progressive Muslims

ON JUSTICE, GENDER AND PLURALISM

EDITED BY
OMID SAFI

ONEWORLD
OXFORD

7

PROGRESSIVE MUSLIMS AND ISLAMIC JURISPRUDENCE: THE NECESSITY FOR CRITICAL ENGAGEMENT WITH MARRIAGE AND DIVORCE LAW[1]

Kecia Ali

Progressive Muslims have a difficult relationship with Islamic law. Many progressive Muslims have undertaken alternative close readings of the Qur'an, or have delved deeply into ethical and mystical aspects of Islam to find teachings that can be used as a cornerstone of a progressive Islamic interpretation. But we have been reluctant to enter into serious conversations about Islamic law, which is generally seen as the realm of more conservative scholars. Partially as a result of this hesitancy, discussions of Islamic law today tend to reflect only different degrees of conservatism and fundamentalism. Debates over implementing *Shari'ah* revolve around issues like the stoning of adulterers or amputating the hands of thieves. For those living in the Muslim world, negotiations with Islamic law as it is enforced through personal status codes are a practical necessity. Muslims who live in the West, however, encounter Islamic law only to the extent that we choose to apply it in our personal dealings. For many, that means most especially in matters of family. Paradoxically for progressive Muslims, this is the arena where traditional Islamic law is thought to be most conservative.

Despite the fact that Muslim marriage is not generally thought of as a progressive institution, even progressive Muslims generally want to get married. We do not want our relationships to be bound, however, by the strictly hierarchical rules that we assume to be enshrined in Islamic law. A few Muslims in the West simply leave aside Islamic law in personal matters, choosing to abide exclusively by secular laws, which tend to be more egalitarian. These couples work to keep the spirit of Qur'anic proclamations on the nature of marriage alive in their relationships, but do not consider its legal pronouncements literally applicable. Other progressive Muslims, perhaps most, follow the key elements of classical marriage in the wedding, but may reduce the dower to a symbolic

amount due to discomfort with its "commercial" connotations. There is an implicit understanding, in these unions, that traditional legal rules – such as those allowing the husband to take additional wives or to forbid his wife from leaving the marital home without permission – will not govern the spouses. Both of these approaches are based on an understanding of Islamic marriage law as inherently biased against women; therefore, it is avoided or observed primarily in the breach. Islamic law, in this view, does not accurately embody the ideals of Islam regarding relations between spouses, which are mutuality, respect, and kindness. A third stance, however, calls for selective appropriation of provisions of classical law, allowing for the spouses to customize their marriage contract through the inclusion of numerous conditions, generally favoring the wife, that modify traditionally accepted rules for spouses' marital rights.

Proponents of this approach argue that, in fact, women are guaranteed numerous marital rights by Islamic law, some of which surpass rights granted by secular Western laws; women simply need to learn how to protect themselves by invoking them. The lawyer Azizah al-Hibri is the most prominent, though by no means the only, advocate for this view, which has gained widespread attention in recent years and has been adopted by many Muslim women's organizations. It is also quickly becoming conventional wisdom among some non-Muslim feminists concerned about avoiding orientalist stereotypes surrounding "women's status" in Islam.[2]

Al-Hibri was recently featured in "Talk of the Town" in *The New Yorker.* There she explained that women have rights in Islamic law that are often unknown and unutilized, with the right to make stipulations in marriage contracts primary among them. According to the article,

> A woman can secure her right to work outside the home at any job she likes; she can reassert her right to have her husband support her financially, even if she has a job or is independently wealthy; she can keep her finances separate from his and invest them wherever she wishes; she can specify the sum of money she expects to receive should the marriage end in divorce or should she be widowed; she can negotiate the right to divorce her husband at will, should he, for example, take another wife; [and] she can reserve the right not to cook, to clean, or to nurse her own children.[3]

This picture does not resemble at all the laws governing most Muslim women's marriages today. If implemented, however, such rights would seem to guarantee women a life of ease and comfort. Further, to the extent that these rights can be supported by opinions from texts of classical jurisprudence, they are more likely to achieve acceptance than attempts to rework marriage law entirely, since they can claim an "authentic" Islamic pedigree.

In this essay, I will argue that this approach misses the forest for the trees. While its adherents may or may not be right about any particular contractual stipulation[4] (and often they significantly overstate the extent to which specific

conditions are enforceable), they fail to address the basic parameters of the marriage contract itself and the assumptions it is based on. By focusing on isolated rights without paying attention to how they are embedded in a system of interdependent spousal obligations, al-Hibri and other advocates for women's legal rights implicitly accept the basic structure of the marriage contract as understood by Muslim jurists to be the divinely sanctioned norm for Islamic marriage. However, this framework is not God-given but rather was developed by men working at a particular time and place, governed by certain assumptions. Before we simply accept the traditional legal understanding of marriage and move to modify its practice with conditions attached to marriage contracts, its basic premises must be subjected to sustained analysis and careful critique.

One purpose of this essay is to present such an analysis of the traditional jurisprudential understanding of marriage. I will demonstrate, through an exposition of the views of early Sunni jurists, that the overall framework of the marriage contract is predicated on a type of ownership (*milk*) granted to the husband over the wife in exchange for dower payment, which makes sexual intercourse between them lawful. Further, the major spousal right established by the contract is the wife's sexual availability in exchange for which she is supported by her husband. This basic claim, which would have been accepted without controversy as an accurate portrayal of the legal dimensions of marriage by virtually any pre-modern Muslim jurist, is unthinkable today for the majority of Muslims, including those who write about Islamic law. This portrait of how traditional jurists conceived of marriage is a necessary precursor to the evaluation of contemporary discourses on marriage in Islamic law that I undertake in the second half of this essay.

I will address two types of modern discourses on Islamic law: neo-conservative and feminist-apologist. Both attempt to appropriate the authority of traditional Islamic law through various means, in each case upholding some of its substantive doctrines while setting others aside. Neo-conservative authors suggest that the rationale for men's and women's differing marital rights and duties is the natural difference between husbands and wives that results from a divinely ordained "complementarity" of males and females. Though presenting their views as simply restatements of traditional law, these authorities allow some rights previously granted to women to lapse, since they do not make sense as part of the new framework.

Feminist and reformist approaches that take women's rights and needs as their main concern make different interpretive moves from those of the neo-conservatives. In some cases, they reject juristic interpretations and turn instead to the Qur'an and, to a lesser extent, the *hadith* collections as source of legal guidance. In this essay, though, I am concerned with the way these discourses focus on particular substantive rules of jurisprudence. Claiming back rights that have recently gone unnoticed or even been denied outright, those working from this perspective attempt to promote and defend wives' rights by appeal to

traditional legal authority. In doing so, however, they provide new justifications and interpretations for these rights that do not accurately reflect their original place in a system of spousal rights and obligations.

In my view, neither contemporary approach profiled here accurately or thoroughly engages with traditional jurisprudence. To do so would be to acknowledge that traditional Islamic legal understandings of marriage and divorce are unacceptable from a modern perspective. A serious analysis of traditional jurisprudential logic leads me to the conclusion that a new jurisprudence is required. It cannot be achieved piecemeal, or through strategies of patching together acceptable rules from different schools. Nor can it be sidestepped by an exclusive focus on scripture. There is no getting around law; we must understand it, then work to replace it. This essay is a preliminary step in the direction of comprehension.

A significant amount has been written in the last decades on Muslim men's and women's marital rights and duties, from a variety of perspectives. Despite the diversity of views, there is a trait common to most of this literature: little attempt is made to distinguish between types of norms and sources of authority. When authors make claims about what rights "Islamic law" (or sometimes simply "Islam") grants to spouses, they might mean Qur'an, or prophetic tradition, or the classical jurisprudence of one or more legal schools, or even the modern, codified laws of a particular Muslim country.[5] If it is traditional jurisprudence that is meant, seldom is it specified whether the text is from the fourth/tenth century or from the fourteenth/twentieth century, or whether the view presented is the majority view or a minority one, perhaps held by only few jurists. Claims that "some jurists" or "many jurists" held a particular view are especially difficult to investigate. This collapsing of different discourses into the category "Islamic law" allows one to claim a broad authority for one's own view without needing to specify the source for that authority. By remaining so vague, it also prevents others from critiquing the claims and being able to weigh independently how authoritative they wish to consider a particular doctrine to be. And shifting from one set of sources to another – taking a majority view from classical Sunni jurisprudence when it suits, turning to the Qur'an when it doesn't, and drawing from modern statutory reforms when necessary – leaves one open to charges of inconsistency.

This essay will use Sunni[6] legal texts from the third century *hijri* / ninth century CE to illuminate how marriage was understood contractually in traditional Islamic jurisprudence.[7] My choice of this period requires a note of explanation. While the following centuries produced important texts – the classical works from the fourth/tenth to the sixth/twelfth century are particularly significant[8] – the literature from the formative period of the third/ninth century is a manageable body of work, making it possible to adequately survey the primary texts themselves. Given the importance of the issues under consideration, I think it is important to have a solid, thorough comparative approach, rather than using selected passages from a variety of texts from different centuries and

different schools, or relying on modern summaries of earlier doctrine which may misrepresent crucial positions. That said, I think my general characterization of the marriage contract and its associated rights and duties applies to later Sunni texts as well, though in a few minor respects later classical doctrines may differ in their particulars from those described here.

I want to be absolutely clear to avoid any misunderstandings: I am not making any argument as to what Islamic marriage ideally should be or what the Qur'an or *Sunnah* says about spouses' rights. Nor should my portrait of legal doctrine be taken as a description of Muslim women's lives, either historical or contemporary.[9] When I state that Islamic jurisprudence grants husbands a type of ownership over their wives, I do not mean that 'Islam' sanctions this, that God intends it, that the Qur'an requires it, or that the Prophet approved it. Rather, I intend to characterize the system of gendered rights and obligations developed by the jurists whose works I am discussing.

One basic fact is very important to keep in mind throughout: there is not now, nor has there ever been, a single, unitary Islamic law. Though Muslims agree that the *Shari'ah* – God's law for humanity – is complete, infallible, and universal, it cannot be known directly but only through the work of human interpreters. Historically, these interpreters have been the jurists. Their attempts to understand, develop, and implement *Shari'ah* are human, imperfect, and shaped by the constraints of their specific historical contexts. This boundary between revealed law (*Shari'ah*) and jurisprudence (called *fiqh* in Arabic, which means "understanding" or "comprehension") has been obscured in the modern period as nations have adopted the term *Shari'ah* to describe their legal codes. Even before the modern period, the human element in the creation of legal rules was often overlooked, particularly by non-specialists. Even among the jurists, conformity with school doctrine (*taqlid*) became important, and the particular rules themselves took on an air of inevitability. However, jurists themselves always recognized that it was their efforts that were central; the term *ijtihad*, used to refer to independent legal reasoning, refers to *striving* for results not the attainment of correct answers. The jurists knew of significant differences between the schools; there is a vital literature of dispute and polemic. While one finds, at times, disparaging remarks about legal doctrines held by other groups of jurists, one also frequently finds a disclaimer, most often after the expression of a ruling on which there is significant disagreement. The jurists state simply, "And God knows best." There can be no clearer recognition of the inability of human reason to fully comprehend and implement God's revealed law.[10]

FORMATION OF ISLAMIC LAW: SOURCES, METHODS, AND JURISTIC DISAGREEMENT

The Qur'an was revealed beginning in the year 610 CE; its revelation continued until Muhammad's death in 632. In addition to general pronouncements on the

nature of the relationship that should exist between spouses – love and tranquillity, good conduct – the Qur'an addressed a number of specific issues relating to marriage and divorce. These included dower, a payment from the husband to the wife at the time of marriage; polygamy; the waiting period to be observed following the end of a marriage to determine if the wife was pregnant; and various types of divorce including unilateral repudiation and divorce for compensation. Muhammad also adjudicated in numerous disputes himself, establishing precedents separate from, and sometimes in tension with, the words of the Qur'an.[11] In the decades following his death, the Prophet's Companions gave *ad hoc* decisions in cases brought to their attention. Some cases were decided in accordance with what a Companion recalled to have been Muhammad's practice in similar situations; others were based on what they expected he would have done in such a circumstance; others simply on a sense of community norms. Sometimes, Companions drew on the Qur'an as support for their decisions, though they differed on the proper understanding of numerous passages.

In later generations, into the eighth century, a process of recording these decisions and various other types of historical accounts from and about Muhammad and his Companions was underway. It eventually resulted in the compilation of books of traditions (*athar, ahadith*), the most famous of which was the *Sahih Bukhari*, completed in the ninth century. At the same time these traditions were being collected, a more systematic effort to explore legal issues was undertaken by jurists. Schools of law (*madhahib*, sing. *madhhab*) formed, with a base of shared doctrine and methodology, though jurists within each school sometimes diverged from the majority opinion on a given topic.[12] Today, these schools survive as four Sunni schools (the Maliki, Hanafi, Shafi'i, and Hanbali) as well as one primary and several smaller Shi'i schools.

The legal schools of the formative period differed substantially on a number of issues related to marriage and divorce: how far a father's right to marry off his virgin daughter without her consent extended; whether an adult woman had the right to contract her own marriage; whether three repudiations pronounced at once took effect together or only counted as one divorce; whether a minimum dower should be set; whether a woman had the right to contractually stipulate monogamy or that her husband could not take her away from her hometown; and whether a woman could stipulate the right to divorce her husband under certain circumstances. One should not assume that some schools held a "liberal" position and others a more "restrictive" one with regard to women's rights. The Hanafi school, which held that adult women were free to contract their own marriages without needing a male representative (*wali*) to act on their behalf, also held that a woman could not obtain a divorce from an unwilling husband on any grounds except total impotence or possibly leprosy, and even then only so long as the marriage had not been consummated.[13] The Maliki school provided the most extensive grounds for a woman to seek divorce, including failure to support and the broad category of "harm" (*darar*, also "cruelty").

Nonetheless, its jurists permitted a father to marry off his never-married daughter against her wishes even if she were forty and independently wealthy. Only the Hanbalis held that there were consequences if a husband violated his contractual stipulation not to move his wife from her hometown or to take another wife; other schools considered these conditions meaningless and unenforceable.

Thus, it is clear that there were significant – and for actual women, quite real – implications to being under the jurisdiction of one legal school or another; the differences between the schools were not, as some have asserted, merely in matters of detail.[14] Nonetheless, there was indeed a shared understanding of the contractual relationship of marriage that prevailed at that time. This common view was based, in large part, on cultural assumptions shared by the jurists as a result of their social location in a particular and, according to Leila Ahmed, particularly patriarchal environment. She has shown that the 'formation of the core discourses of Islam' including jurisprudence took place in an era of hierarchy, social stratification, and the widespread practice of slavery. One characteristic of this environment was the "easy access" of elite men to slave women. She argues that "for elite men in particular, the distinction between concubine, woman for sexual use, and object must inevitably have blurred."[15]

Indeed, the jurists were influenced in their elaboration of a system of marital rights and obligations by the norms governing slavery. Slavery and particularly slave-concubinage were normal and accepted facets of social life, and it was assumed by jurists of the ninth century that one could usefully draw analogies between marriage and slavery, husbands and masters, wives and slaves. At its most basic, the jurists shared a view of marriage that considered it to transfer to the husband, in exchange for the payment of dower, a type of ownership (*milk*) over his wife, and more particularly over her sexual organ (*farj, bud'*). As evidence presented below will show, it was this ownership, while distinct from the outright ownership of another's physical body in slavery, that legitimized sexual intercourse between husband and wife. It also gave the husband the unilateral right to terminate the marital relationship at any time, by repudiating his wife for any, or no, reason. As the jurists frequently noted, this was analogous to the master's freedom to manumit a slave at any time.

Although marriage contained an element of ownership, this ownership was established by a contract that also gave rise to other rights and obligations between the spouses. These rights were interdependent – a wife's rights were obligations upon her husband and vice versa – and strictly differentiated by gender. A wife's most important marital duty was sexual availability, in exchange for which she was to be supported by her husband.[16] The primacy of, and linkage between, these particular rights is clearly illustrated in a passage from the *Umm*, the main Shafi'i work of the period: "Al-Shafi'i said: It is among her rights due from him that he support her, and among his rights to derive pleasure from her [*istimta'a minha*]."[17]

The wife's obligation to be available to her husband was set apart from other types of domestic duties. Maliki, Hanafi, and Shafi'i jurists emphatically denied any wifely duty to perform housework. (Ibn Hanbal's responsa do not discuss this topic.) She need not even cook for herself, let alone her husband. The words of the third-century Hanafi jurist Ahmad b. 'Umar al-Khassaf demonstrate this. He was asked, "What if she doesn't have a servant and her husband supports her, must she bake bread and labor to prepare [food] for herself?" He replied, "If she says, I won't do it, she is not compelled to. Rather, his claim on her is her making herself available for her husband [*tamkin al-nafs min al-zawj*], not for these tasks."[18] Al-Khassaf goes on to contrast the wife's situation to that of a servant, who, if she refuses to perform these services, is not due support and may be turned out of the house. Al-Khassaf was not alone in this view; rather, he was representative. Service is excluded from a wife's duties in the *Mudawwana* in an unequivocal way: "I said: Must a woman serve herself or perform household service or not according to Malik? He said: She need not serve herself or perform any household service."[19] Al-Shafi'i suggested that whether or not a husband had to support a servant for his wife depended on whether or not "someone like her" was accustomed to serving herself; however, he was also adamant that even a woman who did not have a personal servant should be provided with prepared food and someone to bring her water so that she need not go out to collect it.[20] In all of these cases, the wife's performance of household duties is not expected, and is certainly not a condition of her support. Her maintenance is due, instead, as a result of her availability to her husband for sexual enjoyment.

The husband's right to derive pleasure from his wife, in exchange for his support of her, led the jurists to grant him total control over her mobility. A man could restrict his wife's movements in order to keep her available to himself, including forbidding her to go to the mosque or to visit her parents. The *Mukhtasar* of Shafi'i jurist al-Muzani notes that a woman's husband even had the legal right to forbid her to attend the funerals of her parents or her children, though the jurist preferred that he not do so; jurists from other schools held similar views.[21] A woman who left the house without permission would be guilty of *nushuz*[22] – a term variously translated as "recalcitrance," "disobedience," or "rebellion." The Hanafis and Shafi'is agreed that she would lose her right to support so long as she remained unavailable to her husband, while the Malikis and Hanbalis do not directly discuss the suspension of a wife's maintenance for *nushuz*.[23]

For the Shafi'is, a wife's sexual refusal while remaining at home also constituted *nushuz* and was grounds for suspension of maintenance. For the Hanafis, a wife's sexual refusal was not grounds for loss of maintenance. However, this was because she was still considered "available" to her husband; he was entitled to force her to have intercourse.

> If she is in his house but she withholds herself from him is maintenance due to her from him? It is due ... Is it lawful for the husband to have sex

> with her against her will ...? It is lawful, because she is a wrongdoer [*zalima*].[24]

These passages, in addition to illustrating the link between maintenance and a wife's sexual duties to her husband, make clear the extent of a man's sexual rights over his wife according to the early jurists.

Though the wife had a duty of sexual availability, she did not have a right to sex. Though today it is almost a cliché that Islam recognizes women's sexuality,[25] the legal reality in the early texts is that women's rights to sex in marriage were virtually nonexistent. In all four Sunni schools, a woman could have her marriage dissolved for impotence if the husband proved unable to consummate the marriage; she had to complain to a judge then wait for a year. In one other case, if the husband took a vow to abstain completely from sex with her for a period of more than four months (*ila'*), she could seek to have the marriage judicially dissolved on that basis if her husband continued to abstain after four months had passed according to jurists from the Maliki, Shafi'i, and Hanbali schools. (The Hanafis considered a vow of forswearing to result in automatic divorce if not broken or expiated during the four months.)

However, after consummation, simple abstinence without a vow was not grounds for divorce in any of the four schools. Ibn Hanbal, when asked about a man who had intercourse with his wife one time, declared, "He is not impotent, and the couple are not separated. I hold this opinion even if he does not have intercourse with her again, and she has no right to request him to."[26] The Maliki texts record the same position, as in this passage from the *Muwatta'*:

> Yahya related to me from Malik from Ibn Shihab from Sa'id ibn al-Musayyab that he used to say, "Whoever marries a woman and is not able to touch (i.e., have intercourse with) her, a deadline of one year is set for him. If he touches her, [fine], and if not, they are separated."... Malik said, "However, someone who has touched his wife then avoids her (*i'tarada 'anha)* I have not heard that there is a deadline set for him or that they are separated."[27]

In the *Mudawwana,* Ibn Shihab states simply that "I have not heard [that] anyone [would] separate a man and his wife after he touched her, and that is practice among us."[28] The Maliki jurists do make one exception: if the husband's total abstinence constitutes deliberate or negligent harming of the wife (*darar*) it may be grounds for judicial divorce. (However, if the husband becomes impotent or suffers an injury that renders him incapable of intercourse, the wife has no such right.) This position reflects juristic ambivalence about a wife's right to sex. On the one hand, it is acknowledged that depriving a wife of sex can be harmful to her; on the other hand, while "harm" is grounds for divorce (for the Malikis), lack of sex *per se* is not. This unwillingness to grant wives regular rights

to sex is part and parcel of the strict separation between male and female rights that early jurists maintained.

The jurists did, however, grant the wife a right to a portion of her husband's time, subject to certain limitations. A man's duty to divide his time among his wives did not prevent him from traveling or spending a portion of his time with his concubines instead of his wives. A woman had no absolute claim on his time, but rather only claim to equal treatment with her co-wives. A man with more than one wife had a duty to allot his nights between them equally, and very strict rules governed how he was to make up missed turns.[29] Some jurists recommended that he have sex with them all regularly, but despite this, there was no penalty for a husband who did not. Al-Shafi'i voiced the consensus view when he stated that the husband's "division (of time) is based on staying, not having sex." He added – apparently unaware of the irony – that "intercourse is a matter of pleasure, and no one is compelled to it." Of course, he meant that no man is compelled to it; women's continual sexual availability was a condition of their support, and "refusal," again in al-Shafi'i's words, was *nushuz*.[30]

I have shown that if the wife failed in her duty to be sexually available, the jurists agreed that she would lose her right to support. However, in the case where the failure to perform an obligation was the husband's – if he could not support her – the jurists were divided on the consequences. If she could borrow in his name, or liquidate his assets to provide herself with support, she was permitted to do so.[31] However, even if he were unable to support her and had no property upon which she could draw, Hanafi jurists refused to grant her dissolution no matter how long the non-support persisted.[32] In sharp contrast, Shafi'i jurists allowed a wife to seek judicial divorce after as little as three days of non-support.[33] Furthermore, during the three days he was not supporting her, she was allowed to leave the house without her husband's permission in order to obtain what she needed through work. This vast difference in these two schools' treatment of the non-supporting husband (the other Sunni schools fall in the middle of the spectrum between these opposites[34]) illustrates clearly that early Islamic jurisprudence was not monolithic. On topics such as this, some positions were quite favorable to women, and others were anything but. Nonetheless, these specific rules were all embedded within a system of rights and obligations based on the premise of male support for female sexual availability.

CONTEMPORARY DISCOURSES: NEO-CONSERVATIVES

The neo-conservatives are the most prominent faction in debates over the proper legal and social rights of Muslim women today.[35] Their views are represented in publications subsidized by the Saudi government and organizations like the Jamaat-i Islami, and distributed as pamphlets and booklets in mosques and conferences of Muslims everywhere; they are likely to be the most influential group in mosques in the West. Though they often support adherence to Islamic

law, they do not have the political zeal of the fundamentalists, nor are they seeking a return to a pristine, original law. Rather, they support the continued enforcement of law as developed by jurists through the classical period and, in its transformed form, by legislatures in Muslim nations. I have lumped together in this group both those with traditional religious education (the *'ulama*) and those non-specialists – far more numerous – whose support for Islamic law is a matter of principle, but whose understanding of the law is derived from contemporary notions. Even though there are some differences between these groups that might warrant separate consideration, I treat them together in part because in both cases the discourses with which Islamic law is explained and justified take on a decidedly non-traditional tone. Neo-conservative authors may believe in adherence to classical legal doctrines (though, as will be seen below, this is not always the case), but they justify them with language that is, more than anything else, Victorian.

This phenomenon can be seen clearly in a treatise on *nushuz* by Saalih ibn Ghanim al-Sadlaan, a professor from the College of Shari'ah at Muhammad ibn Saud Islamic University in Riyadh. While the author is clearly trained in the doctrines and methods of jurisprudence, and his study draws on these sources, he adopts a tone of biological determinism that is alien to classical *fiqh* discourses:

> The woman is naturally conditioned and created by Allah to perform the functions of pregnancy, giving birth, and taking care of the internal affairs of the house. Man, on the other hand has been endowed with more physical strength and clearer thought and he is, therefore, more befitting to be the leader of the household and the one responsible for providing the means of livelihood, protecting the family and bringing about security and continuance in the family.[36]

While the notions of male superiority and headship of the family, and even of men's greater intellectual and physical capacities, are consonant with earlier jurisprudential treatments of spousal rights, the link the author draws between women's capacity for childbearing and their duty to "tak[e] care of the internal affairs of the house" is not merely a restatement of traditional jurisprudential views. Rather, this formulation assimilates early *fiqh* rules about male support to a male breadwinner / female housewife model that is more in keeping with ideas about 1950s America. As the previous section has shown, this model is inaccurate to describe the early jurists' rationale for male support of their wives. In the case of this particular work, despite the adoption of non-traditional rhetoric, the legal doctrines presented regarding its main topic, *nushuz*, are generally in keeping with the provisions of traditional jurisprudence. However, with regard to a woman's responsibility for "taking care of the internal affairs of the house," Al-Sadlaan departs from the established views of early jurists. His brief mention of this point illustrates a much larger phenomenon: in many cases,

what is advocated by the neo-conservatives as the "traditional" Islamic view is not in fact historically the position adopted by the early and classical jurists.

The neo-conservative treatment of housework as well as women's work outside the home illustrates clearly the differences between early *fiqh* doctrines and contemporary apologia for them. Two examples suffice as evidence. The first is from *Marriage in Islam: A Manual* by Muhammad Abdul-Rauf.[37] First published thirty years ago, and now in its seventh printing, its chapter "A Happy Conjugal Household" gives listings of husbands' and wives' duties, which include the following:

> A husband is responsible for the protection, happiness and maintenance of his wife. He is responsible for the cost of her food, clothes and accommodation. Although she may have to cook, he has to buy her the raw materials and cooking and kitchen facilities, as may be required and applicable.[38]
>
> The management of the household is the wife's primary responsibility. She has to take care of meal preparation, house-cleaning and laundry. Whether she undertakes these tasks herself or has them done under her careful supervision, it is her task to manage them in the best interests of the family. She may expect some cooperation from her husband, but this should depend on what he can afford to do. What is important is the mutual goodwill and love which will no doubt stimulate each party to alleviate the burden of the other as much as possible.[39]

Not only do these passages assign to women the task – meal preparation – that earlier jurists most emphatically exempted her from performing, it sets up an explicit relationship between the husband's support of his wife and her responsibility to do cooking and other household chores. However, the author hesitates a bit: he must pay for food; she *may* have to cook it. Rather than declaring outright that the wife has to perform the listed services (a term he studiously avoids), Abdul-Rauf states that she must "take care" of these "responsibilit[ies]" and "manage" these "tasks."[40]

My second example is drawn from the much-read *Woman in Shari'ah* by 'Abdul Rahman Doi, a text frequently used by English-speaking Muslims as an authoritative resource on Islamic law.[41] Doi, making extensive use of biological and "natural" arguments for women's place in the home and society, avoids any hedging around women's domestic duties. He states, "When a wife is not employed the household becomes her first occupation. By household is meant the rearing of children and all domestic services required for maintaining a clean and comfortable habitation." Doi goes further, however, touching on the subject of women's work. He reserves for the husband the right to prevent his wife from working – acknowledging, though not explicitly, the authority legally granted to the husband to prevent his wife from leaving the marital home for any reason. Yet he departs from traditional jurisprudence when he states that if a man allows

his wife to work, "Any gain from work realized by the wife belongs to the family and cannot be considered as her personal property."[42] In traditional doctrine, there is no marital property regime; the jurists never countenance a married woman's obligation to support herself, let alone her husband or children.

These few examples demonstrate that neo-conservative interpretations diverge from the traditional model in several ways, generally to women's detriment. The majority of North American Muslims rely on pamphlets and quasi-scholarly books such as these, which claim to present authoritative and authentic information, for their knowledge of Islamic law.[43] It is against this backdrop of pseudo-traditional doctrine that the feminist and reformist discourses to which I now turn must be understood.

CONTEMPORARY DISCOURSES: FEMINIST APOLOGETICS

A number of authors concerned with promoting Muslim women's rights in matters of marriage and divorce have discussed women's legal rights "in Islam." These authors oscillate between, on the one hand, upholding specific rules as an example of how Islamic law protects women and, on the other hand, critiquing traditional jurisprudence when patriarchal assumptions lead the jurists to unreasonable decisions.[44] In the latter case, these reformers turn to the Qur'an to challenge, often quite persuasively, juristic interpretations. However, I am concerned here with their attempts to defend the basic precepts of traditional jurisprudence on marriage.

In seeking to counter both stereotyped portrayals of women's legal rights and the negative consequences of neo-conservative interpretations, these authors point to provisions of classical law that guarantee women certain protections. These doctrines serve as evidence that Islamic law is not unremittingly patriarchal. They also provide practical guidelines for Muslim women seeking to ensure more egalitarian marriages for themselves. Both goals are laudable, and the strategy of promoting detailed marriage contracts is, in the short term, potentially quite effective at securing for women rights that are ignored today. However, there are two serious flaws in this approach. First, the strategy of including contractual stipulations is not, jurisprudentially, nearly as straightforward as it is often made out to be. Second, and far more importantly, adding conditions onto a contract does not change its basic essence. I will address the validity of stipulations first.

Among the clauses al-Ḥibri suggests women can include in their marriage contracts are some rights that accrue to women anyway according to traditional jurisprudence (such as to be supported by her husband or to not have to cook or clean) and some that are only hers if agreed upon in the contract (such as to work outside the home).[45] In this latter category are the oft-mentioned stipulations that a husband will not take any other wives or will not relocate his wife from her hometown. Al-Hibri writes that

> In fostering change, the Qur'an resorts to what has been known as recently in the West as affirmative action. In a patriarchal society, even a general declaration of equal rights is not sufficient to protect women. Consequently, divine wisdom gave women further protections. Paramount among these protections is the ability of the Muslim woman to negotiate her marriage contract and place in it any conditions that do not contradict its purpose. For example, she could place in her marriage contract a condition forbidding her husband from moving her away from her own city or town.[46]

The Qur'an, it should be pointed out, does not refer to stipulations in the marriage contract. So Al-Hibri is using the phrase "divine wisdom" to describe the jurisprudential doctrine of stipulations. However, according to Maliki, Hanafi, and Shafi'i jurists of the formative period, the stipulation that the husband will not move his wife from her hometown is completely void; the Hanbali jurists alone allow it.[47] Even in the Hanbali case, the wife is given a choice as to whether or not to divorce her husband in this circumstance; she is not allowed to bind him to remain with her in her town. My discussion here will focus on the related issue of stipulations against polygamy, illustrating that the current discourses about these stipulations misrepresent the provisions of traditional jurisprudence on the subject. I will further argue that even if this provision can be satisfactorily formulated so as to be legally binding, it still fails to address the underlying inequities in spousal rights.

When a contemporary author mentions putting a condition in the contract that the husband will not take another wife, or that she has a choice to divorce him if he does so, she or he is lumping together two entirely different mechanisms for ensuring the wife's "right." The first is a simple contractual stipulation; the second is conditional delegated divorce. According to Maliki, Hanafi, and Shafi'i texts from the formative period, contractual stipulations that a husband will not take additional wives (or any concubines) are meaningless.[48] For the Hanbalis, if the husband breaks the condition by taking an additional wife, the first wife has the option to divorce him.[49] However, in none of these cases is the validity of the second marriage affected.

The second mechanism is more potent. In this type of stipulation, the husband delegates his power of repudiation to the wife if he performs a certain action. Thus, a husband can state in the contract that "If such-and-such occurs, your affair is in your hands." If the wife learns that the condition has come to pass, she has the option to divorce him.[50] There is difference of opinion on whether such a choice is only good during the particular encounter where she learns of it or whether she retains the right even after that meeting so long as she has not had intercourse with her husband. For the Hanbalis, however, a woman can lose her right to divorce by having intercourse with her husband *even if she did not know that the event giving her the right to divorce had taken place*: "If her

husband has intercourse with her, the wife in question no longer has the option of separating from him, regardless of whether she was aware of her option before the act of intercourse."[51] In this case, under Hanbali law, a woman who had not put a stipulation in her marriage contract that her husband would not take an additional wife, but rather relied on delegated divorce at a later date, would lose her freedom of choice if her husband simply concealed the second marriage long enough to have intercourse with the first wife. (Remember that she is legally obligated to have intercourse with him whenever he desires.)

There is one additional way that a wife can attempt to regulate her husband's taking of another wife: through having him pronounce a suspended repudiation. For all of the schools, if the husband makes an oath of repudiation conditional on his taking a second wife ("If I marry again, you are repudiated") the repudiation is effective. As a practical matter, when a woman has no other option for assuring her right to be separated from a polygamous husband, this conditional repudiation can be a useful strategy. But what makes the strategy possible is the unfettered nature of a man's right to repudiation. His repudiation automatically takes effect when he marries again simply because of his absolute right to repudiate his wife. The same would be true if he said, "If you ever speak to so-and-so, you are repudiated" (or "If I ever speak to so-and-so . . .") or even "If it rains on Tuesday, you are repudiated." To hold up a woman's right to divorce on her husband's taking another wife as an example of how Islamic law protects women's rights ignores the specific legal rationale for validating such a divorce. It occurs in a context in which the woman has no way to protect herself from an unwanted repudiation, which is valid without her consent, participation, or even knowledge.

I have demonstrated that insuring against polygamy through a condition in the marriage contract is not the simple affair it is made out to be by contemporary authors. Yet even if one could find a way to construct stipulations against polygamy in a binding manner, it would not address this basic imbalance in men's and women's marital rights, or the definition of the marriage contract as being unilaterally in the husband's domain (*fi yadihi*). There is no condition that can restrict the husband's right to repudiate his wife at any time, for any reason or no reason at all. Raga' El Nimr acknowledges this, in an apologetic piece that differs only subtly from the views put forth by Abdul-Rauf, but does not explore its implications.[52] For El Nimr and others who stress women's protections in Islamic law, however, the dower serves that function by acting as practical deterrent or an economic safety net. I now turn to a consideration of how dower (*mahr* or *sadaq*) is understood in these discourses. Some stress its economic importance, while others suggest that a large deferred dower provides a disincentive to capricious repudiations, since the balance will become due at divorce. El Nimr considers that dower is intended "to safeguard the economic position of women after marriage." Drawing from Qur'anic verses on dower, El Nimr argues that dower is a critical means through which women can secure

their well-being. She writes that "The object is to strengthen the financial position of the wife, so that she is not prevented, for lack of money, from defending her rights."[53]

Al-Hibri likewise stresses the dower's importance for women, providing a slightly different description of its purpose:

> Mahr, therefore, is not a "bride price" as some have erroneously described it. It is not the money the woman pays to obtain a husband nor money that the husband pays to obtain a wife. It is part of a civil contract that specifies the conditions under which a woman is willing to abandon her status as a single woman and its related opportunities in order to marry a prospective husband and start a family.[54]

In comparison, the Maliki jurists of the formative period express a quite different role for the dower, stating that a free woman "is due her dower, and her vulva [*bud'uha*] is not made lawful by anything else."[55] Nor do the jurists shy away from considering the dower a price. Indeed, Al-Shafi'i explicitly uses the term "price" (*thaman*) on numerous occasions for the dower, stating that "dower is a price among prices."[56] Various discussions in the *Umm* illustrate that dower is "a price for the vulva" (*thaman al-bud'*),[57] and that "a woman's fair dower is the fair value of her vulva" (*qima mithl al-bud'a mahr mithlaha*).[58] The commercial aspects of the marriage contract are unremarkable for the jurists. For example, in discussing a situation where a slave was specified as the wife's dower, Al-Shafi'i states that "she sold him her vulva for the slave" (*ba'athu bud'aha bi 'abd*).[59]

I do not give these examples to prove that marriage was a sale, for the jurists also made analogies that differentiated marriage from sales in particular respects. I simply want to demonstrate that jurists of the formative period did not have any hesitation whatsoever in using the terminology of sales and purchases to discuss marriage. The discomfort with these comparisons is our own, and was not shared by the pre-modern jurists. The explanations of dower given by Al-Hibri and El Nimr gloss over the logic and language of traditional jurisprudence, accepting its substantive rules but providing them with more palatable interpretations.

As with dower, Al-Hibri and El Nimr champion women's exemption from domestic duties in traditional jurisprudence, but provide a new rationale for it. In these discourses, a woman's lack of duty to cook or clean is an example of her marital rights. El Nimr writes that

> With regard to domestic duties, Islam has relieved women of all manual drudgery. According to strict Islamic injunctions, it is not obligatory for a woman to cook the food for her husband or children, or to wash their clothes or even to suckle the infants. A woman can refuse to do any of these things without this being made a ground of legal complaint against her. If she undertakes these duties, it is an act of sheer grace.[60]

While with regard to dower, El Nimr turns to the Qur'an for her explanation, here she refers only to "strict Islamic injunctions" – meaning, undoubtedly, jurisprudence. Though she makes the point forcefully that women do not have household or childcare duties, she does not offer any explanation of what responsibilities they do have as wives or why it is that they are exempt from the obligation to perform these services.

Al-Hibri's treatment of the same subject offers a glimpse into her interpretive strategy:

> Islam also views marriage as an institution in which human beings find tranquillity and affection with each other. It is for this reason that some prominent traditional Muslim scholars have argued that a woman is not required to serve her husband, prepare his food, or clean his house. In fact, the husband is obligated to bring his wife prepared food, for example. This assertion is based on the recognition that the Muslim wife is a companion to her husband and not a maid. Many jurists also defined the purpose of the marriage institution in terms of sexual enjoyment (as distinguished from reproduction). They clearly stated that a Muslim woman has a right to sexual enjoyment within the marriage.[61]

Al-Hibri, like El Nimr, is correct in her characterization of the traditional jurisprudential position that a wife has no obligation to do household chores (though she perhaps underestimates how prevalent this position was, attributing it only to "some prominent traditional Muslim scholars"). Seizing on the view that women are not required to do housework, Al-Hibri argues that this indicates that Muslim women were recognized to be "companions" to their husbands rather than maids. However, for the early jurists, as discussed above, wives were bound to provide service, but sexual rather than domestic.

The wife's sexual responsibilities are entirely sanitized by Al-Hibri's next statement that "Many jurists also defined the purpose of the marriage institution in terms of sexual enjoyment." This phrasing obscures the reality that sex in marriage was almost exclusively a female duty and a male right. While it was recommended that a husband satisfy his wife sexually, women had no enforceable rights to sex. Indeed, Al-Hibri's assertion here about women's right to sexual enjoyment is undercut by her later statement that "some traditional jurists gave women the right to seek judicial divorce if they had no conjugal relations with their husbands for more than four months."[62] Apparently, of the "[m]any jurists" who "clearly stated that a Muslim woman has a right to sexual enjoyment within the marriage" only "some" considered that a husband's abstention for more than four months constituted grounds for separation. Indeed, even this overstates the case; four months, as my discussion of the formative period jurists indicated, is only the relevant period of sexual abstention where a husband has completely forsworn his wife; it does not apply to cases of abstention without a vow.

CRITIQUE AND ANALYSIS

The early and classical Muslim jurists had a clear logical system underpinning their conception of marriage and the interdependent rights of spouses within it. The basic purpose of marriage was legitimizing sexual intercourse: the jurists formulated an interdependent system of spousal rights that put the wife's support and the husband's right to sex at its center. This system was predicated, at a very basic logical level, on an analogy to slavery and other types of ownership. Furthermore, its specific rules were based on the widespread availability of slave-servants. Thus, the jurists' debate was not over whether women were required to maintain their husbands' homes, cook, and clean, but rather whether the husband had to support only one of his wife's servants or more than that. Admittedly, this likely bore little resemblance to reality for the majority of Muslim women. But it served as a basis for the elaboration of many different rules that are unintelligible if removed from this framework and held up independently as an example of what "Islam" guarantees women.

Neo-conservative authors, even as they press for the observance of certain substantive rules that are the product of early *fiqh*, balk at using the commercial terminology and analogies to slavery that were part of the jurists' accepted language. While often upholding the spousal rights that were agreed upon in that model, they provide new rationales for them, as can be seen in their discussions of a husband's duty to maintain his family. For the early jurists, "a husband must maintain his wife, whether she is rich or poor, for restricting her for himself so that he may derive pleasure from her [*bi habsiha 'ala nafsihi li'l-istimta'a biha*]."[63] The jurisprudential rationale for a husband's support of his wife is entirely separate from the rationale for any person's support of other relatives, including minor children or parents. For the neo-conservatives, however, a man's duty to support his family is part and parcel of his male nature that makes him fit for earning a living and supporting his "dependents." No distinction is made between wives and children. The wife's role is conceived of in a complementary fashion: her nature makes her suited for caring for the home and children. In the process, certain traditional female rights (such as a wife's exemption from housework) tend to fall by the wayside, as they are incompatible with the new understanding of male and female roles in marriage. When women's advocates seek to resurrect these rights, they do so by appeal to the authority of traditional jurisprudence. Like their neo-conservative antagonists, however, they frame these rights in a different conceptual vocabulary than that originally used by the jurists.

Feminist discourses that seek to promote more egalitarian Islamic laws are, undoubtedly, strategically useful. In particular, highlighting women's legal exemption from housework or childcare is a useful corrective to neo-conservative discourses that presume wives have an obligation to perform these services because of a natural aptitude for them. Likewise, the attempt to promote the

inclusion of conditions in marriage contracts governing the husband's taking of additional wives or the wife's right to work and keep her earnings can be an important means of setting forth the spouse's expectations for the marriage. This appeal to traditional legal views, however, is not without its perils. Though potentially quite effective in securing for women rights that are not respected today, it runs the risk of further cementing the authority of the traditional opinions. With regard to women's work outside the home, while traditional jurisprudence rejects a man's right to take any of his wife's earnings, it upholds, as I have noted, his right to prevent her from working entirely – indeed, to forbid her from leaving the home at all. Some would suggest that a condition in the marriage contract would resolve that; it is an iffy proposition with regard to traditional law.[64] Even where conditions can be made enforceable, and where rights can be upheld, the feminist rhetoric of women's marital rights in Islamic law distorts traditional legal rationales – if not its substantive doctrines – at least as seriously as does the neo-conservative discourse.

Al-Hibri, El Nimr, and others fail to grapple with the way that the specific rights they point to as evidence of women's legal protections are part of a larger logical understanding of what is being contracted for in marriage. If women reserve the right not to do any household service or childcare, *and* to be entirely supported by their husbands, while at the same time being free to pursue whatever work they choose, *and* maintaining sole control over their earnings from that work, what rights does the husband have? What responsibilities does the woman have in this situation? What is the basic aim of marriage, in either case? If the husband no longer supports his wife and no longer controls her mobility, then what is the point, legally speaking? Such a marriage no longer serves the purpose for which it was regulated according to traditional jurisprudence: ensuring a woman's sexual availability in exchange for male support. If it is a different type of marriage, then it needs a different type of law. Half-measures to make the best of an existing situation are insufficient. It is necessary to question the traditional model that obliges a husband to support his wife and grants him the right to control her movements in return and expect sex at his whim. This will require a radical rethinking of Islamic marriage, beginning with a fresh approach to the Qur'an, above all.

A number of scholars, including Al-Hibri, have undertaken this effort to flesh out a new exegesis of sacred texts as a means of arriving at an alternative view of relations between the sexes in society, including in marriage. Their work is important, and challenges the androcentric nature of traditional interpretations. Al-Hibri turns to the Qur'an in those cases where traditional law does not offer a resolution to the problems she sees. Others such as Riffat Hassan, Amina Wadud, and Asma Barlas have focused on the Qur'an to the exclusion of jurisprudence. Their ground-breaking studies have inspired a willingness on the part of other progressive Muslims to address legal issues through new approaches to the Qur'an.[65] In and of itself, there is nothing wrong with such

an approach; indeed, the Qur'an must be at the center of Muslim piety and thought. However, in focusing so single-mindedly on the interpretation of the Qur'an, discarding centuries of jurisprudential texts as irredeemable, progressive Muslims run the risk of leaving the field of jurisprudence entirely to those trained in its methods and committed to its traditional assumptions. Scriptural exegesis, no matter how sophisticated, is not a legal methodology; the Qur'an is not a law book. Though the Qur'an does contain specific commands and prohibitions as well as moral and ethical guidance, it does not provide explicit regulations covering all possible circumstances. Some means of applying its provisions to the nearly infinite cases that arise among Muslims will always be necessary. The battle for egalitarian Muslim marriages will be fought on numerous fronts, and jurisprudence will undoubtedly be one of them.

Progressive Muslims cannot afford to ignore jurisprudence. There is a need for a thorough appraisal and analysis of the rules and methods of traditional jurisprudence. Such analysis will demonstrate, as I have done in part in this essay, that its doctrines are entirely inadequate to serve as the basis for laws governing Muslim families, communities, and societies today. However, it should also illustrate the phenomenal intellectual effort that went into creating the logical systems that produced law to govern millions of Muslim lives through the centuries. I would even venture to say that the legal method used by the jurists is basically sound, including the use of analogy. The issue is the assumptions from which they began, including the notion that marriage can be usefully compared to slavery or to commercial transactions. This does not mean, however, that doctrines should be simply modified, piecemeal, until we come up with something we can live with. Rather, whatever elements of traditional jurisprudential method are used, the process of regulating marriage and divorce will have to begin anew. Qualified Muslims must begin working to shape new laws, beginning from new assumptions – including those that feminist and progressive Qur'anic scholars have brought to the fore. The most critical of these insights is that men and women are ontologically equal, and that ultimately our equality as human beings in the sight of God matters more than any distinctions based on social hierarchy.

CONCLUSION

Azizah al-Hibri posits that the Islamic marriage contract "is a vehicle for ensuring the continued well-being of women entering matrimonial life in a world of patriarchal justice and inequality."[66] I agree that it can be; a large deferred dower is often successfully used as a disincentive to hasty repudiation, for example.[67] Certain other stipulations may secure rights that would otherwise be unenforceable. However, this formulation fails to address the complicity of jurisprudential institutions and doctrines in, at the very least, perpetuating the patriarchy and inequality that make such measures vital. The husband's

unrestricted right to unilateral repudiation, for example, is not a *necessary* interpretation of scripture and prophetic tradition, yet traditional jurisprudence has affirmed his right to exercise it while denying women any parallel privilege. Since men have this unilateral power, contractual stipulations and practical strategies such as deferred dowers become crucial for women, a means of negotiating a patriarchal terrain. But given that jurisprudence itself is largely to blame for the state of affairs that requires women to implement these "affirmative action"[68] strategies, praise for the protections it extends to those women knowledgeable and powerful enough to invoke them seems misplaced.

Acknowledging the deeply patriarchal and discriminatory elements in Islamic jurisprudence is not cause for despair. It does not mean accepting that God intends Muslim women and men to live in hierarchical, authoritarian marital relationships. On the contrary, as I have illustrated, a thorough exploration and analysis of traditional jurisprudence will reveal the extent to which its rules are seriously flawed; they cannot be Divine. The role of human agency in the creation of these laws is evidenced by the diversity of legal views as well as the creation of a system of male marital privilege and sharply differentiated spousal rights that does not simply emerge wholly formed from the Qur'an. This system is the result of an interpretation, indeed of numerous acts of interpretation, by particular men living and thinking at a specific time. Their jurisprudence is shaped not by any malicious misogyny, or so I choose to believe, but rather by the assumptions and constraints of the time in which it was formulated. Our contemporary recognition that the traditional scheme of marriage law is compromised beyond repair liberates us to pursue a new jurisprudence, one based on assumptions that do not liken women to slaves or marriage to purchase. A marriage law that foregrounds the mutual protectorship of men and women (Q. 9:71) rather than male providership (Q. 4:34), or that focuses on the cooperation and harmony of spouses inherent in the Qur'anic declaration that spouses are garments for one another (Q. 2:187), can represent a starting point for a new jurisprudence of marriage. The result will be a closer – but still only human, and therefore fallible – approximation of divinely revealed *Shari'ah* than what currently exists. And God knows best.

ENDNOTES

1. An early version of this essay was delivered as a lecture at the University of Missouri – Columbia in March 2002 as "Marriage and Divorce in Islamic Law: Contemporary Debates in Historical Perspective." I would like to thank the Women's History Month Committee for that invitation and the lively exchange that ensued. I would also like to thank Kate Albright, Ellen Dunning, Ann Kim, Khaleel Muhammad, Harvey Stark, and especially Omid Safi for their comments and suggestions. Of course, I am responsible for any errors of fact or interpretation that remain.
2. For a scathing critique of this type of discourse, see Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (London and New York: Zed, 1999).

3. This is the reporter's summary, not al-Hibri's. Rebecca Mead, "Comment: A Woman's Prerogative," *New Yorker*, December 2001. It accurately conveys Al-Hibri's views as presented in that piece and several other published articles. For this essay, I draw from two articles by Al-Hibri: "An Introduction to Muslim Women's Rights," in *Windows of Faith: Muslim Women Scholar-Activists in North America*, ed. Gisela Webb (Syracuse, NY: Syracuse University Press, 2000), 51–71 (hereafter, "An Introduction"), and "Islam, Law, and Custom: Redefining Muslim Women's Rights," *American University Journal of International Law and Policy*, 12(1), 1997, 1–44 (hereafter, "Islam, Law, and Custom").
4. *Shart*, pl. *shurut*.
5. For example, in an article discussing honor killings, Lama Abu Odeh uses the heading "The classical jurisprudential treatment of crimes of honour" for a section dealing exclusively with contemporary Arab criminal codes. "Crimes of Honour and the Construction of Gender in Arab Societies," in *Feminism and Islam: Legal and Literary Perspectives*, ed. Mai Yamani (New York: New York University Press, 1996), 146. No mention is made of *fiqh* doctrines. I point this out not to disparage the article or its conclusions, but to emphasize that the terminology used to discuss Islamic law in its varied manifestations is seldom applied in a precise fashion.
6. I do not discuss the Shi'i legal schools here, in part because the role of *mut'a* ("temporary") marriage in Shi'i law makes comparison difficult. However, in its broad outlines the Shi'i view of marriage (*nikah*) is similar to Sunni law. See Shahla Haeri, *Law of Desire: Temporary Marriage in Shi'i Iran* (Syracuse, NY: Syracuse University Press, 1989), especially chapter 2, "Permanent Marriage: *Nikah*."
7. This is the body of literature that I survey in my doctoral dissertation, "Money, Sex, and Power: The Contractual Nature of Marriage in Islamic Jurisprudence of the Formative Period" (Duke University, 2002). However, the dissertation does not discuss Hanbali jurisprudence, which I include here. This essay draws on the following texts: for the Maliki school, the *Muwatta'* of Malik ibn Anas (d. 179/795) and *Al-Mudawwana al-Kubra* (hereafter, *Mudawwana*) of Sahnun al-Tanukhi (d. 240/854); for the Hanafi school, *Kitab al-Hujjah 'ala Ahl al-Madina* (*Kitab al-Hujjah*) attributed to Muhammad al-Shaybani (d. 189/805), and two other works attributed to him: a recension of Malik's *Muwatta'* (*Muwatta' al-Shaybani*) and *Al-Jami' al-Saghir*; as well as the *Kitab al-Nafaqat* of Ahmad ibn 'Umar al-Khassaf (d. 261/874); for the Shafi'i school, *Al-Umm*, attributed to Muhammad b. Idris al-Shafi'i (d. 204/820) and the *Mukhtasar al-Muzani 'ala 'l-Umm* of Isma'il b. Yahya al-Muzani (d. 264/878); for the Hanbali school, a compilation of Ahmad b. Hanbal's (d. 241/855) legal responsa (*masa'il*) edited from manuscript sources and translated by Susan Spectorsky as *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh* (*Chapters*). My citations of the Arabic volumes include the titles of the chapter and subsection to which I am referring, to make it easier for those using different editions of the texts to locate the relevant passages. Unless otherwise noted, all translations from the Arabic are mine.
8. Baber Johansen has addressed some of these issues for the classical period using Transoxanian Hanafi texts. See "The Valorization of the Human Body in Muslim Sunni Law," in Devin J. Stewart, Baber Johansen, and Amy Singer, *Law and Society in Islam* (Princeton: Markus Wiener, 1996), 71–112.
9. Numerous scholars have investigated these subjects and found compelling evidence of female agency and juristic effort to protect women's interests. Despite women's clear disadvantages in legal doctrine across the schools, in practice women were able to exercise many rights, especially to property. Further, they often gained advantages that, in strict doctrinal terms, they should not have had. Scholars working with court records and collections of *fatawa* (juristic opinions, sing. *fatwa*) have demonstrated that judges were often, in their application of the law, amenable to women's claims and flexible in their judgments. This was often done by sidestepping, rather than directly challenging, problematic doctrines. To take only one example, in Hanafi communities, a woman's inability to obtain divorce from an unwilling, non-supporting husband was dealt with not

by changing the school's position, but by appointing a deputy judge from another legal school to pronounce the divorce. For an online bibliography of works on women, gender, and Islamic law, see www.brandeis.edu/departments/nejs/fse

10. Khaled Abou El Fadl has made this point eloquently in *Speaking in God's Name: Islamic Law, Authority, and Women* (Oxford: Oneworld, 2001), 32.
11. One well-known subject on which prophetic precedent is generally agreed to differ from Qur'anic revelation is that of punishment for a married person (*muhsan/muhsana*) guilty of illicit intercourse (*zina*). While the Qur'an prescribes flogging as a punishment for *zina*, some *hadith* record the Prophet as setting stoning as the penalty for adulterers, reserving flogging for fornication.
12. Several recent scholarly works have explored the early development of the Sunni legal schools and their methodologies. Two particularly useful studies are Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997) and Christopher Melchert, *The Formation of the Sunni Schools of Law, 9th–10th Centuries C.E.* (Leiden: Brill, 1997).
13. Occasionally, one or two other equally serious diseases were included by analogy to leprosy.
14. Farida Shaheed, writing about feminist criticism of Muslim laws, states in a footnote, "On the question of women's rights, status, and role, the four [Sunni] schools agree in principle. The differences between them relate to details of legal procedure." See "Controlled or Autonomous: Identity and the Experience of the Network, Women Living under Muslim Laws," *Signs: Journal of Women in Culture and Society*, 19(4), 1994, 1004, n. 7. In *Women in Islam: From Medieval to Modern Times*, rev. edn (Princeton: Markus Wiener, 1993), 50, Wiebke Walther writes of the four Sunni schools of law, "They are to be found in various regions of the Islamic world, but they do not vary very much in their dogmas."
15. Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992), 85. See also p. 67 and chapter 5, "Elaboration of the Founding Discourses."
16. Two aspects are important in the consideration of sexual availability: "deriving pleasure" (*istimta'a*) and "exercising restraint" (*habs*, later *ihtibas*). For purposes of this article, the two are combined in the notion of sexual availability, though there were some important distinctions between the two.
17. Muhammad b. Idris al-Shafi'i, *Al-Umm* (Beirut: Dar al-Kutub al-'Ilmiyya, 1993), K. al-Nafaqat, "Bab al-rajul la yajidu ma yunfiqu 'ala imra'atihi," 5:132.
18. Ahmad b. 'Umar al-Khassaf, *Kitab al-Nafaqat* (Beirut: Dar al-Kitab al-'Arabi, 1984), K. al-Nafaqat "Bab nafaqat al-mar'a 'ala al-zawj wa ma yajibu laha min dhalika," 33.
19. Sahnun b. Sa'id al-Tanukhi (Malik b. Anas), *Al-Mudawwana al-Kubra* (Beirut: Dar Sader, n.d.), K. al-Nikah IV, 'Fi ikhtilaf al-zawjayn fi mata'at al-bayt,' 2:268.
20. "And if someone like her does not serve herself, maintenance of a servant for her is obligatory for him." *Al-Umm*, K. al-Nafaqat, "Al-nafaqa 'ala 'l-nisa'," 5:153; see also "Wujub nafaqat al-mar'a," 5:127.
21. Isma'il b. Yahya al-Muzani, *Mukhtasar al-Muzani*, published as vol. 9 of Al-Shafi'i, *Al-Umm* (Beirut: Dar al-Kutub al-'Ilmiyya, 1993), K. al-Nikah, "Mukhtasar al-qasm wa nushuz al-rajul 'ala 'l-mar'a . . ., 9:199.
22. See Vardit Rispler-Chaim, "*Nusuz* between Medieval and Contemporary Islamic Law: The Human Rights Aspect," *Arabica*, 39, 1992, pp. 315–27; Kecia Ali, "Women, Gender, *Ta'a* (Obedience) and *Nusuz* (Disobedience) in Islamic Discourses," in *Encyclopedia of Women and Islamic Cultures*, ed. Suad Joseph (Leiden: Brill, forthcoming); and Sa'diyya Shaikh, "Exegetical Violence: Nushuz in Qur'anic Gender Ideology," *Journal for Islamic Studies*, 17, 1997, 49–73.
23. One fifth/eleventh-century Maliki text suggests that Ibn al-Qasim (d. 191/806–7), the main authority for Malik's views in the *Mudawwana*, considered the maintenance of a *nashiz* wife to be obligatory. See Ibn 'Abd al-Barr (d. 463/1071), *Al-Kafi fi Fiqh Ahl al-Madina al-Maliki* (Beirut, Dar al-Kutub al-'Ilmiyya, 1987), K. al-Nikah, "Bab fi 'l-nafaqat 'ala

'l-zawjat wa hukm al-a'sar bi 'l-mahr wa 'l-nafaqat," 254. However, I found no evidence of this in the *Mudawwana*. Perhaps further study of Maliki manuscript sources for the formative period will turn up additional information that can substantiate this claim and provide a rationale for it.

24. Al-Khassaf, *Kitab al-Nafaqat*, "Bab nafaqat al-mar'a 'ala 'l-zawj wa ma yajibu laha min dhalika," 35–6.
25. A representative statement is that of Asifa Quraishi: "In Islam, sexual autonomy and pleasure is a fundamental right for both women and men." See Asifa Quraishi, "Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," in *Windows of Faith*, ed. Webb, 131. Quraishi's comments in the note to this passage reference sources dealing with women's right to sexual pleasure. Though jurists may seek to protect women's right to sexual pleasure in any given act of intercourse, they do not require the husband to have intercourse with his wife in the first place. This is because of the strict separation of male and female rights in marriage that I am arguing for in this paper.
26. Susan Spectorsky (trans.), *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh* (Austin: University of Texas Press, 1993), 113. See also p. 234: "[W]hen a man has had intercourse with his wife once, he is not impotent."
27. *Muwatta'*, K. al-Talaq, "Bab ajal alladhi la yamassu imra'atahu," 375; see also *Mudawwana*, K. Nikah IV, "Ma ja'a fi 'l-'innin," 2:265.
28. Ibn al-Qasim reiterates this view: "I [Sahnun] said: If he has sex with her one time then keeps away from her, is he set a year's deadline in Malik's opinion? He [Ibn al-Qasim] said: No deadline is set for him if he has intercourse with her according to Malik then he avoids her." *Mudawwana*, K. Nikah IV, "Ma ja'a fi 'l-'innin," 2:265. The same view is expressed in Hanafi and Shafi'i texts. See Muhammad al-Shaybani, *Al-Jami' al-Saghir*, (Beirut: 'Alam al-Kutub, n.d.), K. al-Zihar, "Masa'il min Kitab al-Talaq lam tadkhul fi 'l-abwab," 241–2; *Mukhtasar al-Muzani*, K. al-Nikah, "Ajal al-'innin wa 'l-khasi ghayri majbub wa 'l-khuntha," 9:191; *al-Umm*, K. al-Nikah, "Nikah al-'innin wa 'l-khasi wa 'l-majbub," 5:65.
29. Equally between free wives, that is; Hanafis, Hanbalis, Shafi'is, and at least one prominent authority cited by the Malikis (Sa'id b. al-Musayyab) argued for two nights for a free wife to each night for a slave wife. Malik, on the other hand, defended an equal division between free and slave wives. See *Mudawwana*, K. al-Nikah IV, "Al-qasm bayna al-zawjat," 2:271; K. al-Nikah II, "Fi nikah al-ama 'ala 'l-hurra wa 'l-hurra 'ala 'l-ama," 2:204–6. It should be emphasized that a slave wife belonged, of necessity, to another master. Though a man could take his own female slaves as concubines, he could not marry them without first manumitting them or selling them to another owner, who then needed to give permission for the marriage. A slave concubine was not entitled to a share of her owner's time.
30. *Al-Umm*, K. al-Nafaqat, "Nushuz al-mar'a 'ala 'l-rajul," 5:285.
31. For a strong statement of this view by Ibn Hanbal, see Spectorsky, *Chapters*, 230.
32. Muhammad al-Shaybani, *Kitab al-Hujjah* (Hyderabad: Lajnat Ihya' al-Ma'arif al-Nu'maniyah, 1965), K. al-Nikah, "Bab al-rajul yatazawwaju al-mar'a wa la yajidu ma yunfiqu 'ala imra'atihi," 3:451–69.
33. "He said: If he finds his wife's maintenance day by day, they are not separated, and if he does not find it, he is not granted a delay of more than three [days], and he does not prevent his wife during the three [days] from going out to work or ask (i.e., ask for food). If he does not find her maintenance, she chooses [whether or not to divorce him] ... And if they are separated then his situation improves it (i.e., the separation) is not rescinded. He does not possess the right to return to her during the waiting period, unless she wishes with a new marriage." *Al-Umm*, K. al-Nafaqat, "Bab al-rajul la yajidu ma yunfiqu 'ala imra'atihi," 5:132.
34. For the Maliki position, see *Mudawwana*, K. al-Nikah IV, "Fi farad al-sultan al-nafaqa li 'l-mara'a 'ala zawjiha," 2:258–63. For the Hanbali position, see Spectorsky, *Chapters*, 80, 190.
35. One could argue for other terms to describe this group, including traditionalist or neo-traditionalist. I do not attach any importance to the term "neo-conservative" beyond its simple descriptive nature.

36. Saalih ibn Ghaanim al-Sadlaan, *Marital Discord (*al-Nushooz*): Its Definition, Cases, Causes, Means of Protection from It, and Its Remedy from the Qur'an and Sunnah*, trans. Jamaal al-Din M. Zarabozo (Boulder: Al-Basheer, 1996), 13. Though published by an obscure press in the U.S.A., by the time of its translation the book was already in its third Arabic edition.
37. Muhammad Abdul-Rauf, *Marriage in Islam: A Manual* (Alexandria, VA: Al-Saadawi, 2000; reprint of 1972 edition). Many sections of this work are accessible online, giving some indication of its wide acceptance. See, for example, www.jannah.org/sisters/relations.html
38. Abdul-Rauf, *Marriage*, 47.
39. Abdul-Rauf, *Marriage*, 55.
40. See also a modified version of this sentiment, which reflects the special attention devoted to food preparation among a woman's duties: "If the wife is sick and cannot perform her household duties or she belongs to a rich family and refuses to do her domestic work with her own hands or she regards it to be below her dignity, then she may be provided with cooked food. But it is better to do her domestic work with her own hands and as a housewife it is her responsibility. The duty of a husband is to provide means and a wife should manage and run the house." Muhammad Iqbal Siddiqui, *Family Laws of Islam* (Delhi: International Islamic Publishers, 1988), 108–9. This formulation preserves the traditional rule that a wife is not required to perform this work, but emphasizes her domestic duties nonetheless.
41. 'Abdul Rahman I. Doi, *Woman in Shari'ah (Islamic Law)* (London: Ta-Ha, 1994). This work is one of the sources used by Raga' El Nimr in her article, discussed in the following section. Despite its generally accurate portrayal of various legal doctrines across the Sunni schools, the book has a few significant errors and numerous minor ones. Mistakes include: failing to acknowledge traditional rules allowing for the forced marriage of minors (35); stating that Malikis consider a marriage guardian's power of compulsion (*ijbar*) to apply to widows and divorcees (36); failing to note juristic disagreement on when and how apostasy causes a marriage to be dissolved (43) and how return (*raj'a*) is effected during a woman's waiting period (86–7); failing to differentiate between irrevocable and absolute repudiation (86–7); claiming that there is no possibility of divorce oaths before marriage (89); misidentifying a woman in a *hadith* (93); affirming that compensation in *khul'* divorce is limited to the dower amount (96); mis-stating the time that must elapse before Maliki and Shafi'i jurists will grant judicial divorce for non-support (107); and asserting vehemently that a marriage contracted for an unlawful dower "is null and void. All the jurists of the 4 schools agree upon this point" (160–1). In fact, *none* of the Sunni schools holds that view. While the specified dower would be invalid, the marriage is *at most* (e.g. for the Malikis) subject to dissolution (*faskh*), and even then only if not consummated; this is quite different from being void (*batil*), which implies having no legal effects whatsoever. Such errors in a work of this type are particularly unfortunate, because those knowledgeable enough to spot the mistakes will not be relying on this work for their understanding of Islamic law, and those who rely on it, unknowingly, will be misled.
42. Ibid., 107. However, he later states that if she runs a lawful business, she may "keep the whole income to herself. Islamic law does not put any responsibility for domestic expenses on her." (154). Doi does not note any contradiction or attempt to reconcile these positions.
43. In a more recent phenomenon, the predominance of this type of information on the web parallels its presence in Muslim communities. Khaled Abou El Fadl's *Speaking in God's Name* illustrates, through its analysis of Saudi *fatawa*, that this type of thinking is not present only in the United States.
44. Al-Hibri refers to this type of arrogant and "self-serving worldview" as "Satanic logic." "An Introduction," 51; see also p. 57, n. 19.
45. The specific issue of working outside the home at a salaried job is anachronistic, though of course women did earn money through commercial activities in the first Muslim centuries. The closest proxy by which to examine this right is the wife's stipulation that she may come and go as she pleases. Alternatively, one could look at the husband's right to determine the

marital domicile unilaterally, since the wife's right to maintain stable employment is obviously compromised if the husband may relocate her at his whim. In both cases, wherever these stipulations are discussed in Maliki, Hanafi, and Shafi'i texts they are simply deemed void. Hanbali jurisprudence, in contrast, allows these types of stipulations. See Spectorsky, *Chapters*, 183–4, 232.

46. Al-Hibri, "An Introduction," 58.
47. It should be pointed out that this stipulation, along with a prohibition against taking additional wives, has been used by numerous Muslim women through history, with a greater or lesser degree of success in judicial enforcement. On the distinction between judicial decisions (*qada'*), which are binding on litigants but do not set precedent, and juristic opinions (*ifta'*), which are precedent-setting but not binding on anyone, including those who have requested the *fatwa* (opinion), see Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, "Muftis, Fatwas, and Islamic Legal Interpretation," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. M.K. Masud, B. Messick, and D.S. Powers (Cambridge and London: Harvard University Press, 1996), 3–32.
48. Maliki views: Malik ibn Anas, *Al-Muwatta* (Beirut: Dar al-Fikr, 1989), K. al-Nikah, "Bab ma la yajuzu min al-shurut fi 'l-nikah," 335, *Mudawwana*, K. al-Nikah II, "Fi shurut al-nikah," 2:197–200; Hanafi views: *Kitab al-Hujjah*, K. al-Nikah, "Al-rajul yatazawwaju 'ala shay' ba'duhu naqd wa ba'duhu ila ajal," 3:210–2; Shafi'i views: *al-Umm*, K. al-Sadaq, "Al-shart fi 'l-nikah," 5:107–9, *Mukhtasar al-Muzani*, "Al-shart fi 'l-mahr . . .," 9:195–196.
49. Spectorsky, *Chapters*, 183–4.
50. These texts do not specifically address this type of delegation occurring at a second marriage, but the principle is the same as in those events they do discuss. See Spectorsky, *Chapters*, 206–7, 219–20.
51. Spectorsky, *Chapters*, 206. Ibn Hanbal makes this statement when questioned about another jurist's opinion "that if a husband has intercourse with his wife without her knowing that she has the option of choosing to be separated from him, she is asked to swear that she did not know of the option during intercourse. If she swears that she did not, then she is given the option of separating from him. If she did know of her option, she has lost it by the act of intercourse." The option does not concern the husband breaking a stipulation against taking an additional wife, but the same logic applies.
52. "The wife may not legally object to the husband's right of divorce. The marital contract establishes her implicit consent to these rights. However, if she wishes to restrict his freedom in this regard or to have similar rights, she is legally allowed to do so. She may stipulate in the marital agreement that she, too, will have the right to divorce or keep the marriage bond only so long as she remains the sole wife." El Nimr does not explain how it is that "if she wishes to restrict his freedom in this regard . . . she is legally allowed to do so" if, as she affirms, a "wife may not legally object to the husband's right to divorce." El Nimr, "Women in Islamic Law," in *Feminism and Islam*, ed. Mai Yamani (Ithaca Press: Reading, 1996), 96.
53. El-Nimr, "Women in Islamic Law," 97.
54. Al-Hibri, "An Introduction," 60.
55. *Mudawwana*, K. al-Nikah V, "Fi ihlal," 2:292.
56. For example, disagreeing with the Maliki (and Hanafi) position that a minimum dower is necessary, Al-Shafi'i states, "The dower is a price [*thaman*] among prices, so whatever they consent to as a dower that has a value [*qima*] is permitted, just as whatever two people engaged in a sale of anything that has a value [consent to] is permitted." See *Al-Umm*, Kitab Ikhtilaf Malik wa'l-Shafi'i, 7:376.
57. *Al-Umm*, K. al-Sadaq, "Fi 'l sadaq bi aynihi yatlafu qabla dafa'ahu," 5:92.
58. *Al-Umm*, K. al-Nafaqat, "Ikhtilaf al-rajul wa 'l-mar'a fi 'l-khul'," 5:300.
59. *Al-Umm*, K. al-Sadaq, "Sadaq al-shay' bi aynihi fa yujadu mu'ayban," 5:111. See also *Mukhtasar al-Muzani*, K. al-Nikah, "Sadaq ma yazidu bi budnihi wa yanqasu," 9:194, and *al-Umm*, K. al-Sadaq, "Fi 'l-sadaq bi aynihi yatlafu qabla dafa'ahu," 5:92.
60. "Women in Islamic Law," 97.

61. Al-Hibri, "An Introduction," 57–8. On housework, see also her "Islam, Law, and Custom," 22.
62. Al-Hibri, "An Introduction," 70.
63. *Al-Umm*, K. al-Nafaqat, "Wujub nafaqat al-mar'a," 5:128.
64. Furthermore, this does not necessarily affect the social recognition of these rights. At an Islamic Society of North America session I attended in Chicago in 1994 or 1995, a woman raised a related issue before a panel of male "experts." She had stipulated in her marriage contract that she was to attend medical school. Her husband, however, was objecting now that she sought to do so. The panelist who responded to her acknowledged the validity of the condition, but counseled her to drop her plans for medical school in order to preserve family harmony! What type of harmony can exist when it is predicated on the negation of women's legitimate aspirations?
65. I do not mean in any way to suggest that these scholars have erred by not addressing jurisprudence; to the contrary, progressive Muslims must be grateful for the work they have done and the conceptual frameworks they have introduced. Nor do I intend to imply that exegesis is only a precursor to work on law. Rather, I mean that *some* progressive Muslims must devote attention to jurisprudence; it is a *fard kifaya*, a collective obligation the performance of which by a portion of the community exempts others from the duty to undertake it.
66. Al-Hibri, "An Introduction," 60.
67. See, for example, Lisa Wynn, "Marriage Contracts and Women's Rights in Saudi Arabia," in *Women Living under Muslim Laws. Special Dossier 1: Shifting Boundaries in Marriage and Divorce in Muslim Communities*, ed. Homa Hoodfar (Montpelier, France: WLUML, 1996), 106–20. This topic has been discussed in numerous sociological studies. Today, the use of deferred dower is widely accepted in many parts of the world, and has been for centuries, as studies based on Ottoman court registers attest. Indeed, dividing a dower into prompt and deferred portions is common in North American Muslim communities. Yet while a fixed term for deferring payment of some portion of the dower was acceptable for jurists of the formative period (e.g. one or two years), the idea of deferring part of the dower's payment until death or divorce was controversial and, at the very least, disapproved of. See, for example, *Mudawwana*, K. al-Nikah II, "Fi shurut al-nikah," 2:197; *Kitab al-Hujjah*, K. al-Nikah, "Al-rajul yatazawwaju 'ala shay' ba'duhu naqd wa ba'duhu ila ajal," 3:211–2.; *al-Umm*, K. al-Sadaq, "Al-shart fi 'l-nikah," 5:107–9; and *Mukhtasar al-Muzani*, "Al-shart fi 'l-mahr . . ." 9:195–6.
68. Al-Hibri uses this term; see "Talk of the Town," and "An Introduction," 51 and *passim*.