co-wives.

In evaluating men’s behavior in allocation, Shāfiī and his disciple al-Muzanī focused on doing justice, while Mālik and his followers stressed the avoidance of partiality. Divergent rules flowed from these starting points. We see this most clearly when circumstances such as travel or illness disrupted the normal apportionment of turns. Shāfiī justice demanded a strictly equal allocation of time, but the Mālikī focus on motivation meant that even spending unequal time, if done for a legitimate reason and not out of partiality, did not necessarily violate the obligation to be fair.

The *Mudawwana*’s discussion of a man’s choice of travel partner shows the calculations:

I said: What if he travels with one of them to his landed estate (*ḍay‘atihi*) and for a need of his, or he makes pilgrimage with one of them, or makes the lesser pilgrimage (*‘umra*) with her or takes her on a military expedition (*ghazā bihā*), then he arrives [home] to the other one and she requests of him that he stay with her the same number of days that he traveled with her companion? He said: Mālik said: She is not due that. Instead he begins apportioning anew between them and the days that he was traveling with his [other] wife are ignored, except in the case of military expeditions.¹⁵

Ibn al-Qāsim here permits, in accordance with the teaching of Mālik, a major departure from the one-night rule that governed the division of

time when a husband and his wives were together; a husband could choose the wife with whom he wished to travel: “He may take whichever one of them he wishes unless his taking one of them is due to partiality (*‘alā wajh al-mayl*) towards her and [inclination] away from his other wives.”¹⁶ Military expeditions merit special consideration because a relevant prophetic precedent exists. But though Ibn al-Qāsim recalls the Prophet’s practice of drawing lots when he wished to travel with one or some of his wives, he does not consider it binding. Instead, he turns to his authoritative predecessors among the jurists: “I did not hear Mālik say anything about the case of military expeditions except that Mālik or someone else mentioned that the Messenger of God, may God’s peace and blessings be upon him, used to draw lots between [his wives]. So, rather, in the case of military expeditions he has to draw lots between them. But my opinion is that all of this is the same, military expeditions and other [travel].”¹⁷ Ibn al-Qāsim bases his own view on a legal similarity between the cases, ignoring prophetic precedent. This cavalier treatment of prophetic example contrasts with Ibn al-Qāsim’s earlier insistence regarding the question of the length of each wife’s turn, that “what has been established from the Messenger of God . . . suffices for you.” Here, the husband may travel with “whichever one of them he wishes,” without the duty to make up the lost turns of those who remained at home, provided only that his choice is not guided by partiality.

Besides favoritism, what would lead a man to choose one wife as travel companion rather than another? The *Mudawwana* poses a scenario in which one wife’s admirable moral and administrative qualities lead to her indispensability at home: “If he goes out with her, and draws her lot, his wealth and children will be jeopardized and harm will come to him as a result.” In this situation, he could legitimately choose her co-wife, “who does not have that capacity or that reliability, so instead he travels with her to lighten her burden and because of her uselessness (*li qillat manfa‘atihā*) in what he might delegate to her from his estate and his affairs and in his [lack of] need for her to act on his behalf in his [affairs].”¹⁸ The text recognizes women’s varied capacities and the possibility that a wife could be a capable companion and helpmate for her husband. For her to act on his behalf in managing his estate and household exceeds what can be expected from her legally and goes beyond the quid pro quo logic of interdependent rights. Yet her performance of these tasks does not earn her compensatory time on his

return. Her impressive skills and capabilities do nothing to alter the husband's prerogative to decide whom he takes with him on a journey.

The Mālikī focus on avoiding partiality, with only exceptional references to doing justice, drew implicitly on the Qur'anic assertion that doing justice is an impossible, and therefore inappropriate, standard. Q. 4:129 declares, "You are never able to do justice between wives even if you desire to; but do not incline completely away (*lā tamīlū kulla al-mayl*) from a woman." The *Mudawwana* only alludes to the Qur'an, but the *Umm*'s hermeneutical approach on the same subject is explicitly scriptural, quoting the Qur'an and referring to its provisions. Lest his insistence on a husband's duty to do justice between wives seem to contradict the Qur'anic declaration that justice is impossible, Shāfi'ī interprets the verse through the lens of a prophetic hadith that narrows the scope of justice in conjugal matters. The Prophet acknowledges that he allocates equally that which he controls ("*mā amliku*"), which Shāfi'ī understands to be his actions, while God is responsible for what he cannot control—in Shāfi'ī's interpretation, his emotions.¹⁹ Although justice might be impossible in matters of the heart, feelings are irrelevant; God judges on the basis of one's actions and statements. Justice required avoiding any inequity in word or deed (though it did not extend to equality in sexual matters), specifically in the measurable dimension of time spent. Such inequity constituted the "inclining completely away" that the Qur'an forbade. Shāfi'ī's restrictive exegesis argues for justice as a positive and objective standard in apportionment in contrast to the Mālikī focus on avoiding partiality, a negative and subjective measure.²⁰

The divergent effects of using "avoiding partiality" or "ensuring justice" as organizing rubrics become clearer when travel or illness disrupts the normal order of rotation. Mālik forgives an imbalance of time as long as a man avoids favoritism. As with travel, where "he may take whichever one of them he wishes unless his taking one of them is due to partiality towards her and [inclination] away from his other wives,"²¹ a husband might have a valid reason, such as illness, for departing from an equal division while at home. If capable of continuing his visitations, he had to do so. However, according to Mālik, if his illness was so grave that he could not do so, "then I see no problem with him staying wherever he wishes, unless it is out of partiality."²² No makeup of missed turns was due. Even if a man simply shirked his responsibility

to one wife by staying with another for a month, Mālik condemned his actions but did not require him to make up the time, only noting that if he persisted in his unfair treatment he could be punished.²³

Shāfiʿī, by contrast, defined justice as precisely equal allocation of time. But justice could involve a substitute mechanism of lot drawing, as with travel. If a husband intent on a journey drew lots to determine which wife would accompany him, he thereby exempted himself from the need to make up the time to those who remained behind. Should he fail to draw lots, he was obliged to make up the time.²⁴ Drawing lots to choose whom to take on a journey demonstrated a concern for strict fairness to individual wives.²⁵ Random selection made the process acceptable: each wife had an equal chance of being selected. (However, if after drawing lots the husband decided that he would rather travel alone than with the wife whose lot was drawn, he could leave her at home without penalty as long as he did not take another in her place—humiliating for the woman, perhaps, but legally acceptable, as a man could not be forced to spend time with his wives.) The *Umm*'s discussion under “Juristic Disagreement on Apportionment during Travel” offers a rationale in the context of rebutting a putative Ḥanafī position. According to the *Umm*, Ḥanafīs held that a man had to make up travel days to those who remained behind, whether he selected his travel partner himself or chose her by lot. This Ḥanafī position—as far as I can tell not corroborated in formative-period Ḥanafī sources—rectifies the perceived deficiency of the Mālikī view, which is overgenerous toward the husband, by positing the need to make up days. Shāfiʿī substitutes the equal chance of each wife in the selection process for the equality of time.

Apart from travel, though, strict equality of time governed Shāfiʿī regulation. If a husband missed or shortened a visit with one of his wives because of illness or some other pressing necessity, Shāfiʿī insisted on his making up the time scrupulously.²⁶ If a wife fell seriously ill, her husband could remain with her until she recovered or died; if she died, he could remain until her corpse was buried. Nonetheless, even in this admittedly extreme case, he was still obliged to make up the lost nights to his other wife or wives. A husband who sickened had to continue his rounds unless he was too weak to do so. Then he might remain where he took ill (not, as in the Mālikī view, “wherever he wishes”) until capable of resuming his visitations. Then he had to make up to his neglected

wife or wives the same amount of time he spent, in his grave illness, with one wife.

The choice of organizing concepts resulted in real differences in doctrine with regard to calculating wives' rights to a portion of their husbands' time under the exceptional circumstances of travel, illness, or a man's shirking of his duty. Yet despite these differences, there was important common ground among the formative-period jurists. The presumption of multiple wives indelibly stamped jurists' thinking about cohabitation. Their rules sprang from the notion that a wife had no enforceable claim to an absolute proportion of her husband's time, though Mālik does suggest that even if he visits his concubines, she should get one of four nights. However, she may not object to his travel; it goes without saying that a man's wives have no right to restrict his movements in order to have their regular turns with him. Even to consider the question makes no sense: no jurist asks whether a man's wife may prohibit him from traveling to ensure her share of his time. Juristic differences regarding the selection process for travel are slight in comparison to their agreement on the husband's right to take some or all of his wives with him if he wished and the wives' obligation to accompany him if chosen.²⁷ At the same time, no wife has a right to go with him. As Shāfi'i puts it, "he is not obligated to take [all of] them or any of them." A wife claims a portion of her husband's time, but the overarching context is still that of her availability to him, not the reverse. Finally, and only alluded to briefly thus far, the jurists agree that whatever standard of fairness governs apportionment, equality in sexual matters is neither obligatory nor expected. Later sections of this chapter will address this question of sexual rights more directly. First, however, I turn to the wedding nights.

Wedding Nights

When a man marries a woman, how many nights may or must he stay with her? Does this change depending on whether she is a virgin? And if he already has a wife or wives, what about her or their share of his time? When an already married man takes a new wife, the requisite wedding nights may interfere with his duty to his other wife or wives. Jurists' various approaches to these questions illustrate their common dependence on a view of gender-differentiated spousal claims, their

diverse ways of drawing on scriptural texts to render rules, and the refinement of doctrines through debate and disputation.

Mālik's view can be summed up as follows: a virgin bride is due seven nights with her groom; a non-virgin, three. These are her right and are not counted against her in calculating each wife's turn; the husband begins apportionment with a clean slate after the wedding nights: "If the man has another wife, he divides his time equally between them after the wedding nights. He does not count the wedding nights against the one he has just married."²⁸ The *Muwatta'* invokes prophetic precedent for its distinction between virgin and non-virgin brides. When the Prophet married Umm Salama, a widow, he gave her a choice: "If you wish, I will spend seven [nights] with you and then spend seven with them. If you wish, I will spend three with you and then visit them in turn."²⁹ She replied, "Spend three." The text goes on to report Anas b. Mālik's maxim: "Seven for the virgin, and three for the non-virgin." Umm Salama's choice between three and seven nights raises the tricky issue of whether the wedding nights are the wife's right. This issue is absent from the *Muwatta'* but present in the *Mudawwana*, where the treatment of the topic implicitly responds to Ḥanafī critique. Mālikī authorities understand the Prophet's granting Umm Salama a choice between three and seven nights to mean that as a non-virgin she was entitled to three nights with her new husband that would not need to be made up to his other wives. However, if she were to take the full week offered to her, it would need to be made up in its entirety to the others. In the *Mudawwana*, Ibn al-Qāsim affirms that the wedding nights are the bride's right and the husband cannot choose to forgo them.³⁰ Both the virgin and the non-virgin have a claim to the wedding nights: "Seven for (*li*) the virgin and three for (*li*) the non-virgin." The preposition *li*, "for" or "due to," stands opposed to *ʿalā*, "upon" or "due from": "And you are told in the hadith of Anas b. Mālik that these are *for* the woman and not *for* the man." Three elements thus constitute the Mālikī doctrine on wedding nights: they are the bride's right, they need not be made up to any additional wives, and their number depends on whether she has been previously married.

Both the *Muwatta' Shaybānī* and the *Kitāb al-Ḥujja* argue, on the authority of Abū Ḥanīfa, against two of these points: the differentiation between virgin and non-virgin brides and the exemption of the wedding nights from the rules of apportionment. Instead, al-Shaybānī

states that all brides receive the same number of nights and that those nights must be made up to each of a husband's previous wives. (The *Kitāb al-Ḥujja* further attributes to Abū Ḥanīfa the view that the husband could determine how many wedding nights were to be spent with the bride.) This view that the wedding nights had to be made up to a man's other wives responded to a perceived flaw in the Mālikī position, which ignored the conflict between the bride's right to wedding nights and the other wives' rights to their allotted turns. Shaybānī criticizes Mālikī doctrine for giving a new bride wedding nights at the expense of the turns of her co-wife or co-wives. Abū Ḥanīfa resolves the problem by making the wedding nights simply a regular part of a man's apportionment to his wives.

These Ḥanafī texts treat hadith strategically, addressing them where necessary to bolster their arguments. They do not, however, serve as the starting point for Ḥanafī doctrines in the way that they do for the Mālikīs. Behnam Sadeki, in treating the topic of prayer, argues that Ḥanafī jurisprudence is "nearly maximally hermeneutically flexible," meaning that the contents of hadith do not determine Ḥanafī doctrines.³¹ In the case of legal works specifically addressing Mālikī doctrines, however, the hadith that serve as proof for their positions must be addressed. Both the *Muwattaʿ Shaybānī* and the *Kitāb al-Ḥujja* address the hadith, either by interpreting the same hadith in a different way or by offering an alternate rendering.

Ḥanafī authorities dissolve the distinction between wedding nights and normal apportionment, and between new bride and an existing wife or wives, using variants of the Umm Salama hadith. The *Muwattaʿ Shaybānī* presents substantially the same text as the *Muwattaʿ* but offers an alternate interpretation as authoritative: "If he spends seven with her, he must spend seven with them, he does not add anything for her and against them. And if he spends three with her, he spends three with them."³² Mālik holds that after the three nights that are due to the new wife alone, the husband begins his regular rounds, taking equal turns with each. According to Shaybānī, however, if he spends three nights with his new wife, he must also spend three nights with each of the others, lest he impermissibly favor the new wife.

The *Kitāb al-Ḥujja* expands on this need for equality, drawing explicitly on prophetic precedent:

Muḥammad said: Abū Ḥanīfa, may God be pleased with him, said about the man who marries a woman and [already] has another wife, whether the one he just married is [either] a virgin or a non-virgin: He does not stay with the one he just married except the same amount he stays with the other. If he wishes, he spends seven [days] with the one he married and spends seven with the other, and if he wishes, three [days] with the one he married and three with the other, and if he wishes a night and a day with the one he married and with the other, and so forth. He does not spend with the one he married [any time] except what he spends with the other [also].³³

This passage reiterates the irrelevance of virginity to the number of wedding nights and asserts the need for spending equal time with the new wife and any other wife or wives. It also makes another point worth digressing briefly to address: Shaybānī reports Abū Ḥanīfa's statement that the husband had the prerogative to decide how many wedding nights a bride received: "If he wishes, he stays seven . . . and if he wishes, three . . . and if he wishes, a night and a day." If the wedding nights were nights like any other, the length of time spent with the bride became the husband's choice, provided the condition of equality was met. Nonetheless, the *Kitāb al-Ḥujja* remains uncharacteristically reticent on this point, acknowledging it in passing but marshaling no evidence to contest the opposing view. Perhaps because the reports about Umm Salama, even in the preferred Ḥanafī version, suggest that it is the bride who determines how many wedding nights she gets, Shaybānī skates over this issue even as he challenges other components of the Medinan reading of the hadith.

The *Ḥujja* further contests the Mālikī position by giving a version of the Umm Salama hadith that differs from that in the *Muwatta'* and the *Muwatta' Shaybānī*. Shaybānī introduces the text in a way that makes clear it is intended to rebut Mālik's position: "How can they say that [all seven nights would need to be made up] when the hadith has come about the Messenger of God, may God's blessings and peace be upon him and his family, when he married Umm Salama, may Exalted God be pleased with her, that he, may God's blessings and peace be upon him, said to her: "If you wish I will spend seven with you and spend seven with them; if you wish I will visit you and them in turn (*durtu 'alayki wa 'alayhinna*)?"³⁴ The key difference in the Prophet's

words appears in the last phrase: “I will visit you and them in turn.” (The other version has “I will spend three with you then visit them in turn.”) The parallelism between the bride and any previous wives avoids room for the misinterpretation (in Shaybānī’s opinion) that leads to the Mālikī view.³⁵ Nonetheless, Shaybānī condescends to argue in the *Hujja* against the Mālikī position utilizing their preferred version of the tradition as well, as in the *Muwatṭaʾ* *Shaybānī*.³⁶ Here he appeals to logic. It makes no sense to accept that the non-virgin bride has three nights that are hers by right and that need not be made up to co-wives, then state that if she takes the option of having seven nights, all seven would need to be made up. Instead, if three are her right, exempt from the regular apportionment, then only four would need to be made up to the other wives if she were to choose seven.³⁷ His phrasing “obligatory to her and upon them (i.e., the other wives)” depicts the Mālikī position as giving a bride rights against her co-wives. Taking the wedding nights from the allotted portions of co-wives is logically untenable.

Shaybānī follows his logical argument with an appeal to prophetic example. He elicits from the sunna a principle of nonfavoritism that explains both the Ḥanafī allocation and also the nondifferentiation between virgin and non-virgin brides. The *Hujja* explicitly links the two: “It is not the right of the bride and the other [i.e., a previous wife] to [his] privacy with her except [with] equality, and we do not think that the Messenger of God, may God’s blessings and peace be upon him and his [family,] favored the bride over those beside her and he did not favor the virgin over the non-virgin and he did not stay alone with them or have privacy with them except equally.” In addition to being illogical, the Mālikī interpretation of the Umm Salama hadith violates this principle of nonfavoritism. It ought to be clear, says Shaybānī, that the “the first part of the hadith enters upon the last”; that is, “it does not favor her against them in its first part when it says ‘If you wish, I will spend seven with you and seven with them.’ Likewise, in the last part indeed its meaning is: ‘I will take turns with them like what I did for you.’”³⁸

In contrast to the Ḥanafīs, who treat the wedding nights as simply part of an ongoing allocation of time to a man’s wives and who granted a newly married woman no special consideration, Shāfiʿī and al-Muzanī upheld both key elements of Mālik’s stance: that a husband spent a dif-

ferent number of nights with virgin and non-virgin brides, and that these nights need not be made up to any co-wives.³⁹ As they grappled with the challenge posed by the Ḥanafīs to Mālik’s reasoning—one cannot simply ignore the question of how the wedding nights affect existing wives—the *Umm* and the *Mukhtaṣar* of al-Muzanī differ in how strictly they separate male and female claims. The question of whether the nights are the wife’s right or the husband’s right turns out to be key.

To sidestep the logical problem of favoritism of one wife over another, the *Umm* argues that a new bride is not really yet a wife and so the rules about apportionment do not apply to her. The husband has the right to depart from his normal apportionment of time in order to spend wedding nights with his bride: “Shāfiī, may God be merciful to him, said: If a man marries a woman and consummates [the marriage] with her, then her situation is not the situation of [those wives] who are [already] with him. If she is a virgin, he may stay seven days and nights with her, and if she is a non-virgin, then he may spend three days and nights. Then he begins the division (*al-qisma*) between his wives.”⁴⁰ Until her wedding nights have passed, “her situation is not the situation” of his existing wives. By framing the issue this way, Shāfiī sidesteps the grounds on which the Mālikī position was attacked by the Ḥanafīs, that is, that one wife was being given time at the expense of her co-wives. In the *Umm*’s formulation, the time spent with the new wife is simply an exemption of the husband from his regular duty, analogous (though this is not stated explicitly) to his right to travel without his wives or to abstain from visiting his wives in order to be with his concubines. However, unlike his unrestricted right to stay away from his wives in these cases, the wedding night exemption is limited. After seven nights (if a virgin), or three (if a non-virgin), the bride becomes a wife and may not receive preferential treatment: “She is one of them after her days have ended, and he may not favor her over them.”⁴¹ (The shift from bride to wife is no doubt momentous in other ways as well, but the point at issue is the honeymoon period.)

Shāfiī justifies the husband’s departure from his normal visitations of his previous wives, but by making the right to the wedding nights the husband’s, Shāfiī leaves open the possibility that the husband might not spend the requisite number of wedding nights with his new bride. Shāfiī’s compulsive separation of men’s and women’s claims precludes arguing that the bride has the “right” to wedding nights or

that the husband has them as his duty, which would effectively be the same thing. (Claims that are “for” [*li*] one spouse are “due from” [*‘ala*] the other.) Shāfi‘ī must maneuver delicately to ensure the bride gets her wedding nights without suggesting that a husband and wife have reciprocal, mutual claims. First, he speaks of the husband’s right to spend wedding nights with his new bride and apart from his other wives: “If a man marries a virgin he may (*kāna lahu*) stay seven nights with her and if a non-virgin, three. These nights are not counted against him and to his wives who were with him before her. He begins the apportionment from after the seven [or] from after the three [wedding nights].” If he fails to spend this time with his new bride, he must make it up to her: “And if he does not do this and he allots time to his wives, omitting [the wedding nights], he makes up that amount to either [bride, the virgin or the non-virgin] as if he left her rights in the apportionment and he makes it up to both of them.”⁴² He meticulously avoids any declaration that the wedding nights are the bride’s right: “And it is not his right with regard to the virgin or the non-virgin except to stay with them [i.e., the brides] this number, unless they permit it.”⁴³ It makes no sense to require the wife’s permission to forgo the wedding nights if they were not her right. The husband had to make up any shortfall in the wedding nights to his bride, just as if he were to shortchange her in his allocation of time; functionally, the wedding nights were, as in Mālikī doctrine, the bride’s right, exempt from the usual rules of apportionment of time. The *Umm* goes to extraordinary lengths to avoid acknowledging this because this position was vulnerable to the same critique leveled by the Ḥanafīs at the Mālikī position: one wife was being favored at the expense of the other or others.

The subtlety of the *Umm*’s argument stands out when juxtaposed to al-Muzanī’s matter-of-fact treatment of the wedding nights in his *Mukhtaṣar*.⁴⁴ Al-Muzanī simply says outright, without pussyfooting around, that the wedding nights are the husband’s duty. At the same time, he declares that they are not to be counted against him by his previous wives, implying that they are his right with regard to his other wives. Like Shāfi‘ī, al-Muzanī treads a fine line. The Prophet’s words to Umm Salama were “an indication that if a man marries a virgin he must (*‘alayhi an*) stay seven nights with her, and three with the non-virgin, and it is not counted against him by his wives who were already with him before her”⁴⁵ The wedding nights were the husband’s right

insofar as they could not be counted *against him* by his other wives and he was exempt from making the time up to them; in this, the *Mukhtaṣar* agrees with the *Umm*. The texts diverge, though, where al-Muzanī claims that Shāfiʿī holds that the wedding nights are a man’s duty to his bride that he “must” fulfill. The *Umm* continually resists stating that the husband has the wedding nights as a duty upon him (*ʿalayhi*) as well as being a right that he possesses (*lahu*), relying instead on circumlocutions such as Shāfiʿī’s declaration that “he *may* stay (*lahu an*) . . . And it is not his right . . . except to stay with them this number [of nights].” In contrast to the *Umm*’s painstaking separation, al-Muzanī summarizes Shāfiʿī’s rules commonsensically: the wedding nights were the husband’s right with regard to his previous wives but his duty with regard to his new wife.

The wedding nights have limited significance for the ongoing relationship between spouses—at most, in Shāfiʿī’s formulation, the bride has a week before she becomes a wife—but they reveal a great deal about the jurists’ visions of fairness regarding co-wives. As with other aspects of apportionment, fairness was necessary. But what precisely did it entail? The Mālikīs did not question how a new wife’s claim to wedding nights interfered with any existing wives’ rights. The Ḥanafīs worried about favoritism toward the bride at the expense of her co-wives and insisted that any time spent with the bride be made up to the others. The Shāfiʿīs made the point that the husband had a right to wedding nights with his new wife; for this reason, brides were temporarily exempt from the apportionment among his other wives. Did virginity merit special treatment? The Ḥanafīs downplayed it, but others gave a virgin bride more time with her groom, or her groom more time with her. Why? The answer could be as simple as the presence of the three-vs.-seven distinction in the hadith account of the Prophet’s wedding nights: it cried out for explanation. There are also hadith that recommend that men marry virgins, stressing their greater playfulness.⁴⁶ This perspective suggests the husband’s right to enjoy his virginal bride, but the emphasis on considering the wedding nights the wife’s right suggests instead her need for greater time to become acclimated to her new husband.⁴⁷ One could speculate about the slow introduction of a virgin to the delights of the marital bed, but this would be pure invention.

Did a wife have an enforceable claim to wedding nights with her new husband? The Mālikīs straightforwardly view the nights as the

wife's right. The Ḥanafīs hold—though Shaybānī in the *Kitāb al-Ḥujja* does not defend this point with his usual vehemence—that the husband decided how many nights the bride received; she had no say. These views jibed with stances on whether wedding nights were exempt from apportionment. However, both the *Umm* and the *Mukhtaṣar al-Muzanī* betray the Shāfiī jurists' struggle to find a formulation that preserves the husband's right to wedding nights while holding him accountable for fulfilling these nights to his new bride—a task made difficult by the vision of strictly separated rights and duties for husbands and wives.

Lose a Turn

Sex is another crucial claim that ideally was mutual, but in legal thought ultimately one-sided. In contrast to Jewish law, which defined conjugal obligations primarily as the wife's claim on the husband, in Muslim marriage sex was the husband's claim on his wife. Paul Powers sets "mutual sexual access and fidelity" among the contractual rights and duties of marriage. This is accurate insofar as one understands both access and fidelity to mean quite different things for husbands and wives.⁴⁸ This is not to suggest that Muslim source texts or jurists ignored women's sexual needs entirely, much less that in practice men regularly withheld sex from women because they were legally entitled to do so. Occasional references to women collecting a "bed fee" from husbands in exchange for conjugal favors suggest the operation of a rather different model of sexual access.⁴⁹ Moreover, classical Muslim medical and other literature reflects a more balanced notion of conjugal sexuality.⁵⁰ As jurists drew on this repertoire of ideas about male and female desire, they selected those elements that fit their scheme, ignored those that did not, and fit them into a mostly coherent set of rules.⁵¹ Containing the sexual drive, which both men and women possessed, was one key function of marriage. These rules privilege male sexual needs and desires, discounting without ever directly denying women's claim to fulfillment.

Though wives had an obligation to fulfill male sexual needs in exchange for their claim to support, marriage was also a way of "fortressing" women's sexuality.⁵² Early jurists were deeply ambivalent about wives' sexual claims.⁵³ They repeatedly alluded to women's claim to sex, and yet in nearly every instance where a wife pressed a specific

claim, they renounced coercive measures to compel a husband to intercourse. Again and again they declined to impose consequences on neglectful husbands. They were caught between competing agendas: promoting social chastity, envisioning marriage as a bastion of mutual satisfaction and repose, and constructing a legal framework for marriage with strictly separate male and female claims. The gap between obligation and recommendation became a chasm.

The discourse of apportionment stemmed from an unwillingness to see women's conjugal claims as sexual. It emphasized cohabitation and companionship. The purpose of the husband's allocation of time to each wife was "dwelling [together] and intimacy (*ilfan*)."⁵⁴ Terminology for taking turns emphasized physical presence: *mabīt*, "residing," or *qāma bi*, "staying with." Defining turn taking asexually meant that impediments to sex on either party's part were irrelevant. So was the husband's willingness to have sex. A wife's refusal, though, made her liable to losing her turn, her right to support, or both. The legal treatment of these three cases—impediments to intercourse on the part of either spouse, the husband's refusal, and the wife's refusal—show how dependent the logic of marital rights was on a strict division of claims by gender.

A wife was due companionship from her husband. A husband might want and perhaps enjoy companionship with his wife. What the jurists focused on, though, was his right to enjoy her sexually. This could and presumably would involve penetration but could also include other sexual activities. When intercourse was temporarily forbidden or even permanently ruled out, a wife retained her claim to a turn and her husband remained obligated to stay with her. Illness was a common reason that intercourse might be contraindicated, as was menstruation, which precluded penetration but permitted other intimacies. Provided she did not refuse her husband those activities for which she was fit, a wife with a physical impediment to intercourse such as a disease (*dāʿ*) or vaginal obstruction nonetheless retained her right to her allotted time.⁵⁵ Ibn al-Qāsim justified his opinion that the husband of a woman with such an obstruction "apportions to her and does not set aside her day" by analogy to Mālik's ruling that both "the menstruant and the ill woman with whom he cannot have intercourse" were due their turns despite the fact that it was not permissible to have intercourse with them.⁵⁶ The texts presume that nonpenetrative sexual activities were

allowed, and the gratification thus obtained meant that the wife was fulfilling her end of the bargain.

A husband's physical defects likewise did not affect apportionment, though the wife's satisfaction in such a case was little discussed. A husband who "is impotent, or a eunuch, or has had his penis severed, or who is incapable with women" must still, Shāfi'ī says, allocate his time appropriately, just like the "healthy, potent man" (*al-ṣaḥīḥ al-qawī*).⁵⁷ Eunuchs were persistent figures in legal texts concerning marriage. Their appearance in legal treatises, clearly disproportionate to their presence in the population, can be explained as the result of jurists' attempts to sort out what precisely defined individuals as capable of exerting the rights and prerogatives of husbands.⁵⁸ (In similar fashion, jurists debate whether and how a mute or deaf-mute man can contract a marriage or divorce a wife.) Eunuchs consistently figure as men, with the rights and prerogatives of husbands. Sometimes rules distinguish between those men whose testicles had been removed and those who had undergone complete castration, including removal of the penis. Though either defect was usually grounds for dissolving a marriage if it prevented consummation, once consummation had taken place or a woman had waived her right to it by remaining with a husband whom she knew could not perform sexually, his sexual inability was not grounds for divorce. Nor, Shāfi'ī insists, did it affect his duty to take turns among his wives, since "apportionment is for dwelling (*sukn*), not for intercourse."⁵⁹

More revealing of legal assumptions was a man who was capable of intercourse with his wife but simply unwilling or uninterested. He had to spend the night with his wife when it was her turn, and this turn "count[ed] against her" even if he did not have sex with her.

Intersecting nonlegal discourses about marriage posit a parallel between husbands and wives with regard to sex. Marriage makes a wife licit for her husband, and it also makes him licit for her. In that sense, it is reciprocal. Female desire appears, from time to time, as a consideration, as does care for female satisfaction in the carnal act. The hadith take note of women's sexual needs, though most of the focus is on men's sexual claims on their wives, and a Qur'anic passage (Q. 2:223) suggests to men how to conduct themselves amorously. Commentators drew on prophetic statements about proper treatment (a man should

not fall upon his wife like a beast, but approach her with kisses and caresses). Despite the availability of these texts, the jurists apparently found them extraneous. Desirous women were largely absent from these texts' discussions of sex in marriage: marriage conveyed reciprocal sexual licitness but lopsided or even one-sided sexual rights. On the one hand, marriage made a man lawful to his wife as a sexual partner, just as it made her lawful to him. On the other hand, the structuring of rights and duties by gender rendered women's availability to their husbands a condition of their support. A husband's satisfaction of his wife's desires was at once necessary and incompatible with the *quid pro quo* logic of marital transactions. Apportionment partially bridged this gap even as it construed wives' claims in nonsexual terms. The jurists wrestled with a wife's human needs within the confines of their gender-differentiated parameters for enforcing marital rights.

Mālikī authorities engaged this ambiguity most directly, considering both a man's wants and his wife's desires. They affirmed a wife's right to satisfaction but vacillated about consequences for a neglectful husband. Treating wives unequally in sexual matters was permissible, provided it was not done out of partiality. An exchange between Saḥnūn and Ibn al-Qāsim focused on this point. Asked about whether a man with two wives who was "in the mood for sex" on one wife's day but not on the other's day (*yanshaṭu fī yawm hādhihi li 'l-jimā' wa lā yanshaṭu fī yawm hādhihi li 'l-jimā'*) was obligated to the latter wife in any way, Ibn al-Qāsim replied that "whenever he abandons sex with one of them and has sex with the other by way of cruelty (*ḍarar*) and partiality, keeping away from this one because of finding his pleasure with the other one, then it is not appropriate for him and it is not lawful." However, "there is no problem" if he abstains because of lack of desire since, in Mālik's view, "the man is not compelled to do justice between the two of them with regard to sex."⁶⁰ The passage that follows provides a clue about how this ruling fits into the broader framework of conjugal rights. It asks whether free and slave women are due equal portions of their husband's time, presenting Mālik's insistence—not shared by the other Medinan authorities—on equal division of time between wives of various statuses. The *Mudawwana* then turns to the subject of a wife whose monogamous husband fails to have intercourse with her regularly. Placing the issue of whether co-wives' turns must be alike before

a further discussion of the neglectful husband reaffirms the difference between a woman's claim to an equal share of her husband's time and her lack of claim to equality in sexual matters. Her allotment of time with her husband is not subject to the vagaries of his mood, but her access to intercourse depends on his desire.

Nonetheless, the Mālikī authorities ultimately conclude that depriving a wife of sex entirely could harm her. A wife whose husband's daytime fasting and nighttime prayer kept him from having sex with her complained to Saḥnūn. Saḥnūn asks Ibn al-Qāsim whether "there is anything due her or not." Ibn al-Qāsim replies that the husband "is harming [her] (*muḍārrun*)". The wife's claim to intercourse "became incumbent on him when he married her." In accordance with Mālik's view, the husband should be told, "You may not leave your wife without intercourse, so either have intercourse with her or we will separate you and her."⁶¹ Ibn al-Qāsim omits mention of any specific frequency of intercourse, but his threat of intervention by the public authority assumes that lack of sex harms the wife—her complaint constitutes evidence of this harm—and gives grounds for separation.

This affirmation of a wife's claim to marital intercourse conflicts, though, with other elements of Mālikī rulings on allotting time and sexual favors between wives. Although lack of sex could harm a wife, elsewhere the husband's desire and motives alone determined the frequency of intercourse with a particular wife. Broad assertions, like Ibn al-Qāsim's, of a wife's sexual claims warred with the denial of a wife's regular rights to intercourse during her allotted turns as well as with the refusal to fix a specific allocation of sex. Additionally, the husband's freedom to spend time with his concubines rather than his wives and to travel whenever he wished, with whomever he wished, provided his actions were not motivated by partiality, further limited the wife's claim to time with him. The wife's right to divorce for continual deprivation of intercourse reflected a concern with the husband's harm of one wife, parallel to a concern with partiality in matters of apportionment. In both cases, the harm he inflicts rather than the lack of sex per se justifies intervention by the authorities.

Shāfi'ī was less conflicted about wives' sexual rights and more staunchly defended their rights to apportionment. He took a more restricted view of the husband's sexual obligations, denying harm or cruelty any relevance. A husband had no obligation to have intercourse

with his wife during her turn, even in the absence of any impediments. Inequality between or among wives in sexual intimacy was inherently permissible, as it was a matter only of the husband's desire. However, a wife's allocated time had to be carefully protected. A man could visit his other wives in their quarters out of necessity during the daytime, but not for social or sexual purposes (*lā li ya'wī*). If he wished to receive one of his wives in his own dwelling, it had to be the one whose turn it was; there was no getting around the restriction on visiting the other wives by bringing them to his lodgings rather than going to theirs. If he had sex with a wife out of turn, he became obliged to make up the time spent having sex to the wife whom he had shortchanged; this remedy reflected the view that it was *time* that the husband owed his wife, not sex.⁶² By asserting that a man should receive only the wife whose turn it was, Shāfi'i aimed to increase each woman's chance to find her husband in the mood without blurring the rigid demarcation between sex (the husband's right and the wife's duty) and apportionment of time (the wife's right and the husband's duty).

Again, we see Shāfi'i's logic at play more clearly in the exceptional case of a woman who has no co-wives and thus has sole claim on her husband's attention (exceptional in that the texts treat polygyny as normative). Where there was no question of justice to co-wives, Shāfi'i explicitly denies the wife's claim to a specific amount of intercourse:

He said: And so if she is alone with him [i.e., he has no other wives], or with a slavegirl he has that he has sex with, he is ordered [to fulfill his obligations] in reverence to God the Exalted, and not to do her harm with regard to intercourse, and he is not obligated to any specific amount of it (*wa lam yufrad 'alayhi minhu shay' bi 'aynihi*). Rather, he is only [obligated] to provide what she absolutely cannot do without, maintenance and lodging and clothing, and also to visit her (*ya'wī*). However, intercourse is a matter of pleasure and no one is compelled to it.⁶³

Shāfi'i is unaware of his blinders. He obviously refers only to men when he declares that "intercourse is a matter of pleasure and no one is compelled to it." Women's sexual availability is, for him, a condition of their support and a prerequisite for their rights to visitation: "if any of them [his wives] refuses to have sex with him, she has disobeyed and abandoned her claim."⁶⁴

We turn, now, from the husband's capacity and willingness for sex to the wife's. Unlike the case of a wife who was menstruating, ill, or

prevented from intercourse by a physical defect, a wife who was absent from the marital home was unavailable. She would lose her allotted turn, even if she had a legitimate reason for her absence. If she traveled, even with permission and for a lawful purpose such as pilgrimage or the management of her financial affairs, she was not entitled to any compensatory time on her return.⁶⁵ (This Shāfiī ruling on her lack of compensatory time when she travels for pilgrimage stood in contrast to the rule that she retained her right to maintenance in the same circumstances, despite the usual linkage of rights to apportionment and maintenance.) If she was a slave whose master demanded her services, her husband need not make up the time to her later.

Only the Shāfiī texts explicitly address how a wife's sexual refusal affects her claim to time with her husband. The early Mālikī texts do not address this issue, for reasons that are unclear. The silence of the Ḥanafīs can be explained easily: a wife's sexual refusal is irrelevant if not accompanied by her departure from the conjugal home, because her husband is permitted to have sex with her without her consent. Non-Ḥanafīs do not penalize a husband for forcing sex on his wife, but neither do they explicitly authorize it in the way that al-Khaṣṣāf does. For all, marital rape is an oxymoron; rape (*ighṭiṣāb*) is a property crime that by definition cannot be committed by the husband. Still, they do make a distinction between forced and consensual sex within marriage.

Shāfiī, however, explicitly declares that a wife who thwarts her husband's advances forfeits her claim on his companionship. This loss of her allotted turn directly parallels her loss of maintenance for the same infraction. To justify his view, Shāfiī alludes to Q. 4:34, one of the two verses that mention *nushūz*: "Shāfiī, may Exalted God be merciful to him, said: And so we say: Do not allot [time] to the woman who refuses her husband, the one who is absent from him, because of God's permission for her husband to abandon her in bed."⁶⁶ In equating "the woman who refuses her husband" and "the one who is absent," Shāfiī gave the husband the right to "abandon" both. Of course, one cannot "abandon" someone who is not present—as already noted, she will not get a makeup turn—so the scriptural support here is for the husband's right to leave a wife who will not accommodate him and seek the company of one who will.

Oaths of Abstinence

The disparity between a husband's sexual claims on his wife and hers on him also manifests itself in two types of oaths or vows that impose sexual abstinence: forswearing (*īlā'*) and *ḡihār*. Both were pre-Islamic forms of divorce whose parameters were adjusted by the Qur'an. Legal texts typically discussed both under the heading of divorce. They are discussed here because they reveal legal authorities' attitudes toward women's sexual claims in marriage and highlight the tension between exhortation and adjudication.⁶⁷ In discussing *ḡihār* and forswearing, Ḥanafī and Shāfi'ī jurists focused on discerning the letter of the law, whereas Mālikīs tended to attend to the oaths' effects, sometimes expressing concern with harm that might be inflicted on a wife by an abstaining husband. Nonetheless, taken cumulatively, these regulations safeguarded a wife's claim to her apportioned time but rendered her right to intercourse largely illusory.

ḡihār and forswearing differed in important ways but shared an element of sexual abstinence. In *ḡihār*, a husband swore that his wife⁶⁸ was to him like the back (*ḡahr*) of his mother, with "back" standing as a euphemism for sexual organ. This taboo forbade intercourse with her until he expiated his oath; the Qur'an prescribes freeing a slave, feeding a number of poor people, or fasting (during daytime) for two consecutive months.⁶⁹ *ḡihār* did not necessarily affect the ongoing rights and obligations of marriage; Shāfi'ī held that in addition to continuing to support her, a man remained obligated to continue apportioning time to a wife from whom he had sworn *ḡihār*.⁷⁰ *ḡihār* neither resulted automatically in divorce nor entitled a woman to seek judicial intervention, though Mālikī authorities sometimes made an exception in cases of harm.

Forswearing had potentially more significant effects on the marital relationship. The Qur'an establishes a four-month waiting period for men who forswear their wives. It declares that "if they return (*fā'ū*), indeed God is Forgiving, Merciful. If they are resolved on divorce, indeed God is Hearing, Knowing."⁷¹ The four-month period was critical, though a vow could be for significantly longer. A husband who broke his vow by having sex with his wife before the term expired had to expiate his broken oath. If four months expired and he had not had

sex with her, Abū Ḥanīfa and his disciples, along with the Medinan authority Saʿīd b. al-Musayyab, held that forswearing automatically resulted in an irrevocable divorce.⁷² They interpreted “return” in the Qurʾanic text to mean having intercourse before the four-month period was up. Failing to have intercourse within that time was evidence of being “resolved on divorce.”

Mālik and his followers, as well as Shāfiʿī, disagreed: the four-month period was not definitive. For them, rather, when this time had passed the wife could complain to the authority, who would impose a suspension in which normal marital claims continued. The husband would be asked to choose between the alternatives provided in the Qurʾan: either “returning” to his wife, demonstrated by having intercourse with her, or pronouncing a divorce. However, as with cases of impotence, this ultimatum depended on the wife’s appeal to the authority. If she did not press a claim before the time specified in his oath expired, the marriage continued.⁷³

For the formative-period legal authorities, four months was not a legal maximum. Simple abstention without a vow of forswearing, no matter what the duration, did not automatically grant a woman the right to divorce. Moreover, a husband who forswore his wife and then, when four months had passed, had a valid excuse for not having intercourse with her could retain her by verbally expressing his intent to keep her as his wife.⁷⁴ These cases presupposed a wife’s lack of a right to sex; the jurists’ concern was only to demonstrate that none of these situations entitled her to claim divorce on grounds of forswearing.

Hypothetical cases, which all of the jurists discussed here were willing to entertain, explored the vow’s logical limits. Forswearing occurred only when a husband vowed to abstain entirely from intercourse with his wife for more than four months. If he swore to abstain for a day or a month, then continued to abstain until more than four months had passed, the wife had no legal recourse.⁷⁵ The same was true if the husband left a loophole allowing him to have intercourse with his wife without breaking his vow.⁷⁶ Abū Ḥanīfa, Shāfiʿī, and Mālik agreed on the logical requirements for a valid vow, but diverged sharply in the tone with which they addressed logical slips in forswearing. Take the Ḥanafī discussion of an oath where “a man swears that he will not approach his wife in that house for four months and he leaves her for four months and doesn’t approach her in it or elsewhere.” Abū Ḥanīfa

held that the man had not forsworn his wife because he could still have intercourse outside the house without violating his vow. His sole concern was to determine whether or not the husband's vow met the strict criteria of forswearing, which it did not.⁷⁷ A Shāfiī example is similar, except that instead of a house it is a town where the husband has sworn not to have sex with his wife: "If he says, 'By God, I will not approach you until I take you out of this town (*balad*),' he has not forsworn her. This is because he can take her out before four months are up." Again, simply the possibility that he *could* have intercourse with his wife without breaking his oath sufficed to exempt him from the consequences of forswearing; he was not actually required to do so.⁷⁸

A parallel passage from the *Mudawwana* gives a quite different overall effect. The Mālikīs attempted to balance an assessment of the vow's validity with concern over the wife's welfare:

[Saḥnūn] said: What if he says to his wife, "By God, I will not have sex with you in this house of mine for a year," and he is dwelling in it with his wife, then when four months have passed, she seeks clarification of [her situation]. She says, "He has forsworn me." The husband says, "I have not forsworn [her], rather, I am a man who has sworn not to have intercourse in this house of mine. If I wished, I could have intercourse with her elsewhere without expiation." [Ibn al-Qāsim] said, I do not consider him to have forsworn her but I think that the authority orders him to take her out and have intercourse with her because I fear that he is harming [her], unless the wife forgoes it and doesn't want that.⁷⁹

Like the the Ḥanafī and Shāfiī scenarios that begin by considering the husband's oath ("And if a man swears . . ." or "If a man says . . ."), the *Mudawwana* commences with the husband's words. However, unlike the other texts, it proceeds to the wife's complaint to the authorities: "He has forsworn me." Abū Ḥanīfa and Shāfiī only point to the logical flaw in the vow: "There is no forswearing upon him from that; can you not see that he may approach her somewhere beside that house and no expiation will be obligatory for him?" In the *Mudawwana*, the husband rather than the jurist defended his position on these grounds. Ibn al-Qāsim, though agreeing with the husband's logic (reluctantly?), exploits this loophole to address the wife's concern. The husband could have sex with her elsewhere and still keep his vow, so the authority should order him to do so.⁸⁰ None of the Ḥanafī authorities requires

or even encourages the husband to take this step, and the Shāfiʿī text explicitly absolves him from doing so: “He is not compelled to take her out.”⁸¹ Equally absent from the Ḥanafī and Shāfiʿī texts was any consideration of the wife’s wishes. The *Mudawwana*, by contrast, takes the wife’s sentiments as the starting point for determining how the authority ought to proceed. Not only does Ibn al-Qāsim express his concern for the vow’s effect on the wife, but his order that the husband take her elsewhere in order to have sex is subject to her desire that it take place.⁸²

The unique Mālikī concern with harm to the wife in cases of forswearing carries over into their regulation of *ḡihār*. In some instances they apply forswearing’s four-month period to cases where they perceive *ḡihār* to be harming women.⁸³ Mālik affirms that *ḡihār* and forswearing are normally separate but if a husband does not want to resume sexual relations with his wife, and has no intention of expiating his oath of *ḡihār*, the issue of harm (*ḡarar*) enters in.⁸⁴ The determination of whether harm is involved relies on the discretion of the authorities, whose intervention must be sought here just as in cases of forswearing.

Mālikī discussions of harm are practical and case specific. This subjective criterion, to be assessed by a judge or the public authority, determines how and when certain legal regulations are to be applied. Mālik and his followers avoid prescribing universal rules. Rather, they favor individual juristic flexibility to provide an equitable solution to a particular problem. In several areas—such as vows of *ḡihār* made with the intent to harm the wife, considerations of partiality in a husband’s allocation of time among his wives, or the wife’s deprivation of sex by a husband who is continually engaged in worship—the *Mudawwana*’s authorities attempt to coax husbands to behave thoughtfully. They do not draw the bright line between lawful and unlawful or between valid and void that characterizes the doctrines of the other schools.

In contrast, Ḥanafīs and Shāfiʿīs strictly separate *ḡihār* and forswearing, never evincing any willingness to impose a deadline for the husband to take any action in *ḡihār*.⁸⁵ The Shāfiʿī texts put it most directly: forswearing and *ḡihār* are separate, and God revealed different rules for each.⁸⁶ This is true even “if he makes *ḡihār* from her then he leaves her (*tarakahā* [i.e., does not have sex with her]) for more than

four months.”⁸⁷ Yet while insisting that there could be no legal assimilation of *zihār* to forswearing, Shāfiī authorities also acknowledge the possibility of harm to the wife, which these Ḥanafī sources ignore. Unlike for the Mālikīs, such harm is a question of the husband’s sin before God; there are no legal remedies for his cruel behavior.⁸⁸ The Shāfiī jurists do aver that if a man who has made an oath of *zihār* decides not to divorce his wife, he must expiate his oath.⁸⁹ However, there is no legal requirement that he have intercourse with his wife, even if he decides to remain married to her.

To return briefly to forswearing and sexual abstention, it is worth noting that even Mālik, who was the most concerned with the effects of sexual abstention on a wife, makes exceptions to the rules requiring a husband to have intercourse with a wife whom he has forsworn. When the husband has a legal excuse, he need not actually have intercourse with his wife to cancel the vow and prevent a divorce. For example, if a man forswears his wife and then travels, making it impossible for him to rescind his oath by having intercourse with her, he may expiate his oath in another way. He is not obligated to return from his journey or bring his wife to join him, a fact that assumes his freedom of movement and her lack of claim to a specific portion of his time. Likewise, if he is ill, he can rescind his vow verbally and perform expiation if able to do so.⁹⁰ In other circumstances where intercourse is physically impossible, as with an elderly husband or one who has a defect of his sexual organs, even one that occurred after he made the vow, the wife has no right to seek judicial intervention after four months; the oath simply becomes ineffective.⁹¹ Despite the concern expressed in other passages for the wife’s experience of harm, Mālik and his followers here take no account of it. Their only concern with the wife’s right to intercourse is to note that “whether she is a virgin or a non-virgin” he must have “had sex with her once.” If, after that, “by the order of God, [he is afflicted with] something that renders him unable to have intercourse with her . . . he and she are never separated [for his sexual incapacity].”⁹² There is no discussion here of her complaining to the authorities or of her willingness to forgo sexual intercourse. Harm or cruelty, so often mentioned in other contexts, is absent, suggesting that their real concern was not with the woman’s experience of harm so much as with the husband’s willful infliction of it. This is in keeping with the

Mālikī concern with the husband's motivations in all questions of apportionment.

Abandoning All Claim

A contradiction lurks at the heart of these jurists' treatment of sex and companionship in marriage. On the one hand, they—especially the Mālikīs—stress intimacy between spouses and acknowledge women's needs for sexual gratification as well as companionship. On the other hand, they insist on men's rights to withdraw from visitation or abstain from intercourse, provided certain limits on behavior or motivation are observed. The most important of these limits is the requirement of fairness between or among wives in the apportionment of time. Yet even this requirement, it turns out, is not absolute: a woman may give up her rights to all or a portion of her due visitation. Why would a woman do such a thing? Rāfi's wife, with whom this chapter began, shows us: to forestall an unwanted divorce. A woman who forgoes her allotted turns might, the jurists maintain, rescind her consent at any time and reclaim her turn. But ultimately, men's unilateral divorce prerogatives constrained wives' ability to do so; insisting on their allotted time might result in the divorce they were attempting to avoid by giving up their turns in the first place.

Abandoning her core marital rights to time and support was one of the few tools at a wife's disposal in negotiating the continuation of her marriage. The jurists who so adamantly reject stipulations to this effect at the outset of marriage deem such compromises acceptable later, viewing them as both Qur'anically sanctioned and, in the case of a wife surrendering her allotted time, grounded in prophetic precedent. According to Medinan authorities cited in the *Mudawwana*, Q. 4:128, the second verse discussing *nushūz*, permits a wife whose husband feels disinclination toward her to give up some of her marital rights in order to remain with him, though they also hold that he "had the duty to offer to divorce her." As with Rāfi and his longtime wife, "If she agreed to remain with him with that [favoritism] and she disliked that he should divorce her, there is no blame on him for what he favors [another] over her."⁹³ The *Muwatta' Shaybānī* concurs that Rāfi acted appropriately when he allowed his wife to choose whether she would rather be di-

forced or remain with him despite his favoritism of his new young wife. In this view, “there is no sin upon him since she consented to remain despite the favoritism.”⁹⁴

Shāfiʿī describes the case of Rāfiʿ and his wife as the occasion of revelation for Q. 4:128.⁹⁵ Drawing explicitly from scripture to support his position, he interprets the Qurʾanic passage as favoring a settlement where the wife forgoes her claims to remain with a husband who dislikes her:

It is clear that if a woman fears the *nushūz* of her husband (*baʿl*), there is no problem for them if they reach a settlement. The husband’s *nushūz* toward her is his dislike of her. God has permitted him to retain her despite disliking her, and they may reach a settlement. And that is an indication that her settlement with him is by forgoing part of her claims on him.⁹⁶

Another example in the *Mudawwana* involves an anonymous woman who does not wish to be separated from her husband. As with the *Umm*’s discussion of Rāfiʿ and his wife, this husband “dislikes” his wife. Both texts use derivations of the root *k-r-h*, a term from Q. 4:19, which declares that there might be “much good” in a woman whom a man dislikes. Shāfiʿī’s quotation of the first and last portions of this verse fits the standard pattern of Qurʾanic quotation in the *Umm*. It also manages to leave out the term *dislikes*, drawing attention instead to two other aspects of the verse: the husband’s obligation to “relate to them [i.e., wives] equitably” and the “much good” that could be in these women. Shāfiʿī subtly criticizes men who treat their wives badly because they dislike them. But, when Rāfiʿ’s wife surrenders complete control of the allocation to him, stating “allot to me what seems good to you,” Shāfiʿī concludes that there is “no problem” with her giving up her turns. Similarly, in the *Mudawwana* the wife offers to give her turns to a co-wife, either extant or to be married in addition to her. Mālik’s reply is similar to that of Shāfiʿī: “There is no problem in that, and he doesn’t allot anything to her.”

Another case has special precedential value. Appearing in both the *Kitāb al-Āthār* of Abū Yūsuf and the *Umm*, it concerns the Prophet and his wife Sawda. The Prophet, according to the jurists, modeled justice in his marital behavior. As befits his special status, he was exempted from some of the obligations governing other husbands and was subject

to rules that did not apply to ordinary believers. The Qur'an excuses him from the requirement of apportioning his time among his wives, allowing him to "defer the turn of any" he wished. The fact that he was exceptional in this regard makes the jurists' frequent references to him as a paragon of fairness in turn taking even more noteworthy. For the most part, his example is cited, as earlier in this chapter, as evidence for equality in division. Here, his behavior with Sawda is likewise taken to apply to other husbands. At issue is Muḥammad's agreement to retain Sawda in exchange for her giving up her right to a portion of his time. According to the account presented in the *Kitāb al-Āthār*, the Prophet divorced Sawda by ordering her to begin observing a waiting period ("Count."). Her offer to give her turn to 'Ā'isha was the key to getting taken back. Sawda's expressed motive to remain one of the Prophet's wives was looking toward a privileged heavenly status.⁹⁷ In a similar account from the *Umm*, the Prophet was only contemplating divorce when Sawda declared, "I give my day and my night to my sister 'Ā'isha."⁹⁸

These hadith avoid any suggestion of the Prophet's dislike of or *nushūz* toward Sawda, which would constitute unthinkable censure of Muḥammad. Though male *nushūz* was not a legal offense, it was distasteful and incompatible with Muḥammad's exemplary persona. That said, the precariousness of Sawda's situation parallels that of the anonymous woman in the *Mudawwana* and Rāfi's first wife. "The Messenger of God wanted to divorce one of his wives" echoes both "what if a man is married to a woman and he dislikes her and wants to divorce her?" and "Rāfi' b. Khadij . . . disliked something about her . . . and wanted to divorce her." The women's statements resemble each other even more clearly: "And she said: Don't divorce me . . . ; I give my day and my night to my sister 'Ā'isha"; "and she says: "Don't divorce me, and I give all my days to my companion, don't allot anything to me"; "and she said: "Don't divorce me; retain me and allot to me what seems good to you."

Sawda's strategy worked. She remained among the "Mothers of the Believers" and her "settlement" (though the *Umm* does not use the term here) remained in effect for the rest of Muḥammad's life: "The Prophet died having nine wives, and he apportioned to eight."⁹⁹ One cannot know whether other husbands retained their wives on the basis of them giving up their turns, or whether the wives later found the terms of the settlement intolerable. All agreed that a wife who relinquished

her allotted time was not forever bound by that decision. “She may change her mind” and reclaim her turns at any time.¹⁰⁰ For Ibn al-Qāsim, if she rescinded her agreement her husband was obliged to either “apportion to her or separate from her if he has no need for her.”¹⁰¹ Similarly, in Shāfiʿī’s words, “If she changes her mind about it, [no course of action] is lawful for him except justice towards her or separating from her.”¹⁰² Yet these references to divorce, and to the husband’s privilege to choose it, insistently recall the rationale for the wife’s original choice to forgo her right.

Asked about a husband who refused to either allot a wife her fair share of time or divorce her, Shāfiʿī confronts the limits and possibilities of the jurisprudential enterprise. He answers that “he is compelled to apportion to her, and he is not compelled to divorce her.” “He is not,” Shāfiʿī adds, “compelled to apportion sex (*al-iṣāba*) to her, and he should (or ‘must,’ *yanbaghī lahu*) strive to do justice toward her regarding it.”¹⁰³ Shāfiʿī insists that a husband could be forced to apportion time to his wife if he was unwilling to divorce her, but proffers no mechanism for doing so; the compulsion is purely hypothetical. He also makes no pretense at ensuring equal treatment in sexual matters; the basic framework of gender-differentiated rights holds. The role of advocate for ethical comportment remains, though: the husband “ought to” or even “must” attempt to do justice to the wife.

At this point it is helpful to compare directly the formative-period authorities’ perspectives on male and female *nushūz*. Their stance toward men’s *nushūz* might be best characterized as disapproving, in stark contrast to their condemnatory stance on women’s *nushūz*. A wife’s *nushūz*—at least insofar as it encompassed sexual refusal, abandonment of the marital home, or both—clearly violated the husband’s rights. It justified him suspending her maintenance (for the Ḥanafīs and Shāfiʿīs) and ceasing to allocate a turn to her (according to the Shāfiʿīs). Later Mālikīs concur, and though the *Muwatṭaʾ*⁷ and the *Mudawwana* are silent on the subject, it is probable that the formative-period authorities did so as well. When a husband committed *nushūz*, by contrast, the jurists presumed that he no longer desired a particular wife and wished to avoid her—unfortunate, perhaps, but understandable. His *nushūz* did not violate any of her rights. It was his prerogative to allocate his sexual favors as he wished or to divorce her if he no longer liked her. The jurists thus did not impose any consequences on him. Instead, his *nushūz* became

the impetus for his wife to forgo some or all of her claims—above all, her allotted turn with him.

The jurists partially anchored their treatments of male and female *nushūz* in the two verses from the Qur'an where they are discussed in strikingly different ways. Leila Ahmed has pointed out that the jurists tended to render male duties as recommended while treating female duties as obligatory.¹⁰⁴ For the interrelated marital claims of support, companionship, sex, and physical availability, her analysis certainly resonates. Though there were glimmers of disapproval for husbands whose favoritism or partiality led a wife to forgo her rights, the juristic consensus held that there was ultimately “no problem” with such agreements. Still, the jurists' discussions of negotiated divorce for compensation (*khul'*), discussed in the next chapter, treat male and female *nushūz* in more directly parallel ways, suggesting a more balanced assessment of human behavior.

Conclusion

With few exceptions, a double standard surrounding male and female sexual exclusivity is a pervasive feature of most premodern legal systems and social practices. The widespread normalization of legal polygyny by Muslims, however, was historically unusual in the Near East and Mediterranean. Neither Greek nor Roman law allowed polygyny. Certain strands of Christianity barely tolerated remarriage after the death of a spouse, much less after divorce; to have more than one wife at a time would be entirely beyond the pale. Jewish law permitted concurrent marriage of a man to more than one wife but treated such marriages as exceptional. The rabbis' treatment of *onah*, the husband's sexual obligations to his wife, began from the assumption that a man had one wife to keep appropriately sated. The Muslim framework of apportionment diverges not only in assigning the sexual duties primarily to the wife rather than the husband, but also in starting from the assumption that a man will have more than one wife at a time.

Even with presumptive polygyny, though, husbands' responsibilities to their wives included an affective or intimate component. Though it was not precisely sexual, it relied on closeness and companionship. Their insistence on this right serves to compensate, in a small way, for

the sexual claims they would like to give women—or so repeated gestures in that direction attest—but cannot because of their insistence on differentiating rights by gender.

Several considerations mitigate a man's prerogatives to spend his time entirely as he chooses, but concern for a wife's marital experience is not primary among them. A woman cannot permanently forfeit her share of her husband's time. However, the guiding principle in regulating apportionment was not the husband's absolute duty to spend time with any wife, but rather his responsibility to be fair between or among his wives. Each wife's claim to a portion of his time was relative, not absolute, hence a man's freedom to travel without his wives or remain apart from all of them while visiting his concubines. Apart from complaining to the judge, a woman had no juridical means to ensure that her husband spent time with her, while he had at his disposal a range of consequences to mete out if she made herself unavailable to him.

Even when a husband dutifully took turns among his wives, he had no obligation to treat them equally when it came to sex. A wife had a right to a share of her husband's time but no claim to sex during her turn. The Mālikī jurists pointed out that a man's having sex with one wife more than another because of partiality was "not lawful." Yet only the husband's desire mattered: if he felt frisky with one wife and not the other, his abstention was acceptable. The wife's desire was irrelevant. For Shāfi'ī, the matter was even simpler: sex was the husband's right and not his duty; he could not be "compelled to do it." There was a substantial difference between the Mālikī approach to marital sex, however, and that of the others. A wife whose husband neglected her completely in favor of supererogatory acts of worship could seek judicial relief on the basis of harm, as in certain cases of *zihār*. The practical effects of this recognition of a wifely right to intercourse were still limited by the larger framework of gender-differentiated spousal rights. This gender division of marital rights governed the husband's *nushūz*, which was reinterpreted not as rebellion or recalcitrance but as dislike or antipathy. Rather than censuring the husband, the jurists presented the wife's waiving of her marital rights as the solution. Though a wife had the right to her share of his time, the jurists uniformly permitted her to relinquish this claim. Though explicitly concerned only with the legalities of women's giving up their rights to their allotted portion of

time, the situations the jurists presented, where women bargained with husbands to avoid being divorced against their will, attested to a fundamental imbalance of legal power in the marital relationship. The husband's unilateral prerogative to terminate the marriage inescapably affected the whole fabric of spousal claims.