MARRIAGE AND SLAVERY
IN EARLY ISLAM
While writing this book, I have had numerous opportunities to explain its subject. One of my less successful attempts occurred several years ago, when an Algerian acquaintance enquired politely about my progress, adding, “Remind me what it’s about.” I answered that I was writing about marriage, divorce, and the reciprocal but gender-differentiated obligations of husbands and wives in ninth-century Islamic jurisprudence. I was focusing, I added, on three major issues: first, diversity of opinion in early legal thought; second, the influence of hierarchical social structures, including slave ownership, on the jurists’ visions of marriage; and third, the vital role of polemical exchange in the refinement of legal doctrine. As I finished this summary, we were joined by a colleague of his, another North African Muslim. “Guess what?” said the first man enthusiastically, drawing the new arrival into the conversation. “She’s writing a book on women’s rights in Islam.”

This exchange—funny only in retrospect—involved a series of miscommunications. My own inept, jargon-filled explanation deserves most of the blame. Incomprehensibility plagues academics. We have specialized knowledge that bears on contemporary topics but tend to be lousy at communicating it to people not initiated into our disciplinary mysteries. Although the time period with which this book is concerned is remote, its subject matter is of vital interest today, when women, gender, and Islamic law occupy center stage in debates about modernity and religious authenticity across the globe. I failed to show how my treatment of marriage, sex, and interpretive authority resonates deeply with contemporary discussions. But not all the blame for the misunderstanding was
mine. Common habits of thought make it difficult for people to hear nuances, no matter how clearly expressed. Intricate ideas shrink to bite-sized platitudes. An analysis of gender and hierarchy in family and society dwindles to a simple matter of women’s rights. An historical description of a particular era in Muslim legal thought morphs into a statement about a monolithic entity called Islam. Pernicious tendencies toward sweeping generalizations seem to increase exponentially when the subject involves both women and Islam.

Fortunately, the situation is better among scholars than among the general public. Though bestselling books on women and Islam tend toward sensationalistic memoirs or journalistic exposés, recent decades also have witnessed a spectacular surge of relevant academic studies, especially in law. We now have an impressive understanding of women’s transactions (personal and proprietary) in much of the premodern Muslim world, especially the Ottoman Middle East, for which abundant court records and fatwa compilations exist. Leslie Peirce’s microhistory of a year in the sixteenth-century life of the Ottoman provincial court of Aintab notes, “Focusing on women at court has the benefit of highlighting the gap between normative prescription and actual practice—or perhaps, more accurately, highlighting the complicated relationship between the two.” In the courts, actors including judges and litigants draw from available resources, which include “official” jurisprudence as well as customary practice, to arrive at the most favorable outcome. Courtroom observation by legal anthropologists across twentieth-century Muslim societies supplements historians’ archival work. By focusing on the court as a sphere of negotiation and on the variety of resources that actors of all types brought into the court, historians such as Peirce and anthropologists such as Ziba Mir-Hosseini and Susan Hirsch are able to make women’s voices—filtered and mediated though they may be—appear in a way that is nearly impossible with the textual sources of legal manuals and fatwas. From Africa to Indonesia, Muslim women are not the silent victims of oppressive patriarchal regimes but active participants in their families and societies. Women own and manage property, claim and sometimes win custody of children, seek divorce and often get it, and generally stand up for themselves. Judges uphold female rights within the context of broader patriarchal patterns. Both in courtrooms and in daily life, women have managed to negotiate leeway in a variety of spaces.
One major way in which studies of law have proceeded has been to “compare doctrine with the actual practice of the court.”\textsuperscript{4} As one scholar discussing scriptural and legal texts notes, “Social patterns were in great contrast to the ‘official’ picture presented by these ‘formal’ sources.”\textsuperscript{5} Studies often juxtapose flexible and relatively fair court outcomes with an undifferentiated and sometimes harshly patriarchal textual tradition of jurisprudence. We are shown proof of “the flexibility within Islamic law that is often portrayed as stagnant and draconian.”\textsuperscript{6} Given the shift within women’s studies over the last decades of the twentieth century—from concern with documenting oppressive structures to retrieving evidence of women’s agency and resistance—it is not surprising that the record of practice has been more attractive than the comparatively elitist and androcentric jurisprudential discourse.

As scholars emphasize diversity and contingency in contemporary and historical applications of the law, though, they often overlook diversity of doctrine within and between normative texts. At a very basic level, the existence of contradictory positions within the realm of jurisprudence considered mutually orthodox challenges the simplistic equation of “Islamic law” with revealed law. Instead of supporting a model whereby the jurists merely discover the \textit{shari‘a}—and sometimes disagree on minor points—close attention to jurisprudence reveals significant differences on important topics. At a minimum, one conclusion of this book, salient to Muslim reformers, is that Islamic legal rules are to a significant extent the product of human and therefore fallible interpretive processes, and thus are susceptible to reform. Human reason and agency have been involved deeply in the production of religio-legal rules, including those governing marriage and divorce. This is, as one early reader of this manuscript pointed out, jejune for scholars of Islamic legal history, but may well be a new idea for lay Muslims and others for whom Islamic jurisprudence equals \textit{shari‘a}, which is understood as immutable Divine law. Drawing this connection is of vital importance given the widespread appeals to \textit{shari‘a} in Muslim contexts today.

Revivalist groups call for the implementation of \textit{shari‘a} as the sine qua non of a truly Islamic society. But these contemporary appeals to reinstate \textit{shari‘a} involve “a grossly exaggerated sense of the practical application of Shari‘a as a comprehensive, self-contained and immutable normative system in the pre-colonial period.”\textsuperscript{7} Despite the conceptual importance of \textit{shari‘a}, “most premodern Islamic states maintained two
or more parallel legal systems.” Scholars and rulers alike were less concerned with the purity of the legal system than its overall success at keeping order and ensuring a reasonable approximation of justice. The jurists were charged with constructing from the raw material of scripture, prophetic precedent, and (in interpersonal matters) local custom a set of regulations that would guide the behavior of individual believers and serve as a basis for adjudication by duly constituted authorities. From its inception, the implementation of law involved a series of compromises between secular, state-generated law (siyāsa sharʿīyya or, in Ottoman terms, kanun) and religiously grounded jurisprudence (fiqh).

Jurisprudence, then, is not reducible to law in its modern Western sense. It most closely parallels rabbinic law, halakha, in both scope and process. As with rabbinic discourse, Muslim jurisprudence was an open rather than a closed system. Jurists expounded, explained, debated, and justified their stances on legal matters both mundane and lofty, social and ritual. Opinions and arguments continued over time, and minority views remained part of a canon, available for later thinkers to draw on. Issues were seldom fully resolved. It remained fully permissible for jurists to derive fresh solutions to legal problems based on independent recourse to foundational texts (ijtihat). Of necessity, however, this innovation coexisted with a routine reliance on precedent. The need for stability and predictability meant that advisory legal opinions (fatwas) and judicial verdicts were based largely on dominant views within the legal schools.

In the aftermath of European colonialism, legislative codes have supplanted jurisprudence as the primary fount of legal doctrine in nearly every nation with a Muslim majority. There is no pretense of religious legitimacy for most areas of law such as commerce, crime, or international relations. Marriage and family, however, remain regulated by so-called personal-status laws. With the rise of political Islam, these laws have become an ideological battleground, with women’s rights at center field. Inheritance, marriage, divorce, and sexual crimes have been the chief arenas in which claims are staked. Even as its links to the historical tradition of jurisprudence become tenuous, the ideological heft of Islamic law has increased. Politicians and activists have fixated on women’s status as a barometer of religious authenticity. Appeals to shar‘a invoke a timeless, authentic past, even as the content and implementation of the laws in question diverge considerably from earlier regulations. As Judith
Tucker notes, “For the state to make ‘Islamic’ rules and then use modern means of repression to apply them to its population as part of a legitimating process does not, in terms of substance and procedure, find much support in traditional Islamic legal thinking.”

My point in highlighting divergences between classical Islamic jurisprudence and today’s claims about Islamic law by various actors is not that modern claims to enact shari‘a are unacceptable because they deviate from a pristine past. If anything, it is to make clear that there was no such pristine past. The early jurists were themselves engaged in a messy, complicated, human project of cobbling together from revealed and mundane sources a law that would be a pale reflection of the divine imperative and at the same time its closest earthly equivalent. Knowing how discourses on marriage have evolved allows a fuller understanding of ongoing normative discussions about marriage in Islam. My aim is not to debunk feminist claims with regard to Islamic law, nor to present what the Qur’an or sunna (prophetic example) “really say” about how marriage should be structured. Instead, I offer an analysis of the jurists’ conceptual system.

Although the jurists’ doctrines do not directly govern Muslim lives today—and did not directly govern Muslim lives in the past, either—they remain deeply influential. This is true even though the jurists’ project differed from the legal codes so vehemently debated today. In her recent survey of Islamic law as it pertains to women and the family, historian Tucker observes that the premodern “system and the doctrines it produced are no longer intact, but I submit that there is an embedded approach and a texture to gender issues that remain relevant to the ways in which those issues are being confronted today.”

I would go further: core ideas about maleness, femaleness, sexuality, and power that structured marriage in the early jurists’ thinking survive in myriad ways in today’s discourses. Some of these ideas would be disclaimed if set out openly for approval—the parallel between wives and slaves being the most obvious—but they remain influential in contemporary discussions.

Modern discourses about women and marriage typically focus on women, as with my interlocutors’ reframing of marriage as a question of women’s rights. Christina de la Puente has suggested that “the woman is the true protagonist of the chapters dedicated to marriage law in the Islamic sources.” I am skeptical about this characterization of the
decidedly androcentric early Muslim legal texts, but it certainly holds today, when the emphasis has shifted from men’s duties and men’s rights.

A related and equally vital change has taken place in the rhetoric associated with marriage. Modern Muslim authors, both clerics and laypeople, glorify female domesticity and maternal virtue. The family unit they idealize, with mother-housewife at its center, differs sharply from early jurists’ visions of the normative family. Domestic duties of child rearing and housewifery serve as the rationale for support by the male husband-father-breadwinner. In some respects, this model is likely to have accorded more fully with the experience of nonelite women throughout history: domestic drudgery and responsibility for child care would have been primary concerns for many, if not most, women. But, as the chapters that follow will show, premodern Muslim legal writings presented a model of spousal relationships in which parental relations were peripheral and children were secondary. (This separation derives at least partially from the way that legal works are structured into chapters, with separate “books” addressing marriage and divorce.) Although in the practice of the courts other family duties might get a hearing, in the jurists’ treatises, a wife’s main duties to her husband were to obey him and be sexually available. In exchange, he fed, clothed, and housed her.

Hierarchy, tempered to a greater or lesser degree by affection, stood at the core of marriage. The jurists showed no hesitation in making analogies between wives and slaves or between marriage and commercial transactions. In fact, their central notion about marriage was that the marriage contract granted a husband, in exchange for payment of dower, a form of authority or dominion (milk) over his wife’s sexual (and usually reproductive) capacity. The same term, milk, was used—though with a somewhat different semantic range—for ownership of a slave. It was the exclusive milk over a particular woman—as a slave or as a wife—that rendered sexual access licit. The implications of this basic idea, and the ways in which it affected the jurists’ regulation of spousal rights while the marriage endured, are the subject of this book.

Discussing slavery in tandem with marriage will strike some readers as deliberately provocative. Ownership terminology and imagery may offend or bewilder. It would have been unexceptionable to early Muslim audiences, for whom both life and law were saturated with slaves and
slavery. In this, Muslim societies were not unusual. Norman Cantor has estimated that “roughly one quarter of any major society in antiquity were human chattels—someone’s property.” The percentages for Muslim societies varied, and precise figures are difficult to come by, but enslaved people formed a significant proportion of any population. Some specialized research has been done on specific legal doctrines concerning slavery. Scholars have studied the elite slave soldiers of the Mamluk and Ottoman eras; others have shown that African as well as Turkic slaves were used for military purposes in the Abbasid era. But references in legal and literary works do not provide a firm basis for assessing the proportion of slaves in any given population or determining their ethnic or occupational profiles. Eric Savage’s assessment of the slave trade in eighth-century North Africa discusses the enslavement of captives in warfare and the use of slave girls and women. He suggests in passing, following Bernard Lewis, that the primarily domestic and military use of slaves portrayed in scholarship may reflect urban and other biases of the sources rather than any reality. Slaves worked in agriculture in large numbers in some regions and at some times. Ibn Buṭlān’s eleventh-century handbook refers to slaves employed in gold, salt, and copper mines. These are not the types of slavery that preoccupied the jurists. Instead, their queries mostly treated domestic servants as well as slaves acting as commercial agents.

Domestic slavery was common. Frequent offhand textual references to household servants can be taken as evidence of their ubiquity. The omnipresence of slaves in legal texts owes not only to their social presence but also to their utility in legal discussion: slaves are useful to think with. Slaves appear not only in chapters devoted to subjects such as manumission but also interspersed throughout discussions of matters where slavery itself is marginal. For instance, discussions over the fine points of commercial transactions often take the purchase of a slave as their basic example. One reason is that a slave is a nonfungible (unique) commodity. Complicated legal issues can arise: what if a newly purchased slave has a defect that the seller did not disclose? What if a slave dies before delivery? The problem cannot be rectified, as it could with agricultural produce or other fungible goods, by substitution of an equivalent item. In these discussions, slaves serve as a placeholder for other types of commodities. Another reason is the nature of slaves as persons who could be freed. Vital issues arose about slaves as potentially
free persons who were subject to future manumission, which could place limits on their salability.

Even prior to manumission, slaves were not only chattels. They could also be legal subjects—for instance, as parties to marriage contracts. Cases involving slaves introduced additional variables into legal queries. These issues sometimes involved core tenets of marriage, such as the right of a male slave to divorce his own wife or how the time of a female slave was to be divided when she had both a husband and a master. Slavery affected not only the particulars of how marriage could be practiced when one spouse was enslaved, but also the entire legal understanding of marriage itself.

But slavery was more than an occasion for technical virtuosity in details of marriage law: it was central to the jurists’ conceptual world. In particular, it affected how marriage and gender were thought about. There was a vital relationship between enslavement and femaleness as legal disabilities, and between slave ownership and marriage as legal institutions. Slaves and women were overlapping categories of legally inferior persons constructed against one another and in relation to one another—sometimes identified, sometimes distinguished. Slavery was frequently analogized to marriage: both were forms of control or dominion exercised by one person over another. The contracting of marriage was parallel to the purchase of a slave, and divorce parallel to freeing a slave. Marriage and slavery intersected at the institution of concubinage (milk al-yamīn), which legitimized sex between a man and his own female slave and made any resultant progeny free and legitimate. Slave concubinage helped define marriage both by comparison and contrast. To discuss marriage in the premodern period without reference to slavery would fundamentally distort the jurists’ ways of thinking; the one was bound up with the other, even more so in legal thinking than in actual practice.

Islam in the Context of Other Legal Systems

Every society must organize kin relations. Perhaps the most crucial question is how marriages will be formed and how children will be legitimated. What role do individuals, especially daughters, play in selecting their marriage partners? What claims could each spouse make on the other? What rules govern parental and filial rights and obliga-
tions? What possibilities for extramarital outlets do men and women have? Is polygamy permissible? What rights do husbands and wives have to dissolve their marriages? The combinations of solutions in various traditions cannot be reduced to a spectrum that runs from being most oppressive to women to most liberating. Rather, rules combined in distinctive ways, according to often unspoken requirements of logical coherence as well as social patterns and customs. Muslim jurists’ answers to questions about kin, consent, property, sexuality, and progeny were drawn from a pool of available resources, including pre-Islamic Arab custom, scripture, precedent of the Prophet and other early Muslims, local custom in areas to which Islam spread, and other legal systems. These were also affected, I will argue, by the exigencies of legal reasoning itself.

Pre-Islamic Arab practice served as one vital source of law. Muhammad and those who formed his community were born into an Arabia where Islam did not yet exist. Its rejected marriage customs are obscure, sometimes available only in Qur’anic and other polemical characterizations. But other customs were sanctioned, perhaps restricted or channeled or regulated in new ways. Broad questions of legal principle arise from the selective treatment of practice: are customary practices presumed permissible unless specifically forbidden? Or, to the contrary, do particular regulations serve as the foundation for an entirely new system? Qur’an and prophetic precedent are, of course, the best known sources of law. To a certain extent, they obviously reflect the practice of the time, and in that sense reinforce Arab custom.

As Islam spread from the Arabian peninsula—north and west as well as east, to territory previously governed by Sassanians, Romans, and Byzantines—Muslims encountered new local customs as well as extant legal systems. Just as Islam never existed in a vacuum, neither did its legal system. The extent of outside influence, especially Jewish and Roman, on the development of Islamic law is deeply contentious. In some cases, vital parallels seem to provide clear instances of borrowing or adaptation. For instance, certain Muslim rules about manumission of a slave by contract resemble Roman institutions. And, with regard to marriage settlements, one might speculate that the practice of breaking dower into prompt and deferred portions, which was at first rejected by Muslim legal thinkers but persistently practiced, might have some relation to norms of Roman Egypt. Some of these parallels likely
arose out of independent interaction with local practice in the areas where Islam spread. In other cases, Muslim law may have been influenced more directly by legal systems; it makes sense that Muslim jurists would look to solutions to tricky problems formulated by their counterparts in other traditions. But Wael Hallaq has argued that “the ingenious process of assimilation, systematization, and Islamicization managed to dissipate all the indigenous features of legal institutions and to recast them in a fashion that is not in the least reminiscent of the older institutions.”

Hallaq’s “not in the least reminiscent” is perhaps an exaggeration, but his basic point holds: “Systematization in particular had a powerful effect on reshaping and reformulating whatever raw legal material Islam encountered. This systematization was given sharp expression in the profound desire of Muslim scholars for logical coherence, while at the same time they took into full consideration what they deemed to be divinely inspired propositions.”

There are critical similarities and vital differences among Roman, Jewish, and Islamic laws regulating marriage and slavery. The similarities illuminate the broader context of the ancient Near East and Mediterranean. All use terms related to acquisition or sale for some forms of marriage, but the rabbinic kinyan, acquisition, is central, while the Roman coemptio, a fictive sale, is marginal. The archaic Roman form of marriage known as manus refers to the husband’s “hand” as a representation of his power, as do the Muslim terms yad (hand) and milk al-yamīn (ownership by the right hand), which refer to control over certain marital rights (by a husband or father) and to slave ownership, often concubinage. These coincidences of vocabulary are not necessarily indicative of doctrinal borrowing, but rather of a broader culture of legal understandings growing out of hierarchical social structures. A systematic comparative study of Roman and Islamic marriage law, with due attention to differences of period and possible influences (especially given Roman rule in Egypt) would be highly desirable. A similar study of Islamic jurisprudence and halakha is also much needed. But rather than explore these similarities extensively, I have chosen to highlight those ways in which Muslim jurisprudence departs notably from its predecessors.

In particular, returning to Hallaq’s notion of systematization, it is the particular way that Muslim thinkers frame the conceptual and legal relationship between marriage and slavery, hinging on the transfer of
rights to licit sex, that constitutes its unique formulation. Premodern Muslims were typical rather than unique in having both patriarchal marriage and slaveholding. The two coexisted throughout the ancient Near East and Mediterranean as well as in pre-Islamic Arabia. Male-dominated marriage and patrilineal kinship predominated in Greek, Roman, biblical, rabbinic, Byzantine, and Sassanian law and practice, though specific contours of these systems varied and shifted over time both within and across civilizations. Kin relationships placed some women and men in dependent and subordinate positions to others, especially—but not exclusively—to fathers. Marriage in the ancient and late antique world was inseparable from other forms of control over women. It is misleading to think that marriage subjugates an otherwise independent female to a husband. Rather, females (like subordinate males) were already enmeshed in webs of kin control and mutual obligation.

Treatment of slaves was one of the most unusual elements of Muslim law, generally, and marriage law, specifically. Enslavement of captives was widely practiced in antiquity. People were routinely bought and sold. Household slavery was common. Slaveholding, in practice nearly everywhere, included the sexual use of enslaved women and sometimes men. In some times and places, both were explicitly permitted by law; in others, sexual use of slaves happened despite legal strictures. Muslim rules were exceptional in light of prevailing regional practices in extending certain privileges and restrictions to slaves—especially contingent permission to marry and the expectation of adherence to the same sexual codes binding free people, though with lesser penalties for violations. Muslim distinctiveness surrounding the marriages and sexual conduct expected of enslaved people is crucial. Yet two factors militate against drawing too strong a contrast with other systems. First, rules surrounding the use of slaves in Muslim contexts were undoubtedly flouted in practice, especially the ones that (unlike Greek and Roman slavery) strictly forbade any sexual use of male slaves and prohibited all access by masters to married female slaves. Second, though other systems, such as the Roman, forbade formal marriages by slaves, a degree of social and even legal accommodation of slave unions developed. In practice, then, there is likely to have been a good deal less difference than a strict law-to-law comparison would indicate.
If social practice perhaps did not differ greatly, we must ask why such distinctions were legally so vital. This returns us to the internal logic of the Muslim legal tradition. Rules regarding marriage and slavery were closely tied to definitions of both licit sex and legitimate paternity. Legitimacy had fewer implications in the Muslim system than in either the Jewish or Roman systems. Muslim jurisprudence did not preoccupy itself greatly with questions of “citizenship” or illegitimacy, apart from the latter’s connection with illicit sexual relationships. Instead, it focused on licit conduct and extended the privilege and obligation of licit conduct to slaves as well.

Early Muslim jurists adhered to a bottom-line view of marriage as a transaction that conveyed to the husband, in exchange for a pecuniary consideration paid to the wife, a type of control, power, or dominion (milk) analogous to (but more limited than) a master’s power over his female slave. It is this dominion over her that makes intercourse between them lawful. The connection between milk and lawful sexuality stands at the core of all regulation of marriage and divorce and by its absence marks discussions over punishment for illicit sex. Though Muslim jurists rarely consider the situation of a woman dallying with her male slave (whatever role it plays in literary works such as Thousand and One Nights), it is the absence of sexualized ownership by a female owner over her male slave that prevents them from having a licit relationship, even without the complication of a cuckolded husband.

**Interlude**

In the Arabian peninsula, a few years after the death of the Prophet Muḥammad, an audacious Muslim woman took one of her young male slaves as a bed partner. She mentioned having done so to the caliph ʿUmar, who inquired incredulously as to her justification. “I thought,” she replied, “that ownership by the right hand made lawful to me what it makes lawful to men.”

“Ownership by the right hand” (milk al-yamīn, also “property of the right hand”) is a Qur’anic euphemism for slavery. It appears in several verses that refer to “what your right hands own” alongside wives or spouses as lawful sexual partners. This scriptural allusion went neither unnoticed nor unchallenged by ʿUmar ibn al-Khaṭṭāb, a notoriously stern figure. Shocked and dismayed by her action as well as her implicit claim to have God’s permission for it, he
sought the advice of the Companions, those Muslims who had known Muḥammad during his lifetime and whose collective wisdom and judgment came to be considered by later Sunnis a vital source of legal precedent. Their verdict: “She has [given] the book of Exalted God an interpretation that is not its interpretation.” Though ʿUmar refrained from punishing her for committing illicit sex, he forbade her from ever marrying any free man. Most importantly, in the account of this episode preserved in the Muṣannaf of ʿAbd al-Razzāq al-Ṣaḥābī (d. 211/827), ʿUmar put an end to the liaison by “order[ing] the slave not to approach her.”

The Muṣannaf, a collection of reports from Companions and Meccan authorities, includes another version of this story, which agrees in some details and differs in others.²⁹ It reports that another ʿUmar, the later caliph ʿUmar b. ʿAbd al-Azīz, was confronted by “a woman from the Bedouin who came to him with a Byzantine (rūmi) slave of hers.” She complained of the meddling of her agnatic kin—her “father’s brother’s sons”—who objected to her relationship with her slave: “I have sought to take him as a concubine (innī istasrartuḥu) and my kin have forbidden me.” She explicitly states what the other woman merely implies: a woman should be able to have sex with her male slave by right of possession. In the first narrative, the female owner asserts her rights somewhat tentatively (“I thought [it] made lawful to me”), but this owner defiantly claims her due: “I am in the position of a man: he has a female slave and has sex with her.”³⁰ ʿUmar retorts that her position is not that “of a man” but rather one “in ignorance.” He avers that only her “ignorance” saves her from a hadd punishment, the stoning threatened though not carried out in the previous anecdote. He then commands a group of men, perhaps the aforementioned kin, to take the slave and “sell him to someone who will take him to a land other than hers.”

ʿUmar’s rebuke alludes to the pre-Islamic “age of Ignorance,” the Jāhiliyya, the mores of which Muslim sources depict as wanton and promiscuous. Marriage patterns in pre-Islamic Arabia are necessarily obscure; our sources are Muslim and view many facets of that era through contemptuous eyes, especially practices dealing with sexual morality. In a famous account, Muḥammad’s wife ʿAʾishah describes four types of marriage that existed in Arabia before the coming of Islam. The first, the form of patriarchal marriage sanctioned by Islam, stressed female
sexual exclusivity and male control over the marriage tie. The other three types allowed a woman multiple sexual partners, and sometimes—though not always—the power to choose or refuse them herself.\textsuperscript{31} Presumably, ʿUmar’s allusion to “ignorant” practices alludes to this female freedom to select and reject partners at will—a power one would expect to be wielded by the owner of a slave, but one that did not accord with later Muslim views.

In both anecdotes, a free woman asserts sexual rights over her male slave, and a group of free men reject her claim. The public nature of these incidents is notable. The anecdotes take for granted that the authorities, the woman’s kin, or both have a stake in her sexual relationship with her slave, and thus the right to intervene. As they do so, they make no definitive pronouncement about women’s right to take concubines, but they base their stance implicitly on a notion of fundamental gender difference: women do not have the same sexual prerogatives as men.

Though the woman’s status as owner of the slave is unquestioned, her position is nonetheless ambiguous. The free men concur that she cannot make him her licit partner. But what then? The divergent resolutions reflect the unstable nature of the woman’s position as owner once sexuality enters into the equation, as well as the equivocal agency of the male slave. Having the slave sold away recognizes the woman’s control over her property, while the order to the slave not to approach her assumes that because of his maleness, he can control the sexual relationship, even though he is owned, not owner.\textsuperscript{32}

It will be helpful to compare these passages from the \textit{Muṣānnaf} with a parallel text from the \textit{Kitāb al-Umm} of Muḥammad ibn Idrīs al-Shāfiʿī (d. 204/820), roughly al-Ṣanʿānī’s contemporary.\textsuperscript{33} To my knowledge, this is the only other formative-period text in which the question of a woman taking her male slave as a sexual partner appears. The \textit{Umm}, the most hermeneutically sophisticated of the ninth-century legal texts, is a magisterial collection of substantive law, refined and expanded by Shāfiʿī’s students after his death.\textsuperscript{34} In the course of a discussion of how many wives and concubines a man may have, the \textit{Umm} briefly addresses the question of women taking male concubines. It is in this context of discussing licit sexual relationship among free people and slaves that Shāfiʿī digresses to debate with an interlocutor who “holds the view that a woman has ownership of the right hand, and
says: Why does she not take her male slave as a concubine as a man
takes his female slave as a concubine?” Shāfī‘ī responds with a sweeping
pronouncement about women, gender, and control in marriage and
concubinage: “The man is the one who marries, the one who takes a
concubine, and the woman is the one who is married, who is taken as
a concubine. One cannot make analogies between things that are differ-
ent.”35 The Umm appeals to fundamental gender differences that it deems
vital to marriage, divorce, spousal prerogatives, and, ultimately, legal per-
sonhood. It also notably mentions analogy (qiyās), a significant method-
ological development and one that is vital to understanding intersect-
ing legal discourses about marriage, concubinage, and slavery. The jurists’
recourse to analogy, unlike the way marriage and slavery are treated by
the hadith scholars and exegetes, furthers the connection between
marriage and slavery by drawing connections and extending verdicts
systematically.

Legal Development

Shāfī‘ī’s treatment of a woman taking her male slave as a concubine
both crystallizes and constitutes a culmination of the legal discussion
of marriage, spousal rights, and lawful sex in the formative period. It
demonstrates continuities with the era represented in the Muṣannaf as
well as departures from the decision-making process it depicts. Slavery
remained an unchallenged fact of social life. Authorities still forcefully
rejected the notion that a (free) woman could take a (slave) concubine
and took for granted (free) men’s right to do so. Fundamentally, neither
‘Umar’s companions nor Shāfī‘ī could conceive of licit sex without male
control, even if they expressed themselves differently and with varying
degrees of self-awareness about the regulating endeavor in which they
were engaged. Yet between the one and the other, vital shifts in Islamic
legal thought occurred. Between the late eighth century, when key for-
mative figures lived, and the early tenth century, when the eponymous
schools of jurisprudence were established, doctrines became system-
atized, methods became more uniform, and a theoretically coherent
notion of marriage and licit sexuality, centered on exclusive male do-
minion of female sexual capacity, emerged.36 Some of these elements
were already in place at an intuitive rather than systematic level in the
Muṣannaf. There, ad hoc decision making prevailed. ‘Umar alludes to
scripture in discussing the woman who takes a male concubine, but does not explicitly cite Qur’anic verses. No one was professionalized or formally authorized to render legal opinions. The compilation of the *Muṣannaf* more than a century later retrospectively affirms the precedential value of Companion verdicts alongside the legal opinions of early regional authorities (here, mostly Meccan), even as its transmission bears witness to the activity of a new class of specialists who report and record these earlier precedents.

Early legal texts display remarkable variety in form as well as content, ranging from compendia of reports like ‘Abd al-Razzāq’s *Muṣannaf* to explicitly reasoned treatises and vigorous discussions of legal disagreements. Texts like the *Muṣannaf* served a different purpose from the *Umm’s*, and continued to be produced alongside more speculative works of jurisprudence. But even though there was no strict linear progression from one methodological stage to another, the overall trend was toward more formal arguments and scriptural evidence-based justifications for particular doctrines. Qur’an and prophetic precedent in the form of hadith were the primary sources utilized, though the opinions of earlier authorities, from the generation of the Companions to regional scholars, continued to carry weight. Yet over the course of the formative period, the bounds of viable opinion on a variety of topics narrowed and justifications for specific positions were elaborated. Intergroup polemics helped strengthen evidentiary and logical standards. Certain types of arguments gained prominence while others tended to fade. In some instances, new doctrines developed. In other cases, jurists took established doctrines and kitted them out with scriptural proof texts and bolstered them with stronger logical defenses.

Analogy, *qiyyās*, plays a central role in formative-period legal thought. Its use in the main texts of Mālikī, Ḥanafī, and Shāfiʿī thinkers is evident. Analogy comes to be a major component of the shared Sunni legal method, one of the four sources of law in the framework commonly if erroneously attributed to Shāfiʿī. Explicit reference to it in formative-period texts is tentative and sometimes erratic, though, mostly occurring when a doctrine deviates from the results that would be expected by it. It is one of my core contentions that the use of analogy, in particular the analogy between marriage and slavery, is key to understanding Muslim marriage law. The strict gender differentiation of marital rights, the importance of women’s sexual exclusivity, and
above all the strict imposition of rules about unilateral divorce, however contested in practice, all facilitate and flow from the key idea that marriage and licit sex require male control or dominion. Analogy makes this possible.

In this book, I analyze early texts from what would become three major Sunni legal schools: the Mālikī, the Ḥanafī, and the Shāfi’ī. I have left out the Ḥanbalīs. Ibn Ḥanbal (d. 241/855), who knew Shāfi’ī, kept aloof from the types of debates taking place here. Though analogy eventually found a place in later Ḥanbalī legal theory, it was deeply suspect to Ibn Ḥanbal and his early associates. As Christopher Melchert writes, “He staunchly opposed the teaching of law apart from the transmission of hadīt reports, staunchly opposed the collection and transmission of juridical opinions from anyone later than the Companions and Successors—staunchly opposed, that is, both the practice of his rationalistic contemporaries, the nascent Ḥanafī school (also the nascent Mālikī and Šāfi’ī schools), and the basis of Sunnī jurisprudence from the tenth century onwards.”

Susan Spectorsky’s translation of Ibn Ḥanbal’s responsa on questions of marriage and divorce demonstrates topical overlap with the concerns of other jurists, but also a constant refusal to engage in the what-if scenario spinning that animated their disputations.

The Mālikī, Ḥanafī, and Shāfi’ī schools, their major scholars, and their core texts require some elucidation. The Mālikīs originated in Medina, the Arabian city where the first Muslim community was situated. Named after Mālik ibn Anas (d. 179/795), the Mālikīs identify themselves as the record (and arbiter) of traditional Medinan “practice” (al-ʾamal ʾindaḥā), which they view as a vital source of law. The two foundational texts to be discussed here are the Muwaṭṭa’, attributed to Mālik, and the Mudawwana, attributed to Saḥnūn al-Tanūkhī (d. 240/855).

The Muwaṭṭa’ presents the precedent of Muḥammad, the practice of the Medinan community, and often the opinions of respected Medinan jurists, sometimes with Mālik’s own views included. A comparatively short work, the Muwaṭṭa’ represents a quite early stage of Medinan/Mālikī jurisprudence, originally dating to the eighth century. A much longer text, the Mudawwana provides an early ninth-century elaboration of Mālik’s views and those of his predecessors and followers. The Mudawwana purports to reflect conversations between Saḥnūn and Ibn al-Qāsim (d. 191/806), who had studied extensively with Mālik. A
comparison of the *Mudawwana* with the *Muwaṭṭa*’ on various points suggests that proponents of Medinan doctrines considered it necessary to substantiate and defend their positions in response to challenges by Iraqi jurists. The *Mudawwana* reflects these debates, but seldom explicitly.

If Mālik reflected and transmitted the juristic heritage of the Medinan school, then Abū Ḥanīfa (d. 150/767) stands as the principal representative of the Iraqi school. Iraq was a hotbed of legal thought in the second/eighth century. Both Jaʿfar al-Ṣādiq—after whom the main Shiʿi legal school is named—and Abū Ḥanīfa, who studied with him, were based there, as was the Kufan jurist Ibn Abī Laylā (d. 148/765–766), a rival of Abū Ḥanīfa. Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805) and Abū Yūsuf (d. 182/798) were the preeminent disciples of Abū Ḥanīfa. These men transmitted and refined his doctrines, defending them against his Iraqi and Medinan opponents. Several expository and comparative or polemical works are more or less securely attributed to Shaybānī. In the former category are *al-Jāmiʿ al-Kabīr* and *al-Jāmiʿ al-Ṣaghīr*. In the latter category are the *Kitāb al-Hujja*, a polemic against “the people of Medina,” of whom Mālik was the most prominent representative, and a recension of Mālik’s *Muwaṭṭa*, known as the *Muwaṭṭa* of Shaybānī (*Muwatta*’ Shaybānī), which compares the views of Mālik, with whom Shaybānī studied for several years, to those of Abū Ḥanīfa, his later teacher. Abū Yūsuf, whose *Kitāb al-Āthār* compiles juristic opinions in a manner like the *Muṣannaf*, also has attributed to him a similar text comparing the doctrines of Abū Ḥanīfa to those of his Kufan rival Ibn Abī Laylā (*Ikhtilāf Abī Ḥanīfa wa Ibn Abī Laylā*). The importance of networks of scholarship can be even more clearly seen in the career of Shāfīʿi, whose *Umm* I discussed earlier. Shāfīʿi is a crucial figure in early Islamic jurisprudence, remembered primarily for his contribution to legal theory. Though Noel Coulson exaggerates when he calls him “the *deus ex machina* of his time,” Shāfīʿi contributed signally to the compromise legal methodology that ultimately allowed Sunni scholars to integrate both prophetic traditions and various techniques of reasoning, including analogy. After early study with important Meccan scholars, Shāfīʿi spent time learning from Mālik in Medina. He then traveled to Iraq, where he studied and debated with Shaybānī. After a period of study—and a return to Mecca, where he led a teaching circle—Shāfīʿi taught in Baghdad and composed works of
jurisprudence. Shāfī‘ī draws from both Mālikī and Ḥanafī traditions, here synthesizing, there rejecting his predecessors in developing his distinctive doctrines and increasingly systematic rationales for them. Toward the end of his life, he settled in Egypt, where he revised his works and taught additional students, who in turn taught others; the Kitāb al-Umm, compiled and polished after his death, and chiefly transmitted by al-Rabī‘ ibn Sulaymān al-Murādī (d. 270/884), represents his mature doctrines.48 A more independently minded student, Ḥamīd b. Yaḥyā al-Muzanī (d. 264/877–878), composed a widely circulated abridgement (Mukhtasar) of the Umm.49 Modern editions of the Umm are printed with this Mukhtasar as well as several shorter treatises on particular legal-methodological issues or jurisprudential disagreements. These notably include Ikhtilāf al-‘Iraqiyayn, which records Shāfī‘ī’s responses to Abū Yūsuf’s record of the “disagreement of the two Iraqis”—that is, Abū Ḥanīfa and Ibn Abī Laylā.

This brief sketch of the relationships between a handful of formative-era jurists hardly does justice to their overlapping connections or the broader networks of which they formed part. In the eighth and ninth centuries, boundaries between groups of jurists were porous rather than fixed; there were no formal legal schools (madhāhib, singular madhhab). Nurit Tsafrir notes, “It is not at all certain what the nature of a legal school in the second/eighth] century was, and what it meant to be a follower of such a school.”50 And with regard to what to call them, Steven Judd refers to an “epistemological dilemma” of long standing: “In a world of diverse views held by thousands of scholars who travel frequently and borrow concepts from each other, how does one sort scholars and ideas into manageable categories?”51 Naming schools after eponymous “founders” became standard in the ninth or tenth century, taking precedence over earlier categories based on “intellectual persuasion,” “teacher,” or “geography.” To use eponymous school names rather than geographical ones before the tenth century is thus anachronistic: the Ḥujja refers to its opponents as “the people of Medina” and Shāfī‘ī’s comparative work treats “two Iraqis.” But the labels Ḥanafī, Mālikī, and Shāfī‘ī are useful so long as we remember that we are speaking, for instance, of a “nascent Mālikī school”52 rather than a full-fledged classical madhhab. Mālikī, Ḥanafī, and Shāfī‘ī serve as useful shorthand for identifying loosely affiliated clusters of jurists who (usually) congregated in certain areas and were engaged in both internal and external
debates over legal method and doctrine. One must keep in mind the fluid nature of school boundaries, lest the terms become more a hindrance than a help. In referring to jurists throughout this book with eponymous labels, I intend something along the lines of Peter Hennigan’s provisional use of the identifier Ḥanafī: “‘Ḥanafī’ defines a legal culture in which an identifiable group of jurists—who were later (re)-contextualized as ‘Ḥanafīs’—cited to and disputed with one another.”

Reading Legal Texts

Hennigan’s reference to citation and disputation highlights core practices of jurisprudential culture. Both left traces in the texts. References to respected predecessors helped trace the line of authority for a particular position, or supported a particular position in arguments with colleagues. Disputation could be internal (acknowledging differing opinions within a group, as with the various Medinan authorities cited in the Mudawwana or differences between Abū Ḥanīfa and Abū Yūsuf in the Jāmi’ al-Ṣaghīr) or external (Abū Ḥanīfa’s view against Mālik’s, or that of Shāfi‘i against Shaybānī). Argumentative practices helped define the boundaries between groups of jurists. As Alasdair MacIntyre famously noted, traditions necessarily have external boundaries and internal divisions.

From an outsider’s perspective, the Sunni jurists under study here constitute a single tradition. Engaged in a legal approach to regulating Muslim lives, they share certain assumptions, approaches, and values, as well as authoritative texts. Additional core agreements defined distinctively Mālikī, Ḥanafī, and Shāfi‘i traditions. Each has characteristic doctrines, particular themes, and concerns that emerge repeatedly. Internally, they engaged with issues of concern to their predecessors, and in conversation with them, in “an argument extended through time.” Jurists also engaged in conversation, debate, and argument with contemporaries outside of their increasingly self-contained schools.

Formative-period texts express and defend doctrines, sharing, disputing, modifying, adapting, and rejecting them both within and across geographical and chronological boundaries and across groups of adherents. Doctrines and supporting evidence emerge as fragments of a conversation. Sometimes we are able to hear both halves of it, but at other times we can only infer what the other portion must, or at least might, have been. Attending to this discursive nature of the legal tradition is
vital to understanding it, even as the fixity of writing, especially near the end of the formative period, affected how composition and transmission occurred.

It is necessary to say a word about the relationship between legal texts and social practice. At one level, texts were the outcome of social processes. They were affected by the material conditions of their production. Patterns of thought were defined in part by who met whom, where information was transmitted and shared, who could travel in order to study with recognized authorities. Networks of conversation across a deeply interconnected Muslim world, with strong circulation not only of goods but of people and ideas, led to locally inflected forms of Islam coming into contact with and being challenged by other norms and practices. The texts discussed here were produced from Andalusia to Iraq over the course of a century or two. Some of the differences among jurists’ doctrines have been explained, in part, by social phenomena in their places of origin. Greater Mālikī rights for slaves, for instance, have been attributed to the relative egalitarianism of Medina, while Ḥanafī strictures on social equality in marriage have been linked to Kūfan cosmopolitanism. Still, whatever regional differences existed, common traits affected legal scholarship. Economic stratification, ethnic hierarchy, and at least some degree of sex segregation were prominent features of the societies where these texts emerged.

We must say a bit more about the gendered settings in which legal texts were produced as well as the general climate of ideas and social practices of the time. Prescriptive texts advocating strict sex segregation did not fully describe reality, but jurisprudence was in practice a predominantly male enterprise. Women were not formally excluded from studying jurisprudence or attaining its highest ranks; some jurists even permitted, at least theoretically, women’s appointment to judgeships. Within scholarly families, females might receive an education in jurisprudence, and some of these women taught students. (They did not, though, partake of the rihla, the journey in search of knowledge that was de rigueur for most scholars of the time.) A few later female scholars became famous muftis, and their guidance was routinely sought. However, women are rarely cited as authorities for particular legal positions—Muḥammad’s wife ʿĀʾisha is an exception—and none is recorded in these texts as the author of a work of jurisprudence. Women’s voices in these legal texts are muted, though not uniformly silent.
Gendered patterns of segregation and female subordination not only marginalized women from the ranks of scholars but also shaped male jurists’ doctrines. Leila Ahmed has argued that legal norms for marriage were colored by the “easy access” elite men had to female slaves, which led to a blurring of “the distinction between concubine, woman for sexual use, and object.”57 She links these shifts in “the ground of intersexual relationships” to the process whereby “it became the norm among the elites for men to own large harems of slave women.”58 One must not discount the influence of the sexual commodification of enslaved women on cultural production. Nonetheless, the practices of the courtly elite did not translate directly into law. First, harems were complex institutions, serving purposes other than the sexual gratification of rulers. Of the thousands of women in the early Abbasid caliph al-Mutawakkil’s harem (estimates range from 4,000 to 12,000), only a small fraction were likely concubines.59 Most would have been domestic drudges and personal servants, not only of the concubines but also of administrators, women of the family, young children, and so forth. A second consideration is that jurists were not truly part of the courtly elite with fabulous wealth and “large harems.” Their experience of the sexual system was tempered both by their distance from the rock-star lifestyle of the caliph’s court and by their consistent attempts to integrate theory and practice, text and life.

Slave ownership was not only for the filthy rich, though, and the jurists identified with slaveholders rather than with slaves. Some owned at least one enslaved concubine; both Shāfi‘i and Ibn Ḥanbal died leaving concubines who had borne them children (umm walad).60 One report declares that Mālik ibn Anas “purchased three hundred sarārī [concubines] and would spend one night a year with each of them.”61 Even if, as is likely, this report exaggerates, it makes clear that concubinage was a normal part of the sociosexual patterns of life in this era, as was domestic servitude more generally. Shāfi‘i—by no means a wealthy man—apparently had in his household two adolescent male slaves as well as an Andalusian wet nurse, who nursed the child born to his slave concubine. Stories about Mālik refer to a black female slave who answered knocks at his gate. In addition to illustrating the widespread nature of slaveholding, these anecdotes help us remember that their own status as slaveholders cannot help but have influenced the jurists’ rulings. We can discern very little definitely about the ways that the
women or slaves in male jurists’ lives might have affected their scholarship beyond a few tantalizing hints in their texts.

Legal Norms and Social Practices

There was a complex, multilayered, and bidirectional relationship between the legal-discursive tradition and the social world. One must not “mistake medieval normative and legal texts for descriptive accounts of gender relations in medieval Islam.” Texts may unwittingly attest to social practices through their repeated condemnations of specific activities. For instance, a tirade by fourteenth-century Cairene scholar Ibn al-Hājīj terming women’s public presence a cause of social disorder inadvertently demonstrates women’s persistence in appearing in public spaces. Historian Amira Sonbol suggests that “the actual lives women led caused reactionary clergymen to interpret laws more conservatively. The ‘looser’ the women, the stricter the interpretation.” The norm of female seclusion was consistently subverted in practice.

But one cannot simply assume that texts merely presented a foil for resistance or that practice directly opposed doctrine. Legal writings, cautiously utilized, can serve as evidence for social history. The prevalence of certain subjects in legal treatises sometimes reflects their actual importance and at other times is wildly disproportionate to their presence in real life. The focus on the validity of certain conditions in marriage contracts—such as those denying the husband the right to take additional concurrent wives—suggests that this was something brides routinely sought to negotiate. On the other hand, eunuchs and intersexed individuals occasioned a great deal of legal reflection but cannot have constituted more than a tiny minority of any population. Telling the difference between the two is sometimes a matter of guesswork, and sometimes can be backed up by other evidence, such as notarial manuals and court archives. Fatwas that include case particulars are more revealing than treatises; notarial manuals, which have a close connection to practice, are perhaps more useful still. In evaluating specific cases mentioned in legal compendia, again one must assess whether they present historical fact or hypothetical cases.

My aim in this book is not to extract social history from prescriptive texts. I neither assess how closely these texts mirror real life nor speculate extensively about how actual behavior conformed to jurists’
dictates. Rather, I try to explicate the jurists’ surprisingly coherent vision of marriage and its gendered duties and, secondarily, explore the role of jurisprudential dispute in producing doctrinal development. Though the dominant ideology in the texts was contested in practice, understanding it remains beneficial. In fact, to the unknowable extent that the jurists’ ideals went unrealized, the logical exigencies of the legal system—the things the jurists felt compelled to insist on even though they could not be enforced—are more sharply revealed. This book focuses on the jurists’ conceptual worlds, using agreements and disagreements on marriage, divorce, and spousal rights to illuminate ideas about gender, ownership, and legal reasoning. How did legal rationales develop the way they did? What were the jurisprudential reasons as well as social assumptions behind the jurists’ choices?

Understanding these discursive patterns poses challenges for readers today. As already noted, their authors shared unarticulated presuppositions unthinkable to many modern readers. Slavery, which they took for granted, is the clearest example, and I have already explained why it is inseparable from ideas about marriage. Less immediately obvious but perhaps even more significant are notions about property rights and bodily rights, individual freedoms, kinship structures, and systems of patronage. It is easier to point out what is obviously objectionable, such as some people’s ownership of others or the apparent commodification of women’s bodies, than to recognize the merely unfamiliar, such as the role of the family in marriage arrangements. Readers understandably focus on what is strange—noting unanimous juristic agreement on the right of the father to marry off his minor and/or virgin daughter without her permission—and bypass what was a highly significant reform in its own context: the insistence that a woman who had once been married could not be married off again without her spoken consent. Seeing through a modern lens, we risk overlooking the key issues that animated these legal discussions.

I have already noted two of the interrelated challenges that formative-period legal texts pose to modern readers. First, they are prescriptive rather than descriptive, with a complex relationship to the social contexts they reflect and address. Second, they assume certain things about men, women, and kinship that are no longer givens. A third challenging factor is their genre. These texts are addressed to an audience trained in a specific way of asking questions and interpreting
answers. They use specialized terminology and rely on a wealth of assumed knowledge. Not only do they presume familiarity with religious source texts of the Qur’an and hadith and specific legal doctrines and ideas, but they expect their audience to be conversant with broader ongoing legal discussions. Much remains unstated because it is obvious.

I will argue, moreover, that the rhythms or modes of argument characteristic of legal texts shaped the jurists’ views. Conventions of legal argumentation led jurists to different conclusions from those of others equally steeped in the same scriptural and cultural milieu. Legal thinkers were neither cut off from larger social patterns nor necessarily restricted to jurisprudential works in their intellectual output. In works of poetry or scriptural exegesis, the same men might approach questions of marriage and gender quite differently. Jurisprudence is not merely an epiphenomenon of patriarchy. The law has a life and logic of its own. At some level, ideas are determinative of other ideas, or at least limited by the intellectual justifications that can be produced. The need to construct defensible arguments leads to a hardening of certain positions, including those denying the enforceability of certain wifely rights, such as those to sex.

We see this manifest directly in discussions of marriage and slavery. The critical conceptual links between marriage and slavery emerge from a core idea about sexuality and sexual licitness: licit sex was possible only when a man wielded exclusive control over a particular woman’s sexual capacity. This view, implicitly shared at the outset of the formative period, was fuzzy with regard to female slaves and stronger with regard to free women. By the end of the formative period, among the legal thinkers discussed here, it was accepted that the same strictures would apply to slave sexuality. The jurists’ comfort with the semantic overlap between marriage and slavery facilitated this process. Gail Labovitz, in a study of marriage in rabbinic thought, has proffered a model for understanding the relationship between wives, slaves, and other possessions. Using the work of George Lakoff and Mark Johnson (Metaphors We Live By) as well as of Paul Ricoeur, she suggests that metaphor is a means of understanding, and indeed making, reality. In the case of the rabbinic treatment of marriage, the central metaphor is “women are ownable.” But metaphor requires ambiguity: marriage “is” and “is not” ownership; both affirmation and negation are necessary to its function.
Introduction

In the Muslim context, metaphor serves as a necessary backdrop for the central analogy between marriage and slavery and marriage and other forms of ownership. The analogy can function only because of the perception of an underlying similarity: if there was no way in which the wife was viewed as like a slave, it would not work. The fact that the comparison resonates unpleasantly to educated Muslim ears today suggests the extent to which the broader metaphorical ground has shifted. For the early jurists, however, analogies between marriage and slavery appear as if the parallels between these categories were “real or self-evident or in the nature of things.”

From our vantage point, we see them instead as a “code specific to the praxis of [a] given social group,” specifically, the jurists of premodern Muslim times. A concern for descriptive efficiency, rather than a deliberate attempt at female subordination, helps explain frequent analogies between marriage and purchase or divorce and manumission. But once analogies are in use, they are self-perpetuating. The continual approximation of wives and slaves, as well as husbands and masters, resulted in deeply entrenched ideas about male agency and female passivity in matters of marriage and sexuality.

Structure of the Book

The chapters of this book build a cumulative argument about jurisprudential understandings of marriage and slavery, men and women, and husbands and wives. It argues for understanding early Muslim legal texts as expressions of a technical discourse, bound by its own internal logic and need for systematization and consistency. The legal-methodological imperatives driving the production and defense of legal doctrine cannot be divorced from their end product: a hierarchical framework for marriage and sexuality that deals with competing pressures by allowing differences in women’s legal personhood before and outside of marriage, but pressing for uniformity in the legal claims of wives. At the same time, an expansive vision of male marital privilege opens the rights and duties of husbands even to male slaves. Sexuality becomes the key realm for the construction of masculinity and femininity.

Chapter 1 addresses the basic parallel between contracting marriage and buying a slave. It discusses the extent of and limits on paternal and owners’ power over the marriages of their charges and looks at the integration of slaves into an economy of kinship. Exploring varying
legal views on women’s legal personhood, it discusses women’s capacity to contract marriage. The role of the ownership tie in establishing licit sexual access constitutes a major element of the conceptual relationship between marriage and slavery.

Chapter 2 treats interdependent claims established by marriage, focusing on the exchange of maintenance for sexual availability. It stresses the gender differentiation of marital rights and explores the differences introduced when a female slave is married. By looking at the way in which claims are divided between her husband and her master, it becomes possible to delineate with greater precision the core elements of the marital transaction.

Chapter 3 turns from the husband’s rights to sex to the wife’s rights to companionship. It investigates wives’ claims on their husbands for sex and companionship, using jurists’ discussions of a wife’s right to an allotted portion of her husband’s time. Both the division between wives and concubines and the crucial distinction between the wife’s claims and the husband’s claims are evident. I show how the jurists were trapped, to a certain extent, by their own insistence on logical consistency.

Chapter 4 looks at various modes of divorce, particularly the husband’s unilateral right to repudiation, frequently analogized to manumission. With sustained attention to the establishment of consensus on the right of a male slave to alone wield the right of divorce over his wife, this chapter argues that the right to sever the marriage tie is essential to the jurists’ vision of marriage—making a one-way right the basis for a two-person relationship.

Chapter 5 explores the parallels between marriage and slavery as forms of *milk*, utilizing the regulations surrounding the marriages of male and female slaves, as well as the institution of slave concubinage, to elucidate the rights of husbands and wives. It also returns to the subject of women taking male slaves as “concubines” to revisit the key idea of a man’s exclusive dominion over a woman’s sexuality as the basis for licitness in both marriage and slavery.

*Note on Texts, Translation, and Transliteration*

Recent scholarship has debated heatedly the authorship and chronology of particular works from the eighth and ninth centuries (the second
and third *hijri* centuries). Scholars have argued over when texts such as the *Umm* and the *Mudawwana* came to exist in their current forms, who authored them, and when and how they circulated in oral and written form. Since I trace the lines of argument for certain doctrines, my conclusions must be regarded as provisional to the extent that they depend on assumptions about the chronology or authenticity of specific works. However, my main arguments about the structure of marriage and marital rights depend neither on the precise chronology of the texts nor on their attributions to particular individuals.  

Few Arabic legal texts have been translated into English or European languages. Of those used here, only the *Muwaṭṭaʾ* Shaybānī has had an adequate translation, which appeared after this book was substantially complete. Mālik’s *Muwaṭṭaʾ* has had several full and partial non-scholarly translations, but none with sufficient attention to the nuances of the legal terminology. All translations from legal texts here are, therefore, my own unless otherwise noted. The notes provide book (*kitāb*) and chapter (*bāb*) titles so that those working with editions of the texts other than those I have cited will be able to locate the relevant passages.

Legal texts present special challenges for a translator. Islamic legal writings combine layers of allusion to scripture with technical legal terminology. My translations are usually as literal as possible, and I repeat key Arabic words frequently. Legal texts are also often brief and allusive rather than expository. Where necessary, extended clarifications appear in square brackets.

I follow a modified version of the transliteration system used by the *International Journal of Middle East Studies*. Terms that have passed into common English usage, such as *Qurʾān*, *hadith*, *Sunni*, and *fatwa*, appear without diacritical marks or italics.

I have done my best to present these legal texts on their own terms and to assess their arguments accordingly. This book is engaged in thinking through what a group of scholars had to say. The jurists themselves closely scrutinized and criticized each other’s works. I like to think they would not mind that I also engage with their claims and evidence, and attend closely to the ways in which they argue with each other.