

# Every Law Tells a Story: Orthodox Divorce in Jewish and Islamic Legal Histories

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Every law, when probed and prodded, tells a story about its historical trajectory, a nonlinear 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 late antique and medieval eras.<sup>1</sup> The received tradition narrates a woman's minimal agency in divorce—in both Jewish and Islamic law—as intrinsic.<sup>2</sup> It is widely known—or presumed—that Jewish and Muslim women have relatively less access to divorce than their male counterparts in present-day Jewish and Islamic courts.<sup>3</sup> In both traditions, women can encounter difficulties in obtaining divorces.<sup>4</sup> 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.<sup>5</sup> I argue that changes in women's divorce

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1. 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.

2. 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 *infra* Section IV, Disenchanting the Orthodox Narratives.

3. "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 XII JEWISH LAW ASSOCIATION STUDIES (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 Islamic Law Project, *Legal Profiles*, EMORY UNIV. SCH. LAW (2002), available at <http://www.law.emory.edu/ifl/index2.html>.

4. For a discussion of the Jewish chained wife (the *agunah*, a woman unable to obtain a divorce decree), see 1 BERNARD S. JACKSON, *AGUNAH: THE MANCHESTER ANALYSIS* (2011). By way of example, see a modern United States case, *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983), which found enforceable a Jewish marital agreement requiring fulfillment of Jewish divorce laws. See also MICHAEL J. BROYDE, *MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA* (2001). In this Article, I translate *get* 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 L.Q. 2 (2001). See also Muhammad Munir, *Judicial Law Making: An Analysis of Case Law on Khul' in Pakistan* (Apr. 5 2012) (working paper), available 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.

5. While some feminists and some religious reformers may find that this Article resonates

options are manifestations of multidimensional historical processes that illustrate law's profoundly contingent contexts.<sup>6</sup> Divorce in Jewish and Islamic legal systems underwent parallel transformations between the late antique (roughly, 250–800 CE) and medieval (roughly, 800–1450 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. In addition, this Article resists the conventional heuristics of comparative legal studies by replacing notions of “influence” or “transplant” with recognition of parallel legal changes and shared legal culture.

Legal communities use narratives to illustrate legal rules and 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” and illustrate how they are espoused by both historical actors and contemporary scholars.<sup>7</sup> This Article employs historicism and thick descriptions of law to challenge those orthodox narratives.<sup>8</sup> Influencing the outcome of those discussions, in terms of specific legal norms, is not my objective here.<sup>9</sup> Rather, the underlying aim of this piece is to use historicism to challenge the legal authority of authoritarian groups.<sup>10</sup> The narration

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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. See CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTICING SOLIDARITY* (2003) (explaining that feminist strategies are not homogenous).

6. 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 ed., 1984).

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

8. By historicism, I mean specifically post-foundationalist, radical historicism. See Mark Bevir, *What is Genealogy?*, 2 J. PHIL. HIST. 263 (2008) [hereinafter Bevir, *What is Genealogy?*] (explaining radical historicism). Radical historicism is distinct from general historicist approaches. See Mark Bevir, *Why Historical Distance Is Not a Problem*, 50 HIST. & THEORY 24 (2011). 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.

9. I intentionally abstain from modern and anachronistic conclusions. This is an ethical stance in opposition to the totalizing project of modernity. See, e.g., TALAL ASAD, *GENEALOGIES OF RELIGION* (1993).

10. Similarly, 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 over certain issues in Islamic legal history.” KHALED M. ABOU EL FADL, *AND GOD*

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.<sup>11</sup>

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.<sup>12</sup> 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 forces of change in these two “religious” legal systems are not so different than in 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, 250–800 CE) and offers some provisional explanations for why women’s divorce options became more limited between 800 and 1450 CE). This case study indicates that comparative legal history—as implemented in this Article—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 or uniform.<sup>13</sup> Jewish and Islamic divorce laws tell stories

KNOWS THE SOLDIERS: THE AUTHORITATIVE AND AUTHORITARIAN IN ISLAMIC DISCOURSES 35 (2001).

11. On *nomos*, see Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 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 J.L. & HUMAN. 17 (2005).

12. 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 to RELIGION AND THE SECULAR: HISTORICAL AND COLONIAL FORMATIONS* 1, 6 (Timothy Fitzgerald ed., 2007).

13. The “Near East” (and its modern equivalent, the “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 231,

that are sporadic, unpredictable, and barely audible under the faux euphony of orthodoxy.

#### I. DEFINING WIFE-INITIATED DIVORCE<sup>14</sup>

It is widely presumed that men have unlimited access and women have restricted access to initiate divorce in both Jewish and Islamic law.<sup>15</sup> This presumption, however, simplifies a 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.<sup>16</sup> 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.<sup>17</sup> 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 divorce.<sup>18</sup> In describing women as

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. I recognize that “Near East” is not a fixed region and that the geographic references in this Article are fluid, rather than systematic.

14. 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 University of California, Berkeley (Oct. 14, 2010).

15. 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, *Gittin* 9:10 (recounting debate between Shammai and Hillel about a husband’s legitimate grounds for divorcing his wife—adultery or any reason); *see also* Babylonian Talmud, *Gittin* 90a. Generally, Islamic law does not restrict a husband’s ability to divorce his wife, except by limiting the number of times a husband can divorce the same wife after remarriage.

16. A social history approach of investigating actual divorce processes cannot be sufficiently reconstructed using the available historical evidence.

17. See the discussion in Avishalom Westreich, *History, Dogmatics and Hermeneutics: The Divorce Clause in Palestinian Ketubbot and the Geonic Compulsion of Divorce 2* (Agunah Research Unit, Working Paper No. 15, 2009).

18. 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

autonomous legal actors, this Article does not project modern notions of women's agency.

## II. A JUDAIC CHRONOLOGY OF WIFE-INITIATED DIVORCE<sup>19</sup>

### A. Rabbinic Era (70–620 CE)

There is a thorny scholarly debate surrounding the evidence for Jewish women obtaining divorces or actually divorcing their spouses in antiquity and late antiquity.<sup>20</sup> Without delving into the details, it is evident that the diverse and varied situations of pre- and non-rabbinic Jewish women included wife-initiated divorce.<sup>21</sup> The key documentary evidence is Aramaic marriage contracts of the Elephantine Jewish community dated to the fifth century BCE, which include a stipulation that a wife may initiate divorce and pay her husband a divorce settlement (i.e., not collect her dower).<sup>22</sup> At least some Jewish women were able to divorce their husbands in the antique and late antique periods.

presence.” 3 S.D. GOITEIN, *A MEDITERRANEAN SOCIETY: THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE CAIRO GENIZA* 270 (1978). Muslim women also frequently represented themselves in divorce, as will be discussed below in the Islamic chronology of wife-initiated divorce.

19. The periodization of Jewish legal history and dates of rabbinic texts used in this section are modified versions of the dates used in contemporary Jewish studies. See *THE CAMBRIDGE COMPANION TO THE TALMUD AND RABBINIC LITERATURE*, at xiii–xvi (Charlotte Elisheva Fonrobert & Martin S. Jaffee eds., 2007). For a critical analysis of periodization in Jewish legal history, see Shlomo Zalman Havlin, *On Literary Canonization as a Basis for Periodization in Halakha*, in *RESEARCHES IN TALMUDIC LITERATURE: A CONFERENCE IN HONOUR OF THE EIGHTIETH BIRTHDAY OF SHAUL LIEBERMAN* 148 (Saul Liberman ed., 1983). Since most Jewish legal sources represent rabbinic legal opinions, Qaraite and other sectarian legal practices are not fully represented in this chronology; references to documentary sources are provided whenever possible in an effort to alleviate this imbalance.

20. See David Instone Brewer, *Jewish Women Divorcing Their Husbands in Early Judaism: The Background to Papyrus Seelim 13*, 92 *HARV. THEOLOGICAL REV.* 349 (1999); Bernard S. Jackson, *Some Reflections on Family Law in the Papyri*, in *JEWISH LAW ASSOCIATION STUDIES* XIV 141 (Hillel Gamoran ed., 2002); see also Robert Brody, *Evidence for Divorce by Jewish Women?*, 50 *J. JEWISH STUD.* 230 (1999).

21. “This right of women to divorce their husbands appears to have become a normal part of Egyptian Judaism . . . . This is very different from Palestinian and later rabbinic Judaism where a woman could only demand a divorce on . . . specific grounds[.]” Brewer, *supra* note 20, at 354. Also, in Palestine, “Some rich or influential Jewish women divorced their husbands under the Roman law.” *Id.* at 356 (citing evidence from Josephus). But note that Jewish women may not at this time (under the Herodians, 37 BCE to 92 CE) have perceived divorcing their husbands as being under Roman rather than Jewish law.

22. Friedman notes that “[t]his right is embodied in a stipulation written in the marriage contracts from the fifth century BCE Jewish community of Elephantine. As we learn from the Geniza fragments, such a stipulation was written in the *ketubbot* of Palestine through the eleventh century. Passages that reflect the wife's rights for a divorce can be identified in the Talmudic literature. And in some localities, this usage became accepted legal practice in post-Talmudic times.” 1 MORDECHAI A. FRIEDMAN, *JEWISH MARRIAGE IN PALESTINE: A CAIRO GENIZAH STUDY* 313 (1980) [hereinafter 1 FRIEDMAN, *JEWISH MARRIAGE IN PALESTINE*]; see also MORDECHAI A. FRIEDMAN, *GENIZA STUDIES IN JEWISH MARRIAGE LAW* 4 (1970). Among the documentary evidence that Friedman studied is Babatha's marriage contract (ca. second century CE). See Mordechai A. Friedman, *Babatha's 'Ketubba': Some Preliminary Observations*, 46 *ISRAEL EXPLORATION J.* 55 (1996). For the papyri, see

This evidence of Jewish legal practice contrasts somewhat with the content of rabbinic legal texts.<sup>23</sup> Rabbinic jurisprudence on divorce is ostensibly built around one Biblical verse, Deuteronomy 24:1, which describes a husband delivering a divorce document to his wife.<sup>24</sup> The verse does not specify if this divorce procedure is the only legally valid form of divorce.<sup>25</sup> But rabbinic jurists elaborated a variety of justifications for divorce. In the Tosefta (compiled 220–350 CE), the rabbis claim that a couple may not continue their marriage if either is afflicted with boils.<sup>26</sup> The Mishnah (compiled in the early third century CE) briefly considers when a woman can demand divorce because of her husband's impotence, her "uncleanliness," or her vow not to have sex.<sup>27</sup> The Mishnah also enumerates how a wife gradually loses her divorce settlement for being recalcitrant.<sup>28</sup> Other rabbinic literature enumerates a husband's unreasonable behavior or defects that warrant a husband being forced to divorce his wife.<sup>29</sup> In

THE DOCUMENTS FROM THE BAR KOKHBA PERIOD IN THE CAVE OF LETTERS: HEBREW, ARAMAIC, AND NABATEAN-ARAMAIC PAPYRI 118–141 (Yigael Yadin et al. eds., 2002). Goitein concurred with Friedman in 3 GOITEIN, *supra* note 18, at 264.

23. Bernard Jackson has observed that "the social institution of marriage, as reflected in the narratives, appears to deviate from the legal institution, as reflected in the laws . . . the narratives conceive of divorce as being performed by expulsion or desertion while the law assumes that any such expulsion (he 'sends her out of his house', Deut. 24:1, 3) is preceded by the writing and delivery of a *sefer keritut*." Bernard S. Jackson, *The 'Institutions' of Marriage and Divorce in the Hebrew Bible*, 56 J. SEMITIC STUD. 221, 243 (2011).

24. "Suppose a man enters into marriage with a woman, but she does not please him because he finds something objectionable about her, and so he writes her a certificate of divorce, puts it in her hand, and sends her out of his house[.]" *Deuteronomy 24:1* (The New Oxford Annotated Bible, 2010).

25. For a brief introduction to Jewish divorce laws, see RACHEL BIALE, WOMEN AND JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC SOURCES 70–101 (1984). For a more extensive examination, see SHLOMO RISKIN, A JEWISH WOMAN'S RIGHT TO DIVORCE: A HALAKHIC HISTORY AND A SOLUTION FOR THE AGUNAH (2006). Riskin is a major modern Orthodox rabbinic figure, and the arguments he presents in his text come from within an orthodox perspective.

26. TOSEFTA, *Ketubbot* 7:11; see also MISHNAH, *Ketubbot* 7:9-10 (stating that a husband can be compelled to divorce his wife if he has certain blemishes or is repulsive).

27. MISHNAH, *Nedarim* 11:12 (describing three types of women who can be divorced, but retain their dowry). According to this passage, Jewish women used to make three claims (i.e., rape, impotent husband, vow of refusal, or inability to engage in intercourse) that warranted divorce and the full payment of the *ketubbah*, but the rabbinic sages changed these practices. In the late antique Near East, vows were a common aspect of social discourse, such that a woman's vow may be understood as a pretext for initiating divorce.

28. "Recalcitrant," in this Article, is equivalent to the category of *moredet* in Jewish law or *nashiz* in Islamic law—both of which concern a wife who is broadly perceived as disobedient to her husband. (Both terms are also applied to men, but used more frequently to describe women.) *Moredet* is often translated as "rebellious," but I prefer to translate it as "recalcitrant." Moreover, while there is significant rabbinic-legal discussion about what acts constitute recalcitrance (typically, either denial of sex or refusal to perform household chores), I contend that the wife's actions are less significant than the underlying issue of her desire to divorce her husband. In other words, a recalcitrant wife is equivalent to a woman who is seeking a divorce. For a discussion of the *moredet*, see for example MISHNAH, *Ketubbot* 1:2 (wife loses seven dinarim for every week of her recalcitrance).

29. MISHNAH, *Ketubbot* 7:1–5 (discussing various cases in which a husband makes unconscionable/unreasonable restrictions that warrant compelling the husband to divorce); see also *id.*

the Palestinian Talmud (compiled 220–425 CE), the rabbis comment that a woman's right to divorce consists of tormenting her husband until he gives her a writ of divorce.<sup>30</sup> But in the same text, it is suggested that, in accordance with a marriage contract stipulation, a husband should divorce his wife and pay half the dower (*ketubbah*) payment if the woman expresses an aversion to her husband.<sup>31</sup> The Palestinian Talmud also includes a reference to a conditional divorce in which a husband offers his wife a divorce decree if she pays him a specific sum—most likely her dower.<sup>32</sup> The Babylonian Talmud (compiled 200–650 CE) specifies that a woman is entitled to her dower if her husband is infertile or impotent.<sup>33</sup> Moreover, a woman whose husband refuses to provide her conjugal rights can be divorced with the court's intervention and receive her dower.<sup>34</sup>

To summarize, this survey of rabbinic literature indicates the following types of divorce were recognized in late antiquity:

- (1) A husband divorces his wife for whatever reason and pays her dower.<sup>35</sup>
- (2) A rabbinic court compels a husband to divorce his wife<sup>36</sup> and pay the dower because the husband:
  - (a) has physical defects;<sup>37</sup>
  - (b) imposes unreasonable restrictions or makes unreasonable demands;<sup>38</sup>
  - (c) is sterile, impotent, or refuses to provide conjugal rights;<sup>39</sup>
  - (d) works in a profession considered disgusting;<sup>40</sup>

7:8–10 (stating that blemishes of which a wife was unaware warrant divorce); PALESTINIAN TALMUD, *Ketubbot* 7:1–5 (describing husband's behavior that warrants divorce). See also the corresponding discussions in the BABYLONIAN TALMUD, *Ketubbot* 71a–71b, 77a.

30. PALESTINIAN TALMUD, *Ketubbot* 5:1.

31. PALESTINIAN TALMUD, *Ketubbot* 7:6. A marriage contract stipulation suggesting a wife's ability to initiate divorce is also acknowledged in Palestinian Talmud, *Ketubbot* 5:9.

32. PALESTINIAN TALMUD, *Gittin* 7:5 (stating that if he says, "[T]his is your get if you pay me 200 zūz," then she is divorced and pays). Two hundred zūz (silver pieces) is the default dower amount for a previously unmarried Jewish woman. This particular divorce negotiation resembles one form of *khul'* divorce in Islamic legal practice, which will be discussed below.

33. BABYLONIAN TALMUD, *Ketubbot* 65a–65b.

34. MISHNAH, *Ketubbot* 5:6–7 (stating that a husband's refusal to provide conjugal rights is grounds for adding to a woman's dower). BABYLONIAN TALMUD, *Ketubbot* 61b (stating that if a husband refuses to provide his wife's conjugal rights for longer than specified periods, he must divorce her and pay her dower).

35. See *supra* text accompanying note 15. The House of Shammai's argument to limit a husband's ability to divorce was refuted by the House of Hillel. See MISHNAH, *Gittin* 9:10. But the *ketubbah* payment was perceived as an impediment to the husband's otherwise unencumbered right to divorce. See BABYLONIAN TALMUD, *Ketubbot* 11a and *Yebamot* 89a.

36. MISHNAH, *Gittin* 9:8; see also BABYLONIAN TALMUD, *Gittin* 88b (explaining that a Jewish court may compel a divorce, but a non-Jewish court may only do so based on the decision of a Jewish court; specific type of divorce decree, גט מערשה); MISHNAH, *Arakhin* 5:6 (stating a husband is compelled to give a writ of divorce to his wife until he says he wills it).

37. MISHNAH, *Ketubbot* 7:9.

38. *Id.* at 7:1–5.

39. *Id.* at 5:6; see also BABYLONIAN TALMUD, *Ketubbot* 91a.

- (e) or because the wife has made a vow prohibiting her husband from touching her.<sup>41</sup>
- (3) A husband divorces his wife and does not pay the dower because the court has declared the wife to be recalcitrant (i.e., a *moredet* or in breach of contract),<sup>42</sup> or because the wife
- (a) apostatized, ignored a Jewish precept, or acted immorally;<sup>43</sup>
- (b) refused sexual relations with her husband or performance of “wifely duties”;<sup>44</sup>
- (c) or has blemishes or physical defects that impinge the marital relationship.<sup>45</sup>

The practical consequences of these rabbinic ideas on divorce likely varied from community to community.<sup>46</sup> Since the Palestinian tradition included a wife’s right to divorce in the marriage contract, there may have been distinctions between Palestinian and Babylonian divorce practices.<sup>47</sup> Moreover, the rabbinic prerogative of annulling a marriage may have, in practice, been a means of granting a woman a divorce (without the husband’s deliverance of a divorce decree).<sup>48</sup> Still, this brief schema delineates the basic ideas circulating about divorce within late antique rabbinic legal communities.

#### B. Geonic Era (620–1050 CE)<sup>49</sup>

In 650/651 CE, Geonic rabbis issued a decree (*taqqanah*) that a recalcitrant wife (*moredet*) could procure a divorce immediately and not lose her dower (*ketubbah*).<sup>50</sup> This decree abandoned the twelve-month waiting period and loss of

40. MISHNAH, *Ketubbot* 7:10.

41. See *supra* text accompanying note 27.

42. MISHNAH, *Ketubbot* 5:5–7 (defining a recalcitrant wife); PALESTINIAN TALMUD, *Ketubbot* 5:8 (stating that a “writ of rebellion” is a charge against or a deduction of the wife’s ketubbah payment). BABYLONIAN TALMUD, *Ketubbot* 63a (stating that the ketubbah of a recalcitrant wife is reduced to depletion and she is divorced).

43. MISHNAH, *Ketubbot* 7:6.

44. *Id.* at 5:7.

45. *Id.* at 7:8.

46. For a broad overview, see HISTORY OF JEWISH WOMEN IN LATE ANTIQUITY (Tal Ilan ed., 1994).

47. 1 FRIEDMAN, JEWISH MARRIAGE IN PALESTINE, *supra* note 22, at 313; see also Westreich, *supra* note 17, at 18–21.

48. BABYLONIAN TALMUD, *Ketubbot* 3a and *Gittin* 33a (explaining that rabbis can annul betrothal by returning the dower money or by declaring the sexual act as non-marital, which corresponds to the two means of enacting a marriage); see Avishalom Westreich, *Umdena as a Ground for Marriage Annulment: Between Mistaken Transaction (Kiddushei ta’ut) and Terminative Condition*, 20 JEWISH L. ASS’N STUD. 330 (2010).

49. On Geonim, see ROBERT BRODY, THE GEONIM OF BABYLONIA AND THE SHAPING OF MEDIEVAL JEWISH CULTURE (1998).

50. This is documented in the Geonic responsa of Rav Sherira Gaon (d. 1038, Babylon): Originally, the legal requirement was that we do not coerce the husband to divorce his wife if she requests a divorce, except in those [cases] in which the Rabbis stated that they do coerce him to divorce her . . . . Later, they made another decree that they would make an

dower stipulated for a recalcitrant wife in the Babylonian Talmud.<sup>51</sup> Historical sources indicate that this decree was viewed by the majority of Geonim as a legal enactment validated by judicial authority and social need.<sup>52</sup> Genizah evidence<sup>53</sup> indicates that in the medieval Near East, Jewish women could initiate divorce by

announcement concerning her for four consecutive weeks . . . . Finally, they decreed that they announce about her for four weeks and she would forfeit everything. Nevertheless, they did not coerce the husband to write her a divorce document . . . . And they decreed that they make her wait for a divorce for 12 months (from the time she asks for a divorce) because they might reconcile and if they do not reconcile after 12 months, they coerce the husband and he writes a divorce document for her. After our Saboraic rabbis, when our sages noticed that the daughters of Israel were going and relying upon Gentiles to acquire for them divorce documents by force from their husbands and there would be those who write divorce documents by coercion and it would be doubtful whether it was a legal or illegal divorce and this would lead to calamity . . . . They decreed in the time of Mar Rav Rabba son of Rav Hunai (may they rest in Eden) about a recalcitrant wife who requests a divorce, that all of the *nikhsei tẓon barzel* (dowry) that she brought with her [into the marriage] he must pay for and that even what was destroyed or lost he must pay her . . . . And they coerce him and he writes for her a divorce document immediately and she receives one or two hundred [the standard dower]. By this custom we practice today as we have for three hundred years and more. So should you do as well.

BENJAMIN MENASSEH LEWIN, OTSAR HA-GE'ONIM: TESHUVOT GE'ONE BAVEL U-FERUSHEHEM 'AL PI SEDER HA-TALMUD 8:99–102 (1928). Also cited in RISKIN, *supra* note 25, at 56–59. Rav Sherira Gaon also mentions this decree in THE IGGERES OF RAV SHERIRA GAON 126 (Nosson Dovid Rabinowich trans., 1988). See also BRODY, *supra* note 49, at 62–63; GIDEON LIBSON, JEWISH AND ISLAMIC LAW: A COMPARATIVE STUDY OF CUSTOM DURING THE GEONIC PERIOD 111 (2003) While I translate *taqqanah* as decree in this paper, it is to avoid confusing the reader. The literal meaning of *taqqanah* is to straighten and it has the connotation of establishing, instituting, or ordaining a legal rule.

51. In this Article, I assume that by 650 CE, either the Babylonian Talmud had been redacted or much of the material in it was associated with a corpus that would later be identified as the Babylonian Talmud. “In the case where a woman ‘rebels’ against her husband, her *ketubbah* (dower) may be reduced by seven denarii a week. R. Judah said: seven tropaics. Our Masters went back and deliberated that an announcement regarding her shall be made on four consecutive Sabbaths and that then the court shall send her [the following warning]: ‘Be it known to you that even if your *ketubbah* is for a hundred maneh you have forfeited it.’” BABYLONIAN TALMUD, *Ketubbot* 63b. “We also make her wait twelve months, a [full] year for her divorce, and during these twelve months she receives no maintenance from her husband.” *Id.* at 64a. The relevant passage features the story of a woman being forced to remain married to her husband and implies that it is unwarranted to do so. But note that Westreich identifies the twelve-month waiting period as a late Talmudic stratum. Avshalom Westreich, *Compelling a Divorce? Early Talmudic Roots of Coercion in a Case of Moredet* 12 (Agunah Research Unit, Working Paper No. 9, 2008).

52. A Gaon notes, “And now in the two yeshivas they rule on the recalcitrant wife that even though she seized something from her *ketubbah*, we take it from her and we give it to the husband and we give her a divorce document immediately.” SIMEON QAYYARA (9th century; Iraq), HALAKHOT GEDOLOT § 36, Laws of Marriage. *But see infra* text accompanying note 59.

53. Genizah marriage contracts include explicit stipulations that a wife may relinquish her dower and be divorced “by the authorization of the court.” 2 MORDECHAI A. FRIEDMAN, JEWISH MARRIAGE IN PALESTINE: A CAIRO GENIZAH STUDY 56 (1980). (For an example of Genizah evidence, see the Taylor-Schechter Cairo Genizah Collection at Cambridge University Library TS 13 J 3, fol. 22, copied from S.D. Goitein’s Typed Texts. 07-09-90, N.H. (p).) Document of a full-fledged *bara'ah* (release of spouse from obligations upon divorce) in which husband and wife from al-Mahalla appear before the court of Fustat, Ab 4973/Ab 1524/August 1213. On Genizah sources generally, see Marina Rustow, *The Genizah and Jewish Communal History*, in FROM A SACRED SOURCE: GENIZAH STUDIES IN HONOUR OF PROFESSOR STEFAN C. REIF 289 (Ben M. Outhwaite & Siam Bhayro eds., 2011).

forfeiting some of their rights—what is often described as a “ransom” divorce, in line with the equivalent Arabic terminology.<sup>54</sup> This historical evidence should be emphasized: the Geonic practice of coercing a husband to divorce a “recalcitrant” wife was normative for centuries until its gradual undermining in the late medieval period. In other words, when compared to the Rabbinic period (or, more precisely, rabbinic texts), an additional option *may* have been introduced in which a woman could obtain a divorce decree immediately (instead of waiting twelve months) in exchange for relinquishing part (or all) of her economic rights. This differs from the contract stipulation described in the Palestinian Talmud<sup>55</sup> because an explicit marriage contract stipulation does not appear to have been required and because women appear to have been able to initiate divorce proceedings as a result of the Geonic decree.<sup>56</sup> This form of wife-initiated divorce appears to have been implemented by the Geonim as an extension of the Talmudic category of a recalcitrant wife.<sup>57</sup> In his *Halakhot Pesuqot*, Rav Yehudai Ben Naḥman (d. late

54. See in particular the Judeo-Arabic documents cited in Mordechai A. Friedman, *Divorce Upon the Wife's Demand as Reflected in Manuscripts From the Cairo Geniza*, 4 JEWISH L. ANN. 103 (1981). I concur with Friedman, who notes that “[a] more likely Jewish source for the ransom-divorce may be seen in that practice usually referred to as the Gaonic enactment concerning the moredet, the recalcitrant wife. According to most traditions, this usage, instituted in Babylonia in 650–651 BC, empowered a wife who could not bear living with her husband to initiate divorce proceedings.” Mordechai A. Friedman, *The Ransom-Divorce: Divorce Proceedings Initiated by the Wife in Medieval Jewish Practice*, 6 ISR. ORIENTAL STUD. 288, 301 (1976) [hereinafter Friedman, *The Ransom-Divorce*]. Friedman further contends, “The *iftidā*’ was clearly undertaken by the wife on her own initiative, as a result of her unhappiness in the marriage. The wife had renounced her claims against her husband on condition that he divorce her.” *Id.* at 296. Goitein concurred with Friedman and explained that the Arabic term for release (*barāʾ*) sometimes referred to the divorce decree. 3 GOITEIN, *supra* note 18, at 267–68.

55. PALESTINIAN TALMUD, *Ketubbot* 5:1, *supra* note 30.

56. As will become clear, I challenge the view that this geonic practice “deviated” from Talmudic practice and argue that it should be understood as a customary practice, rather than an “innovative” enactment. Libson suggests that this Geonic *taqqanah* might have been a custom. See Gideon Libson, *Halakhab and Reality in the Gaonic Period: Taqqanah, Minhag, Tradition and Consensus: Some Observations*, in THE JEWS OF MEDIEVAL ISLAM: COMMUNITY, SOCIETY, AND IDENTITY 67, 72–74, 84–86 (Daniel Frank ed., 1995). However, Libson also claims:

There is ample evidence, for example, of women in the category known as ‘rebellious wife’ (*ishah moredet*) appealing to Muslim courts in order to circumvent Jewish law, which would not readily grant them a divorce; in such cases the *geonim* felt it necessary to deviate from talmudic law, in order to keep such women in the frame of Jewish courts . . . Thus, the *geonim* created a *takkanah* (enactment) that a ‘rebellious wife’ could obtain a divorce immediately, rather than wait the extensive time required by rabbinic law, without forfeiting the statutory value of her *ketubbah* (marriage contract).

GIDEON LIBSON, JEWISH AND ISLAMIC LAW, A COMPARATIVE REVIEW 265, § 11 (2007); see also 2 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 658–65 (Bernard Auerbach & Melvin J. Sykes trans., 1994) (discussing the Geonic decree on the recalcitrant wife); RISKIN, *supra* note 25, at 56.

57. Friedman explains that “[a]s far as the Geonim were concerned the fact that a wife could demand a divorce from her husband was not a new element introduced by the enactment.” 1 FRIEDMAN, JEWISH MARRIAGE IN PALESTINE, *supra* note 22, at 324. Elsewhere, Friedman clarifies:

It would seem most likely that the practice which is referred to in our sources as *iftidā*’ and by Saadiah as *xul*’ (*ixtilā*) was nothing but the then accepted procedure for the recalcitrant wife, familiar to us from the Gaonic responsa. The wife’s power to initiate divorce

eight century, Iraq) notes that only a rabbinic court's coercion of a husband is a valid means of compelling a husband to divorce his wife.<sup>58</sup> Rabbi Isaac Alfasi (d. 1103 CE, Maghreb), in his *Sefer ha-halakhot*, written while he was living in Morocco, accepts the Geonic practice (of coercing a husband to divorce a recalcitrant wife), but suggests that it is not based on talmudic practice.<sup>59</sup> Rabbi Hananel ben Hushiel (d. 1053 CE, Tunisia), however, appears to have understood the Geonic decree as permitting a court order that the husband pay the dowry, but not that he deliver a divorce document.<sup>60</sup>

To summarize, Geonic divorce practices included:

- (1) A husband divorces his wife for whatever reason and pays her dowry.<sup>61</sup>
- (2) A rabbinic court compels a husband to divorce his wife and pay the dowry because the husband:<sup>62</sup>
  - (a) has physical defects;
  - (b) imposes unreasonable restrictions or behavior;
  - (c) is sterile or impotent;
  - (d) or works in a profession considered disgusting.
- (3) A husband divorces his wife and does not pay the dowry because the court has declared the wife to be recalcitrant (i.e., a *moredet* or in breach of contract) or because the wife:
  - (a) apostatized, ignored a Jewish precept, or acted immorally;
  - (b) refused sexual relations with her husband or performance of "wifely duties";

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proceedings was thus recognized as standard procedure; and it was not necessary to write a special stipulation in the marriage contract, as was the Palestinian practice.

Friedman, *The Ransom-Divorce*, *supra* note 54, at 302.

58. He is known as Yehudai Gaon. YEHUDAI BEN NAHMAN (D. LATE 8TH CENTURY; IRAQ), SEFER HALAKHOT PESUKOT 342 (Solomon David Sassoon & Neil Danzig eds., 1998) (explaining that it is valid for a non-rabbinic court to coerce a Jewish husband to divorce his wife if a rabbinic court authorizes the coercion).

59. Rabbi Isaac Alfasi is known as the Rif. Westreich notes that

R. Isaac Alfasi, active in the second half of the eleventh century, was the most prominent halakhist in Spain after the geonic period. In his treatise, *Sefer Ha-Halakhot*, widespread throughout Spain (where he took refuge late in his life), he explicitly states that the ruling coercing the husband to divorce his rebellious wife originates in the geonic ordinance rather than in the Talmud itself.

Westreich, *supra* note 3, at 209–10. According to Friedman, "[a]lthough a number of the Gaonic responsa specify that the husband is compelled to issue a divorce some medieval authorities who based themselves exclusively on Alfasi interpreted the Gaonic enactment as if the husband's consent were required." 1 FRIEDMAN, JEWISH MARRIAGE IN PALESTINE, *supra* note 22, at 324.

60. Michael S. Berger, *Maimonides on Sex and Marriage, in MARRIAGE, SEX, AND FAMILY IN JUDAISM* 149, 155–56 (Michael J. Brody & Michael Ausubel eds., 2005).

61. But note that Rabbeinu Gershom (d. 1028 CE, Germany) "enacted a decree which made it impossible for a husband to divorce his wife against her will." RISKIN, *supra* note 25, at xii.

62. These grounds for compelling a husband to divorce his wife are discussed in Geonic responsa. See, e.g., ALBERT HARKAVY, TESHUVOT HA-GEONIM: SHEELOT U-TESHUVOT § 451 (Menorah, Makhon Le-Mehkar Ule-Hotsaat Kitve-Yad U-Sefarim 'Atikim 1959) (1887).

- (c) or has blemishes or physical defects that impinge the marital relationship.
- (4) A wife divorces her husband, receiving either her full dowry or part of it and without waiting twelve months. In practice, it is unclear if the wife actually received the dowry or relinquished it.<sup>63</sup>

The final category was explicitly practiced in the Geonic period, but it is unclear precisely who (husband or court) delivered the divorce decree.<sup>64</sup> Since there is limited surviving historical evidence, we cannot be certain which divorce types were most prevalent.

### C. Era of the Rishonim (1050–1400 CE)

In the post-Geonic era, the Rishonim (roughly, medieval rabbis) further elaborated rabbinic opinions on when a woman could be divorced from her husband.<sup>65</sup> Two subcategories in this period appear to have supplemented the rabbinic “short list” of grounds that warrant a court ordering a husband to divorce his wife: (1) the husband’s adultery<sup>66</sup> and (2) the husband’s transgression of the laws of Moses (or apostasy).<sup>67</sup> A woman’s ability to initiate a divorce without citing one of the grounds specified in the Babylonian Talmud became, during the period of the Rishonim, an issue debated by jurists that generated a variety of regional practices.<sup>68</sup>

Generally, the Rishonim debated a rabbinic court’s ability to coerce a husband to divorce his recalcitrant wife by making conflicting assertions about the so-called “origin” of the law: the Talmud or the Geonic decree. Rashi (d. 1105 CE, France) suggested that the Talmud was the source of the practice.<sup>69</sup> His grandson

63. Goitein notes that the Genizah contains numerous documents indicating that Jewish wives initiated divorce proceedings by renouncing their financial claims (i.e., their dowries) against their husbands. 3 GOITEIN, *supra* note 18, at 265.

64. As in the case of evidence of Jewish women divorcing in antiquity, the interpretation of the historical record is obfuscated by an “orthodox” presumption that only husbands—not rabbinic courts—can deliver the divorce decree. But the evidence of substantive flexibility (i.e., Jewish wives initiating divorces) insinuates some procedural flexibility (i.e., less formalism than the presumption that only husbands may deliver divorce decrees). Moreover, Qaraites permitted judicial divorce decrees. See *infra* text accompanying note 160. In addition, it is unclear if Islamic courts only coerced Jewish husbands to deliver divorce decrees or if they also provided judicial divorce decrees. Goitein mentions Genizah evidence of a Jewish woman who went to a Muslim judge to divorce her husband against his will; the judge may have issued the divorce decree. 3 GOITEIN, *supra* note 18, at 265.

65. Elaboration of Talmudic discussions include: (a) refusal or inability to provide wife sufficient maintenance, JOSEPH BEN EPHRAIM KARO (D. 1575; SPAIN), SHŪLHAN ‘ARŪKH, *Even Ha’ezer*, *Ketubbot* 70:3 (1563); (b) refusal of conjugal rights, *id.* at *Even Ha’ezer*, *Ketubbot* 76:11; (c) husband’s inability to provide maintenance or sex, *id.* at *Even Ha’ezer*, *Gittin* 154:3; (d) husband is compelled to divorce his wife if he engages in a disgusting profession, *id.* at *Even Ha’ezer*, *Gittin* 154:1.

66. *Id.*

67. See also KARO, SHŪLHAN ‘ARŪKH, *Even Ha’ezer*, *Gittin* 154:1.

68. For a thorough discussion of the medieval debates on the recalcitrant wife doctrine, see Westeich, *supra* note 3.

69. Rashi (d. 1105; France) offers the following gloss of *Ketubbot* 63b: “One who says ‘I want *him*’—we should force her by reducing her *ketubbah*. But if she said ‘he is repulsive to me’—I do not want

(Rashbam, d. 1158 CE, France) upheld the decree by ruling that a husband should be coerced to divorce his recalcitrant wife.<sup>70</sup> However, Rashbam's brother, Rabbeinu Tam (d. 1171 CE, France) rejected the Geonic decree of coercing the husband to divorce his wife and effectively claimed that the Geonic practice was unorthodox.<sup>71</sup>

In comparison, Maimonides (d. 1204 CE, Andalusia/Egypt) criticized, but did not entirely reject, Geonic practices pertaining to a wife's ability to demand a divorce as a recalcitrant wife (*moredet*).<sup>72</sup> Viewing the Geonic decree as based on Talmudic practice, Maimonides differentiated between two types of recalcitrant wives: (a) one who "loathes" her husband must forfeit her dower in order for the husband to "be compelled to divorce her immediately"<sup>73</sup> and (b) one who "rebels against her husband merely in order to torment him" becomes the subject of a daily public announcement threatening the forfeiture of her dower if she persists in her recalcitrance;<sup>74</sup> if she persists, then she is prohibited from receiving maintenance (i.e., alimony) for twelve months, when she finally receives her

either him or his ketubbah. *No pressure is placed on her*—to delay her, but rather he gives her a divorce document and she is divorced without a *ketubbah*." *Id.* at 212 (citing RASHI, *Ketubbot* 63b).

70. *Id.* at 212 (citing RASHBAM IN TUR, *Even Ha'ezer*, ch. 77).

71. In ŠEFER HA-YASHAR, Responsa § 24, Rabbeinu Tam (d. 1171; France) explains:

The Geonim decreed that we do not delay her 12 months for a divorce document, but rather we coerce him (to give it). Heaven forbid that our rabbis should increase the mamzerim (bastards) in Israel, for we established that Ravina and Rav Ashi were the end of the "instruction." And granted that the Geonim were able to establish that the *ketubbah* of a woman could be collected on movable property [whereas in Talmudic times it was only collectable on immovable property], based on halakhah or their own opinion, that is a monetary issue. But to permit an invalid divorce document, we do not have the authority from the days of Rav Ashi to the days of the messiah.

RISKIN, *supra* note 25, at 98–99. *See also* Westreich, *supra* note 3, at 212 (citing *Sefer ha-yashar*, RESPONSA § 24 and TOSAFOT, *Ketubbot* 63b). Riskin offers a theory about Rabbeinu Tam's influence:

Insisting that there was no Talmudic precedent for coercing a husband to divorce his wife on the basis of her subjective claim that he was repulsive to her, he rejected the earlier Gaonic decrees. So overwhelming was his personality, and so cogent his legal reasoning, that his ruling influenced all subsequent halakhic authorities. From his time onward, the tide turned in the other direction, and the position of earlier authorities such as Alfasi and Maimonides was rejected. To this day the law is such that a woman who finds her husband distasteful has no legal recourse and must remain tied to a husband she abhors.

RISKIN, *supra* note 25, at xiii; *see also* 2 ELON, *supra* note 56, at 661–62 (explaining that Rabbeinu Tam invalidated the authority of Geonim to enact divorce legislation); Westreich, *supra* note 3, at 212 (discussing Rabbeinu Tam's influence).

72. In *Hilkhot Ishut* 14:14, Maimonides claims, "The Gaonim reported that in Babylonia they have different customs pertaining to the recalcitrant wife, but those customs did not spread to the majority of Israel and many great scholars in many places disagree with them. We ought to recognize and to rule according to Talmudic law." MAIMONIDES (D. 1204; ANDALUSIA/EGYPT), MISHNEH TORAH *Hilkhot Ishut* 14:14, at 90.

73. In *Hilkhot Ishut* 14:8, Maimonides explicitly states that a woman is not held captive and forced to have sex with her husband if she despises him. *Id.* *Hilkhot Ishut* 14:8, at 88–89.

74. Shai Secunda has pointed out to me that this practice of making a public announcement is evident in Zoroastrian law, discussed in the Babylonian Talmud, and mentioned in the Palestinian Talmud in reference to a Babylonian sage. Therefore, these public announcements were likely a Babylonian practice shared by many groups in that region.

divorce decree.<sup>75</sup> A practical application of his legal opinions is evident in a Maimonidean responsum, which makes clear that a woman who chooses to divorce leaves without her dower and the husband is forced to divorce her.<sup>76</sup>

The debate among Rishonim about the legitimacy of the Geonic decree was fundamentally related to broader questions of juristic authority.<sup>77</sup> Rashba (d. 1310 CE, France) accepted Rabbeinu Tam's opinion that the Geonic practice was not based on the Talmud, but did not describe it as legally invalid.<sup>78</sup> Rabbeinu Asher (d. 1327 CE, Germany/Toledo) opposed the Geonic decree on the grounds that it was not accepted by a majority of Jews and that social circumstances had changed since its enactment.<sup>79</sup> By the early fourteenth century, a perspective of the Western Rishonim that the Geonic decree was invalid began to dominate. By the sixteenth century, a major Jewish law code acknowledged a rabbinic court's ability to

75. MAIMONIDES, *supra* note 72, *Hilkhot Ishut* 14:9-13, at 89-90.

76. Responsum 34. A translation and discussion of this responsum is available in Renee Levine Melammed, *He Said, She Said: A Woman Teacher in Twelfth-Century Cairo*, 22 ASS'N FOR JEWISH STUD. REV. 19, 27 (1997).

77. This is evident in many rabbinic texts and appears explicitly in Rabbi Yitzhak Ben Moshe. See YITZHAK BEN MOSHE (d. 1250; Vienna), ŠEFER OR ZARU'A, § 1, responsa 4354:

The Geonim of the yeshivas of Babylonia, our Savoraic rabbis who were after the 'instruction,' decreed that they coerce a husband to give a divorce document to a recalcitrant wife immediately and also the Ba'al of Halakhot Gedolot wrote and also Rav Hai and Rav Sherira wrote and all the Geonim, that for more than 300 years from their days this decree was decreed and there is no deviation from this. And thus also Rav Alfasi wrote his legal opinion and there is no one who can uproot the decree of the great bet din of Babylonia. Therefore, this divorce document is legitimate and there is no questioning it. And, moreover, she has a strong claim that he cannot have sex with her and since he agreed to give her a divorce document even though by coercion, then his divorce is valid. For we have here a commandment to obey the words of the sages, the decree of the great bet din . . . .

78. In RESPONSA, part 2, section 276, Rashba (d. 1310, Spain) states, "Nevertheless, if it is their custom in those places to do as Maimonides, let them. Because even Geonim, you know they said: we coerce (him) to divorce (her) as long as she is recalcitrant. And in the places where they follow that tradition, we have no authority to disagree with them or to void their words." See also Westreich, *supra* note 3, at 213-14. Rashba claims that "[i]t is now fitting to be very cautious about this issue, and not to act in accordance with this [Geonic] decree at all, for it has already been nullified because of the generation." RISKIN, *supra* note 25, at 119.

79. Rabbeinu Asher is known as the Rosh. RISKIN, *supra* note 25, at 126-27 (citing the Rosh's claims that the Geonic decree was for a particular generation and that Rabbeinu Gershom represented uninterrupted rabbinic tradition); see also 2 ELON, *supra* note 56, at 662-65. The Rosh's son, Jacob ben Asher (d. ca. 1349; Spain; also known as the Tur), is the author of an important code of Jewish law. In *Even Ha'ezer*, marriage laws, section 77, the Tur notes:

The woman who refuses her husband sex there are many decrees enacted on the subject . . . . We saw a Geonic (text) that states to give her (the recalcitrant wife) her essential *ketubbah* of 100 or 200 so that the daughters of Israel do not become illicit (i.e., engage in immoral sexual behavior) . . . . The Rosh, according to the words of Rav Alfasi, said that when they saw the denigration among the daughters of Israel and that if they waited 12 months for a divorce document they would rely upon idol-worshippers and go out to evil culture . . . . The sages of Ashkenaz and Sefard agreed that in the case of 'he is repulsive to me' it is not permissible to coerce the husband to divorce so every judge should be careful not to coerce a divorce in the case of 'he is repulsive to me.' And also they do not coerce her to be with him . . . .

compel a divorce, but in situations of the husband's unwillingness to support his wife.<sup>80</sup>

It may be possible to differentiate the legal practices of the "East" (including Babylonia and North Africa) from the legal practices of the "West" (including primarily Europe). Jewish communities in the East continued to coerce husbands to divorce their wives, as documented by Genizah evidence.<sup>81</sup> The perspective of Western rabbinic authorities appears to have arrived in the East at the end of the fourteenth century when two rabbinic jurists (Ribash and Rashbatz) moved from the southern regions of modern-day Spain to North Africa and prohibited coercion of a husband to divorce a recalcitrant wife.<sup>82</sup>

This condensed chronology of Jewish women's access to divorce indicates that a prevalent Eastern practice of rabbinic courts coercing husbands to divorce "recalcitrant" wives was gradually abolished by Western Rishonim (late medieval rabbis) as a result of its characterization as unorthodox.<sup>83</sup> Rather than resolve the debate about the orthodoxy (or lack thereof) of the Geonic decree, I want to turn to the Islamic chronology, which may elucidate some of the confusion in the authority issues of the Judaic chronology.

### III. AN ISLAMIC CHRONOLOGY OF WIFE-INITIATED DIVORCE<sup>84</sup>

#### *A. 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.<sup>85</sup> Most of the Qur'ānic verses dealing with the subject of divorce are addressed to men and discuss the post-

80. KARO (D. 1575; SPAIN), SHŪLHAN 'ARŪKH, *Even Ha'ezer, Gittin* 154:3.

81. See the Taylor-Schechter Cairo Genizah Collection at Cambridge University Library, Additional Series 146 4 (requiring by court order a husband to write a divorce decree for his wife in Egypt, ca. 1240); *id.* at New Series J 455 (forcing a husband to give his wife a divorce decree).

82. Ribash is Rabbi Isaac Bar Sheshet (d. 1408, Spain/Algiers) and Rashbatz (also Tashbatz) is Simeon ben Zemah Duran (d. 1444, Spain/Algiers). Westreich, *supra* note 3, at 216–17.

83. How to interpret the historical evidence of Jewish women initiating divorces is the crucial issue here. Friedman summarized that "during a millennium and a half it was stipulated in ketubbot and rabbis eventually recognized as binding that through the wife's initiative, if she found life with her husband unbearable, the court would take action to terminate the marriage." Friedman, *supra* note 22, at 27.

84. The periodization used in this section is my own and is not standard in the field of Islamic legal studies. I elaborate this periodization in Lena Salaymeh, *Islamic Law*, in THE INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES (James D. Wright ed., forthcoming 2015).

85. Two of the earliest surviving compilations of reports (*muṣannaḡāt*) 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-MAJID MAHMŪD 'ABD AL-MAJID, AL-ITTIJĀHĀT AL-FIQHĪYAH 'INDA AṢHĀB AL-HADĪTH FĪ AL-QARN AL-THĀLĪTH AL-HIJRĪ (Maktabat al-Khānjir 1979). On the reliability of these sources, see HARALD MOTZKI, HADĪTH: ORIGINS AND DEVELOPMENTS (2004).

divorce waiting period and alimony.<sup>86</sup> 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.”<sup>87</sup> 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.<sup>88</sup> In all versions of this 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.<sup>89</sup> But jurists did not restrict this form of divorce to judicial intervention.<sup>90</sup> Most versions of the narrative describe the event without indicating that the woman was at fault, but rather that she found her husband intolerable.<sup>91</sup> Yet there are other variations of this narrative that imply distinct conditions surrounding this particular woman’s forfeiture divorce (*kbul’*): she was abused;<sup>92</sup> she was recalcitrant;<sup>93</sup> or her husband consented to the divorce settlement.<sup>94</sup> In discussing a woman’s potential fault,

86. Relevant verses include Qur’ān 2:228–32, 2:236–37, 2:241, 65:1–7, 4:35.

87. *Id.* at 2:229. The verse is commonly understood as referring to *kbul’*.

88. This is a narrative about a woman named Habībah who initiates and affects a divorce by returning her dower to her husband. 6 ‘ABD AL-RAZZAQ IBN HAMMĀM AL-HIMYARĪ AL-SAN’ĀNĪ (D. 827; YEMEN), *MUSANNAF FĪ AL-HADĪTH* 482–503 (Habīb al-Raḥmān al-‘Azamī ed., 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). In some versions of the narrative, the woman is identified as Jamīlah and in other versions her name is not used.

89. 6 AL-SAN’ĀNĪ, *supra* note 88, at 501–06 (indicating that in the majority of reports a husband may not take more than dower in *kbul’* divorce); 4 ‘ABD ALLĀH IBN MUHAMMAD IBN ABĪ SHAYBAH (D. 849; IRAQ), *AL-KITĀB AL-MUSANNAF FĪ AL-AHĀDĪTH WA-AL-ĀTHĀR* 128–29 (Muḥammad ‘Abd al-Salām Shāhīn ed., 1995) (indicating that in the majority of reports a husband may not take more than dower in *kbul’* divorce).

90. 6 AL-SAN’ĀNĪ, *supra* note 88, at 494–95 (indicating that in the majority of reports, *kbul’* is permissible without court intervention); 4 IBN ABĪ SHAYBAH, *MUSANNAF*, *supra* note 89, at 124–25 (indicating that in the majority of reports *kbul’* is permissible without court intervention); MUHAMMAD RAWWĀS QAL’AH’JĪ, MAWSŪ‘AT FIQH ‘UTHMĀN IBN ‘AFFĀN 162–63 (Jāmi‘at Umm al-Qurā, Kulliyat Al-Sharī‘ah Wa-Al-Dirāsāt Al-Islāmiyah, Markaz Al-Baḥth Al-‘Ilmī Wa-Iḥyā’ eds., 1983) [hereinafter QAL’AH’JĪ, ‘UTHMĀN IBN ‘AFFĀN] (suggesting that *kbul’* is permissible without a judge). *But see* 1 MUHAMMAD RAWWĀS QAL’AH’JĪ, MAWSŪ‘AT FIQH AL-HASAN AL-BASRĪ 386 (1989) [hereinafter QAL’AH’JĪ, AL-HASAN AL-BASRĪ] (suggesting that *kbul’* is not permissible without court intervention).

91. 6 AL-SAN’ĀNĪ, *supra* note 88, at 483; MUHAMMAD RAWWĀS QAL’AH’JĪ, MAWSŪ‘AT FIQH ‘ALĪ IBN ABĪ TĀLIB 246 (1983) (asserting that *kbul’* is permissible if wife states that she finds husband intolerable).

92. 6 AL-SAN’ĀNĪ, *supra* note 88, at 482–84.

93. *Id.* at 495–98 (indicating that in the majority of reports, the husband can only accept payment from wife if she finds him intolerable or she is recalcitrant); IBN ABĪ SHAYBAH, *supra* note 89, at 120–21 (suggesting that a wife’s recalcitrance is a condition for forfeiture divorce); QAL’AH’JĪ, *supra* note 91, at 246 (explaining that *kbul’* is permissible if wife is recalcitrant). Some reports limit the forfeiture divorce to a wife who committed a grave sin (such as adultery).

94. The implication of consent is that this divorce was not unilaterally imposed on the husband by the Prophet. AL-SAN’ĀNĪ, *supra* note 88, at 502–03.

some jurists were concerned with preventing an injustice prohibited in the Qurʾān: a woman relinquishing her dower right without cause in order to divorce her husband.<sup>95</sup> 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.<sup>96</sup> 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?<sup>97</sup> Most late antique jurists ruled that a forfeiture divorce is irrevocable or that it is a rescission.<sup>98</sup>

That this wife-initiated divorce was historically practiced is corroborated by a report that ʿUmar (d. 644), the second caliph, condemned criticism of women who demanded a divorce by forfeiting their dowers.<sup>99</sup> (This type of criticism is apparent in reports that women who pursue forfeiture divorces are morally compromised.<sup>100</sup>) There were four basic late antique Islamic divorce practices:

- (1) The most frequently discussed situation is of a husband divorcing his wife and paying a divorce settlement.<sup>101</sup> According to some jurists, he could avoid paying the post-divorce alimony if she was deemed recalcitrant.<sup>102</sup>
- (2) A husband offers his wife the option of choosing divorce or staying

95. The Qurʾānic verse is 4:19 (“[D]o not compel them [women] to give away part of what you have given them unless they commit an obvious sin.”).

96. MUHAMMAD RAWWĀS QALʾAHʾJĪ, MAWSŪʾAT FIQH SUFYĀN AL-THAWRĪ 378 (1990) (explaining that *kbulʾ* is void under duress of husband’s abuse and husband must return dower).

97. There are two basic categories of divorce: (1) *ṭalaq rajʿī* is a revocable divorce in which the couple can reconcile under the terms of the original marriage contract during a specified waiting period; (2) *ṭalaq baʿin* is an irrevocable divorce that necessitates a new marriage contract. The sources indicate that *kbulʾ* was inconsistently described as divorce (conflictingly specified as irrevocable or revocable) or *faskh* (rescission or voiding of the marriage contract). AL-SANʾĀNĪ, *supra* note 88, at 480–82; 4 IBN ABĪ SHAYBAH, *supra* note 89, at 113, 121–23 (providing conflicting opinions on the revocability of a forfeiture divorce).

98. QALʾAHʾJĪ, *supra* note 91, at 247 (classifying *kbulʾ* as an irrevocable divorce); MUHAMMAD RAWWĀS QALʾAHʾJĪ, MAWSŪʾAT FIQH ʿUMAR IBN ʿABD AL-ʿAZĪZ 268 (Jāmiʾ at Al-Kuwayt ed., 2001) [hereinafter QALʾAHʾJĪ, ʿUMAR IBN ʿABD AL-ʿAZĪZ] (classifying *kbulʾ* as an irrevocable divorce); MUHAMMAD RAWWĀS QALʾAHʾJĪ, MAWSŪʾAT FIQH ʿABD ALLĀH IBN ʿUMAR: ʾASRUHU WA-HAYĀTUH 324 (1986) (providing conflicting reports on *kbulʾ* as divorce or rescission); QALʾAHʾJĪ, *supra* note 96, at 378–79 (classifying *kbulʾ* as irrevocable divorce); MUHAMMAD RAWWĀS QALʾAHʾJĪ, MAWSŪʾAT FIQH ʿABD ALLĀH IBN ʾABBĀS 313–34 (1996) [hereinafter QALʾAHʾJĪ, ʿABD ALLĀH IBN ʾABBĀS] (classifying *kbulʾ* as rescission); 1 QALʾAHʾJĪ, AL-HASAN AL-BASRĪ, *supra* note 90, at 386–87 (classifying *kbulʾ* as irrevocable divorce).

99. 4 IBN ABĪ SHAYBAH, *supra* note 89, at 201; 4 ʿABD ALLĀH IBN MUHAMMAD IBN ABĪ SHAYBAH, MUSANNAF FĪ AL-AHĀDĪTH WA-AL-ĀTHĀR 185 (Saīd Laḥḥām ed., 1989) (condemning criticism of women who seek *kbulʾ* divorces); QALʾAHʾJĪ, ʿUMAR IBN ʿABD AL-ʿAZĪZ, *supra* note 98, at 268 (claiming that *kbulʾ* divorce is permitted where wife finds her husband intolerable); *see also* 11 AHMAD IBN AL-HUSAYN AL-BAYHAQĪ (D. 1066; KHURASAN), AL-SUNAN AL-KUBRA 182 (1996) (condemning criticism of women who seek *kbulʾ* divorces).

100. 4 IBN ABĪ SHAYBAH, *supra* note 89, at 201.

101. *Id.* at *Kitāb Al-Talaq passim*; 6 MUHAMMAD IBN IDRĪS AL-SHĀFĪʾĪ (D. 820; ARABIA/EGYPT), AL-UMM *passim* (2001).

102. QALʾAHʾJĪ, *supra* note 96, at 780–81 (stating that a recalcitrant wife does not receive post-divorce alimony and making no mention of dower reduction or loss).

with him; if she chooses divorce, he pays her the full divorce settlement.<sup>103</sup>

- (3) A wife divorces her husband and she pays some form of divorce settlement by relinquishing part or all of her dower.<sup>104</sup>
- (4) A court divorces a couple because the husband is unable to provide his wife with sufficient maintenance,<sup>105</sup> is missing,<sup>106</sup> or is impotent.<sup>107</sup>

This historical evidence unambiguously records a wife's ability to initiate and to effect a divorce (*ḵbul'*) 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.<sup>108</sup>

### B. Professionalization of Legal Schools (800–1050 CE)

Professional jurists replaced the imprecision surrounding wife-initiated divorce with elaborate juridical categories. In comparison to earlier ḥadīth collections (*muṣannaḥāt*), slightly later, canonical compilations reduce the number of

103. This is based on a Prophetic precedent. YA'QŪB IBN IBRĀHĪM AL-ANSĀRĪ AL-KŪFĪ ABŪ YŪSUF (D. 798; IRAQ), KITĀB AL-ĀTHĀR 139–41 (1978); 6 AL-SAN'ĀNĪ, *supra* note 88, at 515–26; 7 *Id.* at 8–15; 4 IBN ABĪ SHAYBAH, *supra* note 89, at 92–94; 1 MUHAMMAD IBN YAZĪD IBN MĀJAH (D. 887; IRAN), SUNAN AL-MUSTAFĀ 632 (Abi Al-Hasan Muḥammad Ibn 'Abd Al-Hādī Al-Sindī Hanafī ed., 1975) [hereinafter IBN MĀJAH, SUNAN AL-MUSTAFĀ] (reporting that the Prophet offered his wives a divorce option); 1 IBN MĀJAH (D. 887; IRAN), SUNAN ABĪ 'ABD ALLĀH MUHAMMAD IBN YAZĪD AL-QAZWĪNĪ IBN MĀJAH 661–62 (MUHAMMAD FUĀD 'ABD AL-BĀQĪ ed., 1952–54) [hereinafter IBN MĀJAH, SUNAN IBN MĀJAH] (reporting that the Prophet gave wives the option to divorce and receive full dower). The following late antique jurists validated giving a wife the option to divorce without relinquishing her dower: QAL'AH'JĪ, *supra* note 91, at 440–43; QAL'AH'JĪ, 'UTHMĀN IBN 'AFFĀN, *supra* note 90, at 257; QAL'AH'JĪ, 'ABD ALLĀH IBN 'UMAR, *supra* note 98, at 562–64; MUHAMMAD RAWWĀS QAL'AH'JĪ, MAWSŪ'AT FIQH ZAYD IBN THĀBIT WA-ABĪ HURAYRAH 197–98 (1993); QAL'AH'JĪ, *supra* note 96, at 614–16; QAL'AH'JĪ, 'ABD ALLĀH IBN 'ABBĀS, *supra* note 98, at 510.

104. 6 AL-SAN'ĀNĪ, *supra* note 88, at 490–91, 494–95, 500–06; 4 IBN ABĪ SHAYBAH, *supra* note 89, at 120–23, 128–29; QAL'AH'JĪ, 'UTHMĀN IBN 'AFFĀN, *supra* note 90, at 162 (indicating that the first four caliphs all permitted *ḵbul'* divorce); *see also* 7 MUHAMMAD IBN ISMĀ'IL BUKHĀRĪ (D. 870; KHURĀSĀN), SAHĪH AL-BUKHĀRĪ [THE TRANSLATION OF THE MEANINGS OF SAHĪH AL-BUKHĀRĪ, ARABIC-ENGLISH] 149–51 (Muhammad Muhsin Khan trans., 1981); 'ALĪ IBN JA'FAR MADANĪ (D. 825), MASĀIL 'ALĪ IBN JA'FAR WA-MUSTADRAKĀTUHĀ 283 (1990) (Imāmī Shī'ī: a woman relinquishes any monetary claims against the husband in wife-initiated divorce). (There was a minority opinion that prohibited forfeiture divorces and another minority opinion that only permitted them with judicial intervention; but neither of these positions was normative. 'ABLAH KAHLĀWĪ, AL-KHUL': DAWĀ'MĀ LĀ DAWĀ'LA-HU: DIRĀSAH FIQHĪYAH MUQĀRANAHAH 68–69 (2000).)

105. 4 IBN ABĪ SHAYBAH, *supra* note 89, at 174–75; QAL'AH'JĪ, *supra* note 91, at 456 (indicating a judge may issue a divorce if the husband is unable or unwilling to provide maintenance). *But see* QAL'AH'JĪ, *supra* note 96, at 781 (indicating a judge does not divorce a couple if the husband is unable to provide sufficient maintenance for the wife).

106. QAL'AH'JĪ, 'ABD ALLĀH IBN 'ABBĀS, *supra* note 98, at 520 (indicating a judge may issue a divorce with sufficient grounds, such as abandonment).

107. QAL'AH'JĪ, *supra* note 91, at 454–55 (indicating that a divorce is granted if husband is impotent or cannot provide the wife with conjugal rights).

108. QAL'AH'JĪ, 'ABD ALLĀH IBN 'ABBĀS, *supra* note 98, at 312, 510 (indicating that in *ḵbul'* the wife pays for separation, whereas *ṭalaq* is husband's option).

reports about wife-initiated divorce (*kebul'*) and limit these divorces to situations where a wife has "sufficient" grounds.<sup>109</sup> There were 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.<sup>110</sup> Yet most Muslim jurists interpreted the narratives about the Prophetic precedent permitting wife-initiated divorce<sup>111</sup> as including a requirement of the husband's consent<sup>112</sup> or as being prompted by a situation of abuse.<sup>113</sup> Many legal texts of this period also

109. I compared the *musannaḥāt* of al-Ṣanʿānī (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 *kebul'* 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, Hadīth-Scholar Style: From Al-Dārimī to Al-Tirmidhī*, 19 J. ISLAMIC STUD. 325, 368 (2008). Later sources include more versions implying that it is wrong for a woman to demand a divorce without sufficient "justification." 1 IBN MĀJAH (D. 887; IRAN), SUNAN IBN MĀJAH, *supra* note 103, at 662 (suggesting that a woman who demands a divorce without grounds will be punished in the hereafter); *see also* 2 MUHAMMAD IBN ʿISĀ TIRMIDHĪ (D. 892; KHURĀSĀN), SUNAN AL-TIRMIDHĪ WA-HUWA AL-JĀMIʿ AL-SAHĪH 429–30 (ʿAbd al-Wahhāb ʿAbd al-Lāṭif & ʿAbd al-Rahmān Muḥammad ʿUthmān eds., 1965) (including narratives about the evils of a woman demanding a divorce without sufficient justification).

110. *See supra* text accompanying note 91. Some canonical Sunnī texts seem to have understood a wife's disgust for her husband as sufficient grounds. *See, e.g.*, 1 IBN MĀJAH, SUNAN IBN MĀJAH, *supra* note 103, at 663 (implying that Ḥabībah pursued *kebul'* because her husband was repulsive). Note that Imāmī Shīʿī sources make the wife's explicit statement of disgust for her husband incumbent in a *kebul'* divorce. 7 MUHAMMAD IBN AL-HASAN ḤURR AL-ʿĀMLĪ (D. 1693; LEBANON/IRAN), WASĀIL AL-SHĪʿAH ILA TAHSIL MASĀIL AL-SHARĪʿAH 487–89 (Imāmī Shīʿī) (ʿAbd al-Rahīm Rabbānī, et al. eds., 1956). This resembles the rabbinic discussions of a wife who seeks a divorce because her husband is repulsive. *See supra* text accompanying notes 69, 73, 79.

111. *Supra* text accompanying note 88.

112. 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. *Supra* text accompanying note 94. 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: 6 AL-SHĀFIʿĪ, *supra* note 101, at 500, no. 2503 & no. 2504 (providing no mention of spousal abuse or husband's consent); 3 AHMAD IBN SHUʿAYB NASĀI (D. 915; EGYPT/SYRIA), KITĀB AL-SUNAN AL-KUBRA 369 (ʿAbd al-Ghaffār Sulaymān Bindārī & Sayyid Kasrawī Hasan eds., 1991) (giving no indication of abuse or husband's consent in narrative). Bājī includes the narrative about Ḥabībah without stipulating the husband's consent and includes a narrative about a woman who divorced (*ikhtalʿat*, feminine form of the verb *kebul'*) her husband. 5 SULAYMĀN IBN KHALAF BĀJĪ (D. 1081; ANDALUSIA), AL-MUNTAQA: SHARH MUWATTAʿ MĀLIK 295–300 (Muḥammad ʿAbd al-Qādir ʿAṭā ed., 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, *supra* note 4, at 20.

113. There are several different versions of this narrative. *See supra* text accompanying notes 92–94. 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, *supra* note 109, at 368. By way of illustration, Nasāi (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, *supra* note 104, at 63; *see also* 2 ʿABD ALLĀH IBN ʿABD AL-RAHMĀN DĀRIMĪ (D. 869; SAMARQAND), SUNAN AL-DĀRIMĪ 162 (Muḥammad ʿAbd al-ʿAzīz Khālīdī ed., 1996) (claiming that

closely associated with wife-initiated divorce (*ḵbul'*) and recalcitrant wives, which was less evident in earlier texts.<sup>114</sup> 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 recalcitrant (*nāshizāb*).<sup>115</sup> This juristic elaboration of the forfeiture divorce is remarkable because the legal option of husbands paying less than the divorce settlement is not substantiated by a Prophetic legal precedent.<sup>116</sup> Instead, it appears to have been elaborated by Muslim jurists in this period.

Whereas earlier texts included women's voices, in later texts it is primarily men enacting forfeiture divorce.<sup>117</sup> Thus, whereas *ḵbul'* 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.<sup>118</sup> This coincided with what appears to be a slight change in the dower

Ḥabībah's husband was abusive); 1 SULAYMĀN IBN AL-ASH'ATH AL-SIJISTĀNĪ ABŪ DĀWŪD (D. 889; IRAQ), SUNAN ABI DĀWŪD 462 (Muḥammad Muḥyī al-Dīn 'Abd al-Ḥamīd ed., 1970) (providing different narratives in which Ḥabībah's husband was or was not abusive); 4 *Id.* at 310–11 (providing different narratives in which Ḥabībah's husband was or was not abusive); 2 ABŪ JA'FAR MUHAMMAD IBN JARĪR AL-TABARĪ (D. 923; IRAQ), JĀMI' AL-BAYĀN 'AN TA'WĪL ĀY AL-QURĀN 276 (providing a narrative about Ḥabībah that includes spousal abuse) (1986–87); 2 ABŪ ISHĀQ IBRĀHĪM IBN 'ALĪ IBN YŪSUF FĪRŪZĀBĀDĪ AL-SHĪRĀZĪ (D. 1083; IRAN), AL-MUHADHDHAB FĪ FIQH AL-IMĀM AL-SHĀFĪ'Ī 71–72 (1959) (Shāfi'ī narrating that she pursued a *ḵbul'* divorce because her husband was abusive).

114. Again, this is based on my comparison of *mūsannaḡāt* to later collections. See the beginning of the section on *ḵbul'* in 2 'ABD AL-SALĀM IBN SA'ĪD SAHNŪN (D. 854; TUNISIA) ET AL., AL-MUDAWWANAH AL-KUBRA LI-IMĀM MĀLIK IBN ANAS AL-ĀSBAHĪ 241–51 (Tīsa ibn Mas'ad Zawāwī ed., 1994). Reports about a recalcitrant wife and wife-initiated divorce are juxtaposed in 6 AL-SHĀFĪ'Ī, *supra* note 101 (*ḵitāb al-ḵbul' wa al-nushūz*). The section on recalcitrance (*nushūz*) appears immediately before the section on wife-initiated divorce (*ḵbul'*) in 2 AL-SHĪRĀZĪ, *supra* note 113, at 71–78 (Shāfi'ī section on recalcitrance immediately precedes section on *ḵbul'*). In a different edition: 2 ABŪ ISHĀQ IBRĀHĪM IBN 'ALĪ IBN YŪSUF FĪRŪZĀBĀDĪ AL-SHĪRĀZĪ (D. 1083; IRAN), AL-MUHADHDHAB FĪ FIQH AL-IMĀM AL-SHĀFĪ'Ī 486–99 (Zakariyā 'Umayrāt & Muḥammad ibn Aḥmad Baḡṭāl eds., 1995). Some Muslim jurists viewed *ḵbul'* as being only permissible in situations of recalcitrance or loathing. KAHLĀWĪ, *supra* note 104, at 68.

115. See *supra* text accompanying note 93.

116. 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.

117. 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 *ḵbul'* in the feminine verbal form, but then exclusively or primarily offer examples of men initiating this divorce. See, e.g., 6 AL-SHĀFĪ'Ī, *supra* note 101, at 502 (discussing *ḵbul'* as a man's prerogative). That many legal texts begin the section on *ḵbul'* by discussing a woman's decision to divorce her husband suggests that women had some autonomy in this matter. See, e.g., 2 AL-SHĪRĀZĪ, *supra* note 113, at 489 (Shāfi'ī section begins, "[I]f 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.

118. A husband can divorce through *ḵbul'* and pay less than the full settlement if (a) wife is recalcitrant; (b) wife commits a sin; (c) wife is disobedient. 4 'ABD AL-RAHMĀN JAZĪRĪ ET AL., KITĀB AL-FIQH 'ALA AL-MADHĀHIB AL-ARBA'AH WA MADHĀHIB AHL AL-BAYT 472–73 (1998) (explaining Mālikīs recommended *ḵbul'* divorce of a recalcitrant wife and Ḥanbalīs permitted *ḵbul'* divorce of a recalcitrant wife); see also 'ĀMIR SA'ĪD ZAYBĀRĪ, AḤKĀM AL-KHUL' FĪ AL-SHARĪ'AH AL-ISLĀMĪYAH 75–76 (1997).

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 classification of *kbul'* as a divorce or rescission<sup>119</sup> and the permissibility of a husband taking more than the dower.<sup>120</sup>

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.

119. See *supra* text accompanying note 98; 'ABD AL-RAHMĀN IBN 'AMR AWZĀ'Ī (D. 774; SYRIA), SUNAN AL-AWZĀ'Ī: AHĀDĪTH WA-ĀTHĀR WA-FATĀWĀ 338 (Marwān Muḥammad al-Sha'ār ed., 1993) (Awzā'ī: *kbul'* is a divorce); ABŪ YŪSUF, *supra* note 103, at 129 (Ḥanafī: a separation initiated by the wife is irrevocable); 2 'ABD ALLĀH IBN MUHAMMAD IBN BARAKAH (D. 10TH CENT; 'UMĀN), KITĀB AL-JĀMĪ' 196 ('Īsā Yaḥyā Bārūnī ed., 2nd ed. 1974) (Ibādī: *kbul'* is a revocable divorce); 'ABD ALLĀH IBN 'ABD AL-RAHMĀN IBN ABĪ ZAYD AL-QAYRAWĀNĪ (D. 996; TUNISIA), AL-RISĀLAH AL-FIQHĪYAH 202, 205 (1986) (Mālikī: *kbul'* is irrevocable); 2 ABŪ YA'LA MUHAMMAD IBN AL-HUSAYN IBN AL-FARRĀ' (D. 1066; IRAQ), AL-MASĀIL AL-FIQHĪYAH MIN KITĀB AL-RIWĀYATAYN WA-AL-WAJHAYN 136 ('Abd al-Karīm ibn Muḥammad Lāhim ed., 1985) (Ḥanbalī: *kbul'* dissolves contracts); 6 MUHAMMAD IBN AḤMAD SHAMS AL-DĪN SARAKHSĪ (D. 11TH CENT; TRANSOXANIA), KITĀB AL-MABSŪT 171 (1993) (Ḥanafī: *kbul'* is irrevocable); 7 HURR AL-'ĀMILĪ, *supra* note 110, at 495 (Imāmī Shī'ī: *kbul'* is irrevocable). Note, there are conflicting opinions within each legal school. See MUHAMMAD IBN NASR MARWAZĪ (D. 906; SAMARQAND), IKHTILĀF AL-FUQAḤĀ' 301–02 (Muḥammad Tāhir Ḥakīm ed., 2000) (summarizing the opinions of major jurists on the legal implications of a *kbul'* divorce). Irrevocable divorce (*talāq ba'īn*) 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 (*faskḥ*) 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, *supra* note 104, at 113–17 (summarizing which jurists or legal schools view *kbul'* as irrevocable divorce, revocable divorce, or rescission); see also ZAYBĀRĪ, *supra* note 118, at 221–23.

120. See *supra* text accompanying note 89. The possibility that a husband could take in excess of the dower continued to be a subject of juristic debate. AWZĀ'Ī, *supra* note 119, at 338 (Awzā'ī: a husband may not take more than the dower in a *kbul'* divorce); MĀLIK IBN ANAS (D. 796; ARABIA), MUWATTA' AL-IMĀM MĀLIK 188–89 ('Abd al-Wahhāb 'Abd al-Laṭīf ed., 2d ed. 1979) (explaining that it is unfavorable, but permitted, for a husband to take more than dower in *kbul'*); 6 AL-SHĀFI'Ī, *supra* note 101, at 501 (explaining that a husband may take more than dower); 1 IBN MĀJĀH, SUNAN AL-MUSTAFĀ, *supra* note 103, at 633 (explaining that a wife returns only her dower, not more, in *kbul'*); 2 IBN BARAKAH, *supra* note 119, at 195 (Ibādī: it is not permissible for a husband to take more than the dower in *kbul'*); IBN ABĪ ZAYD AL-QAYRAWĀNĪ, *supra* note 119, at 205 (Mālikī: a wife may offer her dower, less, or more in *kbul'*); 2 YŪSUF IBN 'ABD ALLĀH IBN 'ABD AL-BARR (D. 1070; ANDALUSIA), KITĀB AL-KĀFĪ FĪ FIQH AHL AL-MADĪNAH AL-MĀLIKĪ 593 (Muḥammad Muḥammad Aḥīd Wuld Mādik Mūrītānī ed., 1980) (Mālikī: *kbul'* is a wife losing entire dower and *fidya* is wife losing part of dower); 7 HURR AL-'ĀMILĪ, *supra* note 110, at 493 (Imāmī Shī'ī: husband may take more than dower in *kbul'*, but not in *mubara'ah*).

- (2) A husband divorces his wife and pays less than the divorce settlement under the category of *kbul'*, possibly because the wife is recalcitrant or immoral.<sup>121</sup>
- (3) A court declares a wife divorced and the husband pays the divorce settlement for the following reasons:
  - (a) if he is impotent or has a severe defect or disease;<sup>122</sup>
  - (b) if he deserts his wife, fails to provide her maintenance, or is cruel;<sup>123</sup>
  - (c) or if he is insane.<sup>124</sup>
- (4) A wife divorces her husband<sup>125</sup> and forfeits the divorce settlement (dower) partially, completely, or even pays in excess under specific circumstances.<sup>126</sup> According to many jurists, the husband's consent is required.<sup>127</sup>
- (5) Less prevalent than in an earlier period,<sup>128</sup> a husband offers his wife the

121. Many late antique jurists and Ahmad ibn Hanbal prohibit a husband from taking more than the wife's dower; Hanafis do not recommend his taking more; Maliki's, Shafi'i's, and Imami Shi'i's 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 *kbul'* divorce) are summarized in KAHLAWI, *supra* note 104, at 140–43.

122. "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. 2 'ALI IBN ABI BAKR MARGHINANI (D. 1197; FARGHANA), THE HIDAYA: COMMENTARY ON THE ISLAMIC LAWS 217 (Hanafi) (Zahra Baintner trans., Darul Ishaat 2007). By the early modern period, Hanafi jurists had identified sexual impotence as the only valid grounds for a woman to demand a divorce, but also permitted women to include numerous stipulations in the marriage contract that would facilitate their divorce rights. See JAZIRI ET AL., *supra* note 118, at *passim*.

123. See *supra* text accompanying note 105; see also 17 ABI ZAKARIYA MUHYI AL-DIN IBN SHARAF AL-NAWAWI (D. 1277; SYRIA) ET AL., AL-MAJMU', SHARH AL-MUHADHAB 110–12 (Zakariya 'Ali Yusuf ed., 1966–69) (Shafi'i: if a husband cannot support his wife, they are divorced).

124. But there is a Hanafi opinion that a woman cannot demand judicial divorce if her husband is mentally incompetent or has a serious disease. 2 MARGHINANI, *supra* note 122, at 219 (Hanafi).

125. A wife can demand *kbul'* if (a) wife finds husband disgusting (incompatibility); (b) husband is abusive; (c) wife fears that she cannot be faithful. 6 SARAKHSI, *supra* note 119, at 171 (Hanafi: including a chapter on *kbul'* that begins, "[I]f a woman divorces her husband . . ."). Ibn Hazm synopsis juristic opinions by noting that some jurists prohibit *kbul'*, 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). 'ALI IBN AHMAD IBN HAZM (D. 1064; ANDALUSIA), MARATIB AL-IJMA' FI AL-'IBADAT WA-AL-MU'AMALAT WA-AL-I'TIQADAT 74–75 (Zahiri) (1970); see also 10 'ALI IBN AHMAD IBN HAZM (D. 1064; ANDALUSIA), AL-MUHALLA 286–97 (Zahiri) (Hasan Zaydan Tulbah ed., 1967–71) [hereinafter IBN HAZM], AL-MUHALLA].

126. See *supra* text accompanying note 121.

127. While all the legal schools accept the validity of *kbul'*, most legal schools view it as a negotiated settlement. 10 IBN HAZM, AL-MUHALLA, *supra* note 125, at 286 (Zahiri: *kbul'* is only by mutual consent). Hanafis require the husband to accept the wife's *kbul'* offer in order for a divorce to be valid. 4 JAZIRI ET AL., *supra* note 118, at 494. This resembles the common—although likely not universal—rabbinic perspective that a husband must deliver a *get* for a divorce to occur.

128. See *supra* text accompanying note 103. Earlier texts discuss this option more than later texts.

option of choosing divorce or staying with him; if she chooses divorce, he pays her a divorce settlement.<sup>129</sup>

When compared to the previous period (of legal circles and networks), a wife's ability to initiate divorce was circumscribed.

### C. Consolidation (1050–1400 CE)

By the eleventh century, Muslim jurists had elaborated more details surrounding divorce practices.<sup>130</sup> Jurists developed a taxonomy for divorce settlements 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.<sup>131</sup> They also continued

129. IBN ANAS, *supra* note 120, at 191–92 (giving a wife a divorce option with full dower); ABŪ YŪSUF, *supra* note 103, at 139–41 (Ḥanafī: women given choice to divorce and receive dowers); 2 BISHR IBN GHĀNIM AL-KHURĀSĀNĪ AL-IBĀDĪ (D. CA. 815; KHURĀSĀN), MUDAWWANAH AL-KUBRĀ 56–67 (Ibādī) (1984); 6 SARAKHSĪ, *supra* note 119, at 210–23 (Ḥanafī: giving wife divorce option with full dower); 2 IBN 'ABD AL-BARR, *supra* note 120, at 587–91 (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. 10 IBN HAZM, AL-MUHALLĀ, *supra* note 125, at 144–53 (Zāhirī).

130. Ibn Rushd summarizes these medieval juristic perspectives:

Five opinions are, thus, derived for *kbul'*. 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 (*mashbūr*) opinion.

2 IBN RUSHD, THE DISTINGUISHED JURIST'S PRIMER: A TRANSLATION OF BIDĀYAT AL-MUJTAHID 81 (Imran Ashan Khan Nyazee trans., 1996). Duress here refers to a husband forcing his wife to accept less than the divorce settlement.

131. Jurists continued to debate the permissibility of a husband taking more than the dower from the wife in *kbul'*. Ibn Rushd summarizes this debate:

The term *kbul'*, 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 79. Still, there is a difference of opinion on the possibility of a husband taking more than the divorce settlement in *fidya*. See 2 'ALĀ' AL-DĪN MUHAMMAD IBN AḤMAD SAMARQANDĪ (D. 1144; SAMARQAND), TUḤFAT AL-FUQAḤĀ' 301–02 (Muḥammad Zakī 'Abd al-Barr ed., 1958) (Ḥanafī: dominant opinion is that a husband may not take more than dower, but minority opinion permits taking more than dower, so the ruling is that if the couple agreed to more than dower, it stands); 2 MARGHĪNĀNĪ, *supra* note 122, at 194–95 (Ḥanafī: it is legally permissible for husband to take more than the dower); 10 MUWAFFAQ AL-DĪN 'ABD ALLĀH IBN AḤMAD IBN QUDĀMAH AL-MAQDĪSĪ (D. 1223; SYRIA), AL-MUGHNĪ 269–70 ('Abd Allāh ibn 'Abd al-Muḥsin Turkī & 'Abd al-Fattāḥ Muḥammad Ḥulw eds., 2d ed. 1992) (Ḥanbalī: it is permissible, but unfavorable, for husband to take more than dower; notes conflicting juristic opinions); 2 MAJD AL-DĪN ABĪ AL-BARAKĀT 'ABD AL-SALĀM IBN 'ABD ALLĀH IBN AL-KHIDR IBN TAYMĪYAH AL-HARRĀNĪ (d. 1254/5; SYRIA/IRAQ), MUHARRAR FĪ AL-FIQH 'ALĀ MADHHAB AL-IMĀM AḤMAD IBN HANBAL 99 (Shams al-Dīn Ibn Muflīḥ al-Ḥanbalī al-Maqdisī et al. eds., 1999) (Ḥanbalī: a *kbul'* divorce settlement may not exceed dower); JA'FAR IBN AL-HASAN MUHAQQIQ AL-HILLĪ (D. 1277; IRAQ), MUKHTASAR AL-NĀFI' FĪ FIQH AL-IMĀMĪYAH 227–28 (Imāmī Shī'ī: discussing debate about *fidya*) (1967). The majority Shāfi'ī opinion permits a husband to take more than the dower as part of the *kbul'* divorce settlement, whereas the minority Shāfi'ī opinion disapproves of this practice. 16 AL-NAWAWĪ et al., *supra* note 123, at 8–9 (Shāfi'ī: discussing divorce settlement amounts); MUHAMMAD IBN MAKKĪ SHAḤĪD AL-AWWAL (D. 1384; SYRIA), AL-LUM'AH AL-DIMASHQĪYAH FĪ FIQH AL-IMĀMĪYAH 199–200 (Muḥammad Taqī Murwārīd & 'Alī Aṣghar Murwārīd eds., 1990) (Imāmī Shī'ī: a husband may take more than the dower in *kbul'*, but he may not take more than dower in *mubāra'ah*).

to debate the classification of wife-initiated divorce as revocable or irrevocable (roughly equivalent to breach and rescission of the marriage contract).<sup>132</sup> To summarize, Ḥanafīs, Mālikīs, later Shāfi'īs, minority Ḥanbalīs, and a majority of late antique jurists viewed *kbul'* as equivalent to divorce; but earlier Shāfi'īs, a majority of Ḥanbalīs, and a minority of late antique jurists considered *kbul'* to be rescission (*faskh*).<sup>133</sup> While there is no indication that jurists prohibited any of the divorce types previously practiced,<sup>134</sup> the distinctions between earlier and later legal texts imply that a woman's access to divorce became limited to particular circumstances.<sup>135</sup> In theory, women still had the legal right to divorce their husbands by paying a divorce settlement.<sup>136</sup> Yet, juristic restrictions (as outlined in

132. Zamakhsharī explains that *kbul'* 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. MAHMŪD IBN 'UMAR ZAMAKHSHARĪ (D. 1144; KHWĀRAZM), RU'ŪS AL-MASĀ'IL (AL-MASĀ'IL AL-KHILĀFIYAH BAYNA AL-HANAFIYAH WA-AL-SHĀFI'ĪYAH) 404–06 ('Abd Allāh Nadhīr Aḥmad ed., 1987); see also 2 SAMARQANDĪ, *supra* note 131, at 299 (Ḥanafī: *kbul'* is irrevocable divorce); 3 MAHMŪD IBN AḤMAD MARGHĪNĀNĪ (D. 1219/20; FARGHĀNA), AL-MUHĪT AL-BURHĀNĪ FĪ AL-FIQH AL-NU'MĀNĪ 501 (Aḥmad 'Izzū 'Ināyah ed., 2003) (Ḥanafī: *kbul'* is irrevocable divorce); 10 IBN QUDĀMAH AL-MAQDĪSĪ, *supra* note 131, at 274–75 (Ḥanbalī: cites conflicting reports among jurists about *kbul'* as divorce or rescission); 2 IBN TAYMĪYAH AL-HARRĀNĪ, *supra* note 131, at 98 (Ḥanbalī: *kbul'* is an irrevocable divorce); AḤMAD IBN 'ABD AL-HALĪM IBN TAYMĪYAH (D. 1328; SYRIA), MAJMŪ' MIN AL-FATĀWĀ AL-KUBRĀ LIL-IMAM IBN TAYMĪYAH § 32, at 289 (Sa'īd Muḥammad al-Laḥḥām ed., 1993) (Ḥanbalī: cited conflicting reports among jurists about *kbul'* as divorce or rescission); MUHAQQIQ AL-HILLĪ, *supra* note 131, at 227 (Imāmī Shī'ī: summarizing debate on legal status of *kbul'*); 3 'UTHMĀN IBN 'ALĪ AL-ZAYLA'Ī AL-HANAFĪ (D. 1342/3) ET AL., TĀBYĪN AL-HAQĀ'IQ; SHARH KANZ AL-DAQĀ'IQ 182 (Aḥmad 'Azzū 'Ināyah ed., 2000) (Ḥanafī: *kbul'* is an irrevocable divorce).

133. MUSTAFA DHAHABĪ, AL-KHUL' WA-AHKĀMUHU FĪ AL-SHARĪ'AH AL-ISLĀMĪYAH 60 (2000).

134. For instance, husbands continued to give wives the option of divorce with receipt of the full divorce settlement, as evidenced in medieval juristic texts. 2 SAMARQANDĪ, *supra* note 131, at 279–88 (Ḥanafī: giving wife divorce option); BURHĀN AL-DĪN AL-FARGHĀNĪ AL-MARGHĪNĀNĪ (D. 1197; FARGHĀNA), AL-HIDĀYAH: THE GUIDANCE. 593–605 (Imran Ahsan Khan Nyazee trans., 2006) (Ḥanafī: giving wife divorce option); 2 AL-SHĪRĀZĪ, *supra* note 113, at 83–84 (Shāfi'ī: husband gives a wife the option to divorce and receive full dower); 16 AL-NAWAWĪ ET AL., *supra* note 123, at 88–93 (Shāfi'ī: a husband offers a wife a divorce option). Jurists distinguish between “*taklyīr* (granting a choice) and *tamlīk* (granting possession of the right).” 2 IBN RUSHD, *supra* note 130, at 84 (summarizing the juristic debates on these divorce types); see also 1 FATĀWĀ AL-'ĀLAMGĪRĪYAH (1664–1672) 387–409 (Dār Iḥyā' al-Turāth al-'Arabī 1980) (n.d.) (Ḥanafī: men giving women a divorce option without losing dower).

135. Abuse and repulsiveness continued to be cited as grounds for a woman to pursue a *kbul'* divorce. For example, a Shāfi'ī text cites the main ḥadīth (as precedent) about a woman who pursued a *kbul'* divorce because her husband was abusive, but jurists cautioned against allowing *kbul'* when a husband is intentionally abusive in order to avoid paying the divorce settlement. 16 AL-NAWAWĪ ET AL., *supra* note 123, at 3–6 (Shāfi'ī: physical abuse as provoking wife-initiated divorce); 2 NŪR AL-DĪN 'ALĪ IBN ABĪ BAKR HAYTHAMĪ (D. 1405), GHĀYAT AL-MAQSŪD FĪ ZAWĀ'ID AL-MUSNAD 267–68 (Khalāf Maḥmūd 'Abd al-Samī' ed., 2001) (Shāfi'ī: implying that Ḥabībāh pursued *kbul'* because her husband was repulsive).

136. Ibn Rushd notes that “there is no dispute that a woman possessing discretion (a *rashīdā*) has a right to transact redemption herself[.]” 2 IBN RUSHD, *supra* note 130, at 82; see also 10 IBN QUDĀMAH AL-MAQDĪSĪ, *supra* note 131, at 267 (Ḥanbalī: wife has the right to “ransom” divorce); 16 AL-NAWAWĪ ET AL., *supra* note 123, at 2 (Shāfi'ī: “[I]f a woman loathes her husband . . . she may

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.<sup>137</sup> Notably, juristic discussions of wife-initiated divorce often occur adjacent to or in conjunction with the topic of recalcitrance.<sup>138</sup> Still, medieval and early modern court records establish that women continued to acquire divorces by forfeiting part or all of their dowers.<sup>139</sup> Indeed, it is possible that wife-initiated (*kbul'*) 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.

#### IV. DISENCHANTING THE ORTHODOX NARRATIVES<sup>140</sup>

Thus far, I have presented two distinct chronologies—one Judaic and the other Islamic—in which I outlined historical changes in how jurists of each community conceptualized a woman's right to divorce. In both of these chronologies, jurists interpreted the legal opinions and practices of their predecessors within a juristic construction of historical "truth" that informs legal orthodoxy. The historical evidence presented in these two chronologies contrasts

remove him by [paying] compensation . . ."). But numerous legal texts apply the term *kbul'* to a husband divorcing his wife and not paying the full divorce settlement. See, e.g., 2 AL-SHĪRĀZĪ, *supra* note 113, at 490–91 (Shāfi'ī). Most legal texts recognize that either spouse may divorce the other through *kbul'*. 16 AL-NAWAWĪ ET AL., *supra* note 123, at 37 (Shāfi'ī: either spouse initiates *kbul'*); 1 FATĀWĀ AL-'ĀLAMGĪRĪYAH (1664–1672), *supra* note 134, at 488 (Hanafi: *kbul'* 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.

137. Ibn Rushd explains "the majority held that [redemption divorce] is permitted with the mutual consent of the parties, unless consent to pay him is obtained by fear of injury to her." 2 IBN RUSHD, *supra* note 130, at 81; see also 2 MARGHĪNĀNĪ, *supra* note 122, at 194 (Hanafi: implying that *kbul'* necessitates mutual consent); 1 FATĀWĀ AL-'ĀLAMGĪRĪYAH (1664–1672), *supra* note 134, at 488 (Hanafi: implying through dual verbal form that *kbul'* is mutual agreement between spouses). Jurists acknowledge that either spouse may initiate *kbul'*, but do not account for how to deal with a husband's refusal. AHMAD IBN LU'LU' IBN AL-NAQĪB (D. 1368; EGYPT), 'UMDAT AL-SĀLIK WA-'UDDAT AL-NĀSIK 336 (Ṣāliḥ Muādhhdhin et al. eds., 1979) (Shāfi'ī: *kbul'* is permissible when one or both spouses want to end the marriage).

138. 2 IBN TAYMĪYAH AL-HARRĀNĪ, *supra* note 131, at 95, 97 (Hanbali: section on recalcitrance immediately precedes section on *kbul'*); 3 AL-ZAYLA'Ī AL-HANAFĪ ET AL., *supra* note 132, at 185 (Hanafi: Prophetic precedent concerning Ḥabibah's *kbul'* divorce is explicitly interpreted as an example of a woman's recalcitrance); 1 FATĀWĀ AL-'ĀLAMGĪRĪYAH (1664–1672), *supra* note 134, at 488 (Hanafi: associating *kbul'* with *nushūz* of either spouse). Contemporary Egyptian Islamist-feminist 'Ablah Kaḥlāwī begins her monograph on *kbul'* with a discussion of recalcitrance (*nushūz*), but argues that recalcitrance is not a condition for *kbul'* divorces. KAHLĀWĪ, *supra* note 104, at 64.

139. See Ronald C. Jennings, *Divorce in the Ottoman Sharia Court of Cyprus, 1580–1640*, 78 STUDIA ISLAMICA 155 (1993) (discussing instances of *kbul'* divorces in Ottoman Cyprus).

140. A version of this section was presented as part of a panel I organized on "Comparative Contextualizations of Jewish Legal History" at the Association for Jewish Studies annual conference in Washington, D.C. (Dec. 20, 2011).

with the “orthodox” stories—the reductive narratives that are constructed and repeated by historical actors and contemporary scholars. The orthodox Islamic legal story elides distinctions between the legal practices of the late antique and medieval periods, creating a seamless narrative of women being able to negotiate a divorce only by forfeiting their dowers—or more. On its own, the Islamic chronology detailed above implies that medieval Muslim jurists construed a Prophetic precedent about wife-initiated divorce as requiring a husband’s consent or necessitating a husband’s fault; consequently, they elaborated a variety of restrictions on wife-initiated divorce.

The orthodox Jewish legal story narrates legal changes to legitimate normative practice. In what is described as the Rabbinic period (70–620 CE), women did not have a no-fault divorce option because they could initiate a divorce only if they could prove just cause. In the Geonic period (620–1050 CE), the rabbis felt “pressured” by the influence of Islamic courts to change existing practices by facilitating a no-fault divorce option for women. In the era of the Rishonim (1050–1400 CE), the rabbis corrected the “deviant” Geonic practice and returned Jewish law to its “original” foundations by prohibiting women from no-fault divorce.

The orthodox Islamic narrative obscures that the specific procedural requirement of obtaining a husband’s acquiescence to the wife’s divorce initiation likely emerged in the medieval period. The orthodox Jewish narrative obscures that the Geonic practice of coercing a husband to divorce a “recalcitrant” wife was normative for centuries until its gradual undermining in the late medieval period. When these two orthodox stories and the two chronologies enumerated above are all juxtaposed, a pattern begins to emerge.

I want to problematize a specific point of intersection between these two narratives: the orthodox Jewish narrative characterizes the Geonic enactment (*taqqanah*) as an innovation (i.e., lacking talmudic precedent) caused by Islamic “influence” and many scholars accept this perspective.<sup>141</sup> The question I want to explore is why this Geonic decree has been interpreted—both by some Rishonim and by some contemporary scholars—as having deviated from Talmudic practice.<sup>142</sup> This Geonic decree’s classification is the site of a contest for legal

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141. See *supra* text accompanying note 56. But see 1 FRIEDMAN, JEWISH MARRIAGE IN PALESTINE, *supra* note 22, at 298 (arguing that wife-initiated divorce was a pre-Islamic Jewish custom); see also Westreich, *supra* note 51, at 16 (“Demanding a divorce . . . did not have to be based on any condition, but was based rather on the law of *moredet* itself. Accordingly, the reason why the amoraim do not discuss the right to demand divorce is that it was already known and accepted, rather than this being the ‘point of the innovation’ of the condition.”).

142. My claim is that the characterization of the Geonic decree as deviating from the Talmud or as exceeding the limits of Geonic authority is implicitly based on an evaluation of the Geonic context. In other words, those Rishonim who rejected the Geonic ordinance as an innovation did so because they believed it was “caused” by Islamic influence. Westreich, *supra* note 3, at 217 (describing the opinion of Rishonim: “Halakhic sources explicitly indicate that the aim of this ruling was to prevent malicious manipulations in Moslem [sic] courts that forced Jewish men to grant a divorce demanded by women claiming ‘repulsion.’”).

authority, and I will provide historical and critical evidence to offer an alternative understanding of this Jewish law in its presumed “Islamic” context.

A late medieval rabbinic consensus gradually developed in the West that viewed the Geonic decree as an “innovation” caused by the “influence” of Gentile courts. Contemporary scholars who presume that the Gentile courts were Islamic characterize the Geonic decree as being caused by Islamic pressure—of some kind.<sup>143</sup> But these two characterizations of “innovation” and “influence” must be reevaluated because they obscure a complicated historical struggle for legal authority. Discrediting the Geonic legal practice of facilitating a recalcitrant wife’s divorce claim may be a manifestation of Western rabbinic authority overpowering Eastern rabbinic authority.<sup>144</sup>

The implications of the two characterizations that I will challenge are manifest in a specific example. There is suggestive evidence of Jewish women divorcing their husbands prior to the Islamic period and the interpretation of that evidence is driven by interpretations of the Geonic decree. In other words, those who view the decree as an extension of a continuous practice (i.e., the Talmud sanctions the practice of coercing husbands to divorce a wife) thus recognize that Jewish wives had a long-standing ability to initiate unilateral divorce.<sup>145</sup> In contrast, those who view the decree as a legal “innovation” based on “foreign influence” thereby negate the possibility that Jewish wives could initiate divorce outside the judicially recognized justifications.<sup>146</sup> Therefore, the historical and contemporary interpretation of this decree has significant stakes for Jewish legal practice and the conventional narratives should be scrutinized.

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143. Contemporary scholars perpetuate these assumptions about “innovation” and “influence.” For instance, like other contemporary scholars, Brody characterizes the Geonic decree as “dictated by profound changes in the circumstances affecting Jewish life in the Muslim world, and more particularly in Babylonia, which necessitated a *departure* from Talmudic law.” BRODY, *supra* note 49, at 62 (emphasis added).

144. Libson suggests that “[r]ejections of geonic rulings are more common among Ashkenazi scholars, who allowed themselves more latitude in legal decisions than the Sephardim.” Gideon Libson, *Halakhah and Law in the Period of the Geonim*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 197, 241 (N. S. Hecht et al. eds., 1996).

145. *See supra* text accompanying note 21. Jewish wives appear to have been able to initiate divorce in Babylonia (possibly prior to the Geonic decree) and in Palestine (based on a practice of including a stipulation in the marriage contract). Elimelech Westreich notes that “between the Talmudic period and the time close to the *Shulhan Arukh*, Jewish law had sustained a divorce regime enabling the woman to coerce her husband to grant a divorce without submitting a defined ground.” Westreich, *supra* note 3, at 207.

146. *See supra* text accompanying note 20 (providing various works on conflicting scholarly debate surrounding the evidence for Jewish women divorcing their spouses in antiquity and late antiquity); *see also* LIBSON, *supra* note 50, at 158.

*A. Reevaluating Causal Influence*

At the time of the Geonic decree (mid-seventh century),<sup>147</sup> a minority of the population was Muslim and Islamic courts were not adjudicating outside the garrison towns established during the Arab/Muslim conquests.<sup>148</sup> That a minority Muslim presence could have such significant effect on Jewish legal practice as to provoke the enactment within decades of the beginning of Iraq's conquest is improbable. In other words, the orthodox narrative's claim that the Geonim "deviated" from Talmudic practice in order to defend against the threat of Muslim "influence"—coercive or otherwise—is based on inaccurate historical evidence.<sup>149</sup> The majority population at this time was actually Christian or Zoroastrian; among Eastern Christians and Zoroastrians, women returning their dowers in order to effect a divorce is a historically-verified practice.<sup>150</sup> Since local communities operated courts, the Gentile courts that provoked the Geonic decree may not have been Islamic even after the Muslim conquests.<sup>151</sup> Indeed, wife-initiated divorce may not have been the dominant Islamic legal practice, since it was the subject of intense juristic debate among Muslims and possibly only one of many legal positions.<sup>152</sup> Moreover, it is particularly improbable that any potential Islamic legal

147. Libson dates the decree to 650 or 651 CE and while it may be possible to date it to a slightly later period, these historical observations hold true. LIBSON, *supra* note 50, at 111.

148. Hallaq explains that Islamic law was only applied in the garrison towns and parts of the Arabian peninsula for the first several decades after the Prophet's death. WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 54–55 (2005). Morony observes that Islamic law was not applied to Jews and he suggests that rabbinic authority increased as a result of the non-involvement of Muslims in their internal legal affairs. MICHAEL G. MORONY, *IRAQ AFTER THE MUSLIM CONQUEST* 320, 518 (1984). In contrast, Libson rejects that the decree's proximity in time to the Arab/Muslim conquests weakens the assumption of influence. Libson, *supra* note 144, at 238. But Libson does not provide historical evidence about the administration of Islamic courts in the mid-seventh century to substantiate his influence claim.

149. Indeed, common interpretations of the Geonic decree suggest prejudicial and anachronistic assumptions. For example, a contemporary scholar argues that the Geonic decree does not represent absorption of legal concepts of one culture into another culture, but rather a defensive act of a minority culture against the destructive influence of the surrounding majority culture. Yehudah Zvi Stampfer, *Islamic Influence in the Divorce Laws of Rav Samuel Ben Hofni Gaon and the Rambam*, in *'ALE 'ASOR: DIVRE HA-VE 'IDAH HA- 'ASIRIT SHEL HA-HEVRAH LE-HEKER HA-TARBUT HA- 'ARVIT-HA-YEHUDIT SHEL YEME-HA-BENAYIM* 312 (Soc'y for Judaeo-Arabic Studies et al. eds., 2008). This is based on an inaccurate understanding of history: the majority of the population in Iraq (or the Near East more generally) was Christian and did not become Muslim until several centuries later.

150. See *infra* text accompanying notes 185, 187, 190. Of course, it is not the only practice, since "from the reign of Constantine [306–337 CE] onwards, the legislation on divorce was sometimes tightened, sometimes relaxed. For a long time, the laws remained much more liberal in the eastern empire than in the west." ANTTI ARJAVA, *WOMEN AND LAW IN LATE ANTIQUITY* 258 (1996).

151. See *supra* text accompanying note 148.

152. By way of example, Muslim jurists debated the necessity of having a legal justification or court involvement for *kebul'*. Two late antique Muslim jurists—al-Ḥasan al-Baṣrī (d. 728 CE) and Ibn Sirīn (d. 729 CE)—had an exceptional opinion that *kebul'* is only permissible with judicial oversight. KAHLĀWĪ, *supra* note 104, at 69; 6 SARAKHSĪ, *supra* note 119, at 173 (Ḥanafī: court involvement not necessary for *kebul'*); 10 IBN QUDĀMAH AL-MAQDĪSĪ, *supra* note 131, at 268–69 (Ḥanbalī: conflicting reports about the necessity of court involvement in *kebul'*); see also DHAHABĪ, *supra* note 133, at 51–59.

“influence” was coercive. The orthodox Jewish narrative inaccurately assumes the existence of Islamic influence that is actually negated by historical evidence.

More probable than the existence or prevalence of Islamic courts is the possibility that Jewish women simply knew that non-Jewish women who demanded divorces did not have to wait one year, in addition to having relatively more expansive inheritance and property rights. Threatened by the possibility of Jewish women converting (to any religion), Geonic rabbis likely reduced the waiting period; this practical modification can be interpreted as reacting to an internal social demand—not necessarily “influence.” In legal terminology, we can identify this kind of legal change as “social welfare” or “public interest” and it is endemic to all legal systems. Moreover, forum shopping of legal consumers shaped legal changes. While Jewish women in the Near East and North Africa were able to acquire divorces in rabbinic courts under a recalcitrant wife claim throughout the medieval period,<sup>153</sup> they apparently still frequented state (i.e., Islamic) courts.<sup>154</sup> Even in places where rabbinic courts facilitated wife-initiated divorce, Jewish women availed themselves of state (i.e., Islamic) courts because the Geonic enactment did not prevent Jewish women from accessing other legal options.<sup>155</sup> To appreciate the dynamics of legal pluralism, we need to recognize such complexities as venue shopping and socio-economic barriers to legal consumerism.

Gil noted that “there was still no clear-cut Muslim law with regard to divorce.” MOSHE GIL, *A HISTORY OF PALESTINE, 634–1099*, at 164 (Ethel Broido trans., 1992); see also Libson, *supra* note 144, at 238 (acknowledging the possibility of Islamic legal diversity, but discounting it).

153. Westreich notes that at the end of the fourteenth century, there were “Jewish communities living in a distinctively Moslem [sic] environment where the rebellious wife suit was accepted without question.” Westreich, *supra* note 3, at 216. This was likely practiced in different ways. Goitein suggests, based on surviving documentary evidence, that women often initiated divorces; Genizah evidence indicates that some powerful women were able to pressure their ex-husbands to give them considerable divorce settlements that appear to have been larger than their dowers. 3 GOITEIN, *supra* note 18, at 266.

154. Goitein mentions a Jewish woman who divorced her husband in an Islamic court. 3 GOITEIN, *supra* note 18, at 265. On Jews frequenting Islamic courts for divorce, see URIEL I. SIMONSOHN, *A COMMON JUSTICE: THE LEGAL ALLEGIANCES OF CHRISTIANS AND JEWS UNDER EARLY ISLAM 178–80* (2011); see also ARYEH SHMUELEVITZ, *THE JEWS OF THE OTTOMAN EMPIRE IN THE LATE FIFTEENTH AND THE SIXTEENTH CENTURIES: ADMINISTRATIVE, ECONOMIC, LEGAL, AND SOCIAL RELATIONS AS REFLECTED IN THE RESPONSA 67* (1984) (“[S]ixteenth century matrimonial cases were frequently referred to Muslim law courts.”). Pertaining to the early modern period, Al-Qattan notes:

The frequency and ease with which Jewish and Christian men and women went to the Muslim court in connection with marriage and divorce suggests, on the one hand, that such recourse was neither unusual nor fraught with communally burdensome consequences. It also illustrates the ways in which Christian and Jewish women availed themselves of the wife-instigated kinds of divorce not available to them according to the rules of their respective faiths.

Najwa Al-Qattan, *Dhimmi in the Muslim Court: Legal Autonomy and Religious Discrimination*, 31 INT’L J. MIDDLE E. STUD. 429, 435 (1999).

155. It may, however, be the case that (rabbinic) Jewish women continued to seek judicial divorce decrees from state (i.e., Islamic) courts in situations where a Jewish husband refused to deliver a divorce decree.

In addition, the “influence” theory does not sufficiently explain how the Geonic enactment “protected” the Jewish community from two realities: the availability of state (such as Islamic courts) that facilitated a Jewish wife’s divorce and the possibility of conversion.<sup>156</sup> The orthodox narrative claims that Jewish women who had to wait twelve months for a divorce fell into indecency (i.e., illicit affairs) or apostatized (presumably becoming Muslim).<sup>157</sup> Ostensibly, the Geonim dispensed with the long waiting period in order to hasten a Jewish woman’s divorce and prevent her apostasy for the purpose of divorcing her Jewish husband.<sup>158</sup> Yet a Jewish woman who became Muslim would not necessarily have been automatically divorced because this Islamic doctrine was not clearly established in the mid-seventh century.<sup>159</sup>

How might the Geonic rabbis have compelled a husband to deliver a divorce

156. LIBSON, *supra* note 50, at 111.

157. An anonymous thirteenth century text identifies both moral indecency and apostasy as causal factors motivating the Geonic decree. RISKIN, *supra* note 25, at 52–53.

158. By the early medieval era, the consensus of Muslim jurists was that a married woman who became Muslim would be divorced unless her husband also converted within her divorce waiting period. 5 MUHAMMAD IBN IDRĪS AL-SHĀFI’Ī (D. 820; ARABIA/EGYPT), MAWSŪ’AT AL-IMĀM AL-SHĀFI’Ī AL-KITĀB AL-UMM: KITĀB AL-NIKĀH 149 (Aḥmad Badr al-Dīn Ḥassūn ed., 1996) (Shāfi’ī: if a woman becomes Muslim and her husband does not convert within the waiting period, they are divorced); 2 SAHNŪN ET AL., *supra* note 114, at 216 (Mālikī: a woman’s conversion to Islam constitutes divorce unless husband converts within waiting period); 2 TIRMIDHĪ, *supra* note 109, at 405 (reporting that a husband of the Prophet’s daughter became Muslim within her waiting period and that this is the opinion of Mālik ibn Anas, al-Awzā’ī, al-Shāfi’ī, Aḥmad, and Ishāq); IBN ABĪ ZAYD AL-QAYRAWĀNĪ, *supra* note 119, at 196 (Mālikī: a non-Muslim woman who becomes Muslim is divorced from her non-Muslim husband unless he converts); 7 IBN HAZM, AL-MUHALLĀ, *supra* note 125, at 364 (Zāhiri: a woman who becomes Muslim while married to a non-Muslim is divorced immediately); 2 AL-SHĪRĀZĪ, *supra* note 113, at 456 (Shāfi’ī: a woman who becomes Muslim is divorced after the waiting period unless her husband also converts); 10 IBN QUDĀMAH AL-MAQDĪSĪ, *supra* note 131, at 8–10 (Ḥanbalī: a woman who becomes Muslim is divorced after the waiting period unless her husband also converts); 15 AL-NAWAWĪ ET AL., *supra* note 123, at 451–59 (Shāfi’ī: a woman’s conversion to Islam is divorce).

159. It is unclear if the seventh-century Muslim community viewed the conversion of a wife as automatically resulting in a divorce. The main precedential authority for this doctrinal rule is that the Prophet’s daughter (Zaynab) became Muslim prior to her husband (Abī al-’Āṣī) and the latter was not forced to convert, although he did so eventually. There are other reports from the Prophetic era about non-Muslim husbands being given time (one month to several months) to convert after their wives became Muslim. Many sources suggest that a non-Muslim woman who became Muslim had the option of divorce or staying with her non-Muslim husband. 7 AL-SAN’ĀNĪ, *supra* note 88, at 173–75 (reporting conflicting narratives about the effects of conversion on marriage between Muslim woman and non-Muslim man); 4 IBN ABĪ SHAYBAH, *supra* note 89, at 109–10 (reporting conflicting opinions about a woman who converts, either she is divorced or she can choose to stay with her non-Muslim husband). Medieval jurists seem to have understood the Prophetic practice of giving husbands an opportunity to convert as corresponding to the divorce waiting period. *See, e.g.*, 2 SAHNŪN ET AL., *supra* note 114, at 211–15 (Mālikī). But there are reports that the length of time between Zaynab’s conversion and her husband’s conversion was significantly longer than the divorce waiting period of a few months. 2 TIRMIDHĪ, *supra* note 109, at 405 (citing six years between the conversion of the Prophet’s daughter and her husband). Similarly, Ibn ‘Abbās reports that the Prophet’s daughter became Muslim eight years prior to her husband and jurists offered various “rationalizations” for why this length of time either did not constitute a precedent or was inaccurate. 10 IBN QUDĀMAH AL-MAQDĪSĪ, *supra* note 131, at 10–11 (Ḥanbalī).

decreed instantaneously when husbands very often delayed the process? If the Geonic practice removed the twelve-month waiting period and then relied on coercing the husband to grant a wife a divorce, the “threat” of conversion to Islam remained. That is, a Jewish woman might simply become Muslim and demand a judicial divorce decree from an Islamic court, rather than wait for her husband to deliver her divorce decree under coercion. It is no coincidence then that the Qaraites—in the eleventh century or earlier—accepted judicial divorce decrees and that Maimonides denounced the practice as heretical.<sup>160</sup> Notably, the specific wording of several Geonic texts implies that courts granted or gave Jewish women divorces, without explicitly delineating that the courts coerced husbands to deliver divorce decrees.<sup>161</sup> While we cannot make conclusions based on this precise terminology, it is likely that judicial divorce decrees became a site of Jewish orthodox contestation in the medieval period. It was not only Muslim “influence” that concerned the rabbis, but also the sectarian influence of Qaraites. Western rabbinic jurists may have marked the boundaries of rabbinic orthodoxy against Qaraite “heresy” through this particular legal issue. The extent to which generalizations may be made from this case study to broader processes of sectarian resistance and regional competition in the shaping of rabbinic Jewish orthodoxy is a matter for further research.

### B. *Giving Voice to the Geonim*

Most Geonim did not view their practice of facilitating wife-initiated divorce as divergent from Talmudic traditions.<sup>162</sup> The Geonic enactment included two components: (a) the removal of the twelve-month waiting period (stipulated in the Babylonian Talmud) for the recalcitrant wife and (b) coercion of the husband to

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Au XI<sup>e</sup> siècle, probablement sous influence musulmane, la loi caraïte évolue vers le renforcement des droits de la femme. Dorénavant, le divorce peut être effectué à la demande de la femme par le tribunal, si le mari refuse de rédiger la lettre de divorce. Cette possibilité de divorce par décision juridique constitue une différence importante par rapport au droit rabbanite. Par conséquent, un divorce caraïte obtenu de telle façon ne pouvait être valable selon la loi rabbanite. Cependant, il semble que le divorce par décision juridique avait un caractère exceptionnel et que la façon la plus répandue de divorcer nécessitait toujours la rédaction d’une lettre par le mari. En effet, la Geniza du Caire ne nous fournit que des exemples de ce dernier type de documents.

Judith Olszowy-Schlanger, *La Lettre de Divorce Caraïte et sa Place Dans les Relations Caraïtes et Rabbanites au Moyen Age*, 155 REVUE DES ÉTUDES JUIVES 337, 342 (1996). I disagree with the author’s characterization of this Qaraite practice as being based on Islamic “influence.” See also MAIMONIDES, *supra* note 72, *Hilbot Gerushin*, 2:20 at 177–78. Maimonides’ critique of non-Jewish courts coercing Jewish husbands is evidence that the practice existed, but not a negation of the possibility that non-rabbinic courts provided judicial divorce decrees.

161. By way of example, see the following responsum: “After the gemara, our rabbis decreed that even what she holds (from him) *we* take from her and *we* give her a divorce immediately . . .” HARKAVY, *supra* note 62, § 71 (emphasis added); see also *supra* text accompanying note 52.

162. Westreich notes that “according to the Geonim, the source of the halakha coercing the husband to grant a divorce to his rebellious wife is the Talmud itself. Several geonic writings indeed state so specifically.” Westreich, *supra* note 3, at 209; see also 1 FRIEDMAN, JEWISH MARRIAGE IN PALESTINE, *supra* note 22, at 324.

grant a recalcitrant wife a divorce.<sup>163</sup> The Geonim perceived the first component as new, but not the second.<sup>164</sup> Yet, later rabbinic authorities interpreted both components of the decree as “innovative,” despite the Geonic perspective that they had preserved rabbinic Jewish tradition.<sup>165</sup> The orthodox narrative thereby marks as heretical the prolonged practice of Geonic communities who facilitated wife-initiated divorce.<sup>166</sup>

The characterization of the Geonic decree as an “innovation” is motivated by the causal presumption of “influence.” It is commonly assumed that the availability of divorce for women in contemporaneous Islamic courts led Geonic rabbis to modify divorce practices.<sup>167</sup> However, Geonic texts do not explicitly identify Islamic courts as being a causal influence on the decree. For example, Naṭrōnāi ben Hilāi (or Natronai Gaon, d. ninth century, Iraq) explained the rationale for the decree as so “that Jewish women should not stray towards lewdness and indecency.”<sup>168</sup> Some Geonic sources do not mention a reason for the enactment.<sup>169</sup> Of course, these Geonim may have been influenced by Islamic legal practices and simply did not admit it. But in analyzing this historical event, we should focus on the consistency and plausibility of historical interpretations. In light of the aforementioned historical evidence, early Geonim did not cite Islamic “influence” for the decree because no such “influence” existed in their time.

In contrast, Sherira ben Ḥanina (Sherira Gaon, d. 1006 CE, Iraq), writing in the late tenth century, identified the decree as being an attempt to prevent Jewish women from asking Gentile courts to coerce their husbands because only a Jewish

163. A third aspect concerns the dower payment since Geonim made it collectable on movable property. Libson, *supra* note 144, at 237. I suspect that it may be possible to add a fourth aspect: the possibility that rabbinic courts granted Jewish women divorces without requiring a formal deliverance of the divorce decree from the husband. But this possibility necessitates more research than the scope of this Article allows.

164. Since the Geonim identified the Talmud as the source for (b), only (a) was perceived by them as innovative. Libson explains, “Rav Sherira holds—and this seems to be the view of all the Geonim—that the compulsory nature of the divorce had already been laid down in the *Talmud*, the only new element in the *taḳḳananah* being the stipulation that divorce be granted forthwith, without delay.” *Id.*; see also Westreich, *supra* note 3, at 209.

165. This is reflected in much of the scholarly literature. By way of example, Libson notes that “since the talmudic text itself could not be easily interpreted and the details of the *taḳḳananah* itself were not known, the interpretation became a matter of controversy among the Geonim themselves. It is therefore difficult to determine the *taḳḳananah*’s precise degree of *deviation* from talmudic law proper.” Libson, *supra* note 144, at 236 (emphasis added).

166. By way of example, Genizah evidence indicates that in Palestinian marriage contracts of the tenth and eleventh centuries, “Either party was empowered, thereby, to demand a divorce for purely subjective reasons and was not compelled to prove cause.” 1 FRIEDMAN, JEWISH MARRIAGE IN PALESTINE, *supra* note 22, at 330.

167. “There is no doubt that the redress open to women in the Shari’a courts spurred the geonim to provide similar redress in Jewish law.” LIBSON, *supra* note 50, at 111; see also Westreich, *supra* note 3, at 217–18.

168. RISKIN, *supra* note 25, at 51.

169. *Halakhot Gedolot* does not explain the enactment’s rationale. *Id.* at 48–49.

court can legitimately coerce a Jewish husband to divorce his wife.<sup>170</sup> In Sherira Gaon's lifetime, Islamic courts were prevalent and, when petitioned by Jewish wives, they probably coerced Jewish husbands to deliver divorce decrees—or possibly granted divorce decrees to Jewish wives. Sherira Gaon may have anachronistically interpreted the reasons for the seventh-century Geonic decree based on his own reality; that is, since Sherira was surrounded by Islamic courts, he may have simply assumed that his Geonic predecessors were likewise “competing” with Muslim jurists for Jewish litigants. Notably, Sherira Gaon is the only known Geonic figure to attribute the influence of Gentile courts to the Geonic decree.<sup>171</sup>

### C. Which Context?

What is problematic about “influence” as a characterization for a particular historical event? “Influence” is very often code for “infiltration” or “impurity.” The orthodox understanding of the Geonic decree focuses on the causal factors (rather than context) that led to its enactment and presents the decree's gradual overturning as if it occurred in the absence of causal factors (or a context). The orthodox Jewish narrative validates a specific bias that can be identified in terms of time (medieval era) and space (the West): it was Western Rishonim who characterized the Geonic decree as unorthodox.<sup>172</sup> What is notable about the orthodox narrative is that Western Christian “influences” are unacknowledged or minimized, while Islamic “influences” are vilified—and both legal systems are drastically oversimplified.<sup>173</sup> Moreover, the distinctions within Christian teachings on divorce may reflect discrete regional practices.<sup>174</sup>

While it is not surprising that Western Rishonim did not describe their

170. *Id.* at 58–59; see also 2 ELON, *supra* note 56, at 659–60.

171. RISKIN, *supra* note 25, at 74 (citing Tykocinski as having made this observation).

172. See *supra* text accompanying note 82 (discussing “Western” Rishonim who overruled North African practices in the late fourteenth century). This is also discernible in the writing of Maimonides. See *supra* text accompanying note 72.

173. In reference to (Christian) Europe, Westreich, for example, claims that the influence of the Gentile environment also affected the decline of the rebellious woman ground, ultimately leading to its abolition. This influence, however, is indirect, as Jewish society internalizes the social norms of the Gentile environment as a result of a prolonged encounter, and projects them onto Jewish law through a complex mutual relationship whose stages cannot be traced.

Westreich, *supra* note 3, at 218. Compare this to Westreich's description of Islamic influence:

Halakhic sources explicitly indicate that the aim of this ruling was to prevent malicious manipulations in Moslem [sic] courts that forced Jewish men to grant a divorce demanded by women claiming ‘repulsion’ . . . [T]he geonic ordinance clearly originated as a result of factors that, although directly affecting Jewish circumstances, were extraneous to *Halakhab*.

*Id.* at 217–18. The historical evidence presented above establishes that no such Islamic “influence” existed for the Geonic decree.

174. The Greek, but not the Hebrew, version of the Gospel of Matthew 5:31-32 limits a husband's grounds for divorcing his wife to adultery. GEORGE HOWARD, THE GOSPEL OF MATTHEW ACCORDING TO A PRIMITIVE HEBREW TEXT 204 (1987); see also *supra* text accompanying note 150.

annulling of the Geonic decree as being the result of Western “influence,” it is remarkable that contemporary scholars perpetuate this selective application of the notion of “influence.” Westreich, for instance, noted that “the process of erosion [of the recalcitrant wife divorce] moved along the lines of advance of Christian society, which gradually conquered and dominated areas that had so far been under Moslem [sic] influence and control, at least in Spain.”<sup>175</sup> Westreich explicitly observes that Rabbeinu Tam’s legal opinion against the recalcitrant wife divorce occurred “as Christian society became monogamous and imposed Catholic laws making divorce impossible.”<sup>176</sup> Moreover, it is possible that Rabbeinu Tam (d. 1171) felt compelled to oppose wife-initiated divorce because his German predecessor, Rabbeinu Gershom (d. 1028) had “enacted a decree which made it impossible for a husband to divorce his wife against her will.”<sup>177</sup> Since Western Jewish men had lost their ability to unilaterally divorce their wives, it became necessary to limit the divorce options of Western Jewish women in similar ways. Contemporary scholars pose a question about the “influences” that provoked the Geonic decree, but not about the “influences” that led to the overturning of that decree.

To be clear, I am not arguing for Western-Christian “influence” on the Western Rishonim; to do so would replace one problematic “influence” paradigm with another. Instead, I contend that all legal communities produce law in social contexts; indeed, law *cannot* be disentangled from society. Just as the Geonim read the Talmud through the intellectual concerns and socio-political realities of their times, so too did the Western Rishonim. These two historical moments—the enactment of the Geonic decree and its abolition by Western Rishonim—are both reflective of, and mediated by, jurists enmeshed in their societies. Late medieval, Western jurists marked a seventh-century Geonic decree as an “innovation” caused by Gentile “influence” within a struggle for legal authority: the Geonic decree was marked as “deviant” not because it occurred under Gentile “influence,” but because its revocation occurred in a Western-Christian context. Contemporary scholars delineated the “other” by placing a Jewish law in an imagined “Islamic” context—instead of a historical one. Both some Western Rishonim and some contemporary scholars employ a notion of “influence” that manifests reductive causality and, thereby, is an impediment to deeper and more complex understanding of legal change. Probing relationships and contextualization can move us beyond simplified notions of “influence” that are themselves legal-political strategies.

The extent to which generalizations may be made from this case to broader processes of sectarian resistance and regional competition in the shaping of rabbinic Jewish orthodoxy is a matter for further research.<sup>178</sup> To understand each

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175. Westreich, *supra* note 3, at 218.

176. *Id.*

177. RISKIN, *supra* note 25, at xii.

178. Libson observed that “[a]lthough [the recalcitrant wife decree] was recorded in geonic

legal system's transformations, we need to recognize the unending dialectic between internal legal logic and changing socio-political circumstances. In the next section, I narrate wife-initiated divorce outside the orthodox framework, with the background of Near Eastern legal culture.

## V. AN INTERWOVEN NARRATIVE OF WIFE-INITIATED DIVORCE

### *A. Antiquity and Late Antiquity (up to 800 CE)*

While most Near Eastern legal systems in antiquity appear to have granted men an unencumbered right to divorce,<sup>179</sup> women were not precluded from divorcing their husbands. Indeed, there is evidence of women initiating divorces,<sup>180</sup> which may have taken place by the act of the wife leaving the home.<sup>181</sup> 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 a scholarly debate on the issue of a woman's ability to divorce in ancient Mesopotamian law.<sup>182</sup> 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.<sup>183</sup> Despite a male, jurisprudential rhetoric legitimating divorce as a

codificatory works, such as *Halakhot Pesuḳot* and *Halakhot Gedolot*, it did not win acceptance in later rabbinic literature—a fate similar to that of many other *taḳḳananot* and customs from the geonic period.” Libson, *supra* note 144, at 238.

179. DAVID L. LIEBER ET AL., DIVORCE 710–11 § 5 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007).

180. Roman provincial law recognized wife-initiated divorce and was likely practiced throughout the Near East. GILLIAN CLARK, WOMEN IN LATE ANTIQUITY: PAGAN AND CHRISTIAN LIFESTYLES 18 (1993). Jewish women divorced their husbands in second century Egypt and in Palestine under Roman law. *See* Brewer, *supra* note 20, at 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 [THE BOOK OF A THOUSAND JUDGEMENTS: A SASANIAN LAW-BOOK]* (A.G. Perikhanian trans., Mazda Publishers in association with Bibliotheca Persica 1997) (620 CE); *DAS SASANIDISCHE RECHTSBUCH “MATAKDAN I HAZAR DATISTAN”* (TEIL II) 25–29, 97–120 (Maria Macuch trans., 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 Ē HAZĀR DĀTASTĀN” OR “THE DIGEST OF A THOUSAND POINTS OF LAW” 72 (1937).

181. 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 68 n.30 (1994).

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

183. 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, *supra* note 182, at 85.

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.<sup>184</sup> 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 practices 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.<sup>185</sup> Since the default Near Eastern norm was for husbands to pay dowers to 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.<sup>186</sup> Indeed, a basic presumption in the region seems to have been that if a wife returned her entire dower, then that act in and of itself constituted divorce.<sup>187</sup> 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 dowers in order to acquire a divorce.<sup>188</sup> Juxtaposed with the

184. 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 T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 108 (2d ed. 1997). Likewise, Johns asserts that “[i]t 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 (1904).

185. Laws of Ur-Namma (ca. 2100 BCE) §§ 9–11 (indicating that a man pays upon divorcing wife, based on wife’s status); ROTH, *supra* note 184, at 18; *see also* Laws of Lipit-Ishtar (ca. 1930 BCE) §§ 28, 30 (limiting 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 (requiring that a husband pays the divorce settlement); *Id.* at 50; Laws of Eshnunna (ca. 1770 BCE) § 59 (punishing a husband financially for divorcing a wife who is mother of his children); *Id.* at 68; Laws of Hammurabi (ca. 1750 BCE) §§ 137–41 (requiring that a husband who divorces wife with whom he has children pays her dowry and half of his assets, and that a husband who 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 §§ 37–38 (allowing that a husband may divorce wife without paying divorce settlement). *Id.* at 167.

186. 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, *supra* note 180, at 24; *see also* Judith Evans Grubbs, “Pagan” and “Christian” Marriage: *The State of the Question*, 2 J. EARLY CHRISTIAN STUD. 361, 366 (1994) (noting that after Constantine, husbands could financially benefit if divorce was the wife’s “fault”).

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

188. There are two relevant papyri from Nessana (in the Negev). The first (document 33), which dates to the sixth century (pre-Islamic) is between Stephan and Sergius, father of Sarah; Stephan retained the dowry and was given back the dower in order to divorce Sarah. 3 CASPER J.

evidence from Jewish and Islamic sources cited above, this suggests that women in the late antique Near East—regardless of confessional identity—relinquished dowers 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 themselves to receive a manumission decree in a manner that mimics a divorce decree in Jewish law.<sup>189</sup> Similarly, the Qur'ānic verse that grants women the option of initiating divorce indicates that women may “ransom” themselves.<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup>

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.

KRAEMER, EXCAVATIONS AT NESSANA: NON-LITERARY PAPYRI 104–06 (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 161–67. 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 sixth century papyri of repudiations—including one (POxy 129) sent from a father-in-law to a husband. *Id.*

189. MISHNAH, *Gittin* 1:4 (comparing delivery of divorce and emancipation documents). PALESTINIAN TALMUD, *Gittin* 1:3 (describing that writs of divorce and writs of manumission are treated the same). The slave's emancipation decree is *get shikebrur* (גֵּת שִׁיכְבְּרִיר וְאֵל), and a woman's divorce decree is *get nashim* (גֵּת נָשִׁים וְאֵל). See also BABYLONIAN TALMUD, *Gittin* 9a (revealing similarities between divorce and emancipation documents); *Qiddushin* 16a (discussing slaves redeeming themselves by payment).

190. Qur'ān 2:229 (explaining that a wife may “redeem” herself from a marriage).

191. DIG. 23.3.1 *et seq* (explaining that a 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* (providing that a wife or husband may repudiate spouse). Although redacted in the sixth century, the *Digest of Justinian* contains legal traditions dating to earlier generations, 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.

192. 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*, ENCYCLOPEDIA IRANICA (Dec. 15, 1995), <http://www.iranicaonline.org/articles/divorce>. This same article notes that a woman who consents to divorce loses some of her financial rights. Also, in Palestine, “Some rich or influential Jewish women divorced their husbands under the Roman law.” Brewer, *supra* note 20, at 356.

*B. Medieval Era (800–1400 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.<sup>193</sup> The professionalization and centralization of legal education resulted in the consolidation of juristic opinions.<sup>194</sup> 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.

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.<sup>195</sup> 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.<sup>196</sup> Orthodox

193. That wife-initiated divorce occurred in an earlier period without court intervention is substantiated by juristic texts. See *supra* text accompanying note 152.

194. 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* (1975). For a similar narrative history of Islamic legal instruction, see HALLAQ, *supra* note 148, at 57–78.

195. 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.

196. 7 'ALĪ IBN MUHAMMAD TABĀTABĀ'Ī (D. CA. 1816), *RIYĀD AL-MASĀ'IL FĪ BAYĀN AL-AHKĀM BI-AL-DALĀ'IL* 25 (1992) (Imāmi Shī'ī: there is no divorce in a temporary marriage); 2 AL-SHĪRĀZĪ, *supra* note 113, at 54 (Shāfi'ī: temporary marriages are void because divorce, inheritance, and other characteristics of marriage are not present).

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 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.<sup>197</sup> 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.<sup>198</sup> Late medieval debates about Geonic 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.

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197. 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 STAN. L. REV. 57, 124 (1984); see also Ron Harris, *The Encounters of Economic History and Legal History*, 21 LAW & HIST. REV. 297 (2003).

198. Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1498–1500 (2000).

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

*C. Speculating on the Intertwoven Narrative*

I have presented a Judaic 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.<sup>199</sup> 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.<sup>200</sup> 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, 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.

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.<sup>201</sup> 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

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199. I define objectivity in post-foundationalist terms. Bevir asserts that “[h]istorians can justify their theories by showing them to be objective, where objectivity arises not out of a method, nor a test against pure facts, but rather a comparison with rival theories.” MARK BEVIR, *THE LOGIC OF THE HISTORY OF IDEAS* 104 (1999).

200. Not coincidentally, more historical evidence survives from the twelfth century than from the eighth 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.

201. Among Western Jews, however, there is an exception: Rabbeinu Gershom (d. 1028 CE) in Germany “enacted a decree which made it impossible for a husband to divorce his wife against her will.” RISKIN, *supra* note 25, at xii 109.

their husbands and refused to return.<sup>202</sup> 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 were transformed into the grand academies of learning that dictated the form and substance of legal education.<sup>203</sup> 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, 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.<sup>204</sup> These 'Abbāsīd judges received higher salaries because

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202. 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.

203. See Salaymeh, *supra* note 84. See also my co-authored pieces on Islamic legal history in IRA M. LAPIDUS, *ISLAMIC SOCIETIES TO THE NINETEENTH CENTURY: A GLOBAL HISTORY* (2012).

204. See generally Wadād al-Qādī, *The Salaries of Judges in Early Islam: The Evidence of the*

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.<sup>205</sup> Judges transformed a late antique practice of divorce as mediation into a medieval practice of divorce as judicial procedure.

#### CONCLUSIONS

The syncretic framework presented here emphasizes understanding legal systems as multivalent and dynamic systems embedded in and inseparable from social contexts. Through historicization and contextualization, this mode of inquiry contests 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.<sup>206</sup>

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 Hanafi school—one of the four surviving orthodox Sunni schools of law that became dominant during the medieval period—provided women with the fewest divorce options;<sup>207</sup> 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.<sup>208</sup> In the early modern period, Ottoman court records attest to the common practice of women paying for divorces.<sup>209</sup> Divorce law reforms during the twentieth century in the Middle East primarily

*Documentary and Literary Sources*, 68 J. NEAR EASTERN STUD. 9 (2009) (examining evidence of increases in judicial salaries).

205. See my encyclopedia article, Salaymeh, *supra* note 84, and co-authored pieces in LAPIDUS, *supra* note 203.

206. As Asad has noted, "[A] transhistorical definition of religion is not viable." ASAD, *supra* note 9, at 30.

207. The Hanafi school recognized sexual impotence as the primary 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 *supra* text accompanying note 122; see also JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 53 (2d ed. 2001).

208. See *supra* text accompanying note 122; see also Leila Ahmed, *Early Islam and the Position of Women: The Problem of Interpretation*, in WOMEN IN MIDDLE EASTERN HISTORY 58, 61 (Nikki R. Keddie & Beth Baron eds., 1991).

209. "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 3 THE CAMBRIDGE HISTORY OF TURKEY: THE LATER OTTOMAN EMPIRE, 1603–1839, at 226, 247 (Suraiya N. Faroqi ed., 2006).

modified Hanafi doctrines.<sup>210</sup> In recent years, several states have facilitated judicial divorce decrees under the doctrine of *kbul'*.<sup>211</sup>

Similarly, the Judaic 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.<sup>212</sup> But even in the early modern era, Jewish women relinquished their financial rights to acquire divorces in Ottoman courts.<sup>213</sup> Modern Jewish courts follow Western Rishonim in effectively denying wives the ability to divorce their husbands without specific grounds.<sup>214</sup> Contemporary laws are based not simply on “authoritative” or “orthodox” precedents, but on ideologically-based interpretations of legal history.<sup>215</sup> I have attempted to demonstrate that these gradual historical processes were contingent, not inevitable.<sup>216</sup> 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.

Understanding the porous frontier between Jewish and Islamic legal systems necessitates combining thick descriptions of law with historically contextualizing narratives.<sup>217</sup> Late antique Jewish and Muslim jurists continued, modified, and practiced Near Eastern legal pluralism. Conventional models of comparative legal studies assume clear boundaries between legal systems; this assumption does not

210. J. N. D. Anderson, *Modern Trends in Islam: Legal Reform and Modernisation in the Middle East*, 20 INT'L & COMP. L.Q. 1, 5 (1971).

211. Lynn Welchman, *Bahrain, Qatar, UAE: First Time Family Law Codifications in Three Gulf States*, in THE INTERNATIONAL SURVEY OF FAMILY LAW: 2010 EDITION 163, 169–71, (William Atkin & Fareda Banda eds., 2010).

212. Libson, *supra* note 56, at 99.

213. “The vast majority of the [*kbul'*] cases involved Muslims, the predominant population of the area, although cases concerning Christians and Jews can also be found here and elsewhere.” Zilfi, *supra* note 209, at 247.

214. Riskin claims:

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, *supra* note 25, at xiii–xvi, 108; *see also* Westreich, *supra* note 3, at 207 (“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.”).

215. Avshalom Westreich’s extensive research into wife-initiated divorce “reveal[s] the ideological nature of the controversy regarding the right to divorce.” Avshalom Westreich, *The Right to Divorce in Jewish Law: Between Politics and Ideology*, 1 INT’L J. JURISPRUDENCE FAM. 177, 178 (2010).

216. This is the objective of genealogy. *See generally* Bevir, *What is Genealogy?*, *supra* note 8.

217. In other words, I seek a balance between synchronic and diachronic explanations. *See* BEVIR, *supra* note 199, at 252 (explaining that “the synchronic and diachronic forms of explanation [are] appropriate to sincere, conscious, and rational beliefs”).

correspond to the historical fluidity and porousness of Jewish and Islamic legal systems. 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.<sup>218</sup> 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.<sup>219</sup>

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.

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218. Glenn observes: "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* 378 (4th ed. 2010).

219. Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC'Y REV.* 869, 889–90 (1988).

