

*Every law tells a story: orthodox divorce in Jewish and Islamic legal histories*Līnā al-Nāzir¹

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Every law, when probed and prodded, tells a story about its historical trajectory, a non-linear transformation with neither a definitive beginning nor an end. The ensuing legal history is an insightful glimpse into a law's past that is likely unfamiliar – perhaps even unexpected. That legal narrative may not be relevant to present-day legal concerns, or it may have immediate resonance to a contemporary dilemma. In either case, it may be exploited by legal actors in pursuit of an agenda. For a legal historian, the challenge is to tell the story of a law while resisting attempts to simplify or to exploit the complexities of history.

The story I will tell here focuses on legal norms of wife-initiated (and acquired) divorce in Jewish and Islamic legal systems in the pre-modern era.² The received tradition narrates a

¹ An earlier version of this article was accepted at the 6th Annual American Society of Comparative Law Works-in-Progress Workshop, which convened at Yale Law School (February 12, 2011); I would like to thank all the participants of the workshop for their suggestions and especially my two commentators, Christine Hayes and Chibli Mallat, and the organizers, Jacqueline Ross, Kim Lane Scheppele, and James Whitman. A later version of this article was discussed as part of UC Irvine's "Law As...II" symposium (March 9, 2012); I would like to thank Chris Tomlins for his invitation, as well as the attendees of the symposium and especially my commentator, Malick Ghachem. For reading and commenting on drafts of this article, I thank Daniel Boyarin, Charlotte Fonrobert, Rhiannon Graybill, Wael Hallaq, Ira Lapidus, Maria Mavroudi, Laurent Mayali, William Ian Miller, and Zvi Septimus. I would also like to thank Menachem Butler, the indefatigable Jewish studies bibliographer, for sending me numerous articles used throughout this piece. Errors are mine alone. Translations from original sources are my own, unless otherwise indicated; translated texts have been cited whenever possible.

² I narrate this story in two voices: the text of this article for the general reader and most (though not all) of the footnotes for the specialist reader.

woman's minimal agency in divorce – in both Jewish and Islamic law – as intrinsic.³ It is widely known – or presumed – that Jewish and Muslim women have relatively less access to divorce than their male counterparts in present-day religious courts.⁴ In both religious traditions, women can encounter difficulties in obtaining divorces.⁵ Combining documentary and literary-legal sources, this article presents evidence that Jewish and Muslim women in the late antique period had relatively more access to divorce than women in the medieval era.⁶ I argue that changes in women's divorce options are manifestations of multidimensional historical processes that

³ The reader may wonder what motivates this particular focus on Jewish and Islamic legal systems, or why Christian legal systems are not represented in this study. This research was built around a specific point of intersection between these two legal systems, which is explored in Section IV, Disenchanted the orthodox narratives.

⁴ "The ruling now prevalent is that a woman initiating divorce proceedings according to Jewish law is required to submit a ground, chosen from a defined list appearing in the Talmud; barring such a ground, the husband cannot be coerced to grant a divorce." Elimelech Westreich, *The rise and decline of the law of the rebellious wife in medieval Jewish law*, in JEWISH LAW ASSOCIATION STUDIES, XII (ZUTPHEN CONFERENCE) 207, (HILLEL GAMORAN ed. 2002). Generally, in modern states that apply Islamic laws in some form, Muslim women are able to secure a divorce if (a) they can establish specific, judicially accepted grounds or (b) they relinquish their dower rights and negotiate a husband's consent. (Exceptions to this general situation are Egypt and Tunisia, which do not require the husband's consent.) See Emory University School of Law, *Islamic family law project: legal profiles*(2002), at <http://www.law.emory.edu/ifl/index2.html>.

⁵ For a discussion of the Jewish chained wife (the *agunah*, a woman unable to obtain a divorce decree), see Bernard S. Jackson, et al., *Agunah: the Manchester analysis*, in DRAFT FINAL REPORT OF THE AGUNAH RESEARCH UNIT (BERNARD S. JACKSON ed. January 2010). By way of example, see a modern U.S. case, *Avitzur v. Avitzur*, 446 N.E.2d 136. See also MICHAEL J. BROUDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA (KTAV Pub. House. 2001). Alan Lazerow, *Give and 'Get?'* Applying the Restatement of Contracts to determine the enforceability of 'Get settlement' contracts, 39 UNIVERSITY OF BALTIMORE LAW REVIEW 103(2009-2010). (In this article, *get* is translated as divorce decree.) On some of the difficulties encountered by Muslim women seeking divorces and contemporary legislation pertaining to it, see Oussama Arabi, *The dawning of the third millennium on shari'a: Egypt's Law no. 1 of 2000, or women may divorce at will*, 16 ARAB LAW QUARTERLY 2(2001). See also Muhammad Munir, *Judicial law making: an analysis of case law on khul' in Pakistan* working papers series at <http://ssrn.com/abstract=2034964>. However, during my relatively recent legal-ethnographic research (sponsored by a Fulbright grant) of Jordan's Islamic courts, I did not observe judges restricting women from initiating or obtaining divorces; the main challenge women faced was receiving alimony and child support payments, not divorces.

⁶ While some feminists and some religious reformers may find that this article resonates with or lends support to their own objectives, this is an unintended consequence of exploring the legal narrative. It should be noted that this is merely one case study and the stories of other laws may reveal a past that corresponds to very different values and expectations. Instead of advocating for a specific doctrinal change, this article intends to illuminate aspects of Islamic and Jewish legal history that remain unappreciated. Moreover, feminist strategies are not homogenous. See CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* (Duke University Press. 2003).

illustrate law's profoundly contingent contexts.⁷ Divorce in Jewish and Islamic legal systems underwent parallel transformations between the late antique (roughly, 250-750 CE) and medieval (roughly, 750-1450 CE) periods as the result of common socio-political and jurisprudential dynamics. By placing Jewish law and Islamic law into historical conversation with each other, this article challenges the norm of studying these legal systems from a primarily internal perspective.

Legal communities use narratives to illustrate legal rules and they also create “internal” narratives about their legal systems that have normative consequences. The analysis presented here establishes that any statement of “what the law *is*” is embedded within a complex historical narrative generated by jurists. Jewish and Muslim jurists construct internal narratives that are ahistorical and legitimate their own authority; I identify these narratives as orthodox.⁸ This article employs historicism and thick descriptions of law to challenge those orthodox narratives.⁹ Influencing the outcome of those discussions, in terms of specific legal norms, is not my

⁷ As Foucault notes, “The purpose of history is to dissipate, not discover, the roots of our identity.” MICHEL FOUCAULT, *THE FOUCAULT READER* 95 (PAUL RABINOW trans. 1984).

⁸ As I use orthodoxy in this article, it is entirely unrelated to contemporary terminology (such as modern Orthodox). Instead, orthodox simply means the existence of a (hierarchical) group or institution that is able to label certain religious groups or practices as heretical.

⁹ By historicism, I mean specifically post-foundationalist, radical historicism and Nietzschean-inspired genealogy. See Mark Bevir, *What is genealogy?*, 2 JOURNAL OF THE PHILOSOPHY OF HISTORY 263(2008). Radical historicism is distinct from general historicist approaches. See Mark Bevir, *Why historical distance is not a problem*, 50 HISTORY AND THEORY 24(2011). I recognize that scholars view historicism as having limitations, namely that it depends on identifying – or constructing – a context and an object. (This view is articulated in Christopher Tomlins, *What is left of the law and society paradigm after critique? Revisiting Gordon's “Critical Legal Histories”*, 37 LAW & SOCIAL INQUIRY, 164 (2012).) I do not claim that historicism is inherently critical, but rather seek to establish the critical effects of historicism within the specific fields of Islamic and Jewish legal studies. I recognize that historicism and thick descriptions of law are not new to the field of legal history. (See *Symposium on Gordon's “Critical Legal Histories”*, 37 LAW & SOCIAL INQUIRY (2012).) While historicism may seem traditional, even cliché, in the discipline of legal history, it is not in other fields. Moreover, the critical component of this project is not historicism, but rather the regional, non-reified narrative of near eastern legal history (the “interwoven” narrative that I present in Section V) that subverts conventional assumptions.

objective here.¹⁰ Rather, an underlying aim of this piece is using historicism to challenge the legal authority of authoritarian groups.¹¹ The narration of legal changes outlined in this article is just one exploration into the shared *nomos* of Jewish and Islamic legal systems and the socio-political struggles over law within it.¹²

Recent, increased scholarly attention to the role of religion in the public sphere has invigorated legal discussions of the (in)compatibility of modern law and religious law. But these debates in contemporary public discourse tend to ossify religious legal systems and to authorize certain voices over others. It is not my intention to accommodate religion to neoliberal values, or to discover the lost purity or goodness of religion, or even to denounce religion. These normative strategies are frequently counterproductive because they reify religion and subscribe to a false religious-secular dichotomy.¹³ This article challenges the terms of contemporary debates by highlighting the dissimilar voices within religious legal systems and by problematizing the monolithic conceptualization of “religious law” that underlies current controversies. Indeed, the plurality of legal opinions within each legal system and the diversity of legal practices among Muslims and Jews attest to the density of these normative spaces. The

¹⁰ I intentionally abstain from modern and anachronistic conclusions. This is an ethical stance in opposition to the totalizing project of modernity. See, for example, TALAL ASAD, *GENEALOGIES OF RELIGION* (Johns Hopkins University Press. 1993).

¹¹ Abou El Fadl has described some of his scholarly work as pursuing a demonstration of historical malleability. He noted, “By presenting the diversity within the legal discourse, I hoped to demonstrate the inability of the authoritarian to dominate and establish uniformity of certain issues in Islamic legal history.” KHALED ABOU EL FADL, *AND GOD KNOWS THE SOLDIERS: THE AUTHORITATIVE AND AUTHORITARIAN IN ISLAMIC DISCOURSES* 35 (University Press of America, Inc. 2001).

¹² On *nomos*, see Robert M. Cover, *Foreword: nomos and narrative*, 97 HARVARD LAW REVIEW 4(1983). (I thank Michael A. Helfand for suggesting the relevance of Cover’s article.) See also Judith Resnik, *Living their legal commitments: paideic communities, courts, and Robert Cover*, 17 YALE JOURNAL OF LAW AND THE HUMANITIES 17(2005).

¹³ Fitzgerald explains “The concept of ‘a religion’ and its pluralization ‘religions’ is a modern category, has a specific set of historical conditions for its emergence...and is a fundamental part of modern Western ideology.” Timothy Fitzgerald, *Introduction*, in *RELIGION AND THE SECULAR: HISTORICAL AND COLONIAL FORMATIONS* 6, (TIMOTHY FITZGERALD ed. 2007).

forces of change in these two “religious” legal systems are not so different than for any other legal system; it is the “law” aspect of these normative orders, rather than the “religion” aspect, that is my emphasis because legal analysis is essential to understanding both Jewish and Islamic legal systems.

This article analyzes historical evidence of both Jewish and Muslim women divorcing their husbands in late antiquity (roughly, 250-750 CE) and offers some provisional explanations for why women’s divorce options became more limited in the medieval period (roughly, 750-1450 CE). This case study indicates that comparative legal history illuminates dynamics of legal change that would otherwise remain unnoticed. Studying a legal system in isolation from its context, which includes contiguous legal systems, obscures expansive and long-term changes. Instead, by plotting parallel changes over time in divorce practices among Jews and Muslims in the “Near East,” this article demonstrates that legal orthodoxy is not timeless.¹⁴ Jewish and Islamic divorce laws tell stories that are sporadic, unpredictable, and barely audible under the faux euphony of orthodoxy.

*I. Defining wife-initiated divorce*¹⁵

It is widely presumed that men have unlimited access and women have restricted access to initiate divorce in both Jewish and Islamic law.¹⁶ This presumption, however, simplifies a

¹⁴ The “Near East” (and its modern equivalent, “Middle East”) is a problematic political, rather than geographic category. Indeed, “The Middle East exists because the West has possessed sufficient power to give the idea substance. In this regard the colonial past and imperial present are parts of the equation that make the Middle East real.” Michael Ezekiel Gasper, *Conclusion: there is a Middle East!*, in *IS THERE A MIDDLE EAST?: THE EVOLUTION OF A GEOPOLITICAL CONCEPT* 240, (MICHAEL E. BONINE, ET AL. eds., 2012). I would prefer to use the more geographically descriptive (and less geopolitically constructed) term Southwest Asia, but the reader may be unfamiliar with this term. As I use “Near East” here, I primarily refer to Mesopotamia, the Arabian Peninsula, the Levant, and Egypt.

¹⁵ A preliminary version of this section was presented as an invited presentation at “Cross Currents: Jewish and Islamic Cultural Exchange, 600-1250 CE,” a symposium organized by the Joint Doctoral Program in Jewish Studies at the Graduate Theological Union and UC Berkeley (October 14, 2010).

complicated historical process – only part of which I will briefly explore here – in which a woman’s access to divorce changed over time. I will focus primarily on jurisprudential texts and only secondarily on how these jurisprudential ideas were actually implemented because the surviving documentary sources make it difficult to reconstruct exactly what kind of access to divorce women – both Muslim and Jewish – had in the late antique and medieval periods.¹⁷ In what follows, I will present two concise chronologies of Jewish legal changes and Islamic legal changes in women’s access to divorce.

I will intentionally not differentiate between a wife’s ability to “initiate” a divorce and her ability to “execute” a divorce. Despite some ambiguous evidence, there is a strong normative presumption that women could not “cause” a divorce because a husband must deliver a divorce decree – a written one in the Jewish tradition and an oral one in the Islamic tradition.¹⁸ As will become evident, these two procedural moves – initiating and executing divorce – were likely more ambiguous (at least in late antiquity) than commonly assumed. A wife’s ability to initiate divorce has legal effect only where a husband’s divorce prerogative is circumscribed – either by a court or by the wife herself. Moreover, while family members were often involved in a Jewish or Muslim woman’s marriage, women were frequently independent actors during

¹⁶ I will not discuss any of the rabbinic limitations placed on a husband’s ability to divorce because it is beyond the scope of my analysis. But see MISHNAH Giṭṭin 9:10 (debate between Shammai and Hillel about a husband’s legitimate grounds for divorcing his wife--adultery or any reason). See also BABYLONIAN TALMUD Giṭṭin 90a.

¹⁷ A social history approach of investigating actual divorce processes cannot be sufficiently reconstructed using the available historical evidence. This approach to family law history is exemplified in Martha Minow, *‘Forming underneath everything that grows’: toward a history of family law*, 1985 WISCONSIN LAW REVIEW 819(1985).

¹⁸ See the discussion in Avishalom Westreich, *History, dogmatics and hermeneutics: the divorce clause in Palestinian Ketubbot and the Geonic compulsion of divorce*, WORKING PAPERS OF THE AGUNAH RESEARCH UNIT, 2 (March 2009).

divorce.¹⁹ In describing women as autonomous legal actors, this article does not project modern notions of women's agency.

II. *An Islamic chronology of wife-initiated divorce*²⁰

Legal circles (610-750 CE)

Muslim women's divorce options in the earliest decades of Islamic history cannot be easily reconstructed, but some historical texts can illuminate the orally-transmitted traditions of the late antique period.²¹ Most of the Qur'ānic verses dealing with the subject of divorce are addressed to men and discuss the post-divorce waiting period and alimony.²² But one key verse declares: "if you fear that they (the couple) cannot maintain God's limits, then it will not be held against them (the couple) if she (the wife) forfeits something."²³ Major exegetical texts and other historical sources interpret this verse as relating to an actual incident in which the Prophet approved a woman returning her dower (*mahr*) to effect a divorce.²⁴ In all versions of this

¹⁹ Goitein notes, "At a divorce the wife normally acted on her own. As customary as it was that the betrothal be enacted in the absence of the bride, the divorce, by contrast, required her presence." SAMUEL D. GOITEIN, *A MEDITERRANEAN SOCIETY: THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE CAIRO GENIZA* v. 3, p. 270 (University of California Press, 1967-1993). Muslim women also frequently represented themselves in divorce, as will be discussed below, in the Islamic chronology of wife-initiated divorce.

²⁰ The periodization used in this section is my own and is not standard in the field of Islamic legal studies. This Islamic periodization is elaborated and substantiated in a work-in-progress article, "Toward a genealogy of Islamic law."

²¹ Two of the earliest surviving compilations of reports (*muṣannafāt*) are of al-Ṣan'ānī (d. 827) and Ibn Abī Shaybah (d. 849). In this section, I will focus on these sources for historical information about the mid-seventh to mid-eighth centuries because these texts are less entangled in particular juristic outcomes than other collections. See 'ABD AL-MAJĪD MAḤMŪD 'ABD AL-MAJĪD, *AL-ITTIJĀHĀT AL-FIQHĪYAH 'INDA AṢḤĀB AL-ḤADĪTH FĪ AL-QARN AL-THĀLITH AL-HIJRĪ* (Maktabat al-Khānjī. 1979). On the reliability of these sources, see Harald Motzki, *The muṣannaf of 'Abd al-Razzāq al-Ṣan'ānī as a source of authentic aḥādīth of the first century A.H.*, 50 JOURNAL OF NEAR EASTERN STUDIES (1991). See also HARALD MOTZKI, *ḤADĪTH: ORIGINS AND DEVELOPMENTS* (Ashgate/Variorum. 2004).

²² Relevant verses include Qur'ān 2:228-232, 2:236-237, 2:241; 65:1-7; 4:35.

²³ Id. at, 2:229. The verse is understood as referring to *khul'*. MUḤAMMAD IBN ISMĀ'ĪL BUKHĀRĪ (D. 870; KHURĀSĀN), *ṢAḤĪḤ AL-BUKHĀRĪ* v. 5, p. 2012 (interpreting verse 2:229 as permitting *khul'*, even without court intervention) (MUṢṬAFĀ BUGHĀ ed. MUḤAMMAD MUḤSIN KHAN trans., Dār al-Kathīr 5th ed. 1993).

²⁴ This is a narrative about a woman named Ḥabībah who initiates and effects a divorce by returning her dower to her husband. 'ABD AL-RAZZĀQ IBN HAMMĀM AL-ḤIMYARĪ AL-ṢAN'ĀNĪ (D. 827; YEMEN), *MUṢANNAF FĪ AL-*

narrative, the wife returns the entire dower she had received from her husband and the Prophet approves her action. Most late antique Muslim traditionists interpreted the narrative as limiting the amount a woman forfeits to the amount she received as dower, since there are no Prophetic reports permitting a husband to take more than the dower.²⁵ But jurists did not restrict this form of divorce to judicial intervention.²⁶ Most versions of the narrative describe the event without indicating the woman was at fault, but rather that she found her husband intolerable.²⁷ Yet there are other variations of this narrative that imply distinct conditions surrounding this particular woman's forfeiture divorce (*khul'*): she was abused²⁸; she was recalcitrant²⁹; her husband consented to the divorce settlement.³⁰ In discussing a woman's potential fault, some jurists were concerned with preventing an injustice prohibited in the Qur'ān: a woman relinquishing her

HADĪTH v. 6, 482-503 (ḤABĪB AL-RAḤMĀN AL-ʿAZAMĪ ed., al-Maktab al-Islāmī. 1970-). The same narrative is reported by numerous other traditionists, not cited here, including Mālik (d. 796), Bukhārī (d. 870), Muslim (d. 875), Dārimī (d. 869), Ibn Mājah (d. 887), Abū Dāwūd (d. 889), and al-Tirmidhī (d. 892), and other texts. In some versions of the narrative, the woman is identified as Jamīlah and in other versions her name is not used.

²⁵ Id. at, v. 6, p. 501-506 (majority of reports suggest a husband may not take more than dower in *khul'* divorce). ʿABD ALLĀH IBN MUḤAMMAD IBN ABĪ SHAYBAH (D. 849; IRAQ), AL-KITĀB AL-MUṢANNAF FĪ AL-AḤĀDĪTH WA-AL-ĀTHĀR v. 4, p. 128-129 (majority of reports suggest a husband may not take more than dower in *khul'* divorce) (MUḤAMMAD ʿABD AL-SALĀM SHĀHĪN ed., Dār al-Kutub al-ʿIlmīyah. 1995).

²⁶ AL-ḤIM YARĪ AL-ṢANʿĀNĪ (D. 827; YEMEN), Muṣannaf, v. 6, p. 494-495 (majority of reports indicate that *khul'* is permissible without court intervention). IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 124-125 (majority of reports indicate that *khul'* is permissible without court intervention). MUḤAMMAD RAWWĀS QALʿAHʿJĪ, MAWSŪʿAT FIQH ʿABD ALLĀH IBN ʿUMAR: ʿASRUHU WA-HAYĀTUH p. 324 (*khul'* is permissible without judge) (Dār al-Nafāʿis. 1986). MUḤAMMAD RAWWĀS QALʿAHʿJĪ, MAWSŪʿAT FIQH ʿUTHMĀN IBN ʿAFFĀN p. 162-163 (*khul'* is permissible without judge) (Jāmiʿat Umm al-Qurā, Kulliyat al-Sharīʿah wa-al-Dirāsāt al-Islāmīyah, Markaz al-Baḥṭh al-ʿIlmī wa-Iḥyāʾ al-Turāth al-Islāmī. 1983). But see MUḤAMMAD RAWWĀS QALʿAHʿJĪ, MAWSŪʿAT FIQH AL-ḤASAN AL-BAṢRĪ v. 1, p. 386 (*khul'* is not permissible without court intervention) (Dār al-Nafāʿis. 1989).

²⁷ AL-ḤIM YARĪ AL-ṢANʿĀNĪ (D. 827; YEMEN), Muṣannaf, v. 6, p. 483. MUḤAMMAD RAWWĀS QALʿAHʿJĪ, MAWSŪʿAT FIQH ʿALĪ IBN ABĪ ṬĀLIB p. 246 (*khul'* is permissible if wife states that she finds husband intolerable) (Dār al-Fikr. 1983).

²⁸ AL-ḤIM YARĪ AL-ṢANʿĀNĪ (D. 827; YEMEN), Muṣannaf, v. 6, 482-484.

²⁹ Id. at, v. 6, p. 495-498 (majority of reports indicate that husband can only accept payment from wife if she finds him intolerable or she is recalcitrant). IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 120-121 (a wife's recalcitrance is a condition for forfeiture divorce). QALʿAHʿJĪ, ʿALĪ IBN ABĪ ṬĀLIB, p. 246 (*khul'* is permissible if wife is recalcitrant). Some reports limit the forfeiture divorce to a wife who committed a grave sin (such as adultery).

³⁰ The implication of consent is that this divorce was not unilaterally imposed on the husband by the Prophet. AL-ḤIM YARĪ AL-ṢANʿĀNĪ (D. 827; YEMEN), Muṣannaf, v. 6, p. 502-503.

dower right without cause in order to divorce her husband.³¹ Late antique jurists ruled that if a husband abuses his wife in order to pressure her to pursue a forfeiture divorce, then that divorce is void and the wife receives her full dower.³² In addition, there seems to have been some ambiguity as to the status of a forfeiture divorce: was it a revocable divorce, an irrevocable divorce, or a rescission?³³ Most late antique jurists ruled that a forfeiture divorce is irrevocable or that it is a rescission.³⁴

That this wife-initiated divorce was historically practiced is corroborated by a report that ‘Umar (d. 644), the second caliph, condemned criticism of women who demanded a divorce by forfeiting their dowers.³⁵ (This type of criticism is apparent in reports that women who pursue forfeiture divorces are morally compromised.³⁶) There were four basic late antique Islamic divorce practices:

³¹ The Qur’ānic verse is 4:19 (“do not compel them (women) to give away part of what you have given them unless they commit an obvious sin”).

³² MUḤAMMAD RAWWĀS QAL‘AH‘JĪ, MAWSŪ‘AT FIQH ‘ABD ALLĀH IBN ‘ABBĀS p. 312-313 (if a wife is not at fault, then it is impermissible for husband to take money in a forfeiture divorce) (Dār al-Nafā’is. 1996). MUḤAMMAD RAWWĀS QAL‘AH‘JĪ, MAWSŪ‘AT FIQH SUFYĀN AL-THAWRĪ p. 378 (khul‘ is void under duress of husband’s abuse; husband must return dower) (Dār al-Nafā’is. 1990).

³³ There are two basic categories of divorce: (1) *ṭalāq raj‘ī* is a revocable divorce in which the couple can reconcile under the terms of the original marriage contract during a specified waiting period; (2) *ṭalāq bā‘in* is an irrevocable divorce that necessitates a new marriage contract. The sources indicate that *khul‘* was inconsistently described as divorce (inconsistently specified as irrevocable or revocable) or *faskh* (rescission or voiding of the marriage contract). AL-ḤIM YARĪ AL-ṢAN‘ĀNĪ (D. 827; YEMEN), Muṣannaf, v. 6, p. 480-482. IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 113 & 121-123 (conflicting opinions: forfeiture divorce as revocable or irrevocable).

³⁴ QAL‘AH‘JĪ, ‘Alī ibn Abī Ṭālib, p. 247 (khul‘ is an irrevocable divorce). MUḤAMMAD RAWWĀS QAL‘AH‘JĪ, MAWSŪ‘AT FIQH ‘UMAR IBN ‘ABD AL-‘AZĪZ p. 268 (khul‘ is an irrevocable divorce) (Jāmi‘at al-Kuwayt, Lajnat al-Tā’līf wa-al-Tarīb wa-al-Nashr. 2001). QAL‘AH‘JĪ, ‘Uthmān ibn ‘Affān, p. 163-164 (conflicting reports, khul‘ is divorce or rescission). QAL‘AH‘JĪ, ‘Abd Allāh ibn ‘Umar, p. 324 (conflicting reports, khul‘ is divorce or rescission). QAL‘AH‘JĪ, Sufyān al-Thawrī, p. 378-379 (khul‘ is irrevocable divorce). QAL‘AH‘JĪ, ‘Abd Allāh ibn ‘Abbās, p. 313-314 (khul‘ is rescission). QAL‘AH‘JĪ, al-Ḥasan al-Baṣrī, v. 1, p. 386-387 (khul‘ is irrevocable divorce).

³⁵ IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 201. ‘ABD ALLĀH IBN MUḤAMMAD IBN ABĪ SHAYBAH (D. 849; IRAQ), MUṢANNAF FĪ AL-AḤĀDĪTH WA-AL-ĀTHĀR v. 4, p. 185 (do not criticize women who want khul‘ divorces) (SA‘ĪD LAḤHĀM ed., Dār al-Fikr. 1989). QAL‘AH‘JĪ, ‘Umar ibn ‘Abd al-‘Azīz, p. 268 (khul‘ divorce permitted where wife finds husband intolerable). See also AḤMAD IBN AL-ḤUSAYN BAYHAQĪ (D. 1066; KHURASAN), AL-SUNAN AL-KUBRĀ v. 11, p. 182 (do not criticize women who want khul‘ divorces) (Dar al-Fikr. 1996).

³⁶ IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 201.

- (1) The most frequently discussed situation is of a husband divorcing his wife and paying a divorce settlement.³⁷ According to some jurists, he could avoid paying the post-divorce alimony if she was deemed recalcitrant.³⁸
- (2) A husband offers his wife the option of choosing divorce or staying with him; if she chooses divorce, he pays her the full divorce settlement.³⁹
- (3) A wife divorces her husband and she pays some form of divorce settlement by relinquishing part or all of her dower.⁴⁰
- (4) A court divorces a couple because the husband is unable to provide his wife with sufficient maintenance,⁴¹ is missing,⁴² or is impotent.⁴³

³⁷ Id. at, v. 4, kitāb al-talāq, passim. MUḤAMMAD IBN IDRĪS AL-SHĀFI'Ī (D. 820; ARABIA/EGYPT), AL-UMM v. 6, passim (Dār al-Wafā' lil-ṭibā'ah wa-al-nashr wa-al-tawzī'. 2001).

³⁸ QAL'AH'JĪ, Sufyān al-Thawrī, p. 780-781 (recalcitrant wife does not receive post-divorce alimony; no mention of dower reduction or loss).

³⁹ This is based on a Prophetic precedent. YA'QUB IBN IBRĀHĪM AL-ANṢĀRĪ AL-KUFĪ ABŪ YŪSUF (D. 798; IRAQ), KITĀB AL-ĀTHĀR 139-141 (Dār al-Kutub al-Ilmiyah. 1978). AL-ḤIMYARĪ AL-ṢAN'ĀNĪ (D. 827; YEMEN), Muṣannaf, v. 6, p. 515-526 and v. 7, p. 8-15. IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 92-94. MUḤAMMAD IBN YAZĪD IBN MĀJAH (D. 887; IRAN), SUNAN AL-MUṢṬAFĀ v. 1, p. 632 (Prophet offered his wives divorce option) (ABĪ AL-ḤASAN MUḤAMMAD IBN 'ABD AL-HĀDĪ AL-SINDĪ ḤANAFĪ ed., Al-Fikr. 1975). MUḤAMMAD IBN YAZĪD AL-QAZWĪNĪ IBN MĀJAH (D. 887; IRAN), SUNAN ABĪ 'ABD ALLĀH MUḤAMMAD IBN YAZĪD AL-QAZWĪNĪ IBN MĀJAH v. 1, p. 661-662 (Prophet gave wives option to divorce and receive full dower) (MUḤAMMAD FU'ĀD 'ABD AL-BĀQĪ ed., Dār Ahyā' al-Kutub al-'Arabīyah. 1952-54). See also the following late antique jurists who validated giving a wife the option to divorce without relinquishing her dower: QAL'AH'JĪ, 'Alī ibn Abī Tālib, p. 440-443. QAL'AH'JĪ, 'Uthmān ibn 'Affān, p. 257. QAL'AH'JĪ, 'Abd Allāh ibn 'Umar, p. 562-564. MUḤAMMAD RAWWĀS QAL'AH'JĪ, MAWSŪ'AT FIQH ZAYD IBN THĀBIT WA-ABĪ HURAYRAH p. 197-198 (Dār al-Nafā'is. 1993). QAL'AH'JĪ, Sufyān al-Thawrī, p. 614-616. QAL'AH'JĪ, 'Abd Allāh ibn 'Abbās, p. 510.

⁴⁰ AL-ḤIMYARĪ AL-ṢAN'ĀNĪ (D. 827; YEMEN), Muṣannaf, v. 6, 490-491, 494-495, 500-506. IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 120-123, 128-129. QAL'AH'JĪ, 'Uthmān ibn 'Affān, p. 162 (the first four caliphs all permitted khul' divorce). See also MUḤAMMAD IBN ISMĀ'ĪL BUKHĀRĪ (D. 870; KHURĀSĀN), Ṣaḥīḥ AL-BUKHĀRĪ = THE TRANSLATION OF THE MEANINGS OF Ṣaḥīḥ AL-BUKHĀRĪ, ARABIC-ENGLISH v. 7, p. 149-151 (MUḤAMMAD MUHSIN KHAN trans., Dar al-Fikr. 1981). 'ALĪ IBN JA'FAR MADANĪ (D. 825), MASĀ'IL 'ALĪ IBN JA'FAR WA-MUSTADRAKĀTUHĀ 283 (Imāmī Shī'ī: a woman relinquishes any monetary claims against the husband in wife-initiated divorce) (Mu'assasat Āl al-Bayt li-Ihyā' al-Turāth. 1990). (There was a minority opinion that prohibited forfeiture divorces and another minority opinion that only permitted it with judicial intervention; but neither of these positions was normative. 'ABLAH KAHLĀWĪ, AL-KHUL': DAWĀ' MĀ LĀ DAWĀ' LA-HU: DIRĀSAH FIQHĪYAH MUQĀRANAHA 68-69 (Dār al-Rashād. 2000).)

⁴¹ IBN ABĪ SHAYBAH (D. 849; IRAQ), Muṣannaf, v. 4, p. 174-175. QAL'AH'JĪ, 'Alī ibn Abī Tālib, p. 456 (a judge may issue divorce if husband is unable/unwilling to provide maintenance). But see QAL'AH'JĪ, Sufyān al-Thawrī, p. 781 (a judge does not divorce a couple if the husband is unable to provide sufficient maintenance for the wife).

This historical evidence unambiguously records a wife's ability to initiate and to effect a divorce (*khul'*) in seventh-century Arabia, but the conditions surrounding a wife's divorce option were imprecise. There seems to have been a gendered aspect to the legal terminology used by jurists in this period:⁴⁴

Professionalization of legal schools (750-1050 CE)

Professional jurists replaced the imprecision surrounding wife-initiated divorce with elaborate juridical categories. A comparison between earlier ḥadīth collections (*muṣannafāt*) with slightly later, canonical ones, reveals that most of the later texts reduce the number of reports about wife-initiated divorce (*khul'*) and limit these divorces to situations where a wife has sufficient grounds.⁴⁵ There are conflicting opinions about what constituted reasonable justification for a wife to pursue a divorce, with some jurists identifying her expressed statement of abhorrence as sufficient.⁴⁶ Yet most Muslim jurists interpreted the narratives about the

⁴² QAL'AH'JĪ, 'Abd Allāh ibn 'Abbās, p. 520 (a judge may issue divorce with sufficient grounds, such as abandonment).

⁴³ QAL'AH'JĪ, 'Alī ibn Abī Ṭālib, p. 454-455 (divorce granted if husband is impotent or cannot provide wife with conjugal rights).

⁴⁴ QAL'AH'JĪ, 'Abd Allāh ibn 'Abbās, p. 312 & 510 (in *khul'* wife pays for separation; *ṭalāq* is husband's option).

⁴⁵ I compared the *muṣannafāt* of al-Ṣan'ānī (d. 827) and Ibn Abī Shaybah (d. 849) to Scott Lucas's schematic study of the texts of Bukhārī (d. 870), Muslim (d. 875), Dārimī (d. 869), Ibn Mājah (d. 887), Abū Dāwūd (d. 889), and al-Tirmidhī (d. 892). The later texts have fewer reports about *khul'* and suggest the necessity of sufficient grounds (such as spousal abuse or a husband's consent) that were not explicit in earlier texts. Scott C. Lucas, *Divorce, ḥadīth-scholar style: from al-Dārimī to al-Tirmidhī*, 19 JOURNAL OF ISLAMIC STUDIES, 368 (2008). Later sources include more versions implying that it is wrong for a woman to demand a divorce without sufficient "justification." IBN MĀJAH (D. 887; IRAN), Sunan Ibn Mājah, v. 1, p. 662 (a woman who demands a divorce without grounds will be punished in the hereafter). And see MUḤAMMAD IBN 'ISĀ TIRMIDHĪ (D. 892; KHURĀSĀN), SUNAN AL-TIRMIDHĪ WA-HUWA AL-JĀMĪ' AL-ṢAḤĪḤ v. 2, p. 429-430 (narratives about the evils of a woman demanding a divorce without sufficient justification) ('ABD AL-WAHHĀB 'ABD AL-LATĪF & 'ABD AL-RAḤMĀN MUḤAMMAD 'UTHMĀN eds., al-Maktabah al-Salafiyyah. 1965).

⁴⁶ See footnote 27. Some canonical Sunnī texts seem to have understood a wife's disgust for her husband as sufficient grounds: IBN MĀJAH (D. 887; IRAN), Sunan Ibn Mājah, v. 1, p. 663 (implying that Ḥabībah pursued *khul'* because her husband was repulsive). Note that Imāmī Shī'ī sources make the wife's explicit statement of disgust for her husband incumbent in a *khul'* divorce. MUḤAMMAD IBN AL-ḤASAN ḤURR AL-'ĀMILĪ (D. 1693; LEBANON/IRAN), WASĀ'IL AL-SHĪ'AH ILĀ TAḤṢĪL MASĀ'IL AL-SHARĪ'AH v. 7, p. 487-489 (Imāmī Shī'ī) ('ABD AL-RAḤĪM RABBĀNĪ, et al. eds., Maktabat al-Islāmiyyah. 1956). This resembles the rabbinic discussions of a wife who seeks a divorce because her husband is repulsive. See footnotes **Error! Bookmark not defined.**, **Error! Bookmark not defined.**, **d Error! Bookmark not defined.**

Prophetic precedent permitting wife-initiated divorce⁴⁷ as including a requirement of the husband's consent⁴⁸ or as being prompted by a situation of abuse.⁴⁹ Many legal texts of this period also closely associated wife-initiated divorce (*khul'*) and recalcitrant wives, which was less evident in earlier texts.⁵⁰ Consequently, the legal possibility that seems to prevail in this period is a husband's option to divorce his wife and not pay the full dower if she is considered

⁴⁷ See footnote 24.

⁴⁸ Most versions of the narrative suggest that the husband was not consulted, but rather that the Prophet simply agreed to the woman's (Ḥabībah's) suggestion of giving back the garden she had received as her dower and the husband, upon learning of the Prophet's approval, acquiesced. See footnote 30. This is a key procedural issue, since a husband's unilateral prerogative to effect the divorce is not substantiated by all versions of this narrative. Specific examples include the following: AL-SHĀFI'Ī (D. 820; ARABIA/EGYPT), al-Umm, v. 6, p. 500, no. 2503 & no. 2504 (no mention of spousal abuse or husband's consent). AḤMAD IBN SHU'AYB NASĀ'Ī (D. 915; EGYPT/SYRIA), KITĀB AL-SUNAN AL-KUBRĀ v. 3, p. 369 (no indication of abuse or husband's consent in narrative) ('ABD AL-GHAFFĀR SULAYMĀN BINDĀRĪ & SAYYID KASRAWĪ ḤASAN eds., Dār al-Kutub al-'Ilmiyah. 1991). Bājī includes the narrative about Ḥabībah without stipulating the husband's consent and includes a narrative about a woman who divorced (*ikhtal'at*, feminine form of the verb *khul'*) her husband. SULAYMĀN IBN KHALAF BĀJĪ (D. 1081; SPAIN), AL-MUNTAQĀ: SHARḤ MUWAṬṬA' MĀLIK v. 5, p. 295-300 (MUḤAMMAD 'ABD AL-QĀDIR 'AṬĀ ed., Dār al-Kutub al-'Ilmiyah. 1999). Arabi has also observed that the Ḥabībah narrative in the canonical text of al-Bukhārī does not indicate the husband's permission was necessary for wife-initiated divorce. Arabi, 20.

⁴⁹ There are several different versions of this narrative; see footnote 28. The version that includes abuse becomes more dominant in a later period. While Dārimī, Ibn Mājah, Abū Dāwūd, and al-Tirmidhī include a category of reports preventing a woman from seeking to divorce a non-abusive husband, the other texts (i.e., Bukhārī and Muslim) do not. See Lucas, 368. By way of illustration, Nasā'ī (d. 915) and Ṭabarānī (d. 971) narrate the Prophetic story about the woman divorcing her husband and returning her dower (which is narrated in earlier collections), but add that the husband was abusive (which does not appear in earlier collections). KAHLĀWĪ, al-Khul', 63. See also 'ABD ALLĀH IBN 'ABD AL-RAḤMĀN DĀRIMĪ (D. 869; SAMARQAND), SUNAN AL-DĀRIMĪ v. 2, p. 162 (Ḥabībah's husband was abusive) (MUḤAMMAD 'ABD AL-'AZĪZ KHĀLIDĪ ed., Dār al-Kutub al-'Ilmiyah. 1996). SULAYMĀN IBN AL-ASH'ATH AL-SIJISTĀNĪ ABŪ DĀWŪD (D. 889; IRAQ), SUNAN ABĪ DĀWŪD v. 1, p. 462 & v. 4, p. 310-11 (different narratives: Ḥabībah's husband was/not abusive) (MUḤAMMAD MUḤYĪ AL-DĪN 'ABD AL-ḤAMĪD ed., Dār Iḥyā' al-Turāth al-'Arabī. 1970z). ABŪ JA'FAR MUḤAMMAD IBN JARĪR AL-ṬABARĪ (D. 923; IRAQ), JĀMĪ' AL-BAYĀN 'AN TA'WĪL ĀY AL-QUR'ĀN v. 2, p. 276 (narrative about Ḥabībah includes spousal abuse) (Dār al-Ma'rifah. 1986-7). ABŪ ISHĀQ IBRĀHĪM IBN 'ALĪ IBN YŪSUF FĪRŪZĀBĀDĪ AL-SHĪRĀZĪ (D. 1083; IRAN), AL-MUHADHDHAB FĪ FIQH AL-IMĀM AL-SHĀFI'Ī v. 2, p. 71-72 (Shāfi'ī: she pursued a *khul'* divorce because her husband was abusive) (Sharikat Maktabat wa-Maṭba'at Muṣṭafā al-Thānī al-Ḥalabī wa-Awlādahu bi-Miṣr. 1959).

⁵⁰ Again, this is based on my comparison of *muṣannafāt* to later collections. See the beginning of the section on *khul'* in 'ABD AL-SALĀM IBN SA'ĪD SAHNŪN (D. 854; TUNISIA), ET AL., AL-MUDAWWANAH AL-KUBRĀ LI-IMĀM MĀLIK IBN ANAS AL-AṢBAḤĪ v. 2, 241-251 ('ĪSĀ IBN MAS'AD ZAWĀWĪ ed., Dār al-Kutub al-'Ilmiyah. 1994). Reports about a recalcitrant wife and wife-initiated divorce are juxtaposed in AL-SHĀFI'Ī (D. 820; ARABIA/EGYPT), al-Umm, v. 6 (kitāb al-*khul'* wa al-*nushūz*). The section on recalcitrance (*nushūz*) appears immediately before the section on wife-initiated divorce (*khul'*) in AL-SHĪRĀZĪ (D. 1083; IRAN), al-Muhadhdhab, v. 2, p. 71-78 (Shāfi'ī: section on recalcitrance immediately precedes section on *khul'*). In a different edition: ABŪ ISHĀQ IBRĀHĪM IBN 'ALĪ IBN YŪSUF FĪRŪZĀBĀDĪ AL-SHĪRĀZĪ (D. 1083; IRAN), AL-MUHADHDHAB FĪ FIQH AL-IMĀM AL-SHĀFI'Ī v. 2, p. 486-499 (ZAKĀRIYĀ 'UMAYRĀT & MUḤAMMAD IBN AḤMAD BATTĀL eds., Dār al-Kutub al-'Ilmiyah. 1995). Some Muslim jurists viewed *khul'* as being only permissible in situations of recalcitrance or loathing. KAHLĀWĪ, al-Khul', 68.

recalcitrant (*nashiz*).⁵¹ This juristic elaboration of the forfeiture divorce is remarkable because the legal option of husbands paying less than the divorce settlement does not have a Prophetic legal precedent.⁵² Instead, it appears to have been elaborated by Muslim jurists in this period.

Wherein earlier texts included women's voices, in later texts it is primarily men enacting forfeiture divorce.⁵³ Thus, whereas *khul'* seemed to have simply been the term used for wife-initiated divorce in an earlier period, it became a term used for divorce situations in which the husband paid less than the full divorce settlement.⁵⁴ This coincided with what appears to be a slight change in the dower payment: previously, the wife received the full dower (i.e. consideration) at the formation of the marriage contract, but gradually, most dowers were partially paid at the contract formation and the remainder was recorded as a kind of debt the husband's estate owed the wife, due at divorce or at his death. This resulted in a shift in the procedural mechanism by which a wife initiated divorce: no longer able to simply return the dower that was given to her, she had to instead relinquish her rights to an unpaid dower in a formal legal process. Regardless of the initiating party (wife or husband), jurists debated the

⁵¹ See footnote 29.

⁵² There are no references to this practice in biographical or historical texts; in addition, the jurisprudential texts do not cite a Prophetic precedent. In other words, there is no indication in the historical sources that a Muslim man in the Prophetic period could divorce a woman without paying the full dower.

⁵³ By "earlier" and "later" I refer not only to the dating of specific texts, but also to the dating of the materials in the texts. Later sources tend to introduce *khul'* in the feminine verbal form, but then exclusively or primarily offer examples of men initiating this divorce. See, for example, AL-SHĀFI'Ī (D. 820; ARABIA/EGYPT), *al-Umm*, v. 6, p. 502 (discussing *khul'* as a man's prerogative). That many legal texts begin the section on *khul'* by discussing a woman's decision to divorce her husband suggests that women had some autonomy in this matter. See, for example, AL-SHĪRĀZĪ (D. 1083; IRAN), *al-Muhadhdhab*, v. 2, p. 489 (Shāfi'ī; section begins, "if a woman dislikes her husband...she may divorce him..."). Yet, much of the subsequent discussions in these texts focus on a husband verbalizing or effecting the divorce through his proclamation.

⁵⁴ A husband can divorce through *khul'* and pay less than the full settlement if (a) wife is recalcitrant; (b) wife commits a sin; (c) wife is disobedient. 'ABD AL-RAḤMĀN JAZĪRĪ, ET AL., *KITĀB AL-FIQH 'ALĀ AL-MADHĀHIB AL-ARBA'AH WA MADHHAB AHL AL-BAYT* v. 4, 472 (Mālikīs recommending *khul'* divorce of a recalcitrant wife), 473 (Hanbalis permitting *khul'* divorce of a recalcitrant wife) (Dār al-Thaqalayn. 1998). See also 'ĀMIR SA'ĪD ZAYBĀRĪ, *AḤKĀM AL-KHUL' FĪ AL-SHARĪ'AH AL-ISLĀMĪYAH* 75-76 (Dār Ibn Ḥazm. 1997).

classification of *khul'* as a divorce or rescission⁵⁵ and the permissibility of a husband taking more than the dower.⁵⁶

To summarize, by the end of the professionalization period, the following divorce practices were recognized:

- (1) A husband divorces his wife for whatever reason and pays the divorce settlement in full.
- (2) A husband divorces his wife and pays less than the divorce settlement under the category of *khul'*, possibly because the wife is recalcitrant or immoral.⁵⁷

⁵⁵ See footnote 34. 'ABD AL-RAḤMĀN IBN 'AMR AWZĀ'Ī (D. 774; SYRIA), SUNAN AL-AWZĀ'Ī: AḤĀDĪTH WA-ĀTHĀR WA-FATĀWĀ 338 (Awzā'ī: *khul'* is a divorce) (MARWĀN MUḤAMMAD AL-SHA'ĀR ed., Dār al-Nafā'is. 1993). ABŪ YŪSUF (D. 798; IRAQ), Kitāb al-āthār, p. 129 (Hanafi: a separation initiated by the wife is irrevocable). 'ABD ALLĀH IBN MUḤAMMAD IBN BARAKAH (D. 10TH; 'UMĀN), KITĀB AL-JĀMĪ' v. 2, p. 196 (Ibādī: *khul'* is a revocable divorce) ('ĪSĀ YAḤYĀ BĀRŪNĪ ed., Dār al-Fath 2nd ed. 1974). 'ABD ALLĀH IBN 'ABD AL-RAḤMĀN IBN ABĪ ZAYD AL-QAYRAWĀNĪ (D. 996; TUNISIA), AL-RISĀLAH AL-FIQHĪYAH 202 & 205 (Mālikī: *khul'* is irrevocable) (Dār al-Gharb al-Islāmī. 1986). ABŪ YA'LĀ MUḤAMMAD IBN AL-ḤUSAYN IBN AL-FARRĀ' (D. 1066; IRAQ), AL-MASĀ'IL AL-FIQHĪYAH MIN KITĀB AL-RIWĀYATAYN WA-AL-WAJHAYN v. 2, p. 136 (Hanbali: *khul'* dissolves contract) ('ABD AL-KARĪM IBN MUḤAMMAD LĀHIM ed., Maktabat al-Ma'ārif. 1985). MUḤAMMAD IBN AḤMAD SHAMS AL-DĪN SARAKHSĪ (D. 11TH CENT; TRANSOXANIA), KITĀB AL-MABSŪT v. 6, p. 171 (Hanafi: *khul'* is irrevocable) (Dār al-Kutub al-'Ilmiyah. 1993). ḤURR AL-'ĀM ILĪ (D. 1693; LEBANON/IRAN), Wasā'il al-shī'ah, v. 7, p. 495 (Imāmī Shī'ī: *khul'* is irrevocable). Note, there are conflicting opinions within each legal school; see MUḤAMMAD IBN NAṢR MARWAZĪ (D. 906; SAMARQAND), IKHTILĀF AL-FUQAḤĀ' p. 301-302 (summarizing the opinions of major jurists on the legal implications of a *khul'* divorce) (MUḤAMMAD ṬĀHIR ḤAKĪM ed., Adwā' al-Salaf. 2000). Irrevocable divorce (*talāq bā'in*) is the opinion of many late antique jurists, as well as Mālik and Aḥmad ibn Ḥanbal (in one of two opinions attested to him); revocable divorce (*talāq raj'ī*) is the opinion of the Zāhirīs; rescission (*faskh*) is the opinion of some late antique jurists, as well as al-Shāfi'ī and Aḥmad ibn Ḥanbal (in one of two opinions attested to him). KAHLĀWĪ, al-Khul', 113-117 (summarizing which jurists/legal schools view *khul'* as irrevocable or revocable divorce, or rescission). See also ZAYBĀRĪ, Aḥkām al-khul', 221-223.

⁵⁶ See footnote 25. The possibility that a husband could take in excess of the dower continued to be a subject of juristic debate. AWZĀ'Ī (D. 774; SYRIA), Sunan al-Awzā'ī, 338 (Awzā'ī: a husband may not take more than the dower in a *khul'* divorce). MĀLIK IBN ANAS (D. 796; ARABIA), MUWAṬṬĀ' AL-IMĀM MĀLIK 188-189 (unfavorable, but permitted, for husband to take more than dower in *khul'*) ('ABD AL-WAHHĀB 'ABD AL-LATĪF ed., al-Maṭba'ah al-'Ilmiyah 2nd ed. 1979). AL-SHĀFI'Ī (D. 820; ARABIA/EGYPT), al-Umm, v. 6, p. 501 (husband may take more than dower). IBN MĀJAH (D. 887; IRAN), Sunan al-Muṣṭafā, v. 1, p. 633 (wife returns only her dower, not more, in *khul'*). IBN BARAKAH (D. 10TH; 'UMĀN), Kitāb al-jāmi', v. 2, p. 195 (Ibādī: it is not permissible for a husband to take more than the dower in *khul'*). IBN ABĪ ZAYD AL-QAYRAWĀNĪ (D. 996; TUNISIA), al-Risālah al-fiqhīyah, p. 205 (Mālikī: a wife may offer her dower, less, or more in *khul'*). YŪSUF IBN 'ABD ALLĀH IBN 'ABD AL-BARR (D. 1070; SPAIN), KITĀB AL-KĀFĪ FĪ FIQH AHL AL-MADĪNAH AL-MĀLIKĪ v. 2, p. 593 (Mālikī: defining *khul'* as wife losing entire dower and fidya as wife losing part of dower) (MUḤAMMAD MUḤAMMAD AḤID WULD MĀDIK MŪRITĀNĪ ed., Maktabat al-Riyāḍ al-Ḥadīthah. 1980). ḤURR AL-'ĀM ILĪ (D. 1693; LEBANON/IRAN), Wasā'il al-shī'ah, v. 7, p. 493 (Imāmī Shī'ī: husband may take more than dower in *khul'*, but not in mubāra'ah).

⁵⁷ Many late antique jurists and Aḥmad ibn Ḥanbal prohibit a husband from taking more than the wife's dower; Ḥanafīs do not recommend his taking more; Mālikīs, Shāfi'īs, and Imāmī Shī'īs permit husbands to take as much as, less than, or more than the dower amount he gave her. The two main juristic opinions (for and against a husband taking more than the dower in a *khul'* divorce) are summarized in KAHLĀWĪ, al-Khul', 140-143.

(3) A court declares a wife divorced and the husband pays the divorce settlement for the following reasons:

- a. if the husband is impotent or has a severe defect or disease⁵⁸
- b. if the husband deserts the wife, fails to provide her maintenance, or is cruel⁵⁹
- c. if the husband is insane⁶⁰

(4) A wife divorces her husband⁶¹ and forfeits the divorce settlement (dower) partially, completely, or even in excess under specific circumstances.⁶² According to many jurists, the husband's consent is required.⁶³

⁵⁸ “An impotent husband must be allowed a year’s probation after which divorce takes place” and the wife is entitled to keep the entire dower. ‘ALĪ IBN ABĪ BAKR MARGHĪNĀNĪ (D. 1197; FARGHĀNA), THE HIDAYA: COMMENTARY ON THE ISLAMIC LAWS v. 2, p. 217 (Ḥanafī) (ZAHRA BAINTEINER trans., Darul Ishaat. 2007). By the early modern period, Ḥanafī jurists identified sexual impotence as the only valid grounds for a woman to demand a divorce, but also permitted women to include numerous marriage contract stipulations that would facilitate their divorce rights. See also JAZĪRĪ, ET AL., Kitāb al-fiqh, passim.

⁵⁹ See footnote 41. See also ABĪ ZAKARĪYĀ MUḤYĪ AL-DĪN IBN SHARAF AL-NAWAWĪ (D. 1277; SYRIA), ET AL., AL-MAJMU‘, SHARḤ AL-MUHADHAB v. 17, p. 110-112 (Shāfi‘ī: if a husband cannot support his wife, they are divorced) (ZAKARĪYĀ ‘ALĪ YŪSUF ed., Maṭba‘at al-‘Āshimah. 1966-69).

⁶⁰ But, there is a Ḥanafī opinion that a woman cannot demand judicial divorce if her husband is mentally incompetent or has a serious disease. MARGHĪNĀNĪ (D. 1197; FARGHĀNA), The Hidayah, v. 2, p.219 (Ḥanafī).

⁶¹ A wife can demand *khul‘* if (a) wife finds husband disgusting (incompatibility); (b) husband is abusive; (c) wife fears that she cannot be faithful. SARAKHSĪ (D. 11TH CENT; TRANSOXANIA), al-Mabsūṭ, v. 6, p. 171 (Ḥanafī: chapter on *khul‘* begins with quote “if a woman divorces her husband...”). Ibn Ḥazm synthesizes juristic opinions by noting that some jurists prohibit *khul‘*, while others make it conditional upon one of the following factors: (a) a political leader permits it; (b) the wife is having an affair; (c) the husband is abusive; (d) she refuses to purify herself; (e) she claims that her husband is repulsive; (f) she dislikes him and he is not compelling her (to relinquish her dower). ‘ALĪ IBN AḤMAD IBN ḤAZM (D. 1064; SPAIN), MARĀTIB AL-IJMĀ‘ FĪ AL-‘IBĀDĀT WA-AL-MU‘ĀMĀLAT WA-AL-‘IṬIQĀDĀT p. 74-75 (Zāhirī) (Dār al-Kutub al-‘Ilmīyah. 1970). See also ‘ALĪ IBN AḤMAD IBN ḤAZM (D. 1064; SPAIN), AL-MUḤALLĀ v. 10, p. 286-297 (Zāhirī) (ḤASAN ZAYDĀN ṬULBAH ed., Maktabat al-Jumhūriyah al-‘Arabīyah. 1967-1971).

⁶² See footnote 57.

⁶³ While all the legal schools accept the validity of *khul‘*, most legal schools view it as a negotiated settlement. IBN ḤAZM (D. 1064; SPAIN), al-Muḥallā, v. 10, p. 286 (Zāhirī: *khul‘* only by mutual consent). Ḥanafīs require the husband to accept the wife’s *khul‘* offer in order for a divorce to be valid. JAZĪRĪ, ET AL., Kitāb al-fiqh, v. 4, 494. This resembles the common – although likely not universal – rabbinic perspective that a husband must deliver a *get* for a divorce to occur.

(5) Less prevalent than in an earlier period,⁶⁴ a husband offers his wife the option of choosing divorce or staying with him; if she chooses divorce, he pays her a divorce settlement.⁶⁵

When compared to the previous period, a wife's ability to initiate divorce was circumscribed.

Consolidation (1050-1400 CE)

By the late medieval period, Muslim jurists had elaborated more details surrounding the divorce practices of the professionalization period.⁶⁶ Jurists developed a taxonomy for divorce settlement types paid by a wife by trying to assign different terms for divorces in which the wife loses the dower, or more or less than the dower.⁶⁷ They also continued to debate the

⁶⁴ See footnote 39. Earlier texts discuss this option more than later texts.

⁶⁵ IBN ANAS (D. 796; ARABIA), *Muwatta' al-Imām Mālik*, p. 191-192 (giving wife divorce option with full dower). ABŪ YŪSUF (D. 798; IRAQ), *Kitāb al-āthār*, p. 139-141 (Ḥanafī: women given choice to divorce and receive dowers). BISHR IBN GHĀNIM AL-KHURĀSĀNĪ AL-IBĀDĪ (D. CA. 815; KHURĀSĀN), *MUDAWWANAH AL-KUBRĀ* v. 2, p. 56-67 (Ibādī) (*Wizārat al-Turāth al-Qawmī wa-al-Thaqāfah*. 1984). SARAKHSĪ (D. 11TH CENT; TRANSOXANIA), *al-Mabsūṭ*, v. 6, p. 210-23 (Ḥanafī: giving wife divorce option with full dower). IBN 'ABD AL-BARR (D. 1070; SPAIN), *Kitāb al-kāfī*, v. 2, p. 587-591 (Mālikī: giving wife divorce option with full dower). But see Ibn Ḥazm negating the possibility of a woman being given the option of choosing divorce. IBN ḤAZM (D. 1064; SPAIN), *al-Muḥallā*, v. 10, p. 144-153 (*Zāhirī*).

⁶⁶ Ibn Rushd summarizes these medieval juristic perspectives: "Five opinions are, thus derived for *khul'*. First, that is not permitted at all. Second, it is permitted in all circumstances, that is, even under duress. Third, it is not permitted unless fornication is witnessed. Fourth, it is permitted when there is fear that the limits imposed by Allāh will not be maintained. Fifth, that it is permitted in all circumstances, except under duress, which is the most widely accepted (*mashhūr*) opinion." AVERROES IBN RUSHD II (D. 1198; SPAIN/MOROCCO), *THE DISTINGUISHED JURIST'S PRIMER: A TRANSLATION OF BIDĀYAT AL-MUJTAHID WA-NIHĀYAT AL-MUQTAṢID* v. 2, p. 81 (MUHAMMAD ABDUL RAUF ed. IMRAN KHAN NYAZEE trans., Garnet Publishing. 1994). (Duress here refers to a husband forcing his wife to accept less than the divorce settlement.)

⁶⁷ Jurists continued to debate the permissibility of a husband taking more than the dower from the wife in *khul'*. Ibn Rushd summarizes this debate: "The term *khul'*, however, in the opinion of the jurists is confined to her paying him all that he spent on her, the term *ṣulḥ* to paying a part of it, *fidya* to paying more than it, and *mubāra'ah* to her writing off a claim that she had against him." Id. at, v. 2, p. 79. Still, there is a difference of opinion on the possibility of a husband taking more than the divorce settlement in *fidya*. See also: 'ALĀ' AL-DĪN MUḤAMMAD IBN AḤMAD SAMARQANDĪ (D. 1144; SAMARQAND), *Tuḥfat al-Fuqahā* v. 2, p. 301-302 (Ḥanafī: dominant opinion that husband may not take more than dower; other opinion permits taking more than dower; ruling is that if the couple agreed to excess, it stands) (MUḤAMMAD ZAKĪ 'ABD AL-BARR ed., University of Damascus Press. 1958). MARGHĪNĀNĪ (D. 1197; FARGHĀNA), *The Hidayah*, v. 2, p. 194-195 (Ḥanafī: it is legally permissible for husband to take more than the dower). MUWAFFAQ AL-DĪN 'ABD ALLĀH IBN AḤMAD IBN QUDĀMAH AL-MAQDĪSĪ (D. 1223; SYRIA), *AL-MUGHNĪ* v. 10, p. 269-270 (Ḥanbalī: it is permissible, but unfavorable, for husband to take more than dower; notes conflicting juristic opinions) ('ABD ALLĀH IBN 'ABD AL-MUḤSIN TURKĪ & 'ABD AL-FATTĀḤ MUḤAMMAD ḤULW eds., Hajr 2nd ed. 1992). MAJD AL-DĪN ABĪ AL-BARAKĀT 'ABD AL-SALĀM IBN 'ABD ALLĀH IBN AL-KHIDR IBN TAYMĪYAH AL-ḤARRĀNĪ (D. 1254/5; SYRIA/IRAQ), *MUḤARRAR FĪ AL-FIQH 'ALĀ MADHHAB AL-IMĀM*

classification of wife-initiated divorce as a revocable or irrevocable divorce (roughly equivalent to breach and rescission of the marriage contract).⁶⁸ To summarize, Ḥanafīs, Mālikīs, later Shāfi'īs, minority Ḥanbalīs, and a majority of late antique jurists viewed *khul'* as equivalent to divorce; but earlier Shāfi'īs, a majority of Ḥanbalīs, and a minority of late antique jurists considered *khul'* to be rescission (*faskh*).⁶⁹ While there is no indication that jurists prohibited any of the divorce types previously practiced,⁷⁰ the distinctions between earlier and later legal texts

AḤMAD IBN ḤANBAL v. 2, p. 99 (Ḥanbalī: *khul'* divorce settlement may not exceed dower) (SHAMS AL-DĪN IBN MUFLIḤ AL-ḤANBALĪ AL-MAQDISĪ (D. 1362; SYRIA), et al. eds., Dār al-Kutub al-ʿIlmiyah. 1999). JAʿFAR IBN AL-ḤASAN MUḤAQQIQ AL-ḤILLĪ (D. 1277; IRAQ), MUKHTAṢAR AL-NĀFIʿ FĪ FIQH AL-IMĀMIYAH 227-228 (Imāmī Shīʿī: discussing debate about *fidya*) (Asadī. 1967). The majority Shāfiʿī opinion permits a husband to take more than the dower as part of the *khul'* divorce settlement, whereas the minority Shāfiʿī opinion disapproves of this practice. AL-NAWAWĪ (D. 1277; SYRIA), ET AL., al-Majmūʿ, v. 16, p. 8-9 (Shāfiʿī: discussing divorce settlement amounts). MUḤAMMAD IBN MAKKĪ SHAḤĪD AL-AWWAL (D. 1384; SYRIA), AL-LUMʿAH AL-DIMASHQĪYAH FĪ FIQH AL-IMĀMIYAH 199-200 (Imāmī Shīʿī: he may take more than the dower in *khul'*; he may not take more than dower in *mubāraʿah*) (MUḤAMMAD TAQĪ MURWĀRĪD & ʿALĪ AṢGHAR MURWĀRĪD eds., Dār al-Turāth; al-Dār al-Islāmiyah. 1990).

⁶⁸ Zamakhsharī explains that *khul'* is a divorce (*talāq*) for Ḥanafīs, whereas it is dissolution (*faskh*) for Shāfi'īs. The difference is that Ḥanafīs permit reconciliation between the spouses under the original contract, whereas Shāfi'īs do not. MAḤMŪD IBN ʿUMAR ZAMAKHSHARĪ (D. 1144; KHWĀRAZM), RUʿŪS AL-MASĀʿIL (AL-MASĀʿIL AL-KHILĀFIYAH BAYNA AL-ḤANAFIYAH WA-AL-SHĀFIʿIYAH) 404-406 (ʿABD ALLĀH NADHĪR AḤMAD ed., Dār al-Bashāʿir al-Islāmiyah. 1987). See also: SAMARQANDĪ (D. 1144; SAMARQAND), Tuḥfat al-fuqahāʾ, v. 2, p. 299 (Ḥanafī: *khul'* is irrevocable divorce). MAḤMŪD IBN AḤMAD MARGHĪNĀNĪ (D. 1219/20; FARGHĀNA), AL-MUḤIT AL-BURHĀNĪ FĪ AL-FIQH AL-NUʿMĀNĪ v. 3, p. 501 (Ḥanafī: *khul'* is irrevocable divorce) (AḤMAD ʿIZZŪ ʿINĀYAH ed., Dār Iḥyāʾ al-Turāth al-ʿArabī. 2003). IBN QUDĀMAH AL-MAQDISĪ (D. 1223; SYRIA), al-Mughnī, v. 10, p. 274-275 (Ḥanbalī: cites conflicting reports among jurists about *khul'* as divorce or rescission). IBN TAYMIYAH AL-ḤARRĀNĪ (D. 1254/5; SYRIA/IRAQ), Muḥarrar, v. 2, p. 98 (Ḥanbalī: *khul'* is an irrevocable divorce). AḤMAD IBN ʿABD AL-ḤALĪM IBN TAYMIYAH (D. 1328; SYRIA), MAJMUʿ MIN AL-FATĀWĀ AL-KUBRĀ LIL-IMAM IBN TAYMIYAH sec. 32, p. 289 (Ḥanbalī: cites conflicting reports among jurists about *khul'* as divorce or rescission) (SAʿĪD MUḤAMMAD AL-LAḤHĀM ed., Dār al-Fikr. 1993). MUḤAQQIQ AL-ḤILLĪ (D. 1277; IRAQ), Mukhtaṣar, 227 (Imāmī Shīʿī: summarizing debate on legal status of *khul'*). ʿUTHMĀN IBN ʿALĪ AL-ZAYLAʿĪ AL-ḤANAFĪ (D. 1342/3), ET AL., TABYĪN AL-ḤAQĀʾIQ; SHARḤ KANZ AL-DAQĀʾIQ v. 3, p. 182 (Ḥanafī: *khul'* is irrevocable divorce) (AḤMAD ʿAZZŪ ʿINĀYAH ed., Dār al-Kutub al-ʿIlmiyah. 2000).

⁶⁹ MUṢṬAFĀ DHAHABĪ, AL-KHULʿ WA-AḤKĀMUHU FĪ AL-SHARĪʿAH AL-ISLĀMIYAH 60 (Dār al-Ḥadīth. 2000).

⁷⁰ For instance, men continued to give women the option of divorce and receiving the full divorce settlement, as evidenced in medieval juristic texts. SAMARQANDĪ (D. 1144; SAMARQAND), Tuḥfat al-fuqahāʾ, v. 2, p. 279-288 (Ḥanafī: giving wife divorce option). ʿALĪ IBN ABĪ BAKR MARGHĪNĀNĪ (D. 1197; FARGHĀNA), AL-HIDĀYAH = THE GUIDANCE: A TRANSLATION OF AL-HIDĀYAH FĪ SHARḤ BIDĀYAT AL-MUBTADĪ, A CLASSICAL MANUAL OF ḤANAFĪ LAW 593-605 (Ḥanafī: giving wife divorce option) (IMRAN AHSAN KHAN NYAZEE trans., Amal Press. 2006). AL-SHĪRĀZĪ (D. 1083; IRAN), al-Muḥadhdhab, v. 2, p. 83-84 (Shāfiʿī: husband gives wife option to divorce and receive full dower). AL-NAWAWĪ (D. 1277; SYRIA), ET AL., al-Majmūʿ, v. 16, p. 88-93 (Shāfiʿī: husband offers wife divorce option). Jurists distinguish between “*takhyīr* (granting a choice) and *tamlīk* (granting possession of the right).” IBN RUSHD II (D. 1198; SPAIN/MOROCCO), Jurist's Primer, v. 2, p. 84 (summarizing the juristic debates on these divorce types). FATĀWĀ AL-ʿĀLAMGĪRĪYAH (1664-1672) v. 1, p. 387-409 (Ḥanafī: men giving women divorce option without losing dower) (Dār Iḥyāʾ al-Turāth al-ʿArabī. 1980).

imply that a woman's access to divorce became limited to particular circumstances.⁷¹ In theory, women still had the legal right to divorce their husbands by paying a divorce settlement.⁷² Yet, juristic restrictions (as outlined in jurisprudential texts) seem to have limited this right to cases where a wife could establish grounds for divorce or to situations where the husband concedes to the divorce settlement.⁷³ Notably, juristic discussions of wife-initiated divorce often occur adjacent to or in conjunction with the topic of recalcitrance.⁷⁴ Still, court records from later Islamic periods establish that women continued to acquire divorces by forfeiting part or all of

⁷¹ Abuse and repulsiveness continued to be cited as grounds for a woman to pursue a *khul'* divorce. For example, a Shāfi'ī text cites the main ḥadīth (as precedent) about a woman who pursued a *khul'* divorce because her husband was abusive, but jurists cautioned against allowing *khul'* when a husband is intentionally abusive in order to avoid paying the divorce settlement. AL-NAWAWĪ (D. 1277; SYRIA), ET AL., al-Majmū', v. 16, p. 3-6 (Shāfi'ī: physical abuse as provoking wife-initiated divorce). NŪR AL-DĪN 'ALĪ IBN ABĪ BAKR HAYTHAMĪ (D. 1405), GHĀYAT AL-MAQSŪD FĪ ZAWĀ'ID AL-MUSNAD v. 2, p. 267-268 (Shāfi'ī: implying that Ḥabībah pursued *khul'* because her husband was repulsive) (KHALĀF MAḤMŪD 'ABD AL-SAMĪ' ed., Dār al-Kutub al-'Ilmīyah. 2001).

⁷² Ibn Rushd notes that "there is no dispute that a woman possessing discretion (a *rashīda*) has a right to transact redemption for herself." IBN RUSHD II (D. 1198; SPAIN/MOROCCO), Jurist's Primer, v. 2, p. 82. See also IBN QUDĀMAH AL-MAQDĪSĪ (D. 1223; SYRIA), al-Mughnī, v. 10, p. 267 (Ḥanbalī: wife has the right to "ransom" divorce). AL-NAWAWĪ (D. 1277; SYRIA), ET AL., al-Majmū', v. 16, p. 2 (Shāfi'ī: "if a woman loathes her husband...she may remove him by [paying] compensation..."). But numerous legal texts apply the term *khul'* to a husband divorcing his wife and not paying the full divorce settlement. See, for example, AL-SHĪRĀZĪ (D. 1083; IRAN), al-Muḥadhdhab, v. 2, p. 490-491 (Shāfi'ī). Most legal texts recognize that either spouse may divorce the other through *khul'*. AL-NAWAWĪ (D. 1277; SYRIA), ET AL., al-Majmū', v. 16, p. 37 (Shāfi'ī: either spouse initiates *khul'*). Fatāwā al-'Ālamgīrīyah (1664-1672), v. 1, p. 488 (Ḥanafī: *khul'* in the masculine verbal form). There is some inconsistency between the practice being identified as a woman's option, but specified as necessitating a husband's verbalization of the divorce.

⁷³ Ibn Rushd explains "the majority held that it [redemption divorce] is permitted with the mutual consent of the parties, unless consent to pay him is obtained by fear of injury to her." IBN RUSHD II (D. 1198; SPAIN/MOROCCO), Jurist's Primer, v. 2, p. 81. MARGHĪNĀNĪ (D. 1197; FARGHĀNA), The Hidayah, v. 2, p. 194 (Ḥanafī: implying that *khul'* necessitates mutual consent). Fatāwā al-'Ālamgīrīyah (1664-1672), v. 1, p. 488 (Ḥanafī: implying through dual verbal form that *khul'* is mutual agreement between spouses). Jurists acknowledge that either spouse may initiate *khul'*, but do not account for how to deal with a husband's refusal. AḤMAD IBN LU'LU' IBN AL-NAQĪB (D. 1368; EGYPT), 'UMDAT AL-SĀLIK WA-'UDDAT AL-NĀSIK 336 (Shāfi'ī: *khul'* is permissible when one or both spouses want to end the marriage) (ŞĀLĪḤ MU'ADHDHIN, et al. eds., Maktabat al-Ghazzālī. 1979).

⁷⁴ IBN TAYMĪYAH AL-ḤARRĀNĪ (D. 1254/5; SYRIA/IRAQ), Muḥarrar, v. 2, p. 95 & 97 (Ḥanbalī: section on recalcitrance immediately precedes section on *khul'*). AL-ZAYLA'Ī AL-ḤANAFĪ (D. 1342/3), ET AL., Tabyīn al-ḥaqā'iq, v. 3, p. 185 (Ḥanafī: Prophetic precedent concerning Ḥabībah's *khul'* divorce is explicitly interpreted as an example of a woman's recalcitrance). Fatāwā al-'Ālamgīrīyah (1664-1672), v. 1, p. 488 (Ḥanafī: associating *khul'* with *nushūz* of either spouse). Contemporary Egyptian Islamist-feminist 'Ablah Kaḥlāwī begins her monograph on *khul'* with a discussion of recalcitrance (*nushūz*), but argues that recalcitrance is not a condition for *khul'* divorces. KAḤLĀWĪ, al-Khul', 64.

their dowers.⁷⁵ Indeed, it is possible that *khul'* divorces superseded judicial grants of divorce in which women were given full dowers.

What this condensed chronology of Muslim women's access to divorce suggests is that jurists gradually interfered with a wife's ability to divorce her husband. Notably, husbands gained the option of divorcing and paying less than the standard divorce settlement in a variety of situations.

III. An interwoven narrative of wife-initiated divorce

Antiquity and late antiquity (up to 750 CE)

While most Near Eastern legal systems in antiquity appear to have granted men an unencumbered right to divorce,⁷⁶ women were not precluded from divorcing their husbands. Indeed, there is evidence of women initiating divorces,⁷⁷ which may have taken place by the act of the wife leaving the home.⁷⁸ Common Near Eastern customs are apparent in some surviving ancient Mesopotamian legal texts; as in the case of Jewish divorce practices in antiquity, there is

⁷⁵ See Ronald C. Jennings, *Divorce in the Ottoman sharia court of Cyprus, 1580-1640*, STUDIA ISLAMICA (1993).

⁷⁶ David L. Lieber, et al., Divorce 710-711 § 5 (MICHAEL BERENBAUM & FRED SKOLNIK eds., Macmillan Reference USA 2nd ed. 2007).

⁷⁷ Roman provincial law recognized wife-initiated divorce and was likely practiced throughout the Near East. GILLIAN CLARK, WOMEN IN LATE ANTIQUITY: PAGAN AND CHRISTIAN LIFE-STYLES 18 (Clarendon Press. 1993). Jewish women divorced their husbands in second century Egypt and in Palestine under Roman law. See Brewer, 354. The main source for Zoroastrian law is the *Mādigān ī hazār dādistān* and it is commonly dated to approximately 620 CE. *Mādigān ī hazār dādistān*. English, The book of a thousand judgements: a Sasanian law-book; introduction, transcription and translation of the Pahlavi text, notes, glossary and indexes by Anahit Perikhanian; translated from Russian by Nina Garsoïan 252-259 (A. G. (ANAIT GEORGIEVNA) PERIKHANIĀN trans., Mazda Publishers in association with Bibliotheca Persica 1997). DAS SASANIDISCHE RECHTSBUCH "MATAKDAN I HAZAR DATISTAN" (TEIL II) 25-29, 97-120 (MARIA MACUCH trans., Deutsche Morgenländische Gesellschaft: Kommissionsverlag, F. Steiner. 1981). This text notes, "When a woman having got divorce on the woman's own inclination..." SOHRAB JAMSHEDJEE BULSARA, THE LAWS OF THE ANCIENT PERSIANS AS FOUND IN THE "MĀTĪKĀN Ê HAZĀR DĀTASTĀN" OR "THE DIGEST OF A THOUSAND POINTS OF LAW" 72 (H.T. Anklesaria. 1937).

⁷⁸ By way of example, Sealey points out that marriage in ancient Greece was not public and did not necessitate judicial involvement. RAPHAEL SEALEY, THE JUSTICE OF THE GREEKS p. 68, fn. 30 (University of Michigan Press. 1994).

a scholarly debate on the issue of a woman's ability to divorce in ancient Mesopotamian law.⁷⁹ The nature of the surviving historical evidence (primarily legal texts and some court records) results in this inconsistency in the historical interpretation surrounding women and divorce in the ancient Near East. But it may be concluded that the ambiguous nature of the historical evidence itself reflects a diverse legal reality in which some wives did divorce their husbands and others did not.⁸⁰ Despite a male, jurisprudential rhetoric legitimating divorce as a male prerogative, women could and did divorce their husbands in practice. At least in some cases, women in the ancient Near East had to seek judicial intervention in order to divorce their husbands.⁸¹ Even this condensed "pre-history" suggests that, by the late antique period, there were diverse Near Eastern customary practices of men divorcing women, women divorcing men, and judges intervening to effect divorces.

Underlying these practice is a specific economic reality: men paid for both marriages and divorces. Ancient Near Eastern legal texts consistently reference divorce in terms of men paying divorce settlements.⁸² Since the default Near Eastern norm was for husbands to pay dowry to

⁷⁹ "The right of a wife to divorce her husband in OB [Old Babylonian] law has been the subject of considerable dispute." RAYMOND WESTBROOK, *OLD BABYLONIAN MARRIAGE LAW* 79 (F. Berger. 1988). "Scholars disagree as to whether a wife had the legal capacity to divorce her husband." RUSS VERSTEEG, *EARLY MESOPOTAMIAN LAW* 88 (Carolina Academic Press. 2000).

⁸⁰ Westbrook concludes that the conflicting evidence of a wife's ability to initiate divorce is the manifestation of "the difference between theory and practice." WESTBROOK, *Old Babylonian marriage law*, 85.

⁸¹ The Laws of Hammurabi (ca. 1750 BCE) mention that if a wife repudiates her husband, an inquiry is made; if she is found to be not at fault, then she takes her dowry and leaves, but if she is found to be at fault, she is thrown into the water. MARTHA TOBI ROTH, ET AL., *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 108 (Scholars Press. 1997). Likewise, Johns asserts that "It was far harder for a woman to secure a divorce from her husband. She could do so, however, but only as the result of a lawsuit. As a rule, the marriage-contracts mention death as her punishment, if she repudiates her husband." C. H. W. JOHNS, *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* 143 (T. & T. Clark. 1904).

⁸² Laws of Ur-Namma (ca. 2100 BCE) sec. 9-11 (man pays upon divorcing wife, based on wife's status) ROTH, ET AL., *Law collections*, 18. Laws of Lipit-Ishtar (ca. 1930 BCE) sec. 28, 30 (limits a man's ability to divorce his first wife; indicates that men pay divorce settlement) id. at, 31-32. Sumerian Laws Handbook of Forms (ca. 1700 BCE) iv 12-16 (husband pays divorce settlement) id. at, 50. Laws of Eshnunna (ca. 1770 BCE) sec 59 (husband is financially punished for divorcing a wife who is mother of his children) id. at, 68. Laws of Hammurabi (ca. 1750 BCE) sec. 137-141 (husband who divorces wife with whom he has children pays her dowry and half of his assets; husband who

their wives as part of the marriage process, they maintained stronger privileges to divorce, which also entailed payment of a divorce settlement to the wife. This is why women who divorced their husbands paid for this prerogative in nearly all late antique Near Eastern legal cultures – Jewish, Byzantine, and Islamic.⁸³ Indeed, a basic presumption in the region seems to have been that if a wife returned her entire dowry, then that act in and of itself constituted divorce.⁸⁴ For example, late antique divorce documents (written in Greek on papyrus) from Nessana indicate that Christian women – both prior to and soon after the Arab/Islamic conquest – relinquished their dowries in order to acquire a divorce.⁸⁵ Juxtaposed with the evidence from Jewish and Islamic sources cited above, this suggests that women in the late antique Near East – regardless of confessional identity – relinquished dowries in order to divorce their husbands.

These divorce-based monetary exchanges resemble the conceptually related slavery and ransoming practices of the region. At the level of terminology, slaves could financially redeem

divorces wife who is childless, pays a divorce settlement that varies depending on the status of the wife) id. at, 107. One exception is Middle Assyrian Laws (ca. 1076 BCE) A sec. 37-38 (husband may divorce wife without paying divorce settlement) id. at, 167.

⁸³ In late antique Roman provincial (or Christian) law: “A woman who divorced without grounds lost dowry and gifts and had to wait five years to remarry; a man who divorced without good reason merely lost dowry and gifts.” CLARK, *Women in late antiquity: pagan and Christian life-styles*, 24. See also Judith Evans Grubbs, *'Pagan' and 'Christian' marriage: the state of the question*, in CHRISTIANITY AND SOCIETY: THE SOCIAL WORLD OF EARLY CHRISTIANITY 190 (noting that after Constantine, husbands could financially benefit if divorce was the wife's “fault”), (EVERETT FERGUSON ed. 1999).

⁸⁴ Case in point: while *ketubbah* actually means marriage contract, it is commonly used in rabbinic literature to refer specifically to the dowry payment. In other words, the marriage contract and the dowry are equivalent.

⁸⁵ There are two relevant papyri from Nessana (in the Negev). The first (document 33) dates to the 6th century (pre-Islamic) and is between Stephan and Sergius, father of Sarah; Stephan retained the dowry and was given back the dowry in order to divorce Sarah. CASPER J. KRAEMER, *EXCAVATIONS AT NESSANA. NON-LITERARY PAPYRI 104-106* (Princeton University Press. 1958). The second (document 57) dates to 689 CE (post-Islamic, under the Umayyad empire) and is an agreement between Nonna and John (a priest) that is signed by seven witnesses. Id. at, 161-167. Nonna's document states that she “waives all property claims, and asks for a divorce or release.” Id. at, 162. Kraemer suggests that document 57 is related to a *libellus repudii* – a document of repudiation that Theodosius II (d. 450 CE) required (in Nov. Th. 12 pr. enacted in 439 CE) either spouse to send to the other in a divorce. Kraemer further proposes that document 57 resembles other 6th century papyri of repudiations – including one (POxy 129) sent from a father-in-law to a husband. Id. at.

themselves to receive a manumission decree that mimics a divorce decree in Jewish law.⁸⁶ Similarly, the Qur’ānic verse that grants women the option of initiating divorce indicates that women may “ransom” themselves.⁸⁷ There is a late antique exception that, perhaps, proves the rule: while a wife may repudiate her husband according to the late antique *Corpus Juris Civilis* (Roman legal code), the husband does not pay a dowry, whereas the wife pays a dowry in order to marry and her husband profits from it during the marriage.⁸⁸ Moreover, Near Eastern women of higher social status had relatively more access to divorce, further indicating that financial means figured into a woman’s ability to procure a divorce.⁸⁹

Recognition of the diversity of late antique Near Eastern legal practices and women’s agency suggests that there were a variety of legal maneuvers for women to obtain divorces. It should be noted that judicial involvement likely varied according to region – with some areas functioning without an official court. We may characterize this period as being legally heterodox.

⁸⁶ Mishnah, Gītṭīn 1.4 (comparing delivery of divorce and emancipation documents). P. Talmud, Gītṭīn 1:3 (writs of divorce and writs of manumission are treated the same). The slave’s emancipation decree is *get shikhrūr* (גֵּט שְׁחִירָוּר) and a woman’s divorce decree is *get nashīm* (גֵּט נָשִׁים). See also B. Talmud, Gītṭīn 9a (similarities between divorce and emancipation documents) and Qiddushin 16a (discussing slaves redeeming themselves by payment).

⁸⁷ Qur’ān 2:229 (a wife may “redeem” herself from a marriage).

⁸⁸ Dig. 23.3.1 *et seq* (woman pays dowry at marriage); Dig. 24.3.1 *et seq* (elaborating various dowry-related cases and husband’s rights to dowry’s profits); Dig. 24.2.1 *et seq* (wife or husband may repudiate spouse) in THE DIGEST OF JUSTINIAN (ALAN WATSON trans., University of Pennsylvania Press revised English-language ed. 1998). Although redacted in the 6th century, the Digest of Justinian contains legal traditions dating to earlier generations of jurists, including to the Roman republican period. Beirut’s Roman law school was destroyed in an earthquake in 551 CE and it is unclear to what extent formal Roman law was subsequently taught or practiced in the region. I use the term Roman provincial law in recognition of the hybrid Roman and customary practices that were likely prevalent in the Near East prior to the Arab/Muslim conquests.

⁸⁹ For instance, in the Parthian period, “In contrast to the legal limitations imposed upon the commoners, the noblewomen could easily divorce their husbands. This class privilege, judging by the tenacity of legal and social institutions, must have continued in Sasanian times.” Muhammad A. Dandamayev, et al., Divorce (December 15, 1995). This same article notes that a woman who consented to divorce lost some of her financial rights. Also, in Palestine, “Some rich or influential Jewish women divorced their husbands under the Roman law.” Brewer, 356.

Medieval era (750-1400 CE)

Legal systematization and professionalization transformed legal practice in the Near East. Marriage and divorce became institutionalized in the medieval era. By the twelfth century, divorce became a primarily court-mediated process and some court intervention became normative for most divorce situations.⁹⁰ The professionalization and centralization of legal education resulted in the consolidation of juristic opinions.⁹¹ Some form of legal orthodoxy is evident in both Jewish and Islamic legal texts that present a hierarchy of divorce practices:

- (1) husband divorces wife and pays full divorce settlement;
- (2) court divorces husband and wife because of husband's impotence, defects, or unreasonable behavior; husband pays full divorce settlement;
- (3) husband divorces wife or wife divorces husband; husband does not pay divorce settlement or pays only part of the settlement because wife has agreed to accept less or has been declared recalcitrant.

The third category is an intentional collapse of two distinct forms of divorce that became ambiguous in the medieval period. The divorce of a recalcitrant wife in the Jewish legal tradition and the forfeiting wife in the Islamic legal tradition are procedurally the same: they are both situations of women acting to divorce their husbands and losing some money in the process. Similarly, the formalist expectation that a Jewish husband deliver a divorce decree or that a Muslim husband consent to the wife's divorce settlement are both legal-formalist perspectives that gained ascendancy in the medieval periods.

⁹⁰ That wife-initiated divorce occurred in an earlier period without court intervention is substantiated by juristic texts. See footnote **Error! Bookmark not defined.**

⁹¹ The transformation of study circles or networks into academies was a regional process evident among both Muslims and Jews. On the apprenticeship or study circle model of rabbinic legal education prior to the Islamic period, see DAVID M. GOODBLATT, *RABBINIC INSTRUCTION IN SASANIAN BABYLONIA* (Brill. 1975). For a similar narrative history of Islamic legal instruction, see HALLAQ, *The origins and evolution of Islamic law*, 57-78.

It may be possible to discern similar shifts in juristic views of marriage and divorce in how jurists adjudicated temporary marriage: widely practiced in late antiquity, temporary marriages were gradually marked as deviant in the medieval era by Sunnī jurists.⁹² One of the reasons Sunnī jurists offered as evidence of temporary marriage's illegitimacy is that, since the marriage automatically expired at the end of the specified duration, it did not end with a divorce.⁹³ Orthodox jurists appear to have been anxious about women being able to end marriages without going to court; they made a woman's status the subject of institutional oversight.

In all the divorce types enumerated above, men or women pay a divorce settlement depending on which party was considered – by the court or customary norms – to be the breaching party. Generally, women who initiated or demanded divorce in the absence of judicially-recognized justifications lost money in the divorce process. Between late antiquity and the middle ages, these judicially-recognized justifications became more formalized. There is a substantive difference in how the exchange is abstracted: whereas earlier divorce was akin to a contract dissolution (modeled after ransoming or receiving an emancipation decree), in this period, divorce became a contractual breach (modeled after a market procedure, or termination of a labor contract). Just as the employer-employee relationship is a legally rationalized version of the master-slave relationship, so too is medieval divorce a judicially rationalized version of late antique divorce in the Near East. Market dynamics and property-ownership indisputably

⁹² Both Jews and Muslims appear to have practiced temporary marriages throughout the late antique period, but gradually marked it as heretical. The legitimacy of temporary marriages became a sectarian issue between Sunnīs and Shī'īs in the tenth century. I presented a paper on temporary marriage among medieval Muslims and Jews with Zvi Septimus at the Jewish Law Association meeting on July 31, 2012; we are preparing an article for publication that expounds on that presentation.

⁹³ 'ALĪ IBN MUḥAMMAD ṬABĀṭABĀ'Ī (D. CA. 1816), RIYĀḍ AL-MASĀ'IL FĪ BAYĀN AL-AḥKĀM BI-AL-DALĀ'IL v. 7, p. 25 (Imāmī Shī'ī: there is no divorce in a temporary marriage) (Dār al-Hādī. 1992). AL-SHĪRĀZĪ (D. 1083; IRAN), al-Muhadhdhab, v. 2, p. 54 (Shāfi'ī: temporary marriages are void because divorce, inheritance, and other characteristics of marriage are not present).

changed between late antiquity and the medieval era in ways that directly influenced the daily lives of women. While there is undoubtedly a connection between the region's legal and economic history, these economic changes cannot be reconstructed with the available historical sources.⁹⁴ It is possible that the changes enumerated here reflect broader shifts in the relationships between contract and property.

Jurisprudential rhetoric about recalcitrant wives should be understood as disguising situations of women demanding divorces and using a variety of legal strategies to obtain a divorce. Restrictions on a wife's ability to initiate a divorce created a fault-system of divorce that is familiar in a variety of other contexts.⁹⁵ Late medieval debates about Gaonic practices were not unique, but rather reflect a socio-legal process that is evident in both Jewish and Islamic legal texts of the period: a wife's ability to divorce her husband became more deeply embedded within legal procedures that complicated an older practice of women simply "paying" for a divorce. This process is discernible in the increasing emphasis on identifying one of the spouses as being "at fault" with the consequence of "paying" for the divorce.

By appreciating that the relationship between these legal systems was one of a shared social space and historical tradition, we can begin to investigate what parallel legal transformations can tell us about their socio-political contexts. Muslim and Jewish jurists did not elaborate comparable legal schemata for divorce because they were building on similar scriptural texts or legal precedents – indeed, they were not. Nor did they "borrow" from the "influencing" legal system of the "other." Instead, the schemata are essentially alike because they reflect the

⁹⁴ As Gordon has noted, "Because the economy is partially composed of legal relations, legal and economic histories are not histories of distinct and interacting entities but simply different cross-cutting slices out of the same organic tissue." Robert W. Gordon, *Critical legal histories*, 36 STANFORD LAW REVIEW, 124 (1984). See also Ron Harris, *The encounters of economic history and legal history*, 21 LAW AND HISTORY REVIEW 297(2003).

⁹⁵ Lawrence M. Friedman, *A dead language: divorce law and practice before no-fault*, 86 VIRGINIA LAW REVIEW 1497(2000).

comparable customary practices, socio-political circumstances, and jurisprudential logic of Near Eastern legal culture.

Speculating on the interwoven narrative

I have presented a Jewish chronology, followed by an Islamic chronology, and then finally a Near Eastern story. I contend that the narrative of Near Eastern legal pluralism is a more exact and coherent interpretation of the historical evidence than the two preceding chronologies. Moreover, the interwoven narrative is not implicated in any particular self-justificatory or orthodox belief; it is then relatively more objective.⁹⁶ The crux of the interwoven narrative is that changes occurred between the eighth and twelfth centuries that resulted in limitations on women's abilities to initiate divorces.⁹⁷ It should be noted that consumers of these legal systems likely demanded more judicial intervention as a means of clarifying domestic relationships that had significant financial implications (inheritance, post-divorce alimony, and maintenance, etc.). But without sources that give "voice" to these consumers, it is difficult to reconstruct how, why, or when they sought court involvement in marriage and divorce. Consequently, these micro-histories offer limited explanations and it is necessary to consider the macro-context of this case study on wife-initiated divorce. The historical sources do demonstrate that whereas in late antiquity women had more flexibility to simply divorce their husbands without state (whether Byzantine, Sasanian, or, later, Islamic) involvement, by the medieval era divorce had become a state-dominated procedure. I want briefly to consider what broad political and social processes shaped this legal change.

⁹⁶ I define objectivity in post-foundationalist terms. Bevir asserts that "Historians can justify their theories by showing them to be objective, where objectivity arises not out of a method, not a test against pure facts, but rather a comparison with rival theories." MARK BEVIR, *THE LOGIC OF THE HISTORY OF IDEAS* 104 (Cambridge University Press, 1999).

⁹⁷ Not coincidentally, more historical evidence survives from the 12th century than from the 8th century. This certainly has an effect on how we perceive historical change, but the changes enumerated here do not appear to be fabrications of the historical evidence.

In both legal systems, the role of jurists in declaring divorces intensified and jurists thereby staked more control for themselves and, by extension, for husbands.⁹⁸ In late antiquity, divorce often occurred without judicial intervention: Jewish men delivered notarized divorce decrees and Muslim men pronounced an oral divorce statement, but neither procedure necessarily necessitated court registration or involvement; Jewish or Muslim women simply left the homes of their husbands and refused to return.⁹⁹ But in the medieval era, local courts – proliferating throughout the empire – gradually came to process most divorces. The courts, in turn, were staffed by jurists who were being trained in religious institutions of learning that were steadily becoming more technical and bureaucratic. The informal legal circles and networks of the late antique period transformed into the grand academies of learning that dictated the form and substance of legal education.¹⁰⁰ The hundreds of legal schools that existed at the beginning of Islamic history consolidated into the several that came to dominate in the medieval era; likewise, numerous Jewish sects disappeared as rabbinic Judaism came to ascendancy. While the diversity of academies of learning preserved some of the region’s legal plurality, the boundaries between legal orthodoxy and legal heresy were being defined ever more narrowly. These changes in the transmission of knowledge and identification of religious authority were occurring simultaneously among Muslims and Jews in the Near East.

What the interwoven narrative further indicates is that modifications in a woman’s access to divorce is one site where we can witness Jewish and Muslim jurists responding to regional,

⁹⁸ An exception, however, is that Rabbenu Gershom (d. 1028 CE) in Germany “enacted a decree which made it impossible for a husband to divorce his wife against her will.” RISKIN, *A Jewish woman’s right to divorce*, xii, 109.

⁹⁹ While papyri of marriage contracts survive from the late antique Islamic period, I was unable to locate divorce documents in the Arabic Papyrology Database. This could be an accident of historical survival, but I suspect it reflects that divorce was less institutionalized in late antiquity than in the medieval era, from which both marriage and divorce documents survive.

¹⁰⁰ See my co-authored pieces on Islamic legal history in IRA M. LAPIDUS, *ISLAMIC SOCIETIES TO THE NINETEENTH CENTURY: A GLOBAL HISTORY* (Cambridge University Press. 2012).

socio-economic and political changes. In both legal systems, the notion that the breaching party should suffer a financial loss underlies the medieval juristic discourse on divorce. Changes in women's financial autonomy likely corresponded to their ability to initiate divorce by paying out divorce settlements. But the available historical evidence does not permit a clear analysis of the economic changes that accompanied the legal changes described here. As previously mentioned, the medieval processes of urbanization and commercialization – and their effects on law – cannot be easily measured. Likewise, it is unclear if a demographic shift in the number or age of men resulted in increased limitations on women's divorce options or protection of men's status; for instance, there may have been an interest in preventing women from divorcing their husbands while the latter were away at war. There are many questions that cannot be answered.

But there is a specific question for which we can articulate a relatively substantive answer: how did the legal profession change? Broad transformations in the state and in religious institutions had concrete consequences for the legal profession. Recent research has revealed not only that the number of judges increased, but also that their salaries doubled in the mid-eighth century as the 'Abbāsīd Empire (750-1258 CE) began a gradual process of systematizing and centralizing its empire.¹⁰¹ These 'Abbāsīd judges received higher salaries because the empire was more prosperous, there was greater demand for judicial services, and these judges had more training than their predecessors. This legal professionalization resulted from the growing strength and diffusion of institutions of religious learning and training, which appointed or designated jurists for both Muslim and Jewish subjects.¹⁰² Judges transformed a late antique practice of divorce as mediation into a medieval practice of divorce as judicial procedure.

¹⁰¹ Wadād al-Qāḍī, *The salaries of judges in early Islam: the evidence of the documentary and literary sources*, 68 JOURNAL OF NEAR EASTERN STUDIES (2009).

¹⁰² See my co-authored pieces in LAPIDUS, *Islamic societies*.

IV. Conclusions

The syncretic framework presented here emphasizes understanding legal systems through historicization and contextualization; it also offers a model to be applied to other comparative legal studies. This mode of inquiry refutes the reification of religions that leads to false assumptions about the religion's "essence" or "primordial nature." Religious communities, like all communities, are the products of their contexts and cannot be understood as transhistorical (or universal) categories.¹⁰³

The reader may wonder how medieval legal opinions and procedures are relevant to contemporary realities, considering the myriad socio-political and legal changes of the early modern and modern periods. Beyond the precedential value of these jurisprudential ideas, their canonical status keeps them germane. The Islamic chronology of wife-initiated divorce can be concisely continued: The Iraqi-based Ḥanafī school – one of the four surviving orthodox Sunnī schools of law that became dominant during the medieval period – provided women with the least divorce options;¹⁰⁴ this school became the official legal school of the Ottoman empire, whose family law codes are the basis of family laws in contemporary Middle Eastern states.¹⁰⁵ In the early modern period, Ottoman court records attest to the common practice of women paying for divorces.¹⁰⁶ Divorce law reforms during the twentieth century in the Middle East

¹⁰³ As Asad has noted, "a transhistorical definition of religion is not viable." ASAD, *Genealogies of religion*, 30.

¹⁰⁴ By the early modern period, the Ḥanafī school primarily recognized sexual impotence as a valid grounds for a woman to initiate divorce, but (unlike the other three orthodox schools of law) permitted women to include marriage contract stipulations that would facilitate their divorce demands. See footnote 58. See also JOHN L. ESPOSITO, *WOMEN IN MUSLIM FAMILY LAW* 53 (Syracuse University Press. 1982).

¹⁰⁵ Id. at. See also Leila Ahmed, *Early Islam and the position of women: the problem of interpretation*, in *WOMEN IN MIDDLE EASTERN HISTORY* 61, (NIKKI KEDDIE & BETH BARON eds., 1991).

¹⁰⁶ "In the seventeenth and eighteenth centuries, *hul* (Arabic *khul'*), divorce, whereby a wife materially compensates her husband in exchange for his consent to divorce, was a common practice in the empire from Istanbul to Cairo and points in between." Madeline C. Zilfi, *Muslim women in the early modern era*, in *THE CAMBRIDGE HISTORY OF TURKEY: THE LATER OTTOMAN EMPIRE, 1603-1839* 247, (SURAIYA FAROQHI ed. 2006).

primarily modified Ḥanafī doctrines.¹⁰⁷ In recent years, several states have facilitated judicial divorce decrees under the doctrine of *khul*.¹⁰⁸

Similarly, the Jewish chronology of wife-initiated divorce can be briefly continued: Post-medieval rabbinic authorities viewed coercing a husband to divorce a recalcitrant wife as an “innovation” resulting from “outside (i.e., Islamic) influence” and therefore rejected it.¹⁰⁹ But even in the early modern era, Jewish women relinquished their financial rights to acquire divorces in Ottoman courts.¹¹⁰ Modern Jewish courts follow Western Rishonim in effectively denying wives the ability to divorce their husbands without specific grounds.¹¹¹ Contemporary laws are based not simply on “authoritative” or “orthodox” precedents, but on ideologically-based interpretations of legal history.¹¹² I have attempted to demonstrate that these gradual historical processes were contingent, not inevitable.¹¹³ While some may choose to use historicism as a normative legal strategy, specific doctrinal changes will likely be unsuccessful if they are not coupled with deep understandings of legal-historical changes and the power dynamics underlying them.

¹⁰⁷ J.N.D. Anderson, *Modern trends in Islam: legal reform and modernisation in the Middle East*, in ISLAMIC LAW AND LEGAL THEORY (IAN EDGE ed. 1996).

¹⁰⁸ Lynn Welchman, *Bahrain, Qatar, UAE: first time family law codifications in three Gulf states*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 169-171, (WILLIAM ATKIN & FAREDA BANDA eds., 2010).

¹⁰⁹ Libson, 99.

¹¹⁰ “The vast majority of the [*khul*] cases involved Muslims, the predominant population of the area, although cases concerning Christians and Jews can also be found here and elsewhere.” Zilfi, 247.

¹¹¹ Riskin claims that “Rabbenu Tam’s reading of the Talmudic texts, notwithstanding its universal acceptance by successive generations of scholars and final incorporation into the codes, was indeed a minority opinion, and that there is no reason not to restore the means—accepted by the Geonim, and the early authorities of North Africa, Spain, and France—of enabling the woman to free herself from an intolerable marriage...there are sufficient legal grounds to do so, and it is up to the contemporary halakhic community to grant the woman her proper due.” RISKIN, A Jewish woman's right to divorce, xiii. Westreich, 207.

¹¹² Avishalom Westreich’s extensive research into wife-initiated divorce “reveal[s] the ideological nature of the controversy regarding the right to divorce.” Avishalom Westreich, *The right to divorce in Jewish law: between politics and ideology*, 1 INTERNATIONAL JOURNAL OF THE JURISPRUDENCE OF THE FAMILY 177, 178 (2010).

¹¹³ This is the objective of genealogy. See Bevir.

Understanding the porous frontier between Jewish and Islamic legal systems necessitates combining thick descriptions of law with historically contextualizing narratives.¹¹⁴ Late antique Jewish and Muslim jurists continued, modified, and practiced Near Eastern legal pluralism. This case study on a woman's access to divorce has demonstrated the significance of both comparative and historical examination of doctrinal issues, but the implications for social identity are countless.¹¹⁵ In both Jewish and Muslim traditions, identity is intimately intertwined with law; consequently, challenging hermetic presumptions of each legal system by demonstrating their integrated histories contests essentialized identity claims. An anti-essentialist understanding of law will facilitate exploring the dialectical interchange between these legal systems, thereby illuminating the cultural and situational contexts in which laws are formulated from their antecedents – customary practices.¹¹⁶

The evaluation of historical evidence by jurists, laypeople, and historians of both Jewish and Islamic legal systems is deeply embedded within an inherited tradition of unchallenged presumptions. In presenting this historical evidence, I have attempted to illustrate how contemporary understandings of law are entangled within orthodox narrative assumptions. In so doing, I have chosen to elucidate aspects of Jewish and Islamic legal historiography silenced by orthodoxy. There are more stories of Jewish and Islamic laws that remain untold.

¹¹⁴ In other words, I seek a balance between synchronic and diachronic explanations. BEVIR, *The logic of the history of ideas*, 252.

¹¹⁵ Glenn observes that “Recognition and acceptance of the diverse legal traditions of the world has implications for the identities which people in the world give themselves. Recognition of other traditions as partially your own means adhering, however partially, to those traditions. It means identifying with them in some measure. Identity then becomes less clear...” H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 360 (Oxford University Press. 2007).

¹¹⁶ Sally Engle Merry, *Legal pluralism*, 22 *LAW & SOCIETY REVIEW* 869, 889-890 (1988).