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Harm in Marriage

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INTRODUCTION

Marriage in Islam is a solemn covenant (*mīthāqan ghalīẓa*). While the purpose of marriage is to create social stability and cultivate love and tranquility, it is ultimately contractual in nature. This means that a man and woman enter a marriage committing to fulfill certain obligations in exchange for their rights. Since the marriage contract is binding, when either a husband or wife do not fulfill their responsibilities, there are legal consequences. There are also moral consequences: a husband harms his wife when he does not fulfill his responsibilities, and vice versa. In this paper, I argue that Muslim scholars considered a spouse to be harmed in two instances: when a spouse fails to fulfill their responsibilities (i.e., the rights of the other spouse) and when a spouse abuses (*taʿassuf*) their right in a way contrary to custom. When either of these happen, a husband or wife is "harmed."

When a wife does not carry out her duties and thus "harms" her husband, generally, her husband has the authority to enforce consequences according to the three step process highlighted in Qur'anic verse 4:34. When the husband, on the other hand, does not fulfill his marital obligations, a wife is invited to bring her case before arbitrators and/or a judge to help resolve her harm (under the premise that if she takes matters into her own hands, they would be ineffective or put her at greater risk of harm). These communal authorities are tasked with resolving the marital dispute by collecting evidence, assessing the situation, and deciding on the appropriate consequences. A judge, for example, may admonish the husband and compel him to fulfill his obligations through discretionary punishment (*taʿzīr*).

Some marital disputes call for an end to the marriage altogether. Unlike the wife, the husband can pronounce a unilateral divorce, meaning that he can initiate a divorce without cause. This is because, once the marriage is contracted, he is vested with the "marital power" (*milkiyyat al-nikāḥ*) and can thus exercise his will to maintain or end the marriage. After paying or committing to pay the dower (*mahr*) and contracting the marriage, the assumption is that a husband will think carefully before divorcing his wife since there is a financial burden in doing so. This is the most efficient way for a husband to leave a harmful marriage. If the harm was severe, he could involve arbitrators or a judge who could determine whether his wife must compensate him for her harm.

A wife, on the other hand, does not have the authority to dissolve the marriage unilaterally. Beyond not holding the marital power herself, the assumption is that had she been given this power, a woman could contract a marriage for a high dower and then walk away with that money whenever she chose. A wife, nonetheless, had alternative options if she was being harmed and/or was seeking an end to her marriage:

1. She could petition for an annulment (*faskh*) of the marriage contract, in which the contract was

voided because of invalid conditions or fundamental requirements of the contract not being met. Similarly, she could petition for a revocation (*khiyār*) of the marriage contract.[1]

2. She could stipulate conditions or request the power to divorce from her husband (*tafwīḍ, takhyīr,* or *tawkīl*) categorically or conditionally.

3. She could request a bilateral divorce (*khulʿ*) from her husband in which she returned/forfeited her dower or paid another agreed upon amount.

4. She could petition for a judicial divorce (*taṭlīq*).

The details of each of these options differ according to the law school (*madhhab*). In this paper, I will provide an overview of each of these categories and highlight the major differences across the law schools to clarify the various routes a woman could take to leave her marriage. Embedded in these discussions is how jurists understood harm and facilitated options for a woman to leave her marriage if she was being harmed. I argue that scholars generally agreed that a woman experienced harm (*ḍarar*) when her rights were not fulfilled or when a husband abused his rights. They disagreed, however, as to the precise rights a wife was entitled to (and therefore when and how she experiences harms), as well as what consequences a husband had to face when he harmed his wife. These discussions will shed light on how we can understand harm today.

THE VARIOUS WAYS A WIFE CAN REQUEST AN ANNULMENT, REVOCATION, OR DIVORCE

1. Annulment (*faskh*) or revocation (*khiyār*) of the marriage contract:

When a man and woman agree to contract a marriage, they do so under the premise that their prospective spouse is relatively healthy (*salīm*) and free of any major health concerns unless otherwise disclosed. In the event, however, that a man or woman found out *after* they consented to a marriage that their spouse suffered from a particular illness, they were entitled to an annulment of the marriage contract. The law schools vary slightly as to which "defects" (*ʿuyūb*) constituted grounds for annulment and/or divorce.

Most scholars relied on the hadith of ʿUmar ibn al-Khaṭṭāb, which identified four defects: insanity, leprosy (*judhām*), a skin disease similar to leprosy (*baraṣ*), and two forms of vaginal obstruction (*ratq* and *qarn)*.[2] The Shāfiʿīs and Mālikīs both allow for a spouse to revoke the marriage contract if they discover any of these defects—clarifying that any genital defect that would inhibit sexual intimacy (e.g., vaginismus, impotence) was included. Some Mālikīs included other defects such as foul odors from the mouth or vagina or baldness.[3]

The Mālikīs discussed why revocation was limited to these defects. Some held that it was because

they were stated in the law without an explicit reason (*sharʿ ghayr muʿallal*), while others explained that it was because these were ailments that could be concealed. Thus, a future spouse would not know they existed when agreeing to the marriage. Those that argued that the *ʿilla* was the concealment held that any defect that was hidden could constitute grounds for revocation.[4]
For the vast majority of Ḥanafīs, a marriage contract could not be annulled because of a defect. This is because they held that a marriage contract, unlike a sales contract, does not allow for revocation. They made one exception: a wife could request a divorce if her husband suffered from a genital defect that would inhibit consummatory sexual intercourse.[5] They argued that a woman's right to consummation was a fundamental aspect of marriage, and if it could not be met, then a wife had a right to divorce.[6] On the other hand, if a woman suffered from a genital defect that prevented consummation, a husband could not annul the marriage since he had the power to end the marriage through a unilateral divorce. While this was the established opinion in the Ḥanafī school, a prominent voice, Muḥammad al-Shaybānī (d. 189/805), argued that the defects that could allow for divorce should not be limited to genital defects or even skin diseases for that matter. He stated: "His being free of every defect that does not allow her to reside with him except with harm, such as insanity, *judhām*, and *baraṣ*, is a condition for the continuity of the marriage, to the extent that the marriage is to be annulled [if these defects appear]."[7] Al-Shaybānī thus extended his delineation to include defects that did not necessarily interfere in a woman's right to consummatory sex but any illness that subjected to her harm.

2. Stipulating conditions

Another legally valid way a woman could end her marriage was by making stipulations prior to or after the contract. There are three types of conditions in a marriage contract: 1) valid and enforceable, 2) invalid and unenforceable, and 3) invalid that void the marriage contract itself. The law schools disagreed over what types of conditions were valid and how they had to be stipulated in order for them to be effective.[8] Imams Mālik, al-Shāfiʿī and Abū Ḥanīfa—in contrast to al-Awzāʿī and Ibn Shubruma—held that there was no legal weight if a woman, for example, conditioned in the marriage contract that her husband not marry a second wife, move her to another city, etc.[9] The condition, in other words, was invalidated. If the condition was articulated in a particular manner, however, it held legal weight. When a husband accepted a condition by taking an oath on pain of divorce (I.e., "if I marry another woman, you are divorced"), then the condition was valid and effective.
The Ḥanbalīs allowed for these stipulations to be added in a more open-ended manner. Ibn al-Qayyim, for example, stated that if a woman worried her future husband would make her move to

a new city, marry another woman, hit her without having committed a crime (*jurm*), or the like, then she should set a condition prior to marriage that, if any of those worries materialized, she had the right to divorce (*amrahā bi yadihā*). And if a woman was worried that this condition would not be set prior to the contracting of the marriage, Ibn al-Qayyim emphasized, then she should not give her permission to her guardian (*walī*) to marry her off until he agreed. As a result, Ibn al-Qayyim concluded, "a woman could rid herself of an unpleasant marriage and not worry about taking her case to court. And there is nothing wrong (*la baʾs*) with such a loophole (*ḥīla*)."[10]
Some scholars validated even broader access to divorce through the process of, *tafwīḍ*, *takhyīr* or *tamlīk* in which a husband could transfer the right to divorce to his wife. The law schools disagreed over the details of this process, such as the specific formula that had to be uttered, when the option for divorce expired, if the husband could retract his offer, if the divorce was revocable, and so on.[11] The concept, however, was generally the same: the husband could delegate the authority to his wife to decide whether or not she would like to remain married. Upon the transfer of power, the wife's pronunciation of divorce was valid and binding.

3. Bilateral divorce (*khulʿ*)

According to Ibn Rushd al-Ḥafīd (d. 595/1198), the divine law balances the husband's right to unilateral divorce by granting the wife the right to request a divorce through *khulʿ*. Just as the husband was granted the right to divorce if he hated (*farika*) his wife, he concluded, the wife was granted the right to *khulʿ* if she hated her husband.[12] To end her marriage, a wife could negotiate a fair compensation with her husband. When a woman offers something in exchange for a divorce, whether it is a *khulʿ, ṣulḥ, mubāraʾa,* etc.—all of which are varying forms of exchange agreements[13], it is known as a bilateral divorce. According to Mālik, al-Shāfiʿī, and others, it is permissible for a woman to request a *khulʿ* by forfeiting an amount greater, the same, or lesser than her dower if the reason of the divorce is caused by her own shortcomings (*nushūz*).[14] Similar to commercial transactions, the amount does not have a minimum or maximum as long as both the husband and wife agree. Others, however, maintained that a husband could never take more than he gifted his wife based on the hadith of Thābit in which the Prophet (s) commanded Thābit to accept the property he gifted his wife and no more in exchange for a divorce. A wife could also negotiate a *khulʿ* by forgoing any expenses her husband would owe her or any of her services such as nursing their children.
Most scholars agree that *khulʿ* is permissible when the spouses mutually agree so long as a wife is not conceding out of fear of repercussions (*iḍrār*). The Qur'an [4:19] commands believing men to not "treat [your wives] harshly to make them return part of what you gave them [i.e., the dower]

unless they are found guilty of a clear immorality." Al-Ḥasan al-Baṣrī and others held that a "clear immorality" here was referring only to adultery. Thus, except for extenuating circumstances, a husband could not treat his wife harshly to coerce her into a *khulʿ* and avoid paying her any due rights.[15]

4. Judicial divorce (*taṭlīq* or *tafrīq*)

Although the husband holds the marital power and is thus exclusively entitled to a unilateral divorce, there are cases in which a judge could interfere with that power and issue a divorce on his behalf. All the cases that call for judicial divorce have one underlying thread: they are situations in which a husband is not fulfilling his wife's rights or is abusing his own authority. Although not every scholar or law school explicitly identifies these situations as harmful, it is an implicit assumption that entails legal consequences.

a. Financial rights[18]

All four law schools agree that the wife is entitled to financial maintenance (*nafaqa*) and clothing (*kiswa*), based on verse 2:233 and the prophetic hadith: "They [women] have [rights] over you [men] to provide them with their sustenance and clothing in a reasonable manner" [Sahih Muslim] and his (s) saying to Hind, "Take [from your husband] what suffices you and your child in a reasonable manner" [Sahih Bukhari and Muslim].[16] A husband's inability to pay for his wife's financial maintenance (*nafaqa*) was thus grounds for divorce according to the Shāfiʿīs, Mālikīs, and Ḥanbalīs because a woman was not receiving her explicit right. Ibn Rushd offered an additional rationale: a wife must fulfill her duties so long as her husband fulfills his. Hence, she must make herself sexually available so long as her husband is taking care of her financial needs. If he failed to maintain her, she could refrain from sexual intimacy. But in doing so, she was harmed (*ḍarar*)—like the harm of being married to an impotent man—and thus had a right to divorce.[17] The concern for Ibn Rushd, therefore, was a wife's financial and sexual impoverishment.

The Ḥanafīs, on the other hand, held that financial destitution never constituted grounds for revocation or judicial divorce; rather, they treated it as a debt like any other even though they still allowed a wife to prevent her husband from engaging in intimacy until she was granted her financial rights. While the Ḥanafīs acknowledged that a woman may be harmed in doing so because she lost access to sexual intimacy in the process, they did not analogize her situation to that of being married to an impotent man. They argued that the marital bond (*ʿiṣma*) was established by consensus (*ijmāʿ*) and could only be dissolved through equally strong evidence such as consensus or explicit textual sources (*naṣṣ*)—not analogy.[19] Hence, the husband retained exclusive authority

over the marriage and a judge could not interfere. Nonetheless, they still placed legal consequences on the husband if he failed to financially care for his wife. It was not enough to merely cover the costs; if he was stingy, he could be reprimanded because he was required to spend on his wife what was customarily (*bi'l-maʿrūf*) the norm.[20] A husband was also responsible for making sure that his wife had sufficient funds when he traveled or went missing. The moment that her funds depleted, a wife could complain to a judge who would then allow her to take out a loan in her husband's name.[21] Since the Ḥanafīs were much more hesitant to enforce a divorce without consent, they came up with two solutions.[22] Either the Ḥanafī judge could imprison the husband until he conceded or he could appoint a non-Ḥanafī judge to separate the couple.[23]

b. Sexual rights

When a husband swears to refrain from sexual intimacy with his wife for a period of up to four months, he is engaging in what is known as *īlāʾ*.[24] The husband's right to take this oath is affirmed in Qur'anic verse 2:226. If he abuses that right and refrains for over four months, his wife has a right to judicial divorce. According to Ibn Rushd, the four-month time allotted for *īlāʾ* is long enough for a husband to determine whether he wants to remain married or pursue a divorce, while also short enough as to not harm the wife in the process.[25] The law schools disagreed when and how the divorce occurs. According to Imams Mālik, al-Shāfiʿī and Aḥmad, once the four-month time limit was near, the husband had to decide whether he would return to his wife. If he did not, she was granted a divorce. The Ḥanafīs, in contrast, held that if the time allotted had expired and a husband had not resumed marital relations with his wife, then she was de facto divorced.[26] The law schools also disagreed whether the husband must have intended to refrain from sexual intimacy for *īlāʾ* to manifest. The majority held that if he did not take the oath of *īlāʾ*, it did not count.[27] Imam Mālik, however, maintained that even if a husband did not officially take an oath but intended to harm her (*qaṣada al-iḍrār*) by refraining from intimacy, then the rules for *īlāʾ* remained (i.e., a wife can request a divorce after four months).

The Mālikīs and Ḥanbalīs also allowed a wife to petition to a judge if she was experiencing harm from a lack of sexual intercourse more generally. The judge could admonish her husband and set a minimum number of times he would have to please his wife or face judicial divorce. While some scholars pinned that number at once every four months, Ibn Taymiyya argued that a judge should demand a husband be intimate with his wife as often as was normal in their society.[28] While the Shāfiʿīs and Ḥanafīs did not allow for a judicial divorce because a lack of intercourse, they still held a husband to be morally at fault.[29] ʿAlāʾ al-Dīn al-Kāsānī (d. 587/1189) warned that a husband would be held accountable before God for not satisfying his wife's sexual needs and Abū Ḥāmid al-

Ghazālī (d. 505/1111) obligated men to indulge their wives as much as necessary to preserve her chastity.[30]

Similarly, if a husband went missing or was imprisoned and his wife complained of sexual harm, Mālikī and Ḥanbalī judges would grant the wife a judicial divorce after giving the husband some leeway (6 months to 4 years) to reappear.[31] If, after the time has elapsed, the husband remained missing, the judge could grant her a divorce and the wife would complete the waiting period (*ʿidda*) of a widow.[32] The Mālikīs allowed for divorce on this basis because they analogized the harm a woman experienced when her husband was missing to the harm she would experience from an extended oath of sexual abstinence (*īlāʾ*) or impotence. Just as she had the right to divorce in these situations because of the harm she experienced from a lack of sexual intimacy, she maintained the right to divorce when her husband was missing. The Shāfiʿīs and Ḥanafīs, in contrast, did not grant a wife whose husband is missing a divorce until his death was proven. They maintained that, despite the harm she would experience, the analogy to *īlāʾ* and impotence was not sound. The marital bond (*ʿiṣma*) remained in effect until death or divorce, or explicit evidence allowing otherwise.[33] Al-Kāsānī explained that this was because the harm in voiding a husband's marital power was greater than the harm a woman would experience from a lack of intimacy.[34]

A wife could also refrain from sexual intercourse if she experienced physical or emotional harm because of intimacy. That included the times a woman was sick and unable to be intimate or if she feared vaginal distention (*ifḍāʾ*) from her husband's large penis (*ʿiẓamihi*).[35] The prominent Ḥanbalī scholar Manṣūr ibn Yūnus al-Buhūtī (d. 1051/1641) justified this limitation to a husband's sexual access by explaining that a husband who harmed his wife during intercourse failed to treat his wife according to what was customarily good (*al-maʿrūf*).[36]

c. Emotional rights

Unlike the other law schools, the Mālikīs explicitly allowed for a judicial divorce on the grounds of general harm (*ḍarar*).[37] While they did not offer a specific definition for the term, they described harm in both material and immaterial terms such as when a husband abandoned his wife [*hajr*] or hit her for no legitimate cause, cursed her, and engaged in anal sex.[38] Muḥammad al-Dasūqī (d. 1230/1815) clarified based on earlier Mālikī texts that *hajr* included refraining from talking to her and even turning his head away from her in bed.[39] Muhammad ibn Abī al-Qāsim al-Sijilmāsī (d. 1214/1800) also included the case of a husband who exposed his wife to immoral people and threatened her religious welfare as harmful and grounds for divorce.[40] These examples demonstrate the Mālikīs' recognition that immaterial (e.g., emotional) forms of harm were legitimate reasons for divorce.

What is important here to recognize is that each law school formulated a set of marital rights. Whenever any of these rights were violated, a spouse was harmed. Setting aside the interschool debates over these rights, all jurists recognized the Qur'anic command that men must treat their wives according to what is customarily good (*al-maʿrūf*). This meant that a wife's rights and the definition of harm could fluctuate according to the norms of each society. We are thus left with a variety of ways scholars understood harm; its definition and manifestation could look and feel differently across time and space.

RESOLVING CASES OF HARM

So how did one resolve a case of harm? For starters, it had to be determined whether harm actually manifested. To do so, scholars followed standard protocol for resolving marital discord. In line with the Qur'anic command, a husband and wife experiencing marital problems sought arbitration from members of each family.[41] If their situation was too complex or tense to be resolved by arbitration, a judge or community leader would preside over the case and collect evidence to determine who was telling the truth. The judge, for example, would do so by asking the couple's neighbors to testify what they saw and heard and by questioning community members about the husband's character. It was also common practice to ask a trustworthy individual to temporarily live with or near the couple to observe and counsel them.[42] Alternatively, the wife herself would move out and live with a trustworthy woman.[43] This practice, known most commonly as *dār amīn*, or a safehouse, protected women from alleged harm.[44]

The law schools disagreed as to what the arbitrators or judge could do if they established that a husband harmed his wife. When it came to enforcing a divorce, the default legal principle was that the husband must pronounce the divorce himself. Even if he was harming his wife, many scholars held that a judge could coerce the husband into issuing a divorce (e.g., by imprisoning him until he agrees), but that a judge could not issue it on his behalf. The Mālikīs stood out in this regard and allowed for a judge to issue a divorce. Ibn Rushd explained that whoever committed themselves to the default principle maintained that a divorce could not occur except from the husband. But whoever was more concerned to the harm that it caused women, they (i.e., the Mālikīs and, in many cases, Ḥanbalīs) allowed the judge to issue a divorce to preserve the general welfare (*al-maṣlaḥa al-ʿāmma*).[45] The Mālikīs went even further and compared the arbitrators to the *sulṭan* (i.e., judge), giving them the right as well to issue a judicial divorce on the grounds of harm.[46] Imam Mālik also held that if a wife was revocably divorced (*ṭalāq rajʿī*) because her husband harmed her, her husband could not revoke the divorce until that harm was lifted.[47] Thus, for

example, a wife who was divorced because her husband prolonged his oath of sexual abstinence for greater than four months could not be taken back if her husband continued to refrain from intimacy. Nor could a wife who received a divorce because her husband was financially impoverished be taken back until he had sufficient wealth to care for her. A husband had to guarantee that the harm that led to the divorce in the first place was alleviated if he sought to retract the divorce. These examples demonstrate how the Mālikīs concerned themselves more with the substantive application of the law over a formalistic approach. Rather than focusing on whether a husband explicitly took an oath of *īlāʾ* or was willing to issue a divorce, if a husband harmed his wife, the Mālikīs granted both the judge and arbitrators a right to interfere and ensure the wife a way out of the marriage.

CONCLUDING REFLECTIONS

When discussing the ways a woman could annul, revoke, or request an end to her marriage, scholars indirectly identified the ways that she could experience harm in her marriage. We witnessed this in the case of a woman who was denied her right to consummatory sexual intercourse, as well as her recurring right to financial maintenance. It was also evident in the case of a woman being married to a man suffering from insanity or a severe illness or who was missing altogether. Although these discussions do not fall neatly under a formal category of harm, scholars acknowledged a woman's right to leave the marriage (or impose other consequences on the husband) if these scenarios unfolded because of the undue hardship it posed upon her. This is an underlying point that must be brought to the forefront since it is often assumed that a lack of directly classifying harm implies that non-Mālikī scholars tolerated a wife experiencing all harm in marriage. This was not the case. Rather, they defined harm according to slightly varying standards: it was not an amorphous term that captured any subjective understanding of harm, but a clear effect of a wife's right not being met. Understanding harm as intimately tied to a wife's rights in marriage can help us re-envision what it looks like today. Our unique social and customary standards have allowed us to understand marriage in a different light. Men and women alike nowadays do not usually enter a marriage with the sole expectation of exchanging financial maintenance for sexual access (as it was traditionally conceived in legal discourse). There are broader, normative expectations informed by our distinct customs (*ʿurf*) that we need take into consideration.

As a case in point, let us consider the husband's traditional prerogative to prevent his wife from leaving her home without his permission. This entitlement was informed by two considerations: a husband's right to sexual access and customary standards. The extent to which we function outside

of our homes today is unprecedented and it was thus often historically not unusual to spend most of your time in the domestic space, so placing restrictions did not always impose undue hardship or inconvenience. The idea that a husband could prevent his wife from leaving their home was also tied to his right to sexual intimacy: if she was not home, he lost that access. Therefore, to protect his right in marriage, he was entitled to preventing his wife from going out. The unrestricted right to do so in many societies today, however, would be considered abusive and akin to the prohibited practice of false imprisonment in American law. The reality is that many of our needs are now met outside the home, be it for work, school, groceries, or communal/social livelihoods. And while this does not negate a husband's right to sexual access, a legal conversation that does not take these new customary norms into consideration is severely lacking. A couple must be mindful of one another's sexual needs and not spend excessive time away from one another so either is left sexually unfulfilled. These are discussions that must be had constantly before and throughout the marriage. At the same time, an absolute restriction of movement can be harmful to most women today. While a traditional entitlement of the husband, our contemporary norms can label this entitlement as abuse in the usage of one's right (*al-taʿassuf fī istiʿmāl al-ḥaqq*). The legal concept of *taʿassuf* helps us validate existing rights in the law, but also recognize that the boundaries of those rights may be re-envisioned according to new norms. Doing so, moreover, is directly in line with the Qur'anic command for men to treat their wives according to "what is known to be good by custom" (*al-muʿāshara bi'l-maʿrūf*). Hence, while the marriage contract protects the rights of both men and women, these rights can be molded to accommodate new customary expectations (*al-maʿrūf*). Unlike sales contracts that are based on stringency (*mushāḥa*), many scholars reiterated that marriage was based on generosity (*mukārama*) and therefore flexible.[48]

These cultural reconsiderations can be made with a husband's right to physically discipline his wife as well. Many Muslim jurists limited a husband's right to discipline to what was culturally appropriate.[49] Some jurists went even further. They argued that, when physical discipline no longer worked, the license to hit became prohibited. Mālikī scholars as early as Jamāl al-Dīn Ibn al-Ḥājib (d. 646/1249) emphasized: if hitting was not going to benefit the situation, it was prohibited for a man to hit.[50] The late scholar Fatḥī al-Duraynī (d. 2013), explaining the Mālikī position, stated that if there was no benefit in doing so, then a husband was merely disciplining his wife excessively or to harm her. Since this contradicts the intent of the Lawgiver in allowing for discipline in the first place, it becomes prohibited.[51] One can argue that hitting has the reverse effect on many women today: it aggravates the situation and is thus doubly detrimental. A contemporary of al-Duraynī, ʿAbd al-Ḥalīm Abū Shuqqa (d. 1995) noted that, depending on the spousal relationship, a husband's disciplinary measures could be effective. But he admits thereafter: for a prudent wife, hitting would not be a good idea.[52] Ibn ʿĀshūr declared that allowing men to hit their wives was

dangerous and that judges should announce to men that whoever hits his wife will be punished.[53] There are two key takeaways from this discussion. The first is for our imams and community leaders who play a crucial role in educating our community on marital rights and responsibilities. We need to facilitate discussions on how couples can navigate marriage in a way that maintains their core rights but allows for flexibility in accommodating cultural norms. At the same time, we must educate couples on how the lack of fulfilling those rights causes harm and entails consequences. The Islamic judicial system historically served as the focal point for arbitration and adjudication but, that responsibility (albeit burdensome) has now de facto fallen on the shoulders of imams and community leaders. Ideally, the conversation must begin at how this responsibility is often misplaced, and that communities need to build a wider network of social and legal services to support imams in this specialized role. How this network would be assembled and practically function needs to be addressed in a future paper. Regardless, the circumstances of each couple must be evaluated on a case-by-case basis with a more nuanced understanding of harm. Although scholars may have not always spelled out the definition of harm in every case of marital discord, this paper attempted to illustrate how scholars implicitly understood harm to manifest when a wife's rights were not being met and offered her legal recourse, be it through a bilateral agreement, judicial divorce, or admonishing the husband in other ways.

To effectively coach our communities, we need to establish clearly what rights a husband and wife are entitled to in marriage, followed by what can be accommodated according to customary norms. Then, we need to envision harm as manifesting whenever those rights are not fulfilled or are abused. Women should be educated about their right to seeking a marital separation when experiencing harm. Given the lack of an enforceable legal system in the US context, women should be empowered to stipulate clauses in their marital contracts to allow for divorce upon the manifestation of harm. In cases of domestic violence, we need to revive the practice of safe-housing and ensure that women are protected while seeking marital resolution or dissolution.

The second key takeaway is communicating these ideas for those who may doubt Islamic laws on marriage. Many struggle with understanding how Islam allows for husbands to physically discipline their wives (in light of Qur'anic verse 4:34). They witness individuals who abuse this verse and are left to assume that Islam does not only allow for domestic violence but emboldens men to harm their wives. A closer look at how scholars debated the rules on marriage and divorce does not only challenge this perception but unveils a deeper concern for protecting women's rights and preventing harm by granting her legal recourse when her rights were not being fulfilled. Scholars were aware that a woman's rights—and by extension how she could be harmed—could look and feel different according to a society's customs. And while much work needs to be done today to protect women from those who misunderstand or abuse these laws, we can appreciate that Muslim

scholars were concerned about domestic harm centuries before it was even deemed an issue in the Western world and set measures in place to eliminate it.

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[1] Muḥammad ibn Rushd al-Ḥafīd, *Bidāyat al-mujtahid*, ed. Muḥammad Ṣubḥī Ḥasan Ḥallāq, 4 vols. (Cairo: Maktabat Ibn Taymīya, 1995), 3:95ff.

[2] Ibn Rushd, 3:96; Manṣūr ibn Yūnus al-Buhūtī, *Kashshāf al-qināʿ ʿan matn al-Iqnāʿ*, ed. Ibrāhīm Aḥmad ʿAbd al-Ḥamīd, (Riyadh: Dār ʿĀlim al-Kutub, 2003), 2461-2469; Wahba al-Zuḥaylī, *al-Fiqh al-islāmī wa-adillatuhu*, 8 vols. (Damascus: Dār al-Fikr, 1985), 7:514-527.

[3] Ibn Rushd, 3:97.

[4] Ibid.

[5] Abū Bakr b. Masʿūd al-Kāsānī, *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾīʿ*, eds. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd, 10 vols. (Beirut: Dār al-Kutub al-ʿIlmīya, 2003), 3:598-9; Muḥammad Abū Zahra, *Al-Aḥwāl al-shakhṣīya* (Cairo: Dār Al-Fikr Al-ʿArabī, 1957), 355.

[6] Muḥammad b. Aḥmad al-Sarakhsī, *Kitāb al-Mabsūṭ*, 30 vols. (Beirut: Dār al-Kutub al-ʿIlmīya, 1989), 5:97

[7] Al-Kāsānī, 3:597

[8] A marriage, for example, is invalidated (*fāsid*) when a condition (*sharṭ*) from the requirements of marriage is dropped or a required ruling in the divine law is changed or added. Those that void the contract altogether are conditions that contradict the purpose of marriage, such as *taḥlīl* or *mutʿa*. Scholars disagree as to whether invalid conditions added to the marriage invalidate the contract altogether or whether the condition itself is simply invalidated.

[9] Ibn Rushd, 3:112.

[10] Ibn Qayyim al-Jawziyya, *Iʿlām al-muwaqqaʿīn ʿan rabb al-ʿālamīn*, ed. Ḥasan Āl Salmān and Aḥmad ʿAbdullāh Aḥmad, 7 vols. (Riyadh: Dād Ibn al-Jawzī, 2002), 5:368.

[11] Ibn Rushd, 3:139ff.

[12] Ibn Rushd, 3:133.

[13] Ibn Rushd, 3:129.

[14] Ibn Rushd, 3:132.

[15] Ibn Rushd, 3:133; al-Buhūtī, 2570.

[16] Ibn Rushd, 3:103.

[17] Ibn Rushd, 3:98.

[18] The Shāfiʿis and Mālikīs allowed for a woman to request a revocation of the marriage prior to consummation if the husband was unable to pay the dower (albeit some Mālikīs granted the

husband a year or two to do so). See Ibn Rushd, 3:98.

[19] Ibn Rushd, 3:98.

[20] Al-Ṣadr al-Shahīd, *Sharḥ Adab al-qāḍī li'l-Khaṣṣāf*, ed. Muḥiyy al-Dīn al-Sirḥān, 4 vols (Baghdad: Maṭbaʿat al-Irshād, 1978), 4:228-229.

[21] Al-Ṣadr al-Shahīd, 4:249.

[22] Ibn Rushd, 3:98.

[23] Al-Ṣadr al-Shahīd, 4:229, 233-234.

[24] Ibn Rushd, 3:187.

[25] Ibn Rushd, 3:192.

[26] Ibn Rushd, 3:188.

[27] Ibn Rushd, 3:189.

[28] Ibn Taymīya, *al-Mustadrak ʿalā majmūʿ fatāwa shaykh al-islām Aḥmad ibn Taymīya,* ed. Muḥammad ibn Muḥammad Qāsim, 5 vols. (self-published?), 4:215, 218; al-Buhūtī, 2549-2550.

[29] Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-bārī bi sharḥ al-Bukhārī,* ed. ʿAbd al-ʿAzīz ibn Bāz, Muḥammad ʿAbd al-Bāqī, 13 vols. (Cairo: al-Maktaba al-Salafīya, 1970), 9:299.

[30] Abū Ḥāmid al-Ghazālī, *Iḥyāʾ ʿulūm al-dīn,* 4 vols (Beirut: Dār al-Maʿrifa, 1982), 2:50.

[31] The Ḥanbalīs, for example, grant a woman a divorce if her husband is missing or absent without a valid excuse and she is experiencing harm (*ḍarar*) as a result. See Wahba al-Zuḥaylī, *al-Fiqh al-islāmī wa-adillatuhu*, 8 vols. (Damascus: Dār al-Fikr, 1985), 7:533.
The nature of this ruling differs depending on where the husband went missing (e.g., in Muslim lands, in *dār al-ḥarb*, etc.). See Ibn Rushd, 3:99-100.

[32] Ibn Rushd, 3:99.

[33] Ibid.

[34] Al-Kāsānī, 3:604.

[35] Muwaffaq al-Dīn ibn Qudāma, *al-Mughnī*, ed. ʿAbdullāh ibn ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fattāḥ al-Ḥulū (Riyadh: Dār ʿĀlam al-Kutub, 1997), 10:170; al-Buhūtī, 2543.

[36] Al-Buhūtī, 2544-2545.

[37] *Muwaṭṭaʾ Mālik, kitāb al-ṭalāq, bāb mā jāʾ fī al-khiyār;* al-Dardīr in Muḥammad al-Dasūqī, Aḥmad al-Dardīr, and Khalīl b. Isḥāq al-Jundī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-kabīr,* ed. Muḥammad ʿIllīsh, 4 vols. (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabīya, n.d.), 2:345.

[38] Al-Dardīr in al-Dasūqī, et al., *Ḥāshiyat al-Dasūqī,* 2:345.

[39] Al-Dasūqī in al-Dasūqī, et al., *Ḥāshiyat al-Dasūqī,* 2:345; Muḥammad ibn Yūsuf al-Mawwāq, *al-Tāj wa'l-iklīl li Mukhtaṣar Khalīl,* 8 vols. (X: Dār al-Kutub al-ʿIlmīya, 1994), 5:265.

[40] Aḥmad b. Yaḥyā al-Wansharīsī, *al-Miʿyār al-muʿrib*, ed. Muḥammad Ḥajjī, 13 vols. (Rabat: Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmīya, 1981), 3:134-5; Muḥammad al-Mahdī al-Wazzānī, *al-Nawāzil al-*

jadīda al-kubrā, ed. ʿUmar b. ʿAbbād, 8 vols. (Rabat: Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmīya, 1997), 3:450-1.

[41] Ibn Rushd, 3:185-6.

[42] Al-Buhūtī, 2567; Ibn Taymīya*,* 4:221.

[43] Muḥammad al-Khalwatī, *Ḥāshiyat al-Khalūtī ʿalā Muntahā al-irādāt,* ed. Sāmī ibn ʿAbdullāh al-Ṣaqīr and Muḥammad ibn Ṣāliḥ al-Loḥaydān (Damascus: Dār al-Nawādir, 2011), 4:525; al-Mawwāq, 5:263-264.

[44] Ibn Qudāma, 10:263; Maribel Fierro, "Ill-treated Women Seeking Divorce: The Qurʾānic Two Arbiters and Judicial Practice among the Mālikīs in al-Andalus and North Africa," in *Dispensing Justice in Islam: Qadis and Their Judgments*, ed. Muhammad K. Masud, Rudolph Peters, and David S. Powers (Leiden: Brill, 2006), 323–47.

[45] Ibn Rushd, 3:191.

[46] Ibn Rushd, 3:186.

[47] Ibn Rushd, 3:193.

[48] Ibn Qudāma, 9:343; Ibn Rushd, 3:19; al-Dasūqī, et al., 2:278.

[49] ʿAbd al-Ḥalīm Abū Shuqqa, *Taḥrīr al-marʾa fī ʿaṣr al-risāla,* 6 vols. (Cairo: Dār al-Qalam l-il-Nashr wa-l-Tawzīʿ, 2017), 5:244.

[50] Khalīl ibn Isḥāq, *al-Tawḍīḥ sharḥ Mukhtaṣar Ibn al-Ḥājib*, ed. Abū al-Fadl al-Dīmāṭī, 6 vols. (Beirut: Dār Ibn Ḥazm, 2012), 3:446.

[51] Fatḥī al-Duraynī, *Naẓarīyat al-taʿassuf fī istiʿmāl al-ḥaqq fī al-fiqh al-islāmī,* 2nd ed. (Beirut: Muʾassasat al-Risāla, 1977), 256.

[52] Abū Shuqqa, 5:244.

[53] Ṭāhir ibn ʿĀshūr, *al-Taḥrīr wa'l-tanwīr,* 30 vols. (Tunis: al-Dār al-Tūnusīya li'l-Nashr, 1984), 5:44.