Late antique and medieval Islamic legal histories: contextual changes and comparative (re)considerations

by

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Abstract

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This dissertation demonstrates the contingent and contextual nuances of Islamic legal history by balancing precise legal case studies with broad-spectrum jurisprudential surveys. This work places Islamic legal history within diverse late antique (seventh to tenth centuries CE) and medieval (tenth to fifteenth centuries CE) contexts through specific comparisons with rabbinic legal traditions. By delineating intricate legal changes involving several generations of jurists, my research demonstrates the flexibility, expansiveness, and contingency of Islamic legal traditions within a meta-narrative about the transformations of law in the "Near East." I offer a historical understanding of the ambiguous and mutable nature of law and illustrate the complexity of legal pluralism and the struggle for legal-politcal authority that underlies the formation of orthodoxy. This research challenges common reifications of "Islamic law" as an inevitable outcome or a static, monolithic whole.

Introduction. This chapter provides a literature review of contemporary Islamic legal historiography and comparative studies of Jewish and Islamic law. I demonstrate that (1) Islamic law is not an independent entity with an identifiable "birth" or unchanging/fundamental characteristics and (2) Islamic and Jewish legal similarities result not from "borrowing," but from historical instances of dialectical interchange, from shared customary traditions, and from shared contexts. The introduction outlines the dissertation's objective of introducing critical readings of non-legal sources to Islamic legal historiography in order to reconstruct legally heterodox practices of jurists in the late antique era.

Chapter 1: Legal historiography – a case study in international law. This chapter uses a variety of underused historical and legal sources (*sīrah, maghāzī, muṣannafāt, masānīd*) to reconstruct the treatment of prisoners of war during the Prophetic era (610-632 CE) in Medina and in the decades immediately afterward. I argue that both historical narratives and late antique juristic opinions indicate that it was likely impermissible to execute prisoners of war, a position that differs from medieval juristic rulings that generally permitted the execution of prisoners of war. This chapter proposes that medieval Muslim jurists participated in the writing of Islamic historiography – a process that inherently involved the fusion of pre-Islamic

traditions and a modification of the historical evidence. In so doing, these medieval jurists facilitated and created the historical bases for their legal opinions, which should be understood not as simply outcome-determinative, but as a complex process of legal norm articulation.

Chapter 2: Legal heterodoxy – a case study in taxation. Building upon the first chapter, this chapter further investigates the overlapping roles of historians and jurists in Islamic late antiquity through a case study on the charity tax. This case study scrutinizes a variety of underexploited historical and legal sources in order to clarify how historiographic "certainty" can be achieved through the critical reading of heterodox (i.e. non-orthodox and legally pluralist) sources. Some late antique and medieval jurists made the charity tax incumbent on minors or others lacking full legal capacity because they conceptualized the category of "Muslim" in ways that were distinct from ritual practices. This chapter argues that Islamic charity was unique in its degree of regulation by comparing Islamic doctrines with their rabbinic counterparts. I use the category of taxation to emphasize the administrative aspects of charity and to expand conceptualization of late antique religious identity from a purely confessional model to a quasi-citizenship model, thereby expounding how legal history enriches social history.

Chapter 3: Legal changes – a case study in family law. This chapter presents two chronologies of legal changes in Jewish and Islamic legal history related to wife-initiated divorce using a wide array of legal texts and documentary evidence. Interweaving these two narratives of wife-initiated divorce, I argue for a historicized, contextual understanding of law by demonstrating that the changes in each legal system were part of a regional, socio-political process of juridical professionalization. I demonstrate that the characterization of a particular Gaonic decree related to wife-initiated divorce as an "innovation" caused by Islamic "influence" is historically inaccurate and reflects a broad struggle for legal authority. In both legal systems, divorce – in terms of jurisprudence and practice – transformed from contract dissolution to contractual breach. I argue that these changes were the result of contingent socio-political contexts of empire expansion, professionalization of jurists, and elaboration of urban market structures.

Conclusion. The conclusion brings together the theoretical and methodological approaches implemented in each of the dissertation's three chapters to argue for a specific approach to the study of Islamic legal history. I advocate that overcoming contemporary Islamic legal historiography's major weakness – the de-contextualization of late antique Islamic legal practices – requires exploring relatively unexploited historical sources and grounding Jewish-Islamic legal comparisons in actual cases. The culmination of these claims is the periodization for Near Eastern legal history that I offer as an alternative to the traditional periodization of Islamic law. By contrasting late antique Jewish and Islamic legal doctrines with medieval Jewish and Islamic legal doctrines, this conclusion reveals that both legal systems formulated a legal "orthodoxy" during roughly the same period.

dedication

for amjad,

whose absence is painfully ever-present

and whose ephemeral presence was my supreme lesson in the essence of being

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Preface

A significant challenge of interdisciplinary research and writing is "speaking" to distinct audiences simultaneously. Different readers will find diverse sections of this dissertation to be "simplistic" or "stating the obvious." I have chosen to emphasize clear explanations, at times at the cost of redundancy for expert readers, in order to facilitate accessibility for a broader audience. This dissertation is not intended to be read by specialists in only one field and, therefore, it will be read differently by individual scholars.

In this dissertation, the reader will notice I avoid identifying Islamic and Jewish legal systems as "religious law." This is because I am interested in problematizing the very assumptions that underlie the category of "religious law" by demonstrating how "legal" and how quintessentially "human" both legal systems were and continue to be.

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We stand on the shoulders of giants.

Professor Emeritus Ira Lapidus has been my mentor in the truest sense, not only encouraging me to think about broad historical changes, but also cultivating my career development and offering his sage advice. I am particularly grateful for his willingness to listen attentively and patiently when I consulted him about myriad impediments and challenges along this path. He is a paradigmatic mentor and he truly earned the Middle Eastern Studies Association (MESA) Mentoring Award (2011).

I thank Laurent Mayali for teaching me Roman law, guiding me in comparative legal studies, and, by his example, showing me that scholars can be honest, kind, and thoroughly decent; I am also grateful for his generous support and confidence. I thank Wael Hallaq for paving a path in Islamic legal studies for me to follow; I have long considered his work as my starting point. I thank Maria Mavroudi for introducing me to late antique studies, for encouraging me to merge philological rigor with historical thinking, and for providing me with detailed and incisive feedback on this dissertation. I thank Beshara Doumani for illuminating the absurd politics of academic knowledge production.

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I have had the honor of learning from teachers to whom I owe intellectual debts: Hamid Algar, Mark Bevir, David Lieberman, Charlotte Fonrobert, and Hossein Modarressi. I benefitted from the feedback, mentorship, and advice of Malick Ghachem, Christine Hayes, Chibli Mallat, William Ian Miller, Harry Scheiber, David Tanenhaus, Christopher Tomlins, and James Whitman.

I owe special thanks and appreciation to my writing partner, Rhiannon Graybill, who provided regular feedback on my writing, overall support during the final years of my graduate experience, and inspiration to overcome any professional obstacle. Our meetings were always the highlight of my week and her encouragement, advice, and friendship were my sustenance; I cannot imagine having finished without her.

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The research for this dissertation has been generously funded by a Javits Fellowship, as well as the Al-Falah Program and the Sultan Program at the Center for Middle Eastern Studies (UC Berkeley). I am grateful to have had these funding sources. My dissertation project was also aided by my participation in the Social Science Research Council (SSRC) Religion and International Affairs Dissertation Workshop in Pacific Grove, California (June 5-9, 2011).

For their engaging comments and questions, I thank my co-panelists and audiences at the conferences where I presented parts of this dissertation: Legal Regimes and Legal Change in Antiquity at UC Berkeley (April 14, 2012); "Law As..." (II): History as Interface for the Interdisciplinary Study of Law at UC Irvine School of Law (March 9, 2012); Association for Jewish Studies annual conference in Washington, D.C. (December 20, 2011); American Academy of Religion annual meeting in San Francisco (Nov. 21, 2011); Law and Society Association annual meeting in San Francisco (June 4, 2011); Association for the Study of Law, Culture and the Humanities annual conference in Las Vegas (March 12, 2011); 6th Annual American Society of Comparative Law Works-in-Progress Workshop at Yale Law School (February 12, 2011); Cross Currents: Jewish and Islamic Cultural Exchange, 600-1250 CE, a symposium at the Graduate Theological Union and UC Berkeley (October 14, 2010); Muslims and Jews Together: Seeing from Without, Seeing from Within, an international workshop at the University of California at Berkeley and at Davis (April 29, 2010); Middle Eastern Studies Association annual meeting in Washington, D.C. (November 23, 2008); American Society for Legal History annual meeting in Ottawa (November 15, 2008); Symposium on Law, War, and History organized by UNLV School of Law and Institute for Legal Research at Berkeley Law (February 16, 2007).

I encountered many obstacles and deceptions. I confronted many detractors and resistors. For them, this dissertation serves as proof that the scholarly project they challenged is possible. And this is just a beginning.

Introduction

Toward a genealogy of "Islamic law"

The accusation that something is against Islamic law (or "*sharīʿah*") is hurled repeatedly amidst contemporary socio-political controversies; the implementation of "*sharīʿah*" is a political slogan and a popular aspiration; non-Muslim governments demand reform or abolition of this "*sharīʿah*" while many Muslims demand its unadulterated application. In the United States, a certain paranoia about a potential invasion of *"sharīʿah"* has animated recent political discourse. Contemporary scholars in Islamic studies similarly discuss the applicability, flexibility, and even relevance of "*sharīʿah*" while presuming its stability or normativity. All these actors presume that there is some definable body of law that is "*sharīʿah*" – ahistorical, divine, and unchanging. But "*sharīʿah*" means and has always meant different things to different people. Islamic law encompasses not only juristic debates, but political and socio-economic ones.[1] Common conceptualizations of Islamic law in the contemporary world are historically inaccurate because they do not fully appreciate that Islamic legal systems could have been very different – they could have been something else entirely.[2] To understand what that something else could have been, we have to immerse ourselves in an Islamic legal past without assuming that it inescapably leads to an Islamic legal present. This requires engaging critically with Islamic legal-historical sources by situating them within their late antique contexts and comparing them to their late antique counterparts.[3] While there are myriad forms of and perspectives on Islamic legal systems today, my interest is in the historical contingencies that produced these contemporary expressions and that is why I focus on late antique Islamic legal history.[4]

This dissertation examines, in three case studies, how late antique Muslim society transformed its hybrid legal-cultural context. This diverse Near Eastern context was an

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[1] In this dissertation, "Islamic law" means Islamic legal systems and practices. It is, by definition, polycentric (i.e. there are multiple legal opinions on most legal issues), pluralist (i.e., there are multiple sources of legal authority), and constantly changing.

[2] In appreciating contingency, this dissertation's objective is genealogical because "genealogy serves a critical purpose, exposing the contingent and 'shameful' origins of cherished ideas and entrenched practices." Mark Bevir, "What is genealogy?," *Journal of the Philosophy of History* 2, no. 3 (2008): 264.

[3] Extending late antiquity to include the Islamic period was initiated by Peter Brown. See Peter R. L. Brown, *The world of late antiquity: from Marcus Aurelius to Muhammad*, Library of European civilization (London: Thames and Hudson, 1971). See also Peter R. L. Brown, *The world of late antiquity: AD 150-750* (New York: W.W. Norton, 1989).

[4] Like many in the field of Islamic studies, in the past, I used the term "early Islamic" because late antique is not widely-used. See Lena Salaymeh, "Early Islamic legal-historical precedents: prisoners of war," *Law and History Review* 26, no. 3 (2008). But I believe "late antique Islam" is more accurate and appropriate than "early" Islam and therefore use this terminology throughout this dissertation. Sizgorich explicitly situated the beginnings of Islam in late antiquity, explaining "The birth and early growth of the Muslim community within a late antique cultural milieu did nothing to undermine the evolution of a distinctively Islamic cultural tradition. Rather, the tradition begun within that milieu would prove so powerful as to recast ancient signs and symbols as uniquely its own." Thomas Sizgorich, "Narrative and community in Islamic late antiquity," *Past & Present*, no. 185 (2004): 42. See also Thomas Sizgorich, *Violence and belief in late antiquity: militant devotion in Christianity and Islam* (Philadelphia: University of Pennsylvania Press, 2008).

amalgamation of Arabian tribal, Roman provincial, Sasanian, and Jewish legal practices.[5] There is an emerging scholarly trend in the direction of situating Islamic beginnings within late antique studies and this dissertation is part of that broader scholarly project.[6] Islamic legal traditions and systems do not have a tangible "origin" or "evolution"; there are only shifts and transformations in Islamic legal practices and theories within concrete and existing Islamic communities. Beginnings – rather than origins – are the focus of my legal-historical inquiry.[7] Each case study situates a particular late antique Islamic legal doctrine within the historical context in which it began and traces how the legal reasoning of jurists changed between the late antique and medieval eras.[8] Islam is commonly constructed as a unified whole, which prevents full recognition of the nuances and details of Islamic societies, their institutions, their social and legal practices, and – perhaps most importantly – their transformations. This dissertation demonstrates how a non-developmental historicism can refine understandings of Islamic legal history.[9]

It is not uncommon for contemporary Islamic legal scholarship to mention some extinct schools of law in passing.[10] But these references have not provoked serious scholarly

[5] The "Near East" is a problematic political (specifically, imperialist), rather than geographic category. 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.

[6] There is an emerging trend of situating Islamic history within a late antique context. For instance, Chase Robinson noted that "a koine of late antique religious architecture that includes the Ḥijaz can now provisionally be identified" Chase F. Robinson, "Reconstructing early Islam: truth and consequences," in *Method and theory in the study of Islamic origins*, ed. Herbert Berg (Leiden: Brill, 2003), 133. But even scholars within this trend continue to accept a problematic periodization that differentiates between "late antiquity" and "early Islam." This is evident in a recent text that distinguishes between the late antique context and the rise of Islam. See Chase F. Robinson, ed. *The formation of the Islamic world, sixth to eleventh centuries*, The new Cambridge history of Islam (Cambridge: Cambridge University Press, 2011).

[7] "What is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity." Michel Foucault, *The Foucault reader*, trans. Paul Rabinow (1984), 79.

[8] A common critique of historicism is that it entails a historian's identification of an "object" and "fabrication" of a context. Tomlins suggests this critique in Christopher Tomlins, "What is left of the law and society paradigm after critique? Revisiting Gordon's "Critical Legal Histories"," *Law & Social Inquiry* 37, no. 1 (2012): 164. (Legal historicism is the subject of recent debates among legal historians. See "Symposium on Gordon's 'Critical Legal Histories'," *Law & Social Inquiry* 37, no. 1 (2012).) Responding to critiques of historicism, Bevir explains that "Postfoundationalism thereby dispels both the postmodernist and modernist ideas of historical distance. It suggests that historians cannot access the past and secure facts apart from the context of their present concepts and theories. The past only ever appears in our present beliefs; it is never given at a distance." Mark Bevir, "Why historical distance is not a problem," *History and Theory* 50, no. 4 (2011): 25.

[9] Dominant historicist approaches are developmental in orientation; this dissertation implements radical historicism as defined by Bevir: "Radical historicism overlaps with a nominalist and constructivist social ontology that emphasizes the contingency and contestability of beliefs, actions, and practices. Thus, it denaturalizes beliefs, actions, and practices that others' conceive as in some way or other natural: when other people believe that certain social norms or ways of life are natural or inevitable, radical historicists denaturalize these norms and ways of life by suggesting that they arose out of contingent historical contests." Bevir, "What is genealogy?," 271.

[10] Some examples: Abou El Fadl notes, "there are many extinct schools such as the schools of Ibn Abī Laylā (d. 148/765), Sufyān al-Thawrī (d. 161/778), al-Ṭabarī (d. 310/923), al-Layth b. Saʿd (d. 175/791), al-Awzāʿī (d. 157/774), Abū Thawr (d. 240/854), Dāwūd b. Khalaf (the Zāhirī) (d. 270/884) and many more." Khaled Abou El Fadl, *And God knows the soldiers* (Lanham, Maryland: University Press of America, Inc., 2001), 27. Dutton observes, "many more than these [legal schools] in the formative period of Islamic law in the first to third centuries AH, such as those of

efforts to reconstruct the jurisprudential practices of late antique jurists.[11] This dissertation attempts to begin the complicated process of re-inscribing these jurists and their legal practices in Islamic legal historiography. To understand the significance of late antique jurisprudence, I contrast it with antecedent, neighboring, and successor jurisprudence among Muslims, Jews, and other Near Eastern communities. The temporal scope of this project includes the seventh and eighth centuries, which are characterized by some scholars as part of a late antique "dark age" – marked by sparse and complicated sources, little archaeological or material evidence, and numerous conceptual mysteries.[12] This dissertation is intended as an invitation for future research and inquiry to further illuminate these spaces darkened by scholarly neglect. I interweave an array of historical evidence within an interpretive framework grounded in legal and social theory.

This dissertation seeks to illustrate that (1) Islamic law is not an independent entity with an identifiable "birth" or unchanging/fundamental characteristics and (2) Islamic and Jewish legal similarities result not from "borrowing," but from historical instances of dialectical interchange, from shared customary traditions, and from shared contexts. Of course, Roman/Byzantine and Sasanian legal practices are part of this shared Near Eastern context and in some instances I will refer to these legal systems. But my focus is on Islamic and Jewish legal systems because they coexisted in the same social space for several centuries and this unique situation lends itself to broad, comparative, and extended analyses.

I. Limitations of contemporary Islamic legal historiography[13]

One objective of this dissertation is to fill a lacuna in existing Islamic legal historiography by explaining how late antique Muslim communities forged and continued to modify their own legal systems while adapting their antecedent, neighboring, and even

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al-Awzāʿī (d. 157/774), al-Layth ibn Saʿd (d. 175/791), Dāwūd al-Ẓāhirī (d. 270/884), and 'the two Sufyāns', i.e. Sufyān al-Thawrī (d. 161/778) and Sufyān ibn ʿUyayna (d. 198/813)" Mālik Ibn Anas (d. 796; Arabia) et al., "Original Islam: Mālik and the madhhab of Madina," *Culture and civilization in the Middle East* (2007): 2. See also Wael B. Hallaq, *Sharīʿa: theory, practice, transformations* (Cambridge: Cambridge University Press, 2009), 36-54. Patricia Crone, *Roman, provincial and Islamic law* (Cambridge: Cambridge University Press, 2002), 23-24.

[11] This is not the case in contemporary scholarship in Arabic because many recent texts discuss the jurisprudence of the Companions, Successors, and other late antique jurists. I utilize and reference several such texts throughout this dissertation, including Muḥammad Rawwās Qalʿah'jī's edited series, *Silsilat mawsūʿat fiqh al-salaf*. Notably, contemporary secondary literature in Arabic is generally more cognizant of continuity and of the significance of pre-professional jurists to Islamic legal thought; see, for example, Muḥammad Yūsuf Mūsá, *Tārīkh al-fiqh al-Islāmī*, 2nd ed., 3 vols. (Cairo: Dār al-Maʿrifah, 1964-1966). See also ʿAbd al-Majīd Maḥmūd ʿAbd al-Majīd, *al-Ittijāhāt al-fiqhīyah ʿinda aṣḥāb al-ḥadīth fī al-qarn al-thālith al-hijrī* (Cairo: Maktabat al-Khānjī, 1979).

[12] For conflicting perspectives on Islamic historiography, see ʿAbd al-ʿAzīz al-Dūrī, *The rise of historical writing among the Arabs*, ed. Charles Issawi and Bernard Lewis, trans. Lawrence I. Conrad, Modern classics in Near Eastern Studies (Princeton: Princeton University Press, 1983). See also Robert G. Hoyland, "History, fiction and authorship in the first centuries of Islam," in *Writing and Representation in Medieval Islam: Muslim horizons*, ed. Julia Bray, *Routledge Studies in Middle Eastern Literatures* (London and New York: Routledge, 2006). Herbert Berg, ed. *Method and theory in the study of Islamic origins* (Leiden: Brill, 2003).

[13] An earlier version of this section was presented as "Myths of 'Islamic law' and false origins" as part of a panel I organized on 'Revising Islamic Legal Historiography' (which was sponsored by Middle East Medievalists) at the Middle Eastern Studies Association (MESA) annual meeting in Washington, D.C. on November 23, 2008.

internal legal systems.[14] Effectively ignoring the 7th century, contemporary Islamic legal historiography characterizes the 8th through 10th centuries CE as the "formative" period of Islamic law and investigates its "evolution" or "development."[15] This period is the focus of what is arguably disproportionate academic interest.[16] This scholarly interest is motivated by an evaluation of Islamic societies and institutions in tandem with ideological debates.[17] In other words, scholarly assessments of Islamic beginnings are not isolated from contemporary or popular characterizations of Islamic societies today.

For the sake of brevity and clarity, I will focus here on a narrow body of Western scholarship written in or translated into English and the historical assumptions embedded within it.[18] Surveying the academic gaps or emphases within the discipline of Islamic legal studies is beyond the scope of this study and has been initiated by others.[19] Similarly, it is not my objective to critique the specifically ideological aspects of academic knowledge production

[14] It remains the case, as Hallaq claimed, that "the legal history of the first three centuries of Islam has yet to be written and must, in the process, abandon the archaic assumptions that have dominated Orientalism so far." Wael B. Hallaq, "The quest for origins or doctrine? Islamic legal studies as colonialist discourse," *UCLA Journal of Islamic and Near Eastern Law* 2, no. 1 (2002-2003): 30.

[15] To be clear, the term "formative" is applied generally in Islamic historiography to refer roughly to the first century of Islamic history. Most scholars distinguish between a "formative" and a "classical" period. Chase F. Robinson, "Conclusion: from formative Islam to classical Islam," in *The formation of the Islamic world, sixth to eleventh centuries*, ed. Chase F. Robinson, *The new Cambridge history of Islam* (Cambridge: Cambridge University Press, 2011).

[16] Hallaq, "The quest for origins or doctrine?," 3 (confirming that "the 'origins' of Islam in general and of Islamic law in particular were and continue to be, comparatively speaking, the focus of much of the writing in the field."). This is supported by a recent survey of Islamic law teaching; Makdisi found that "Forty-six of the eighty-eight courses listed [in his survey of Islamic law courses at American law schools] (52 percent) focus on the origins and development of Islamic law, the methodology of reasoning from its sources, and a survey of its several substantive areas of law." John Makdisi, "A survey of AALS law schools teaching Islamic law," *Journal of legal education* 55(2005): 4.

[17] Lockman notes, "nineteenth-century European Orientalist scholarship tended to focus on what scholars saw as Islam's classical period, from its rise to the period in which it had supposedly reached its zenith and attained its purest form; everything thereafter was regarded as largely a story of decline and degeneration, or at least cultural and social rigidity and stasis." Zachary Lockman, *Contending visions of the Middle East: the history and politics of Orientalism* (Cambridge: Cambridge University Press, 2004), 76.

[18] The most recent important texts discussing the late antique period are: Crone, *Roman*. Yasin Dutton, *The origins of Islamic law: the Qurʾan, the Muwaṭṭaʾ and Madinan ʿamal*, Culture and civilization in the Middle East (Surrey: Curzon, 1999). Harald Motzki, *The origins of Islamic jurisprudence: Meccan fiqh before the classical schools* [Die Anfange der islamischen Jurisprudenz: Ihr Entwickllung in Mekka bis zur Mitte des 2./8. Jahrhunderts (1991)], trans. Marion H. Katz, Islamic history and civilization. Studies and texts, vol. 41 (Leiden; Boston Brill, 2002). Wael B. Hallaq, *The origins and evolution of Islamic law* (Cambridge: Cambridge University Press, 2005). Hallaq modified and elaborated some of his views in Wael B. Hallaq, "Groundwork of the moral law: a new look at the Qurʾān and the genesis of sharīʿa," *Islamic Law and Society* 16(2009). Equally influential, although earlier, are: Joseph Schacht, *An introduction to Islamic law* (London: Oxford University Press, 1964); Joseph Schacht, *The origins of Muhammadan jurisprudence* (Oxford: Clarendon Press, 1950); Joseph Schacht, "Foreign elements in ancient Islamic law," *Journal of Comparative Legislation and International Law* 32, no. 3/4 (1950). Joseph Schacht, "From Babylonian to Islamic law," *Yearbook of Islamic and Middle Eastern Law* 1(1994). I will refer to all of these texts throughout this introduction.

[19] See Lama Abu-Odeh, "The politics of (mis)recognition: Islamic law pedagogy in American academia," *The American Journal of Comparative Law* 52, no. 4 (2004). Jane F. Collier, "Intertwined histories: Islamic law and Western imperialism," *Law & Society Review* 28, no. 2 (1994). Enid Hill, "Comparative and historical study of modern Middle Eastern law," *American Journal of Comparative Law* 26, no. 2 (1978).

within the varied discipline of Islamic legal studies.[20] Nor is it my objective to undermine or disregard the significant contributions made by the diverse scholars whose works will be analyzed here; my intervention is only possible as the result of learning from them. Moreover, I recognize that scholarship is constantly being modified and refined.[21] This brief literature review is intended as a depiction of the most influential ideas in the field, not a critique of any individual scholar.

Misconstruing "Islam"

In the field of Islamic studies, it is not uncommon to read about Islam's "origins" or "formation."[22] These concepts are problematic because they project a unified essence to "Islam" that simply does not exist.[23] Islam does not have independent existence; it does not have agency; therefore, the object of study is not "Islam," but rather Islamic societies, institutions, traditions, and legal systems. For this reason, it is preferable to use "Islam" exclusively in its adjectival form.[24] Late antique Islamic society is, according to my definition, a fusion of several Near Eastern elements and, therefore, the distinction between Islamic and non-Islamic practices is nearly indiscernible in the beginning of Islamic history. I identify the seventh through ninth centuries as Islamic late antiquity.[25] The longstanding scholarly debate over so-called "foreign" influences on Islamic law (and Islamic history in general) assumes an anachronistic definition of "Islam" as an entity that can be separated from its late antique context.[26] Because Islam is identified as a reified entity, scholarship seeks to define it and,

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[20] On this issue, see Hallaq, "The quest for origins or doctrine?." John Strawson, "Encountering Islamic law," *Critical Legal Conference held in New College*(1993), http://www.witness-pioneer.org/vil/Articles/shariah/jsrps.html John Strawson, "Islamic law and English texts," *Law and Critique* VI, no. 1 (1995).

[21] Indeed, Hallaq's 2009 article alters the views he espoused in earlier works – and parallels my own views – by dating the beginning of Islamic law to Qurʾānic revelations. Hallaq states, "the Qurʾān was an incontrovertible and foundational source of the Sharīʿa already in the first half of the Meccan period." Hallaq, "Groundwork of the moral law," 272. Therefore, references to his earlier scholarship are outdated, but I have maintained them because they are indicative of broader trends in the field.

[22] Case in point: an Index Islamicus database search (without date restrictions) for "Islam" and "origins" yielded approximately 275 results, whereas a search for "Islam" and "late antiquity" yielded only 30 results and a search for "Islam" and "beginning" yielded 27 results. (Database search last accessed March 15, 2012.) An example of the problematic consequence of conceptualizing Islam in terms of origins is Berkey's conflation of Islam and medieval Islamic orthodoxy; he claims that "much of what we take to be typically 'Islamic' was in fact the product of a later period." Jonathon P. Berkey, *The formation of Islam: religion and society in the Near East, 600-1800* (Cambridge: Cambridge University Press, 2003), 105.

[23] This critique has been discussed before by Chase Robinson, who notes that "'religion' was conceptualized as a sphere of human action and belief that was distinct from other human activities (e.g. political movements or economic production), endowed with its own evolution (origins being given particular emphasis), and made a transcendent object through history." Robinson, "Reconstructing early Islam," 105. See, generally, Talal Asad, *Genealogies of religion* (Baltimore: Johns Hopkins University Press, 1993). Comparatively, see Michael L. Satlow, "Defining Judaism: accounting for 'religions' in the study of religion," *Journal of the American Academy of Religion* 74, no. 4 (2007).

[24] This echoes Robinson's exhortation, "let us abandon 'Islam' as a term of historical explanation." Robinson, "Reconstructing early Islam," 134.

[25] See footnote 3 and 4.

[26] While the following discussion surveys relatively more recent literature, Crone has chronicled the history of this line of inquiry: "In 1925 Bergsträsser published an article arguing that is was Arab custom rather than Near

consequently, Islamic law is similarly conceptualized as a substantive being. Some Islamic legal specialists have even attempted to identify precisely *where* and *when* Islamic law was "born."[27] A related expression of the search for Islamic "formation" is evident in attempts to demarcate when Islam became a distinct religious movement.[28] These kinds of investigations are reifications of Muslim identity that impose an external classification of "Muslim" that is arbitrarily based on the scholar's assumptions of what constitutes "Islam."[29] Just as being Muslim has different implications at different moments in time, so too does Islamic law have distinct manifestations.

Joseph Schacht was one of the most influential scholars of Islamic law.[30] Schacht implied that late antique Muslims were wrong to consider "the retention of pre-Islamic legal practices as normal."[31] Of course, all societies recycle the practices of their ancestors, so it actually is not only normative, but impossible not to retain prior practices.[32] Schacht asserted that "concepts and maxims originating from Roman and Byzantine law, from the Canon law of the Eastern Churches, from Talmudic and Rabbinic law, and from Sasanian law, *infiltrated* into the nascent religious law of Islam during its period of incubation, to appear in the doctrines of

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Eastern law (Roman or other) which went into the Sharī'a, and in 1933 Nallino argued much the same. In 1947 and 1949 Bousquet, Hassam and Wigmore all asserted the parthenogenetic origins of Islamic law, while FitzGerald in 1951 classified Roman influence as 'alleged'; and though occasional discussion, and even occasional suggestion, of Roman influence has continued since then, it has not been to much effect." Crone, *Roman*: 5.

[27] See, for instance, Samuel D. Goitein, "The birth-hour of Muslim law?," *The Muslim World* 50, no. 1 (1960).

[28] This is exemplified in the work of Fred M. Donner, *Muhammad and the believers: at the origins of Islam* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2010). Donner's hypothesis resembles Boyarin's work on Judaeo-Christianity. (See Daniel Boyarin, *Border lines: the partition of Judaeo-Christianity*, Divinations (Philadelphia: University of Pennsylvania Press, 2004).) But Donner's thesis relies too heavily on a presumption that the semantic distinction between *mu'minūn* and *muslimūn* correlated to a social reality; he thereby adopts an evolutionary conceptualization of 'Islam' as an entity with identifiably 'essential' characteristics and this positivist approach is historically problematic. Moreover, Donner applies a modern conceptualization of conversion that is alien to Islam's late antique context. In some ways, Donner's work is an extension of claims articulated in Robert G. Hoyland, "New documentary texts," *Bulletin of the School of Oriental and African Studies* 69, no. 3 (2006).

[29] Indeed, those scholarly presumptions are themselves based on sources whose author-compilers anachronistically project their understanding of Islam onto the past: "the accounts about the Prophet Muḥammad, the early Islamic conquests, the First Civil War, and the early caliphate do display a kind of uniform view of the community of Believers as being united from the start around a conception of Islam that resembles the 'classical Islam' of the second and third centuries AH. We might liken these accounts collectively to a mirror, in which the authors of the second and third centuries looked to see Islam's origins, but saw reflected mainly themselves—their own understandings of how those origins 'must have been,' based on the conditions and ideals of their own age." Fred M. Donner, *Narratives of Islamic origins*, Studies in Late Antiquity and Early Islam 14 (Princeton: The Darwin Press, 1998), 284.

[30] See Jeannette Wakin, *Remembering Joseph Schacht (1902-1969)*, Occasional Publications 4 (Cambridge (MA): Islamic Legal Studies Program, Harvard Law School, 2003). In an incisive article that pieces together Schacht's many statements concerning "influences" on Islamic law and tests them, Ze'ev Maghen notes that "Schacht is both anticipated and succeeded by scholars who support the notion of heavy outside influence on the formation of Islamic jurisprudence and positive law." Ze'ev Maghen, "Dead tradition: Joseph Schacht and the origins of 'popular practice'," *Islamic Law and Society* 10, no. 3 (2003): 292.

[31] Schacht, *An introduction*: 20.

[32] This is because "all cultures are involved in one another; none is single and pure, all are hybrid, heterogeneous, extraordinarily differentiated, and unmonolithic." Edward Said, *Culture and imperialism* (New York: Vintage Books, 1993), xxv.

the second century A.H."[33] He thereby alleged "that many prominent features of Islamic civilization, notwithstanding *a deceptive Arab appearance*, turn out to be borrowings from the Hellenistic and the Iranian world."[34] He appears to have located this "borrowing" in Iraq.[35] Schacht's claims about the "non-Arab" aspects of Islamic law are ideological clichés based on faulty historical thinking.

For many scholars of Islamic legal studies, Schacht's claim of legal-cultural "borrowing" – which ostensibly occurred in Iraq – is still influential.[36] Like Schacht, Crone rejects the possibility of Arabia being the locus of Islamic law's "origins."[37] While Crone recognizes some historical contingency,[38] she also argues that Islamic law was derived from provincial Roman law (which likely occurred in the Fertile Crescent).[39] Whereas Schacht emphasized Islamic "borrowing" from Graeco-Roman and Iranian cultures, Crone asserts the Aramaic cultural genesis of Islamic law.[40] The "problem of origins and the problem of foreign elements"[41] that

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[33] Schacht, *An introduction*: 21 (emphasis added).

[34] Schacht, "Foreign elements in ancient Islamic law," 10 (emphasis added). In the same article, he further posits an untenable distinction between inside and outside, claiming "I have shown that legal concepts and principles, including even fundamental ideas of legal science, entered Muhammadan law from outside, in particular from Roman law, and have further shown how their adoption took place. Whether these influences amount to little or much is irrelevant; the important fact is that they did happen." Ibid., 17. Crone repeats Schacht's use of the term "deceptive," claiming that "The Arab appearance of the Sharīʿa is striking, but deceptive: it testifies to its ideal, not its actual origins." Patricia Crone, "Jāhilī and Jewish law: the *qasāma*," *Jerusalem Studies in Arabic and Islam* 4(1984): 155.

[35] Crone notes that "Schacht never discussed the possibility that Roman law was transmitted to Islam through Umayyad Syria. On the whole he believed all foreign elements to have been picked up in Iraq, the province in which the classical Sharīʿa was born; and the fact that supposedly Roman elements frequently looked somewhat un-Roman he attributed to the wear and tear to which they had been exposed before transmission to Islam." Crone, *Roman*: 8. Jokisch echoes Schacht in identifying the location of such 'borrowing': "it is here [Baghdad], in the bosom of humanism, and not in Kūfa, Madīna or anywhere else, that Islamic law was born." Benjamin Jokisch, *Islamic imperial law: Harun Al-Rashid's codification project*, ed. Lawrence I. Conrad, Studien zur Geschichte und Kultur des islamischen Orients (Berlin, New York: Walter de Gruyter, 2007), 20.

[36] Maghen notes that "Many scholars influenced by Schacht have also supported and extended the 'massive importation' postulate. The disclaimers of these authors--coupled as they are with confident declarations regarding the large amount of borrowing that 'must' have taken place--make for frustrating reading." Maghen, "Dead tradition," 294. A recent example of this kind of polemics is the claim that "a culture (Islam) borrowed the legal system or large parts of it from another culture (Byzantium)." Jokisch, *Islamic Imperial Law*: 45.

[37] Crone claims, "The tribal organisation of the Arabs on the one hand, and the collective *amnesia* whereby the Prophet's Medina came to be revered as the true home of the Sharīʿa on the other, meant that the Arabs gave an archaic stamp to the law which they received." Crone, *Roman*: 99 (emphasis added).

[38] "It would thus seem that law in the first century of Islam was caliphal law, and that Schacht's 'administrative practice' is a euphemism for a nascent legal system which might in due course have become the classical law of Islam: there is nothing to suggest that it is any less authoritative or any less comprehensive than that which the scholars were to create." Ibid., 16. Crone's work is one of the more influential examples of the application of Schacht's borrowing thesis (with modifications).

[39] "The *a priori* case for a Roman and/or provincial component in Umayyad law is thus very strong... arguments for Roman influence can probably never be as decisive as those for Jewish origins; but it is the best we have." Ibid. Elsewhere, Crone and her co-author assert that "the key transmitters of originally ancient Near Eastern culture will prove to be the inhabitants of the Fertile Crescent, now assisted by the Arabian tradition and now without it, but not usually the Arabians on their own." Patricia Crone et al., "The ancient Near East and Islam: the case of lot-casting," *Journal of Semitic Studies* 55, no. 2 (2010): 450.

[40] "Consequently, a great deal of Islamic culture is Aramaic culture, brought into Islam in the form in which it had developed under Greek and Persian rule, to develop in new directions thereafter." Crone et al., "The ancient Near

Schacht emphasized is one that succeeding generations of scholars have sought to refute by insisting that Islamic law is an authentic continuation of Arab-Islamic legal thought. Some scholars identify the lineage of Islamic law as Arabian,[42] while others characterize it more specifically as Meccan[43] or Medinan.[44] Indeed, some scholars have written articles specifically contesting the Orientalist presumption of excessive "foreign" influences on Islamic law.[45] All these scholars seem to adopt a nationalistic approach to legal historiography.

What underlies this scholarly interest in identifying the lineage of Islamic law is a question about legitimacy. Scholars who describe Islamic law as having "borrowed" from some other legal system are claiming that Islamic law is not genuine because it is not "purely" Arab/Islamic in "origin." But their conceptualization of authenticity is impossible because cultures are inherently hybrid.[46] As Asad explains "[T]here is no such thing as authenticity; borrowing and copying do not signify a lack."[47] Some form of Arabness extended beyond the imaginary borders of the Arabian Peninsula and into both the Byzantine and Sasanian regions.[48] Similarly, Graeco-Roman culture continued to thrive after the beginning of Islam.[49]

East and Islam," 448-49. Crone understands "Aramaic" culture as the shared culture of Christians, Jews, and pagans in the Near East and likely views this as roughly corresponding to Roman provincial law.

[41] Schacht, "Foreign elements in ancient Islamic law," 10.

[42] "Arabia has provided an equally, if not more, convincing source for much of the law that Islam came to adopt." Hallaq, *The origins and evolution of Islamic law*: 4. "Islamic law is a creature of the legal culture of the Near East, especially those forms of it that the Arabs of the south and the north lived and experienced between the fifth and seventh centuries AD." Hallaq, *Sharīʿa*: 13.

[43] Motzki "limit[s] the scope for such an influence, temporally, to the end of the first/seventh century (including pre-Islamic times) and, spatially, to the Arabian Peninsula." Motzki, *The origins*: xv. See also Harald Motzki, "The role of non-Arab converts in the development of early Islamic law," *Islamic law and society* 6, no. 3 (1999).

[44] Dutton concludes that "Madinan *ʿamal* as depicted in the *Muwaṭṭaʾ* represents a continuous development of the 'practice' of Islam from its initial origin in the Qurʾan, *via* the *sunna* of the Prophet as its first expositor." Dutton, *The origins of Islamic law*: 180. See also his introduction in Ibn Anas (d. 796; Arabia) et al., "Original Islam."

[45] See Wael B. Hallaq, "Review: The use and abuse of evidence: the questions of provincial and Roman influences on early Islamic law," *Journal of the American Oriental Society* 110, no. 1 (1990). Motzki, "The role of non-Arab converts." It is not my objective here to evaluate the substantive assertions made by either Hallaq or Motzki in these articles; such an endeavor would necessitate intense and extensive engagement beyond my purposes.

[46] See footnote 32.

[47] Asad, *Genealogies of religion*: 10.

[48] Trimingham notes that "the Arabs inhabited all the regions lying to the north of the Peninsula proper, Syria and Palestine, Mesopotamia and Babylonia, even parts of western Persia, intermingled with the Aramaic-speaking peoples of these regions." John Spencer Trimingham, *Christianity among the Arabs in pre-Islamic times* (London: Longman Group Limited, 1979), 1. "The Arab element in the Orient and the Fertile Crescent was constantly replenished by waves of penetrators and immigrants, both seasonal and unseasonal, from Arabia. It was this constant flow from the Peninsula that was the most important element in reinforcing the Arab presence in the Orient demographically and keeping it alive culturally." Irfan Shahīd, *Rome and the Arabs: a prolegomenon to the study of Byzantium and the Arabs* (Washington, D.C.: Dumbarton Oaks Research Library and Collection, 1984), 11. In addition, "Documentary and narrative sources show Arabs as having been present in Egypt, including the Fayyūm, before the Muslim conquest." Petra M. Sijpesteijn, "Shaping a Muslim state: papyri related to a mid-eighth-century Egyptian official" (Dissertation, Princeton University, 2004), 89. See also Jan Retsö, *The Arabs in antiquity: their history from the Assyrians to the Umayyads* (London; New York: Routledge Curzon, 2005).

[49] Bowersock observes in Islamic late antiquity "a remarkable continuity of Hellenism in both its cultural and pagan aspects." G. W. Bowersock, *Hellenism in late antiquity*, Jerome lectures; 18th ser. (Ann Arbor: University of Michigan Press, 1990), 80.

Social psychology, particularly the theory of attribution bias, offers a lens through which to understand the contour of this debate – and the more extensive debate about the foreign versus Arab identity of Islam.[50] Scholars attribute causality (of Islamic law's development) to external (foreign) or internal (Arabian or Islamic) factors based on their self-identification as or evaluation of observers or actors, respectively. But in reality, both external and internal causal factors are always operational. More precisely, the distinction between externality and internality in the beginning of Islamic history is not easily discernible – if at all. This debate about "borrowing" reveals that answering the "origin" question requires defining culture in an impossibly monolithic way, often based on the fallacy of a single cause. Some Islamic legal studies scholarship suppresses the inevitable hybridity that characterizes any region or period and is entrapped in an artificial quandary of identifying the pure lineage of Islamic law. Some recent scholarship has critiqued the limitations of scholarly identifications of "borrowing" or "influence."[51] Similarly, recent scholarship on Arabic translations of Greco-Roman and other texts has shifted away from the "borrowing" paradigm and toward an understanding of (literary) translation as a non-passive act of creation.[52] These insights form the background to this dissertation's approach.

Terms like "borrowing" and "influence" are embedded within an erroneous presumption of clear boundaries between Islamic and un-Islamic.[53] Those boundaries are often drawn by modern scholars using modern identity categories to describe the past. One symptom of this identity politics in scholarship is the ostensible competition to determine which "foreign" legal system was more influential.[54] Such inquiries attempt to measure the influence or dissemination of each community's legal traditions, but this is empirically

[50] See Lee Ross, "The intuitive psychologist and his shortcomings: distortions in the attribution process," in *Advances in experimental social psychology*, ed. Leonard Berkowitz (New York: Academic Press, 1977).

[51] An excellent critique is Michael L. Satlow, "Beyond influence: toward a new historiographic paradigm," in *Jewish literatures and cultures: context and intertext*, ed. Anita Norich and Yaron Z. Eliav (Providence, R.I.: Brown Judaic Studies, 2008). See also Michael E. Pregill, "The Hebrew Bible and the Quran: the problem of the Jewish 'influence' on Islam," *Religion Compass* 1, no. 6 (2007).

[52] For example, Gutas asserts that "translations are seen from the very beginning as part of research processes stemming from intellectual currents in Baghdad and as such creative responses to the rapidly developing Arabic scientific and philosophical tradition. Study of the complexes emancipates one from the perennial but moot problems of essentializing conceptualizations and explanations, such as the extent of the 'originality' of Arabic science and philosophy, or the 'creativity' or lack thereof of Arabs and Semites." Dimitri Gutas, *Greek culture, Arabic thought* (New York: Routledge, 1998), 150. Similarly, Vagelpohl discusses "the status of translations as *literary creations in their own right*." Uwe Vagelpohl, *Aristotle's Rhetoric in the East: the Syriac and Arabic translation and commentary tradition*, Islamic philosophy, theology and science, v. 76 (Leiden; Boston: Brill, 2008), 209.

[53] Daniel Boyarin explains that "Borders themselves are not given but constructed by power to mask hybridity, to occlude and disown it." Boyarin, *Border lines:* 15. Similarly, Satlow explains that "To be a Jew in antiquity could mean many different things to different people; to make a priori assumptions about who the 'Jews' were is to obscure the way in which Jewish identity could be fluid. Put differently, the ambiguity of the very criteria by which historians of the Jews gather their data (i.e., 'Jew') needs to be recognized." Satlow, "Beyond influence," 45.

[54] This is discernible in Crone's discussion of Roman law's "influence." She claims, "It is plain from papyrological and other evidence that the law of the Near Eastern provinces was never wholly Romanised and numerous peregrine institutions survived under a more or less Roman veneer. This is a point of fundamental importance to historians of Islamic law, and the conclusion of the present work is that provincial practice contributed far more to the Sharī῾a than did Roman law. But it would nonetheless be a mistake to preclude the possibility of Roman influence on the ground that Roman law was not really practised in the Roman Near East at all." Crone, *Roman:* 14.

impossible.[55] Of course, these observations about scholarly interests in measuring the "Arabness" of Islamic law extend more broadly to Islamic studies in general.[56] The notion of borrowing is effectively useless because it fails to account for the transformation and integration of pre-Islamic communities into late antique Islamic society. In other words, integrating one's own culture into a newly-established community is not borrowing: it is an assimilative process. In late antiquity, several Near Eastern elements constituted the very definition of Islam.

Misjudging law

Societies with legal actors or law enforcers have law. Yet much Islamic legal scholarship characterizes late antique Muslim societies as either not having a legal system, or having a legal system that was not Islamic, or having a legal system that was immature.[57] All these interpretations are equally problematic, because they are based on a narrow definition of "law" that fails to appreciate that it is the existence of jurists or other legal actors that signifies law. Schacht claimed that "During the greater part of the first century Islamic law, in the technical meaning of the term, did not as yet exist."[58] For Schacht, "the starting-point of Muhammadan jurisprudence lies in the practice of the late Umaiyad [sic] period"[59] and not earlier. Schacht alleged that Islamic law did not exist before 100 AH (after *hijrī*) because he defined Islamic law as the product of surviving legal schools.[60] The very act of attempting to identify a *date* for the beginning of Islamic legal history illustrates an assumption that the first Muslim community did not have a legal system from its beginning.[61]

The interest in offering a date for Islamic law's "origins" is a manifestation of the reification of Islamic law that belies a presumption against continuity as these scholars seem intent on identifying a moment of rupture that simply did not exist.[62] After Schacht,

[55] Absent an empirical study of every known "Islamic" legal doctrine from late antiquity and its equivalent in the region's non-Islamic legal systems, it is not possible to determine which system is the most "influential." Moreover, in many cases, it is simply impossible to differentiate between Islamic and other Near Eastern legal practices during late antiquity.

[56] By way of example, Berkey claims "Arabia may be where Islam began, but the cultures and traditions of other areas, most notably the more populated regions of the Near East from Egypt to Iran, arguably played a more critical role in the subsequent delimitation of Islamic identity." Berkey, *The formation of Islam*: 29.

[57] This may be a manifestation of a presumption about the nature of law in pre-modern versus modern societies. Rouland notes that "In spite of evolutionist prejudices, there is no radical distinction, in nature, between law in modern societies and traditional societies." Norbert Rouland, *Legal anthropology*, trans. Philippe G. Planel (Stanford: Stanford University Press, 1994), 243.

[58] Schacht, *An introduction*: 19.

[59] Schacht, *The origins*: 1.

[60] Schacht alleged that "the traditions from the Prophet do not form, together with the Koran, the original basis of Muhammadan law, but an innovation begun at a time when some of its foundations already existed." Ibid., 40.

[61] See footnote 27. This is inherently related to the broader scholarly interest in identifying "unique" Islam. Berkey, for example, claims that "Anything we can now recognize as a distinctively Islamic tradition did not coalesce until relatively late—the end of the seventh or beginning of the eighth century." Berkey, *The formation of Islam*: 60.

[62] Indeed, this problematic notion of discontinuity is evident in other works. For example, "One of the principal themes of the study at hand is to show that the early development of Islamic law was in no way continuous." Jokisch, *Islamic Imperial Law*: 3.

succeeding generations of scholars have sought to offer alternative – usually earlier – dates for the beginning of Islamic law. Crone appears to date Islamic law to the beginning of Islam, but embedded within an evolutionary presumption; she claims:

> Islamic law, it would seem, evolved from embryonic beginnings to classical shapes within less than two hundred years. Very much indeed must have happened in the period from about 620 to 820, that is in the period for which our documentation is poor. Our chances of being able to reconstruct the origins of Islamic law with any degree of certainty are accordingly somewhat limited.[63]

Motzki argued that Schacht dated Islamic jurisprudence too late and suggested 25-50 *hijrī*.[64] Primarily by examining early monographs, Motzki traces what he classifies as Meccan *fiqh* to scholars of the middle of the first *hijrī* century (approximately 670 CE), claiming that their traditions influenced the 'development' of Islamic jurisprudence.[65] Dutton identified "the formative period of Islamic law in the first to third centuries AH"[66] as being equivalent to the period before the emergence of the legal schools. Dutton proposes refinement of Schacht's categories by emphasizing the distinction between *sunnah* and *ʿamal*; he thereby contests Schachtian perceptions of disjunction between acts of the Prophet, *sunnah*, and *ḥadīth*.[67] Hallaq's earlier work similarly defined "the 'formative period' as that historical period in which the legal system arose from rudimentary beginnings and then developed to the point at which its constitutive features had acquired an identifiable shape."[68] In more recent work, Hallaq explicitly dates Islamic law to the beginning of Islam, but continues to distinguish a later, more mature form.[69]

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[63] Crone, *Roman*: 26.

[64] Motzki expressly states that "The beginnings of a law that was Islamic in the true sense of the word and of theoretical occupation with it are placed too late by a good half to three quarters of a century." Motzki, *The origins*: 296.

[65] For an overview of Motzki's historical outline, see ibid., 287-93. Motzki contends that "In view of the conditions ascertained for Mecca the following assumptions made by Schacht must be revised: that for the better part of the first/seventh century there existed no Islamic law 'in the technical meaning of the term;' that the foundations of what later became Islamic law were laid by the *qādīs* and governors of the Umayyad dynasty." Ibid., 296.

[66] Ibn Anas (d. 796; Arabia) et al., "Original Islam," 2.

[67] Like Motzki, Dutton maintains both an "origin" and a linear development of Islamic law. The *Muwaṭṭaʾ*, composed by Mālik ibn Anas (d. 179/795) and dated to approximately the year 150/767, is a book of *ʿamal*, which according to Dutton, is "not only our earliest formulation of Islamic law, but also our earliest record of that law as a lived reality rather than the theoretical construct of later scholars." Yasin Dutton, *The origins of Islamic law: the Qurʾan, the Muwaṭṭaʾ and Madinan ʿamal* ibid. (Surrey: Curzon, 1999), 4.

[68] Hallaq, *The origins and evolution of Islamic law*: 2-3. Criticizing both the Schachtian and post/anti-Schachtian perspective of tracing Islamic law, Hallaq argues that "[t]o search for the 'origins' of Islamic law in the long process of *hadīth* evolution – as some prominent modern scholars have done – is therefore to miss the point altogether. In the present work, the pre-*hadīth* forms of Islam (including *sunan, ʿilm* and *ra'y*) are as valid as those that emerged later." Ibid., 200.

[69] Hallaq posits that "'law' took off where and when morality began, with the revelation of the first Sūrahs in Mecca. It was then and there that 'Islamic Law' began, and it was thence that the intricate moral blueprint was to be given further 'legal' and other elaborations. These elaborations became the full-fledged Sharīʿa, one that was morally grounded and supremely Qurʾānic, from the very start." Hallaq, "Groundwork of the moral law," 279. Hallaq observes "Two stages of development preceded and paved the way for the rise of the doctrinal schools: the first was the stage of study circles and the second the stage of the personal schools." Hallaq, *Sharīʿa*: 60. Hallaq's

Many scholars focus on offering a date for the beginning or "formation" of Islamic law because they define Islamic law in a particular way: as one of the surviving *professional* legal schools that came to dominate in a later period. Islamic legal scholarship largely ignores Islamic legal practice in the first century of Islam because, measuring it against the later, professional legal system, it appears (erroneously) incomplete or deficient. Furthermore, the longstanding emphasis on certain texts has led scholars to ignore evidence of Islamic legal thought or practice outside of identifiable legal (*fiqh*) texts,[70] such as biographical or other social history texts.[71] This narrow approach to sources assumes that reading texts in isolation is sufficient for knowledge production.[72] It is as if the absence of self-identified legal texts means that a legal system did not exist before the first *hijrī* century. But the formation of the orthodox legal schools was not inevitable.[73] There is significant historical evidence of legal practice during the first century of Islam in a variety of historical texts (including *sīrah, maghāzī, muṣannafāt,* and *masānīd*) that have not been properly investigated. The problem is not sources; the problem is anachronistic, backward projection of orthodox Sunnī Islamic law onto legal practice of an earlier period that is fundamentally distinct. There was much more law in late antique Muslim societies than previously assumed and that law is multi-vocal, contested, and leads to unintended consequences.

Misunderstanding historical change

The emphasis on "origins" in Islamic legal historiography reflects an implicitly evolutionary or developmental theory of history.[74] Islamic legal development is,

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schemata – indeed, the impressive corpus of his work – forms the background narrative of Islamic legal history that my research seeks to clarify and to elaborate.

[70] Motzki states that "If this study can contribute to bringing back the debate on the origins of Islamic jurisprudence and early traditions in general to a more 'philological' level of interpreting the texts – 'philological' does not necessarily mean 'uncritical' or essentialist' – then it will have fulfilled its purpose." Motzki, *The origins*: xvii.

[71] In a different context, Gordon offers an explanation for this influence, asserting, "This is why, long after the discrediting of evolutionary theories of history, legal history was still so frequently written as if these theories still held sway. For the historian who restricts his sources to the strictly legal, there often is no explanation available other than the genetic." Robert W. Gordon, "Introduction: J. Willard Hurst and the common law tradition in American legal historiography," *Law & Society Review* 10, no. 1 (1975): 20.

[72] "The primary aim of Orientalism is to uncover the deep symbolic significance of Islamic cultural expression, of which the Arabic language is the primary vehicle. Hence research has been traditionally focused on the literary outpourings of the 'ruling institutions.'" Bryan S. Turner, *Marx and the end of Orientalism* (London: George Allen & Unwin Ltd, 1978), 6.

[73] "Having severed Islamic legal concepts from both their origins and their operational frameworks, orientalist scholars concluded that fiqh products and Islamic law were one and the same, a divine dictation, which was incapable of change." Haifaa Khalafallah, "The elusive 'Islamic law': rethinking the focus of modern scholarship," *Islam and Christian-Muslim Relations* 12, no. 2 (2001): 143.

[74] By way of comparison, this correlates to Whiggish understandings of history that were prevalent among scholars of Western legal systems. Robert W. Gordon's observes "a Whiggish notion of law as progress, so that, by means of gradual adaptation, the ancient and essential principles of legal order may be seen as ever more efficiently and purely realized (with some allowances for lapses and setbacks) in practice. In this synthesis, legal history is often written as the story of the genetic ancestors or 'origins' of the legal forms of the present and of the gradual developing of these embryos into their mature modern condition." Robert W. Gordon, "The past as

unfortunately, understood as progressing from gestational obscurity to mature legal schools.[75] In this problematic framework, any law that existed prior to the "development" of *uṣūl al-fiqh* is immature and deficient. However, the seemingly unbreakable association between Islamic law and *uṣūl al-fiqh* is historically inaccurate.[76] A less problematic periodization of Islamic law will unshackle its "formative" period from a linear construction of history. The beginning of an Islamic community is equivalent to the beginning of Islamic history.

Mistaking methodologies as truth-generating

No student of Islamic history can escape the conundrum of debates surrounding Islamic primary sources.[77] But what few scholars in the field recognize is that "methodological" questions cannot be isolated from their ideological frameworks. Thus when a scholar makes a claim about the supposed unreliability of late antique Islamic sources, it is inherently based on both a judgment about the society that produced those sources and a philosophical position about the nature of truth claims. Scholars who fail to abstract their methodological positions avoid recognizing the results of their positions. The following discussion is a brief overview of some recurring issues within controversies about Islamic sources. Muslim historians of late antiquity cannot be identified as a homogenous group; there were myriad political and theological debates that animated late antique Muslim societies, which suggests that moments of consensus among Muslim historians should be taken seriously.[78] Where our diverse textual evidence indicates unanimity is historical truth's point of departure. Our task is to investigate how to critically interpret our sources.[79]

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authority and as social critic: stabilizing and destabilizing functions of history in legal argument," in *The historic turn in the human sciences*, ed. Terrence J. McDonald (Ann Arbor: University of Michigan Press, 1996), 343.

[75] Gordon explains the problems and inaccuracies of viewing legal history as progressive development: "The assumptions of the evolutionary histories of nineteenth-century jurists, especially the assumptions of necessary stage developments in all – at least all 'progressive' – societies from communalism toward individualism, and status to contract, were...broken up by historicist critics who found that even English legal development had skipped stages or gone through them in reverse order!" Robert W. Gordon, "Historicism in legal scholarship," *The Yale Law Journal* 90, no. 1017 (1981): 1035-36.

[76] "*Fiqh* literature does not represent 'Islamic law.' *Fiqh* must be recognized as a generic term describing a repertoire of concepts that arose in a certain time and eventually created a series of intellectual and cultural syntheses and it must be studied as such. Legality for Muslims, having partly developed outside state control, rests on a generic methodological framework that allows substantial differences, including an outright rejection of the whole edifice of *fiqh*." Khalafallah, "The elusive 'Islamic law'," 150.

[77] Robinson observes that "it is a measure of just how conservative the professional study of Islamic history remains that the noisiest controversy of the last 25 years concerns the reliability of our written sources, rather than the models according to which we are to understand and use them." Robinson, "Reconstructing early Islam," 115.

[78] Tucker observes, "It is surprising to note that historians of diverse interests, historical periods and contexts, creeds, nationalities, political opinions, and other collective identities have independently reached similar beliefs about history that resulted from the research of others. Bearing in mind the radical heterogeneity of historians, it would have been reasonable to expect historians to disagree about political or religious historiography as much as they disagree about politics and religion." Aviezer Tucker, *Our Knowledge of the Past* (Cambridge: Cambridge Unviersity Press, 2004), 24.

[79] Robinson has already expressed a similar position: "it is a measure of just how conservative the professional study of Islamic history remains that the noisiest controversy of the last 25 years concerns the reliability of our written sources, rather than the models according to which we are to understand and use them." Robinson,

i. contemporaneity

It is common for scholars of Islamic studies to allege that all the sources for Islamic history are unreliable because they were redacted or recorded at least a century after the events transpired.[80] That the primary sources were not written contemporaneous with the events is not completely "damaging" to the historical value of these sources for numerous reasons. First, contemporaneous sources are not inherently more reliable than later sources; there is no general rule that can be applied to all sources or that can guarantee the reliability of a particular kind of source. Second, some sources should not be categorized as later because the narratives transcribed in written sources were initially orally composed and transmitted contemporaneously as part of both a literary and a living legal tradition.[81] Specifically, some narratives about the Prophetic and Caliphal past were actively being used as precedents for legal decisions and were preserved not simply in literary form, but also in the form of social application.[82] I refer to the overlap between historical sources and legal practice throughout the substantive chapters of this dissertation. Third, these non-contemporaneous written sources are based on both oral materials and extinct written texts that were likely contemporaneous. In other words, contemporaneous written materials are likely embedded within later written texts.[83] Fourth, vast periods of history from a wide variety of areas are known to us exclusively through the accounts of non-contemporary sources; if these sources were rejected or presumed false, it would simply be impossible to write historiographies of these periods and places. Instead, historians are tasked with presenting theories about the past by critically using whatever evidence is available to them.

"Reconstructing early Islam," 115. See also Chase F. Robinson, *Empire and elites after the Muslim conquest: the transformation of northern Mesopotamia* (New York: Cambridge University Press, 2000).

[80] Donner's view in this regard is typical: "as any serious student of Islamic origins will know, these literary sources pose various problems as evidence for Islamic origins. First of all, there is the fact that they are not contemporary sources; sometimes they were written many centuries after the events they describe. It is obvious that reconstructing Islamic origins on the basis of such literary materials violates the first law of the historian, which is to use contemporary sources whenever possible. Nor is this merely a nicety of principle; even a quick reading of some of the main literary sources for Islamic origins—particularly narratives on this theme—reveals internal complexities that give pause to the serious researcher." (Donner 1998, 4, citation omitted) Donner, *Narratives*: 4.

[81] For a discussion of orality in Islamic historiography, see Gregor Schoeler, *The oral and the written in early Islam*, ed. James E. Montgomery, trans. Uwe Vagelpohl, Routledge Studies in Middle Eastern Literatures (London and New York: Routledge, 2006).

[82] "[T]he consensus exists because events actually did happen in the way described by our sources, and were so well known in the early community that all groups were required to accept the basic 'script' of events." Donner, *Narratives*: 289. This is not to imply that there are no slippages or ambiguities in these historical sources; for a relevant discussion, see Chapter 1.

[83] Wadad al-Qaḍī has demonstrated this quite convincingly and we should consider her insightful and precise work as indicative of broader characteristics of these materials. See Wadād al-Qāḍī, "An Umayyad papyrus in al-Kindī's *Kitāb al-Quḍāt*?," *Der Islam* 84, no. 2 (2008).

ii. orality and chains of transmission

Primary textual sources for reconstructing late antique Islamic history were orally composed and transmitted for several generations before being transcribed in their surviving textual forms approximately a century after the events.[84] Many specialists in the field of Islamic studies erroneously presume that the oral beginnings of late antique Islamic sources render these sources unreliable.[85] Oral transmission – as the primary archival form – should not be presumed to be less reliable than written transmission, in light of scribal errors and problems of textual preservation and transmission.[86] Throughout the late antique Near East, oral transmission was often supplemented by written transmission as part of an expansive educational process that intertwined oral and written forms of learning and communication.[87] Indeed, there is evidence that the earliest Islamic state relied on written documentation, which suggests that writing may have had a much stronger role to play in the beginning of Islamic history than commonly presumed.[88] Research on the use of oral sources for historiography has demonstrated that oral sources should be compared to written sources and material/documentary evidence as a means of verifying historical probability.[89]

iii. multi-vocality

One of the repeated criticisms of late antique Islamic sources is that they cannot be factual because they are inconsistent, as manifested in variant narratives of the same historical event. This notion is based on the false premise that factuality is only possible where one version of past events exists. Individuals experience, interpret, and relate facts differently. For example, variations in the testimonies of several witnesses to a crime are normative and do not preclude the admissibility of the testimony. The expectation that only one consistent

[84] For a discussion of this process, see Schoeler, *The oral and the written*.

[85] For a relevant discussion, see James E. Montgomery's introduction in ibid., 13. Vansina counters assumptions about the unreliability of oral sources, noting that "oral tradition is not necessarily untrustworthy as a historical source, but, on the contrary, merits a certain amount of credence within certain limits." Jan Vansina, *Oral tradition: a study in historical methodology*, trans. H. M. Wright (Chicago: Aldine Pub. Co., 1965, c1961), 1.

[86] Vansina explains that "oral traditions are historical sources which can provide reliable information about the past if they are used with all the circumspection demanded by the application of historical methodology to any kind of source whatsoever." Vansina, *Oral tradition*: 183. On oral traditions generally, see Jan Vansina, *Oral tradition as history* (Madison: University of Wisconsin Press, 1985). On textual criticism, see Paul Maas, *Textual criticism*, trans. Barbara Flower (Oxford: Clarendon Press, 1967). Schoeler also notes "it is as easy to falsify material in writing as it is in oral transmission!" Schoeler, *The oral and the written*: 41.

[87] Schoeler, *The oral and the written*: 41-47.

[88] Robin notes that "Cette réforme de l'écriture arabe pendant les premières décennies de l'Islam prouve que le premier État musulman (avant la sortie d'Arabie) n'a pas d'aversion pour l'écriture, mais, bien au contraire, en fait un usage constant. Il serait bien étonnant, dès lors, que l'écriture n'ait pas été utilisée pour la transmission des données de la Tradition." Julien Christian Robin, "La réforme de l'écriture arabe à l'époque du califat médinois," *Mélanges de l'Université Saint-Joseph* 59(2006): 351.

[89] "Examination of the information on which a testimony is based is therefore the first step towards evaluating its reliability...The next step is to compare it with all the other testimonies which describe the same facts. The comparative method is the one which enables the historian to arrive at an overall estimate of the relative reliability of the various testimonies." Vansina, *Oral tradition*: 114.

narrative is factual is a manifestation of a positivist orientation.[90] The processes used in transmitting, transcribing, and compiling late antique Islamic sources necessarily resulted in dissimilarities.[91]

iv. fallibility

In the field of Islamic studies, two default modes of engaging historical sources dominate: one presumes they are false and looks for snippets of factuality and the other presumes they are true and searches for snippets of inaccuracy. This is a manifestation of an oft-repeated critique of late antique Islamic sources that Muslim historians, transmitters, or compilers modified the "truth" in order to serve their interests or the interests of their patrons.[92] Indeed, it has become common for scholars to claim that late antique Islamic sources reveal more about their compilers or authors than historical "facts."[93] But authors and compilers do not all have the same objectives and there is no hierarchical organization that appears to have altered Islamic sources to conform with a particular historical vision – in late antiquity or the medieval era.[94] Every Islamic literary-historical source conveys the testimony of several historical actors; it is illogical to negate the veracity of all these sources based on problems (or fabrications) in some of the narratives.[95]

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[90] Or, as Mohammed Bamyeh notes, "With some effort at listening to the interplay of ideational and discursive configurations reverberating through the classical story of Islam, almost all 'contradictions' uncovered by revisionist historians can be shown to be contradictions solely in modern logic and modality of reading." Mohammed A. Bamyeh, *The social origins of Islam: mind, economy, discourse* (Minneapolis: University of Minnesota Press, 1999), viii.

[91] Schoeler provides a comprehensive and thorough discussion of variant traditions. Schoeler, *The oral and the written*: 33.

[92] Donner provides a succinct description: "The skeptical approach derives plausibility from years of source-critical and tradition-critical research that has conclusively demonstrated the existence in Islamic tradition of a heavy overlay of pious legend and the influence of manipulations, distortions, and fabrications of all kinds. This tampering with the tradition makes it unclear where the kernel of historical 'truth' may lie, and gives the skeptics the opening to claim that there is no historical kernel at all, only successive layers of repeatedly reshaped and redacted material." Donner, *Narratives*: 25. But note that Gil observed, "I find the general corpus of traditions – as preserved in the Arab sources – to be essentially genuine. I am well aware of the trend among some distinguished scholars, which is now in vogue to consider most traditions regarding the period of the Prophet to be mere inventions dating from later periods, a kind of typological construction. It is clear that there was some embellishment by later generations, often encouraged by rulers for propaganda purposes. As I discuss below, traditionalists were aware of such interests, which often conflicted with each other, and it is easy for us to detect them; basically, however, the facts we do have could not have been invented, and there is a fair amount of unanimity in the way they are presented." Moshe Gil, "The earliest waqf foundations," in *Related worlds: studies in Jewish and Arab ancient and early medieval history* (Aldershot, Hampshire, Great Britain; Burlington, Vt.: Ashgate, 2004), 125.

[93] Referring to narratives about the beginning of Islamic history, Donner claims "We might liken these accounts collectively to a mirror, in which the authors of the second and third centuries looked to see Islam's origins, but saw reflected mainly themselves—their own understandings of how those origins 'must have been,' based on the conditions and ideals of their own age." Donner, *Narratives*: 284.

[94] Donner notes that there were "no 'authorities' who had the power to impose a uniform dogmatic view." Ibid., 27.

[95] As Motzki astutely noted, "The possibility that isnāds and biographies were fabricated does not allow one to conclude that they really were fabricated. This must be positively proven first. The proof that some isnāds or some information contained in biographies of tradents were really fabricated does not necessarily mean that

v. fictional alternatives

In recent years, another approach to the sources has become apparent: some scholars have relinquished attempts to use late antique Islamic sources for historiographical purposes and chosen instead to explore the fictional or narrative aspects of these texts.[96] While this approach serves certain literary – and perhaps ideological – purposes, I reject, as false, any assumption of a dichotomy between facts and narratives because facts are always embedded in narratives.[97] To relegate these sources to an exclusively literary analysis does historical understanding a great disservice. Like all historical sources, late antique Islamic texts are neither purely fictional nor purely factual.

II. Alternatives to contemporary Islamic legal historiography

Re-conceptualizing Islamic society

It is possible to define late antique Islamic history as 613 CE (the Prophet's declaration of Islam) to 750 CE (the end of the Umayyad dynasty and beginning of the ʿAbbāsid Empire).[98] The study of Islamic history's beginnings must be situated within the field of late antique studies. Placing Islam in its late antique context and emphasizing Islamic society as the object of inquiry does not necessarily render Muslim indefinite or meaningless. Focusing on Islamic society and accepting that what it meant to be Muslim simply changed (and continues to do so) over time and according to region does not in any way diminish or deny the syncretism or hybridity of religious identity. While some late antique Muslims may have practiced Jewish, Christian, or pagan rituals, this does not mean that they were not Muslims. Belief and ritual practices are not comprehensive identity markers. The historical evidence of conquests suggests that becoming Muslim was similar to changing one's citizenship or political

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most of them or even all of them were." Harald Motzki, "The question of the authenticity of Muslim traditions reconsidered: a review article," in *Method and theory in the study of Islamic origins*, ed. Herbert Berg (Leiden: Brill, 2003), 245.

[96] For instance, Rubin states, "The question 'what really happened' in Muḥammad's times is not the one asked in this book, which instead is concerned with the manner in which the texts tell the story of Muḥammad's life, and is aimed to discover how the various evolving versions of this story tell us about the image of the Prophet as perceived by the believers among whom these texts were created and circulated." Uri Rubin, *The eye of the beholder: the life of Muḥammad as viewed by the early Muslims: a textual analysis*, Studies in late antiquity and early Islam, 5 (Princeton, NJ: Darwin Press, 1995), 1. See also Suleiman Ali Mourad, *Early Islam between myth and history: al-Ḥasan al-Baṣrī (d. 110H/728CE) and the formation of his legacy in classical Islamic scholarship*, Islamic Philosophy, Theology and Science. Texts and Studies, 62 (Leiden; Boston: Brill, 2006). That scholars, such as Mourad, are able to identify texts as pseudepigraphal should be indicative of the potential for critical reading – rather than an indictment of the sources.

[97] For postfoundationalists, historical distance (i.e., the presumed gap between facts and narratives is not a problem. Bevir explains, "All knowledge—including natural science as well as history—involves a kind of theoretical or literary construction of the facts." Bevir, "Why historical distance is not a problem," 32.

[98] This periodization is based, in part, on Peter Brown's observation that "the late seventh and the early eighth centuries, and not the age of the first Arab conquests, are the true turning-point in the history of Europe and the Near East." Brown, *The world of late antiquity*: 200.

affiliation: it was not just about faith.[99] To nuance our understanding of Islamization, we must integrate notions of citizenship because religious beliefs were intimately connected to political activities and aspirations. Many scholars (both Muslim and non-Muslim) seem unwilling to recognize that what being Muslim means fundamentally changes, varying according to time and place.[100] Islam is not a timeless category, but the creation of Islamic orthodoxies can be traced to particular historical moments. This project seeks to explore predecessor legal orthodoxies and dissenting legal opinions in late antiquity.

Redefining "law"

Recent work in socio-legal studies and in legal anthropology indicates that the definition of law in Islamic studies is deficient.[101] Instead of defining "Islamic law" as what is encoded in surviving legal texts, this dissertation will utilize legal traditions and practices documented in a variety of historical sources produced during the first century of Islam, therefore, before the emergence of professional legal schools. The oral tradition is capable of preserving legal precedents and this dissertation mines late antique Islamic legal texts for evidence of oral traditions.[102] There is no universal definition of Islam or Islamic law that can be disassociated from its historical and social contexts.[103] Indeed, my objective is to explore Islamic legal polycentricity within the context of Near Eastern legal pluralism during late antiquity.[104] The specific application of late antique contextualization is acutely warranted in the study of law because customs – part of the default normative ordering of society – are a source of law in every legal system. In late antique Islamic societies, customs are an amalgamation of tribal, Roman-Byzantine, Zoroastrian, Jewish, and Syriac Christian traditions. Many scholars have discussed the continued practice of these legal traditions in Islamic societies.[105] The problem in this area of scholarly inquiry is not the investigation into pre-

[99] For a multi-dimensional definition of religion, see Smart's seven dimensions of religion in Ninian Smart, *The world's religions* (Cambridge University Press, 1989).

[100] Donner's use of the term "believers" is simply unnecessary for two reasons: (a) these terminological distinctions impose a reified (ahistorical) definition of Muslim; (b) the community he describes appears to have self-identified as Muslim, even if later generations defined and practiced Islam differently. In other words, the historical process that Donner describes is that of a Muslim community whose rituals or beliefs changed. Donner, *Muhammad and the believers*.

[101] Rouland suggests that this is "the ethnocentricism of Western law: the identification of law with the state." Rouland, *Legal anthropology*: 3.

[102] Underlying the aggrandizement of written legal texts and corresponding diminishment of the oral tradition is a clear scholarly bias: "Classic legal theory has a pejorative view of orally based law, which is defined negatively in relation to written law. In our view this approach bears all the hallmarks of evolutionism, and should not be spared criticism." Ibid., 170.

[103] As Talal Asad explains, "there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes." Asad, *Genealogies of religion*: 29.

[104] Reza Banakar, "Power, culture and method in comparative law," *International Journal of Law in Context* 5, no. 1 (2009): 82 ("the diversity of sources and forms of law within the same social space (legal pluralism) or within the same legal system (legal polycentricity)."). On legal pluralism generally, see Sally Engle Merry, "Legal pluralism," *Law & Society Review* 22, no. 5 (1988).

[105] One example is the administrative apparatus of the caliphate, which continued many Roman-Byzantine practices – such as the legal status of non-Muslim subjects. Coulson notes that "The legal status of non-Muslim

Islamic legal norms, but rather the notion that the adoption and adaptation of those norms is "un-Islamic" despite it being impossible to create a legal system that is unrelated to its predecessors. Islamic legal traditions did not emerge in a vacuum: they are the continuation, with modifications, of earlier Near Eastern legal practices.[106] Indeed, neglecting thorough exploration of pre-Islamic Arabian legal traditions is the result of polemics, as well as scarce and difficult sources.[107] Late antique Islamic legal culture was undeniably heterogeneous.[108] Whereas a basic mode of inquiry in Islamic legal studies is diachronic doctrinal analysis, my research seeks both to broaden the definition of law beyond doctrine and to recognize discontinuities in legal practice. In selecting the case studies that form the substantive chapters of this dissertation, I made no assumptions about the continuity (or discontinuity) of pre-Islamic legal systems; instead, I sought to discover relationships between late antique Islamic legal doctrines and pre-Islamic legal systems.

Re-reading the sources: textual criticism, contextualization, and protagonist voices

The presumed "problem" of the sources is intrinsically related to the assumed absence of institutions, such as a legal system.[109] The only alternative to critically engaging the available

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subjects in Islam was modelled [sic] largely on the position of the non-citizen groups in the Eastern Roman empire. By the contract of *dhimma*, which embodied the notion of *fides* in Roman law." Noel J. Coulson, *A history of Islamic law* (Edinburgh: University Press, 1964), 27. This is a clear example of legal continuity, but identifying which Roman legal doctrines continued to be implemented in Muslim societies is not an exact science. Crone notes that "Not a single item of Goldziher's and Schacht's list of Roman elements in Islamic law has been proved, and several are demonstrably wrong." Crone, *Roman:* 11.

[106] Robert Roberts noted that "There are many customs which are common to all Eastern nations and cannot be traced to the code of any particular people." Robert Roberts, *The social laws of the Qorân: considered and compared with those of the Hebrew and other ancient codes* (London: Curzon Press, 1971), 2. Walter Young has made a similar assertion: "Islamic law is a natural outgrowth of its Near Eastern Semitic heritage." Walter Young, "Stoning and hand-amputation: the pre-Islamic origins of the *hadd* penalties for *zinā* and *sariqa*" (Master's thesis, McGill University, 2005), 7. Other scholars mention continuity of near eastern legal practices, without it altering a core assumption of "influence." By way of example, Judith Romeny Wegner's comparative work is infused with notions of "influence," although she recognizes that "both Jewish and Islamic law reflect the influence of the customary law of Mesopotamia." Judith Romney Wegner, "The status of women in Jewish and Islamic marriage and divorce law," *Harvard Women's Law Journal* 5(1982): 4.

[107] To my knowledge, no legal scholar has systematically compiled pre-Islamic Arabian legal materials or compared them with their successor Islamic equivalents. Hoyland notes that "It was quite common in the sedentary regions of Arabia to inscribe texts of a legal nature on stone. The advantage of this was that these texts were then easily available for all to read (or have read for them) and would endure for many lifetimes. The subjects are diverse: commercial ordinances...sanctions against criminals, hydrological legislation, cultic prescriptions, boundary settlements, property claims and so forth." Robert G. Hoyland, *Arabia and the Arabs: from the bronze age to the coming of Islam* (London: Routledge Press, 2001), 210.

[108] With modification, Crone's notion of hybrid indigenous law is useful here: "What they [Muslim jurists] reshaped was essentially provincial practice. This practice contained elements of Roman law in Syria and Egypt, just as it contained elements of Sasanid law in Iraq; and Roman law certainly, and Sasanid law probably, entered the Sharī̄a as a result. But substantially it was of ancient Near Eastern and Greek origin, or in other words it was the indigenous law of the Near East as it had developed after Alexander. Crone, *Roman:* 99.

[109] Chamberlain noted this phenomenon in a different context: "Where the sociological emphasis has been on the 'lack' of formal institutions and group structures, the historiographical problem has been to grapple with the 'scarcity' of original document collections." Michael Chamberlain, *Knowledge and social practice in medieval Damascus, 1190-1350*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 1994), 2.

sources is erasing this period from history, as demonstrated by the "absence" of Islamic law espoused by many academics.[110] Therefore, this project focuses on answering the more appropriate and effective question, *How can we use the sources?* Some scholars have produced interesting and historically valuable work that is grounded in close and thorough readings of numerous Islamic sources. But insufficient work has been done in the area of reconstructing lost texts or exploring the documentary evidence contained within literary texts.[111] My dissertation will implement the heuristics outlined by scholars who have similarly asserted that scrutinizing the entire Islamic historiographical tradition, along with comparisons to non-Islamic sources, is the only way to reach an "authentic" or "reliable" historiography of Islamic society during its first century.[112]

III. Intersections: Jewish and Islamic comparative law[113]

Within Western scholarly traditions, Jewish law has traditionally been viewed as a significant (if not the primary) source of "influence" on Islamic law – and vice-a-versa; most comparative Jewish and Islamic legal studies focus on this issue.[114] I seek to replace the erroneous and problematic discourse of "borrowing" with a historically-nuanced recognition

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[110] Chamberlain – referring to sources of a later period – offers another useful insight into this issue: "To ignore this information because it may be 'untrue' is to ignore what are perhaps the most productive sources on some of the critical questions of the social and cultural history of the period." Ibid., 20.

[111] Leading works/scholars in this area include: Iḥsān ʿAbbās, *Shadharāt min kutub mafqūdah fī al-tārīkh* (Beirut: Dār al-Gharb al-Islāmī, 1988). al-Qāḍī, "An Umayyad papyrus in al-Kindī's *Kitāb al-Quḍāt*?." Wadād al-Qāḍī, "The salaries of judges in early Islam: the evidence of the documentary and literary sources," *Journal of Near Eastern Studies* 68, no. 1 (2009).

[112] "It is noteworthy that in a century of close work on Islamic origins, during which a vast number of new sources of every variety have been recovered from manuscripts and published, the new debates or opinion groups that have come to light appear to be not so much ones that reveal dangerous opinions suppressed by the 'authorities,' but marginal positions that simply died out for lack of sufficient interest to sustain them in the community. For this reason, it seems plausible to assert that the traditional Islamic material, considered as a whole, notwithstanding the (sometimes) extensive redaction of particular parts of it, contains embedded within it sufficient material to reconstruct at least the main issues debated by Believers in the early Islamic period, and the basic attitudes of the main parties to those debates." (Donner 1998, 28-29, citation omitted) Donner, *Narratives*: 28-29. See also, al-Dūrī, *The rise of historical writing among the Arabs*.

[113] An earlier version of this section was presented as an invited presentation at "Muslims and Jews Together: Seeing from Without, Seeing from Within," an International Conference/Workshop sponsored by University of California at Berkeley and at Davis (April 29, 2010).

[114] "Liebesny, Fitzgerald, Snouck Hurgronje, and Brunschvig, took Judaism as their point of departure in their quest for outside influences on Islam...It follows from the very brief survey above that modern scholarship largely agrees that Judaism influenced Islamic law or contributed to its consolidation; different authors, however, dispute the measure of that influence and its depth." Gideon Libson, *Jewish and Islamic law: a comparative study of custom during the Geonic period*, Harvard series in Islamic law, 1 (Cambridge, Mass.: Islamic Legal Studies Program, Harvard Law School, 2003), 4. Contrary to Libson's claim about him, Fitzgerald critiqued the methodology underlying notions of "borrowing" – at least as it pertained to Roman law; Fitzgerald noted that "in general, the procedure even of some very eminent writers, has been to string together a list of resemblances, sometimes real but generally superficial and too often imaginary; and then to assert that such resemblances are in themselves proof of borrowing by the later from the earlier system." S.V. Fitzgerald, "The alleged debt of Islamic to Roman law," *The Law Quarterly Review* 67(1951): 81. For an example of scholarship claiming Islamic "borrowing" from Judaism, see Abraham I. Katsh, *Judaism in Islām: Biblical and Talmudic backgrounds of the Koran and its commentaries*, 3rd ed. (New York: Sepher-Hermon Press, 1980).

of shared customary practices.[115] Notions of "influence" and "borrowing" are inaccurate because the boundary between inside and outside is more porous and imaginary than often presumed. Jews and Muslims shared a common Near Eastern legal culture and altered their normative orders in ways that reflect both the internal dynamics of legal communities and the external, socio-political contexts.[116] Meticulous research demonstrates that what was once conceptualized as "borrowing" is actually evidence of shared, historical practice.[117]

Earlier comparisons of Jewish and Islamic legal systems adopted a problematic evolutionary understanding of both Jewish law and Islamic law and identified a particular time and place for Jewish legal "influence" on Islamic law.[118] The reality, however, is that all legal systems are constantly in flux and that the concept of "influence" imposes a historically inaccurate notion of unilateral exchange.[119] While some scholars recognize mutual "influence" (rather than cross-fertilization), they have erroneously limited it to particular periods.[120] My viewpoint is that exchange occurs continuously and cannot be demarcated in time. Assertions about the greater influence of one legal system or another tend to reflect the scholar's own area of expertise, rather than an empirically-based comparative evaluation.[121] Moreover, accidents of historical evidence preservation can easily skew our perception of the complex realities of Near Eastern legal systems by insinuating the idea of "influence" rather than

[115] Wasserstrom astutely asserted that "the debtor-creditor model of influence and borrowing must be abandoned in favor of the dialectical analysis of intercivilizational and interreligious process." Steven M. Wasserstrom, *Between Muslim and Jew: the problem of symbiosis under early Islam* (Princeton, N.J.: Princeton University Press, 1995), 11.

[116] Meron similarly suggested that "le droit musulman est en réalité la cristallisation d'un droit coutumier, notamment celui qui régissait la vallée du Tigre et de l'Euphrate, bien avant l'avènement de l'Islam" and identified "un droit coutumier commun aux droits juif et musulman." Yaakov Meron, "Points de contact des droits juif et musulman," *Studia Islamica*, no. 60 (1984): 84-85, 117.

[117] See, for example, Crone and Silverstein on lot-casting: "What the striking similarity between Jewish and Islamic law reflects is not, in this particular case, Jewish *Fortleben* in Islam, but rather the shared roots of Jewish and Islamic culture in the ancient Near Eastern tradition. We seem to have here a case comparable to that of circumcision, practised by both the Jews and the Arabs (eventually Muslims), not by the one borrowing from the other, but rather by both retaining an ancient custom which had once been widespread in the Near East (notably in Egypt)." Crone et al., "The ancient Near East and Islam," 432.

[118] Libson articulates this clearly, noting "Both the time (8th or 9th century) and the place (Iraq and Syria) of the consolidation and crystallization of Islamic law have added an important dimension to our understanding of the factors that influenced the Muslims' legal system. They located the encounter between Muslim jurists and Judaism in Iraq-Babylonia closer to the classical centers of Jewish scholarship, Sura and Pumbedita (and to the centers of Roman law), than previously thought." Libson, *Jewish and Islamic law*: 6. See also Judith Romney Wegner, "Islamic and Talmudic jurisprudence: the four roots of Islamic law and their Talmudic counterparts," *The American Journal of Legal History* 26, no. 1 (1982): 26.

[119] By way of example, Rabbinic law changed in the Gaonic period. Libson recognizes that "The evolution of halakhah in the geonic period was primarily a continuation of talmudic tradition, although one cannot deny outside influence." Libson, *Jewish and Islamic law*: x.

[120] Libson claims that "At the first stage, immediately after the birth of Islam, it was Jewish law that influenced the fledgling Islamic system, but during the geonic period the flowed changed direction, with Islamic law putting its imprint on halakhah. Most probably there was a transitional phase, lasting approximately from the mid-7th to late 8th centuries, during which the flow was two-way in parallel channels." Ibid., 175.

[121] For example, Jokisch conveniently claims that "As a whole, however, one may clearly say that most of the Sharī'a experts gave preference to Roman law, classical or post classical, and secondly to Jewish law." Jokisch, *Islamic Imperial Law*: 75. Not based on any systematic comparative study, Jokisch's claim of Roman law's primary "influence" simply legitimates the conclusions of his work.

shared history.[122] While other scholars have acknowledged regional traditions as a source for "similarities" between Jewish and Islamic legal traditions, they did so without relinquishing the problematic framework of 'influence.'[123] My approach follows some previous scholarship in emphasizing that shared traditions (not "influence") are the primary explanation for "similarities."[124]

What is unique about the relationship between Muslim and Jewish jurists is that both legal communities continued to practice and to modify their legal systems in the same social space for at least a century (the late antique through early modern periods). Still, it is not my intention to assert Jewish legal traditions as relatively more "influential" than other legal traditions; such an inquiry is both impossible to measure and based on imagined boundaries of separation. Underlying the assumption of influence is the erroneous belief that some legal systems (Jewish, Roman, etc.) were static and could then "influence" a legal system that was in the process of "forming."[125] This developmental perception of history is philosophically untenable and must be rejected.[126]

Some scholars have refuted the viability of any comparative research into late antique legal systems.[127] Others have avoided historical contextualization and instead focused on canonical legal texts (from disparate eras) of each religious community.[128] In my opinion, both approaches are misguided. The difficulties and uncertainties surrounding this research do not justify avoiding studying late antique Near Eastern legal culture through its subcomponent parts.[129] This dissertation begins with the presumption that there is a common legal

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[122] For instance, Crone and Silverstein note, "if it had not been for the chance preservation of the two Greek papyri, one might have taken lot-casting for the distribution of land in early Islamic society and classical law to represent a case of Jewish *Fortleben* in Islam; for until the papyri were discovered, it was only in rabbinic texts that the practice seemed to be alive in connection with inheritance shares." Crone et al., "The ancient Near East and Islam," 431.

[123] Case in point: referencing similarities between Jewish and Islamic legal norms, Wegner asserts that "Several hypotheses will be advanced, including common semitic tribal origins, common environmental influences on the development of both systems, independents development (convergence), and strong evidence especially in Shāfiʿī's case, of borrowing from talmudic sources." Wegner, "Islamic and Talmudic jurisprudence," 30.

[124] Satlow, "Beyond influence."

[125] These evolutionary ideas were critiqued in the first section of this Introduction. See also footnote 120.

[126] For a critique of developmental legal histories, see Gordon, Robert W. "Critical legal histories." *Stanford Law Review* 36, no. 57 (1984): 57-125.

[127] Melchert asserted that "Verifiable data from the first/seventh Islamic century are so scanty, both from within and without the Islamic tradition (e.g., records of non-Rabbinic Judaism), it seems unlikely we shall advance far beyond the sort of speculative reconstructions we have seen already from Crone and Hawting." Christopher Melchert, "The early history of Islamic law," in *Method and theory in the study of Islamic origins*, ed. Herbert Berg (Leiden: Brill, 2003), 324.

[128] By way of example, Neusner and Sonn assert that "Ours is a study in history and comparison of religions viewed as intellectual constructions. We give an account of how sages imagine things, not how people actually conducted themselves." Jacob Neusner et al., *Comparing religions through law: Judaism and Islam* (London; New York: Routledge, 1999), 10. See also Wegner, "Islamic and Talmudic jurisprudence."

[129] Libson notes that "The basic difficulty in determining which system (or systems) influenced Muslim law is the multiplicity of systems that might have contributed to its consolidation, ranging from early Arab customs, through the legal systems of the Ancient East, including Jewish and Christian religious law, to the classical systems of Greek, Roman-Byzantine and Sassanian-Persian law." Libson, *Jewish and Islamic law*: 1. But unlike Libson and other scholars, I am not concerned with debating degrees of influence.

background from which disparate legal communities formed their independent traditions.[130] My model for comparing Jewish and Islamic law emphasizes historical accounts of legal practices and legal communities in clearly delineated periods and social spaces.[131] Existing comparative Jewish and Islamic legal scholarship is methodologically and theoretically limited by its emphasis on texts, on identifying similarities and differences, and on doctrine.

Social context, instead of textual focus

Scholarship that purports to compare Jewish and Islamic laws typically focuses on two modes of textual comparison: (1) between the Torah and the Qurʾān[132] or (2) between the Babylonian Talmud and select medieval Islamic legal texts of the four surviving Sunni legal schools.[133] Texts (or a body of texts) are presumed to be representative of the entire legal tradition. Thus, it is assumed that by reading the Torah or the Qurʾān, one can discover the essential or fundamental aspects of each religion's legal tradition. Likewise, the Babylonian Talmud or medieval Islamic legal texts are perceived – and thereby constructed – as the definitive sources of Jewish and Islamic law. This textual approach discounts the constantly changing meanings and applications of these texts within diverse interpretive communities; it ignores people.[134] It is historically inaccurate because it compares texts from entirely different periods and social spaces, thereby ascribing independent existence to textual traditions in isolation from their interpretive communities. This approach also elevates a particular textual tradition above its predecessors or successors; among the many erasures are the Palestinian Talmud, the legal practices of non-Rabbinic Jews, and the legal traditions of extinct and minority Islamic legal schools.

Moreover, textually-based comparison is intertwined with religious orthodoxy because such comparisons are frequently a search for origins and a fixation on sacred texts.[135] Text-

[130] I concur with Mallat who encourages scholars to "seriously consider close resemblances in substance and form across religions and eras in favour of an identifiable, common Middle Eastern legal koine." Chibli Mallat, *Introduction to Middle Eastern law* (Oxford; New York: Oxford University Press, 2007), 28.

[131] I concur with Banakar's emphasis on contextualization: "the contextualisation of law should be regarded as the indispensable methodological characteristic of all comparative studies of law that aspire to transcend the understanding of law as a body of rules and doctrine. The method of contextualisation situates legal action, behaviour, institution, tradition, text and discourse in specific time and sociolegal space, thus, revealing law's embeddedness in societal relations, structures, developments and processes." Banakar, "Power, culture and method in comparative law," 71.

[132] Case in point: "we focus on what by common agreement of the faithful governs through eternity. For Judaism that is the Torah, and for Islam, the Qur'an and the Sunna." Neusner et al., *Comparing religions through law*: 9.

[133] By way of example: "Our picture of the two religions therefore conveys the vision of the virtuosi, the ideal of the sages of the Torah and of the scholars who articulated the classical works of Islamic jurisprudence (*fiqh*). Anyone who wishes to compare the laws of the two religions will begin exactly where we do, but no one who then proposes to compare the two religions will end there." Ibid., 11.

[134] A recent exception is Talya Fishman, *Becoming the people of the Talmud: oral Torah as written tradition in medieval Jewish cultures* (Philadelphia: University of Pennsylvania Press, 2011).

[135] The "origins" or "essences" of religious traditions are historical constructs and, as Said asserted, "The state of mind that is concerned with origins is, I have said, theological. By contrast, and this is the shift, beginnings are eminently secular, or gentile, continuing activities." Edward Said, *Beginnings: intention and method* (New York: Columbia University Press, 1985), 372-73. There is, of course, scholarly interest in subverting orthodox interpretations of texts, but these trends are relatively recent and arguably less dominant.

based approaches promote and legitimate an orthodox expression of each religious tradition: certain (late antique) Rabbis define Jewish law and certain (medieval) Muslim jurists define Islamic law to the exclusion of all dissenting or alternative opinions (recorded in non-canonical texts). Consequently, similarities or differences between legal systems are attributed to innate characteristics of these texts or religions, rather than to a social context.[136] Specifically, doctrinal similarities in Jewish and Islamic legal systems can be the result of shared Near Eastern customary practices that are often unacknowledged by orthodox jurists or scholars.[137]

Relationships, instead of similarities and differences

The notion of legal transplants has had limiting effects on comparative Jewish-Islamic legal research.[138] Contrary to the transplant thesis, similarities can arise from dialectical interchange in which two legal communities in the same social space are debating issues of common interest.[139] Likewise, differences are not evidence of inherent or primordial separation between these legal traditions because borders are often constructed by elites.[140] Differences can indicate how one legal system defined itself as distinct from another or responded to distinct circumstances. By investigating relationships, we can explore areas of convergence.[141]

In terms of research questions, I want to suggest an alternative framework. The standard question, "what are the Jewish and Islamic legal norms concerning *topic x*?" is one that invites a limited comparative framework of similarities and differences. Instead, I suggest we should ask, "what were the legal norms of Jewish and Muslim peoples in *place a* during *time b* on *topic x* and how do these laws relate to each other?" Shifting our expectations away from

[136] By way of example, Neusner and Sonn observe, "Why should the two religions concur on so many fundamental propositions concerning the form that religion should take in the here and now of ordinary life? It is because of the character of the revelation – Torah, Qur'an – that each means to realize in the social order." Neusner et al., *Comparing religions through law*: 247.

[137] See, for example, Young, "Stoning and hand-amputation."

[138] The notion of "legal transplants" should be applied in limited situations, where there is clear evidence; it is applicable to modern situations of one state incorporating the legal codes (or significant parts thereof) of another state. See Alan Watson, *Legal transplants: an approach to comparative law* (Athens: University of Georgia Press, 1993). But I contend that legal transplantation is not relevant to Jewish and Islamic legal systems in the late antique and medieval periods.

[139] For instance, "at least in some cases, the seeming affinities between Jewish midrash and the Quran may be due to an ongoing dialogue over scriptural matters that took place in both communities in the medieval period, and not to Muhammad's unequivocal 'debt' to Jewish informants." Pregill, "The Hebrew Bible and the Quran," 655. Pregill further explains, "the Quran's putative resemblance to its supposed 'influences' might very well reflect the transmission of elements from the tafsīr to the Jewish community, which then subsequently generated those very narratives wrongly understood as having 'influenced' the Quran in the first place." Ibid., 656.

[140] Boyarin notes that "Borders themselves are not given but constructed by power to mask hybridity, to occlude and disown it." Boyarin, *Border lines*: 15.

[141] "Wave theory posits that linguistic similarity is not necessarily the product of a common origin but may be the product of convergence of different dialects spoken in contiguous areas, dialects that are, moreover, not strictly bounded and differentiated from each other but instead shade one into the other. Innovations at any one point spread like the waves created when a stone is thrown into a pond, intersecting with other such waves produced in other places and leading to the currently observed patterns of differentiation and similarity." Ibid., 18.

simple similarities and differences facilitates observations of the relationships between polycentric Jewish and Islamic legal systems in the context of Near Eastern legal pluralism.[142] I argue that to elucidate ambiguities in one legal system of the Near East, it is beneficial to examine the corresponding legal ideas and practices of a neighboring legal system. Future research will unearth the depth of interdependence among the many legal systems of the Near East.[143] Chapter 3 offers an exposition of the relationship between these two legal systems in terms of parallel transformations.

Legal systems, instead of doctrine

Scholarship that "compares" Jewish and Islamic law usually focuses on legal doctrines – instead of on legal systems as a whole.[144] This perpetuates orthodox conceptualizations of religious law (as a set of unchanging divine laws), instead of providing contextualized accounts of law across space. The specific scholarly emphasis on comparing Jewish and Islamic norms relating to women and the family reflects a modern conceptualization of religious law as being relegated to family law doctrines.[145] In contrast, in Chapter 3, I focus on legal systems as a

[142] See footnote 104.

[143] As Glenn has noted "The interdependence of complex traditions is evident both from the difficulty in defining the starting points of major legal traditions (even the prophets retain much of previous law, now revealed) and by the ongoing, major forms of communication and debate between complex traditions." H. Patrick Glenn, *Legal traditions of the world: sustainable diversity in law* (Oxford; New York: Oxford University Press, 2007), 356.

[144] Some examples include: M. R. Moodie et al., "Symposium on religious law: Roman Catholic, Islamic, and Jewish treatment of familial issues, including education, abortion, in vitro fertilization, prenuptial agreements, contraception, and marital fraud," *Loyola of Los Angeles international and comparative law journal* 16, no. 1 (1993). Mary F. Radford, "The inheritance rights of women under Jewish and Islamic law," *Boston College international and comparative law review* 23, no. 2 (2000). Stephen D. Ricks, "Kinship bars to marriage in Jewish and Islamic law," in *Studies in Islamic and Judaic traditions*, ed. William M. Brinner and Stephen D. Ricks, *Brown Judaic studies; no. 110* (Atlanta: Scholars Press, 1986). In Arabic, see ʿAbd al-ʿAzīz Yūsuf ʿAbd al-Maqṣūd, *Taʿaddud al-zawjāt bayna al-yahūdīyah wa-al-naṣrānīyah wa-al-islām: dirāsah muqāranah naqdīyah* (Cairo: Dār al-Fikr al-ʿArabī, 2010). Muḥammad Rāmiz ʿAbd al-Fattāḥ ʿAzīzī, *Taḥrīm al-ribā: fi al-islām wa-al-diyānatayn al-yahūdīyah wa-al-masīḥīyah*, Min silsilat al-iqtiṣād al-Islāmī, 1 (Amman: Dār al-Furqān lil-Nashr wa-al-Tawzīʿ, 2004). Aḥmad Ghazālī, *al-Ṭalāq al-infirādī wa-tadābīr al-ḥadd minh fī al-fiqh al-islāmī wa-al-sharāʾiʿ al-yahūdīyah wa-al-masīḥīyah wa-al-waḍʿīyah wa-al-taqniyāt al-ʿarabīyah al-muʿāṣirah: dirāsah muqāranah* (Cairo: Dār al-Nahḍah al-ʿArabīyah, 2000). Khālid Muṣṭafá Hāshim, *al-Jarīmah: dirāsah muqāranah bayna al-sharīʿatayn al-yahūdīyah wa-al-islām* (Harindun, Farjiniya: al-maʿhad al-ʿālamī lil-fikr al-islāmī, 2007). Ṣāliḥ Muḥammad Muḥyī al-Dīn Kīlānī, *Masāʾil al-aḥwāl al-shakhṣīyah bayna al-diyānāt al-thalāth: al-yahūdīyah, al-masīḥīyah, al-islām* (Amman: Dār Yāfā al-ʿIlmīyah lil-Nashr wa-al-Tawzīʿ, 2009). Hind Muʿadlalī, *al-Zawāj fī al-sharāʾiʿ al-samāwīyah wa-al-waḍʿīyah* (Damascus: Dār Qutaybah lil-Ṭibāʿah wa-al-Nashr wa-al-Tawzīʿ, 2002). ʿAbd al-Rāziq Aḥmad Qandīl, *al-Mawārīth fī al-yahūdīyah wa-al-islām: dirāsah muqāranah*, Silsilat Faḍl al-Islām ʿalá al-Yahūd wa-al-Yahūdīyah, al-ʿadad 13 (Giza: Markaz al-Dirāsāt al-Sharqīyah, Jāmaʿat al-Qāhirah, 2008). ʿInād Najr al-ʿAjrafī ʿUtaybī, *al-Qatl wa-al-sariqah fī al-yahūdīyah wa-al-masīḥīyah wa-al-islām*, Silsilat Tashrīʿ al-ḥudūd fī al-adyān al-thalāthah, 1 (Riyadh: s.n., 1998); ʿInād Najr al-ʿAjrafī ʿUtaybī, *al-Zinā wa-al-khamr fī al-yahūdīyah wa-al-masīḥīyah wa-al-islām* (Riyadh: Dār ʿĀlam al-Kutub, 2002); ʿAbd al-Rāziq Aḥmad Qandīl, *al-Mawārīth fī al-yahūdīyah wa-al-islām: dirāsah muqāranah*, Silsilat Faḍl al-Islām ʿalá al-Yahūd wa-al-Yahūdīyah, al-ʿadad 13 (Giza: Markaz al-Dirāsāt al-Sharqīyah, Jāmaʿat al-Qāhirah, 2008).

[145] This is demonstrated by the relative over-emphasis on comparing Islamic and Jewish laws as they pertain to women and the family. It is a reflection of a long-standing ideological interest/desire in "saving" the "Oriental woman." In addition to the previous note, see, for example, Wegner, "The status of women." Chapter 3's case study is not an exception, although the heuristics and theoretical approaches are distinct. Although, the case study was selected because Gideon Libson identified the Gaonic decree related to wife-initiated divorce as an innovation/deviation resulting from Islamic influence and Chapter 3 emerged out of my attempt to understand

whole by investigating the role of jurists, courts, law schools, scriptural hermeneutics, and procedural rules. Research should be pursued that illuminates the relationship between Jewish and Islamic legal systems in terms of legal theory, sources, methodology, argumentation, and legitimation.[146]

It should be noted that there is no neutral or universal language of "comparative law" that transcends legal cultures. Consequently, the terminology I use to describe historical legal systems necessarily invokes "modern" or "foreign" legal categories.[147] Exploring relationships between Jewish and Islamic legal history can clarify the relative meaning of legal terminology and thereby substantiate interpretations about the legal-historical past.[148] Chapter 3 aims to shift comparative Jewish and Islamic legal studies away from attempts to identify causal relationships between these legal systems by implementing some of the methodological and theoretical alternatives outlined in this Introduction.[149] Change in Near Eastern legal pluralism is the background narrative for this dissertation[150]

IV. Sources in the dissertation case studies

The three case studies presented in this dissertation share some important commonalities in their approach to primary sources. Each case study integrates insights from several genres of Islamic historical sources and juxtaposes the ensuing narrative with materials from other Near Eastern communities. Within Islamic studies, this dissertation's use of some sources (both historical-literary and documentary) and combination of heterogeneous sources is not prevalent. Whenever possible, I have identified the author of a primary source by including his death date and his location. Locations are not necessarily the place where an

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Libson's assertion. See Libson, *Jewish and Islamic law*: 110-12. See also Gideon Libson, "Halakhah and law in the period of the Geonim," in *An introduction to the history and sources of Jewish law*, ed. Neil S. Hecht, et al. (Oxford; New York: Clarendon Press; Oxford University Press, 1996), 235.

[146] Comparative law should incorporate "conception of law, theory of legal sources, methodology of law, theory of argumentation and theory of legitimation of the law." Mark Van Hoecke et al., "Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law," *The International and Comparative Law Quarterly* 47, no. 3 (1998): 536.

[147] "Besides avoiding the pitfalls of whiggery, the legal historian must therefore also be cautious in applying current jurisprudential models to the past. As has been seen, sensitivity to the voices of the past may often reveal that they spoke in different languages." Michael Lobban, "Introduction: the tools and the tasks of the legal historian," in *Law and history*, ed. Andrew Lewis and Michael Lobban, *Current Legal Issues 2003* (Oxford: Oxford University Press, 2004), 5.

[148] There are insights to be gained from the kind of relational analysis I argue for here. As Lévi-Strauss noted, "The error of traditional anthropology, like that of traditional linguistics, was to consider the terms, and not the relations between the terms." Lévi-Strauss, Claude. *Structural Anthropology*. Translated by Claire Jacobson and Brooke Schoepf. New York: Basic Books, 1963, 46. I am similarly interested in exploring the relationship between Jewish and Islamic legal ideas, or how they can be defined in relation to each other. (However, I reject structuralism's diminishment of human agency.)

[149] In this sense, I seek to implement Foucault's observation that "we have to rid ourselves of the prejudice that history without causality could no longer be history." Michel Foucault, *Religion and culture*, ed. Jeremy R. Carrette (New York: Routledge, 1999), 92.

[150] Goitein asserted that "as many of these [resemblances] seem to originate from parallel developments rather than from borrowing, the similarity between the two religions poses problems rather than solves them." Goitein, "The birth-hour of Muslim law?," 23. The perspective that will be outlined here is that "similarities" indicate continuation of antecedent Near Eastern practices and need not be perceived as problematic or causally related.

author was born, or where he died, but rather where he was intellectually active; in addition, I have used general and broad regional terms, rather than naming specific cities, even when that information is readily available. I have also referred to translations of primary sources in order to introduce the general reader to these resources.[151]

Chapter 1: Legal historiography – a case study in international law. This chapter explores biographical sources (*sīrah* and *maghāzī)* to create a narrative about the treatment of prisoners of war during the Prophetic era (610-632 CE) in Medina and in the decades immediately afterward. Pre-canonical ḥadīth collections (*muṣannafāt* and *sunan*) are used to survey the legal opinions of late antique Muslim jurists who practiced law prior to the consolidation of legal schools. The chapter then reviews a variety of legal texts dating from the ninth through thirteenth centuries and representing four major Sunnī legal schools (Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī). Switching genres, I examine a major exegetical text, al-Ṭabarī's *Tafsīr* of the Qurʾān, for information about how historical interpretive communities might have understood particular Qurʾānic verses with legal consequences. Finally, the legal norms of pre-Islamic communities are introduced to suggest the complexity of intertextuality in the late antique Near East. An objective of this chapter is to illustrate the overlaps of juristic texts and historical texts, since they were often recorded for both legal and historical purposes in late antiquity.

Chapter 2: Legal heterodoxy – a case study in taxation. This chapter presents a variety of Qurʾānic verses pertaining to the obligation to pay charity in order to demonstrate the multiple understandings of charity within the Qurʾān. Drawing upon biographical and historical sources, the imposition of a charity tax by the Prophet is reconstructed. The chapter then uses pre-canonical ḥadīth collections (*muṣannafāt*) and Shīʿī ḥadīth sources to establish that there are no sectarian differences in the reported amount of the charity tax. I offer some contrasts between Islamic charity taxation practices with discussions of charity in antique rabbinic Jewish texts in order to highlight the distinctly regulatory aspects of Islamic charity taxation. To scrutinize how various jurists interpreted the category of Muslim in relation to payment of the charity tax, I investigate an array of legal texts representing minority, sectarian, and majority opinions from the ninth through the fourteenth centuries. The chapter then juxtaposes these multi-dimensional notions of Muslim identity with particular moments in Islamic history when taxation was the subject of controversies. References to papyrological evidence of charity taxation are interspersed throughout the chapter.

Chapter 3: Legal changes – a case study in family law. This chapter uses a multitude of Jewish and Islamic legal texts dating from the third through fourteenth centuries to create two chronologies of legal changes in Jewish and Islamic legal history related to wife-initiated divorce. The rabbinic reception of a seventh-century Gaonic decree about wife-initiated divorce is scrutinized by examining Jewish legal texts dating from the eighth through fourteenth centuries. The chapter then offers an alternative understanding of this Gaonic decree by examining Near Eastern legal precedents, as evidenced in the legal texts of Byzantine and Zoroastrian communities. Alongside papyrological evidence, this interweaving of legal evidence from several legal systems demonstrates that both Muslim and Jewish jurists transformed divorce from contract dissolution into contractual breach.

[151] I have consulted the original sources even when I have referred to works in translation. I refer to English translations as part of a strategic effort to introduce non-specialist readers to these important sources.

In each of these case studies, I scrutinize a doctrinal law by digging deep into its historical past and situating it within a late antique context of hybrid legal practices. Comparison and contextualization produce alternative understandings of Islamic legal history.

Chapter 1: Legal historiography – a case study in international law[1]

Prisoners of war: late antique precedents in medieval juristic

The inseparability of law and history is evident when historical interpretation — an integral component of legal hermeneutics — results in juristic disagreement. This chapter tracks the shift from prohibition to permissibility of prisoner of war execution in Islamic legal history between the late antique and medieval periods by demonstrating the connections between changing legal opinions and changing historiographical readings. The legal category of "prisoner of war" is arguably a modern one; however, for our purposes, "prisoner of war" refers to soldiers or combatants captured during or immediately after warfare. In the context of seventh-century Arabia, "combatants" generally means males above the age of puberty and capable of engaging in warfare.[2] Contemplating the contrast between historical and jurisprudential interpretations of historical events with legal implications will facilitate investigation of the interactions between historiography and legal discourse.[3] In this chapter, I will explore a few questions in order to highlight the ambiguous, overlapping roles of historians and jurists as they construct (legal) histories:

(1) Do historical narratives about all the battles that occurred during the Prophet's lifetime illustrate his legal practice concerning treatment of prisoners of war?;

(2) After the Prophet's death, how did late antique Muslim jurists adjudicate this issue?;

(3) What legal reasoning did key Muslim jurists of the medieval period apply in permitting the execution of war prisoners?[4];

(4) What could explain the discrepancy between the chronologically earlier opinion (prohibiting prisoner execution) and the later, more dominant legal opinion (permitting prisoner execution)?[5]

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[1] This chapter is a revised version of a previously published article, Salaymeh, "Early Islamic legal-historical precedents." (For the sake of *Law and History Review*'s non-specialist audience, I refer to English translations of Arabic texts whenever possible, but the original sources were consulted in all instances.) I thank Harry Scheiber and David Tanenhaus for their invitation to deliver an earlier version of this chapter at the Boalt-UNLV Symposium on *Law, War, and History* in February 2007. I thank Ira Lapidus, David Lieberman, Hossein Modarressi, and the anonymous reviewer of *Law and History Review* for their comments and suggestions on a previous version of this chapter. I thank Rhiannon Graybill, Maria Mavroudi, and Amr Osman for their comments on a revised version.

[2] The normative Islamic legal opinion is that non-combatants may not be killed. Non-combatants are generally defined as children, women, the elderly, the sick (physically or mentall), and the disabled.

[3] This chapter's approach to late antique Islamic sources presumes that "it seems plausible to assert that the traditional Islamic material, considered as a whole . . . contains embedded within it sufficient material to reconstruct at least the main issues debated by Believers in the early Islamic period, and the basic attitudes of the main parties to those debates." Donner, *Narratives*: 28-29.

[4] This period is commonly described as "classical" within the field of Islamic studies. However, I will use "medieval" to emphasize its connection to global history periodization or "professional" to refer to a significant characteristic of jurists during this period (namely, that the majority of them belonged to professional legal schools).

Asking and answering these questions will illustrate the complicated, dynamic process by which legal normativity changes despite juristic claims of "following" tradition.

My focus is on late antique historiography and on the legal reasoning articulated by subsequent generations of Muslim scholars in an array of legal and historical texts, rather than on normative war practices that may have influenced legal opinions.[6] I will occasionally refer to contemporaneous war situations, but I avoid fully exploring them because legal texts refer only to Islamic (especially Prophetic) precedents and because historical sources report an inconsistent variety of practices.[7] Moreover, keeping prisoners of war alive (rather than executing them) likely burdened an army's movement and resources (by generating additional needs for provisions) and burdened the local population near the battlefield; but these socio-economic consequence to the legal ruling on war prisoner execution cannot be easily measured or historically reconstructed. While I recognize the significance of context to jurisprudential reasoning, in this chapter my primary objective is to scrutinize the internal dynamics of legal reasoning. Thus, historical analysis of each individual jurist's possible contextual influences is beyond the scope of this chapter. I contend that the dominant opinion pertaining to prisoner of war execution shifted from prohibition to permissibility as a result of jurists constructing authoritative precedents by maneuvering historical narratives. By combining biographical, exegetical, historical, and legal sources, I demarcate that a significant shift in the majority juristic opinion (from prohibition to permissibility of prisoner execution) likely occurred in conjunction with a change in the juristic understanding of key historical events and Qurʾānic passages.

I. Prisoners of war in Islamic history: the Prophetic period

It is necessary to begin by reconstructing the battles during the lifetime of the Prophet because his actions and legal pronouncements are authoritative in dominant Islamic legal

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[5] In contrast to the majority opinion (of the medieval period) permitting prisoner execution, there are minority opinions prohibiting it – such as the Shīʿī (Imāmī) school of law. See al-Ḥasan ibn Yūsuf Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*, 20 vols., Muʾassasat Āl al-Bayt li-Iḥyāʾ al-Turāth (Qum: Muʾassasat Āl al-Bayt li-Iḥyāʾ al-Turāth, 1993/1994), v. 9, p. 154-55 (Imāmī Shīʿī: if a combatant is imprisoned after combat ends, he may not be executed and Imām decides between freeing, ransoming, or enslaving). There is also a minority Ḥanafī opinion – represented by al-Ḥasan (bin Zīyād) and Ḥammād bin abī Sulaymān – that prohibits execution. See Muḥammad ibn Aḥmad Sarakhsī (d. 11th cent; Transoxania) et al., *Sharḥ al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn Munajjid, 5 vols. (Cairo: Maʿhad al-Makhṭūṭāt bi-Jāmiʿat al-Duwal al-ʿArabīyah, 1971/1972), v. 3, p. 1024 (Ḥanafī).

[6] Khaled Abou El Fadl suggests that the prohibition of prisoner execution disappeared from Islamic legal history because it was "inconsistent with the war practices of the age." Khaled Abou El Fadl, "The rules of killing at war: An inquiry into classical sources," *The Muslim World* 89, no. 2 (1999): 153. For a brief overview of Islamic legal opinions on prisoners of war, see Abū Jaʿfar Muḥammad ibn Jarīr al-Ṭabarī (d. 923; Iraq), *Kitāb al-jihād wa-kitāb al-jizyah wa-aḥkām al-muḥāribīn min kitāb ikhtilāf al-fuqahāʾ*, ed. Joseph Schacht (Leiden: Brill, 1933), 141-46.

[7] For instance, the *Life* of Theodota of Amid (d. 698 CE) reports collecting ransom money from church attendees (living under Islamic rule) for the purpose of ransoming captives (presumably held by the Byzantines). See MS Jerusalem (St Mark's, Syrian Orthodox Patriarchate) 199, fol. 557b (an 18th-century Arabic translation of a Syriac vita originally composed in the early eighth century). Writing in the twelfth century, the Patriarch of Antioch, Michael the Syrian, reported both Muslim killing and freeing of war prisoners throughout the eighth century CE. See Michael I Patriarch of Antioch (d. 1199; Syria), *Chronique de Michel le Syrien: patriarche jacobite d'Antioche (1166-1199)*, trans. Jean Baptiste Chabot, 4 vols. (Paris: Ernest Leroux, 1899-1910), v. 2, p. 479, 501, 26 and v. 3, p. 1-2. (Thanks to Jack Tannous for these references.) See also Youval Rotman, *Les esclaves et l'esclavage: de la Méditerranée antique à la Méditerranée médiévale : VIe-XIe siècles* (Paris: Belles lettres, 2004), 56-62, 68-75.

theory.[8] The objective is to trace historical narratives about battles and prisoners in Islamic sources that later form the basis for jurisprudential precedents. Therefore, the focus of the following pages is on reconstructing Muslim historical consciousness and not with authenticity or the version of history that is accepted by contemporary historians. For the purposes of this chapter, all references to historical events are based on histories related by Muslim historians.

Since there were no battles during the first decade of the Muslim community's existence, this chapter investigates battles that occurred between 622 CE (the year of the *hijrah*, or migration) and 632 CE (the year of the Prophet's death). I will distinguish between raids and actual battles involving the military confrontation of two sides; only those events in which two armies appear to have challenged each other will be categorized as battles.[9] In part, I achieve this goal by differentiating between conflicts motivated primarily by politics (i.e. battles) and economics (i.e. raids).[10] Similarly, sources do not clearly delineate between combatants (killed during battle) and prisoner-combatants (killed in captivity), but I mine this distinction from details in the narratives. The main sources for the following historical reconstruction of early Islamic warfare are the eighth-century biography by the Iraqi historian Ibn Isḥāq (d. 767 CE) and several ḥadīth collections (primarily late eighth- and early ninth-century texts).[11] These sources are not intended to be exhaustive or factually authoritative, but rather to represent conventional Islamic historical knowledge.[12]

The first battle waged by the early Muslim community was at Badr in 624 CE/2 AH; a Muslim army of approximately 300 soldiers confronted the Quraysh army of nearly 1000. (The Quraysh were the powerful pagan Arabs that had persecuted the Prophet and his followers in Mecca for approximately thirteen years.) Combat began with a traditional three-on-three

[8] Application of the methodology of *uṣūl al-fiqh* is not what is intended. Instead, it is a legal-historical tradition, since "already in the first/seventh century people consciously resorted to the Qurʾān and to rulings of the Prophet as sources of the law, if not as extensively as in later times." Motzki, *The origins*: 295. For general introductions, see Wael B. Hallaq, *A history of Islamic legal theories: an introduction to Sunnī uṣūl al-fiqh* (Cambridge, UK ; New York, NY: Cambridge University Press, 1997). See also Mohammad Hashim Kamali, *Principles of Islamic jurisprudence*, Rev. ed. (Cambridge [England]: Islamic Texts Society, 1991).

[9] This intentionally modifies the list of battles reported in canonical sources, such as Muḥammad Ibn Saʿd (d. ca. 845; Iraq), *Kitāb al-Ṭabaqāt al-kabīr*, trans. S. Moinul Haq, assisted by H. K. Ghazanfar, 2 vols. (Karachi: Pakistan Historical Society, 1967), v. 2, p. 2. See also Muḥammad Ibn Isḥāq (d. 767; Iraq) et al., *The life of Muḥammad: a translation of Isḥāq's Sīrat rasūl Allāh*, trans. Alfred Guillaume (Karachi: Oxford University Press, 2004, 1955), 659-60. Muslim ibn Hajjāj al-Qushayrī (d. 875; Khurāsān), *Ṣaḥiḥ Muslim; being traditions of the sayings and doings of the prophet Muhammad as narrated by his companions and compiled under the title al-Jāmiʿ-uṣ-ṣaḥīh, by Imām Muslim*, trans. ʿAbdul Ḥamīd Ṣiddīqī, 4 vols. (Lahore: Sh. Muhammad Ashraf 1971-75), v. 3, n. 4462-70, pp. 1004-05.

[10] This is because raids or "*Ghazw* had always been an important component of the Bedouin economy of survival." Bamyeh, *The social origins of Islam: mind, economy, discourse*: 42. Thus, this differentiation between a raid and a battle is fashioned from indications in the sources.

[11] Ḥadīth is a narration of what the Prophet or one of his companions said, did, or acknowledged. See Harald Motzki, *Ḥadīth: origins and developments* (Aldershot; Burlington, VT: Ashgate/Variorum, 2004). On the biographical literature, see Harald Motzki, ed. *The biography of Muḥammad: the issue of the sources*, Islamic history and civilization. Studies and texts, v. 32 (Leiden; Boston, MA: Brill, 2000).

[12] Consequently, evaluating the authenticity of sources is immaterial. Secondary literature is avoided in this historical account precisely because the objective is to sketch what Muslims knew or believed about their history. Also, Wāqidī's *Kitāb al-Maghāzī* is not used as a main source for reasons of historical influence and reliability. For an evaluation of Islamic historical sources, see Donner, *Narratives*.

challenge; the three Muslims defeated the three Quraysh. Open combat then began, but only lasted a few hours before most of the Quraysh army fled. Nearly 70 Quraysh were killed in battle, with a comparable number taken captive.

Historical reports concerning the handling of the majority of Badr prisoners are relatively consistent and transparent: they were ransomed.[13] The Prophet apparently consulted two of his companions (Abū Bakr and ʿUmar, the first two caliphs who succeeded him) on the situation of the prisoners; the former recommended ransoming and the latter recommended execution.[14] It appears that the Prophet considered the possibility of executing the prisoners, but rejected it. Yet there are also reports that two Quraysh prisoners – both of whom had tormented the Prophet when he was in Mecca – were executed: al-Naḍr bin al-Ḥārith and ʿUqbah b. Abī Muʿīṭ.[15] Al-Naḍr had vehemently opposed the Prophet in Mecca, but it is not possible to determine whether the Prophet ordered or approved his killing, which may have occurred during battle.[16] In Mecca, ʿUqbah had placed the fetus of a camel on the Prophet's back while he was prostrating in prayer.[17] The same ḥadīth that reports ʿUqbah's active involvement in this humiliation of the Prophet also states that ʿUqbah was seen "lying slain in the battlefield."[18] This account directly contradicts the other report of ʿUqbah's execution.[19] Consequently, a student of Islamic historiography may question the occurrence of these executions – or, at least, the timing (i.e., during or after battle). Indeed, both individuals are listed as Quraysh losses, not prisoners, at Badr – possibly implying that they were killed during battle.[20] Moreover, it is unclear if these executions represent exceptional cases – for example, if these two individuals were killed in retaliation for a particular crime in accordance with tribal custom. To delineate the status of this event as specific or general, we must analyze both the situations of the other Badr prisoners and prisoners from other battles.

Of course, every historical source reflects the motivations and projections of its author, but by reading a variety of sources against each other, we can trace inconsistencies and then we may scrutinize how Muslim jurists dealt with these inconsistencies. In this case, the two purported prisoner executions at Badr contradict not only the reported decision against

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[13] ʿAbd al-Razzāq ibn Hammām al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf fī al-ḥadīth*, ed. Maʿmar ibn Rāshid and Ayman Naṣr Azharī, 12 vols. (Beirut: Manshūrāt Muḥammad ʿAlī Bayḍūn, Dār al-Kutub al-ʿIlmīyah, 2000), v. 5, p. 141, 44, 240. On the historical value of this source, see Harald Motzki, "The muṣannaf of ʿAbd al-Razzāq al-Ṣanʿānī as a source of authentic aḥādīth of the first century A.H.," *Journal of Near Eastern Studies* 50, no. 1 (1991).

[14] In another version, the Prophet consulted the community, which chose ransoming. ʿAbd Allāh ibn Muḥammad Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf fī al-aḥādīth wa-al-āthār*, ed. Saʿīd Laḥḥām, 9 vols. (Beirut: Dār al-Fikr, 1989), v. 7, p. 673 & v. 8, p. 474-75.

[15] al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf*: v. 5, pp. 140-41, 250. Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 8, p. 477.

[16] Pellat, Ch. "al- Naḍr b. al- Ḥārith b. 'Alḳama b. Kalada b. 'Abd Manāf b. 'Abd al-Dār b. Ḳuṣayy." *Encyclopaedia of Islam*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel and W.P. Heinrichs. Brill, 2007. Brill Online. University of California UC Berkeley. 20 May 2007 <http://www.brillonline.nl/subscriber/entry?entry=islam_SIM-5730>

[17] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 8, p. 441. al-Qushayrī (d. 875; Khurāsān), *Ṣaḥiḥ Muslim*: v. 3, n. 4421-22, pp. 986-987.

[18] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 8, p. 441. al-Qushayrī (d. 875; Khurāsān), *Ṣaḥiḥ Muslim*: v. 3, no. 4424, p. 987.

[19] See footnote 15.

[20] Ibn Isḥāq (d. 767; Iraq) et al., *The life*: 337.

execution, but also many other accounts. The Prophet "divided the prisoners amongst his companions and said, 'Treat them well.'"[21] Ibn Isḥāq cites one of the prisoners as recounting that "when they ate their morning and evening meals they gave me the bread and ate the dates themselves in accordance with the orders that the apostle had given about us. If anyone had a morsel of bread he gave it to me."[22] It is also reported that the Prophet was unable to sleep because a Badr prisoner was bound too tightly; he relaxed once his bindings were loosened.[23] These narratives indicate that the Badr prisoners of war were fed and clothed before being set free – some without and others with ransoms. Ibn Isḥāq narrates the situation of a poor prisoner (and poet) who requested to be set free; the Prophet granted his request on condition that he not fight against the community again.[24] While these historical narratives romanticize the Prophet's piety and "saintly" behavior, they also suggest that most prisoners from the battle of Badr were not executed and were specifically protected by the Prophet's command and practice. When these narratives about the majority of Badr prisoners being treated well are compared with the conflicting narratives about two prisoner executions, it becomes more difficult to determine a lucid historical precedent for legal purposes. The significance of these contradictory and vague narratives is in how these historical incidents will be interpreted by later generations of Muslims – especially jurists.[25] Scrutinizing narratives from early Muslim historiography about succeeding battles may illuminate a historical pattern.

The second major Muslim battle was at Uḥud in 625 CE/3 AH. The Quraysh of Mecca, angered by the preceding year's defeat, fortified their army and returned to battle the Muslim army. Interestingly, ʿUmar is reported as claiming that after the Prophet consulted and rejected his advice at Badr (see above), prisoners were executed rather than ransomed at Uḥud.[26] Yet historical works do not indicate that any prisoners of war were taken.[27] The subsequent battle occurred in 627 CE/5 AH and is known as the Battle of the Trench because the Muslim community dug a defensive trench around a critical part of the city of Medina. The battle was basically a prolonged siege: the confederation of troops led by the Quraysh could not cross the ditch and after three weeks of surrounding the city of Medina, cold, sand storm weather purportedly sent them fleeing. There are no reports of prisoners being taken.[28] The

[21] Ibid., 309.

[22] Ibid.

[23] al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf*: v. 5, p. 240.

[24] Ibn Isḥāq (d. 767; Iraq) et al., *The life*: 318. (Incidentally, this poet reportedly did help Quraysh in their next battle, Uḥud, against the Muslim community.)

[25] For an example of how a jurist interpreted these events, see ʿAbd al-Salām ibn Saʿīd Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah al-kubrá li-Imām Mālik ibn Anas al-Aṣbaḥī*, ed. ʿĪsá ibn Masʿad Zawāwī, 5 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1994), v. 1, p. 502-03.

[26] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 8, p. 475.

[27] Ibn Isḥāq (d. 767; Iraq) et al., *The life*: 387-89. Other sources suggest one prisoner (the poet from the battle of Badr) was executed, but this may have occurred during battle or as a result of his violating a prior agreement (not to fight against the Muslim community) with the Prophet. This discrepancy needs further investigation, beyond the scope of this chapter.

[28] Ibid., 459-60. Readers familiar with early Islamic history are asked to consider this depiction of history seriously and not reflexively presume any omission based on prior exposure to the Islamic historical tradition. Section V will explain why a prevailing historical interpretation (both academic and non-academic) concerning Banū Qurayẓah constitutes a problematic special case.

subsequent battle was also a prolonged siege – this time at Khaybar in 628 CE/6 AH; no prisoners are reported to have been taken captive.[29] In 629 CE/7 AH, the Prophet sent numerous letters to diplomatic figures around the Arabian peninsula. His emissaries were reportedly killed by Northern Arab tribes under Byzantine protection. Consequently, a Muslim army marched northward to Mūʾtah to confront a large Byzantine army that defeated them. No Byzantine prisoners appear to have been taken.[30] The Battle of Ḥunayn took place in 630 CE/8 AH. Women, children, and apparently combatants were taken as captives, but they were all released without ransom.[31]

In compiling this brief sketch of Prophetic battles, I have relied upon a set of canonical Islamic historical texts. But the historical summary presented here of the Prophet's treatment of war prisoners differs from some historical and contemporary sources in its categorization of battles and its exclusion of later historical sources.[32] In other words, as previously mentioned, this chapter distinguishes battles from expeditions or raids.[33] The Prophet's battles, all of which occurred during the last decade of his life, offer us only two clear situations in which he dealt with combatant prisoners of war – Badr and Ḥunayn. At Badr, most prisoners were ransomed, in accord with tribal custom. At Ḥunayn, the prisoners were set free without ransoms. In all the battles following Badr, no prisoners appear to have been executed. This series of events would be logical if the general directive after Badr to treat a prisoner well precluded the prerogative of execution and was implemented in subsequent battles. Viewed in light of narratives from all the battles during the Prophet's lifetime, the overall treatment of prisoners of war at Badr more likely suggests the impermissibility of poor treatment (including killing).

This interpretation (against the permissibility of prisoner execution) of the imperfect historical record is corroborated by historical narratives about raids during the Prophet's life. For instance, the Prophet ordered that someone be set free when he was captured during a raid.[34] Another ḥadīth explicitly suggests that not executing prisoners is divinely approved (or ordained).[35] Similarly, the detailed history of raids compiled by al-Wāqidī relates that during the raid of Nakhlah a prisoner was taken and ʿUmar ibn al-Khaṭṭāb wanted to kill him, but the

[29] A few non-combatant captives were taken as booty, but no "soldiers" were captured. Ibid., 511, 14-16.

[30] Ibid., 535.

[31] Ibid., 570, 76. Muḥammad ibn Ismāʿīl Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī = The translation of the meanings of Ṣaḥiḥ al-Bukhārī, Arabic-English* [Jamiʿ al-sahih], trans. Muhammad Muhsin Khan, 9 vols. (Medina: Dar al-Fikr, 1981), v. 4, p. 235.

[32] See, for example, ʿAbd al-Salām bin al-Ḥasan Adghīrī, *Ḥukm al-asrá fī al-Islām wa-muqāranatuhu bī al-qānūn al-dawlī al-ʿāmm* (Rabat: Maktabat al-Maʿārif, 1985), 89-117. But see Raʾūf Shalabī, *al-Jihād fi sabīl Allāh: majālatuhu wa-wasāʾiluhu wa-āhdāfuhu* (Cairo: Dār al-Turāth al-ʿArabī, 1974), 106-07.

[33] See footnote 9.

[34] The individual was Thumāma. al-Qushayrī (d. 875; Khurāsān), *Ṣaḥiḥ Muslim*: v. 3, n. 4361, pp. 962-963.

[35] The report narrates that "eighty persons from the inhabitants of Mecca swooped down upon the Messenger of Allah (may peace be upon him) from the mountain of Tanʿīm. They were armed and wanted to attack the Holy Prophet (may peace be upon him) and his Companions unawares. He (the Holy Prophet) captured them but spared their lives. So, God, the Exalted and Glorious, revealed the verses: 'It is He Who restrained your hands from them and their hands from you in the valley of Mecca after He had given you a victory over them.'" ibid., v. 3, n. 4452, p. 1001.

Prophet prohibited it.[36] These isolated incidents of raids further imply that the Prophet's normative practice was to protect the lives of prisoners.

Indeed, ransoming prisoners was a profitable enterprise that benefited these struggling tribal communities. That execution of war prisoners was an economically poor choice – in comparison to ransoming or enslavement – is unmistakable. While historical sources attribute piety to the Prophet's practice of protecting prisoners, it may have also been motivated by an economic interest in benefiting from ransoming.[37] Although there was a clear incentive not to execute war prisoners, there appears to be little evidence for why prisoners should be executed (other than retaliation/revenge against particular individuals). To answer the first question (Do historical narratives about all the battles that occurred during the Prophet's lifetime illustrate his legal practice concerning treatment of prisoners of war?) that I posed: we cannot arrive at a definitive conclusion concerning the permissibility of executing prisoners of war. However, the strongest conjecture based on the available historical evidence in Muslim historiography suggests that the Prophet's legal practice was to treat prisoners of war well and not kill them.[38] But it must be noted that there are no reports of the Prophet explicitly prohibiting execution of prisoners of war. The remainder of this chapter considers how late antique and medieval jurists contended with the precedential value of this historical evidence, since these narratives were integral to their (legal) education and formed the precedential basis of their jurisprudence.

II. Late antique jurists

Surviving historical sources offer limited information from which to reconstruct judicial activity directly following the Prophet's death. But reports about the legal opinions of the Prophet's companions are contained in late antique compilations and continued to be mentioned in medieval juristic texts.[39] The Prophet's companions often acted as jurists and they may have prohibited prisoner execution,[40] but there are conflicting reports about their jurisprudence.[41] However, among succeeding generations of Muslim jurists, there is a more

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[36] Muḥammad ibn ʿUmar Wāqidī (d. 822; Medina/Iraq), ed. *Kitāb al-Maghāzī* (Beirut: ʿĀlam al-Kutub, 2006), 48.

[37] Indeed, exegetes attributed this economic motivation to the Prophet. See footnote 86.

[38] For a contemporary text echoing this interpretation, see ʿAbd al-Wāḥīd Muḥammad Fār, *Asrá al-harb: dirāsah fiqhīyah wa-taṭbīqīyah fī niṭāq al-qānūn al-duwalī al-ʿāmm wa-al-sharīʿah al-islāmīyah* (Cairo: ʿĀlam al-Kutub, 1975), 192.

[39] As the citations in this section indicate, the legal opinions of the Prophet's companions, successors, followers, and the famous late antique jurists who led legal circles are reported in historical compilations of the 8th and 9th centuries (*sunan* and *muṣannafāt*), as well as jurisprudential texts (up to the 14th century). I have also relied on Muḥammad Rawwās Qalʿah'jī's contemporary compilations of the legal opinions of prominent jurists of the first Islamic century; his work is based on extensive research in late antique and medieval Islamic texts.

[40] Concerning prohibition of prisoner execution, Ibn Rushd mentions that: "Al-Ḥasan ibn Muḥammad al-Tamīmī reported that there is a consensus of the Companions on this issue." Averroes Ibn Rushd II (d. 1198; Spain/Morocco), *Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid* ed. Mājid al-Ḥamawī, 4 vols. (Beirut: Dār Ibn Ḥazm, 1995), v. 2, p. 738.

[41] Awzāʿī reports conflicting practices (killing or ransoming/enslaving prisoners) of ʿUmar ibn al-Khaṭṭāb, the second caliph. ʿAbd al-Raḥmān ibn ʿAmr Awzāʿī (d. 774; Syria), *Sunan al-Awzāʿī: aḥādīth wa-āthār wa-fatāwá*, ed. Marwān Muḥammad al-Shaʿʿār (Beirut: Dār al-Nafāʾis, 1993), 403. Likewise, there are conflicting reports about the practice of ʿUmar's son. See Muḥammad Rawwās Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿUmar: ʿaṣruhu wa-ḥayātuh*, Fī sabīl mawsūʿah fiqhīyah jāmiʿah; 7 (Beirut: Dār al-Nafāʾis, 1986), 118.

readily identifiable historical group in the Islamic legal tradition that prohibited prisoner execution. It is comprised of early and renowned figures in Islamic legal history: Saʿīd bin Jubayr (d. 714 CE), Ḥasan al-Baṣrī (d. 728 CE), and ʿAṭāʾ bin Abī Rabāḥ (d. 732/3 CE).[42] They were some of the earliest jurists in Islamic history who adjudicated prior to the emergence of professional schools of law. They (and others) are reported to have cited the consensus of the Prophet's companions, the historical practice of the Prophet, and a verse of the Qurʾān (47:4) as limiting the options for dealing with prisoners of war to freeing or ransoming them.[43] Specifically, Ḥasan al-Baṣrī (and possibly ʿAbd Allāh ibn ʿAbbās, d. 687/8) prohibited prisoner execution based on Qurʾān 47:4 and asserted that prisoners may only be ransomed or freed.[44] This verse states, "Therefore, when ye meet the unbelievers, smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly (on them): thereafter (is the time for) either generosity or ransom."[45] This group of late antique Muslim jurists likely found no discrepancy between this Qurʾānic verse and the practice of the Prophet, with which they must have been intimately familiar.

This opinion against prisoner execution was not, however, unanimous – although at this stage it was not simply a minority or dissenting one. ʿUmar ibn ʿAbd al-ʿAzīz (d. 720 CE) is reported to have prohibited prisoner execution, but also to have executed one prisoner under peculiar circumstances.[46] Other late antique jurists – including Ibrāhīm al-Nakhaʿī (d. 717 CE) and Sufyān al-Thawrī (d. 778 CE) – permitted prisoner execution as one of several options available to a Muslim leader.[47] Mujāhid (d. 718 CE) claimed that the companions of the Prophet formed a consensus that Qurʾān 47:4[48] was abrogated by Qurʾān 9:5[49], thereby providing a Muslim leader with the options of execution, ransom, freeing, or enslaving prisoners of war.[50]

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[42] Reported in Muwaffaq al-Dīn ʿAbd Allāh ibn Aḥmad Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*, ed. ʿAbd Allāh ibn ʿAbd al-Muḥsin Turkī and ʿAbd al-Fattāḥ Muḥammad Ḥulw, 16 vols. (Imbābah, Cairo: Hajr, 1986), v. 13, p. 45 (Ḥanbalī). Also reported in Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 9, p. 156 (Imāmī Shīʿī).

[43] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 7, p. 671, 73-74. Also cited in Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 13, p. 45 (Ḥanbalī). Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 9, p. 156 (Imāmī Shīʿī).

[44] Muḥammad Rawwās Qalʿah'jī, *Mawsūʿat fiqh al-Ḥasan al-Baṣri*, 2 vols., Fī sabīl mawsūʿah fiqhīyah jāmiʿah;9 (Beirut: Dār al-Nafāʾis, 1989), v. 1, p. 127-28. Muḥammad Rawwās Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿAbbās*, Fī sabīl mawsūʿah fiqhīyah jāmiʿah; Silsilat mawsūʿat fiqh al-salaf (Beirut: Dār al-Nafāʾis, 1996), 121.

[45] Qurʾān 47:4, *The Holy Qur-ān*, trans. 'Abdāllah Yūsuf 'Alī (Al-Madīnah Al-Munawarah: King Fahd Holy Qur-ān Printing Complex, 1989-1990), 1560.

[46] This particular prisoner is reported to have killed many Muslims in battle in intensely violent ways. Muḥammad Rawwās Qalʿah'jī, *Mawsūʿat fiqh ʿUmar ibn ʿAbd al-ʿAzīz*, Fī sabīl mawsūʿah fiqhīyah jāmiʿah; Silsilat mawsūʿat fiqh al-salaf (Kuwait: Jāmiʿat al-Kuwayt, Lajnat al-Tāʾlīf wa-al-Tʿarīb wa-al-Nashr, 2001), p. 171.

[47] Muḥammad Rawwās Qalʿah'jī, *Mawsūʿat fiqh Ibrāhīm al-Nakhaʿī*, 2 vols., Fī sabīl mawsūʿah fiqhīyah jāmiʿah; 8 (Beirut: Dār al-Nafāʾis, 1986), v. 1, p. 282. Muḥammad Rawwās Qalʿah'jī, *Mawsūʿat fiqh Sufyān al-Thawrī*, Fī sabīl mawsūʿah fiqhīyah jāmiʿah; Silsilat mawsūʿat fiqh al-salaf, 10 (Beirut: Dār al-Nafāʾis, 1990), p. 156. Unfortunately, these sources do not report the reasoning relied upon by these jurists in declaring this legal opinion.

[48] See footnote 45.

[49] "But when the forbidden months are past, then fight and slay the pagans wherever ye find them, and seize them, beleaguer them, and lie in wait for them in every stratagem (of war)." *The Holy Qur-ān*: 497. Abrogation basically means that the legal significance of one verse is overruled by a second verse revealed at a chronologically later time.

[50] al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf*: v. 5, p. 143-44.; Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 7, p. 672. These verses will be discussed in more detail below.

This brief overview suggests that during the late antique period, those jurists who sanctioned prisoner execution did so based on verse abrogation and (possibly) political expediency. How these legal opinions related to Prophetic practice is a more complicated matter because it is unclear what oral and written traditions were in circulation and what legal significance such traditions had for these jurists. At this point in Islamic legal history, many jurists appear to have understood the Qurʾān as prohibiting prisoner execution and to have disagreed about what the Prophet's practice was. Despite the diversity of opinions, it is clear that the prohibition of prisoner execution was a strong legal opinion supported by major jurists of the seventh/eighth centuries CE. I emphasize this because medieval Muslim jurists legitimated their jurisprudence by claiming continuity and preservation of the legal practices of their predecessors. Moreover, the multiplicity of these legal opinions corresponds – perhaps directly – to the variations in the historical sources about the treatment of prisoners of war in the Prophetic era. If even these late antique jurists who lived closest in time to the Prophet were unaware of or unable to come to a consensus on the Prophet's practice pertaining to war prisoners, how would later generations of jurists establish a Prophetic precedent?

III. Professional Islamic legal discourse

Medieval jurists consolidated a majority opinion that accepted execution of prisoners of war.[51] These professional Muslim jurists authored their own individual legal texts or their legal opinions were recorded by their students; in addition to these surviving texts, there is a genre of juristic disagreement – texts that record differences of opinion among jurists – that further illuminates and substantiates juristic debates about the permissibility of executing prisoners of war. In the medieval era, jurists gradually began to identify with a particular legal school as legal reasoning and opinions became further codified. This section briefly summarizes the legal opinions of a few mainstream and prominent Muslim jurists from the "professional" period. These legal opinions represent several centuries and four major Sunnī legal schools (Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī).[52] The aim of this intentionally ahistorical presentation is to identify trends and assumptions in dominant legal discourse and to demonstrate that Prophetic precedent is not the most significant factor in medieval Islamic legal reasoning. Rather than being exhaustive or authoritative, this is an outline of the discursive framework in which jurists treated the question of prisoners of war.[53] I have selected a few influential texts that are representative of a larger body of legal texts and will allow us to focus on the salient modes of legal reasoning in the medieval era. The legal schools represented in this selection share a basic formula for deriving Islamic legal rulings, dictating that the highest authority is the Qurʾān and the secondary authority is the Prophet's statements or deeds. In this context, it is of particular interest how jurists grappled with the historical record, given that the narratives cited in the preceding section were integral to their

[51] There was no consensus on the treatment of war prisoners, as documented by Ibn Ḥazm. ʿAlī ibn Aḥmad Ibn Ḥazm (d. 1064; Spain), *Marātib al-ijmāʿ fī al-ʿibādāt wa-al-muʿāmālat wa-al-iʿtiqādāt* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1970), p. 114 (Ẓāhirī: jurists disagree about treatment of war prisoners in terms of killing, ransoming, and freeing).

[52] Sunnī legal schools differ in many respects, but these differences are not pertinent to this study. The Imāmī Shīʿī legal school opinion is a minority one, prohibiting prisoner execution. See footnote 5.

[53] Focus will again be on primary texts (rather than secondary literature) in order to contrast the historical and legal depictions of prisoners of war.

(legal) education. In other words, how did jurists reconcile all of the divergent historical narratives they inherited (presented in Sections I and II)?

Silent authority and precedents of "professional" jurists

One of the earliest extant Islamic juristic texts discussing prisoners of war is the *Siyar* of Shaybānī (d. 805 CE), a Ḥanafī Iraqi jurist. Shaybānī recorded the teachings of Abu Ḥanīfah (d. 767 CE) on the authority of Shaybānī's teacher, Abū Yūsuf (d. 768), a prominent figure in the Ḥanafī school of legal thought; in this way, the substance of Shaybānī's text dates to the life of Abu Ḥanīfah (about fifty years earlier). Abu Ḥanīfah reportedly stated that "The Imām is entitled to a choice between taking them to the territory of Islam to be divided and killing them...[The Imām] should examine the situation and decide whatever he deems to be advantageous to the Muslims."[54] Although limited by the form of its transmission, it is noteworthy that Abu Ḥanīfah does not appear to have referred to any precedents or legal authority – or his student does not report the basis of his legal reasoning. The legal question and response are succinctly and simply presented because he likely assumes the legitimacy of these options.[55] Notably, Abu Ḥanīfah was nearly a contemporary of the three jurists who opposed prisoner execution.[56] It is probable that he was aware of their opinion on prisoner execution, so it is interesting that he did not attempt to refute their reasoning.

Al-Qayrawānī (d. 996 CE), a Mālikī Tunisian jurist, declared that "It is not wrong to kill a non-Arab unbelieving prisoner, but no one is to be killed after being given a guarantee of safety (*amān*), and treaties with the enemy are not to be violated."[57] A non-Arab unbelieving prisoner in al-Qayrawānī's time could have been Byzantine – though not in al-Qayrawānī's home of Tunisia, but rather in Crete. To give an example of contemporary war practices, Byzantine Emperor Nikephoros II Phocas (d. 969 CE) advised his soldiers on prisoner execution in his military treatise.[58] I mention this in order to situate al-Qayrawānī's text within a historical context in which prisoners of war was a lived reality, but it must be recognized that

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[54] Muḥammad ibn al-Ḥasan Shaybānī (d. 804/5; Iraq), *The Islamic law of nations: Shaybānī's Siyar*, trans. Majid Khadduri (Baltimore: Johns Hopkins Press 1966), p. 100 (Ḥanafī).

[55] This succinctness is also evident in a twelfth-century Ḥanafī legal compendium; see Abū Bakr ibn Masʿūd Kāsānī (d. 1189; Syria), *Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*, ed. Aḥmad Mukhtār ʿUthmān, 10 vols. (Cairo: Zakarīyā ʿAlī Yūsuf, 1968), v. 9, p. 4307. There is a minority Ḥanafī opinion prohibiting prisoner execution (see footnote 5).

[56] See footnote 42.

[57] ʿAbd Allāh ibn ʿAbd al-Raḥmān Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *The Rísâla: treatise on Mâlíkî law of ʿAbdallâh Ibn-Abî-Zayd Al-Qayrawânî (922-996): an annotated translation*, trans. Joseph Kenny (Minna: Islamic Education Trust, 1992), p. 107. See also ʿAbd Allāh ibn ʿAbd al-Raḥmān Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *al-Risālah al-fiqhīyah* (Beirut: Dār al-Gharb al-Islāmī, 1986), p. 189 (Mālikī: it is permissible to kill prisoner combatants). Al-Qayrawānī likely presumed that believing (i.e., Muslim) prisoners may not be killed. This may be a reference to *bughāh*, Muslims who resist government authority. See Khaled Abou El Fadl, "The rules of killing at war: An inquiry into classical sources," *The Muslim World* 89, no. 2 (1999): 146.

[58] "Mais s'il arrive qu'ils soient poursuivis par l'ennemi, les cavaliers devront aller rejoindre les quarante autres restés sur place, mettre à mort ou envoyer en avant les prisonniers qu'ils auront faits, s'en aller au plus vite et gagner l'endroit bien défendu." Byzantine Emperor Nikēphoros II Phōkas (d. 969), *Le Traité Sur la Guérilla de l'Empereur Nicéphore Phocas (963-969)*, trans. Gilbert and Haralambie Mihăescu Dagron, Le monde Byzantin (Paris: Editions du Centre National de la Recherche Scientifique, 1986), 74. This implies that Byzantines likely accepted or practiced prisoner execution in cases when the army was retreating and these prisoners were slowing them down. It is entirely unclear if this practice had any effect on their Muslim neighbors.

it is entirely unclear if this specific example was relevant to al-Qayrawānī. Since al-Qayrawānī did not elaborate, it would be too speculative to link Byzantine war practices with his legal reasoning. As in the case of Abu Ḥanīfah, al-Qayrawānī seemed unconcerned with historical precedents or legal authority for this particular issue. Followin his Mālikī antecedent, Ibn ʿAbd al-Barr (d. 1071 CE) succinctly identifies a Muslim leader's options to deal with prisoners of war: killing, freeing, ransoming, or enslaving.[59]

Al-Nawawī (d. 1277 CE), a Shāfiʿī Syrian jurist, asserted that a Muslim leader may kill, ransom, or enslave a prisoner of war based on the needs of society, without citing the Qurʾān or historical precedents.[60] In contrast, his Shīʿī (Imāmī) Iraqi contemporary, Jaʿfar ibn al-Ḥasan Muḥaqqiq al-Ḥillī (d. 1277 CE), noted that prisoners who were captured during warfare may not be killed and that the Imam may choose between freeing, ransoming, or enslaving war prisoners.[61] The Ḥanbalī Syrian jurist Ibn Taymiyyah (d. 1328 CE) also declared that a ruler has four options for dealing with prisoners; he asserts "This is the opinion of the majority of the jurists, as they have concluded from the Book and the Sunna; though some jurists consider the liberation of such a captive as well as the ransom in return for his liberty as abrogated."[62] The permissibility of executing war prisoners was so obvious to him that Ibn Taymiyah simply pointed to the Qurʾān and Prophetic practice, without any elucidation.[63] For these distinguished jurists, representing each of the four main Sunnī schools of law, Qurʾān and history were either irrelevant or provided so obvious an authority/precedent that it did not need to be explained. Since these legal texts are part of a broader discursive milieu – in which the text of the Qurʾān, content of ḥadīth, and historical precedents were intimately familiar – it is possible that this silence of authority and precedent is only striking to a present-day reader. Still, it is remarkable that historical precedents (section I) or previous juristic opinions (section II) are not engaged. This reticence in explaining the basis of their legal reasoning may have been a component of broader legal dynamics in which rationalists did not engage issues of precedent, but it was unlikely to have been the case for later jurists.[64] Precedents and juristic opinions may have been less influential to medieval Muslim jurists than we assume based on our contemporary understandings of normative Islamic jurisprudence.

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[59] Yūsuf ibn ʿAbd Allāh Ibn ʿAbd al-Barr (d. 1070; Spain), *Kitāb al-kāfī fī fiqh ahl al-Madīnah al-Mālikī*, ed. Muḥammad Muḥammad Aḥīd Wuld Mādīk Mūrītānī, 2 vols. (Riyadh: Maktabat al-Riyāḍ al-Ḥadīthah, 1980), v. 1, p. 467 (Mālikī).

[60] Abī Zakarīyā Muḥyī al-Dīn ibn Sharaf al-Nawawī (d. 1277; Syria), *Rawḍat al-ṭālibīn*, ed. ʿĀdil Aḥmad ʿAbd al-Mawjūd, ʿAlī Muḥammad Muʿawwaḍ, and Jalāl al-Dīn ʿAbd al-Raḥmān ibn Abī Bakr Suyūṭī (d. 1505), 8 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1992), v. 7, p. 450-51 (Shāfiʿī). See also Abī Zakarīyā Muḥyī al-Dīn ibn Sharaf al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ, sharḥ al-Muhadhab*, ed. Zakarīyā ʿAlī Yūsuf, 18 vols. (Cairo: Maṭbaʾat al-ʿĀṣimah, 1966-69), v. 17, p. 102 (Shāfiʿī).

[61] Jaʿfar ibn al-Ḥasan Muḥaqqiq al-Ḥillī (d. 1277; Iraq), *Mukhtaṣar al-nāfiʿ fī fiqh al-imāmīyah* (Tehran: Asadī, 1967), 137 (Imāmī Shīʿī).

[62] These four options are freeing, ransoming, enslaving, or killing. Aḥmad ibn ʿAbd al-Ḥalīm Ibn Taymīyah (d. 1328; Syria), *Ibn Taimiyya on public and private law in Islam; or, Public policy in Islamic jurisprudence* [al-Siyasah al-shar'iyah fi islah al-ra'i wa-al-ra'iyah], trans. Omar A. Farrukh (Beirut: Khayats 1966), 142, citation omitted (Ḥanbalī).

[63] This could be because his contemporaneous political situation – the Crusades – was a motivation for harsher treatment of prisoners. When warfare became more intense, jurists may have been less concerned with justifying the execution of prisoners of war.

[64] Rationalists (*ahl al-raʾy*) were less likely to refer to Prophetic precedents than traditionists (*ahl al-ḥadīth*). But this was less relevant after the first century of Islamic history. See Hallaq, *Sharīʿa*: 55-60.

Qurʾān and precedents in "professional" Islamic legal discourse

While some jurists omitted discussion of legal authority or precedents, others cited and explained specific Qurʾānic verses and historical events to support the permissibility of prisoner execution. Māwardī (d. 1058 CE), a Shāfiʿī Iraqi jurist, listed the same four options delineated above (execution, enslavement, ransoming, and releasing).[65] Māwardī asserted an obscure (and inconsistent) interpretation of Qurʾān 47:4,[66] in which he implied that bonds should be tied around executed soldiers.[67] He failed to explain how executed prisoners could be shown grace or ransom (as the verse demands). In relying on this verse to substantiate his legal opinion permitting execution, he provided no historical context or examples of the Prophet (or his companions) executing war prisoners. In contrast, Māwardī mentioned examples of grace and ransom from the biography of the Prophet and the history of the early Muslim community.[68] By citing incidents from the Prophet's practice that legitimize only some of the legal options he lists, Māwardī demonstrated the inconsistent significance of precedent to his legal reasoning. Indeed, Māwardī's uneven discussion of prisoner of war execution appears outcome determinative because it was based on a nonsensical interpretation of a Qurʾānic verse and on selective references to Prophetic precedents.

To further support his ruling, Māwardī relied on a narrative alleging that the Prophet disapproved of ransoming. He cited the aforementioned report (*khabar*)[69] concerning the Prophet's consultation with Abū Bakr and ʿUmar at Badr and then used it to interpret Qurʾān 8:67[70] as a condemnation of ransoming and a reproaching of the Prophet for ransoming the Badr prisoners. Māwardī declared, "After this verse was revealed, God's Messenger, God bless him and grant him peace, said, 'Had God decreed our punishment in this verse, ʿUmar, you would have been the only one to escape it.'[71] This is a peculiar report to use as a precedent because it is negative evidence, suggesting that the Prophet made a mistake by *not* executing prisoners of war. But if the Prophet did err in his judgment, would there not be some reported statement of him more explicitly explaining his error and advising his followers of the proper course of action? More importantly, other versions of this story do not cite the Prophet as approving ʿUmar's earlier suggestion to execute prisoners.[72] Māwardī uses this specific historical narrative to imply the legitimacy of prisoner execution – thereby evading furnishing an actual historical example of prisoner execution. Living under the Būyids (r. 934-1055 CE),

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[65] ʿAlī ibn Muḥammad Māwardī (d. 1058; Iraq), *The Ordinances of Government* [Al-ahkām al-sulṭāniyya w'al-wilāyāt al-dīniyya], trans. Wafaa H. Wahba, The great books of Islamic civilization (Reading Garnet, 1996), 54 (Shāfiʿī). See also footnote 54. See also his Shāfiʿī successor, Abū Isḥāq Ibrāhīm ibn ʿAlī ibn Yūsuf Fīrūzābādī al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī*, 2 vols. (Cairo: Sharikat Maktabat wa-Maṭbaʿat Muṣṭafá al-Thānī al-Ḥalabī wa-Awlādahu bi-Miṣr, 1959), v. 2, p. 236 (Shāfiʿī: Imām may choose to kill, enslave, ransom, or free male combatants (i.e. not minors) as he deems appropriate).

[66] See footnote 45.

[67] Māwardī (d. 1058; Iraq), *Ordinances*: 54.

[68] Ibid., 54-55.

[69] See footnote 14.

[70] Qurʾān 8:67: "It is not fitting for a Prophet that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but Allah looketh to the Hereafter: And Allah is exalted in might, Wise." *The Holy Qur-ān:* 489.

[71] Māwardī (d. 1058; Iraq), *Ordinances*: 50-51.

[72] See footnote 14. See also al-Qushayrī (d. 875; Khurāsān), *Ṣaḥiḥ Muslim*: v. 3, n. 4360, p. 962.

Māwardī was unlikely to have been influenced by ongoing battles with non-Muslims, since the Būyids were involved in conquering Muslim territories. Could Māwardī's juristic opinion on prisoners of war have been a polemical dispute with the Būyid Shīʿī jurists around him? Here again, it is difficult to identify the contextual background to this jurist's legal resoning.

Like Māwardī, Ibn Rushd (d. 1198 CE) scrutinized the Qurʾān for evidence concerning the execution of war prisoners. This Mālikī Spanish jurist and philosopher clarified that the disagreement among jurists "stems from the conflict of the acts (of the Prophet), and the conflict of the apparent meaning of the Qurʾānic text with the acts of the Prophet."[73] Ibn Rushd explained Qurʾān 47:4[74] as indicating that "after taking prisoners the *imām* can only pardon or take ransom."[75] But, like Māwardī, Ibn Rushd claimed that Qurʾān 8:67[76] implies that execution is better than ransoming (exemplified by the mistake made at Badr) and that the Prophet's acts relating to treatment of prisoners were inconsistent.[77] What is curious about Ibn Rushd's interpretation of Qurʾān 8:67 is that he defined the key verb (*yuthkhina*) as killing whereas he interpreted the same verb (*athkhantumuhum*) in Qurʾān 47:4[78] as meaning overcoming or subduing. The root of this verb (*th-kh-n*) can mean slaughter, subdue, or even apply oneself energetically; it is peculiar that within one discussion of these two verses, Ibn Rushd defines the same verb inconsistently. He asserts that the status of this verse as abrogated or not is the crux of the legal controversy.[79] He claims that those who argued that prisoner execution is not permissible believed that Qurʾān 47:4 abrogates the acts of the Prophet, which is contrary to the reasoning of his predecessors (specifically, the late antique jurists discussed in Section II).[80] Thus, he presumes that the minority opinion (prohibiting prisoner execution) relies on the same understanding of historical events as his own (i.e. that the Prophet executed war prisoners), rather than an alternative version. What could have motivated Ibn Rushd to rationalize the execution of war prisoners? Ibn Rushd was born during the Almohad rebellions, received protection from Yaʿqūb al-Manṣūr (Almohad Amīr, r. 1184-1199 CE), and, toward the end of his life, witnessed Almohad victories over the Portugese (in

[73] Averroes Ibn Rushd II (d. 1198; Spain/Morocco), *The Distinguished Jurist's Primer: a translation of Bidāyat al-mujtahid wa-nihāyat al-muqtaṣid* ed. Muhammad Abdul Rauf, trans. Imran Khan Nyazee, 2 vols. (Reading: Garnet Publishing, 1994), v. 1, p. 456 (Mālikī).

[74] See footnote 45.

[75] Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 456 (Mālikī).

[76] Qurʾān 8:67 "It is not fitting for a Prophet that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but Allah looketh to the Hereafter: And Allah is exalted in might, Wise." *The Holy Qur-ān:* 489.

[77] Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 456 (Mālikī).

[78] "Therefore, when ye meet the unbelievers (in fight), smite at their necks; at length, when ye have thoroughly subdued them, bind (the captives) firmly: therefore (is the time for) either generosity or ransom..." *The Holy Qur-ān:* 1560.

[79] Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 457 (Mālikī).

[80] "Those who maintained that the verse, which is specific about the matter of captives (prohibiting execution), has abrogated the acts of the Prophet, said that the captive is not to be executed. Those who maintained that the verse neither mentions captives nor is its purpose the final disposal of the question of what is to be done to the captives, and that the act of the Prophet (God's peace and blessings be upon him) is an addition to what is in the verse, when they take into account the censure of the failure to execute the captives said that the execution of the captives is permitted." ibid.

1191 CE) and the Castilians (in 1195 CE). Ongoing battles with Christian armies may explain why Ibn Rushd assumed the permissibility of prisoner of war execution.

Al-Rāfiʿī (d. 1226 CE), a Shāfiʿī Iranian jurist, claims that there are historical precedents of the Prophet practicing all four options, with the precedent of execution coming from the executions of al-Naḍr and ʿUqbah at Badr, as well as of Abā ʿAzzah al-Jumahīī at Uḥud.[81] He asserts that a leader must determine which of the four options is best for the community. He then cites two Qurʾānic verses (8:67 and 47:4) and explains that they were context specific: he asserts that 47:4 demands either the freeing or ransoming of prisoners because the community was strong, whereas 8:67 recommends execution of prisoners (in his interpretation) because the community was weaker.[82] While al-Rāfiʿī refers to a change in circumstances, he does not elaborate on the relevant historical details.

This brief presentation of the legal reasoning of some major jurists of the tenth through thirteenth centuries has demonstrated a remarkably disjointed use of Qurʾānic authority and inconsistent references to ḥadīth and historical precedents. This variety is reflective of the legal polycentricity that is endemic to Islamic legal traditions, but it also suggests that precedent (i.e. Prophetic practice as preserved in historical sources) is less instrumental to the reasoning of Muslim jurists than might be presumed. While the Prophetic practice may be characterized as inconclusive, all these jurists approach the issue of prisoners of war with little concern for expressly justifying the legal opinions they advocate with clear legal-historical precedents. None of the juristic texts cited here discussed the ḥadīth concerning the Prophet's commands that prisoners of war be treated well. Most jurists simply discussed the legal status of prisoners of war without even reconciling their judgments with the historical narratives about most war prisoners being ransomed or freed.[83]

A possible explanation for these inconsistent references to precedent is that these juristic opinions were outcome determinative or utilitarian, and this is yet another example of jurists using legal rhetoric to arrive at their desired result. Or perhaps the majority of jurists were legitimating "executive authority" by asserting that a ruler has a multitude of options or expressing their individual opinions without regard for precedent/authority. Nevertheless, these explanations are too simplistic and too cynical because these jurists probably believed in the legitimacy of their legal rulings. While the socio-political objectives of jurists certainly influenced their understandings of Qurʾān and Prophetic practice, in the course of debating other jurists or teaching their students, jurists must have had to defend their opinions by substantiating them. Why did they not defend their legal opinion on the permissibility of war prisoner execution with exhaustive references to Prophetic precedents or refutations of late antique juristic opinions?

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[81] ʿAbd al-Karīm ibn Muḥammad al-Rāfiʿī (d. 1226; Iran), *al-ʿAzīz sharḥ al-wajīz: al-maʿrūf bi-al-sharḥ al-kabīr*, ed. ʿAlī Muḥammad Muʿawwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd, 14 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1997), v. 11, p. 410. His Shāfiʿī predecessor cites three executions at Badr, one at Uḥud, and one in Mecca. al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 237 (Shāfiʿī: offering historical examples of Prophet executing prisoner combatants).

[82] al-Rāfiʿī (d. 1226; Iran), *al-ʿAzīz*: v. 11, p. 410. His Shāfiʿī predecessor offered the same rationalization for a presumed "confusion" in the Qurʾānic verses. al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 237 (Shāfiʿī: when Muslims were weak, they ransomed their prisoners; when they became strong, they executed them).

[83] This corresponds to Abou El Fadl's observations about "a selective and creative process by which the jurists construct and negotiate certain values." Abou El Fadl, "The rules of killing at war," 149, citation omitted.

Despite their abstract commitment to implementing authentically 'Islamic' rulings, most of these jurists seem unconcerned with explicitly identifying and examining historical precedents from the lifetime of the Prophet. One reason for this phenomenon is that the jurists assumed the familiarity of the audience (likely other jurists or law students) with the text and exegesis of the Qurʾān, the biography of the Prophet, and late antique Islamic history. Even the jurists who did cite legal-historical authority seemed to perceive executing a war prisoner as historically normative in some way; Māwardī, Ibn Rushd, and al-Rāfiʿī selectively referred to Prophetic precedents that legitimated their interpretations of the Qurʾān. I contend that this presumption of normativity arises from two interrelated traditions: exegesis and historiography. The juristic outline presented above illustrates that jurists did not rigorously scrutinize historical materials to establish a definitive legal-historical precedent. Instead, by engaging the language of the Qurʾān (and not historical-legal precedents), the jurists were able to avoid an important legal-historical question: if the Qurʾānic ruling is to execute prisoners of war, when and how did the Prophet implement it after Badr?

IV. Prisoners of war in Qurʾān and its exegesis

The previous section's summary of some Islamic legal opinions on prisoner of war execution indicates that interpretation of Qurʾānic verses often relies on a historiographically-based presumption – one that may be unarticulated – about a verse's context. As part of their training, jurists were educated in Qurʾānic exegesis (*tafsīr*). In this section, I will examine one of the earliest and most influential exegetical texts, al-Ṭabarī's *Tafsīr*. Al-Ṭabarī (d. 923 CE) was an Iraqi jurist, historian, and exegete who was likely familiar with the reported traditions cited in Section I.[84] His exegetical work illuminates the (contemporaneous and subsequent) juristic understanding of certain verses and was likely one of the sources used by many jurists. Jurists who permitted prisoner of war execution may have abbreviated the explanations of their legal reasoning precisely because a canonical text offered a well-known scriptural and precedential justification for their legal opinions. In al-Ṭabarī's *Tafsīr*, a jurist may have located a post-Badr example of prisoner execution.

Al-Ṭabarī explains Qurʾān 8:67[85] as a criticism of the Prophet for ransoming prisoners of war at Badr and claims that execution would have been preferable. He interprets the verse as admonishing the Muslim community for trying to profit from war prisoners (by ransoming them), rather than killing them.[86] Ṭabarī expounds on Qurʾān 47:4 as an instruction to tie the

[84] Donner notes that "it is reasonable to consider al-Ṭabarī's work as a representative product of the early Islamic historiographical tradition, if not, indeed, as the culmination and crowning glory of that tradition." Donner, *Narratives*: 128.

[85] See footnote 70.

[86] Ṭabarī defines the key verb (*yuthkina*) as killing. Abū Jaʿfar Muḥammad ibn Jarīr al-Ṭabarī (d. 923; Iraq), *Jāmiʿ al-bayān ʿan taʾwīl āy al-Qurʾān*, ed. Ṣalāḥ ʿAbd al-Fattaḥ Khālidī and Ibrāhīm Muḥammad ʿAlī, 7 vols. (Damascus; Beirut: Dār al-Qalam; al-Dār al-Shāmīyah, 1997), v. 4, p. 101-02. This corresponds to the interpretation of two other major exegetical scholars, Zamakhsharī and Bayḍāwī. See Maḥmūd ibn ʿUmar Zamakhsharī (d. 1144; Khwārazm), *al-Kashshāf ʿan ḥaqāʾiq al-tanzīl wa-ʿuyūn al-aqāwīl fī wujūh al-taʾwīl*, ed. ʿAlī ibn Muḥammad al-Sayyid al-Sharīf Jurjānī, Aḥmad ibn Muḥammad Ibn al-Munayyir, and al-Ḥamawī Muḥibb al-Dīn Muḥammad ibn Abī Bakr, 4 vols. (Cairo: al-Bābī al-Ḥalabī, 1966), v. 2, p. 168. See also ʿAbd Allāh ibn ʿUmar Bayḍāwī (d. 1286; Shīrāz), *Anwār al-tanzīl wa-asrār al-tāʾwīl. Beidhawii Commentarius in Coranum: ex codd. Parisiensibus, Dresdensibus et Lipsiensibus*, ed. Heinrich Leberecht Fleischer, 2 vols. (Lipsiae: Sumptibus F.C.G. Vogelii, 1846-1848), v. 1, p. 374. But see Muqātil b. Sulaymān's suggestion of subdue and overcome in Muqātil ibn Sulaymān al-Balkhī (d. 767; Iraq), *Tafsīr Muqātil ibn*

bonds of a prisoner of war tightly lest he escape and cause harm.[87] But he delineated a controversy about this verse that is evident in the juristic texts: some scholars believed that the verse is a valid, un-abrogated rule (thereby prohibiting prisoner execution),[88] while other scholars believed that the verse was abrogated by Qurʾān 8:57[89] or 9:5[90] -- or even 2:191.[91] (There is juristic disagreement about which verse did the abrogating.) Ṭabarī referred to Ḥasan al-Baṣrī's prohibition of prisoner execution and indicated that it was based on a report that ʿAbdallāh ibn ʿUmar (son of the second caliph) refused to execute a prisoner in accordance with Qurʾān 47:4.[92] Ṭabarī expressed his opinion that verse 47:4 is not abrogated and is a valid legal command; but he claimed that 9:5 is chronologically earlier than 47:4 and therefore offers a Muslim leader the additional option of executing war prisoners. Ṭabarī alleged that it was the practice of the Prophet to kill some war prisoners and not others.[93] The historical precedents he cites are the execution of ʿUqbah at Badr and the Banū Qurayẓah (discussed below).

I will briefly present two examples of juristic texts that appear to rely on or concur with the historical interpretation embedded in Ṭabarī's exegesis or some other medieval Islamic text.[94] These two examples highlight that in the Islamic juristic tradition, Qurʾānic exegesis and historiography are intertwined and integral to Islamic legal reasoning. This intricate intertextuality also reveals the dialectical, mutually influential relationships between historical narratives, exegesis, and legal opinions. The Ḥanafī Transoxanian jurist, al-Sarakhsī (d. 1090 CE) mentioned the majority-condoned four options[95] and then the minority opinion (within his legal school) against prisoner execution. He explained that dissenting jurists (al-Ḥasan and Ḥamād bin abī Sulaymān) relied on a narrative reporting that the son of the Caliph ʿUmar refused to execute a prisoner of war, implying that they considered this a binding precedent.[96] Sarakhsī alleged to have historical evidence for the permissibility of execution after imprisonment in the Badr executions (al-Naḍr and ʿUqbah) and the story of Banū

Sulaymān: 80-150 hijrīyah, ed. ʿAbd Allāh Maḥmūd Shiḥātah, 5 vols. (Cairo: al-Hayʾah al-Miṣrīyah al-ʿĀmmah lil-Kitāb, 1979), v. 4, p. 44.

[87] al-Ṭabarī (d. 923; Iraq), *Jāmiʿ*: v. 6, p. 688.

[88] Notably, Imāmī Shīʿī jurisprudence rejects abrogation of Qurʾānic verses, which is why this legal school rejects prisoner of war execution as an option. Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 9, p. 158 (Imāmī Shīʿī).

[89] "If ye gain mastery over them in war, disperse, with them, those who follow them, that they may remember." *The Holy Qur-ān*: 486.

[90] "But when the forbidden months are past, then fight and slay the pagans wherever ye find them, and seize them, beleaguer them, and lie in wait for them in every stratagem (of war)." Ibid., 497. This verse was introduced at footnote 49. See also al-Ṭabarī (d. 923; Iraq), *Jāmiʿ*: v. 6, p. 688-89.

[91] "And slay them wherever ye catch them..." *The Holy Qur-ān*: 80. Awzāʿī claims that 2:191 abrogated 47:4. Awzāʿī (d. 774; Syria), *Sunan al-Awzāʿī*: 393.

[92] See Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿUmar*: 118.

[93] al-Ṭabarī (d. 923; Iraq), *Jāmiʿ*: v. 6, p. 689.

[94] Such as, Aḥmad ibn Muḥammad Naḥḥās (d. 950; Egypt), *Nāsikh wa-al-mansūkh fī al-Qurʾān al-karīm*, ed. Muḥammad ibn ʿAli Udfuwī (Egypt: al-Maktabah al-ʿAllāmīyah, 1938), p. 165-66.

[95] The four options are freeing, enslaving, ransoming, or killing. See footnotes 60, 62, 65, and 81.

[96] Sarakhsī (d. 11th cent; Transoxania) et al., *Sharḥ*: v. 3, p. 1024 (Ḥanafī).

Qurayẓah. Departing from Ṭabarī's exegesis, Sarakhsī declares that Qurʾān 47:4 was abrogated.[97]

Similarly, Ibn Qudāmah (d. 1223 CE), a Ḥanbalī Syrian jurist, began his discussion of the treatment of prisoners of war by listing the same four options that the majority of jurists permit. He referred to the dissenting opinions of three late antique jurists (Saʿīd bin Jubayr, Ḥasan al-Baṣrī, and ʿAṭāʾ bin Abī Rabāḥ) and explained that they rely on the ransoming of Badr prisoners as a precedent and on Qurʾān 47:4 as limiting the options for dealing with war prisoners to the two (ransoming and grace) mentioned in the verse.[98] Ibn Qudāmah substantiated his legal opinion with allusions to two executions at Badr (al-Naḍr and ʿUqbah), the killing of the poet (Abā ʿAzzah) at Uḥud, and the Banū Qurayẓah.[99] The ambiguity of these historical precedents was discussed above (Section I) – except the story of the Banū Qurayẓah tribe. Ṭabarī's exegesis and the legal reasoning of both Sarakhsī and Ibn Qudāmah accept the abrogation of a key verse (47:4) based on a historiographical identification of a weighty precedent: the Prophet executing prisoners of war after Badr. But does the Banū Qurayẓah incident offer a precedent for prisoner execution?

V. Slippage: the complexity of historical categorization

Many (if not most) jurists who permitted prisoner execution probably sincerely believed that the Prophet did execute prisoners of war. But the possibility that two isolated and specific prisoner executions at Badr or one execution at Uḥud were sufficient for deriving such a significant opinion seems peculiar. As Ṭabarī's exegesis and some juristic texts confirm, there was another incident that was selectively cited as a historical precedent for prisoner execution.[100] Some Qurʾān commentators, ḥadīth compilers, and jurists categorized (perhaps inaccurately?) an incident involving the tribe of Banū Qurayẓah as one of warfare, rather than breach of treaty or treason.[101] Readers familiar with Islamic history may have noticed the absence of references to this incident in the first section summarizing battles during the Prophet's life. This was an intentional attempt to engage these historical sources while resisting interpretations of historical events provided by Muslim historians or jurists.[102]

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[97] Ibid., v. 3, p. 1025 (Ḥanafī).

[98] Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 13, p. 45 (Ḥanbalī).

[99] Muwaffaq al-Dīn ʿAbd Allāh ibn Aḥmad Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*, ed. ʿAbd Allāh ibn ʿAbd al-Muḥsin Turkī and ʿAbd al-Fattāḥ Muḥammad Ḥulw, 2nd ed., 15 vols. (Cairo: Hajr, 1992), v. 13, p. 46 (Ḥanbalī).

[100] By way of example, Mālik cites the execution of ʿUqbah and "seventy prisoners" in reference to Banū Qurayẓah. Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 502-03 (Mālikī).

[101] For a historical depiction of these events, see Abū Jaʿfar Muḥammad ibn Jarīr al-Ṭabarī (d. 923; Iraq), *The victory of Islam*, trans. Michael Fishbein, The history of al-Ṭabarī, VIII (Albany: State University of New York Press, 1997), p. 27-41. An example of the classification discrepancies is that ḥadīth concerning the Banū Qurayẓah are in the book of warfare of later ḥadīth collections. See al-Qushayrī (d. 875; Khurāsān), *Ṣaḥiḥ Muslim*: v. 3, n. 4368-71, p. 966. But al-Shāfʿī classifies this incident under treaty violation. See footnote 109.

[102] The focus of what follows is not moral evaluation (since contemporary morality is not superior to this history), but how and why a historical incident is interpreted by successive generations in certain ways. This event is not entirely verifiable and its non-occurrence has been argued. However, factuality is not relevant because our focus is on what Muslim jurists believed to have happened in late antique Islamic history – not what actually happened. For opposing interpretations of this narrative (as fictional or factual), see W.N. Arafat, "New Light on the Story of

The Banū Qurayẓah was arguably the most powerful of the more than dozen Jewish Arab tribes in Medina.[103] When the Muslim community settled in Medina, the Prophet entered into some kind of treaty agreement (likely based on tribal legal custom) with this Jewish Arab tribe as well as others.[104] Several years later, it was suspected and alleged that the Banū Qurayẓah collaborated with the enemy during the Battle of the Trench – thereby breaching the treaty agreement between the groups. After the battle, a Muslim army besieged their fortress. The Banū Qurayẓah surrendered and Saʿd b. Muʿādh (chief of a clan allied with them) was appointed arbitrator – and may have specifically been chosen by Banū Qurayẓah for this role. Regardless of justifiability, he appears to have determined treason and imposed a tribal legal norm by ordering the execution of the combatants (i.e., men beyond puberty) and enslavement of the women and children.[105]

Late antique Islamic historiography was generally structured around the recording of battles, such that the very genre of Muslim historical narratives is closely associated with warfare.[106] Since this event immediately followed the Battle of the Trench, historical sources likewise place it directly after descriptions of the battle (which was actually a siege, since no actual warfare took place). This may explain why readers (historically and contemporaneously) interpret the Banū Qurayẓah trial as part of the battle. This is, of course, an interesting case of the structure of a historical narrative having substantive (legal) implications. But should this incident be considered an Islamic – rather than tribal – legal precedent? There are contradictory references to the Prophet approving or implementing the order that make characterizing it as an application of Islamic law problematic.[107] The presumption that this incident is Islamic ignores the treaty agreement, third-party involvement, trial-like circumstances, indefinite legal application (tribal, Jewish, or Islamic?), and lack of combat that distinguish a battle and prevent it from from having clear precedential value. In other words, what makes this event an "Islamic" legal precedent for Muslim jurists?

Moreover, how relevant is the Banū Qurayẓah incident to Islamic jurisprudence on treatment of prisoners of war? The late antique majority opinions (see Section II) and

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Banū Qurayẓa and the Jews of Medina," *Journal of the Royal Asiatic Society of Great Britain and Ireland* (1976). M.J. Kister, "The massacre of the Banū Qurayẓa: a re-examination of a tradition," *Jerusalem Studies in Arabic and Islam* 8(1986). For a discussion of the problematic motif of "Muḥammad and the Jews," see Rizwi S. Faizer, "Muhammad and the Medinan Jews: a comparison of the texts of Ibn Ishaq's Kitāb sīrat rasūl Allāh with al-Waqidi's Kitāb al-maghāzī," *International Journal of Middle East Studies* 28, no. 4 (1996).

[103] See Michael Lecker, "Wāqidī's account on the status of the Jews of Medina: a study of a combined report," *Journal of Near Eastern Studies* 54(1995).

[104] See Michael Lecker, *The "Constitution of Medina": Muḥammad's First Legal Document*, Studies in Late Antiquity and Early Islam 23 (Princeton: The Darwin Press, 2004), 48. The smaller, more numerous Jewish Arab tribes appear to have been party to the so-called Constitution, whereas the three largest and more powerful tribes entered into separate agreements.

[105] This ruling could have also been an application of Biblical law since there are reports that "Jewish law" (whatever that meant in 7th century Arabia) was applied in judgment against Jewish adulterers. For the most often cited example, see Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī*: v. 8, bk 82, no. 825, p. 550.

[106] On the relationship between biographical and campaign literature, see Josef Horovitz et al., eds., *The earliest biographies of the Prophet and their authors* (Princeton: The Darwin Press, 2002), 4.

[107] The incident is described as the judgment of Saʿd in al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf*: v. 5, p. 280. See also differing attributions of the judgment to God or Saʿd in Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 8, p. 503.

medieval dissenting opinions[108] cited at the beginning of this essay may attest to a period in Islamic history when this event was explicitly not understood as relevant to prisoners of war. Indeed, even the medieval majority opinions (permitting prisoner execution, summarized in Section III) attest to the inexplicit and ambiguous precedential value of this event. Juristic references to this incident fall under both discussions of non-aggression treaties and general ordinances for warfare, indicating that jurists themselves did not distinctly categorize this as war. For example, al-Shāfiʿī cites the incident under treaty violation and does not clearly describe Banū Qurayẓah as war prisoners.[109] Thus, some jurists probably differentiated between war prisoners and captured "traitors." Of all the juristic texts examined for this paper, only two explicitly cite Banū Qurayẓah as a precedent for prisoner execution and both are post-tenth century legal texts – meaning both are chronologically later than al-Ṭabarī's *Tafsīr*. Sarakhsī claimed that Banū Qurayẓah is the precedent for permissibility of execution.[110] A century later, Ibn Qudāmah observed that narratives about Banū Qurayẓah and two Badr executions "were disseminated and well-known."[111] More thorough and comprehensive legal-textual searches would be necessary in order to claim that the Banū Qurayẓah became a precedent in a later period (i.e. in the medieval era). But it is certainly remarkable that numerous earlier jurists and contemporaries of Sarakhsī and Ibn Qudāmah did not cite the incident as a precedent. Whether stated or implied, if some jurists presumed this as precedent for executing war prisoners, then their reasoning discounts both the circumstances of this event and other historical precedents (discussed in Section I). It is clear that many jurists avoided or neglected reconciling all the historical narratives pertaining to actual prisoners of war in their legal analysis. These jurists may have believed it was unnecessary to thoroughly analyze each incident in which the Prophet dealt with prisoners of war because the Banū Qurayẓah incident was the presumptive basis for their conceptualization of prisoner execution as normative. Other jurists may have believed that the Banū Qurayẓah incident was a precedent for punishing treason. Of course, some jurists may not have differentiated between these two categorizations of the Banū Qurayẓah incident.

It is possible that medieval Muslim scholars characterized an internal dispute with one of the Jewish Arab tribes as a war because, in their context, they conceptualized Jewish Arab tribes as clearly distinguishable from pagan and Muslim Arabs – a dichotomy (between Jewish and Arab) that is not historically attested for most of the seventh century.[112] Indeed, the overwhelming evidence of intermarriage[113] and integration,[114] as well as of socio-political

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[108] See footnote 5.

[109] Muḥammad ibn Idrīs al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*, ed. Ismāʿīl ibn Yaḥyá Muzanī (d. 878), Reprint of the ed. published in Cairo, 1321 (1903/4) ed., 7 vols., Kitāb al-Shaʿb (Cairo: Dār al-Shaʿb, 1968), v. 4, p. 107.

[110] Sarakhsī (d. 11th cent; Transoxania) et al., *Sharḥ*: v. 3, p. 1025.

[111] Muwaffaq al-Dīn ʿAbd Allāh ibn Aḥmad Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-ʿUmdah fī al-fiqh al-Ḥanbalī*, ed. al-Hawwārī and Anwar Zahrāʾ (Damascus: al-Dār al-Muttaḥidah lil-Ṭibāʿah wa-al-Nashr, 1990), p. 46.

[112] Donner suggests "the Believers may have adopted a distinct confessional identity as Muslims only in the second half of the first century AH." Donner, *Narratives*: p. 99, footnote 1. But see Amikam Elad, "Community of believers of 'holy men' and 'saints' or community of Muslims? The rise and development of early Muslim historiography," *Journal of Semitic Studies* 47, no. 2 (2002).

[113] *See* Michael Lecker, "A note on early marriage links between Quraīshis and Jewish women," *Jerusalem Studies in Arabic and Islam* 10(1987).

[114] Lecker notes that "fosterage was probably the social institute that facilitated the absorption of Arab children by Jewish clans." Michael Lecker, "'Amr ibn Ḥāzm al-Anṣārī and Qurʾān 2, 256: 'No compulsion is there in

contracts, indicate that Jewish Arab tribes were an integral component of Medinan society. Most historiographical works about this event reify the religious identity of the tribe, thereby ignoring the salient historical fact that there were no apparent conflicts between the nascent Muslim community and the majority of Jewish Arab tribes in Medina and that there may be economic undercurrents to the strained relationship with Banū Qurayẓah. The Banū Qurayẓah had been tax collectors for the Persians and were economic forces in Medina; the Prophet appears to have undertaken some redistribution of property that could have antagonized them.[115] It is probable that at least some late antique jurists (and possibly the Prophet's companions) did not share the same historiographical understanding of this incident as the medieval jurists; this difference in historical understanding may correlate to the differences of opinion on the legality of executing prisoners of war. Medieval Muslim jurists either could not conceptualize the complex hybridity of Jewish-Muslim-Arab identity or chose not to accept it. Most contemporary historians have, unfortunately, continued to disregard the complex nature of historical identity by projecting modern identity categories on this historical period. The prolonged existence of Jewish-Christians is a comparable historical case that further substantiates the likelihood of vague confessional identity during this period.[116] Both the exegesis and historiography employed by medieval jurists signals that they assumed unambiguous confessional identities, manifested in violent hostilities between groups. The reality of late antique Arabia was more complex than the emplotted narrative of Banū Qurayẓah written by medieval Muslim scholars.

VI. Historical exegesis of the Qurʾān?

Thus far, I advocated that the Qurʾānic interpretations of the majority of professional jurists do not reconcile with the historical evidence, but I did not provide a lucid reconstruction of an alternative (possibly earlier) exegesis. Reflecting this mosaic of historical interpretations (Section I) onto the Qurʾān may evoke the exegesis of the late antique jurists who substantiated their judgment against prisoner execution with reference to Qurʾān and authoritative precedents. The divergent historiographical and Qurʾānic readings that produce opposing legal judgments hinge upon identifying whether or not a particular verse (Qurʾān 47:4) is abrogated. A common means of identifying verse abrogation is to determine temporal order; while difficult to ascertain definitively, in this case, it appears that Qurʾān 8:67 was

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religion'," *Oriens* 35(1996): 63. See also Michael Lecker, "Zayd b. Thābit, 'a Jew with two sidelocks': Judaism and literacy in pre-Islamic Medina (Yathrib)," *Journal of Near Eastern Studies* 56(1997).

[115] See Mahmood Ibrahim, *Merchant capital and Islam* (Austin: University of Texas Press, 1990), 180.

[116] Daniel Boyarin noted that "In suggesting that Judaism and Christianity were not separate entities until very late in late antiquity, I am, accordingly, not claiming that it is impossible to discern separate social groups that are in an important sense Christian/not-Jewish or Jewish/not-Christian from fairly early on (by which I mean the mid-second century)." Boyarin, *Border lines*: 21. Similarly, I recognize that in the beginning of Islamic history there were groups that could be identified as Muslim/not-Jewish, but the "fuzziness of the borders" that Boyarin discusses is relevant to understanding how Muslim identity changed in late antiquity. See also R. Werblowsky et al., "Christianity," ed. Michael Berenbaum and Fred Skolnik, *Encyclopaedia Judaica* 4(2007), http://find.galegroup.com/gvrl/infomark.do?&contentSet=EBKS&type=retrieve&tabID=T001&prodId=GVRL&docId=CX2587504287&eisbn=0-02-866097-8&source=gale&userGroupName=berk89308&version=1.0

revealed prior to Qurʾān 47:4.[117] Therefore, on its own, chronological order of Qurʾānic verses necessitates a ruling that prisoners of war can only be pardoned or ransomed (as stated in Qurʾān 47:4).[118] Viewing Qurʾān 47:4 as limiting treatment of war prisoners to pardoning or to ransoming is in line with the clearest historical evidence: after Badr (the occasion for Qurʾān 8:67), the Prophet freed all the captives from the battle of Ḥunayn (the only other identifiable battle that resulted in prisoners).[119] Yet given that it is not entirely known what chronological ordering of the Qurʾān medieval Muslim scholars presumed, this may not fully explain the contrary legal rulings.[120]

Abrogation of verses also relies on the categorization of some verses as specific and others as general – a process that began in late antiquity in conjunction with the transmission and study of the Qurʾān. "Professional" jurists who permitted prisoner execution presupposed various conditions on verses, which led to verse Qurʾān 8:67[121] being viewed as general (and, sometimes, Qurʾān 47:4[122] as specific). In light of the historical evidence presented above, the criticism in Qurʾān 8:67 appears to be that war should not be a primarily profitable enterprise (as Ṭabarī explained); that is, the verse instructs believers to battle for spiritual reasons, rather than economic incentives. This insinuates that Qurʾān 47:4 was not a specific regulation, since it appears to have been subsequently implemented. If Qurʾān 8:67 is not a general regulation and it does not override Qurʾān 47:4, then these two verses can be reconciled with the complex historical record. The historical summary (Section I), prohibition of execution by the early jurists (Section II), and historical reconstruction of a key event (Section V), all interconnect with an exegesis that rejects the abrogation of verse 47:4. In other words, reconciling the disparate historical evidence (biographical, legal, and exegetical) suggests that Qurʾān 47:4 limits treatment of prisoners of war to freeing or ransoming, which was the Prophet's practice, as preserved by the majority opinion of late antique jurists. The perspective that Qurʾān 47:4 was abrogated may have been prompted by genuine contentions, by projecting a particular historiography, by utilitarian objectives, or by adherence to a (legal or social) tradition. I contend that all these factors played a role in constructing what jurists believed to be normative and I want to turn now to pre-Islamic customary practices and traditions.

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[117] Theodor Nöldeke, *Tārīkh al-Qurʾān [Geschichte des Qorans]*, ed. Friedrich Schwally, Gotthelf Bergstrasser, and Otto Pretzl, trans. Georges Tamer (Beirut: Konrad Adenauer Foundation, 2004), xxxvi. For the text of these verses, see footnote 70 (Qurʾān 8:67) and footnote 45 (Qurʾān 47:4).

[118] For an example of this legal argument, see Shalabī, *al-Jihād fi sabīl Allāh*: 104-05.

[119] This historical interpretation is evident in some contemporary texts, which suggests that executions of war prisoners were the consequences of some prior crimes unrelated to prisoner status. See ʿUlyān's chapter on "Prisoners of war in Islam" in Muḥyī Hilāl al-Sarḥān, *Asrá al-ḥarb fī al-Islām wa-al-qānūn al-dawlī* (Baghdad: al-Jumhūrīyah al-ʿIrāqīyah, Wizārat al-Awqāf wa-al-Shuʾūn al-Dīnīyah, Majallat al-Risālah al-Islāmīyah, 1986), 39-51. *See also* Shalabī, *al-Jihād fi sabīl Allāh*: 104-07.

[120] Since it was necessary for scholars to study the chronology of Qurʾānic verses in order to determine which verses were abrogated, there was significant scholarly discussion on the issue. But there were differences of opinion and it is difficult to conjecture a specific jurist's perspective on the Qurʾān's chronology. A standard work on this topic is Jalāl al-Dīn ʿAbd al-Raḥmān ibn Abī Bakr al-Suyūṭī (d. 1505; Egypt), *al-Itqān fī ʿulūm al-Qurʾān*, ed. Muḥammad Abū al-Faḍl Ibrāhīm, vol. 2nd (Tehran: Manshūrāt al-Raḍī, 1984).

[121] "It is not fitting for a Prophet that he should have prisoners of war until he hath thoroughly subdued the land. Ye look for the temporal goods of this world; but Allah looketh to the Hereafter: And Allah is exalted in might, Wise."

[122] "Therefore, when ye meet the unbelievers, smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly (on them): thereafter (is the time for) either generosity or ransom."

VII. Another possibility

Thus far, this chapter has focused on textual continuities shared between late antique and medieval jurists: Qurʾān and historical narratives. However, what constituted normativity for Muslim jurists of any period cannot exclusively be located in Islamic texts or Muslim historical figures. The situation of wars against non-Islamic empires, for example, may have shaped (even subconsciously) how jurists viewed the legal status of prisoners of war. Prisoner exchange was common between the Byzantine and Islamic empires during the eighth through tenth centuries,[123] but actual war practices varied across time and region. A more thorough analysis of socio-political contexts is beyond the scope of this chapter and would be likely inconclusive. Moreover, jurists were not only concerned with overcoming their political adversaries because — as the summaries in Sections II and III demonstrate — these jurists believed they were following Islamic tradition, or what they supposed was Islamic tradition. I am not here making a claim about internally-motivated legal reasoning as "good faith" and externally-motivated legally reasoning as "bad faith." Instead, I want to emphasize that all jurists are equally motivated by factors that are both internal and external to formal jurisprudential methodology.

Perhaps some jurists presupposed the permissibility of prisoner execution because they confounded some pre-Islamic traditions with Islamic texts/narratives. Generally, the Prophet and early Muslim jurists acted in harmony with the pre-existing socio-legal norms of the region.[124] While difficult to establish definitively, it appears that pre-Islamic tribal custom was to ransom prisoners of war, but not to execute them. By comparison, Roman law assumed the enslavement of war prisoners, which was widely practiced.[125] A significant pre-Islamic legal norm of the Near East that explicitly advocates prisoner execution is Biblical Law. Deuteronomy 20:13 states, "And when the Lord your God delivers it into your hand, you shall put all its males to the sword."[126] In light of the role that Jewish tradition played in late antique Islamic legal thought, it is possible that the normativity of prisoner execution is a remnant of the biblical tradition.[127] Of course, no Muslim jurist cited the Torah as precedent for prisoner of war execution and there is an insufficient evidentiary basis for making such a claim.[128] Because legal interpretive communities are fluid, the normalcy of prisoner execution

[123] Rotman, *Les esclaves et l'esclavage*: 56-62, 68-75.

[124] "In short, the Qur'ānic regulations modify in certain particulars rather than supplant entirely the existing customary law." Coulson, *A history of Islamic law*: 15.

[125] See references to the enslavement of prisoners of war in *The Digest of Justinian* trans. Alan Watson, revised English-language ed., 2 vols. (Philadelphia: University of Pennsylvania Press, 1998), 1:1.5.4.2 and 2:49.15. See also *The Institutes of Justinian: text, translation, and commentary*, trans. J. A. C. (Joseph Anthony Charles) Thomas (Amsterdam; New York: North-Holland Pub. Co.; American Elsevier Pub. Co., 1975), I.3, p. 14.

[126] Michael David Coogan et al., eds., *The new Oxford annotated Bible*, augmented third ed. (New York: Oxford University Press, 2007), 276. This verse was generally understood as applying to an optional war. The verse's indifference to the category of non-combatant males is echoed in Ibn Ḥazm's ruling that all male enemies – combatant or non-combatant – may be killed. ʿAlī ibn Aḥmad Ibn Ḥazm (d. 1064; Spain), *al-Muḥallā*, ed. Ḥasan Zaydān Ṭulbah, 12 vols. (Cairo: Maktabat al-Jumhūriyah al-ʿArabīyah, 1967-1971), v. 7, p. 345 (Ẓāhirī).

[127] "Borrowing" is an inaccurate way of characterizing the complicated transformation of these hybrid communities. See Satlow, "Beyond influence."

[128] On the acceptability of non-abrogated, pre-Islamic laws (such as Biblical law) as a source of Islamic jurisprudence, see ʿAbd al-Raḥmān ibn ʿAbd Allāh Darwīsh, *al-Sharāʾiʿ al-sābiqah wa-madá ḥujjīyatihā fī al-sharīʿah al-*

within biblical custom could have subtly been integrated into Islamic legal thought.[129] This suggests a deep-rooted historical tradition legitimating prisoner execution that is unrelated to the Qurʾān, or the practice of the Prophet and his companions, or normative Islamic legal methodology. After all, these communities (Arab/Islamic, Jewish, Byzantine) were not easily distinguishable in late antiquity. What was normative to a Muslim jurist was not grounded in a "purely" Islamic tradition and this may explain the juristic tendency to read the historical record as permitting, even prescribing, prisoner execution.

VIII. Conclusion

This chapter has focused on the "internal" dynamics of changing Islamic legal consciousness and consequently avoided fully engaging the influence of actual, contemporaneous practice to legal hermeneutics. The reasoning of jurists during the medieval period relied — among other things — on interpretation of historical texts and of the Qurʾān. In the case of prisoners of war, the majority of these professional jurists arrived at interpretations that seem inconsistent — or, at least unconcerned — with some historical evidence or with some of the opinions of earlier jurists. This chapter situated the Banū Qurayẓah incident within a broader framework of Islamic history; I contend that this historical understanding was shared by some early jurists and minority jurists (Shīʿī and Ḥanafī) who prohibited prisoner execution.[130] It is unclear what the majority (professional or contemporary) Islamic legal opinion on prisoner execution would be if early Muslim historians had clearly distinguished between the Battle of the Trench and the Banū Qurayẓah incident. Nor can we determine what the prevailing legal opinion would be if professional jurists had applied more precision in their concurrent analysis of historical precedents and Qurʾānic verses. But what we can determine is that the legal reasoning of jurists does not simply arise from the methodology they purport to apply or from presumed utilitarian objectives. Interpretations of and assumptions about legal texts and precedents — rooted in complex, multi-layered traditions — intermingle to produce juristic opinions. Variations in Islamic historiography generate juristic disagreement

This chapter has suggested familiar claims: precedent can be used to support a contradictory ruling; jurists are subjective and may make outcome-determinative decisions; jurists are not skilled historians and employ historiography in problematic ways. But this chapter attempted to deepen these observations: most professional jurists began with a genuine presumption that executing prisoners of war is a viable option. This may be unsurprising or normative, but my objective has been to scrutinize the juristic discourse, rather than pass judgment on the legitimacy of this perspective. In citing Qurʾān or ḥadīth, most jurists instinctively understood these sources as sanctioning prisoner execution. The intertwined historical and Qurʾānic interpretations propounded by these jurists demonstrate

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Islāmīyah (Saudi Arabia: ʿA. al-R. b. ʿA. A. al-Darwīsh, 1989). On the dialectical relationship between Islamic and Jewish legal thought see Chapter 3 of this dissertation.Zeʾev Maghen, *After hardship cometh ease: the Jews as backdrop for Muslim moderation*, Studien zur Geschichte und Kultur des islamischen Orients; Beihefte zur Zeitschrift "Der Islam", Neue Folge, Bd. 17 (Berlin; New York: De Gruyter, 2006).

[129] Indeed, the integration of Biblical ideas in the Islamic conceptualization of *jihād* is a fascinating topic, but beyond the scope of this chapter.

[130] For a contemporary presentation of this legal interpretation, see Shalabī, *al-Jihād fi sabīl Allāh*: 101-07.

the significance of these normative suppositions. The intertextual process of "creating" precedents, as depicted in this essay, is not unique to the Islamic legal tradition. For legal historians, this is a complicated inquiry into how historians construct histories, how jurists interpret those constructions, and how legal traditions apply these created legal-historical precedents. This chapter has demonstrated the significance of intertexual legal-historical analysis by demarcating how jurists created the permissibility of prisoner of war execution as a historical truth. Indeed, how jurists interpret historical narratives cannot be separated from historical writing or legal reasoning.

Chapter 2: Legal heterodoxy – a case study in taxation[1]

Taxing citizens: socio-legal constructions of late antique Muslim identity

I. Introduction

Charity is commonly perceived as a pious deed – a voluntary act performed by an individual in the service of the needy members of a community. In the context of religious traditions, it often represents piety and spiritual-economic sacrifice. In the late antique (ca. 250-750 CE) Near East, for Christians and Jews, charity became an increasingly celebrated "public virtue" in service of "the poor."[2] Subsequently, late antique Muslims transformed these charity practices by regulating them: by making the payment of charity incumbent upon every Muslim, charity became a tax.[3] And, in turn, the payment of the charity tax became a means of communally defining a Muslim – an identity that was constructed as the performance of acts that obfuscated the modern boundaries between "ritual" and "political."

Recent studies of charity in Islamic history reflect this assumption of charity's ineluctable role in religion.[4] Scholars tend to project an association between charitable giving and religion in their studies of Muslim charity practices.[5] Indeed, some scholars evaluate charity in historical contexts based on their own assumptions of what correct "religious" practice is or should be.[6] This prevalent construction of charity as a ritual obligation prevents

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[1] For reading and commenting on drafts of this chapter, I thank Rhiannon Graybill, Maria Mavroudi, and Amr Osman. Different parts and versions of this chapter were presented at a panel I organized on 'Muslim Historiography in Islamic Legal Reasoning' at the American Society for Legal History annual meeting in Ottawa (November 15, 2008); a panel on 'Religion and law in the medieval Mediterranean world' at the American Academy of Religion annual meeting in San Francisco (Nov. 21, 2011); and the symposium "Legal Regimes and Legal Change in Antiquity" at UC Berkeley (April 14, 2012).

[2] Brown observed that "'Love of the poor' became a public virtue, which bishops and clergy men were expected to demonstrate, in return for public privileges." Peter R. L. Brown, *Poverty and leadership in the later Roman Empire*, The Menahem Stern Jerusalem Lectures (Hanover and London: University Press of New England, 2002), 74.

[3] To be clear, there was an infrastructure and enforcement mechanism for the calculation and collection of the charity tax from the beginning of Islamic history. The Prophet reportedly kicked out five people from the mosque for not paying their charity tax. Muḥammad ibn Yaʿqūb Kulaynī (d. 941; Iran), *al-Uṣūl min al-Kāfī*, ed. ʿAlī Akbar Ghaffārī and Muḥammad Ākhūndī, 3rd ed., 8 vols. (Tehran: Dār al-Kutub al-Islāmīyah, 1968), v. 3, p. 503, no. 2 (Imāmī Shīʿī). Also cited in Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 9 (Imāmī Shīʿī).

[4] Miriam Frenkel et al., eds., *Charity and giving in monotheistic religions* (Berlin; New York: W. de Gruyter, 2009); Yaacov Lev, "The ethics and practice of Islamic medieval charity," *History Compass* 5, no. 2 (2007); Yaacov Lev, "Charity, pious endowments and royal women in medieval Islam," in *Continuity and change in the realms of Islam : studies in honour of Professor Urbain Vermeulen*, ed. Urbain Vermeulen, K. d Hulster, and J. van Steenbergen, *Orientalia Lovaniensia analecta, 171* (Leuven: Peeters; Departement Oosterse Studies, 2008). I critiqued reified approaches to the study of Islamic charity in Lena Salaymeh, review of Amy Singer, *Charity in Islamic Societies* (New York, Cambridge University Press, 2008), *Journal of Interdisciplinary History* 40, no. 4 (2010). I follow Talal Asad in being skeptical about the relevance of the modern, Western category of religion to Islamic history. Asad, *Genealogies of religion*.

[5] See, for example, Frenkel et al., *Charity and giving in monotheistic religions*.

[6] For example, Lev claims that "The use of sacred charity for political and social ends fall within a broader pattern of the use and abuse of religion in medieval times wherein political rule of every kind, wars, social order, and social practices were presented as religiously inspired and sanctioned." Yaacov Lev, *Charity, endowments, and*

scholars from understanding the multi-dimensional motivations and consequences of charity practices.

Late antique historical sources – biographical, historical, and legal – indicate that there were two competing and converging models of Islamic identity in the Near East: the first viewed being Muslim as being about the practice of certain rituals; the second viewed being Muslim as being a form of citizenship.[7] The first emphasized an individual's awareness of and relationship to a divine entity; the second emphasized an individual's obligations toward and relationship to a Muslim community. A historical analysis of the charity tax illustrates these two competing models and reveals the ways in which a majority of Muslim jurists (in the late antique and medieval eras) favored a hybrid form of the citizenship model. In other words, orthodox Muslim scholars constructed Islamic identity through law in ways that – in modern terminology – are political and not purely confessional. In this chapter, I trace the embedded hybridity of spiritual and political identity by exploring the public or communal dimensions of Muslim identity. I will focus on reconstructing precedents from the earliest decades of the Muslim community (roughly 622-660 CE), prior to the emergence of the Umayyad empire (r. 661-750 CE) in order to explore the notion of Muslim citizenship in the absence of an elaborate state structure. I will then compare and contrast reports about pre-Umayyad charity taxation with medieval juristic texts.

I will investigate charity by delving into seemingly simple questions: (1) What is the charity tax?; (2) How much is the charity tax?; (3) Who should receive the charity tax?; (4) Who should pay the charity tax?; (5) Who does not pay the charity tax?; (6) Why is the charity tax significant? In asking and answering these questions, I am interested in exploring how Muslim jurists articulated the relationship between paying the charity tax and being Muslim. I intend this particular case study to demonstrate some of the ways in which contemporary religious/secular discourse limits our historical understanding. To further substantiate the meaning of these practices for late antique Muslim identity formation, I will offer some comparative considerations from rabbinic law and reflect on Muslim identity in relation to Jewish identity. My objective is to give substantive meaning to late antique "Muslim charity" by understanding it in relationship to "Jewish charity." In so doing, I will illustrate that, from the beginning of Islamic history, most Muslims did not understand Muslim identity as a private matter of faith, but rather as a public expression of socio-political and communal membership. Indeed, this particular tension is one that manifests itself in numerous political and sectarian contests in Islamic history.

II. What is the charity tax?

Political entities depend on the extraction of taxes from their subjects in order to function, such that we may identify the existence of a state wherever we observe a system of

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charitable institutions in medieval Islam (Gainesville, FL: University Press of Florida, 2005), 1. I contend that charity is not "sacred" and its usage as a political strategy should not be evaluated as "abnormal" in any way.

[7] I use "citizenship" to mean membership in a political society. I do not equate my usage of the terms "citizenship" or "state" to the contemporary understanding of an individual's relationship to a modern-nation state.

taxation.[8] This "unscientific" definition has interesting implications for late antique Islamic history because the first Muslim community, organized under the political leadership of the Prophet, is not commonly perceived by contemporary scholars as constituting a "state." But the Prophet and his successors collected an annual tax – one that was dedicated specifically for the poor. This social welfare measure was not simply a matter of piety; it was also governmental regulation.[9] In other words, the Prophet instituted an Islamic state (in historicist terms) – one that dramatically transformed in subsequent years, but cannot be discounted as non-existent. The Prophet's political successors continued the administrative collection and regulation of taxes.[10] This imposition of the charity tax was the subject of considerable political and legal debate in late antiquity.[11]

Since even the earliest Islamic state collected taxes, I identify the Islamic legal obligation to pay charity as a charity tax.[12] I do so as part of a broader interest in exploring the ways in which late antique Islamic charity taxation corresponds to modern taxation regimes – in the context of the United States, state or federal taxes for public welfare programs. For the sake of clarity, I am excluding topics such as charity given at the end of the fasting month, the portion of the war booty that is set aside for charity, and the land tithe.[13] To reconstruct charity taxation from the first four decades of Islamic history, I will probe a variety of historical sources, searching for both consistencies and inconsistencies.

The charity tax in the Qurʾān

An examination of the historical evidence establishes that charity taxation was an integral aspect of Muslim communal identity in the Prophetic period. To reconstruct the Prophet's message and practice of charity taxation, I rely on Qurʾān, ḥadīth, and biographical texts. Various Qurʾānic verses mandate the paying of charity, although the precise term used in Arabic varies.[14] Qurʾānic verses do not explicitly delineate who should pay the charity tax or

[8] The historicist understanding of the state is developed by Bevir and Rhodes, who argue that "the state appears as a differentiated cultural practice composed of all kinds of contingent and shifting beliefs and actions, where these beliefs and actions can be explained through a historical understanding." Mark Bevir et al., *The state as cultural practice* (Oxford: Oxford University Press, 2010), 20.

[9] This is not a denial of the "religious" or faith-based significance of charity taxation. Instead, my objective here is to simply offer a definition of a state that is both historical and flexible.

[10] Papyrological evidence substantiates that a charity tax was collected from Muslims by an Islamic state in the eighth century. Sijpesteijn, "Shaping a Muslim state," 153. The absence of a distinction between these two terms is reflected in the Qurʾān; later jurists elaborated a distinction between these terms.

[11] Sijpesteijn outlines the textual evidence of debates on the possibility of paying the charity tax directly to the poor/needy, without state intervention; these debates are preserved in the earliest ḥadīth collections, but not the later canonical ones. Ibid., 172-73.

[12] That charity was conceptualized by late antique Muslims as a tax is manifested structurally in legal texts that juxtapose charity and poll taxes. In this way, these sections delineate the taxes for citizens and semi-citizens. See footnote 138.

[13] These topics are elaborated in both ḥadīth collections and legal texts.

[14] Throughout this chapter, I intentionally do not assume that *zakāh* is the only term that was used by late antique Muslims to refer to obligatory charity because, in fact, both *ṣadaqah* and *zakāh* were used to refer to the charity tax. While jurists gradually defined the former as voluntary charity and the latter as obligatory charity, there is no indication that this distinction was recognized by the first several generations of Muslims. For a philological analysis of these terms, see Suliman Bashear, "On the origins and development of the meaning of *zakāt* in early

how the tax should be calculated. (Indeed, some verses that identify the charity tax as an obligation may have been addressed to Jews.[15]) Some relevant verses include:[16]

23:4 (Mecca) — *And those who perform charity*

سُوْرَةُ المؤمنون: وَٱلَّذِينَ هُمْ لِلزَّكَوٰةِ فَٰعِلُونَ (٤)

23:60 (Mecca) — *Those who give what is due with fearful hearts because they will return to their Lord*

سُوْرَةُ المؤمنون: وَٱلَّذِينَ يُؤْتُونَ مَآ ءَاتَواْ وَّقُلُوبُهُمْ وَجِلَةٌ أَنَّهُمْ إِلَىٰ رَبِّهِمْ رَٰجِعُونَ (٦٠)

27:3 (Mecca) — *Those who pray, give charity, and acknowledge the hereafter*

سُوْرَةُ النّمل: ٱلَّذِينَ يُقِيمُونَ ٱلصَّلَوٰةَ وَيُؤْتُونَ ٱلزَّكَوٰةَ وَهُم بِٱلْأَخِرَةِ هُمْ يُوقِنُونَ (٣)

31:4 (Mecca) — *Those who pray, give charity, and acknowledge the hereafter*

سُوْرَةُ لقمَان: ٱلَّذِينَ يُقِيمُونَ ٱلصَّلَوٰةَ وَيُؤْتُونَ ٱلزَّكَوٰةَ وَهُم بِٱلْأَخِرَةِ هُمْ يُوقِنُونَ (٤)

32:16 (Mecca) — *...they spend from what we bestowed upon them*

سُوْرَةُ السَّجدَة: تَتَجَافَىٰ جُنُوبُهُمْ عَنِ ٱلْمَضَاجِعِ يَدْعُونَ رَبَّهُمْ خَوْفًا وَطَمَعًا وَمِمَّا رَزَقْنَٰهُمْ يُنفِقُونَ (١٦)

41:7 (Mecca) — *Those who do not give charity and who deny the hereafter*

سُوْرَةُ حٰمٓ السجدة / فُصِّلَت: ٱلَّذِينَ لَا يُؤْتُونَ ٱلزَّكَوٰةَ وَهُم بِٱلْأَخِرَةِ هُمْ كَٰفِرُونَ (٧)

51:19 (Mecca) — *And in their wealth and possessions (was remembered) the right of the (needy), him who asked, and him who (for some reason) was deprived*

سُوْرَةُ الذّاريَات: وَفِىٓ أَمْوَٰلِهِمْ حَقٌّ لِّلسَّآئِلِ وَٱلْمَحْرُومِ (١٩)

70:23-24 (Mecca) — *Those who are regular in their prayers and those in whose assets there is a known right*

سُوْرَةُ المَعَارِج: ٱلَّذِينَ هُمْ عَلَىٰ صَلَاتِهِمْ دَآئِمُونَ (٢٣) وَٱلَّذِينَ فِىٓ أَمْوَٰلِهِمْ حَقٌّ مَّعْلُومٌ (٢٤)

92:5 (Mecca) — *As for him who gives and believes*

سُوْرَةُ اللّيْل: فَأَمَّا مَنْ أَعْطَىٰ وَٱتَّقَىٰ (٥)

2:276 (Medina) — *God diminishes interest (riba) and amplifies charity, for God does not love disbelievers or sinners.*

سُوْرَةُ البَقَرَة: يَمْحَقُ ٱللَّهُ ٱلرِّبَوٰاْ وَيُرْبِى ٱلصَّدَقَٰتِ ۗ وَٱللَّهُ لَا يُحِبُّ كُلَّ كَفَّارٍ أَثِيمٍ (٢٧٦)

Islam," *Arabica* XL(1993). Sijpesteijn notes that "The papyrus makes no distinction between the two terms *ṣadaqa* and *zakāt* but defines both as a *farḍ*, duty." Sijpesteijn, "Shaping a Muslim state," 153.

[15] These are Qurʾān 2:43, 2:83, and 2:110.

[16] The charity tax is described as on obligation in conjunction with prayer in the following Meccan verses: 19:31; 19:55; 21:7; 23:4; 27:3; 31:4; 123:20 The same theme is mentioned in the following Medinan verses: 2:43; 2:83; 2:110; 2:177; 2:277; 4:77; 4:162; 5:12; 7:55; 9:5; 9:18; 9:71; 22:41; 22:78; 24:37; 24:56; 33:33; 108:13; 138:5. Elsewhere, payment of charity is described as being the subject of divine reward (and non-payment is the subject of divine punishment) or is described in generally positive or regulatory terms. Meccan examples include: 7:156; 12:88. Medinan examples include: 2:219; 2:196; 2:263; 2:264; 2:267; 2:271; 2:276; 4:79; 4:91; 4:114; 9:58; 9:103; 9:104; 108:12-14.

9:79 (Medina) *Those who slander the obedient ones of the believers in charity or the ones who find nothing except their work (to give in charity), they mock them and God will mock them for they will have painful torture.*

سُوْرَةُ التَّوبَة: ٱلَّذِينَ يَلۡمِزُونَ ٱلۡمُطَّوِّعِينَ مِنَ ٱلۡمُؤۡمِنِينَ فِي ٱلصَّدَقَٰتِ وَٱلَّذِينَ لَا يَجِدُونَ إِلَّا جُهۡدَهُمۡ فَيَسۡخَرُونَ مِنۡهُمۡ سَخِرَ ٱللَّهُ مِنۡهُمۡ وَلَهُمۡ عَذَابٌ أَلِيمٌ (٧٩)

9:103 (Medina) *"Of their wealth take charity in order to purify and to sanctify them..."*

سُوْرَةُ التَّوبَة: خُذۡ مِنۡ أَمۡوَٰلِهِمۡ صَدَقَةٗ تُطَهِّرُهُمۡ وَتُزَكِّيهِم بِهَا (١٠٣)

24:56 (Medina) *So establish regular prayer and give regular charity...*

سُوْرَةُ النُّور: وَأَقِيمُواْ ٱلصَّلَوٰةَ وَءَاتُواْ ٱلزَّكَوٰةَ وَأَطِيعُواْ ٱلرَّسُولَ لَعَلَّكُمۡ تُرۡحَمُونَ (٥٦)

58:13 (Medina) *...pray and give charity and obey God and His prophet for God is aware of what you do*

سُوْرَةُ المجَادلة: ءَأَشۡفَقۡتُمۡ أَن تُقَدِّمُواْ بَيۡنَ يَدَيۡ نَجۡوَىٰكُمۡ صَدَقَٰتٖۚ فَإِذۡ لَمۡ تَفۡعَلُواْ وَتَابَ ٱللَّهُ عَلَيۡكُمۡ فَأَقِيمُواْ ٱلصَّلَوٰةَ وَءَاتُواْ ٱلزَّكَوٰةَ وَأَطِيعُواْ ٱللَّهَ وَرَسُولَهُۥۚ وَٱللَّهُ خَبِيرُۢ بِمَا تَعۡمَلُونَ (١٣)

These verses (and others not cited here) suggest two primary themes: that giving charity is a religious obligation on par with the central obligation of prayer[17] and that charity is the right of the poor to a portion of the wealth of the non-poor (or a duty that the wealthy owe to the poor).[18]

These two Qurʾānic themes reflect the similar ways charitable giving was understood in late antique near eastern cultures. Pre-Islamic Arabs appear to have believed, if not practiced, that individuals with excess wealth should donate it.[19] Similarly, late antique rabbis viewed charity as more important than all the other Jewish commandments.[20] Christian bishops

[17] The phrase "establish regular prayer and regular charity" is mentioned in Qurʾān 73:20, 2:110, 2:177, 98:5, 24:56, 58:13, and 22:78. A contemporary scholar estimates that in 27 out of the 30 instances in which the word *zakāh* appears in the Qurʾān, it is in conjunction with prayer. Aḥmad Idrīs ʿAbdū, *al-Wāfī fī aḥkām al-zakāh: dirāsah muqāranah bayna al-madhāhib wa-ārāʾ al-ʿulamāʾ* (ʿAyn Malīlah, Algeria: Dār al-Hudá, 2006), 6. For a general discussion of the significance of these verses, see Michael Bonner, "Poverty and economics in the Qur'an," *Journal of Interdisciplinary History* xxxv, no. 3 (2005).

[18] See Qurʾān 51:19 (cited above), 70:24 (And those in whose wealth there is a well-known right), and 59:7 (What God has given to His messenger from the townspeople belongs to God, to His messenger, to kinfolk, to orphans, to the needy, and to the wayfarer, so that it circulates not only between the wealthy...) in *The Holy Qur-ān*.

[19] M. M. Bravmann, "The surplus of property: an early Arab social concept," *Der Islam* 38(1962). See also Bonner, "Poverty and economics in the Qur'an," 403. This may be a reflection of life in Arabian society, where limited material resources and semi-sedentary lifestyles were incongruent with accumulation of wealth. But, in the absence of more concrete evidence, I want to resist assuming a certain stereotype of Arabian society as relatively more egalitarian than more sedentary societies.

[20] Babylonian Talmud, Baba Batra 9a (charity is as important as all the other commandments). Rabbis viewed "charity not as a favor to the poor but something to which they have a right, and the donor, an obligation." Raphael Posner, Haim Hillel Ben-Sasson, and Isaac Levitats, "Charity," in *Encyclopaedia Judaica*, ed. Michael Berenbaum and Fred Skolnik (Detroit: Macmillan Reference, 2007).

disseminated teachings that emphasized the importance of charity as a devotional act.[21] Thus, normative late antique charity practices identified charity as integral to prayer and as the right of the poor. The Qurʾān seems to reflect these normative late antique conceptualizations of charity in its dual emphasis on the spiritual and economic necessity of charity taxation.[22] This might provoke some questions: how is a ritual act (such as prayer or charity tax payment) enforced as an obligatory act? In other words, how did the Prophet and late antique Muslim leaders regulate charity taxation?

The Prophet's imposition of a charity tax

To illuminate legal practices and norms that are not expressly stated in the Qurʾān, we need to examine historical materials about the Prophet's life.[23] Many historical sources identify the names of individuals and the names of the areas or tribes to which they were sent for the purpose of collecting the charity tax.[24] By way of example, the Prophet sent al-Walīd to Banū al-Muṣṭaliq[25] and sent ʿAmr bin Ḥazm to Banū al-Ḥārith[26] to collect the charity tax after

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[21] Peter Brown observed, "Every believer was to God what the beggar was to the giver of alms -- a being utterly dependent on the mercy of another. Seldom in the history of religion (and never before in the history of the Greco-Roman world) had the essence of the human relationship to the divine been concretized in such starkly social terms, and in social terms characterized by such stark asymmetry." Brown, *Poverty and leadership*: 86. Bishops were not the only social figures to promote charity, since "philanthropia was believed in and practiced by the Byzantine State as a religious, social, and political virtue. Practically all the emperors, in one way or another, pursued the application of this noble attribute." Demetrios J. Constantelos, *Byzantine philanthropy and social welfare*, revised 2nd ed., Studies in the Social & Religious History of the Mediaeval Greek World, I (New Rochelle, NY: Aristide D. Caratzas, 1991), 100.

[22] Later in this chapter, I will show how these normative understandings of charitable giving likely resulted in a difference of opinion among Muslim jurists concerning specific aspects of the charity tax's applicability to minors, the mentally incompetent, and slaves.

[23] Al-Ṭabarī reports that in the year 8 AH the Prophet sent ʿAmr b. al-ʿĀṣ to ʿUmān in order to collect the charity tax. al-Ṭabarī (d. 923; Iraq), *The victory of Islam*: 142. Al-Ṭabarī also reports that in the same year (8 AH) the Prophet sent ʿAmr b. al-ʿĀṣ to collect the charity tax from al-Julandā. Abū Jaʿfar Muḥammad ibn Jarīr al-Ṭabarī (d. 923; Iraq), *The last years of the Prophet: the formation of the State A.D. 630-632/A.H. 8-11*, trans. Ismail K. Poonawala, The history of al-Ṭabarī, IX (Albany: State University of New York Press, 1990), 38-39. Despite these examples of charity tax collection, al-Ṭabarī inconsistently states that the charity tax was made obligatory in the year 9 AH. Ibid., 79.

[24] "The apostle sent out his officials and representatives to every district subject to Islam to collect the poor-tax. He sent al-Muhājir b. Abū Umayya b. al-Mughīra to Ṣanʿāʾ, and al-ʿAnsī came out against him while he was there. Ziyād b. Labīd, brother of B. Bayāḍa al-Anṣārī, he sent to Ḥaḍramaut. ʿAdīy b. Ḥātim he sent to Ṭayyiʾ and B. Asad; Mālik b. Nuwayra, to B. Ḥanẓala. The poor-tax of B. Saʿd he divided between two men: Zibriqān b. Badr and Qays b. ʿĀṣim each to be in charge of a section; al-ʿAlāʾ b. al-Ḥaḍramī to al-Baḥrayn, and ʿAlī b. Abū Ṭalib to the people of Najrān, to collect the poor-tax and to superintend the collection of the poll-tax." Ibn Isḥāq (d. 767; Iraq) et al., *The life*: 648-9. Ṭabarī reports a similar version of this list and explains that the Prophet sent out these delegations in the year 10 AH. al-Ṭabarī (d. 923; Iraq), *The last years of the Prophet*: 108.

A canonical *ḥadīth* collection reports that the Prophet "appointed a man called Ibn Al-Lutbiya, from the tribe of Al-Asd to collect zakāt from Banī Sulaim. When he returned, (after collecting the zakat) the Prophet checked the account with him." Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī*: v. 2, p. 337 (no. 576).

[25] Ibn Isḥāq (d. 767; Iraq) et al., *The life*: 493.

[26] "Now the apostle had sent to them after their deputation had returned 'Amr b. Ḥazm to instruct them in religion and to teach them the sunna and the institutions of Islam and to collect their alms..." ibid., 646. Other versions of this narrative elaborate that ʿAmr bin Ḥazm was sent to the people of Yemen where he read a message

both tribes became Muslim. In a historical chronicle, we find a narrative that specifies that the Prophet's emissary collected charity "[only] from the rich and returned [what he took] to the poor."[27] Juxtaposed with these regulatory examples of charity taxation are narratives about voluntary giving. ʿAbd al-Raḥmān bin ʿAuf "gave 4,000 dirhams" to an alms collection, but this appears to be in the context of generous, voluntary giving.[28] Likewise, Mukhayrīq (an Arabian Jew) left all his property to the Prophet, who then donated it in charity; but again, no details about the nature or amount of property are reported.[29] Late antique practices of charitable giving are evident in Qurʾānic verses and in the Prophet's other reported practices of redistribution.[30] In addition to the regulatory aspects of charity taxation,[31] non-payment of the tax was viewed as a sin with spiritual punishments.[32] From the aforementioned Qurʾānic verses and the biographical materials, we can conclude that the Prophet or his representatives collected a charity tax of some kind. If the charity tax were not an established aspect of late antique Muslim communal life, then we should find evidence that some Muslims contested the collection of charity taxation by the Prophet's successors. But the historical sources suggest that, in the post-Prophetic era, the charity tax was not challenged on "ritual" grounds, but rather on "political" grounds, as I will elaborate later in this chapter.[33]

III. How much is the charity tax?

Neither the Qurʾān nor the biographical texts offer details about the *amount* of charity tax that was (or should be) collected. Juxtaposed with the detailed list of names of collectors

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about the charity tax being one dinar for every 40 dinars. Sulaymān ibn Aḥmad al-Ṭabarānī (d. 971; Syria), *al-Aḥādīth al-ṭiwāl*, ed. Muṣṭafá ʿAbd al-Qādir ʿAṭā (Beirut: Dār al-Kutub al-ʿIlmīyah, 1992), 141-43.

[27] The Prophet sent "'Amr b. al-'Āṣ to collect alms [*ṣadaqah*] from Jayfar and 'Amr, the two clans of al-Julandā from the Azd. The allowed "Amr b. al-'Āṣ to collect the alms [without interference], and so he collected it [only] from the rich and returned [what he took] to the poor." al-Ṭabarī (d. 923; Iraq), *The last years of the Prophet*: 38-39. This redistribution phrase is in many ḥadīth sources. See footnote 42.

[28] Ibn Isḥāq (d. 767; Iraq) et al., *The life*: 622.

[29] Ibid., 241. It is unclear if Mukhayrīq intended for the Prophet to distribute his property as charity or if the Prophet received the gift and unilaterally decided to donate it.

[30] "Muhammad asked that those landlords who could not develop their land because they lacked time or expertise hire workers who might have both but own no land. At one point, he asked those landlords to give up the land for the benefit of those who could develop it. With the regulation of the water supply that Muhammad devised, agricultural production was organized and land reclamation became possible; anyone who reclaimed fallow land owned it." Ibrahim, *Merchant capital and Islam*: 88.

[31] See footnote 3.

[32] Punishment for not paying the charity tax was characterized in spiritual terms of retribution in the hereafter. Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī*: v. 2, p. 276-77 (no. 486: whoever does not pay the charity tax will be bitten by a poisonous snake on the day of resurrection).

[33] Shoufani notes that under the reign of Caliph Abū Bakr (d. 634) "many tribes detached themselves from Medina by refusing to pay the tax, or by following other prophets. This movement of severing whatever ties the tribes of Arabia had with Medina is known in the Muslim tradition by the name of Riddah, apostasy." Elias Shoufani, *Al-Riddah and the Muslim conquest of Arabia* (Toronto; Buffalo; [Beirut]: University of Toronto Press; Arab Institute for Research and Publishing, 1973), 4. Shoufani's thorough study demonstrates that the so-called "apostasy" wars were motivated by political and economic controversies, rather than a substantive debate about religious dogma or practice. Indeed, Shoufani argues that the "apostasy" wars were integral to the broader Arab/Muslim expansion and conquest project and that the defecting tribes "were all antagonistic to Medina's policy of expanding its hegemony over all the Arabs." Ibid., 152.

and payees in the biographical sources (including the work of Ibn Isḥāq), this seems to be a peculiar gap in the historical sources.[34] While agents likely collected taxes in kind (i.e., cattle or harvests) and in cash, specific amounts for these categories are not specified in the biographical sources. This, however, does not indicate that the exact amounts were unknown to the late antique Muslim community or unknowable to us through historical research. I want to explore here how we can reconstruct historical-legal practice from other sources, primarily collections of orally-composed and transmitted reports (i.e., muṣannafāt and ḥadīth).[35] This chapter concentrates on the very specific issue of the amount of charity tax that should be applied to money (i.e. gold or silver coins)[36] that an individual has possessed for at least one year – rather than other forms of wealth (such as agricultural lands and cattle).[37] While I am not assuming a heavily-monetized economic system, there is papyrological evidence attesting that, in eighth century, taxes were collected in the form dinars, in addition to goats and sheep.[38] The chapters on the charity tax in ḥadīth collections are sizable and I will not attempt to discuss all the subchapters here.[39] I do so because I suspect that the tax rate on money was equivalent to the rate for other assets and because money was the primary form of liquid assets.[40]

In the late antique ḥadīth collection of Ibn Abī Shaybah (d. 849), there are numerous reports of the Prophet having advised his followers to pay the charity tax.[41] One individual, Muʿādh, is cited as reporting that when the Prophet sent him to deliver the message of Islam to a group, he instructed him to take charity from their wealthy individuals and give it to the

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[34] Ibn Isḥāq (d. 767; Iraq) et al., *The life*: 648-49 (noting names of individuals sent to specific tribes to collect charity).

[35] Ḥadīth began as both a historical and legal activity combining storytelling and oral law compilation. The use of these materials for Islamic historiography remains a deeply contested issue in Islamic studies scholarship. See Motzki, *Ḥadīth: origins and developments*. Rather than engage in the abstract methodological debates of these controversies, I will instead illustrate how I use ḥadīth as a source of both social and legal history.

[36] Rather than all forms of silver and gold, juristic discussions generally focus on silver and gold coins (darāhim and danānīr). Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 118-19 (Imāmī Shīʿī). For an introductory discussion of Islamic coins in late antiquity, see Stefan Heidemann, "Numismatics," in *The formation of the Islamic world, sixth to eleventh centuries*, ed. Chase F. Robinson, *The new Cambridge history of Islam* (Cambridge: Cambridge University Press, 2011). See also Stefan Heidemann, "The merger of two currency zones in early Islam: the Byzantine and Sasanian impact on the circulation in former Byzantine Syria and Northern Mesopotamia," *Iran, Journal of Persian Studies* 36(1998).

[37] For a discussion on what types of property are subject to taxation, see Muḥammad ibn Idrīs al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*, 11 vols. (al-Manṣūrah: Dār al-Wafāʾ lil-ṭibāʿah wa-al-nashr wa-al-tawzīʿ, 2001), v. 1, p. 80-85; v. 3, p. 9-32.

[38] Sijpesteijn, "Shaping a Muslim state," 125.

[39] By way of example, Bukhārī discusses more than fifty subtopics of charity taxation. Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī*: v. 2, p. 275-338.

[40] Monetization and cash circulation in the late antique Eastern Mediterranean is the subject of considerable scholarly debate that is beyond the scope of this chapter. See John F. Haldon, *Money, power and politics in early Islamic Syria: a review of current debates* (Farnham, Surrey, England; Burlington, VT: Ashgate, 2010). See also Chapter 9 in Jairus Banaji, *Theory as history: essays on modes of production and exploitation* (Leiden; Boston: Brill, 2010).

[41] One of the earliest surviving ḥadīth compilations is Ibn Abī Shaybah's *Muṣannaf*. ʿAbd Allāh ibn Muḥammad Ibn Abī Shaybah (d. 849; Iraq), *Al-kitāb al-muṣannaf fī al-aḥādīth wa-al-āthār*, 9 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1995), v. 2, p. 350-52.

poor among them.[42] This text specifies that the Prophet (or his Companions) advised that 200 dirhams is the minimum amount of wealth subject to a 5-dirham charity tax.[43] Yet, nowhere is this amount cited as the Prophet's actual practice, rather than simply a reported statement.[44] In other words, the entire chapter on charity does not report a single incidence of the Prophet or one of his delegates calculating and collecting particular amounts of charity. While the chapter is distinguished by an absence of references to the *amount* of charity tax that the Prophet himself collected,[45] it does include several consistent statements of the amount that was collected in the Prophetic era. This amount is corroborated in another early compilation of ḥadīth, the *Muṣannaf* of al-Ṣanʿānī (d. 827), which suggests a possible link between the Prophet's reported statements concerning calculating charity and his reported practice of collecting charity. Al-Ṣanʿānī reports that the Prophet sent a letter detailing charity tax amounts, including specifying a 5 dirham tax on 200 dirhams that have been in possession for a minimum amount of time (one year).[46] Another early ḥadīth compiler and jurist, Mālik ibn Anas, reports that the charity tax is applied "to twenty dinars (of gold) or two hundred dirhams (of silver)" without referring to the Prophet.[47]

One way to corroborate the consistency of the charity tax amount as reported in these Sunnī ḥadīth collections is to compare these reports with those in Shīʿī collections. This is because polemical or sectarian disputes about law often reflect different historiographical understandings of the Prophet's legal practice.[48] In the case of the charity tax, Shīʿī ḥadīth sources report the same amount or rate of charity tax as Sunnī sources.[49] None of these ḥadīth collections refer to a specific time and place when the Prophet himself collected or ordered the

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[42] Ibid., v. 2, p. 353. "537. Narrated Ibn Abbas [SAS]: When Allāh's Apostle [SAS] sent Muʿāḏẖ to Yemen, he said (to him), 'You are going to people of a (Divine) Book. First of all invite them to worship Allāh (Alone) and when they come to know Allāh, inform them that Allāh had enjoined on them, five prayers in every day and night; and if they start offering these prayers, inform them that Allāh has enjoined on them, the Zakāt. And it is to be taken from the rich amongst them and given to the poor amongst them; and if they obey you in that, take Zakāt from them and avoid (don't take) the best property of the people as Zakāt.'" Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī*: v. 2, p. 309-10. This narrative about Muʿādh being instructed to redistribute the charity tax he collected is accepted in both Sunnī and Imāmī Shīʿī sources. Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 7, 9 (Imāmī Shīʿī: reporting Prophetic statement that the charity tax is an obligation collected from the rich and distributed to the poor). In addition, the redistribution motif echoes the narrative discussed in footnote 27.

[43] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 2, p. 354-55. This amount is interesting because rabbinic literature suggests that anyone who has 200 *zuz* (i.e., dinar) or more may not collect charity. Palestinian Talmud, Peʾah 8:8. Does 200 dinars represent the poverty line in the late antique Near East?

[44] An exception is the ḥadīth cited in a later source. See footnote 26.

[45] This observation applies to many ḥadīth collections I examined.

[46] ʿAbd al-Razzāq ibn Hammām al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *al-Muṣannaf*, ed. Ḥabīburraḥmān Aʿẓamī and Maʿmar ibn Rāshid, 2nd ed., 11 vols., Manshūrāt al-Majlis al-ʿIlmī, 39 (Beirut: al-Maktab al-Islāmī, 1983), v. 4, p. 5-6. See also Yaʿqūb ibn Ibrāhīm al-Anṣārī al-Kūfī Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār* (Beirut: Dār al-Kutub al-ʿIlmīyah, 1978), p. 87 (no. 429); p. 89 (no. 37) (Ḥanafī: charity tax is 5 dirhams out of every 200 dirhams). It is difficult to determine the value of 200 dirhams, but the sources suggest that it was not an amount that only the wealthiest members of a society would have possessed; in other words, the "middle class" would have owned 200 dirhams.

[47] Mālik Ibn Anas (d. 796; Arabia), *al-Muwaṭṭaʾ*, trans. Jīhān Abd al-Raʾūf Hibah, 1st ed., 2 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 2007), v. 1, p. 121-22.

[48] I demonstrate an example of this process in chapter 1.

[49] Kulaynī (d. 941; Iran), *al-Uṣūl min al-Kāfī*: v. 3, p. 510, no. 1; p. 16, no. 5 & 7 (5 dirhams for every 200 dirhams; half a dinar for every 20 dinars).

collecting of this specific charity tax rate. But in the context of these various ḥadīth collections which are characterized by the diversity of opinions reported on a wide range of legal matters, this consistent reference to 2.5% is remarkable. The scholars involved in the project of collecting and transmitting narrations about the Prophet were also involved in the daily life of Muslim societies. As both historians and jurists, they simultaneously recorded the historical practice of this charity tax amount and implemented it. Because the political legitimacy of the caliphs who succeeded the Prophet was the subject of intense political challenges, the taxation regime was the object of scrutiny. If the charity tax amount were not widely known or if it were established by one of the Companions, then late antique sources would most probably reflect some disagreement about the amount. Moreover, since pre-Islamic near eastern practices of charitable giving were at different rates, the consistency of 2.5% is a specifically Islamic precedent that appears to have been widespread.

Late antique Muslim jurists

If the aforementioned historical evidence is reliable, then we should find confirmation in the practice of Muslim jurists; that is, if jurists were also historians who developed the law based on their understanding of legal history, then either they would adjudicate based on this historical precedent or they would dispute the validity of the precedent. The first generation of jurists after the Prophet's death was familiar with the Prophet's practice from their direct experience with him or with the narratives cited above. One such individual, ʿAlī ibn Abī Ṭālib (d. 661), the fourth Sunnī caliph and the first Shīʿī imām, reportedly stipulated possession of the wealth (a minimum of 200 dirhams) for a period of one year prior to paying the tax (of 5 dirhams or 2.5%).[50] In addition, he is reported to have described the rich as being directly responsible for the poor being hungry, unclothed, or overworked.[51] ʿAbd Allāh ibn ʿUmar (d. 693), son of the second Caliph (ʿUmar ibn al-Khaṭṭāb, d. 644), purportedly stated that a minimum amount of wealth (200 dirhams) free of debt must be accrued before the tax (5 dirhams, or 2.5%) is applied.[52] ʿAbd Allāh ibn ʿAbbās (d. 687), a well-known commentator on the Qur'ān and jurist, also stipulated that a minimum amount of wealth (200 dirhams), free of debt, must be accrued before the tax (5 dirhams, or 2.5%) is applied.[53] Again, in the context of early Islamic legal practice – which contains frequent examples of juristic disagreement – this apparent unanimity on the precise amount of the charity tax is significant. Moreover, this unanimity was maintained by later juristic practices.[54]

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[50] ʿAlī al-Riḍā Ibn Mūsá (d. 818; Khurāsān), *al-Fiqh al-mansūb lil-Imām al-Riḍā al-mushtahir bi-fiqh al-Riḍā* Silsilat maṣādir biḥār al-anwār; 1 (Beirut: Muʾassasat Āl al-Bayt li-Iḥyāʾ al-Turāth, 1990), p. 195 (Imāmī Shīʿī: charity tax is 5 dirhams out of every 200 dirhams). al-Ṭabarānī (d. 971; Syria), *al-Aḥādīth al-ṭiwāl*: 145 (ʿAlī narrated from the Prophet that the minimum amount for charity tax liability is 200 dirhams and the tax amount is 5 dirhams). See also Muḥammad Rawwās Qalʿah'jī, *Mawsūʿat fiqh ʿAlī ibn Abī Ṭālib*, Fī sabīl mawsūʿah fiqhīyah jāmiʿah; Silsilat mawsūʿat fiqh al-salaf, 4 (Damascus: Dār al-Fikr, 1983), 295.

[51] Qalʿah'jī, *Mawsūʿat fiqh ʿAlī ibn Abī Ṭālib*: 293.

[52] Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿUmar*: 391.

[53] Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿAbbās*: 368.

[54] Muḥammad ibn Aḥmad Sarakhsī (d. 11th cent; Transoxania), *Kitāb al-Mabsūṭ li-Shams al-Dīn al-Sarakhsī*, 30 vols. (Cairo1906-1913), v. 2, p. 189 (Ḥanafī: charity tax is 5 dirhams for every 200 dirhams). ʿAlī ibn Abī Bakr Marghīnānī (d. 1197; Farghāna), *Al-Hidāyah = the Guidance: a translation of al-Hidāyah fī sharḥ Bidāyat al-mubtadī, a classical manual*

All these reported statements of contemporaries of the Prophet substantiate the notion that the late antique Muslim community was aware of and consistently implemented a specific calculation of the charity tax that appears to have begun with the Prophet. The absence of any conflicting reports on the calculation of monetary charity suggests that tax collection in the amount of 2.5% was an established, well-recognized practice. Indeed, the striking conformity (of these numerous reports in several historical texts) reveals historical authenticity.[55] That is, we may presume that the Prophet instructed or collected 5 dirhams out of every 200 dirhams, even without a specific report that this act occurred.[56] This evidence suggests that the Prophet did establish paying the charity tax as an obligation for every Muslim.[57] Indeed, the historical evidence of a uniform tax rate coupled with the sheer absence of sectarian or dissenting opinions on the tax rate or its obligatory nature indicate that the charity tax was an obligatory practice from the beginning of Islamic history.[58]

As an aside, it should be noted here that ḥadīth compilers and late antique jurists do not appear to have considered the possibility that this amount was flexible – that it could be decreased or increased to serve the needs of the recipients of charity.[59] In my searches of the primary texts, I have not found historical reports implying that the rate could be increased if necessary; instead, I found reports of a Shīʿī Imām asserting that 2.5% is sufficient to provide for the poor.[60] This may suggest that most jurists either conceptualized the charity tax as being disconnected from the eradication of poverty, or believed that the Prophet's particular practice was sufficient, or presumed some other source for poverty assistance. The existence of a consistent Prophetic practice of calculating the charity tax resulted in Muslims not interpreting the Qurʾānic verses as requiring charity taxation that is proportional to the needs of the recipients outlined in Qurʾān 9:60.[61] In other words, late antique Muslims recognized the theme of the right of the poor to a portion of wealth, but understood the Prophetic practice as

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of Ḥanafī law, trans. Imran Ahsan Khan Nyazee (Bristol, England: Amal Press, 2006), 267 (Ḥanafī: charity tax is 5 dirhams on every two hundred dirhams after 1 year).

[55] I do not use authenticity in the positivist sense of Factual Truth, but rather as historical truth. Bevir observes that "For postfoundationalists, a fact is not given; it is a piece of evidence nearly everyone in a given community either accepts or perhaps has good warrant for accepting given the other intersubjective beliefs of that community." Bevir, "Why historical distance is not a problem," 31.

[56] Of course, it is possible that there is a gap between the Prophet's exhortative commandments and his actual practice. But if such a gap existed, then the sources would likely reflect some inconsistencies in this matter.

[57] This contradicts the unsubstantiated claim that a caliph initiated charity taxation as a legal obligation for every Muslim. C. Snouck Hurgronje, "On the institution of *zakāt*," in *The development of Islamic ritual*, ed. G.R. Hawting, *The formation of the classical Islamic world; v. 26* (Aldershot [England]: Ashgate/Variorum, 2006), 207.

[58] Bashear argued that the charity payment was initially a "pre-institutional" practice of paying to expiate for sins. See Bashear, "On the origins," 112-13. Sijpesteijn similarly argues that the charity tax was transformed "in the late Umayyad period" into "a formalized, state-controlled tax levied on all Muslims." Sijpesteijn, "Shaping a Muslim state," 120. While I recognize that the charity tax was the subject of numerous debates, I disagree with both Bashear and Sijpesteijn in their claim that the tax can be dated to the Umayyad era, since the historical sources suggest an earlier practice.

[59] But see the narrative of Caliph ʿUmar bemoaning his inability to redistribute wealth.

[60] Kulaynī (d. 941; Iran), *al-Uṣūl min al-Kāfī*: v. 3, p. 507 (no. 1) & 09 (no. 4).

[61] This is evident in the firm opposition of a highly influential contemporary jurist to any proposal that the charity tax amount be increased to meet social needs. Yūsuf Qaraḍāwī, *Fiqh al-zakāh: dirāsah muqāranah li-aḥkāmihā wa-falsafatihā fī ḍawʾ al-Qurʾān wa-al-sunnah*, 2 vols. (Beirut: Dār al-Irshād lil-Ṭibāʿah wa-al-Nashr wa-al-Tawzīʿ, 1969), 1:244-46.

the only implementation of Qurʾānic commandments. Thus, consistently taxing the 2.5% rate disconnects the payment of charity from the needs of the poor.

Rabbinic charity taxation

Comparing the late antique Islamic charity tax to the charity practices of antecedent Near Eastern communities offers an opportunity to identify some of the ways in which it both continued and transformed preexisting practices.[62] Jewish (and Byzantine) legal practices suggest that establishing precise amounts of charity was common in this region.[63] But surviving historical sources make it difficult to reconstruct precisely what these amounts were and how they were collected.

According to late antique (roughly first to early seventh century) rabbinic texts, charity (and righteous deeds) is more important than all the Torah's commandments.[64] There appear to have been two forms of obligatory charitable giving among rabbinic Jews: (1) donating the tithe (or more, or potentially less) of one's wealth to charity[65] and (2) giving the poor food from a landowner's harvest. The latter obligation includes gleanings[66] and leaving a portion of agricultural fields for the poor (the *peʾah*).[67] In addition, charity was often collected during Purim[68] and there was a charity fund (*kuppah*) for the local poor. In the seventh sabbatical year, the harvest was presumably distributed to all the inhabitants of a city, including the poor.[69]

In late antique rabbinic legal literature, charity is one component of broader ritual practices and is primarily embedded within the legal topics of agriculture (*zeraʿīm*) and festivals (*moʿed*), which are the first and second orders of the Mishnah, respectively. In contrast, in canonical Islamic legal literature, a full section is dedicated to the charity tax, which is often the third topic (following, not coincidentally, purity and prayer).[70] These subtle structural differences between the placement and the extensiveness of rabbinic and of Islamic treatments of charity taxation are significant: whereas in late antique rabbinic Judaism charity is an integral part of ritual practices, in late antique Islam, charity taxation is a legal-political

[62] It is possible that late antique Near Eastern texts record ideas about or aspirations for charity taxation that were not actually practiced, but this possibility is not directly relevant to my objective. In delineating these late antique charity practices, I am interested in how rabbis and others constructed charity taxation as an obligation.

[63] Posner, "Charity." and Andrew J. Cappel, "Poor," ed. Alexander P. Kazhdan, *The Oxford Dictionary of Byzantium* (Oxford University Press, 1991), http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t174.e4417.

[64] Babylonian Talmud, Baba Batra 9a. See also Tosefta, Peʾah 4:19.

[65] Genesis 28:22 was interpreted as implying a tithe payment to the poor. But I was unable to locate any historical evidence of rabbinic Jewish communities obligating the payment of the tithe.

[66] Palestinian Talmud, Peʾah 4:7 (gleanings belong to the poor).

[67] The parts of the field dedicated to the poor, in fulfillment of Leviticus 19:9 and Levitus 23:22, is *peʾah*. Mishnah, Peʾah 1:2 (*peʾah* should not be less than one-sixtieth of harvest); Palestinian Talmud, Peʾah 1:2 (a minimum of one-sixtieth of the field must be dedicated for the poor, but landowner must consider the needs of the local poor).

[68] Tosefta Meg. 1:5

[69] Tosefta Shevīʿīt 8:1-8:2 (discussing distribution of harvest in seventh year)

[70] That the section on charity tax commonly follows prayer is a reflection of the juxtaposition of these two practices in Qurʾānic verses. See footnote 17.

obligation with ritual characteristics. This is particularly evident when we compare late antique and medieval rabbinic Jewish texts on charity: the medieval jurist Maimonides (d. 1204) elaborated a regulatory framework for the collection of charity, some of which was unprecedented.[71] His writings elaborate such issues as how to enforce charity taxation,[72] levels of charitable giving,[73] meeting the needs of the poor,[74] and identifying recipients of charity.[75] Maimonides' discussions of charity are more systematized than his late antique rabbinic predecessors. There is a significant difference between the context of late antique and medieval rabbinic legal texts that may explain the distinctiveness of Maimonides' ideas within the rabbinic canon: Islamic practices had thoroughly "legalized" charity taxation. When we compare the textual evidence of these two historical moments – late antique rabbinic charity versus medieval rabbinic charity – it is evident that charity became more structured within rabbinic Jewish communities. I contend that this reflects a contextual change between the late antique and medieval Near East.

IV. Who should receive the charity tax?

Thus far, this chapter presented historical evidence to establish that Muslims in late antiquity paid a specific charity tax amount. Building on this foundation, I will explore precisely who paid the charity tax in order to illustrate the ways in which Muslim identity was formulated in ritual and in political terms, with a citizenship model ultimately becoming dominant. To investigate further the relationship between charity taxation and membership, I want to briefly mention which groups were expected to receive the charity tax by late antique Muslims. Qurʾān 9:60 defines who should receive charity: "Charity is for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled; for those in bondage and in debt; in the cause of God."[76] Thus, the Qurʾān legislates the necessity of individual charitable giving and identifies recipients, although – as previously mentioned – the administrative details concerning amounts are not provided. Building upon this Qurʾānic mandate, Muslim jurists clarified the proper recipients or beneficiaries of the charity tax. While jurists disagreed on some of the details concerning the definition of each recipient category, the late antique and medieval juristic consensus places

[71] Maimonides was the first known rabbinic figure to codify Jewish charity laws. See Mark R. Cohen, "Maimonides and charity in light of the Geniza documents," in *The Trias of Maimonides: Jewish, Arabic, and Ancient Culture* ed. Georges Tamer (Berlin: Walter de Gruyter, 2005).

[72] Mūsá ibn Maymūn Maimonides (d. 1204; Spain/Egypt), *Mishneh Torah*, 14 vols., Yale Judaica series (New Haven: Yale University Press, 1949), v. 7, p. 79 (Treatise II, 7.10, "He who refuses to give alms, or gives less than is proper for him, must be compelled by the court to comply, and must be flogged for disobedience until he gives as much as the court estimates he should give.").

[73] Ibid., v. 7, p. 91-92 (Treatise II, 10:7-14, "There are eight degrees of almsgiving, each one superior to the other."). Rambam, Mishneh Torah 10:7-15. This appears to be an elaboration of Babylonian Talmud, Babā Metsīʿā 71a.

[74] Ibid., v. 7, p. 77 (Treatise II, 7:3, "You are commanded to give the poor man according to what he lacks.").

[75] Ibid., v. 7, p. 78 (Treatise II, 7:7, "One must feed and clothe the heathen poor together with the Israelite poor, for the sake of the ways of peace."). ibid., v. 7, p. 79 (Treatise II, 7:13, "A poor man who is one's relative has priority over all others...").

[76] "Those whose hearts have been (recently) reconciled" probably refers to recent "converts," or, more specifically, tribes that pledged allegiance to the Prophet.

emphasis on the poor.[77] Papyrological evidence confirms that the charity tax was distributed to the poor and the needy in the eighth century.[78] However, there is juristic debate about the categories of people excluded from receiving charity, which includes non-Muslims and slaves.[79] These two categories (non-Muslims and slaves) are groups whose obligation to pay the charity tax was the subject of juristic disagreement and appears to have been implemented distinctly in different historical periods.

V. Who should pay the charity tax?

There is a consensus, documented in historical and in legal texts, that all free, adult, and sane Muslims are recognized as subject to the charity tax on their wealth.[80] Muslim jurists did not debate the applicability of the charity tax to women because it was taken for granted that women were subject to the tax.[81] Since (free) Muslim women do not have diminished legal capacity (as is the case for minors or the mentally incompetent) and are not subject to limitations on their ownership of property, they are unencumbered legal persons. In contrast, there are two main disagreements about the imposition of the charity tax on individuals without legal capacity (i.e., minors or the mentally incompetent) and on individuals with questionable legal capacity and property rights (i.e., slaves). The charity payment of minors, the mentally incompetent, and slaves were not explicitly addressed in the Qurʾān or in ḥadīth collections.[82] Biographical and historical texts do not cite any instances of the Prophet encountering or soliciting charity from a wealthy minor or slave.[83] There is then no scriptural text or precedential authority addressing this question and, consequently, jurists debated the applicability of the charity tax on these groups. The ensuing interpretive issues debated by Muslim jurists are indicative of broader socio-political disputes about Muslim identity and the economics of social welfare. These disputes can again be classified in relationship to the two Qurʾānic themes previously delineated: charity taxation as a ritual versus political act.

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[77] Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 319-22. There is a juristic discussion about ranking the "poor" and the "needy." Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 237 (Imāmī Shīʿī).

[78] Sijpesteijn, "Shaping a Muslim state," 159-60.

[79] Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 346 (Mālikī: excludes non-Muslims and slaves from receiving charity; prohibits building mosques with charity tax). Abū Yaʿlá Muḥammad ibn al-Ḥusayn Ibn al-Farrāʾ (d. 1066; Iraq), *al-Aḥkām al-sulṭānīyah*, ed. Muḥammad Ḥāmid Fiqī (Cairo: Mustafá al-Babi al-Halabi, 1966), p. 115 (Ḥanbalī: non-believers and slaves should not receive charity).

[80] According to al-Shāfiʿī, every free adult – regardless of age, sanity, or gender – is obligated to pay the charity tax. al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 66. al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 5, p. 293 (Shāfiʿī: charity tax obligatory on all free muslims, including minors and mentally incompetent). Aḥmad ibn Muḥammad Ṭaḥāwī (d. 933; Egypt), *Mukhtaṣar al-Ṭāḥāwī*, ed. Abū al-Wafāʾ al-Afghānī, Silsilat al-maṭbūʿāt, 8 (Cairo: Dār al-Kutub, 1950), 47 (Ḥanafī: one who pays the charity tax must be free, adult, sane, and Muslim).

[81] Evidence from papyri indicates that in the eighth century women paid the charity tax in money. Sijpesteijn, "Shaping a Muslim state," 159. A medieval text confirms this continued practice of taxing women: Ibn ʿAbd al-Barr (d. 1070; Spain), *Kitāb al-kāfī*: v. 1, p. 284 (Mālikī: charity tax is obligatory on all free Muslims, male or female).

[82] In many texts, a minor is synonymous with an orphan. This is because, in this historical context, a minor with living parents was unlikely to have independent wealth. Thus, the only minors who have wealth that could be subject to taxation are orphans with an inheritance.

[83] See the discussion of these sources (especially Ibn Isḥāq and Ṭabarī) in the section above on the Prophet's imposition of the charity tax.

Late antique Islamic precedents: muddle on minors and silence on slaves

There is no clear consensus in late antique historical-legal texts on whether minors must pay the charity tax.[84] Al-Ṣanʿānī reports conflicting ḥadīth concerning the obligation of a minor orphan to pay the charity tax on his/her inheritance.[85] Ibn Abī Shaybah's ḥadīth compilation likewise reports conflicting opinions on the charity tax obligation for the wealth of a minor.[86] Many of the Prophet's companions, as well as some leading jurists, are reported (in Sunnī sources) to have obligated orphan minors to pay the charity tax.[87] In her role as the legal guardian of two orphans, ʿĀʾishah, one of the Prophet's wives, paid the charity tax on their wealth.[88] ʿUmar ibn al-Khaṭṭāb, the second Caliph, required payment of the charity tax on the property of an orphan because he encouraged investing the property so that it is not diminished by the charity tax.[89] Sunnī sources likewise report ʿAlī ibn Abī Ṭālib as articulating that the charity tax is due on wealth – meaning it is not attached to individuals – and therefore it must be paid on wealth owned by minors or the mentally incompetent.[90] According to Sunnī sources, ʿAlī ibn Abī Ṭālib paid the charity tax on behalf of minors under his guardianship.[91] However, in Shīʿī texts, ʿAlī is reported to have stated that orphans need not pay the charity tax.[92] ʿAbd Allāh ibn ʿUmar (d. 693), son of the second Caliph, required payment of the charity tax on the property of a minor[93] on a yearly basis.[94] There are conflicting reports on whether

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[84] Muḥammad ibn ʿĪsá Tirmidhī (d. 892; Khurāsān), *Sunan al-Tirmidhī wa-huwa al-Jāmiʿ al-ṣahīḥ*, ed. ʿAbd al-Wahhāb ʿAbd al-Laṭīf and ʿAbd al-Raḥmān Muḥammad ʿUthmān, 5 vols. (Medinah: al-Maktabah al-Salafīyah, 1965), v. 2, p. 76 (cites to Companions and to well-known jurists who impose and who reject charity taxation of minor).

[85] al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *al-Muṣannaf*: v. 4, p. 66-70.

[86] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: 2:379-80. Another text that presents two conflicting reports on a minor's obligation to pay the charity tax is Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār*: p. 92 (no. 451-53) (Ḥanafī: orphans/minors do not pay charity tax until they pray).

[87] ʿUmar ibn al-Khaṭṭāb, ʿAlī ibn Abī Ṭālib, ʿĀʾishah, Ibn ʿUmar, Al-Shuʿbī, ʿAṭāʾ, Shāfiʿī, Dāwūd, and Mālik obligated orphans to pay the charity tax. ʿAbd Allāh ibn Muḥammad Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*, ed. ʿĪsá Yaḥyá Bārūnī, 2nd ed., 2 vols., Turāthunā (Beirut: Dār al-Fatḥ, 1974), v. 1, p. 616 (Ibāḍī). This is repeated in many other sources. See footnote 103.

[88] Reported in many sources, including al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 69 (no. 791), p. 73 (no. 95), p. 75 (no. 98). Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 308 (Mālikī). Muḥammad Rawwās Qalʿah'jī et al., *Mawsūʿat fiqh ʿĀʾishah umm al-muʾminīn: ḥayātuhā wa-fiqhuhā*, Fī sabīl mawsūʿah fiqhīyah jāmiʿah; Silsilat mawsūʿat fiqh al-salaf (Beirut: Dār al-Nafāʾis, 1989), 341 (minors and orphans obligated to pay charity tax).

[89] ʿUmar's recommendation that the wealth of an orphan be invested to prevent diminishment by the charity tax payment is reported in numerous sources. See, for example, Ibn Anas (d. 796; Arabia), *al-Muwaṭṭaʾ*: v. 1, p. 124 (Mālikī). al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 74, no. 796. Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 308.

[90] Qalʿah'jī, *Mawsūʿat fiqh ʿAlī ibn Abī Ṭālib*: 293-94. Although the opposite view is reported in Sunnī sources, the opinion of ʿAlī is reported in Shīʿī sources as opposing the imposition of the charity tax on minors. Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 11-13 (Imāmī Shīʿī).

[91] al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 75, no. 799. Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 308 (Mālikī).

[92] Kulaynī (d. 941; Iran), *al-Uṣūl min al-Kāfī*: v. 3, p. 541, no. 8 (Imāmī Shīʿī).

[93] Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿUmar*: 387-88.

[94] Ibid., 390-91. al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 74, no. 797.

the noted jurist Ibn ʿAbbās (d. 687/8) required payment of the charity tax on the property of a minor.[95]

The inconsistencies in these legal-historical texts concerning the charity tax liability of minors suggest that the Prophet did not deal with the situation and his contemporaries were unaware of either his practice or his opinion concerning the issue. Moreover, there are no Prophetic precedents or reports from the Companions about practices related to the charity tax liability of slaves. The absence of unambiguous historical precedents results in opposing juristic opinions echoing the two Qurʾānic themes cited at the beginning of this chapter: the charity tax as a religious obligation (therefore only applicable to free, sane, adults) or the charity tax as the right of the poor to some of the property of the wealthy (and therefore being applicable to anyone in possession of wealth, including a minor, a mentally incompetent person, or possibly a slave). As I will expound, the majority opinion of medieval jurists accepted the latter understanding of charity taxation by making it obligatory upon all groups.

Legal capacity: the majority opinion of professional jurists

The majority opinion of medieval Muslim jurists – represented by three of the four surviving Sunnī schools of law (Mālikī, Shāfiʿī, and Ḥanbalī) – requires minors to pay the charity tax on their assets.[96] These jurists make several claims to support their position that I will outline briefly.[97] First, the Qurʾānic verses (particularly Qurʾān 9:103)[98] and Prophetic ḥadīth[99] requiring the payment of the charity tax are general commands that do not articulate any exceptions for minors.

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[95] Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿAbbās*: 367 (citing conflicting reports). Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 1, p. 616 (Ibāḍī: citing Ibn ʿAbbās as claiming that the charity tax is obligatory when prayer becomes obligatory).

[96] Muḥammad ibn Idrīs al-Shāfiʿī (d. 820; Arabia/Egypt), *Mawsūʿat al-Imām al-Shāfiʿī al-kitāb al-Umm*, ed. Aḥmad Badr al-Dīn Ḥassūn, 10 vols., Silsilat muṣannafāt Muḥammad ibn Idrīs al-Shāfiʿī (Beirut: Dār Qutaybah, 1996), v. 2, kitāb al-zakāh, p. 95 & 98-99 (Shāfiʿī: charity tax is obligatory upon minors and mentally incompetent, regardless of gender). Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 308 (Mālikī: minors and mentally incompetent are obligated to pay the charity tax). Muḥammad ibn Naṣr Marwazī (d. 906; Samarqand), *Ikhtilāf al-fuqahāʾ*, ed. Muḥammad Ṭāhir Ḥakīm (Riyadh: Aḍwāʾ al-Salaf, 2000), 450-52 (summarizing the juristic debates about a minor's charity tax liability). Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 1, p. 601 & 14-15 (Ibāḍī: charity tax is obligatory upon minors and mentally incompetent). Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *al-Risālah al-fiqhīyah*: p. 167 (Mālikī: charity tax is obligatory upon minors). al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 1, p. 147 (Shāfiʿī: charity tax is obligatory upon minors & mentally incompetent). Ibn al-Farrāʾ (d. 1066; Iraq), *al-Aḥkām al-sulṭānīyah*: p. 155 (Ḥanbalī: women and minors pay the charity tax). Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 4, p. 69-70 (Ḥanbalī: guardians must pay the charity tax on behalf of minors and mentally incompetent). al-Rāfiʿī (d. 1226; Iran), *al-ʿAzīz*: v. 2, p. 561 (Shāfiʿī: a guardian must pay the charity tax on behalf of a minor or mentally incompetent). al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 5, p. 293 & 96-98 (Shāfiʿī: charity tax is obligatory on minors and the mentally incompetent). Aḥmad ibn Luʾluʾ Ibn al-Naqīb (d. 1368; Egypt), *ʿUmdat al-sālik wa-ʿuddat al-nāsik*, ed. Ṣāliḥ Muʾadhdhin, Muḥammad Ghiyāth al-Ṣabbāgh, and Muḥyī al-Dīn al-Kurdī (Damascus: Maktabat al-Ghazzālī, 1979), 143 (Shāfiʿī: charity tax is obligatory upon every free Muslim, including minors and the mentally incompetent).

[97] For an overview, see ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 41-45 (discussing juristic proofs defending charity tax liability of minors and mentally incompetent).

[98] Qurʾān 9:103, "Of their wealth take charity in order to purify and to sanctify them."

[99] There are two versions of a Prophetic statement that are most frequently cited. One is the Prophet's instruction to take from the rich and give to the poor. The other specifies that the Prophet sent Muʿādh to Yemen to take

Second, a ḥadīth implies that minors must pay the charity tax because the Prophet instructs guardians to invest the wealth of orphans to prevent the diminishment of their assets from charity taxation. The statement is reported in three chains of transmission or versions: by Shāfiʿī,[100] by Ṭabarānī,[101] and by al-Tirmidhī.[102] If the statement were historically verifiable as Prophetic practice, we would have seen more consistent references to it in the historical texts. The inconsistencies in these versions of the same basic statement suggest, however, that no one version of the statement can be categorized as reliable. The statement may have been made by the second caliph, ʿUmar ibn al-Khaṭṭāb (as it is attributed to him in Tirmidhī's version) and then attributed as the statement to the Prophet. Therefore, it is not possible to conclude precisely *who* made the statement, but only that it was a known opinion in the late seventh century.

Third, jurists who require minors to pay the charity tax offer as proof the aforementioned practice of what appears to be the majority of the Prophet's Companions (including ʿUmar, ʿAlī, ʿĀʾishah, and others).[103] Some jurists make additional arguments: that redistribution of a minor's wealth is in the best interests of society; that, by analogy, if a minor must pay tax on land, then s/he should pay tax on all forms of wealth; that the poor have a right to the wealth of the rich, even if the rich are minors or mentally incompetent.[104] The legal reasoning of these jurists, despite their claims to the contrary, does not rely on a *precedent* of the Prophet. Instead, it relies on their general interpretation of the purpose of the

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from the rich to give to the poor. Tirmidhī (d. 892; Khurāsān), *Sunan al-Tirmidhī wa-huwa al-Jāmiʿ al-ṣaḥīḥ*: v. 2, p. 80 (charity tax is taken from the rich and given to the poor). Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 1, p. 602, 14-15 (Ibāḍī: Prophetic statement, take from the wealthy and give to the poor). But see Muḥammad ibn ʿĪsá Tirmidhī (d. 892; Khurāsān), *Ḍaʿīf sunan al-Tirmidhī*, ed. Muḥammad Zuhayr Shāwīsh and Muḥammad Nāṣir al-Dīn Albānī (Beirut: al-Maktab al-Islāmī, 1991), 72 (report that Prophet took from the wealthy and gave to the poor has a weak chain of transmission).

[100] Reported by Shāfiʿī (d. 820) and by Bayhaqī (d. 1066), this version is *mursal* (i.e., the transmission chain is incomplete because it was narrated by Yūsif bin Māhik, who was a successor and did not meet the Prophet). My translation of the ḥadīth: "Whoever is the guardian of an orphan with wealth, let him invest it and not let it sit so that it is reduced by the charity tax." Cited in al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 73, no. 794. Also cited in al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Kitāb al-Umm*: v. 2, kitāb al-zakāh, p. 99 (cites to ḥadīth about investing wealth of an orphan; some scholars identify it as mursal and others as marfūʿ). See also ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 42.

[101] Reported by Anas Ibn Mālik (d. 712) and by Ṭabarānī (d. 971), this version is categorized as *ṣaḥīḥ* (sound or authentic) by some and as *ḥasan* (good, but secondary to *ṣaḥīḥ* in terms of authenticity) by others. Cited in Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 308. See also ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 42.

[102] Reported by Tirmidhī (d. 892), Dāraquṭnī (d. 995), and Bayhaqī (d. 1066), this version is *mawqūf* (i.e., the chain of transmission stops at ʿUmar ibn al-Khaṭṭāb, the second caliph, and does not reach the Prophet). Tirmidhī (d. 892; Khurāsān), *Sunan al-Tirmidhī wa-huwa al-Jāmiʿ al-ṣaḥīḥ*: v. 2, p. 76-77 ("guardians should invest a minor's wealth to prevent its diminishment from charity taxation"; chain of transmission to ʿUmar and to Prophet). But see Tirmidhī (d. 892; Khurāsān), *Ḍaʿīf sunan al-Tirmidhī*: 69-70 (contested reliability of report that Prophet instructed guardians to invest an orphan's wealth to prevent diminishment from charity tax). Also cited in al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Kitāb al-Umm*: v. 2, kitāb al-zakāh, p. 99 (cites to ʿUmar's statement that wealth of orphan should be invested to prevent its diminishment by charity tax payment). See also ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 42-43.

[103] al-Shāfiʿī claims a consensus of the Companions on the obligation of a minor to pay the charity tax. al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 73, no. 793 (Shāfiʿī). See also Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 308 (Mālikī). Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 1, p. 616 (Ibāḍī). See also footnote 87.

[104] These legal arguments are outlined by ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 41-45. See also al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 68-76 (Shāfiʿī: minors are required to pay the charity tax because recipients have a right to their wealth).

charity tax – projected on Qurʾānic verses and various statements attributed to the Prophet – and on the historically reconstructed practice of the Companions. Ultimately – to refer again to the two themes of the Qurʾānic verses I mentioned at the beginning – this majority view interprets the historical evidence in light of the verses that emphasize the right of the poor to the wealth of the wealthy.[105] Indeed, some jurists defined the charity tax as a debt that every Muslim owes to society.[106] In so doing, jurists constructed the charity tax as a political act that was distinguishable from ritual acts. Since the legal capacity of minors was irrelevant to their charity tax liability – in the opinion of the majority of jurists – they were obligated to pay it because they were Muslim citizens, not because they were Muslim believers.

Legal capacity: the minority opinion of professional jurists

In comparison, the minority opinion – represented among the surviving schools by Ḥanafīs and Shīʿīs (with minor differences between them) – does not obligate minors or the mentally incompetent to pay a charity tax on assets.[107] Yet both Ḥanafī and Shīʿī sources include reports suggesting that if a minor's wealth is being invested (i.e., it is accumulating profits), then the charity tax should be paid or calculated for payment after the minor comes of age.[108] These jurists make several claims to support their position against the charity tax liability of minors that I will outline briefly.[109]

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[105] Al-Nawawī, a Shāfiʿī jurist, states specifically, "the charity tax is not obligatory upon them [minors and the mentally incompetent], but rather it is obligatory on their wealth." al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 5, p. 298 (Shāfiʿī). But see Ibn Ḥazm, who argues that the charity tax is an obligation like prayer, but makes it obligatory upon minors, the mentally incompetent, and slaves. Ibn Ḥazm (d. 1064; Spain), *al-Muḥallā*: v. 5, p. 206 (Ẓāhirī: legal capacity is irrelevant to charity tax obligation).

[106] Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 1, p. 603 & 15 (Ibāḍī).

[107] In addition to these surviving schools, Saʿīd ibn Jubayr (d. 714), al-Nakhaʿī (d. 717), and al-Ḥasan al-Baṣrī (d. 728), opposed imposing the charity tax on minors. These minority opinions are reported in Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 283-84. And in Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 11-12 (Imāmī Shīʿī: listing jurists who opposed charity taxation of minors). See also: Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār*: p. 92 (Ḥanafī: no. 451, orphans not obligated to pay charity until they are required to pray). Ṭaḥāwī (d. 933; Egypt), *Mukhtaṣar al-Ṭāḥāwī*: 45 (Ḥanafī: no charity tax for minors, legally incompetent, slaves, or non-Muslims on their movable property or gold). Marghīnānī (d. 1197; Farghāna), *Guidance*: 247-48 (Ḥanafī: slaves, minors, and mentally incompetent not obligated to pay charity tax). Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 11-16 (Imāmī Shīʿī: legal capacity and sanity are prerequistes for payment of the charity tax). ʿUthmān ibn ʿAlī al-Zaylaʿī al-Ḥanafī (d. 1342/3) et al., *Tabyīn al-ḥaqāʾiq; sharḥ kanz al-daqāʾiq*, ed. Aḥmad ʿAzzū ʿInāyah, 7 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 2000), v. 2, p. 19 (Ḥanafī: only sane, free Muslim adults pay charity tax on wealth held for one year). Muḥammad ibn Makkī Shahīd al-Awwal (d. 1384; Syria), *al-Lumʿah al-Dimashqīyah fī fiqh al-Imāmīyah*, ed. Muḥammad Taqī Murwārīd and ʿAlī Aṣghar Murwārīd (Beirut: Dār al-Turāth; al-Dār al-Islāmīyah, 1990), 51 (Imāmī Shīʿī: charity tax is obligatory upon sane, free adults; it is not incumbent upon minors, slaves, or the mentally incompetent). *Fatāwá al-ʿĀlamgīrīyah (1664-1672)*, 6 vols., al-Fatāwá al-Hindīyah al-musammāh bil-Fatāwá al-ʿĀlamkīrīyah; wa-bi-hāmishih fatāwá Qāḍīkhān wa-huwá Fakhr al-Dīn Ḥasan ibn Manṣūr al-Ūzjandī al-Farghānī al-Ḥanafī (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1980), v. 1, p. 172 (Ḥanafī: charity tax is not obligatory upon minors or mentally incompetent).

[108] Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār*: p. 92 (Ḥanafī: no. 456, calculate the charity tax of an orphan's wealth and inform him when he comes of age). Ibn Mūsá (d. 818; Khurāsān), *al-Fiqh al-mansūb lil-Imām al-Riḍā al-mushtahir bi-fiqh al-Riḍā* p. 196-98 (Imāmī Shīʿī: orphans do not pay charity tax unless their wealth is being traded/invested). Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 13-15 (Imāmī Shīʿī: if the wealth of a minor or a slave is invested, then charity tax must be paid). Some jurists differentiate between types of property liable to

The minority jurists reason that, because minors do not have the full moral capacity (i.e. legal understanding) or intention to perform ritual acts (such as praying or fasting), they are not obligated to pay the charity tax.[110] The minority opinion interprets Qurʾānic verse 9:103[111] as indicating that, since they do not need purification from sin, minors and the mentally incompetent are exempt from charity taxation.[112] Minority jurists also cite a ḥadīth that exempts minors, the comatose, and the insane from liability.[113] Some jurists also claim that as disadvantaged members of society, it is in the best interest of minors and the mentally incompetent not to tax their assets and that the charity tax obligation is attached to individuals, rather than wealth.[114] Notably, these jurists are unconcerned with reconciling their opinion with evidence that Companions of the Prophet did oblige minors to pay the charity tax; that particular history lacks conclusive authority in the minority view – for a variety of reasons that are beyond the scope of this chapter.[115] For the minority jurists, it is legal capacity that determines liability to pay the charity tax.[116] How this ruling was actually applied in the varied geographic contexts of Islamic empires between the late antique and medieval periods is an important question for future research.

When jurists debated the charity tax obligation of minors and the mentally incompetent, they were implicitly debating a religious versus political definition of the charity tax.[117] While Ḥanafīs viewed the charity tax as a ritual act and argued that minors are not obligated to perform ritual acts, Shāfiʿīs and others believed that the charity tax is an

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charity taxation when owned by a minor, but I will not discuss these details here. See ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 45.

[109] For an overview, see ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 45-52 (discussing juristic proofs against charity tax liability of minors and mentally incompetent).

[110] So deep is the connection between the charity tax and prayer that some Shīʿī sources report that prayer is not accepted when charity has not been paid. Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 9 (Imāmī Shīʿī). See also: al-Shāfiʿī's response to this position in al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 70-72, no. 792. Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 284 (mentioning those who view the charity tax as a form of worship). al-Zaylaʿī al-Ḥanafī (d. 1342/3) et al., *Tabyīn al-ḥaqāʾiq*: v. 2, p. 19 (Ḥanafī: because the charity tax is a ritual, one of the pillars of the religion, it is not obligatory upon minors and the mentally incompetent).

[111] Qurʾān 9:103, "Of their wealth take charity in order to purify and to sanctify them."

[112] Ibn Ḥazm specifically opposes this view and argues that everyone needs purification from sin. Ibn Ḥazm (d. 1064; Spain), *al-Muḥallā*: v. 5, p. 206 (Ẓāhirī: no category of exemption from charity tax).

[113] Cited in Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 12 (Imāmī Shīʿī). This statement is reported by Abū Dāwūd (d. 884) and by Nasāʾī (d. 915). ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 48-49.

[114] ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 49-52.

[115] Sunnīs and Shīʿīs disagree in their assessment of the Companions and identifying consensus for jurisprudential purposes. See generally Hossein Modarressi Tabātabāʾi, *An introduction to Shīʿī law: a bibliographical study* (London: Ithaca Press, 1984).

[116] The payment of charity is obligatory on anyone who has legal capacity (i.e. not a minor), is sane, is free, and is able to act independently. Muḥaqqiq al-Ḥillī (d. 1277; Iraq), *Mukhtaṣar*: 77 (Imāmī Shīʿī: charity tax is obligatory on sane adults, not minors, or slaves, or the mentally incompetent). According to the same Imāmī Shīʿī jurists, the poll tax is not collected from minors, the insane, and women. Ibid., 134.

[117] Ibn Rushd (d. 1198), the medieval Spanish jurist, explained this juristic disagreement in the following way: "Those who said that it [the charity tax] is worship stipulated *bulūgh* [coming of age or puberty] of the person as a condition (for the obligation), while those who said that it is an obligatory right of the poor and the needy over the wealth of the rich did not take into account *bulūgh* [coming of age] of the person, among other things." Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 284.

obligation upon wealth – just like any other tax.[118] The majority of jurists conceptualized Muslim identity in ways that correspond to contemporary understandings of citizenship, minority jurists defined Muslim identity as a faith-based choice. For majority jurists, the charity tax was just like any other tax imposed by the state on its citizens to fulfill a public function. In contrast, the minority perspective perceives the obligations of a Muslim as taking effect when an individual chooses Islam. For minority jurists, the charity tax is a ritual act just like any other ritual act commanded by the divine.

Legal ownership: Islamic juristic debates on slaves

In contrast to a minor, a slave is subject to basically the same religious obligations as a free person – of prayer, fasting, etc.[119] Consequently, the juristic debate on imposing the charity tax on slaves is not about a slave's religious obligations, but rather about the slave's legal capacity and ability to own property.[120] In other words, the juristic debate indicates that the issue of a slave's ritual obligations was irrelevant. There are three main juristic opinions that correspond to how jurists perceived a slave's individual property rights. The first (and possibly chronologically earliest) opinion imposes the charity tax on slaves, but this opinion was held primarily by late antique Muslim jurists not directly related to one of the surviving professional schools.[121] The second opinion (represented primarily by the Mālikī and Shīʿī schools) does not require slaves to pay the charity tax.[122] Some jurists who hold this opinion explain that slaves are property and therefore, like animals, they cannot own property.[123] The third opinion requires slave owners to pay the charity tax on behalf of slaves and this is the opinion of Shāfiʿī, Abū Ḥanīfah, and others.[124] Notably, both of these two opinions are attested

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[118] Zamaksharī offers a succinct explanation about the differences of opinion between Ḥanafīs and Shāfiʿīs in Maḥmūd ibn ʿUmar Zamakhsharī (d. 1144; Khwārazm), *Ruʾūs al-masāʾil (al-masāʾil al-khilāfīyah bayna al-Ḥanafīyah wa-al-Shāfiʿīyah)*, ed. ʿAbd Allāh Nadhīr Aḥmad (Beirut: Dār al-Bashāʾir al-Islāmīyah, 1987), 208.

[119] I will not address in this section the legal issues concerning Muslim slaves and, instead, take it for granted that a Muslim can be a slave, as is attested in surviving documentary evidence.

[120] For a summary of these juristic debates, see Marwazī (d. 906; Samarqand), *Ikhtilāf al-fuqahāʾ*: 452-53 (summarizing juristic debates on slaves).

[121] Ibn ʿUmar, ʿAṭāʾ, Abū Thawr, and the Ẓāhirīs. Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 284. Also reported in Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 16 (Imāmī Shīʿī).

[122] Late antique jurists reported to have this opinion include Ibn ʿUmar, Jābir, Aḥmad, and Abū ʿUbayd. Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 284. Ibn ʿAbbās is reported to have stated that since slaves cannot own property, they do not pay the charity tax. Qalʿah'jī, *Mawsūʿat fiqh ʿAbd Allāh ibn ʿAbbās*: 367. See also Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 306-07 (Mālikī). ʿAlī ibn Jaʿfar Madanī (d. 825), *Masāʾil ʿAlī ibn Jaʿfar wa-mustadrakātuhā*, Silsilat maṣādir biḥār al-anwār, 8 (Beirut: Muʾassasat Āl al-Bayt li-Iḥyāʾ al-Turāth, 1990), 260 (Imāmī Shīʿī: a slave does not pay the charity tax unless his/her owner permits it). Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *al-Risālah al-fiqhīyah*: p. 167 (Mālikī: charity tax is not obligatory upon slaves). Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 16 (Imāmī Shīʿī: freedom is a prerequisite for payment of the charity tax).

[123] Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 16 (Imāmī Shīʿī).

[124] Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 284. See also: al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, 67. al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 1, p. 147 (Shāfiʿī: charity tax is not obligatory upon slaves). al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 5, p. 293 (Shāfiʿī: charity tax is not obligatory upon slaves). *Fatāwá al-ʿĀlamgīrīyah (1664-1672)*: v. 1, 171 (Ḥanafī: charity tax is not obligatory upon slaves).

in the Ḥanbalī school.[125] Finally, there may be a fourth opinion, which does not impose charity taxation on either the slave or the slave owner.[126] Therefore, the majority opinion (Ḥanafī, Ḥanbalī, and Shāfiʿī) among Muslim jurists in the medieval era was that slaves are liable to pay the charity tax (regardless of whether the slave or the owner actually pays it).

Rabbinic legal practices

I previously cited juristic discussions about the categories of individuals who are obligated to pay the charity tax; these legal debates may seem unsurprising in the context of Islamic legal literature. But when we compare these detailed juristic debates to their rabbinic predecessors, the significance of these discussions is more readily apparent. Rabbinic legal sources do not include an exhaustive discussion of who, other than landowners, was supposed to pay charity.[127] Indeed, it is difficult to determine from the available sources precisely who paid (or was supposed to pay) charity in Jewish communities during late antiquity. Late antique rabbinic legal literature seems to assume that only adult men are obligated to pay charity. Notably, according to the Rambam (d. 1204, Spain/Egypt, aka Maimonides), orphans do not pay charity, even if they are wealthy.[128] The absence of comparable debates within rabbinic legal literature about the applicability of taxation suggests that it was not a controversial subject and implies that charity was not fundamentally relevant to the everyday practice of being Jewish. Moreover, it suggests that in late antiquity, there was not an elaborate Jewish communal structure for collecting charity. By comparison, there presumably was a systematized process for collection of taxes within Jewish communities to be paid to pre-Islamic authorities.[129] This distinction between rabbinic and Islamic legal texts on the issue of who is obligated to pay the charity tax reflects the historical realities of who distributed charity tax funds: rabbis distributed charity funds on behalf of their Jewish followers, but the Islamic state distributed charity funds paid by their Muslim constituents. Consequently, in the late antique and medieval periods, what it meant for Jews to pay charity was a matter of ritual practice regulated by rabbis; what it meant for Muslims to pay charity was a public matter regulation by jurists and the state concurrently.

Islamizing near eastern charity tax?

I want to focus for a moment on the minority Muslim opinions in two cases: (1) the minority (Ḥanafī and Shīʿī) opinion that children are not required to pay the charity tax and (2)

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[125] Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 4, p. 71-73 (Ḥanbalī: conflicting reports, slave owner pays charity tax on behalf of slave or no charity tax obligation for slave).

[126] Although conflicting legal opinions are reported, this perspective is cited in Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 17 (Imāmī Shīʿī: citing non-Imāmī Shīʿī jurists who declare that the charity tax is not obligatory upon slaves or their owners).

[127] Late antique rabbinic discussions of charity primarily concern *peʾah*, which is assessed on agricultural lands and is therefore only applicable to those who own land.

[128] Maimonides (d. 1204; Spain/Egypt), *Mishneh Torah*: v. 7, p. 79 (Treatise II, 7:12, "Orphans may not be assessed for charity").

[129] Brody notes that "It is generally assumed that as early as the talmudic period the Exilarch was responsible for the collection of taxes from the Jewish community, but there is no direct evidence for this." Robert Brody, *The geonim of Babylonia and the shaping of medieval Jewish culture* (New Haven: Yale University Press, 1998), 71.

the minority (Mālikī and late antique jurists) opinion that slaves are not required to pay the charity tax. Both minority Muslim opinions correspond to the rabbinic practice of exempting minors and slaves from charity tax liability. I am not interested in arguing for a causal explanation of "influence."[130] Instead, I want to suggest that orthodox rabbinic and minority Islamic opinions converged in viewing charity as a primarily ritual – rather than political – act. The majority Islamic opinion did not view charity taxation as a simple expression of confessional identity. Indeed, the fact that various Qurʾānic verses commanding charity payment were addressed to Jews did not cause Muslim scholars much concern.[131] This may be because the acts of praying to God and of paying the charity tax would render them Muslims, even if these acts did not completely replace their Jewish identity. In other words, it was possible to be Muslim and Christian, or Muslim and Jewish, or perhaps even Muslim and pagan, in the beginning of Islamic history. The legal distinctions articulated by jurists suggest that late antique Muslim identity was expressed in more political than ritual terms, particularly when compared to contemporaneous rabbinic Jewish identity. This is not to suggest that Muslim identity was purely political, but rather that it is more expansive and ambiguous than commonly acknowledged.

VI. Who does not pay the charity tax?

Women, minors, and slaves were all, according to the majority opinion of Muslim jurists, liable to pay the charity tax – regardless of their status in terms of ritual obligations.[132] But, in late antiquity, there was slippage between the taxation regimes for Muslims and non-Muslims; this muddying was gradually erased in the medieval period when a "confessional" taxation system (charity tax for Muslims and poll tax for non-Muslims) was solidified. This is noticeable in reports clarifying that Muslims do not pay the poll tax.[133] Why would some Muslims have considered the poll tax as a potential tax on them? Put simply, in late antiquity, there was a distinct kind of organization and signification in the taxation system. Papyrological evidence from the eighth century suggests that there were distinct tax regimes for Muslims and for non-Muslims, but these papyri cannot tell us what it meant to be Muslim during that time.[134] Moreover, these papyri also indicate that the terms for poll tax and land tax were "used interchangeably" and that converts to Islam often paid the land tax.[135] Indeed, it was not until the mid-eighth century that payment of the poll tax was distinguished from payment of the land tax.[136] The primary historical distinction made between the charity tax and the poll tax is that the latter – in the beginnings of Islamic history – was a flat rate applied to each household (like the Roman model), rather than a proportional rate applied to each individual. In the earliest period of Islamic history, the poll tax may not have been higher than

[130] I critiqued the notion of "influence" in the Introduction to this dissertation.

[131] Bashear identifies Qurʾān 2:43, 2:83, and 2:110 as addressing Jews. Bashear, "On the origins," 89.

[132] al-Shāfiʿī, for example, states this explicitly. See al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 3, p. 68.

[133] Tirmidhī (d. 892; Khurāsān), *Sunan al-Tirmidhī wa-huwa al-Jāmiʿ al-ṣahīḥ*: v. 2, p. 72-73 (Muslims do not pay poll tax). But see Tirmidhī (d. 892; Khurāsān), *Ḍaʿīf sunan al-Tirmidhī*: 67-68 ("Muslims do not pay the poll tax" is weak).

[134] Sijpesteijn notes that "a regularly state-collected tax expressly for Muslims is levied with a name different from that used for non-Muslims." Sijpesteijn, "Shaping a Muslim state," 158.

[135] Ibid., 161.

[136] Ibid., 166.

the charity tax; indeed, the sources suggest that the poll tax was likely lower than the charity tax.[137]

It is not an accident, then, that *some* (though clearly not all) juristic discussions of the poll tax occur within or immediately adjacent to the chapter on the charity tax.[138] Jurists likely understood taxation as a means of differentiating between Muslims and non-Muslims. So when the first caliph, Abū Bakr (r. 632-634 CE) fought a series of battles against tribes in the Arabian peninsula who refused to pay the charity tax, these battles were labeled *riddah* (defection) wars because the refusal to pay the charity tax was conceptualized as equivalent to rejecting Islamic authority.[139] Later historians and jurists characterized Abū Bakr as fighting heresy (rather than imposing taxation).[140] But if we understand payment of the charity tax as a form of declaring oneself Muslim, then the significance of Abū Bakr's battles becomes more readily apparent. Being Muslim was not simply a matter of religion: it was a hybrid identity of citizenship and faith.

The political nature of charity taxation resonates in a particularly interesting historical example that is often cited in both historical and jurisprudential texts: The second caliph, ʿUmar (r. 634-644 CE)reportedly negotiated with the Arab Christian tribe Banū Taghlib to allow them to pay some equivalent of the charity tax, rather than the poll tax.[141] Does this mean that the Banū Taghlib tribe was considered Muslim in some way? The historical sources are unclear. Caliph ʿUmar reportedly made treaty agreements with three tribes (Tanūkh, Bahrāʾ, and Banū Taghlib) that they pay the charity tax; some jurists appear to have interpreted this charity tax payment as having been in addition to (rather than instead of) the poll tax or as

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[137] al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Kitāb al-Umm*: v. 5, kitāb al-jizyah, p. 74-80 (conflicting reports about the amount of the poll tax; one dinar per person may have been Prophetic practice; ʿUmar may have set poll tax for Syrians at 4 dinars per person, but there are reports of other amounts).

[138] Some examples include: Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 1, p. 333 (Mālikī: mentions poll tax within discussion of charity tax). Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 1, p. 632 (Ibāḍī: discussion of poll tax adjacent to charity tax; poll tax not collected from women, minors, slaves, or priests). Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *al-Risālah al-fiqhīyah*: p. 168 (Mālikī: poll tax discussion immediately following charity tax). Generally, later texts place discussions of the poll tax within the chapter on warfare. Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 9, p 275 (Imāmī Shīʿī).

[139] "Muslim traditionists considered all antagonists of Medina 'apostates' and called the war waged against them the War of Apostasy, *Hurūb al-Riddah*." Shoufani, *Al-Riddah*: 107.

[140] Shoufani notes that "Juristic arguments played a significant role in the definition of the term *Riddah* and the categorization of the groups involved in it." Ibid., 102.

[141] The historical sources report the amount and reasoning inconsistently. Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār*: p. 91 (Ḥanafī: no. 445, he imposed twice the charity tax in lieu of the land tax). Qudāmah Ibn Jaʿfar (d. 932?) narrates: "'Umar made a treaty with them stipulating that they should pay a double ṣadāqa tax, i.e. one dirham out of twenty dirhams but no jizya, and that they should not baptize their children as Christians and plunge them into heresy. 'Alī b. Abī Ṭālib, during his reign, said: If the Banū Taghlib had been left to my judgment, I would have killed their fighters and taken their children captive for their having violated the treaty by baptizing their children, thus forfeiting their right to protection." Qudāmah Ibn Jaʿfar (d. 932?; Iraq) et al., *Qudāma b. Jaʿfar's Kitāb al-kharāj, part seven, and excerpts from Abū Yūsuf's Kitāb al-kharāj*, trans. Aharon Ben Shemesh, Taxation in Islām, v. 2 (Leiden: E. J. Brill, 1965), 42. See also Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 1, p. 284. But al-Ṭabarī (d. 923) reports that ʿUmar taxed them at the same rate as the charity tax and as double the charity tax. Abū Jaʿfar Muḥammad ibn Jarīr al-Ṭabarī (d. 923; Iraq), *The Conquest of Iraq, Southwestern Persia, and Egypt*, trans. G. H. A. Juynboll, The history of al-Ṭabarī, XIII (Albany: State University of New York Press, 1989), 62 & 91. Other sources report double the charity tax as having been imposed on the Banū Taghlib. Yaḥyá Ibn Ādam (d. 818; Iraq), *Yaḥyā ben Ādam's Kitāb al-kharāj*, trans. Aharon Ben Shemesh, Taxation in Islām, v. 1 (Leiden: E. J. Brill, 1958), 55.

being the result of an exceptional case (i.e., a specific treaty agreement and not a general rule).[142] By rationalizing this Banū Taghlib case as exceptional, historians and jurists neglected to appreciate the normativity of taxation as a means of classifying groups. The charity tax signaled political membership, not only spiritual/religious membership. In this light, we can understand a recurring motif in the conquest narratives as a Muslim leader offering citizenship (charity tax), or semi-citizenship (poll tax), or enemy status (no tax).[143] The importance of redistribution in late antique Islamic society is manifested in Abū Dharr al-Ghifārī's protestations against Caliph ʿUthman's (r. 644 - 656) nepotistic disbursements of public funds.[144]

VII. Why is the charity tax significant?

Charity taxation, conversion, and conquest were intimately intertwined in late antique Islamic history.[145] The connection between the payment of the charity tax and being Muslim was so strong that some jurists considered any Muslim who questioned its legal status to be an apostate.[146] One of the topics jurists debated was the obligation to pay the charity tax in the case of a Muslim who apostatizes; as in many other doctrinal areas, there are conflicting reports about the opinions within each orthodox legal school.[147] (These discussions suggest that apostates were not always killed, contrary to the orthodox opinion that death is the appropriate punishment.) One view is that even someone who no longer is Muslim is obligated to pay the charity tax.[148] A second view indicates that some jurists viewed being Muslim and

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[142] Ibn al-Farrāʾ (d. 1066; Iraq), *al-Aḥkām al-sulṭānīyah*: 155-56.

[143] By way of example, this motif is cited in al-Ṭabarī (d. 923; Iraq), *The Conquest of Iraq, Southwestern Persia, and Egypt*: 16 & 21.

[144] Some contemporary scholars celebrate this particular historical figure as a socialist. Muḥammad ʿAlī al-Ṣuwarī, *Abū Dharr al-Ghifārī: al-ishtirākī al-muṭārid* (Beirut: al-Muʾassasah al-ʿArabīyah lil-Dirāsāt wa-al Nashr, 1979).

[145] By way of example, the Umayyads refused to relieve new converts from the obligation to pay the poll tax and to collect the charity tax from them instead. See Ṣāliḥ Saʿīd Āghā, *The revolution which toppled the Umayyads: neither Arab nor ʿAbbāsid* (Leiden; Boston: Brill, 2003), 162. "The early Umayyad fiscal system was unable to cope with the economic and social changes of the first Muslim century, and Umayyad officials consequently had to spend a large part of their time dealing with problems arising from this system while trying to maintain a steady fiscal income. Most attempts at securing an undiminished revenue flow from land-taxes ignored the transformation of the conquest society into one of settled continuity, forcing landholders to cultivate land they wanted to leave, having Muslims pay the same land-taxes as non-Muslims did, and coercing converts into remaining in non-Muslim tax-categories." Sijpesteijn, "Shaping a Muslim state," 183. This issue became crucial in Murjiʾah activism. See Khalil ʿAthamina, "The early Murji'a: some notes," *Journal of Semitic Studies* 35, no. 1 (1990). Wilferd Madelung, *Religious schools and sects in medieval Islam* (London: Variorum Reprints, 1985), 483.

[146] Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 4, p. 5-7 (Ḥanbalī: charity tax obligation is Muslim consensus; anyone who denies that it is an Islamic commandment is an apostate). Ibn al-Muṭahhar al-Ḥillī (d. 1325; Iraq), *Tadhkirat al-fuqahāʾ*: v. 5, p. 7 (Imāmī Shīʿī: one who denies that the charity tax is an obligation is an apostate).

[147] al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Kitāb al-Umm*: v. 2, kitāb al-zakāh, p. 96-97 (conflicting reports about the charity tax liability of a Muslim who apostatizes).

[148] An apostate from Islam is required to pay the charity tax; only Abū Ḥanīfah appears to have had the opinion that one who apostatizes is no longer obligated to pay the charity tax. al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 5, p. 295 (Shāfiʿī). See also al-Rāfiʿī (d. 1226; Iran), *al-ʿAzīz*: v. 2, p. 561 (Shāfiʿī: a non-Muslim does not pay charity tax even after he converts to Islam, but a Muslim must pay charity tax even if he apostatizes). ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 39-40.

fulfilling Islamic obligations as a matter of rational choice to be made by a free adult, such that the choice not to be Muslim must relieve an individual from paying the charity tax.[149] The first view is an extension of the Qurʾānic theme that charity taxation is the right of the poor to a portion of the wealth of the rich, while the second view is an extension of the Qurʾānic theme that charity taxation is a ritual act. The numerous juristic debates explored here indicate that late antique and medieval Muslim jurists were deeply entangled in a project of drawing identity border lines.[150]

VIII. Taxing as identifying: paying to be Muslim

This chapter has used the doctrinal issue of charity to correlate religious identity with notions of citizenship. The legal discussion of who is required to pay the charity tax and who must receive it are both issues that were more institutionalized in Islamic law in comparison to Jewish law. Of course, in the historical context of Jewish communities living under various empires, it is perhaps unsurprising that the internal taxation system was not severe. Because the Islamic taxation system was, from the beginning, a means of taxing both members and quasi-members, it corresponded to a political framework for defining citizenship and semi-citizenship.[151] Who paid and received the charity tax in late antique Islamic societies was not simply a matter of fulfilling a religious obligation; instead, it was—for both Muslims, "semi"-Muslims, and non-Muslims—a matter of paying taxes to the state.

It is not uncommon to hear contemporary Muslims describing charity as one of the "five pillars" of Islam or to hear contemporary Jews describing charity as a commandment (*mitzvah*).[152] In both traditions, charity is commonly understood as a significant aspect of religious dogma and practice. But late antique historical evidence indicates that charity was practiced in ways that are not equivalent to ritual or spiritual acts, but rather what we – in contemporary discourse – would describe as political acts. This is because "religion" is a modern category that was dialectically constructed in relation to "secularism."[153] The category of "religion" is an anachronistic and reductive category that limits our understanding of late antique Islamic history and Muslim identity in late antiquity.[154] Scholars who take "religion"

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[149] Ḥanafīs and Mālikīs do not obligate apostates to pay the charity tax. ʿAbdū, *al-Wāfī fī aḥkām al-zakāh*: 39-40.

[150] Boyarin, *Border lines*.

[151] I use the term semi-citizenship to mean individuals who are neither full citizens nor non-citizens, but instead have an ambiguous middle status. The term is elaborated by Elizabeth F. Cohen, *Semi-citizenship in democratic politics* (Cambridge; New York: Cambridge University Press, 2009). While Cohen's work focuses on semi-citizenship in democratic contexts, I believe the category is relevant to understanding the hierarchy of citizenship in late antique Islamic states.

[152] The reader may have noticed that I did not begin by referring to the charity tax as one of the "five pillars" because this chapter was concerned with interrogating charity practices prior to the formulation of this orthodox idea about the existence of "five pillars." Different versions of Islamic pillars are mentioned in the canonical ḥadīth collections. See, for instance, Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī*: v. 2, p. 271-75.

[153] Fitzgerald explains, "what counts as 'religion' and what counts as 'the secular' are mutually delimiting and defining concepts, the distinction between them continually shifting depending on the context." Timothy Fitzgerald, "Introduction," in *Religion and the secular: historical and colonial formations*, ed. Timothy Fitzgerald (London; Oakville, CT: Equinox Pub., 2007), 15.

[154] Fitzgerald observes that "As a consequence of the reification of religion, most religious studies scholars and many historians, anthropologists and other specialists, assume and write as though religion and the state have always been two essentially different domains of human endeavor, having some problematic but external

as a point of departure in their studies of Islamic history, misconstrue the basic flexibility and ambiguity of what it meant to be Muslim.[155]

When late antique Muslims paid the charity tax, did they perceive themselves as fulfilling a divinely-ordained command or as simply paying taxes to a political entity? Was it any different for them than paying taxes to the Byzantines or the Sasanians? It is unlikely we will ever formulate accurate answers to these questions. Yet in pondering the possibilities, we certainly should not limit ourselves to assumptions about the charity tax as a ritual act. It is impossible to reconstruct historically if any tribes or groups agreed to pay the charity tax to an Islamic political entity, while continuing to practice their pre- or non-Islamic rituals and beliefs. But it is not difficult to imagine that this is what happened. What it meant to convert to Islam in late antiquity may have much more to do with paying the charity tax to an Islamic state and accepting its political sovereignty, than performing a set of rituals or believing in a particular dogma. What Muslims defined as "Muslim" in late antiquity was probably much more fluid than our historical sources convey; this exploration into the multi-faceted debates about charity tax liability suggest that it may have been more complicated than belief and as simple as paying a tax.

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relationship." Timothy Fitzgerald, *Discourse on civility and barbarity: a critical history of religion and related categories* (New York: Oxford University Press, 2007), 10.

[155] This narrow framework is evident in scholarship that seeks to date the "birth" of Muslim identity. This is implicit in Donner's differentiation between "believers" and Muslims in Donner, *Muhammad and the believers.*

Chapter 3: Legal changes – a case study in family law

Every law tells a story: orthodox divorce in Jewish and Islamic legal histories[1]

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

The story I will tell here focuses on legal norms of wife-initiated (and acquired) divorce in Jewish and Islamic legal systems in the pre-modern era. The received tradition narrates a woman's minimal agency in divorce – in both Jewish and Islamic law – as intrinsic. It is widely known – or presumed – that Jewish and Muslim women have relatively less access to divorce than their male counterparts in present-day religious courts.[2] In both religious traditions, women can encounter difficulties in obtaining divorces.[3] Using a wide array of historical

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[1] This chapter was accepted at the 6th Annual American Society of Comparative Law Works-in-Progress Workshop, which convened at Yale Law School (February 12, 2011); I would like to thank all the participants of the workshop for their suggestions and especially my two commentators, Christine Hayes and Chibli Mallat, and the organizers, Jacqueline Ross, Kim Lane Scheppele, and James Whitman. For reading and commenting on drafts of this chapter, I thank Daniel Boyarin, Charlotte Fonrobert, Rhiannon Graybill, Ira Lapidus, Maria Mavroudi, Laurent Mayali, Zvi Septimus, and Sam Thrope. I would also like to thank Menachem Butler, the indefatigable Jewish studies bibliographer, for sending me numerous articles used throughout this piece. Errors are mine alone.

[2] "The ruling now prevalent is that a woman initiating divorce proceedings according to Jewish law is required to submit a ground, chosen from a defined list appearing in the Talmud; barring such a ground, the husband cannot be coerced to grant a divorce." Elimelech Westreich, "The rise and decline of the law of the rebellious wife in medieval Jewish law," in *Jewish Law Association studies, XII (Zutphen conference)*, ed. Hillel Gamoran, *Jewish Law Association Studies* (Binghamton, N.Y.: Global Publications, State University of New York at Binghamton, 2002), 207. Generally, in modern states that apply some form of Islamic law, Muslim women are able to secure a divorce if (a) they can establish specific, judicially accepted grounds or (b) they relinquish their dower rights and negotiate a husband's consent. (Exceptions to this general situation are Egypt and Tunisia, which do not require the husband's consent.) See Emory University School of Law, "Islamic family law project: legal profiles," http://www.law.emory.edu/ifl/index2.html.

[3] For a discussion of the Jewish chained wife (the *agunah*, a woman unable to obtain a divorce decree), see Jackson, Bernard S., Rabbi Dr. Yehudah Abel, Avishalom Westreich, Shoshana Borocin-Knol, and Nechama Hadari. "*Agunah*: the Manchester analysis." In *Draft final report of the Agunah research unit*, edited by Bernard S. Jackson: University of Manchester, January 2010. By way of example, see a modern U.S. case, *Avitzur v. Avitzur*, 446 N.E.2d 136(1983). See also Michael J. Broyde, *Marriage, divorce, and the abandoned wife in Jewish law: a conceptual understanding of the agunah problems in America* (Hoboken, NJ: KTAV Pub. House, 2001). Alan Lazerow, "Give and 'Get?' Applying the Restatement of Contracts to determine the enforceability of '*Get* settlement' contracts," *University of Baltimore Law Review* 39, no. 1 (2009-2010). (In this chapter, *get* is translated as divorce decree.) On some of the difficulties encountered by Muslim women seeking divorces and contemporary legislation pertaining to it, see Oussama Arabi, "The dawning of the third millennium on shari'a: Egypt's Law no. 1 of 2000, or women may divorce at will," *Arab Law Quarterly* 16, no. 1 (2001). See also Abdul Hakim Quick, "*Al-Mu'allaqa*: the Muslim woman between divorce and real marriage," *Journal of Islamic Law* 3, no. 1 (1998). 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

sources, this chapter presents evidence that Jewish and Muslim women in the late antique period had relatively more access to divorce than women in the medieval era.[4] I argue that changes in women's divorce options are manifestations of multidimensional historical processes that illustrate law's profoundly contingent contexts.[5] Divorce in Jewish and Islamic legal systems underwent parallel transformations between the late antique (roughly, 250-750 CE) and medieval (roughly, 750-1450 CE) periods as the result of common socio-political and jurisprudential dynamics. By placing Jewish law and Islamic law into historical conversation with each other, this chapter challenges the norm of studying these legal systems from a primarily internal perspective.

Legal communities use narratives to illustrate legal rules and they also create "internal" narratives about their legal systems that have normative consequences. The analysis presented here establishes that any statement of "what the law *is*" is embedded within a complex historical narrative generated by jurists. Jewish and Muslim jurists construct internal narratives that are ahistorical and legitimate their own authority; this chapter employs historicism and thick descriptions of law to challenge those orthodox narratives.[6] Historicism is used here to disenchant (but obviously not to extinguish) orthodox religious power in order to facilitate non-hierarchical discussions of what Jewish and Islamic law was, is, and should be.[7] Influencing the outcome of those discussions, in terms of specific legal norms, is not my objective here.[8] Rather, an underlying aim of this piece is using historicism to wrest legal authority from authoritarian groups.[9] The narration of legal changes outlined in this

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from initiating or obtaining divorces; the main challenge women faced was receiving alimony and child support payments, not divorces.

[4] While some feminists and some religious reformers may find that this chapter resonates with or lends support to their own objectives, this is an unintended consequence of exploring the legal narrative. And, 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 chapter intends to illuminate aspects of Islamic and Jewish legal history that remain unappreciated. Moreover, it should be noted that feminist strategies are not homogenous. See Chandra Talpade Mohanty, *Feminism without borders: decolonizing theory, practicing solidarity* (Durham; London: Duke University Press, 2003).

[5] As Foucault notes, "The purpose of history is to dissipate, not discover, the roots of our identity." Foucault, *The Foucault reader*: 95.

[6] By historicism, I mean specifically post-foundationalist, radical historicism and Nietzschean-inspired genealogy. See Bevir, "What is genealogy?." Radical historicism is distinct from general historicist approaches. See Bevir, "Why historical distance is not a problem." As I use orthodoxy in this chapter, it is entirely unrelated to contemporary terminology (such as modern Orthodox). Instead, orthodox simply means the existence of a (hierarchical) group or institution that is able to label certain religious groups or practices as heretical.

[7] I do not use "disenchant" in the Weberian sense because I contest Weber's conceptualization of "religion" and its fabrication of the "secular." I use disenchant in the vernacular sense of deconstructing a myth.

[8] I intentionally abstain from modern and anachronistic conclusions. This is an ethical stance in opposition to the totalizing project of modernity. See, for example, Asad, *Genealogies of religion*.

[9] Abou El Fadl has described some of his scholarly work as pursuing a demonstration of historical malleability. He noted, "By presenting the diversity within the legal discourse, I hoped to demonstrate the inability of the authoritarian to dominate and establish uniformity of certain issues in Islamic legal history." Abou El Fadl, *And God knows the soldiers*: 35.

chapter is just one exploration into the shared *nomos* of Jewish and Islamic legal systems and the socio-political struggles over law within it.[10]

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.[11] This chapter challenges the terms of contemporary debates by highlighting the dissimilar voices within religious legal systems and by problematizing the conceptualization of "religious law" that underlies current controversies. The forces of change in these two "religious" legal systems are not so different than for any other legal system. It is the "law" aspect of these normative orders, rather than the "religion" aspect, that is my emphasis because legal analysis is essential to understanding both Jewish and Islamic legal systems.

This chapter analyzes historical evidence of both Jewish and Muslim women divorcing their husbands in late antiquity (roughly, 250-750 CE) and offers some provisional explanations for why women's divorce options became more limited in the medieval period (roughly, 750-1450 CE). This case study indicates that comparative legal history illuminates dynamics of legal change that would otherwise remain unnoticed. Studying a legal system in isolation from its context, which includes contiguous legal systems, obscures expansive and long-term changes. Instead, by plotting parallel changes over time in divorce practices among Jews and Muslims in the "Near East," this chapter demonstrates that legal orthodoxy is not timeless.[12] Jewish and Islamic divorce laws tell stories that are sporadic, unpredictable, and barely audible under the faux euphony of orthodoxy.

I. Defining wife-initiated divorce[13]

It is widely presumed that men have unlimited access and women have restricted access to initiate divorce in both Jewish and Islamic law. 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

[10] On *nomos*, see Robert M. Cover, "Foreword: *nomos* and narrative," *Harvard Law Review* 97, no. 1 (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," *Yale Journal of Law and the Humanities* 17, no. 1 (2005).

[11] 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. Various important consequences flow from this." Fitzgerald, "Introduction," 6.

[12] The "Near East" is a problematic political (specifically, imperialist), rather than geographic category. 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.

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

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.[14] In what follows, I will present two concise chronologies of Jewish legal changes and Islamic legal changes in women's access to divorce.

It should be noted that 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 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.[15] 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.[16]

II. A Jewish chronology of wife-initiated divorce[17]

Rabbinic (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.[18] 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.[19] The key documentary evidence

[14] A social history approach of investigating actual divorce processes cannot be sufficiently reconstructed using the available historical evidence. This approach to family law history is exemplified in Martha Minow, "'Forming underneath everything that grows': toward a history of family law," *Wisconsin Law Review* 1985, no. 4 (1985).

[15] See the discussion in Avishalom Westreich, "History, dogmatics and hermeneutics: the divorce clause in Palestinian *Ketubbot* and the Geonic compulsion of divorce," *Working Papers of the Agunah Research Unit* (March 2009): 2.

[16] Goitein notes, "At a divorce the wife normally acted on her own. As customary as it was that the betrothal be enacted in the absence of the bride, the divorce, by contrast, required her presence." Samuel D. Goitein, *A Mediterranean society: the Jewish communities of the Arab world as portrayed in the documents of the Cairo Geniza*, 6 vols. (Berkeley: University of California Press, 1967-1993), v. 3, p. 270. Muslim women also frequently represented themselves in divorce, as will be discussed in the Islamic chronology of wife-initiated divorce.

[17] 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 Charlotte Elisheva Fonrobert et al., *The Cambridge companion to the Talmud and rabbinic literature*, Cambridge companions to religion (Cambridge; New York: Cambridge University Press, 2007), xiii-xvi. 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 *Babylonian Talmud*, Giṭṭin 90a.)

[18] See David Instone Brewer, "Jewish women divorcing their husbands in early Judaism: the background to papyrus Ṣeʾelim 13," *The Harvard Theological Review* 92, no. 3 (1999). See also Robert Brody, "Evidence for divorce by Jewish women?," *The Journal of Jewish studies* 50, no. 2 (1999). And see Bernard S. Jackson, "Some reflections on family law in the papyri," in *Jewish Law Association Studies XIV*, ed. Hillel Gamoran (Binghamton, NY: Global Academic Pub.; Binghamton University, 2002).

[19] "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

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).[20]

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.[21] The verse does not specify if this divorce procedure is the only legally valid form of divorce.[22] But rabbinic jurists elaborated a variety of justifications for divorce. In the Tosefta (220-350 CE), the rabbis claim that a couple may not continue their marriage if either is afflicted with boils.[23] The Mishnah (early third century CE) briefly considers when a woman can demand divorce because of her husband's impotence, her "uncleanliness," or her status as illicit to Jews.[24] The Mishnah also enumerates how a wife gradually loses her divorce settlement for being recalcitrant.[25] Other rabbinic literature enumerates a husband's unreasonable behavior or

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divorce on the specific grounds named above." Brewer, "Jewish women divorcing their husbands," 354. Also, in Palestine, "Some rich or influential Jewish women divorced their husbands under the Roman law." Ibid., 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 their acts as contrary to Jewish law.

[20] Friedman notes that "This right is embodied in a stipulation written in the marriage contracts from the fifth century B.C.E. 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." Mordechai A. Friedman, *Jewish marriage in Palestine: a Cairo genizah study* (Tel-Aviv; New York: Tel-Aviv University, Chaim Rosenberg School of Jewish Studies; Jewish Theological Seminary of America, 1980), v. 1, p. 313. See also Mordechai A. Friedman, *Geniza studies in Jewish marriage law* (s.l.: s.n., 1970), 4. Among the documentary evidence upon which Friedman relied is Babatha's marriage contract (ca. 2nd century CE). See Yigael Yadin et al., *The documents from the Bar Kokhba period in the cave of letters: Hebrew, Aramaic, and Nabatean-Aramaic Papyri*, 2 vols., Judean Desert Series (Jerusalem: Israel Exploration Society: Hebrew University of Jerusalem: Shrine of the Book, 2002), v. 1, p. 118-41. Goitein concurred with Friedman in Goitein, *A Mediterranean society*: v. 3, p. 264.

[21] "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." Coogan et al., *The new Oxford annotated Bible*, 283-84.

[22] For a brief introduction to Jewish divorce laws, see Rachel Biale, *Women and Jewish law: an exploration of women's issues in halakhic sources* (New York: Schocken Books, 1984), 70-101. For a more extensive examination, see Shlomo Riskin, *A Jewish woman's right to divorce: a halakhic history and a solution for the agunah* (Jersey City: KTAV Pub. House, 2006). Riskin is a major modern orthodox rabbinic figure and the arguments he presents in his text come from within an orthodox perspective.

[23] *Tosefta*, Ketubbot 7:11. See also *Mishnah*, Ketubbot 7:9-10 (a husband can be compelled to divorce his wife if he has certain blemishes or is repulsive).

[24] *Mishnah*: Nedarim 11:12 (three types of women who can be divorced, but retain their dower). According to this passage, Jewish women used to make three claims (i.e., rape, impotent husband, 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 context of late antiquity, vows were a normative part of social discourse, such that a husband's vows may be understood as a reason for initiating divorce.

[25] "Recalcitrant," in this chapter, 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. *Moredet* is often translated as "rebellious," but I prefer to translate it as "recalcitrant." Moreover, while there is significant rabbinic-legal discussions 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 often a woman who is seeking a divorce. For a

defects that warrant a husband being forced to divorce his wife.[26] In the Palestinian Talmud (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.[27] 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.[28] The Babylonian Talmud (200-650 CE) specifies that a woman is entitled to her dower if her husband is infertile or impotent.[29] Moreover, a woman whose husband refuses to provide her conjugal rights can be divorced with the court's intervention and receive her dower.[30]

To summarize, surveying 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.[31]
(2) A rabbinic court compels a husband to divorce his wife[32] and pay the dower because the husband:
    a. has physical defects[33]
    b. imposes unreasonable restrictions or behavior[34]
    c. is sterile, impotent, or refuses to provide conjugal rights[35]
    d. works in a profession considered disgusting[36]
    e. or because the wife has made a vow prohibiting her husband from touching her[37]
(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)[38] or because the wife

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discussion of the *moredet*, see for example, ibid., Ketubbot 1:2 (wife loses seven dinarim for every week of her recalcitrance).

[26] Ibid., Ketubbot 7:1-5 (discussing various cases in which a husband makes unconscionable/unreasonable restrictions that warrant compelling the husband to divorce). See also ibid., Ketubbot 7:9-10. *Palestinian Talmud*, Ketubbot 7:1-5 (husband's behavior that warrants divorce) and Ketubbot 7:8-9 (blemishes of which a wife was unaware warrant divorce). See also the corresponding discussions in the *Babylonian Talmud*: Ketubbot 71a-71b and 77a.

[27] *Palestinian Talmud*: Ketubbot 5:1.

[28] Ibid., Ketubbot 7:6. A marriage contract stipulation suggesting a wife's ability to initiate divorce is also acknowledged in ibid., Ketubbot 5:9.

[29] *Babylonian Talmud:* Ketubbot 65a-65b.

[30] *Mishnah*: Ketubbot 5:6-7 (a husband's refusal to provide conjugal rights as grounds for adding to a woman's dower). *Babylonian Talmud*: Ketubbot 61b (if a husband refuses to provide his wife's conjugal rights for longer than specified periods, he must divorce her and pay her dower).

[31] The House of Shammai's argument to limit a husband's ability to divorce was refuted by the House of Hillel. See *Mishnah*: Gīṭṭīn 9:10. Mishnah,. 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.

[32] *Mishnah*: Gīṭṭīn 9:8. See also Babylonian Talmud, Gīṭṭīn 88b (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 מעושה). See also Mishnah, Arakhin 5:6 (a husband is compelled to give a writ of divorce to his wife until he says he wills it)

[33] Ibid., Ketubbot 7:9.

[34] Ibid., Ketubbot 7:1-5.

[35] Ibid., Ketubbot 5:6. Babylonian Talmud, Ketubbot 91a.

[36] Ibid., Ketubbot 7:10.

[37] See footnote 24.

a. apostatized, ignored a Jewish precept, or acted immorally[39]
b. refused sexual relations with her husband or performance of "wifely duties"[40]
c. has blemishes or physical defects that impinge the marital relationship[41]

The practical consequences of these rabbinic ideas on divorce likely varied from community to community.[42] For instance, there is evidence of a Palestinian tradition of including a wife's right to divorce in the marriage contract.[43] 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).[44] Still, this brief schema delineates the basic ideas circulating about divorce within late antique rabbinic legal communities.

Gaonic (620-1050 CE)

In 650/651 CE, Gaonic rabbis issued a decree (*taqqanah*) that a recalcitrant wife (*moredet*) could procure a divorce immediately and not lose her dower (*ketubbah*).[45] This decree abandoned the twelve-month waiting period and loss of dower stipulated for a recalcitrant wife in the Babylonian Talmud.[46] Historical sources indicate that this decree was viewed by the majority of Gaonim as a legal enactment validated by judicial authority and social need.[47] Geniza evidence indicates that in the medieval Near East, Jewish women could initiate divorce by forfeiting some of their rights – what is often described as a "ransom" divorce, in line with

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[38] *Mishnah*: Ketubbot 5:5-7 (defining a recalcitrant wife). Mishnah, Ketubbot 5:5-7 (defining a *moredet*, recalcitrant wife); Palestinian Talmud, Ketubbot 5:8 (a "writ of rebellion" is a charge against or a deduction of the wife's *ketubbah* payment); Babylonian Talmud, Ketubbot 63a (the *ketubbah* of a recalcitrant wife is reduced to depletion and she is divorced).

[39] Ibid., Ketubbot 7:6.

[40] Ibid., Ketubbot 5:7.

[41] Ibid., Ketubbot 7:8.

[42] For a broad overview, see Tal Ilan, *History of Jewish women in late antiquity* (Jerusalem: The Hebrew University of Jerusalem, Rothberg School for Overseas Students, 1994).

[43] Friedman, *Jewish marriage in Palestine*: v. 1, p. 313. See also Westreich, "History, dogmatics and hermeneutics," 18-21.

[44] *Babylonian Talmud*: Ketubbot 3a and Gittin 33a (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," *Jewish Law Association Studies* 20(June 10, 2010).

[45] See text #3 (Gaonic responsa of Rav Sherira Gaon) in Appendix I. See also Libson, *Jewish and Islamic law*: 111. Brody, *The geonim of Babylonia*: 9, 62-63. 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.

[46] *Babylonian Talmud*: Ketubbot 63b and 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. (See texts #1 and #2 in Appendix I.) But note that Westreich identifies the 12-month waiting period as a late Talmudic stratum. Avishalom Westreich, "Compelling a divorce? Early Talmudic roots of coercion in a case of *moredet*," *Working Papers of the Agunah Research Unit* (May 2008): 12. Dating the redaction of the Babylonian Talmud is beyond the scope of this article; in this chapter, 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.

[47] See texts #3 through #8 in Appendix I. But see footnote 53.

the equivalent Arabic terminology.[48] This historical evidence should be emphasized: the Gaonic 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[49] 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 Gaonic decree.[50] This form of wife-initiated divorce appears to have been implemented by the Gaonim as an extension of the Talmudic category of a recalcitrant wife.[51] In his *Halakhot Pesuqot*, Rav Yehudai Ben Naḥman (d. late 8th 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.[52] Rabbi Isaac Alfasi (d.

[48] 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," *Jewish Law Annual* 4(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, 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 mediaeval Jewish practice," *Israel Oriental studies* 6(1976): 301. 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." Ibid., 296. Goitein concurred with Friedman and explained that the Arabic term for release (*barā'a*) sometimes referred to the divorce decree. Goitein, *A Mediterranean society*: v. 3, p. 267-8. (See also texts #5 and #14 in Appendix I.)

[49] See footnote 28.

[50] Riskin, *A Jewish woman's right to divorce*: 56. See also Menachem Elon, *Jewish law: history, sources, principles* [Ha-mishpat ha-Ivri], trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), v. 2, p. 658-65 (discussing the Gaonic decree on the recalcitrant wife). Libson explains, "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," in *Encyclopaedia Judaica*, ed. Michael Berenbaum and Fred Skolnik (Detroit: Macmillan Reference USA, 2007), 265. As will become clear, I challenge the view that this gaonic practice "deviated" from talmudic practice and argue that it should be understood as a customary practice, rather than an "innovative" enactment. See Gideon Libson, "Halakhah and reality in the Gaonic period: taqqanah, minhag, tradition and consensus: some observations," in *The Jews of medieval Islam: community, society, and identity*, ed. Daniel Frank (Leiden: Brill, 1995), 72-74 and 84-86. As a legal matter, I suspect that this Gaonic 'taqqanah' was more likely the continuation of an existing practice, which is generally suggested by Libson, but not specifically applied in this case.

[51] Friedman explains that "As 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." Friedman, *Jewish marriage in Palestine*: v. 1, p. 324. Elsewhere, Friedman clarifies that "It would seem most likely that the practice which is referred to in our sources as iftidā' and by Saadiah as xulʿ (ixtilāʿ) 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 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," 302.

[52] He is known as Yehudai Gaon. Yehudai ben Naḥman (d. late 8th century; Iraq), *Sefer halakhot pesukot*, ed. Solomon David Sassoon and Neil Danzig, Sifre Mekhon "Ahavat shalom" Yerushalayim (Jerusalem: Ahavat shalom,

1103 CE, Spain/Algeria), in his *Ṣefer ha-halkhot*, written while he was living in Morocco, accepts the Gaonic practice (of coercing a husband to divorce a recalcitrant wife), but suggests that it is not based on talmudic practice.[53]

To summarize, Gaonic divorce practices included:

(1) A husband divorces his wife for whatever reason and pays her dower.[54]
(2) A rabbinic court compels a husband to divorce his wife and pay the dower because the husband:
    a. has physical defects
    b. imposes unreasonable restrictions or behavior
    c. is sterile or impotent
    d. works in a profession considered disgusting
(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) 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'
    c. has blemishes or physical defects that impinge the marital relationship
(4) A wife divorces her husband, receiving either her full dower or part of it and without waiting twelve months.

The final category was explicitly practiced in the Gaonic period, but it is unclear precisely who (husband or court) delivered the divorce decree.[55]

Rishonim (1050-1400 CE)

In the post-Gaonic era, the Rishonim (roughly, medieval rabbis) further elaborated rabbinic opinions on when a woman could be divorced from her husband.[56] Two sub-categories in this period appear to have supplemented the rabbinic "short list" of grounds that

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1998), 342 (it is valid for a non-rabbinic court to coerce a Jewish husband to divorce his wife if a rabbinic court authorizes the coercion).

[53] 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, *Ṣefer 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, "The rise and decline," 209-10.

[54] But note that Rabbenu Gershom (d. 1028 CE) in Germany "enacted a decree which made it impossible for a husband to divorce his wife against her will." Riskin, *A Jewish woman's right to divorce*: xii, 109.

[55] 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, Karaites permitted judicial divorce decrees. See footnote 131. In addition, it is unclear if Islamic courts only coerced Jewish husbands to deliver divorce decrees or if they also provided judicial divorce decrees.

[56] Elaboration of Talmudic discussions include: (a) refusal or inability to provide wife sufficient maintenance (Joseph ben Ephraim Karo (d. 1575; Spain), *Shūlḥan ʿArūkh* (1563), Even Haʿezer, Ketubbot 70:3.); (b) refusal of conjugal rights (ibid., Even Haʿezer, Ketubbot 76:11.); (c) husband's inability to provide maintenance or sex (ibid., Even Haʿezer, Gīṭṭīn, 154:3.). A husband is compelled to divorce his wife if he engages in a disgusting profession (ibid., Even Haʿezer, Gīṭṭīn, 154:1.)

warrant a court ordering a husband to divorce his wife: (1) the husband's adultery[57] and (2) the husband's transgression of the laws of Moses (or apostasy).[58] 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 with a variety of regional practices.[59]

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 Gaonic decree. Rashi (d. 1105 CE, France) suggested that the Talmud was the source of the practice.[60] His grandson (Rashbam, d. 1158 CE, France) upheld the decree by ruling that a husband should be coerced to divorce his recalcitrant wife.[61] Rashbam's brother, Rabbenu Tam (d. 1171 CE, France) rejected the Gaonic decree of coercing the husband to divorce his wife and effectively claimed that the Gaonic practice was unorthodox.[62]

In comparison, Maimonides (d. 1204 CE, Egypt) criticized, but did not entirely reject, Gaonic practices pertaining to a wife's ability to demand a divorce as a recalcitrant wife (*moredet*).[63] 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"[64] 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[65]; if she persists, then she is prohibited from

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[57] Ibid.

[58] Maimonides (d. 1204; Spain/Egypt), *Mishneh Torah*: p. 27, 4.I.IV:15. See also Karo (d. 1575; Spain), *Shūlḥan ʿArūkh*: Even Haʿezer, Gīṭṭīn, 154:1.

[59] For a thorough discussion of the medieval debates on the recalcitrant wife doctrine, see Westreich, "The rise and decline."

[60] Rashi, Ketubbot 63b (see text #11 in Appendix I). See also ibid., 212 (citing Rashi, Ketubot 63b).

[61] Ibid., 212 (citing Rashbam in Ṭur, Even Haʿezer, ch. 77).

[62] See text #12 in Appendix I. See also ibid., 212 (citing Ṣefer ha-yashar, Responsa sec. 24 and Toṣafot, Ketubot 63b). In his *Ṣefer ha-yashar*, Rabbenu Tam claimed, "We hold the halakhic principle that Ravina and Rav Ashi are the last authoritative halakhic decisors, and even were the Geonim able to decree that a woman could collect her alimony from movable property, whether it be on the basis of Talmudic law or their own reasoned judgment, that is only as far as monetary value is concerned...we learned in the Talmud that [the Sages] did not force [a divorce] until twelve months, and they [the Geonim] advanced the forcing of the divorce before [the time which] the law [allows]." Riskin, *A Jewish woman's right to divorce*: 98-99. Riskin suggests Rabbenu 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." Ibid., xiii. See also Westreich, "The rise and decline," 212. See also Elon, *Jewish law*: v. 2, p. 661-62 (Rabbenu Tam invalidated the authority of Gaonim to enact divorce legislation).

[63] Maimonides (d. 1204; Spain/Egypt), *Mishneh Torah*: p. 90, 4.I.XIV:14. See text #13 in Appendix I.

[64] Ibid., p. 88-89, 4.I.XIV:8.

[65] 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.

receiving maintenance (i.e., alimony) for twelve months, when she finally receives her divorce decree.[66]

The debate among Rishonim about the legitimacy of the Gaonic decree was fundamentally related to broader questions of the authority of jurists.[67] Rashba (d. 1310 CE, France) accepted Rabbenu Tam's opinion that the Gaonic practice was not based on the Talmud, but did not describe it as legally invalid.[68] Rabbenu Asher (d. 1327 CE, Spain) opposed the Gaonic decree on the grounds that it was not accepted by a majority of Jews and that social circumstances had changed since its enactment.[69] By the early 14th century, a perspective of the Western Rishonim that the Gaonic decree was invalid began to take hold. By the 16th century, a major Jewish law code required a woman to establish cause (under narrow circumstances) in order for a court to compel a divorce.[70]

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. 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 Spain to North Africa and prohibited coercion of a husband to divorce a recalcitrant wife.[71]

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.[72] Rather than resolve the debate about the orthodoxy (or lack thereof) of the Gaonic practice, I want to turn to the Islamic chronology, which may elucidate some of the confusion in the authority issues of the Jewish chronology.

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[66] Maimonides (d. 1204; Spain/Egypt), *Mishneh Torah*: 4.I.XIV:9-13 (p. 89-90).

[67] This is evident in many rabbinic texts and appears explicitly in Rabbi Yitzhak Ben Moshe (d. 1250, Vienna), *Ṣefer or zaruʿa*. See text #15 in Appendix I.

[68] See text #16 in Appendix I. See also Westreich, "The rise and decline," 213-14. Rashba claims that "It is now fitting to be very cautious about this issue, and not to act in accordance with this [Gaonic] decree at all, for it has already been nullified because of the generation." Riskin, *A Jewish woman's right to divorce*: 119.

[69] Rabbenu Asher is known as the Rosh. See text #17 in Appendix I. Riskin, *A Jewish woman's right to divorce*: 126-27 (Rosh claims that the Gaonic decree was for a particular generation and that Rabbenu Gershom represented uninterruped rabbinic tradition). See also Elon, *Jewish law*: v. 2, p. 662-65.

[70] The *Shulḥan ʿArūkh* implies that a court will only coerce a husband to divorce his wife in calamitous circumstances. Riskin, *A Jewish woman's right to divorce*: 133.

[71] Ribash is Rabbi Isaac Bar Sheshet (d. 1408, Spain/Algiers) and Rashbatzh (also Tashbatz) is Simeon ben Zemah Duran (d. 1444, Spain/Algiers) Westreich, "The rise and decline," 216-17.

[72] How to interpret the historical evidence of Jewish women initiating divorces is the crucial issue here. Friedman summarized that "Jewish law certainly never empowered a wife to unilaterally issue a *geṭ* and divorce her husband. However, 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, *Geniza studies in Jewish marriage law*: 27.

III. An Islamic chronology of wife-initiated divorce[73]

Legal circles (610-750 CE)

Most of the Qurʾānic verses dealing with the subject of divorce are addressed to men and discuss the post-divorce waiting period and alimony.[74] 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."[75] Major exegetical texts and other historical sources cite a story in which the Prophet approves a woman returning her dower (*mahr*) to effect a divorce.[76] This is corroborated by a report that ʿUmar (d. 644), the second caliph, condemned criticism of women who demand a divorce by forfeiting their dower (what is known as *khulʿ*).[77] Thus, some form of payout is presumed to accompany the act of divorce and it is the initiating party – husband or wife – who effectively pays for termination of the marriage contract.

Examining some of the earliest compilations of reports (*muṣannafāt*) can illuminate the orally-transmitted traditions from the era of the Prophet.[78] These texts indicate at least three late antique Islamic divorce practices, all of which were recognized as valid without judicial intervention:

(1) The most frequently discussed situation is of a husband divorcing his wife and paying a divorce settlement.[79]
(2) A husband offers his wife the option of choosing divorce or staying with him; if she chooses divorce, he pays her a divorce settlement.[80]

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

[74] The relevant verses are Qurʾān 2:228-232, 2:236-237, 2:241; 65:1-7; 4:35.

[75] Qurʾān 2:229. (Translations are my own unless otherwise noted.)

[76] This is a narrative about a woman named Ḥabībah. ʿAbd al-Razzāq ibn Hammām al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf fī al-ḥadīth*, ed. Ḥabīb al-Raḥmān al-ʿAẓamī, 11 vols. (Beirut: al-Maktab al-Islāmī, 1970-), v. 6, 502-03. The same narrative is reported in al-Bukhārī, Abū Dāwūd, al-Nasāʾī, and other texts. Muḥammad ibn Yazīd Ibn Mājah (d. 887; Iran), *Sunan al-Muṣṭafá*, ed. Abī al-Ḥasan Muḥammad Ibn ʿAbd al-Hādī al-Sindī Ḥanafī, 2 vols. (Beirut: Al-Fikr, 1975), v. 1, p. 633 (implying that Ḥabībah pursued khulʿ because her husband was repulsive). See also al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 6, p. 500, no. 2503 & no. 04. Some versions of the narrative suggest that the husband was not consulted, but rather that the Prophet simply ordered the woman (Ḥabībah) to give back the garden she had received as her dower and the husband, upon learning of the Prophet's decision, acquiesced. 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.

[77] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 4, p. 201.

[78] Two of the earliest surviving sources are of al-Ṣanʿānī (d. 827) and Ibn Abī Shaybah (d. 849). I mine these sources for historical information about the mid-seventh to mid-eighth centuries. On the reliability of these sources, see Motzki, "The muṣannaf of ʿAbd al-Razzāq al-Ṣanʿānī." See also Motzki, *Ḥadīth: origins and developments*.

[79] Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 4, kitāb al-talāq, passim. al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 6, passim.

(3) A wife divorces her husband and she pays some form of divorce settlement by relinquishing part or all of her dower.[81]

In other words, the available historical evidence unambiguously records a wife's ability to initiate and to effect a divorce in seventh century Arabia.

Professionalization of legal schools (750-1050 CE)

A comparison between the earlier ḥadīth collections (*muṣannafāt*) with slightly later, canonical ones, reveals that most of the later texts reduce the number of reports about wife-initiated divorce (*khulʿ*) and include reports limiting such divorces to situations of the husband's consent only.[82] This is manifested most clearly in narratives that describe *khulʿ* divorces: wherein earlier texts included women's voices, in later texts it is primarily men enacting *khulʿ*.[83] Thus, whereas *khulʿ* 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.[84] Indeed, most Muslim jurists interpreted narratives about the Prophetic precedent permitting wife-initiated divorce[85] as including a

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[80] This is based on a Prophetic precedent. Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār*: 139-41. al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf*: v. 6, p. 515-26 and v. 7, p. 3-16. Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 4, p. 89-90. Ibn Mājah (d. 887; Iran), *Sunan al-Muṣṭafá*: v. 1, p. 632 (Prophet offered his wives divorce option).

[81] al-Ḥimyarī al-Ṣanʿānī (d. 827; Yemen), *Muṣannaf*: v. 6, 490-91, 94-95, 500-06. Ibn Abī Shaybah (d. 849; Iraq), *Muṣannaf*: v. 4, p. 120-23, 28-29. See also Bukhārī (d. 870; Khurāsān), *Ṣaḥīḥ al-Bukhārī*: v. 7, p. 149-51. Notably, one of the narratives in the latter collection is of a woman who goes to the caliph and states that she regrets divorcing her husband. Such a narrative could only be possible if women had the ability to divorce their husbands. This is also recognized in Shīʿī sources. Madanī (d. 825), *Masāʾil ʿAlī ibn Jaʿfar wa-mustadrakātuhā:* 283 (Imāmī Shīʿī: a woman relinquishes any monetary claims agianst the husband in wife-initiated divorce). There was a minority opinion that prohibited this option and another minority opinion that only permitted it with judicial intervention; but neither of these positions were normative. ʿAblah Kaḥlāwī, *al-Khulʿ: dawāʾ mā lā dawāʾ la-hu: dirāsah fiqhīyah muqāranah* (Cairo: Dār al-Rashād, 2000), 68-69.

[82] I compared the *muṣannafāt* 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). I found that later texts have fewer reports about *khulʿ* and suggest several conditions (including a husband's consent) that were not explicit in earlier texts. Scott C. Lucas, "Divorce, ḥadīth-scholar style: from al-Dārimī to al-Tirmidhī," *Journal of Islamic Studies* 19, no. 3 (2008): 368.

[83] 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 *khulʿ* in the feminine verbal form, but then exclusively or primarily offer examples of men initiating this divorce. See, for example, al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm:* v. 6, p. 502 (discussing khulʿ as a man's prerogative). That many legal texts begin the section on *khulʿ* by discussing a woman's decision to divorce her husband suggests that women had some autonomy in this matter. See, for example, Abū Isḥāq Ibrāhīm ibn ʿAlī ibn Yūsuf Fīrūzābādī al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī*, ed. Zakarīyā ʿUmayrāt and Muḥammad ibn Aḥmad Baṭṭāl, 3 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1995), v. 2, p. 489 (Shāfiʿī; section begins, "if a woman dislikes her husband...she may divorce him..."). But much of the subsequent discussions in these texts focus on a husband verbalizing or effecting the divorce through his oral proclamation.

[84] A husband can divorce through *khulʿ* and pay less than the full settlement if (a) wife is recalcitrant; (b) wife commits a sin; (c) wife is disobedient. ʿAbd al-Raḥmān Jazīrī et al., *Kitāb al-fiqh ʿalá al-madhāhib al-arbaʿah wa madhhab ahl al-bayt*, 5 vols. (Beirut: Dār al-Thaqalayn, 1998), v. 4, 472 (Mālikīs recommending khulʿ divorce of a recalcitrant wife), 73 (Ḥanbalis permitting khulʿ divorce of a recalcitrant wife). See also ʿĀmir Saʿīd Zaybārī, *Aḥkām al-khulʿ fī al-sharīʿah al-islāmīyah* (Beirut: Dār Ibn Ḥazm, 1997), 75-76.

[85] See footnote 76.

requirement of the husband's consent[86] or as being prompted by a situation of abuse.[87] Additionally, some legal texts of this period associate wife-initiated divorce (*khulʿ*) and recalcitrant wives, which is not evident in ḥadīth compilations.[88] Consequently, the legal possibility that seems to emerge in this period is a husband's option to divorce his wife and not pay the full dower if she is considered recalcitrant (*nashiz*).[89] The legal option of husbands paying less than the divorce settlement does not have a Prophetic legal precedent.[90] Instead, it appears to have been elaborated by Muslim jurists in this period; notably, it resembles the rabbinic practices mentioned above. Regardless of the initiating party (wife or husband), jurists debated the classification of *khulʿ* as either a revocable divorce or irrevocable rescission.[91] To summarize, by the end of the professionalization period, the following divorce practices were recognized[92]:

(1) A husband divorces his wife for whatever reason and pays the divorce settlement in full.

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[86] 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, "The dawning," 20.

[87] 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, "Divorce, ḥadīth-scholar style: from al-Dārimī to al-Tirmidhī," 368. Some sources includes several reports implying that it is wrong for a woman to demand a divorce without sufficient "justification." See Ibn Mājah (d. 887; Iran), *Sunan al-Muṣṭafá*: v. 1, p. 632-33. And see Tirmidhī (d. 892; Khurāsān), *Sunan al-Tirmidhī wa-huwa al-Jāmiʿ al-ṣahīḥ*: v. 2, p. 429-30 (narratives about the evils of a woman demanding a divorce without sufficient justification). By way of illustration, Nasāʾī (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). Kaḥlāwī, *al-Khulʿ*: 63. See also al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 71-72 (Shāfiʿī: Jamīlah pursued a khulʾ divorce because her husband was abusive). But see that 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 *khulʿ*) her husband. Sulaymān ibn Khalaf Bājī (d. 1081; Spain), *al-Muntaqá: sharḥ muwaṭṭaʾ Mālik*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā, 9 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1999), v. 5, p. 295-300.

[88] Again, this is based on my comparison of *muṣannafāt* to later collections. See the beginning of the section on *khulʿ* in Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 2, 241-51. Reports about a recalcitrant wife and wife-initiated divorce are juxtaposed in al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 6 (kitāb al-khulʿ wa al-nushūz). The section on recalcitrance (*nushūz*) appears immediately before the section on wife-initiated divorce (*khulʿ*) in al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 71-78 (Shāfiʿī: section on recalcitrance immediately precedes section on khulʿ). In a different edition: al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 486-99. Some Muslim jurists viewed *khulʿ* as being only permissible in situations of recalcitrance or loathing. Kaḥlāwī, *al-Khulʿ*: 68.

[89] According to the Mālikī school and others. See Jazīrī et al., *Kitāb al-fiqh*: v. 4, p. 472.

[90] In other words, there are no references to this practice in biographical or historical texts; in addition, the jurisprudential texts do not cite a Prophetic precedent. 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.

[91] Awzāʿī (d. 774; Syria), *Sunan al-Awzāʿī*: 338 (Awzāʿī: khulʿ is a revocable divorce). Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār*: p. 129 (Ḥanafī: a separation initiated by the wife is irrevocable). Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 2, p. 196 (Ibāḍī: khulʿ is a revocable divorce). Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *al-Risālah al-fiqhīyah*: 202 & 05 (Mālikī: khulʿ is irrevocable). Note, there are conflicting opinions within each legal school; see Kaḥlāwī, *al-Khulʿ*: 113-17 (summarizing which jurists/legal schools view khulʿ as irrevocable or revocable divorce).

[92] Ibn Ḥazm synopsizes juristic opinions by noting that some jurists prohibit *khulʿ*, 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). Ibn Ḥazm (d. 1064; Spain), *Marātib al-ijmāʿ fī al-ʿibādāt wa-al-muʿāmālat wa-al-iʿtiqādāt*: p. 74-75 (Ẓāhirī). See also Ibn Ḥazm (d. 1064; Spain), *al-Muḥallā*: v. 10, p. 286-97 (Ẓāhirī).

(2) A husband divorces his wife and pays less than the divorce settlement under the category of *khulʿ*, possibly because the wife is recalcitrant or immoral.[93]
(3) A court declares a wife divorced and the husband pays the divorce settlement for the following reasons:
   a. if the husband is impotent or has a severe defect or disease[94]
   b. if the husband deserts the wife, fails to provide her maintenance, or is cruel[95]
   c. if the husband is insane[96]
(4) A wife divorces her husband[97] and forfeits the divorce settlement (dower) partially, completely, or even in excess under specific circumstances.[98] According to many jurists, the husband's consent is required.[99]
(5) A husband offers his wife the option of choosing divorce or staying with him; if she chooses divorce, he pays her a divorce settlement.[100]

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[93] Ḥanbalīs prohibit his taking more than the wife's dower, whereas Mālikīs and Shāfiʿīs permit husbands to take as much as, less than, or more than the dower amount he gave her. Awzāʿī (d. 774; Syria), *Sunan al-Awzāʿī*: 338 (Awzāʿī: a husband may not take more than the dower in a khulʿ divorce). al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Umm*: v. 6, p. 501. Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 2, p. 195 (Ibāḍī: husband may not take more than dower in khulʿ). Ibn ʿAbd al-Barr (d. 1070; Spain), *Kitāb al-kāfī*: v. 2, p. 593 (Mālikī: defining khulʿ as wife losing entire dower and fidya as wife losing part of dower). See also Kuwait, *al-Mawsūʿa al-fiqhiyyah*, vol. 19 (Kuwait: Ministry of trusts and Islamic affairs, 1990), 243.

[94] "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. ʿAlī ibn Abī Bakr Marghīnānī (d. 1197; Farghāna), *The Hidaya: commentary on the Islamic laws*, trans. Zahra Baintner, 2 vols. (Karachi: Darul Ishaat, 2007), v. 2, p. 217 (Ḥanafī). See also Jazīrī et al., *Kitāb al-fiqh*: passim.

[95] al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 17, p. 110-12 (Shāfiʿī: if a husband cannot support his wife, they are divorced). See also Kuwait, *al-Mawsūʿa al-fiqhiyyah*, 19.

[96] But, there is a Ḥanafī opinion that a woman cannot demand judicial divorce if her husband is mentally incompetent or has a serious disease. Marghīnānī (d. 1197; Farghāna), *The Hidaya*: v. 2, p.219 (Ḥanafī). See also Kuwait, *al-Mawsūʿa al-fiqhiyyah*, 19.

[97] A wife can demand *khulʿ* if (a) wife finds husband disgusting (incompatibility); (b) husband is abusive; (c) wife fears that she cannot be faithful. Sarakhsī (d. 11th cent; Transoxania), *Kitāb al-Mabsūṭ*: v. 6, p. 171 (Ḥanafī: "if a woman divorces her husband...").

[98] The possibility that a husband could take in excess of the dower was a subject of juristic debate. Mālik Ibn Anas (d. 796; Arabia), *Muwaṭṭaʾ al-Imām Mālik*, ed. ʿAbd al-Wahhāb ʿAbd al-Laṭīf, 2nd ed. (Beirut: al-Maṭbaʿah al-ʿIlmīyah, 1979), 188-89 (unfavorable, but permitted, for husband to take more than dower in khulʿ). Ibn Mājah (d. 887; Iran), *Sunan al-Muṣṭafá*: v. 1, p. 633 (wife returns only her dower, not more, in khulʿ). Ibn Barakah (d. 10th; ʿUmān), *Kitāb al-jāmiʿ*: v. 2, p. 195 (Ibāḍī: it is not permissible for a husband to take more than the dower in khulʿ). Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *al-Risālah al-fiqhīyah*: p. 205 (Mālikī: a wife may offer her dower, less, or more in khulʿ).

[99] While all the legal schools accept the validity of *khulʿ*, most legal schools view it as a negotiated settlement. Ibn Ḥazm (d. 1064; Spain), *al-Muḥallā*: v. 10, p. 286 (Ẓāhirī: khulʿ only by mutual consent). Ḥanafīs require the husband to accept the wife's *khulʿ* offer in order for a divorce to be valid. Jazīrī et al., *Kitāb al-fiqh*: v. 4, 494. This resembles the common – although likely not universal – rabbinic perspective that a husband must deliver a *get* for a divorce to occur.

[100] Ibn Anas (d. 796; Arabia), *Muwaṭṭaʾ al-Imām Mālik*: p. 191-92 (giving wife divorce option with full dower). Abū Yūsuf (d. 798; Iraq), *Kitāb al-āthār*: p. 139-41 (Ḥanafī: women given choice to divorce and receive dowers). Bishr ibn Ghānim al-Khurāsānī al-Ibāḍī (d. ca. 815; Khurāsān), *Mudawwanah al-kubrá*, 2 vols. (Oman: Wizārat al-Turāth al-Qawmī wa-al-Thaqāfah, 1984), v. 2, p. 56-67 (Ibāḍī). Sarakhsī (d. 11th cent; Transoxania), *Kitāb al-Mabsūṭ*: v. 6, p. 210-23 (Ḥanafī: giving wife divorce option with full dower). Ibn ʿAbd al-Barr (d. 1070; Spain), *Kitāb al-kāfī*: v. 2, p. 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. Ibn Ḥazm (d. 1064; Spain), *al-Muḥallā*: v. 10, p. 144-53 (Ẓāhirī).

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

Consolidation (1050-1400 CE)

By the late medieval period, Muslim jurists had elaborated more details surrounding the divorce practices of the professionalization period.[101] Jurists developed a taxonomy for divorce settlement types paid by a wife by trying to assign different terms for divorces in which the wife loses the dower, or more or less than the dower.[102] They also continued to debate the classification of wife-initiated divorce as a revocable or irrevocable divorce (roughly equivalent to breach and rescission of the marriage contract).[103] To summarize, Ḥanafīs, Mālikīs, later Shāfiʿīs, minority Ḥanbalīs, Ẓāhirīs, and a majority of late antique jurists viewed *khulʿ* as equivalent to divorce and, therefore, revocable; but earlier Shāfiʿīs, a majority of Ḥanbalīs, and a minority of late antique jurists considered *khulʿ* to be *faskh*, with the result that it is irrevocable.[104] While there is no indication that jurists prohibited any of the divorce

[101] Ibn Rushd summarizes these medieval juristic perspectives: "Five opinions are, thus derived for *khulʿ*. First, that is not permitted at all. Second, it is permitted in all circumstances, that is, even under duress. Third, it is not permitted unless fornication is witnessed. Fourth, it is permitted when there is fear that the limits imposed by Allāh will not be maintained. Fifth, that it is permitted in all circumstances, except under duress, which is the most widely accepted (*mashhūr*) opinion." Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 2, p. 81.

[102] Jurists debated the permissibility of a husband taking more than the dower from the wife in *khulʿ*. Ibn Rushd summarizes this debate: "The term *khulʿ*, 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 *mubāraʾah* to her writing off a claim that she had against him." Ibid., v. 2, p. 79. Still, there is a difference of opinion on the possibility of a husband taking more than the divorce settlement in *fidya*. See also: Marghīnānī (d. 1197; Farghāna), *The Hidaya*: v. 2, p. 194-95 (Ḥanafī: it is legally permissible for husband to take more than the dower). Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 10, p. 269-70 (Ḥanbalī: it is permissible, but unfavorable, for husband to take more than dower; notes conflicting juristic opinions). Majd al-Dīn Abī al-Barakāt ʿAbd al-Salām ibn ʿAbd Allāh ibn al-Khiḍr Ibn Taymīyah al-Ḥarrānī (d. 1254/5; Syria/Iraq), *Muḥarrar fī al-fiqh ʿalá madhhab al-Imām Aḥmad ibn Ḥanbal*, ed. Shams al-Dīn Ibn Mufliḥ al-Ḥanbalī al-Maqdisī (d. 1362; Syria), Muḥammad Ḥasan Muḥammad Ḥasan Ismāʿīl, and Aḥmad Maḥrūs Jaʿfar Ṣāliḥ, 2 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 1999), v. 2, p. 99 (Ḥanbalī: khulʿ divorce settlement may not exceed dower). Muḥaqqiq al-Ḥillī (d. 1277; Iraq), *Mukhtaṣar*: 227-28 (Imāmī Shīʿī: discussing debate about fidya). The majority Shāfiʿī opinion permits a husband to take more than the dower as part of the *khulʿ* divorce settlement, whereas the minority Shāfiʿī opinion disapproves of this practice. al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 16, p. 8-9 (Shāfiʿī: discussing divorce settlement amounts). Shahīd al-Awwal (d. 1384; Syria), *al-Lumʿah*: 199-200 (Imāmī Shīʿī: he may take more than the dower in khulʿ; he may not take more than dower in mubāraʾah). The two main juristic opinions (for and against a husband taking more than the dower in a *khulʿ* divorce) are summarized in Kaḥlāwī, *al-Khulʿ*: 140-43.

[103] Zamakhsharī explains that *khulʿ* is a revocable divorce (*ṭalāq*) for Ḥanafīs, whereas it is an irrevocable divorce (*faskh*) for Shāfiʿīs. The difference is that Ḥanafīs permit reconciliation between the spouses under the original contract, whereas Shāfiʿīs do not. Zamakhsharī (d. 1144; Khwārazm), *Ruʾūs al-masāʾil (al-masāʾil al-khilāfīyah bayna al-Ḥanafīyah wa-al-Shāfiʿīyah)*: 404-06. See also: Maḥmūd ibn Aḥmad Marghīnānī (d. 1219/20; Farghāna), *al-Muḥīṭ al-burhānī fī al-fiqh al-Nuʿmānī*, ed. Aḥmad ʿIzzū ʿInāyah, 11 vols. (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2003), v. 3, p. 501 (Ḥanafī: khulʿ is revocable divorce). Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 10, p. 274-75 (Ḥanbalī: cites conflicting reports among jurists about khulʿ as revocable or irrevocable). Ibn Taymīyah al-Ḥarrānī (d. 1254/5; Syria/Iraq), *Muḥarrar*: v. 2, p. 98 (Ḥanbalī: khulʿ is an irrevocable divorce). Muḥaqqiq al-Ḥillī (d. 1277; Iraq), *Mukhtaṣar*: 227 (Imāmī Shīʿī: summarizing debate on revocability of khulʿ). al-Zaylaʿī al-Ḥanafī (d. 1342/3) et al., *Tabyīn al-ḥaqāʾiq*: v. 3, p. 182 (Ḥanafī: khulʿ is irrevocable divorce).

[104] Muṣṭafá Dhahabī, *al-Khulʿ wa-aḥkāmuhu fī al-sharīʿah al-islāmīyah* (Cairo: Dār al-Ḥadīth, 2000), 60.

types previously practiced[105], the distinctions between earlier and later legal texts imply that a woman's access to divorce became limited to particular circumstances.[106] In theory, women still had the legal right to divorce their husbands by paying a divorce settlement.[107] Yet, juristic restrictions (as outlined in jurisprudential texts) seem to have limited this right to cases where a wife could establish grounds for divorce or to situations where the husband concedes to the divorce settlement.[108] Notably, juristic discussions of wife-initiated divorce often occur adjacent to or in conjunction with the topic of recalcitrance.[109] Still, court records

[105] For instance, men continued to give women the option of divorce and receiving the full divorce settlement, as evidenced in medieval juristic texts. Marghīnānī (d. 1197; Farghāna), *Guidance*: 593-605 (Ḥanafī: women given choice to divorce and receive dowers). al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 83-84 (Shāfiʿī: husband gives wife option to divorce and receive full dower). al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 16, p. 88-93 (Shāfiʿī: husband offers wife divorce option). Jurists distinguish between "*takhyīr* (granting a choice) and *tamlīk* (granting possession of the right)." Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 2, p. 84 (summarizing the juristic debates on these divorce types). *Fatāwá al-ʿĀlamgīrīyah (1664-1672)*: v. 1, p. 387-409 (Ḥanafī: men giving women divorce option without losing dower).

[106] For example, a Shāfiʿī text cites the main ḥadīth (as precedent) about a woman (Jamīlah) who pursued a *khulʿ* divorce because her husband was abusive, but jurists cautioned against allowing *khulʿ* when a husband is intentionally abusive in order to avoid paying the divorce settlement. al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 16, p. 3-6 (Shāfiʿī: physical abuse as provoking wife-initiated divorce). Notably, this suggestion that Jamīlah's husband was abusive is not cited in many other versions of this narrative. Other texts cite a narrative about a woman (Ḥabībah) who initiated a divorce because she found her husband repulsive. Nūr al-Dīn ʿAlī ibn Abī Bakr Haythamī (d. 1405), *Ghāyat al-maqṣūd fī zawāʾid al-Musnad*, ed. Khalāf Maḥmūd ʿAbd al-Samīʿ, 4 vols. (Beirut: Dār al-Kutub al-ʿIlmīyah, 2001), v. 2, p. 267-68 (Shāfiʿī: implying that Ḥabībah pursued khulʿ because her husband was repulsive). This particular language about a wife being repulsed by her husband corresponds to the rabbinic terminology of when a woman may initiate divorce (see previous section).

[107] Ibn Rushd notes that "there is no dispute that a woman possessing discretion (a *rashīda*) has a right to transact redemption herself." Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 2, p. 82. See also Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 10, p. 267 (Ḥanbalī: wife has the right to "ransom" divorce). al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 16, p. 2 (Shāfiʿī: "if a woman loathes her husband...she may remove him by [paying] compensation..."). But numerous legal texts apply the term *khulʿ* to a *husband* divorcing his wife and not paying the full divorce settlement. See, for example, al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 490-91 (Shāfiʿī). Most legal texts recognize that either spouse may divorce the other through *khulʿ*. al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 16, p. 37 (Shāfiʿī: either spouse initiates khulʿ). *Fatāwá al-ʿĀlamgīrīyah (1664-1672)*: v. 1, p. 488 (Ḥanafī: khulʿ 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.

[108] Ibn Rushd explains "the conditions in which redemption is permissible, the majority held that it is permitted with the mutual consent of the parties, unless consent to pay him is obtained by fear of injury to her." Ibn Rushd II (d. 1198; Spain/Morocco), *Jurist's Primer*: v. 2, p. 81. Marghīnānī (d. 1197; Farghāna), *The Hidaya*: v. 2, p. 194 (Ḥanafī: implying that khulʿ necessitates mutual consent). *Fatāwá al-ʿĀlamgīrīyah (1664-1672)*: v. 1, p. 488 (Ḥanafī: implying through dual verbal form that khulʿ is mutual agreement between spouses). Jurists acknowledge that either spouse may initiate *khulʿ*, but do not account for how to deal with a husband's refusal. Ibn al-Naqīb (d. 1368; Egypt), *ʿUmdat al-sālik wa-ʿuddat al-nāsik*: 336 (Shāfiʿī: khulʿ is permissible when one or both spouses want to end the marriage).

[109] Ibn Taymīyah al-Ḥarrānī (d. 1254/5; Syria/Iraq), *Muḥarrar*: v. 2, p. 95 & 97 (Ḥanbalī: section on recalcitrance immediately precedes section on khulʿ). al-Zaylaʿī al-Ḥanafī (d. 1342/3) et al., *Tabyīn al-ḥaqāʾiq*: v. 3, p. 185 (Ḥanafī: Prophetic precedent concerning Ḥabibah's khulʿ divorce is explicitly interpreted as an example of a woman's recalcitrance). *Fatāwá al-ʿĀlamgīrīyah (1664-1672)*: v. 1, p. 488 (Ḥanafī: associating khulʿ with nushūz of either spouse). Contemporary Egyptian Islamist-feminist ʿAblah Kaḥlāwī begins her monograph on *khulʿ* with a discussion of recalcitrance (*nushūz*), but argues that recalcitrance is not a condition for *khulʿ* divorces. Kaḥlāwī, *al-Khulʿ*: 64.

from later Islamic periods establish that women continued to acquire divorces by forfeiting part or all of their dowers.[110]

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 situations where the wife was deemed recalcitrant.

IV. Disenchanting the orthodox narratives[111]

Thus far, I have presented two distinct chronologies – one Judaic and the other Islamic – that outline 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 orthodox Islamic legal story construes historical (specifically Prophetic) precedents as requiring a husband's consent to wife-initiated divorce. Distinctions between the legal practices of the late antique and medieval periods are elided to create a seamless narrative of women only being able to negotiate a divorce by forfeiting their dowers – or more.

Similarly, the orthodox Jewish legal story narrates legal changes to legitimate contemporary dominant practice. In what is described as the Rabbinic period (70-620 CE), women did not have a no-fault divorce option because they could only initiate a divorce if they could prove just cause. In the Gaonic 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" Gaonic practice and returned Jewish law to its "original" foundations by prohibiting women from no-fault divorce.

These separated chronologies legitimate orthodox jurisprudence and foster problematic misconceptions. 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 Gaonic practice of coercing a husband to divorce a "recalcitrant" wife was normative for centuries until its gradual undermining in the late medieval period.

I want to focus on problematizing a specific point of intersection between these two narratives: the orthodox Jewish narrative characterizes the Gaonic enactment (*taqqanah*) as an innovation (i.e. lacking talmudic precedent) caused by Islamic "influence" and many scholars accept this perspective.[112] The question I want to explore is why this Gaonic decree has been interpreted – both by some Rishonim and by some contemporary scholars – as having deviated

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[110] See Ronald C. Jennings, "Divorce in the Ottoman sharia court of Cyprus, 1580-1640," *Studia Islamica*, no. 78 (1993).

[111] 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. (December 20, 2011).

[112] See footnote 50. But see Friedman, who argued that wife-initiated divorce was a pre-Islamic Jewish custom. Friedman, "The ransom-divorce," 298.

from Talmudic practice.[113] This Gaonic decree's classification is the site of a contest for legal 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 Gaonic decree as an "innovation" caused by the "influence" of Gentile courts. Contemporary scholars have presumed that the Gentile courts were Islamic and thereby characterize the Gaonic decree as being caused by Islamic pressure – of some kind.[114] But these two characterizations of "innovation" and "influence" must be reevaluated because they obscure a complicated historical struggle for legal authority. Discrediting the Gaonic legal practice of facilitating a recalcitrant wife's divorce claim may be a manifestation of Western rabbinic authority overpowering Eastern rabbinic authority.[115]

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 impelled by interpretations of the Gaonic 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.[116] 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.[117] Therefore, the historical and contemporary interpretation of this decree has significant stakes for Jewish legal practice.

[113] My claim is that the characterization of the Gaonic decree as deviating from the Talmud or as exceeding the limits of Gaonic authority is implicitly based on an evaluation of the Gaonic context. In other words, those Rishonim who rejected the Gaonic ordinance as an innovation did so because they believed it was "caused" by Islamic influence. Case in point, Westreich describes 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.'" Westreich, "The rise and decline," 217 (citing *Hilkhot ha-Rosh*, Ketubot 85, sec. 35).

[114] Contemporary scholars perpetuate these assumptions about "innovation" and "influence." For instance, like other contemporary scholars, Brody characterizes the Gaonic 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, *The geonim of Babylonia:* 62 (emphasis added).

[115] As Libson observed, "Rejections of geonic rulings are more common among Ashkenazi scholars, who allowed themselves more latitude in legal decisions than the Sephardim." Libson, "Halakhah and law," 241.

[116] See footnote 19. Jewish wives appear to have been able to initiate divorce in Babylonia (possibly prior to the Gaonic 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 *Shulḥan 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, "The rise and decline," 207.

[117] See footnote 18. But see Brody, "Evidence for divorce by Jewish women?." See also Libson, *Jewish and Islamic law*: 158.

Challenging the conventional narrative: reevaluating causal influence

At the time of the Gaonic decree (mid-7th century),[118] a minority of the population was Muslim and Islamic courts were not adjudicating outside the garrison towns established during the Arab/Muslim conquests.[119] 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 that the Gaonim "deviated" from Talmudic practice in order to defend against the threat of Muslim "influence" – coercive or otherwise – is based on inaccurate historical evidence.[120] Because the majority population at this time was likely Christian or Zoroastrian, it is essential to examine the Eastern Christian and Zoroastrian legal practices pertaining to wife-initiated divorce. Among Christians and Zoroastrians, women returning their dowers in order to effect a divorce is a historically-verified practice.[121] Since even after the Muslim conquests local communities operated courts, the Gentile courts that provoked the Gaonic decree may not have been Islamic.[122] 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.[123] Moreover, it is particularly improbable that any potential Islamic legal "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 Muslim 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, Gaonic rabbis likely reduced the

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[118] Libson dates the decree to 650 or 651 and while it may be possible to date it to a slightly later period, these historical observations hold true. Libson, *Jewish and Islamic law*: 111.

[119] 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 the internal legal affairs of Jews. Michael G. Morony, *Iraq after the Muslim conquest* (Princeton, N.J.: Princeton University Press, 1984), 320, 518. In contrast, Libson rejects that the decree's proximity in time to the Arab/Muslim conquests weakens the assumption of influence. Libson, "Halakhah and law," 238. But Libson does not provide historical evidence about the administration of Islamic courts in the mid-seventh century to substantiate his influence claim.

[120] Indeed, common interpretations of the Gaonic decree suggest prejudicial and anachronistic assumptions. For example, a contemporary scholar argues that the Gaonic 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." (my translation) Yehudah Zvi Stampfer, "Islamic influence in the divorce laws of Rav Samuel Ben Hofni Gaon and the Rambam," in *ʿAle ʿasor: divre ha-veʿidah ha-ʿasirit shel ha-hevrah le-heker ha-tarbut ha-ʿArvit-ha-yehudit shel yeme-ha-benayim*, ed. Congress Society for Judaeo-Arabic Studies, et al. (Beer-Sheva: Hotsaat ha-sefarim shel Universitat Ben-Guryon ba-Negev, 2008), 312. It is unacknowledged that the majority of the population in Iraq (or the Near East more generally) was Christian and did not become Muslim until several centuries later.

[121] See footnotes 153, 156, 158, and 161.

[122] See footnote 119.

[123] For debates among Muslim jurists, see, by way of example, the various opinions on the necessity of having a legal justification or court involvement for *khulʿ*. Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 10, p. 268-69 (Ḥanbalī: conflicting reports about necessity of court involvement in khulʿ). See also Dhahabī, *al-Khulʿ wa-aḥkāmuhu fī al-sharīʿah al-islāmīyah*: 51-59. Gil noted that "there was still no clear-cut Muslim law with regard to divorce." Moshe Gil, *A history of Palestine, 634-1099* (Cambridge; New York: Cambridge University Press, 1992), 164. Libson acknowledges this possibility, but discounts it. Libson, "Halakhah and law," 238.

waiting period; this practical modification can be interpreted as responding to a communal necessity – 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. 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,[124] they apparently still frequented state (i.e., Islamic) courts.[125] Since even in places where rabbinic courts facilitated wife-initiated divorce, Jewish women availed themselves of state (i.e., Islamic) courts, the Gaonic enactment did not prevent Jewish women from accessing other legal options.[126] To appreciate the dynamics of legal pluralism, we need to recognize such complexities as venue shopping and socio-economic barriers to legal consumerism.

In addition, the "influence" theory does not sufficiently explain how the Gaonic enactment "protected" the Jewish community from two realities: the availability of state (i.e. Islamic courts) that facilitated a Jewish wife's divorce and the possibility of conversion.[127] 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).[128] Ostensibly, the Gaonim 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.[129] Yet a

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[124] Westreich notes that at the end of the 14th century, "Jewish communities living in a distinctively Moslem [sic] environment where the rebellious wife suit was accepted without question." Westreich, "The rise and decline," 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 exceeded their dowers. See Goitein, *A Mediterranean society*: v. 3, p. 266.

[125] Goitein mentions a Jewish woman who divorced her husband in an Islamic court. Goitein, *A Mediterranean society*: v. 3, p. 265. 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* (Leiden: E.J. Brill, 1984), 67 ("sixteenth 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, "Dhimmis in the Muslim court: legal autonomy and religious discrimination," *International Journal of Middle East Studies* 31, no. 3 (1999): 435.

[126] It may, however, be the case that Jewish (rabbinic) 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.

[127] Libson, *Jewish and Islamic law*: 111.

[128] An anonymous thirteenth century text identifies both moral indecency and apostasy as causal factors motivating the Gaonic decree. Riskin, *A Jewish woman's right to divorce*: 52-53.

[129] 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. al-Shāfiʿī (d. 820; Arabia/Egypt), *al-Kitāb al-Umm*: v. 5, kitāb al-nikāḥ, p. 149 (Shāfiʿī: if a woman becomes Muslim and her husband does not convert within the waiting period, they are divorced). Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah:* v. 2, p. 216 (Mālikī: a woman's conversion to Islam constitutes divorce unless husband converts within waiting period). Tirmidhī (d. 892; Khurāsān), *Sunan al-Tirmidhī wa-huwa al-Jāmiʿ al-ṣahīḥ*: v. 2, p. 405 (husband of Prophet's daughter became Muslim within her waiting period; this is the opinion of Mālik ibn Anas, al-Awzāʿī, al-Shāfiʿī, Aḥmad, and Isḥāq). Ibn Abī Zayd al-Qayrawānī (d. 996; Tunisia), *al-Risālah al-fiqhīyah*: p. 196 (Mālikī: a non-Muslim woman who becomes Muslim is divorced from her non-Muslim husband unless he converts). Ibn Ḥazm (d. 1064; Spain), *al-Muḥallā:* v. 7, p. 364 (Ẓāhirī: a woman who becomes Muslim while married to a non-Muslim is divorced immediately). al-Shīrāzī (d. 1083; Iran), *al-Muhadhdhab*: v. 2, p. 456 (Shāfiʿī: a woman who becomes Muslim is

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.[130]

How could the Gaonic rabbis have compelled a husband to deliver a divorce decree instantaneously when husbands very often delayed the process? If the Gaonic practice removed the twelve-month waiting period and then relied on coercing the husband to grant a wife a divorce, then 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 Karaites did accept judicial divorce decrees and that Maimonides denounced the practice as heretical.[131] Notably, the specific wording of several Gaonic texts implies that courts granted or gave Jewish women divorces, without explicitly delineating that the courts coerced husbands to deliver divorce decrees.[132] 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 the sectarian influence of Karaites. Western rabbinic jurists may have marked the boundaries of rabbinic orthodoxy against Karaite "heresy" through this particular legal issue. The extent to which generalizations may be made from this case study

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divorced after the waiting period unless her husband also converts). Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v. 10, p. 8-10 (Ḥanbalī: a woman who becomes Muslim is divorced after the waiting period unless her husband also converts). al-Nawawī (d. 1277; Syria) et al., *al-Majmūʿ*: v. 15, p. 451-59 (Shāfiʿī: a woman's conversion to Islam is divorce). See also text #9 in Appendix I.

[130] 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-ʿĀṣī) and the latter was not forced to convert, although he did so eventually. There are other narratives from the Prophetic era about non-Muslim husbands being given time (one month to several months) to convert after their wives became Muslim. Medieval jurists seem to have understood the Prophetic practice of giving husbands an opportunity to convert as corresponding to the divorce waiting period. (See, for example, Saḥnūn (d. 854; Tunisia) et al., *al-Mudawwanah*: v. 2, 211-15 (Mālikī).) But it is conceivable that some jurists interpreted historical narratives in such a way as to legitimate the judicial practice of a divorce waiting period because the key precedential issue is the amount of time between the conversion of the Prophet's daughter and her husband. 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. Tirmidhī (d. 892; Khurāsān), *Sunan al-Tirmidhī wa-huwa al-Jāmiʿ al-ṣahīḥ*: v. 2, p. 405 (citing six years between the conversion of the Prophet's daughter and her husband). Similarly, Ibn ʿAbbās 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. Ibn Qudāmah al-Maqdīsī (d. 1223; Syria), *al-Mughnī*: v, 10, p. 10-11 (Ḥanbalī).

[131] "Au XI^{e} 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 decision juridique constitue une difference important par rapport au droit rabbanite. Par consequent, un divorce caraïte obtenu de telle façon ne pouvait être valable selon la loi rabbanite. Cependant, il semble que le divorce par decision juridique avait un caractère exceptionnel et que la façon la plus répandue de divorcer nécessitait toujours la redaction d'une letter 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," *Revue des Études Juives* 155, no. 3 (1996): 342. But note that I disagree with the author's characterization of this Karaite practice as being based on Islamic "influence."

[132] See text #6 and #8 in Appendix I.

to broader processes of sectarian resistance and regional competition in the shaping of rabbinic Jewish orthodoxy is a matter for further research.

Challenging the conventional narrative: giving voice to the Gaonim

Most Gaonim did not view their practice of facilitating wife-initiated divorce as divergent from Talmudic traditions.[133] The Gaonic enactment included two aspects: (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 grant a recalcitrant wife a divorce.[134] The Gaonim perceived the first aspect as new, but not the second.[135] Yet, later rabbinic authorities interpreted both aspects of the decree as "innovative," despite the Gaonic perspective that they had preserved rabbinic Jewish tradition.[136] The orthodox narrative thereby marks as heretical the prolonged practice of Gaonic communities who facilitated wife-initiated divorce.[137]

What underlies the characterization of the Gaonic decree as an "innovation" is the causal presumption of "influence." It is commonly assumed that the availability of divorce for women in contemporaneous Islamic courts led Gaonic rabbis to modify divorce practices.[138] However, Gaonic texts do not explicitly identify Islamic courts as being a causal influence on the decree. For example, Naṭrōnāī ben Hilāī (or Natronai Gaon, d. 9th century, Iraq) explained the rationale for the decree as "so that Jewish women should not stray towards lewdness and indecency."[139] Some Gaonic sources do not mention a reason for the enactment.[140] Of course, these Gaonim 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

[133] 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, "The rise and decline," 209. See also Friedman, *Jewish marriage in Palestine*: v. 1, p. 324.

[134] A third aspect concerns the dower payment since Gaonim made it collectable on movable property. Libson, "Halakhah and law," 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 chapter allows.

[135] Since the Gaonim 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 *taḳḳanah* being the stipulation that divorce be granted forthwith, without delay." Ibid. See also Westreich, "The rise and decline," 209.

[136] 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 *taḳḳanah* itself were not known, the interpretation became a matter of controversy among the Geonim themselves. It is therefore difficult to determine the *taḳḳanah*'s precise degree of *deviation* from Talmudic law proper." Libson, "Halakhah and law," 236 (emphasis added).

[137] By way of example, Geniza evidence indicates that in Palestinian marriage contracts of the 10th and 11th centuries, "Either party was empowered, thereby, to demand a divorce for purely subjective reasons and was not compelled to prove cause." Friedman, *Jewish marriage in Palestine*: v. 1, p. 330.

[138] "There is no doubt that the redress open to women in the Shariʿa courts spurred the geonim to provide similar redress in Jewish law." Libson, *Jewish and Islamic law*: 111. See also Westreich, "The rise and decline," 217-18.

[139] Riskin, *A Jewish woman's right to divorce*: 51. See text #17 in Appendix I.

[140] *Halakhot gedolot* does not explain the enactment's rationale. Ibid., 48-49.

historical interpretations. In light of the aforementioned historical evidence, early Gaonim 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 court can legitimately coerce a Jewish husband to divorce his wife.[141] In Sherira Gaon's lifetime, Islamic courts were prevalent and, when petitioned by Jewish wives, they coerced Jewish husbands to deliver divorce decrees – or possibly granted divorce decrees to Jewish wives.[142] Sherira Gaon may have anachronistically interpreted the reasons for the seventh-century Gaonic decree based on his own reality; that is, since Sherira was surrounded by Islamic courts, he may have simply assumed that his Gaonic predecessors were likewise "competing" with Muslim jurists for Jewish litigants. Notably, Sherira Gaon is the only known Gaonic figure to attribute the influence of Gentile courts to the Gaonic decree.[143]

Which context?

What is problematic about "influence" as a characterization for a particular historical event? "Influence" is really code for "infiltration" or "impurity." The orthodox understanding of the Gaonic 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 Gaonic decree as unorthodox.[144] What is notable about the orthodox narrative is that Catholic "influences" are unacknowledged or minimized, while Muslim "influences" are vilified – and both legal systems are drastically oversimplified.[145]

While it is not surprising that Western Rishonim did not describe their annulling of the Gaonic 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

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[141] Ibid., 58. See also Elon, *Jewish law*: v. 2, p. 659-60.

[142] 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. Maimonides (d. 1204; Spain/Egypt), *Mishneh Torah*: p. 177-78, 4.II.II.20.

[143] Riskin, *A Jewish woman's right to divorce*: 74 (citing Tykocinski as having made this observation).

[144] See footnote 71 (discussing "Western" Rishonim who overruled North African practices in the late fourteenth century). This is also discernible in the writing of Maimonides (see text #13 in Appendix I).

[145] 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, "The rise and decline," 218. Compare this to Westreich's description of Muslim 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'...the geonic ordinance clearly originated as a result of factors that, although directly affecting Jewish circumstances, were extraneous to *Halakhah*." Ibid., 217-18. The historical evidence presented above establishes that no such Islamic "influence" existed for the Gaonic decree.

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."[146] Westreich explicitly observes that Rabbenu Tam's legal opinion against the recalcitrant wife divorce occurred "as Christian society became monogamous and imposed Catholic laws making divorce impossible."[147] Contemporary scholars pose a question about the "influences" that provoked the Gaonic 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 are constituted by their contexts. Just as the Gaonim 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 Gaonic decree and its abolition by Western Rishonim – are both reflective of and mediated by their contexts. Late medieval, Western jurists marked a seventh-century Gaonic decree as an "innovation" caused by Gentile "influence" within a struggle for legal authority: the Gaonic decree was marked as "deviant" not because it occurred under Gentile "influence," but because its revocation occurred in a Western-Catholic 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. Comparison and contextualization can move us beyond simplified notions of "influence" that are themselves legal-political strategies.

This brief exploration into the Gaonic decree on a recalcitrant wife indicates that our task is to situate Jewish law in historical contexts based on evidence and, in doing so, to resist uncritically accepting the suppositions of orthodox narratives. 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.[148] To understand each 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

[146] Ibid., 218.

[147] Ibid.

[148] Libson observed that "Although it [the recalcitrant wife decree] was recorded in geonic codifcatory works, such as *Halakhot Peṣuḳot* and *Halakhot Gedolot*, it did not win acceptance in later rabbinic literature – a fate similar to that of many other *taḳḳanot* and customs from the geonic period." Libson, "Halakhah and law," 238.

Antiquity and late antiquity (up to 750 CE)

While most Near Eastern legal systems in antiquity appear to have granted men an unencumbered right to divorce,[149] women were not precluded from divorcing their husbands. Indeed, there is evidence of women initiating divorces.[150] 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 scholarly debate on the issue of a woman's ability to divorce in ancient Mesopotamian law.[151] The nature of the surviving historical evidence (primarily legal texts and some court records) results in this inconsistency in the historical evidence (jurisprudence or practice) 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 wives did divorce their husbands.[152] Despite a male, jurisprudential rhetoric legitimating divorce as a male prerogative, women could and did divorce their husbands in practice.[153] At least in some cases, women in the ancient Near East had to seek judicial intervention in order to divorce their husbands.[154] 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.

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[149] David L. Lieber et al., "Divorce," in *Encyclopaedia Judaica*, ed. Michael Berenbaum and Fred Skolnik (Detroit: Macmillan Reference USA, 2007), 710-11.

[150] Roman provincial law recognized wife-initiated divorce and was likely practiced throughout the Near East. Gillian Clark, *Women in late antiquity: pagan and Christian life-styles* (Oxford: Clarendon Press, 1993), 18. Jewish women divorced their husbands in second century Egypt and in Palestine under Roman law. See Brewer, "Jewish women divorcing their husbands," 354.

[151] "The right of a wife to divorce her husband in OB [Old Babylonian] law has been the subject of considerable dispute." Raymond Westbrook, *Old Babylonian marriage law*, Archiv für Orientforschung, Beiheft 23 (Horn, Austria: F. Berger, 1988), 79. "Scholars disagree as to whether a wife had the legal capacity to divorce her husband." Russ VerSteeg, *Early Mesopotamian law* (Durham, N.C.: Carolina Academic Press, 2000), 88.

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

[153] By way of example, a Zoroastrian legal 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 "Mâtîkân ê hazâr dâtastân" or "The digest of a thousand points of law"* (Bombay: H.T. Anklesaria, 1937), 72. The main source for Zoroastrian law is the Mādigān ī hazār dādistān and it is commonly dated to approximately 620 CE. See also "Mādigān ī hazār dādistān. English, The book of a thousand judgements: a Sasanian law-book; introduction, transcription and translation of the Pahlavi text, notes, glossary and indexes by Anahit Perikhanian; translated from Russian by Nina Garsoïan," in *Persian heritage series; no. 39* (Costa Mess, Calif.: Mazda Publishers in association with Bibliotheca Persica, 1997), 252-59. *Das sasanidische Rechtsbuch "Matakdan i hazar datistan" (Teil II)*, trans. Maria Macuch (Wiesbaden: Deutsche Morgenländische Gesellschaft: Kommissionsverlag, F. Steiner, 1981), 25-29, 97-120.

[154] The Laws of Hammurabi (ca. 1750 BCE) mention that if a wife repudiates her husband, an inquiry is made; if she is found to be not at fault, then she takes her dowry and leaves, but if she is found to be at fault, she is thrown into the water. Martha Tobi Roth et al., *Law collections from Mesopotamia and Asia Minor* (Atlanta, Ga.: Scholars Press, 1997), 108. Likewise, Johns asserts that "It was far harder for a woman to secure a divorce from her husband. She could do so, however, but only as the result of a lawsuit. As a rule, the marriage-contracts mention death as her punishment, if she repudiates her husband." C. H. W. Johns, *Babylonian and Assyrian laws, contracts and letters* (Edinburgh: T. & T. Clark, 1904), 143.

Ancient Near Eastern legal texts consistently reference divorce in terms of men paying divorce settlements.[155] 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, Sasanian, Byzantine, and Islamic.[156] 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.[157] 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.[158]

These monetary exchanges related to divorce 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 that resembles a divorce decree in Jewish law.[159] Similarly, the Qurʾānic verse that grants women the option of initiating divorce indicates that women may "ransom" themselves.[160] 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 dower,

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[155] Laws of Ur-Namma (ca, 2100 *BCE*) sec. 9-11 (man pays upon divorcing wife, based on wife's status) Roth et al., *Law collections*: 18. Laws of Lipit-Ishtar (ca. 1930 *BCE*) sec. 28, 30 (limits a man's ability to divorce his first wife; indicates that men pay divorce settlement) ibid., 31-32. Sumerian Laws Handbook of Forms (ca. 1700 *BCE*) iv 12-16 (husband pays divorce settlement) ibid., 50. Laws of Eshnunna (ca. 1770 *BCE*) sec 59 (husband is financially punished for divorcing a wife who is mother of his children) ibid., 68. Laws of Hammurabi (ca. 1750 *BCE*) sec. 137-141 (husband who divorces wife with whom he has children pays her dowry and half of his assets; husband who divorces wife who is childless, pays a divorce settlement that varies depending on the status of the wife) ibid., 107. One exception is Middle Assyrian Laws (ca. 1076 *BCE*) A sec. 37-38 (husband may divorce wife without paying divorce settlement) ibid., 167.

[156] The late antique Roman provincial (or Christian) evidence has not previously been cited: "A woman who divorced without grounds lost dowry and gifts and had to wait five years to remarry; a man who divorced without good reason merely lost dowry and gifts." Clark, *Women in late antiquity: pagan and Christian life-styles*: 24. See also Judith Evans Grubbs, "'Pagan' and 'Christian' marriage: the state of the question," in *Christianity and society: the social world of early Christianity*, ed. Everett Ferguson, *Recent studies in early Christianity* (New York: Garland, 1999), 190 (noting that after Constantine, husbands could financially benefit if divorce was the wife's "fault").

[157] 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.

[158] There are two relevant papyri from Nessana (in the Negev). The first (document 33) dates to the 6th century (pre-Islamic) and is between Stephan and Sergius, father of Sarah; Stephan retained the dowry and was given back the dower in order to divorce Sarah. Casper J. Kraemer, *Excavations at Nessana. Non-literary papyri*, Colt Archaeological Expedition, 1936-1937 (Princeton: Princeton University Press, 1958), 104-06. 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. Ibid., 161-67. Nonna's document states that she "waives all property claims, and asks for a divorce or release." Ibid., 162. Kraemer suggests that document 57 is related to a *libellus repudii* – a document of repudiation that Theodosius II (d. 450 CE) required (in Nov. Th. 12 pr. enacted in 439 CE) either spouse to send to the other in a divorce. Kraemer further proposes that document 57 resembles other 6th century papyri of repudiations – including one (POxy 129) sent from a father-in-law to a husband. Ibid.

[159] *Mishnah*: Gīṭṭīn 1.4 (comparing delivery of divorce and emancipation documents). The slave's emancipation decree is *get shikhrūr* (גֵּט שִׁחְרוּר) and a woman's divorce decree is *get nashīm* (גֵּט נָשִׁים). See also *Babylonian Talmud*: Gīṭṭīn 9a (similarities between divorce and emancipation documents) and Qiddushin 16a (discussing slaves redeeming themselves by payment).

[160] Qurʾān 2:229 (a wife may "redeem" herself from a marriage).

whereas the wife pays a dowry in order to marry and her husband profits from it during the marriage.[161] 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.[162]

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.

Medieval era (750-1400 CE)

Processes of legal systematization and professionalization transformed legal practice in the Near East. By the twelfth century, divorce became a primarily court-mediated process and some court intervention became normative for most divorce situations.[163] The professionalization and centralization of legal education resulted in the consolidation of juristic opinions. 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

[161] Dig. 23.3.1 *et seq* (woman pays dowry at marriage); Dig. 24.3.1 *et seq* (elaborating various dowry-related cases and husband's rights to dowry's profits); Dig. 24.2.1 *et seq* (wife or husband may repudiate spouse) in *The Digest of Justinian* (Although redacted in the 6th century, the Digest of Justinian contains legal traditions dating to earlier generations of jurists, including to the Roman republican period. Beirut's Roman law school was destroyed in an earthquake in 551 CE and it is unclear to what extent formal Roman law was subsequently taught or practiced in the region. I use the term Roman provincial law in recognition of the hybrid Roman and customary practices that were likely prevalent in the Near East prior to the Muslim conquests.)

[162] 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," in *Encyclopaedia Iranica* (December 15, 1995). This same article notes that a woman who consented to divorce lost some of her financial rights. Also, in Palestine, "Some rich or influential Jewish women divorced their husbands under the Roman law." Brewer, "Jewish women divorcing their husbands," 356.

[163] That wife-initiated divorce occurred in an earlier period without court intervention is substantiated by juristic texts. Sarakhsī (d. 11th cent; Transoxania), *Kitāb al-Mabsūṭ*: v. 6, p. 173 (Ḥanafī: khulʿ can occur inside or outside courtroom). Two late antique Muslim jurists – al-Ḥasan al-Baṣrī (d. 728 CE) and Ibn Sīrīn (d. 729 CE) – ruled that *khulʿ* is only permissible with judicial oversight. Kaḥlāwī, *al-Khulʿ*: 69.

that a Muslim husband consent to the wife's divorce settlement are both legal-formalist perspectives that gained ascendancy in the medieval periods.

In all these enumerated divorce types, 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.[164]

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. From this perspective, a subtle and gradual change occurred: the legally-recognized justifications for a wife's divorce with a full divorce settlement were expanded while her ability to initiate a divorce without a justification became restricted. This is effectively an elaboration of a fault-system of divorce that is familiar in a variety of other contexts.[165] Late medieval debates about Gaonic practices were not unique, but rather reflect a socio-legal process that is evident in both Jewish and Islamic legal texts of the period: a wife's ability to divorce her husband became more deeply embedded within legal procedures that complicated an older practice of women simply "paying" for a divorce. This process is discernible in the increasing emphasis on identifying one of the spouses as being "at fault" with the consequence of "paying" for the divorce.

By appreciating that the relationship between these legal systems was one of a shared social space and historical tradition, we can begin to investigate what parallel legal transformations can tell us about their socio-political context. 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.

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[164] 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," *Stanford Law Review* 36, no. 57 (1984): 124. See also Ron Harris, "The encounters of economic history and legal history," *Law and History Review* 21, no. 2 (2003).

[165] Lawrence M. Friedman, "A dead language: divorce law and practice before no-fault," *Virginia Law Review* 86, no. 7 (2000).

VI. Speculating on the interwoven narrative

I have presented a Jewish chronology, followed by an Islamic chronology, and then finally a Near Eastern story. I contend that the narrative of Near Eastern legal pluralism is a more exact and coherent interpretation of the historical evidence than the two preceding chronologies. Moreover, the interwoven narrative is not implicated in any particular self-justificatory or orthodox belief; it is then relatively more objective.[166] 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.[167] It should be noted that consumers of these legal systems likely demanded more judicial intervention as a means of clarifying domestic relationships that had significant financial implications (inheritance, post-divorce alimony and maintenance, etc.). But without sources that give "voice" to these consumers, it is difficult to reconstruct how, why, or when they sought court involvement in marriage and divorce. Consequently, these micro-histories offer limited explanations and it is necessary to consider the macro-context of this case study on wife-initiated divorce. The historical sources do demonstrate that whereas in late antiquity women had more flexibility to simply divorce their husbands without state (whether Byzantine, Sasanian, or, later, Islamic) involvement, by the medieval era divorce had become a state-dominated procedure. I want briefly to consider what broad political and social processes shaped this legal change.

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.[168] 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 necessitated court registration or involvement. But in the medieval era, local courts – proliferating throughout the empire – gradually came to process most divorces. The courts, in turn, were staffed by jurists who were being trained in religious institutions of learning that were steadily becoming more technical and bureaucratic. The informal legal circles and networks of the late antique period transformed into the grand academies of learning that dictated the form and substance of legal education.[169] 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

[166] I define objectivity in post-foundationalist terms. Bevir asserts that "Historians can justify their theories by showing them to be objective, where objectivity arises not out of a method, not a test against pure facts, but rather a comparison with rival theories." Mark Bevir, *The logic of the history of ideas* (Cambridge: Cambridge University Press, 1999), 104.

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

[168] An exception, however, is that Rabbenu Gershom (d. 1028 CE) in Germany "enacted a decree which made it impossible for a husband to divorce his wife against her will." Riskin, *A Jewish woman's right to divorce*: xii, 109.

[169] See my co-authored pieces in Ira M. Lapidus, *A global history of Islamic societies: from the seventh to nineteenth centuries* (Cambridge: Cambridge University Press, 2012).

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 ʿAbbāsid Empire (750-1258 CE) began a gradual process of systematizing and centralizing its empire.[170] These ʿAbbāsid judges received higher salaries because the empire was more prosperous, there was greater demand for judicial services, and these judges had more training than their predecessors. This legal professionalization resulted from the growing strength and diffusion of institutions of religious learning and training, which appointed or designated jurists for both Muslim and Jewish subjects.[171] Judges transformed a late antique practice of divorce as mediation into a medieval practice of divorce as judicial procedure.

VII. Conclusions

The syncretic framework presented here emphasizes understanding legal systems through historicization and contextualization; it also offers a model to be applied to other comparative legal studies. This mode of inquiry refutes the reification of religions that leads to false assumptions about the religion's "essence" or "primordial nature." Religious communities, like all communities, are the products of their contexts and cannot be understood as transhistorical (or universal) categories.[172]

The reader may wonder how medieval legal opinions and procedures are relevant to contemporary realities, considering the myriad socio-political and legal changes of the early modern and modern periods. Beyond the precedential value of these jurisprudential ideas, their canonical status keeps them germane. The Islamic chronology of wife-initiated divorce can be concisely continued: The Iraqi-based Ḥanafī school – one of the four surviving orthodox

[170] al-Qāḍī, "The salaries of judges in early Islam: the evidence of the documentary and literary sources."

[171] See my co-authored pieces in Lapidus, *A global history*.

[172] As Asad has noted, "a transhistorical definition of religion is not viable." Asad, *Genealogies of religion*: 30.

Sunnī schools of law that became dominant during the medieval period – provided women with the least divorce options;[173] 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.[174] In the early modern period, Ottoman court records attest to the common practice of women paying for divorces.[175] Divorce law reforms during the twentieth century in the Middle East primarily modified Ḥanafī doctrines.[176] Likewise, the Jewish chronology of wife-initiated divorce can be briefly continued: Post-medieval rabbinic authorities viewed coercing a husband to divorce a recalcitrant wife as an "innovation" resulting from "outside (i.e., Islamic) influence" and therefore rejected it.[177] But even in the early modern era, Jewish women relinquished their financial rights to acquire divorces in Ottoman courts.[178] Modern Jewish courts follow Western Rishonim in effectively denying wives the ability to divorce their husbands without specific grounds.[179] Contemporary laws are based not simply on "authoritative" or "orthodox" precedents, but on ideologically-based interpretations of legal history. I have attempted to demonstrate that these gradual historical processes were contingent, not inevitable.[180] 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 Muslim legal systems necessitates combining thick descriptions of law with historically contextualizing narratives.[181] Late antique Jewish and Muslim jurists continued, modified, and practiced Near Eastern legal

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[173] "Unlike wives in the non-Hanafi schools, and especially the Maliki school, which was the most liberal in this regard, wives under Hanafi law had to endure desertion and maltreatment with no recourse through divorce." John L. Esposito, *Women in Muslim family law* (Syracuse, N.Y.: Syracuse University Press, 1982), 53.

[174] Ibid. See also Leila Ahmed, "Early Islam and the position of women: the problem of interpretation," in *Women in Middle Eastern history*, ed. Nikki Keddie and Beth Baron (New Haven: Yale University Press, 1991), 61.

[175] "In the seventeenth and eighteenth centuries, *hul* (Arabic *khulʿ*), divorce, whereby a wife materially compensates her husband in exchange for his consent to divorce, was a common practice in the empire from Istanbul to Cairo and points in between." Madeline C. Zilfi, "Muslim women in the early modern era," in *The Cambridge history of Turkey: the later Ottoman Empire, 1603-1839*, ed. Suraiya Faroqhi (Cambridge, UK; New York: Cambridge University Press, 2006), 247.

[176] J.N.D. Anderson, "Modern trends in Islam: legal reform and modernisation in the Middle East," in *Islamic law and legal theory*, ed. Ian Edge, *The International library of essays in law and legal theory, 7* (New York: New York University Press, 1996).

[177] Libson, "Halakhah and reality," 99.

[178] "The vast majority of the [*khulʿ*] cases involved Muslims, the predominant population of the area, although cases concerning Christians and Jews can also be found here and elsewhere." Zilfi, "Muslim women in the early modern era," 247.

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

[180] This is the objective of genealogy. See Bevir, "What is genealogy?."

[181] In other words, I seek a balance between synchronic and diachronic explanations: "Synchronic rational explanations uncover the conditional connections between the beliefs that hang together in a given web of beliefs. Diachronic rational explanations uncover the conditional connections between a tradition, an initial web of beliefs, a dilemma, and a later web of beliefs." Bevir, *The logic of the history of ideas*: 252.

pluralism. This case study on a woman's access to divorce has demonstrated the significance of both comparative and historical examination of doctrinal issues, but the implications for social identity are countless.[182] 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.[183]

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.

[182] Glenn observes that "Recognition and acceptance of the diverse legal traditions of the world has implications for the identities which people in the world give themselves. Recognition of other traditions as partially your own means adhering, however partially, to those traditions. It means identifying with them in some measure. Identity then becomes less clear..." Glenn, *Legal traditions of the world*: 360.

[183] Merry, "Legal pluralism," 889-90.

Conclusion

I began this dissertation with a critical review of contemporary Islamic legal historiography, suggesting alternative philosophical foundations and heuristics that draw upon recent scholarship in critical theory and in interdisciplinary studies. I also introduced some critical assessments of previous scholarship that compares Jewish and Islamic law, arguing for more contextualized, critical, and systematic approaches. Each of the three case studies modified conventional ideas about Islamic law. Chapter 1 demonstrated the overlapping roles of jurists and historians in late antique Islamic societies by focusing on the analytical and evidentiary slippages of legal arguments about the execution of prisoners of war. Chapter 2 illustrated the legal and political ways in which charity taxation was used to negotiate late antique Muslim identity. Chapter 3 tracked parallel changes in divorce practices among Jews and Muslims in the Near East and argued that changes in law must be situated within specific contexts. In delving into the intricacies of juristic analyses of these substantive areas of doctrinal law, I chose to illuminate the rich dynamics of internal juristic methods, which differ significantly from both orthodox assumptions and scholarly depictions. In so doing, I have offered an alternative means of understanding the relationships between Islamic and Jewish legal systems – not as legal systems that "borrow" from each other, but rather as legal systems that similarly change in response to a shared context. I employed comparative techniques as a strategy for deepening our historical understandings of both Islamic and Jewish legal systems. Together, the case studies illuminated subtle dynamics of legal thinking and legal practice in late antique and medieval Islamic societies.

I. Comparative legal historicism of the "Near East"[1]

Within contemporary Jewish and Muslim communities, law is legitimated by its orthodoxy – that is, by its habitual, ancient, presumably uninterrupted practice.[2] Both Jewish and Islamic legal histories are similarly emplotted to legitimate contemporary forms of Jewish law or Islamic law. As Hayden White has noted, "every history, even the most 'synchronic' or 'structural' of them, will be emplotted in some way."[3] Meta-narratives about law are crucial to the determination of doctrinal authority because the broad stories about a legal system's history play concrete roles in the determination of law in the contemporary moment. This conclusion will clarify some of the ways in which believers and "secular" scholars share

[1] The periodization outlined in this section was improved by the input of Ira Lapidus and Laurent Mayali; errors are mine alone. The research underlying the ideas presented here is elaborated in co-authored sections on legal and women's history that will appear in Lapidus, *A global history*. My future publications will further expand and detail this periodization. A version of this section was presented at the Law and Society Association annual meeting in San Francisco on June 4, 2011; I would like to thank my co-panelists and the audience for helpful feedback.

[2] I recognize the problems with using the term "orthodoxy," but do so in the absence of an adequate alternative. I define legal orthodoxy as the existence of a hierarchical legal institution (not necessarily empowered by a state) that can label laws as deviant and can punish – through social pressure or otherwise – legal deviance.

[3] Hayden White, *Metahistory: the historical imagination in nineteenth-century Europe* (Baltimore: Johns Hopkins University Press, 1975), 8.

common ideas about legal systems and their histories; I argue that academic scholarship is invested in orthodox narratives about the law.

II. Orthodox narratives of Jewish and Islamic legal histories

Orthodox believers tell self-justifying, historical narratives about their legal systems; they emplot these stories by ascribing habit-based continuity from ancestral authority figures to later generations of orthodox communities. This practice, however, is not limited to orthodox believers, since it characterizes the practice of scholarship (even "secular" scholarship). I will outline extremely abbreviated and over-simplified versions of the "orthodox" stories of Jewish law and Islamic law. These stories are not comprehensive or the subjects of any explicit consensus; however, they are prevalent in the discourse of religious communities, as well as in scholarship and in the processes of socialization in the disciplines of Jewish studies and Islamic studies. In other words, the stories I will outline here are discursive interpretations – or instructive caricatures – of the structurally similar (historical) narratives told by scholars and believers.[4] My objective here is not to accurately portray the legal history perspectives of orthodox believers or of scholars (believers or non-believers), but rather to offer a strategic reduction.[5]

The "story of Jewish law"[6] is the story of orthodox rabbinic Judaism, so non-rabbinic Jewish sects (such as Karaites) are effectively absent.[7] It typically begins with the rabbinic sages (the Tannaim and the Amora'im, 70 through 500 CE) who preserved and elaborated ancient Jewish legal traditions; their authoritativeness is generally unquestioned. The redaction of the Babylonian Talmud is assumed to have been completed by the early 7th century (by the Savora'im or Stammaim, 500-620 CE) and is conceptualized as the culmination of the rabbinic tradition. The Gaonic period (620-1050 CE) is poorly understood and typically viewed as a period of stagnancy. The medieval commentators, known as the Rishonim (1050-1400 CE), authored the definitive commentaries of rabbinic literature that remain canonical until today.[8] This somewhat standard periodization of Jewish law is based on classifying or grouping generations of rabbinic scholars as playing particular roles in Jewish legal authority. Each generation of rabbinic scholars legitimates itself by claiming that its legal output preserves orthodox customs.

The "story of Islamic law"[9] is likewise the story of orthodox Sunnī Islam, so Shīʿī and other sectarian legal expressions are ignored. The late antique period (seventh and early eighth centuries) of Islamic law is categorized in terms of generations of authority: the

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[4] It should be noted that while these conventional stories are modeled after the narratives of evolutionary biology and therefore should be critiqued for being philosophically untenable, this is not the purpose of my analysis here today. For a critique of evolutionary approaches to Islamic legal history, see the Introduction to this dissertation.

[5] I am invoking the idea of "strategic essentialism" as a component of subaltern historiography. For a similar application of postcolonial theory to medieval studies, see Bruce W. Holsinger, "Medieval studies, postcolonial studies, and the genealogies of critique," *Speculum* 77, no. 4 (2002).

[6] See Appendix II, Table 1. The general outlines of this story are evident in both scholarly literature and in orthodox discourse. See the preceding section's literature review.

[7] Karaism is a Jewish sect that rejects talmudic-rabbinic tradition. See Meira Polliack, ed. *Karaite Judaism: a guide to its history and literary sources* (Leiden; Boston: Brill, 2003).

[8] However, the Sulkhan Arukh (early 16th century CE) is considered to be the culminating work of the Rishonim.

[9] See Appendix II, Table 2.

Prophet, the Companions, and the Successors.[10] The traditional story then identifies a period of authoritative legal scholars (roughly the eighth and ninth centuries), with particular emphasis on the eponyms of the surviving legal schools (Ḥanafī, Mālikī, Shāfiʿī, Ḥanbalī) as having laid the foundations for later legal practice. In the medieval period (roughly mid-eighth to fourteenth centuries), it became normative for Muslim jurists to be committed to a canonized jurisprudential methodology (*ijtihād fī al-madhhab* or *taqlīd*). As in the case of the Jewish law story, this story classifies every generation of jurists as playing a certain role in Islamic legal authority and each generation of jurists legitimates itself by claiming to preserve orthodox practices.

The similar plots of these stories operate as narratives about continuity and, in this way, they legitimate orthodoxy.[11] Both orthodox stories coincide with broader historiographic modes of emplotment: "antiquity," "middle ages," and "renaissance" are all historiographic categories that have implicit value meanings. Moreover, these stories have real world consequences because it is primarily the legal interpretations of the late medieval period that are considered authoritative within orthodox communities. These stories function as disciplinary techniques: to narrate legal history in line with the emplotment of these stories – even if modifying certain particulars – is to acquiesce to orthodoxy. In other words, the orthodox stories demand obedience to the status-quo by legitimating the authority of orthodox elites. When scholars present the normativity of these orthodox stories as historical descriptions, they further legitimate orthodox legal power.

III. The orthodoxy of scholarship

Some form of these condensed stories of Jewish and Islamic law has been in circulation for centuries and remains largely unquestioned in the disciplines of Jewish studies and of Islamic studies. Indeed, while historians – particularly historians of gender, sexuality, and race – have actively dismantled master narratives in a variety of fields, these orthodox legal histories remain relatively untarnished.[12] The points of emphasis in terms of legitimacy or authority in these stories correlate to scholarly focus. For example, more scholars specialize in the study of the Babylonian Talmud, presumably redacted in the "authoritative" period, than in Gaonic responsa literature or in the medieval legal commentaries, just as the narrative about Jewish law elevates the Talmud over these other Jewish legal texts.[13] Likewise, as discussed in this dissertation's introduction, most Islamic law scholars focus on the

[10] There is, however, a general recognition of geographic diversity. Hallaq observes, "Each locale, from Syria to Iraq to the Hejaz, established its own legal practices on the basis of what was regarded as the sunna of the forefathers, be they the Companions or the Prophet, although the Prophet more often than not merely sanctioned the ancient Arabian sunan." Hallaq, *Sharīʿa*: 47.

[11] See Appendix II, Table 3. See Peter Brooks, *Reading for the plot: design and intention in narrative* (New York: A.A. Knopf, 1984).

[12] See Daniel Klein, "The Islamic and Jewish laws of usury: a bridge to commercial growth and peace in the Middle East," *Denver journal of international law and policy* 23, no. 3 (1995). By comparison, interesting and innovative research has been done on Jewish-Christians, for example; historians are uncovering aspects of Jewish history in antiquity and late antiquity by exploring underused sources and rethinking assumptions. See Richard Lee Kalmin et al., eds., *Jewish culture and society under the Christian Roman Empire* (Leuven: Peeters); Seth Schwartz, *Were the Jews a Mediterranean society?: reciprocity and solidarity in ancient Judaism* (Princeton: Princeton University Press, 2010); Seth Schwartz, *Imperialism and Jewish society, 200 B.C.E. to 640 C.E* (Princeton, N.J.: Princeton University Press, 2001).

[13] Consider that the Babylonian Talmud is commonly identified as Gemara, which means completion.

authoritative legal texts or the contested beginnings of the professional schools of Islamic law, while very few specialize in the legal schools that do not survive. Scholars in Islamic legal studies legitimate the aforementioned story of law by using the term "classical" to describe the period of Islamic legal history (roughly, the tenth century) that is esteemed by the aforementioned orthodox narrative.[14] Similarly, scholars of Jewish law use the same classification of Jewish legal history that orthodox believers use. When scholars make general claims about what "Islamic law" or "Jewish law" is, they invariably refer to legal ideas or texts that the orthodox narrative identifies as canonical or authoritative.[15] In public discourse, the statements "Islamic law does not allow…" or "Jewish law requires…" are not merely descriptive claims because they are implicated in orthodox ideas.

IV. Consequences of orthodox narratives

What is the significance of these stories? First, these stories are insular: they present law as entirely disconnected from socio-political contexts; legal systems are presumed to march along a linear continuum from "point a" to "point b" without any interference from non-legal factors. Second, these stories are incomplete representations of legal systems: they fail to consider the substantive changes within legal literature, legal education, and legal professionalization. Third, these stories have significant doctrinal consequences: they influence the everyday lives of people who are unaware that modifying these stories radically alters precedential authority in these legal systems. Finally, these orthodox stories are ideologically problematic: they voice the perspective of an orthodox elite, including its biases against groups it deems as "other."

The theme of continuity in Jewish and Islamic legal historiography has significant socio-political ramifications. While most of the jurists – both Muslim and Jewish – in the late antique and medieval periods likely perceived themselves as continuing or maintaining legal traditions, gradual changes nevertheless occurred. If we understand orthodoxy as being the ideology of a particular class – in this context, religious scholars, particularly those affiliated with the dominant political power – then this class narrates its own victory by declaring its practices as being the **same** as the practices of its predecessor classes.[16] Thus, there are two dilemmas: the first is uncovering the changes that underlie juristic narratives of legal continuity in both Jewish and Islamic legal traditions; the second is accounting for continuity across generations of jurists without legitimating the orthodox narrative. I seek to resolve both challenges by using concrete historical evidence to outline a periodization of Jewish and Islamic legal histories that both contextualizes and historicizes.

V. An unorthodox historical narrative

[14] Léon Buskens, "A medieval Islamic law? Some thoughts on the periodization of the history of Islamic law," in *O ye gentlemen: Arabic studies on science and literary culture in honour of Remke Kruk*, ed. Arnoud Vrolijk and J. P. Hogendijk, *Islamic philosophy, theology and science: texts and studies, v. 74* (Leiden; Boston: Brill, 2007), 470.

[15] "In general usage, also among Islamicists, 'Islamic law' is often equated with the classical body of normative writings of Muslim legal scholars known as *fiqh*. This classical corpus of ideas and rules developed on the basis of an orthodox understanding of the Qur'an and traditions of the Prophet, which was already established around 900 AD." Ibid., 472.

[16] Walter Benjamin, "Theses on the philosophy of history," in *Illuminations*, ed. Hannah Arendt (New York: Schocken Books, 2007).

The periodization I present is an evolving framework based on observable changes in legal literature, in the identity and training of jurists, in the role of the state or political authority,[17] and in modes of legal reasoning. There are three risks to my periodization that I want to acknowledge. First, demarcating blocks of time and labeling them can have historiographically limiting effects because it provokes debates about the classification labels and the cut-off dates that can be unproductive. Second, any periodization relies on identifying a historical context that is constructed by historians.[18] Indeed, the changes within and between periods are contingent upon a variety of social, economic, political, and legal factors that need further, critical elaboration. Third, the very structure of periodization invokes evolutionary ideas of history that are linear and downplay contingency. But these limitations are ultimately unavoidable and should not paralyze historical inquiry. Moreover, despite these difficulties, I propose a periodization for Near Eastern legal history as a less problematic alternative to the aforementioned (orthodox) stories of law. In proposing a chronological framework, I am sensitive to the necessity of balancing emphasis on contingency (instead of "evolutionary" process), with incremental changes, with continuity, and with rupture. The periods of Jewish and Islamic legal history are historical moments in which certain jurisprudential modes became dominant. The objective of this periodization is not substantiation with a surplus of historical evidence.[19] Instead, I will simply present my narrative as an alternative to the aforementioned "orthodox" stories and as a starting point for future research and inquiry. The aim of the periodization proposed here is to offer an alternative means of describing and classifying legal change in both Jewish and Islamic legal historiography.

Diffusion and diversity of legal conventions (roughly 610–800 CE)[20]

During this transformative period, Arab-Muslims created a burgeoning empire and integrated or assimilated the region's diverse religious and ethnic communities. Legal education occurred primarily in study circles around particular jurists, who sometimes served as judges in (Muslim or Jewish) local courts.[21] Jewish and Islamic legal literature integrated narrative and legal content, which jurists gradually differentiated as their profession became more specialized.[22] After the ʿAbbāsid empire established Baghdad as the political-intellectual capital (in 762 CE), Iraqi schools of legal thought began a gradual rise to dominance in both

[17] My understanding of the state is based on Bevir, Mark, and R. A. W. Rhodes. *The state as cultural practice*. Oxford: Oxford University Press, 2010.

[18] I thank Christopher Tomlins for reminding me of this challenge. Tomlins explains, "Historians are taught to locate objects in time and in relationship to other objects similarly located, and to examine the nature of the relationships that result from the objects' placement." Tomlins, "What is left of the law and society paradigm after critique? Revisiting Gordon's "Critical Legal Histories"," 164.

[19] The footnotes do contain some historical substantiation. More detailed and precise research demonstrating this periodization will be presented in future publications.

[20] See Appendix II, Table 4.

[21] I distinguish between legal circles (geographic or local schools), legal networks (personal schools), and legal schools (doctrinal schools). This is an adaptation of Hallaq's terminology: "During the second/eighth century, therefore, the term madhhab meant a group of students, legists, judges and jurists who had adopted the doctrine of a particular leading jurist." Hallaq, *Sharīʿa*: 63.

[22] See Barry S. Wimpfheimer, *Narrating the law: a poetics of talmudic legal stories* (Philadelphia: University of Pennsylvania Press, 2011).

Jewish and Islamic legal systems.[23] Despite being institutionalized in academies, legal activity was not centralized and was primarily privately organized by jurists, with little state or public intervention. Debates about the role of oral law (or juristic customs) occurred in both legal communities. During this period, individuals we may describe as pre-Karaites presented their opposition to rabbinic oral law.[24] The redaction of the Babylonian Talmud may be understood as a response to Karaite opposition that elevated the legal significance of the Mishnah (as embodying the oral Torah) to be on par with the (written) Torah.[25] This parallels a similar debate and process occurring in Muslim circles about the significance of "oral law," which manifests itself in the increasing importance of (recorded/written) ḥadīth in Islamic legal literature.[26] Generally, legal practice was both diffuse and diverse, largely based on customary practice and on the legal conventions of antecedent jurists.

Synthesis and systematization (roughly 800–1000 CE)[27]

As the Islamic empire developed an increasingly more complex bureaucratic system, the state and jurists participated in professionalizing the legal schools. Among Muslim jurists, a transition from legal networks to legal schools occurred as part of a broader synthesis of Islamic legal reasoning.[28] Consolidation of legal schools (from hundreds to a few in the case of Islamic jurisprudence) occurred in reaction to/against sectarian resistance. Similarly, rabbinic jurists articulated their understandings of Judaism in reaction to/against Karaite (and other sectarian) challenges. Jewish and Muslim jurists based in Iraq became stronger centers of legal authority by the beginning of the ninth century, if not earlier.[29] Jurists systematized the

[23] This move soon resulted in a shift of rabbinic authority as the Babylonian academies gradually gained ascendancy. "There is little doubt that, in pre-Islamic and early Islamic times, the Jews in the countries originally belonging to the Byzantine empire, such as Palestine, Syria, and Egypt, looked up to the yeshiva of the Holy Land as their highest religious and legal authority." Samuel D. Goitein, "The interplay of Jewish and Islamic laws," in *Jewish law in legal history and the modern world*, ed. Bernard S. Jackson, *The Jewish law annual. Supplement 2* (Leiden: Brill, 1980), 62. The Iraqi jurisprudential style may be differentiated from the Syrian: "the tendency to rely primarily on custom represents a continuation of the ancient Palestinian approach, which placed a greater emphasis on the living, day-to-day tradition and a lesser emphasis on learned argumentation than did the Babylonian." Brody, *The geonim of Babylonia*: 116.

[24] I use pre-Karaite for Astren's term "proto-Karaite," although I reject the linear, evolutionary assumption underlying use of the term. See Fred Astren, *Karaite Judaism and historical understanding* (Columbia, S.C.: University of South Carolina Press, 2004).

[25] While I do not want to delve into the complicated issue of historically dating the redaction of the Babylonian Talmud, I suspect that sectarian conflict played a role in the elevation of the text's importance. Moreover, the parallel debates and shifts from oral to written legal authority among Muslims and Jews are unlikely to be merely coincidental.

[26] For instance, Muslim juristic circles debated the authority of the companion or successor jurists. See Kamali, *Principles of Islamic jurisprudence*: 313-22 (discussing the legal opinions of Companions).

[27] See Appendix II, Table 5.

[28] Hallaq observes, "The intellectual and legal history of Islam between 150 and 350 H (c. 770 and 960 AD) represents a dynamic competition among several forces that crystallized in the opposing movements of traditionalism and rationalism, movements out of which emerged the Great Synthesis." Hallaq, *Sharīʿa*: 57.

[29] "Iraq and the West had the most jurists, Sham and the East the fewest." Monique Bernards et al., "The geographic distribution of Muslim jurists during the first four centuries AH," *Islamic Law and Society* 10, no. 2 (2003): 174. "By the end of the Geonic period, although they retained their traditional names, both leading academies had actually relocated in Baghdad, the capital of the Abbasid empire." Brody, *The geonim of Babylonia*: 36.

transmitted legal opinions of predecessor jurists in texts that would later be identified as canonical. The power of particular law schools (or academies) became entrenched and nominally linked to state power as legal education became focused on emerging legal canons. Babylonian rabbinic Judaism became increasingly authoritative and dominant as reflected in treatises and commentaries of individual Gaonic rabbis.[30]

Legal structure (roughly 1000-1200 CE)[31]

The subsequent period consisted of further systemization of both Rabbinic and Islamic legal literature, roughly from the 11th through 13th centuries.[32] Generally, in this period, Rabbinic and Muslim jurists wrote commentaries on canonized or codified legal texts of predecessor jurists (who had been identified as authoritative) and created condensed legal manuals. An example is the *Hilkhot ha-Rif* (Isaac ben Jacob Alfasi ha-Cohen, d. 1103), which presents practical legal decisions in an abridged form – following the order of the Talmud but presenting only the conclusions or definitive opinions (as determined by Rabbi Alfasi). Moreover, this resembles the Islamic *mukhtaṣar* genre of abridged legal manuals.[33] These abridgements became the main texts of study for students of both legal traditions.[34] Among both Muslim and Jewish jurists, a clear separation between literary and legal materials became prevalent as they further systematized the pragmatic legal rulings of previous generations. For example, the writings of the Jewish jurist and philosopher, Maimonides (d. 1204) adapted the structure prevailing in contemporaneous Islamic legal texts.[35] The Babylonian Tamud is, to

[30] These include *Halachot Pesukot* by Yehudai Gaon, *She'iltot* by Achai Gaon, and *Halachot Gedolot* by Simeon Kayyara. Zvi Septimus has pointed out to me that Rashi cited to or relied on these texts rather than Gaonic responsa. Brody observed that "the Babylonian center achieved independence in calendrical matters in the course of the ninth century, and by the 920s considered itself competent to overrule its erstwhile mentors." Brody, *The geonim of Babylonia*: 120.

[31] See Appendix II, Table 6.

[32] A canonization process has been identified for this period: "the tenth through the thirteenth centuries of the common era, which witnessed also the acme of Jewish-Islamic symbiosis. It was the time when everything we regard as Judaism: Jewish law and ritual, the text of the Hebrew Bible and the synagogue service, Jewish thought and ethics, were put into their final shape and received authoritative status." Goitein, "The interplay of Jewish and Islamic laws," 62.

[33] The Rif removed all *haggadic* materials and kept only *halakhic* passages. Similarly, *mukhtaṣar* texts abbreviate earlier legal texts to offer straightforward legal answers. Hallaq explains that "abridgments (*mukhtasars*) were generally preferred after the fifth/eleventh century when they became abundant. Some of these abridgments were specifically produced by professors for teaching purposes, their intent being to sum up *fiqh* doctrine by invoking legal principles and alluding to 'cases' that supported these principles." Hallaq, *Sharīʿa*: 138.

[34] The Rif was studied in Yeshivas in North Africa and legal schools were using *mukhtaṣar* texts.

[35] See Sarah Stroumsa, *Maimonides in his world: portrait of a Mediterranean thinker* (Princeton, N.J.: Princeton University Press, 2009); Michael Schwarz, "Al-Fiqh, a term borrowed from Islam used by Maimonides for a Jewish concept in his Sefer haMizwoth and in the Guide of the Perplexed," in *Adaptations and innovations: studies on the interaction between Jewish and Islamic thought and literature from the early Middle Ages to the late twentieth century*, ed. Joel L. Kraemer, Y. Tzvi Langermann, and Jossi Stern, *Collection de la Revue des études juives, 44* (Paris; Dudley, MA: Peeters, 2007). On Maimonides more generally, see Gerald J. Blidstein, "Where do we stand in the study of Maimonidean halakhah?," in *Studies in Maimonides*, ed. Isadore Twersky (Cambridge, Mass.: Harvard University Press, 1990); Herbert A. Davidson, "Maimonides' putative position as official head of the Egyptian Jewish community," in *Ḥazon Naḥum: studies in Jewish law, thought, and history presented to Dr. Norman Lamm on the occasion of his seventieth birthday*, ed. Yaakov Elman and Jeffrey S. Gurock (New York, NY; Hoboken, NJ: Michael Sharf Publication Trust of the Yeshiva University Press ; Ktav, 1997); Mordechai A. Friedman, "Maimonides: head of the

this day, read alongside, through, and within the commentary of, for example, Rashi (d. 1105). The technical literature of both legal traditions in this period indicates abbreviation and systematization. These legal-literary changes coincided with the increased involvement of the state with the legal profession.[36]

Legal autonomy (roughly 1200–1400 CE)[37]

By the thirteenth century, Muslim and Jewish jurists were creating abridged versions of canonical legal commentaries and the locus of jurisprudential activity was shifting away from the Iraqi sphere of influence (both geographically and intellectually). This was a direct result of the Mongol invasion of Baghdad, capital of the ʿAbbāsid Caliphate in 1258; in addition to the destruction of Baghdad's libraries, the city's role as an intellectual center came to an abrupt end as regional centers. In provincial centers of legal activity, legal manuals and their commentaries were produced. For example, the legal compilation of Mordechai ben Hillel (d. 1298) corresponds to a type of abridged Islamic legal texts known as "common law *mukhtaṣars*."[38] By this period, a type of process theory had gained ascendancy as jurists identified their role in legal-algorithmic terms.[39]

VI. An alternate story of near eastern law[40]

This rough timeline presents the plot for an alternate historical narrative about the gradual dominance of systemic legal thought, of a class of religious scholars, and of their institutions. It is intended to offer categories and classifications that are distinct from the aforementioned orthodox stories. This periodization can be continued to offer a contextualized narrative outline of how and why law (both Jewish and Islamic) changed in the Near East. This periodization offers a framework to bring together doctrinal analyses (as presented in the case studies of this dissertation's three substantive chapters) with far-reaching socio-political and legal transformations. My intention is to illustrate that jurists in certain periods and places practice similar forms of legal reasoning. By emphasizing

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Jews (ra'is al-yahud) in Egypt," in *ʻAl pi ha-beʼer : meḥkarim be-hagut Yehudit uve-maḥshevet Yiśraʼel, mugashim le-Yaʻaḳov Blidstein*, ed. Uri Ehrlich, Howard T. Kreisel, and Daniel J. Lasker (Beʼer Sheva: Universiṭat Ben-Guryon ba-Negev, 2008); Jacob Lavinger, "Was Maimonides 'rais al-yahud' in Egypt?," in *Studies in Maimonides*, ed. Isadore Twersky (Cambridge, Mass.: Harvard University, Center for Jewish Studies; distributed by Harvard University Press, 1990); Stroumsa, *Maimonides in his world: portrait of a Mediterranean thinker*.

[36] Hallaq clarifies that "By the end of the eleventh century, a substantial segment of the legal elite was in the pay of government. With the incorporation of the professors into the madrasa system, the political domain encroached further into the terrain of the law, subordinating a considerable segment – even the elite – of the professorial profession and contributing to the increasing diminution of the "moral community" of the legists." Wael B. Hallaq, *An introduction to Islamic law* (Cambridge; New York: Cambridge University Press, 2009), 53.

[37] See Appendix II, Table 7.

[38] I use the term "common law *mukhtaṣar*" as defined by Mohammad Fadel, "The social logic of *taqlīd* and the rise of the *mukhtaṣar*," *Islamic Law and Society* 3, no. 2 (1996). An example of a Mālikī *mukhtaṣar* is that of Khalīl b. Isḥāq al-Jundī (d. 1365).

[39] Compare to Henry Melvin Hart et al., *The legal process: basic problems in the making and application of law*, ed. William N. Eskridge and Philip P. Frickey (Westbury, N.Y.: Foundation Press, 1994).

[40] See Appendix II, Table 8.

institutional and contextual factors of change, this periodization directs the focus away from authority figures (famous jurists) and toward processes of change in legal systems.

Contemporary Islamic legal historiography has primarily been focused on (a) Islamic "origins" and (b) Islamic continuity/rupture. The political commitments of many Western scholars are manifested in (a) asserting the "false origins" of Islam by revealing its "non-Islamic" (i.e., Jewish, Roman, etc.) influences or by delegitimizing its foundational texts/figures and (b) claiming the "backwardness" of Islam by minimizing changes and diversity within Islamic practices. Likewise, the political commitments of many orthodox scholars are manifested in (a) establishing the "true origins" of Islam by affirming the purity of Islamic tradition and (b) proclaiming that orthodox authority is legitimate because it preserves Islamic traditions. I argue that these two primary understandings of Islamic law (again, contemporary and historical) ask the same questions about "origins" and continuity, but provide mirror opposite answers that serve specific ideological goals – either reifying the other and attacking a perceived threat or legitimating the authority of orthodoxy and defending the tradition from "external" attack. It is hoped that the present dissertation has contributed to deconstructing the ideology of "*sharīʿah*" – manifested in both scholarly literature and popular discourse – and replacing it with a contextual understanding of Islamic law.

In interpreting the political uses of Islamic law – by orthodox or by imperialist groups – I replace the dominant "*sharīʿah*" myth with a historically contextualized, thick description of Islamic legal changes based on post-foundationalist heuristics. My research deconstructs the ideological notion of "*sharīʿah*" by recognizing that all historical events/texts reflect their contexts, all historical events are contingent, and there is no linear progression in history. Late antique Jews and Muslims practiced, modified, and transformed Near Eastern legal pluralism. They perceived their own legal systems as continuing earlier practices and only slightly modifying those practices when necessary. They did not do so in isolated spaces, disconnected from their predecessors or neighbors – of any religious, ethnic, or political grouping.[41]

VII. Further directions

I hope this effort to create a framework of Near Eastern legal history will direct future research by offering scholars alternate categories based on historical, contextual understandings – rather than orthodox evaluations of the relative authority of certain periods. This dissertation offers the first steps in a broader research project of rewriting the history of Islamic law in the late antique and medieval periods (with an eye to how that narrative continues in the modern era) in order to lay bare the deep and problematic emplottment of

[41] I correlate the intellectual output of a group to that of an individual and seek to explore the ways in which the newly formed Muslim community built upon and adapted its complex tradition, which necessarily included Jewish traditions. Mannheim explains that "Strictly speaking it is incorrect to say that the single individual thinks. Rather it is more correct to insist that he participates in thinking further what other men have thought before him. He finds himself in an inherited situation with patterns of thought which are appropriate to this situation and attempts to elaborate further the inherited modes of response or to substitute others for them in order to deal more adequately with the new challenges which have arisen out of the shifts and changes in his situation." Karl Mannheim, *Ideology and utopia: an introduction to the sociology of knowledge*, trans. Louis Wirth and Edward Shils (New York: Harvest, 1985), 3.

existing Islamic legal histories. This process of rewriting Islamic legal historiography revolves around two main ideas: (1) historicism through contingency and (2) contextualization. The first intervention destablisizes Islamic legal orthodoxy by focusing on the extinct and heterodox aspects of Islamic legal history. The second intervention subverts ideologically-based stereotypes or myths about the "false" or "borrowed" "origins" of Islamic law (and, by extension, Islam) by comparing Islamic legal systems to their contemporaneous, neighboring legal systems (especially Jewish legal systems). Both interventions seek to change the way Islamic law is described, analyzed, and theorized by non-specialists and specialists. Both interventions argue that Islamic law is, has, and always will be a product of its changing, multi-vocal contexts because Islamic law – like any legal system – has no essential core. Beyond rethinking Islamic legal historiography, it is also possible to rethink the way law, religion, identity, and their interrelationships are conceptualized within the field of Islamic studies and Jewish studies. My future research will continue the process begun here of resisting assumptions, scrutinizing the "obvious," and reconsidering what a variety of historical-legal texts from multiple "religious traditions" can tell us about a past that is always simultaneously present and absent.

Post-script

This dissertation is a modest contribution to an evolving framework for re-conceptualizing Islamic legal history. I hope that this is only a beginning. Future research will dig deeper into the intricate details of legal practice and climb higher into the broad socio-political changes that animate the transformations of law in the "Near East."

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Appendix I

1	**Babylonian Talmud, Ketubbot 63b** 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"	**תלמוד בבלי מסכת כתובות דף סג עמוד ב** המורדת על בעלה - פוחתין לה מכתובתה שבעה דינרים בשבת, רבי יהודה אומר: שבעה טרפעיקין. רבותינו חזרו ונמנו שיהו מכריזין עליה ארבע שבתות זו אחר זו ושולחין לה ב"ד: הוי יודעת, שאפי' כתובתיך מאה מנה הפסדת.
2	**Babylonian Talmud, Ketubbot 64a** 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.	**תלמוד בבלי מסכת כתובות דף סד עמוד א** ומשהינן לה תריסר ירחי שתא אגיטא, ובהנך תריסר ירחי שתא לית לה מזוני מבעל
3	**תשובות הגאונים שערי צדק חלק ד שער ד סימן טו** **רב שרירא גאון**. (במודפסות בקיצור סימן רע"א) וששאלתם: אשה שהיא יושב תחת בעלה ואמרה לו גרשני איני רוצה לישב עמך, חייב ליתן לה כלום מכתובתה או לא, כגון דא הויא מורדת או לא. כך ראינו: ששורת הדין היתה מעיקרא שאין מחייבין את הבעל לגרש את אשתו אם בקשה גירושין, חוץ מאותן שאמרו רבותינו בהן שכופין אותן להוציא. וכשהאשה נמנעת מתשמיש ומן המלאכות שחייבת לעשות לו זו היא המורדת (כתובות סג ע"א) שפוחתין לה מכתובתה כלום בכל שבת ושבת וצריכה התראה. ואחר כך התקינו תקנה אחרת (שם /כתובות/ ע"ב) שיהו מכריזין עליה ארבע שבתות זו אחר זו ושולחין לה מבית דין הוי יודעת שאפילו כתובתיך מאה מנה הפסדת. ואמרינן עלה אמר ראמי בר אבא פעמים שולחין לה +(א"ע ע"ז א' ב' ג', פ' ט"ו)+. (כאן חסר לשון, וצריך לומר כמו דאיתא בגמרא: מבית דין אחת קודם הכרזה ואחת לאחר הכרזה.) ומהנכסים שקבלם בעלה על עצמו ואינו מצוי בעינו או מה שבלה ואבד מן נדוניא שלה ומן תכשיטיה שהן נכסי צאן ברזל שצריך הבעל לשלם לה דמיהן, משום שאחריותן עליו, היו פוחתין לה מאשר על האיש שבעה דינרין בשבת. לסוף התקינו שמכריזין עליה ארבע שבתות ומפסידה את כולן. ואף על פי כן, לא היו מחייבין את הבעל לכתוב לה גט. ואם מת נפטרו יורשיו מכתובתה מאשר הוא עליו כחוב, אבל הנמצא בעינו והוא קיים בין מן תכשיטיה דתפוסה לא מפקינן מינה ודלא תפוסה לא יהבינן לה. והתקינו שמשהין אותה כשתובעת גירושין שנים עשר חדש שמא יתפייסו ואם לא יתפייסו לאחר שנים עשר חדש כופין את הבעל וכותב לה גט. ואחרי רבנן סבוראי כשראו חכמים שבנות ישראל הולכות ונתלות בגויים ליטול להן גטין באונס מבעליהן ויש כותבין גיטין באונס ומסתפק גט מעושה בדין או שלא בדין וקא נפיק מינה חורבא (עיין להתוספות ז"ל בפרק אף על פי, כתובות דף ס"ג ע"ב, שכתבוה לתקנה זו, א"ח: עיין בהגהת אשירי פרק אעפ"י) תקינו בימי מר רב רבה בר מר הונאי נוחם עדן למורדת ותובעת גירושין, שכל נכסי צאן ברזל שהכניסה לו משלה תשלם ואפילו מה שבלה או אבד ישלם לה תחתיו, מה שכתב לה על עצמו, מה שאינו מצוי לא ישלם לה, ומה שהוא מצוי נמי אע"ג דתפוסה לה מפקינן מינה ומהדרינן ליה לבעל. וכופין אותו וכותב לה גט לאלתר ויש לה מנה מאתים. ובזאת אנו מתנהגין היום כשלש מאות שנה ויותר. אף אתם עשו כן. עד הנה. **Gaonic responsa** **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 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 Sabboraic 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 tzon 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 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.	
4	**Gaonic Responsa** (Harkavy sec. 19) A married woman who says to her husband, "divorce me, I do not want to be with you" he is liable to give her nothing and she is a recalcitrant wife...	**תשובות הגאונים - הרכבי סימן יט** [הא]ש' שהיא יושבת תחת בעלה ואמרה לו [גרשני איני רוצ]ה לישב עמך חייב ליתן לה כלום וכול' מורדת
5	**Gaonic Responsa** ...for when she "rebels" and forfeits her *ketubbah*, he needs to record it in court that she forfeited to him her *ketubbah*...	**תשובות הגאונים שערי צדק חלק ג שער ב סימן כו** שמא מורדת היא והחזירה לו כתובתה וצריך להודות בבית דין שהחזירה לו כתובתה
6	**Gaonic Responsa** (Harkavy sec. 71) After the gemara, our rabbis decreed that even what she seizes we take to him from her and we give her a divorce immediately...	**תשובות הגאונים - הרכבי סימן עא** בתר גמרא תקינו רבנן דאפילו מאי דתפיסא מהנפקינן ליה מינה ויהבינן לה גיטא לאלתר...
7	**Gaonic Responsa** As for what you asked: If a man marries a second wife and his wife rejects this, she is recalcitrant and she is divorced without a *ketubbah* for Rava said that a man may marry several women in addition to his wife as long as he can provide his marital obligations...	**תשובות הגאונים - קורונל סימן סו** וששאלתם מי שנשא אשה על אשתו במרצה אחת ולא רצתה אשתו בכך היא מורדת ותצא בלא כתובה דאמר רבא נושא אדם כמה נשים על אשתו והוא דאיפשר למיקם בסיפוקיה...

8	**Halakhot Gedolot (9th century), sec. 36, laws of marriage** 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.	**ספר הלכות גדולות סימן לו - הלכות כתובות** והאידנא בתרתין מתיבתא הכין פסקין במורדת דאף על גב דתפישא מידעם מכתובתה קא מפקין ליה מינה ויהבין ליה לבעל ויהבינן לה גיטא אלתר...
9	**Saḥnūn (d. 854/5 CE, Tunisia),** *al-Mudawwanah al-kubrá li-imām Mālik Ibn Anas al-Aṣbaḥī* (v. 2, 212-213) If he converts during her waiting period, a [non-Muslim] husband has a right to his [Muslim] wife, but [if he does not convert] he has no right to her if her waiting period concludes, even if he converts afterwards.	**سحنون , المدونة الكبرى** الزوج أملك بالمرأة إذا أسلم وهي في عدتها, فإذا انقضت عدتها فلا سبيل له عليها وإن أسلم بعد ذلك.
10	**Rabbeinu Gershom (d. 1028, France), Responsa sec. 41** Our Savoraic rabbis, after the "instruction," they decreed that the "practical law" is to take from her what she seized from his property and give it to him and he gives (her) a divorce document immediately so that the daughters of Israel do not go out to evil culture.	**שו"ת רבינו גרשום סימן מא** רבנן סבוראי בתר הוראה תקינו הלכה למעשה למשקל מינה מאי דתפסה מדיליה ומיהב ליה ואיהו יהיב גיטא לאלתר כדי שלא תצאן בנות ישראל לתרבות רעה.
11	**Rashi (d. 1105, France), 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 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	**רש"י כתובות דף סג עמוד ב** **דאמרה בעינא ליה כו'** -- שיש לכופה על ידי פחיתת כתובתה **אבל אמרה מאיס עלי** -- לא הוא ולא כתובתו בעינא **לא כייפינן לה** -- להשהותה אלא נותן לה גט ויוצאה בלא כתובתה
12	**Rabbeinu Tam (d. 1171, France), *Ṣefer ha-yashar*, Responsa, sec. 24** (see also *Toṣafot, Ketubbot 63b*) The Gaonim 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 in Israel, for we established that Ravina and Rav Ashi were the end of the "instruction." And granted that the Gaonim 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 the monetary issues. But to permit an invalid divorce document, we do not have the authority from the days of Rav Ashi to to the days of the messiah.	**ספר הישר (חלק התשובות) סימן כד** שתקנו הגאונים דלא משהינן תריסר ירחי שתא אגיטא אלא כופין אות. חלילה לרבנו להרבות ממזרים בישראל דק"ל רבינא ורב אשי סוף הוראה. ונהי דהגאונים יכולים לתקן כתובת אשה על המטלטלין או על פי הלכה או על פי דעתם דהיינו ממונא, אבל להתיר גט פסול אין כח בידינו מימות רב אשי ועד ימות המשיח.

13	**Maimonides (d. 1204, Spain/Egypt), *Hilkhot Ishut*, 14:14** 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.	**רמב"ם הלכות אישות פרק יד** **הלכה יד** ואמרו הגאונים שיש להם בבבל מנהגות אחרות במורדת, ולא פשטו אותן המנהגות ברוב ישראל ורבים וגדולים חולקין עליהם ברוב המקומות ובדין התלמוד ראוי לתפוש ולדון
14	**Cairo Geniza** 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'a (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. [spouse is husband]	
15	**Rabbi Yitzhak Ben Moshe (d. 1250, Vienna), Ṣefer or zaruʿa, Section 1, Responsa section 4354** The Gaonim 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 Baʿal of Halakhot Gedolot wrote and also Rav Hai and Rav Sherira wrote and all the Gaonim, 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, moreoever, 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...	**ספר אור זרוע חלק א - שאלות ותשובות סימן תשנד** גאוני הישיבות של בבל רבנן סבוראי שהיו אחר ההוראה תקנו שיכופו את הבעל ליתן גט למורדת מיד וכ"כ בה"ג וכך כתבו גם רב היי /האי/ ורב שרירא וכל הגאונים שיותר מג' מאות שנה היה בימיהם שנתקנה זו התקנה ואין לזוז ממנה וכ"כ גם רב אלפס הפסק ואין מי שיכול לעקור תקנת ב"ד הגדול שבבבל הלכך גיטה של זו גט כשר הוא ואין לפרכס עליו וכ"ש שיש לה טענה גדולה שאינו יכול להזקק אליה וכיון שנתרצה ליתן גט אפי' ע"י עישוי גיטו גט דיש כאן מצוה לשמוע דברי חכמים תקנת ב"ד הגדול
16	**Rashba (d. 1310, Spain), Responsa, Part 2, sec. 276** Nevertheless, if it is their custom in those places to do as Maimonides, let them. Because even Gaonim, 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.	**שו"ת הרשב"א חלק ב סימן רעו** ומכל מקום, אם נהגו באותן המקומות, להיות עושין כהרמב"ם ז"ל, הנח להם. כי גם הגאונים ז"ל, ידעת שאמרו: שכופין לגרש, כל שהיא מורדת. ובמקומות שנהגו על פיהם, אין בנו כח לחלוק עליהם, ולבטל דבריהם
17		**טור אבן העזר הלכות כתובות סימן עז** והאשה שמרדה על בעלה מתשמיש הרבה תקנות תקנו בה בתחילה... וחזינא לגאון דקאמר יהיב לה עיקר כתובה מנה מאתים כי היכי דלא ליהוי בנות ישראל הפקר...

הרא"ש ז"ל על דברי רב אלפס אפשר לפי שראו הקילקול בבנות ישראל ואי משהי תריסר ירחי שתא אגיטא תולות עצמן בעכו"ם ויוצאות לתרבות רעה בטלו...

והסכימו חכמי אשכנז וצרפת שבטענת מאיס עלי אין לכוף לבעל לגרש לכן יזהר כל דיין שלא לכוף לגרש בטענת מאיס עלי וכן אין כופין אותה להיות אצלו...

Yaʿqov ben Asher (d. ca. 1349 CE, Spain), Ṭur, Even Haʿezer, marriage laws, section 77

The woman who refuses her husband sex there are many decrees enacted on the subject...

We saw a Gaonic (text) that states to give her (a 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...

Appendix II

Table 1: an orthodox story of Jewish law

Early Rabbinic (Tannaim) (70-220 CE) Middle Rabbinic (Amora'im) (220-500 CE) Late Rabbinic (Savora'im or Stammaim) (500-620 CE)	Early Gaonic (620-800 CE) Late Gaonic (800-1050 CE)	Rishonim (1050-1400 CE)
authority	preservation (stagnancy)	canon (perfecting)

Table 2: an orthodox story of Islamic law

prophet (610-632 CE) companions (ca. 632-661 CE) successors (661-750 CE)	eponyms of the legal schools & their students (ca. 750-950 CE)	jurists following precedents (950-modern era)
authority	preservation (perfecting)	canon (stagnancy)

Table 3: orthodox stories of Jewish and Islamic law

Early Rabbinic (Tannaim) (70-220 CE) Middle Rabbinic (Amora'im) (220-500 CE) Late Rabbinic (Savora'im or Stammaim) (500-620 CE)	Early Gaonic (620-800 CE) Late Gaonic (800-1050 CE)	Rishonim (1050-1400 CE)
authority	preservation (stagnancy)	canon (perfecting)
authority	preservation (perfecting)	canon (stagnancy)
prophet (610-632 CE) companions (ca. 632-661 CE) successors (661-750 CE)	eponyms of the legal schools & their students (ca. 750-950 CE)	jurists following precedents (950-modern era)

Table 4: diffusion and diversity of legal conventions (610-800 CE)

600	650	700	750
Late Rabbinic (Savora'im or Stammaim) (500-620 CE)	Early Gaonic (620-800 CE)		
Bavli	Gaonic responsa; *Halakhot Pesukot* (ca. 760 CE)		
Legal circles & networks (610-750 CE)			Professionalization

	(750-900 CE)
compiling legal practices of companions (*sīrah, maghāzī, muṣannafāt, masānīd*)	legal texts of personal legal schools

Table 5: synthesis and systematization (800-1000 CE)

800	850	900	950
Late Gaonic (800-1050 CE)			
Halakhot Gadolot (early 9th century)		Karaite law	
Professionalization (750-900 CE)			Consolidation & officilization (950-1250 CE)
legal texts of personal legal schools			compromise between ra'y and hadith

Table 6: legal structure (1000-1200 CE)

1000	1050	1100	1150
Late Gaonic (800-1050 CE)	Rishonim (1050-1400 CE)		
Hilchot of the Rif (11th century)	commentaries; *Mishneh Torah* (Rambam, 12th century)		
Consolidation & officilization (950-1250 CE)			
legal compendia; normativity of "classical" *uṣūl al-fiqh*; *mukhtaṣar* genre			

Table 7: legal autonomy (1200-1400 CE)

1200	1250	1300	1350
Rishonim (1050-1400 CE)			
more commentaries, some abridged; Moredechai (13th century)			
Consolidation & officialization (950-1250 CE)	Technocratization (1250-1400 CE)		
"common law" *mukhtaṣar*			

Table 8: a timeline of near eastern legal history