Dear Workshop Participants,

Thank you in advance for reading this chapter, which is part of my book entitled *Across Legal Lines: Jews and Muslims in Modern Morocco*. The book explores how law helped to connect and then, ultimately, divide Jews and Muslims in Morocco during the nineteenth and early twentieth centuries. Drawing on a wide range of previously untapped sources in Arabic, Hebrew, and various European languages, this book presents a new understanding of every-day encounters among Jews and Muslims. I show that Jews successfully navigated the various Jewish, Islamic, and European legal institutions that existed at the local, national, and international levels. Indeed, Jews' ability to move among these different legal institutions was central to their integration into the broader Moroccan society in which they lived. *Across Legal Lines* offers a new way of looking at how Jews lived among Muslims, using law as a lens through which to understand integration and mobility instead of isolation and autonomy. In so doing, I tell a story that changes the way we think about Jewish history, the Middle East, the nature of legal pluralism, and modernization.

The chapter I am sharing with you, entitled "Breaking and Blurring Jurisdictional Boundaries," is about how Jews moved back and forth between Jewish and Islamic courts. (I am including a chapter outline in case you want to get a sense of how this chapter fits into the larger narrative.) While much of the material here is based on *sharī'a* courts, many of my arguments come from documents produced by Jewish notaries and *piskei din* from Jewish courts (as well as *teshuvot*). I am still in the midst of making final revisions to the entire book, and thus am, in advance, very grateful for your comments and suggestions.

Outline

Introduction

I begin by introducing readers to the Assarraf family, whose story is woven through the book, and to my own hunt for the archival traces of Jews' experience in Morocco's various legal institutions. I offer a brief account of the relevant historical background, both concerning Morocco in the nineteenth century and Jews' place in Moroccan society. I then lay out the main arguments of the book, especially how Jews' subordinate legal and social status actually benefited them in the nineteenth century's expanding legal pluralism, and how French colonial reforms served to curtail those advantages. I address the book's interventions in the fields of Jewish, Middle Eastern, and legal history, and provide a short outline of the chapters.

Chapter 1: The Legal World of Moroccan Jews

This chapter draws a mental map of Moroccan legal institutions, guiding readers from the Assarrafs' house in the Jewish quarter of Fez to the international consular courts of Tangiers. In describing the jurisdictions and functioning of all of Morocco's major legal institutions—Jewish courts, *shari'a* courts, the central court of appeal, and consular courts—I lay out how the multiple layers of law fit together in the Moroccan context. Particular attention is paid to the experience of Jews in Islamic legal institutions. I argue that in Moroccan *shari'a* courts, unlike in other parts of the Islamic world, the particularities of the Maliki school of Islamic law greatly mitigated the disabilities associated with Jews' status as subordinate subjects. This chapter offers the first detailed assessment of Morocco's pluralistic legal system in the nineteenth century.

Chapter 2: The Law of the Market

Chapter Two draws on Islamic legal documents—especially from the family archive of the Assarrafs—to argue that both law and commerce connected Jews with Muslims and facilitated Jews' integration into the Muslim-majority society in which they lived. Because only documents notarized in a *shari'a* court could hold up as valid evidence, Jews in business relations with Muslims were regular patrons of Muslim notaries public; indeed, Shalom Assarraf visited them on a weekly basis. Jewish merchants' frequent use of *shari'a* courts allowed some to acquire an unprecedented degree of familiarity with Islamic law and legal procedure. Shalom became so knowledgeable about the *shari'a* that Muslims appointed him as their legal representatives in Islamic courts. Jews' regular use of Islamic legal institutions to facilitate their commercial endeavors both connected them to individual Muslims as clients, patrons, lenders, and business partners and ensured their central role in the broader economy.

Chapter 3: Breaking and Blurring Jurisdictional Boundaries

Chapter Three looks at legal institutions as a vector connecting Jews and Muslims both at the individual and institutional level. The chapter explores how Jews and Muslims crossed the jurisdictional boundaries established by Islamic law, and how doing so brought them into one another's legal spaces. Although Jews had the right to adjudicate intra-Jewish cases in their own courts, they often chose to bring these matters to *shari'a* courts. After Shalom passed away, for instance, his heirs ratified the division of his estate with Muslim notaries public. And while Islamic law explicitly prevented Muslims from subjugating themselves to any law other than that of Islam, some Muslims voluntarily sought out the services of Jewish courts. These legal choices had ramifications for both Jewish and Muslim jurists, who found ways to accommodate the existence of a parallel legal system in their respective institutions. The resulting legal convergence brought Jewish and Islamic courts into partial cooperation from above, complementing the legal, economic, and social relationships they fostered from below.

Chapter 4: The Sultan's Jews

This chapter investigates how Jews appealed to the central government when they were unable to resolve their legal disputes at the local level. These appeals helped to construct a direct relationship with the sovereign and regularly reaffirmed Jews' rights as a protected minority. This relationship became increasingly important in the late nineteenth century as successive sultans attempted to bolster their authority by instituting centralizing reforms, partly in response to accusations from foreigners that the government was unable to protect its Jewish subjects. Jews took advantage of the state's interest in their plight to petition for a range of legal matters. Merchants like Shalom sought help in collecting unpaid debts, while others wanted to be compensated for theft or murder, or demanded fair treatment from abusive officials. Jews' regular appeals to the state demonstrate that they felt empowered to demand the rights to which they were entitled under Islamic law, and served to reaffirm their place in the Moroccan polity as the sultan's protected people.

Chapter 5: Appeals in an International Age

This chapter discusses how the increasing tendency among Jews to appeal to foreign diplomats and international Jewish organizations affected their relationship with the Moroccan state. I focus on four episodes between 1863 and 1884 during which Jews petitioned a range of legal actors in order to address abuses of their legal rights. On the one hand, Jews took advantage of the perception among foreigners that they were an oppressed minority and successfully mobilized unofficial (and sometimes official) intervention on their behalf. On the other, they never ceased appealing to Moroccan government officials as well, nor were Jews unanimous in their appeals to outsiders. Rather than replace their link to the Moroccan state—and especially the sultan—as guarantor of justice, appeals to foreigners expanded the fora to which Jews turned in order to resolve their legal disputes.

Chapter 6: Extraterritorial Expansion

Chapter Six turns to the ways in which Jews with extraterritoriality navigated between local and international courts, as well as how these institutions accommodated one another's existence. Contrary to the dominant narrative, Jews' turn to consular courts was not an attempt to escape Islamic law. Rather, consular courts offered yet one more option among many, and Jews with foreign nationality or protection continued to frequent Jewish and Islamic legal institutions alongside consular ones. Indeed, many Jews preferred to adjudicate certain cases in *shari'a* courts when they felt that Islamic law would offer them a more favorable ruling. The frequent movement among consular courts and local legal institutions meant that consuls had to adapt their legal practices to Islamic legal standards. At the same time, *shari'a* court officials attempted to regulate the increasing numbers of individuals who now moved between their institutions and those of foreign consulates.

Chapter 7: Colonial Pathos

This chapter offers a brief overview of the legal reforms undertaken during the early years of the colonial rule in Morocco and their effect on the legal strategies of Jews and Muslims. French colonial authorities sought to leave Moroccan traditions and institutions (at least outwardly) intact, and thus wanted to preserve what they understood to be the existing divisions among different legal orders. Yet they also insisted on "modernizing" what they viewed as Morocco's "chaotic" legal system by reifying boundaries between different types of courts and eliminating overlaps among different jurisdictions. The result was a series of reforms which sought to prevent forum shopping among Jewish and *shari'a* courts and abolished the majority of extraterritorial privileges; the legal mobility Jews had achieved in the nineteenth century was thus abruptly curtailed. Indeed, Jews experienced French legal reforms as a double deception. Although the French promoted themselves as champions of Jews' rights and guardians of religious equality, the colonial period ultimately exposed Jews to new and sometimes more restrictive legal disabilities, in many ways culminating with the anti-Jewish laws of Vichy rule.

Epilogue

In the Epilogue, I step back to revisit the overarching narrative of *Across Legal Lines*. The changes convulsing Morocco in the late nineteenth century paradoxically offered Jews both increased legal mobility and further opportunities to integrate into Moroccan society. Yet the promotion of legal reforms under colonial rule as benefiting

everyone, especially religious minorities like Jews, turned out to be worse than false; Jews ended up in what was, in many ways, an inferior legal position under the French. Perhaps most importantly, French legal reforms contributed to a reification of difference between Jews and Muslims that paralleled the creation of racial and ethnic categories in other colonial contexts. Although the departure of most of Morocco's Jews after the creation of the state of Israel cannot be pinned on law alone, colonial legal reforms contributed to the growing divergence between Jews and Muslims. The diaspora of the Assarrafs to Israel, Europe, and the Americas serves as a poignant illustration of how a family that was once so deeply tied to the city of Fez—both its Jewish and Muslim communities—dispersed over four continents.

Chapter Three: Breaking and Blurring Jurisdictional Boundaries

Shalom Assarraf passed away in the fall of 1910. As a prominent businessman, a savvy lawyer, a leader of his community, and—perhaps most important of all—the patriarch of a large and prosperous family, Shalom's death was both an emotional blow to those who loved him and a legal headache. Shalom's relatives had to sort out how to divide up a large and complex estate. Shalom was survived by three sons—Ya'akov, Haim Yehudah, and Moshe—who, according to Jewish inheritance law, were his sole heirs.[1] The brothers divided up their late father's estate so that each would get his fair share: Ya'akov, the oldest, received a double portion according to the inheritance laws laid out in Deuteronomy 21:17.

Although Shalom's sons divided his estate according to Jewish legal prescriptions, they nonetheless went to Muslim notaries to have an Islamic legal document drawn up attesting the validity of the allocation.[2] One of Fez's leading rabbis, Vidal ha-Tzarfati, testified before 'udūl that the three brothers were Shalom's only heirs according to Jewish law. As discussed in previous chapters, Jews had the right to adjudicate intra-communal civil cases in their own courts, and inheritance certainly fell under this category. But they chose instead to seek out the services of 'udūl to attest the validity of their settlement. The resulting document was remarkable in two ways; first, it represented Jews' voluntary foray out of Jewish courts and into Islamic ones even when the matter at hand fell squarely under Jewish jurisdiction. Second, it constituted an overt recognition of the validity of Jewish law by Islamic legal authorities; the 'udūl who signed the document were by no means declaring Judaism to be the one true faith, but they were putting all the spiritual and temporal authority of Islamic law behind the idea that Jewish law was the right law for Jews.

The Assarraf brothers' choice to obtain an Islamic legal document for a purely intra-Jewish matter was part of a larger pattern of jurisdictional boundary crossing practiced by

[1] Shalom had five daughters (Hanna, Esther, Gracia, Yaccot, and Mazaltov); however, Jewish law allows for all the inheritance to go to sons even if a man is survived by daughters (daughters only inherit if there are no sons). Shalom also married three times (his first two wives pass away during his lifetime); his third wife, Zohra Sadoun, seems to have predeceased him since the inheritance settlement makes no mention of paying her ketubah (which is all a widow is entitled to from her husband's estate: Menachem Elon, "Succession," in *Encyclopaedia Judaica*, ed. Fred Skolnik and Michael Berenbaum (Detroit: Macmillan Reference, 2007)). Finally, Shalom had a fourth son, Issakhar, who passed away as a child.

[2] TC, File #3, 5 Ṣafar 1336.

both Jews and Muslims. As we have seen in the previous chapter, Jews were a regular presence in sharī'a courts because of their frequent commercial dealings with Muslims. But Jews also elected to engage the services of 'udūl and qāḍīs for matters which did not involve Muslims—and thus fell under the jurisdiction of Jewish courts. Even more surprisingly, some Muslims chose to fulfill their legal needs in Jewish courts, seeking out notarization by sofrim and the adjudication of dayyans. By voluntarily subjecting themselves to the authority of non-Muslim judicial officials, these Muslims blatantly contravened not only the jurisdictional boundaries assigned by Islamic law but also the Islamic legal principle that the sharī'a should be the sole arbiter of Muslims' lives.

Jews' and Muslims' voluntary presence in each other's courts facilitated cooperation not only among individual Jews and Muslims, but between the Jewish and Muslim legal orders. Although at a basic level Jewish and Islamic courts ruled according to different sets of law and thus stood in competition with each other, they also worked in parallel and even in overt cooperation. This is particularly apparent in the common practice among Jews of notarizing legal documents with both 'udūl and sofrim simultaneously. It is also evident in the ways in which both 'udūl and qāḍīs upheld the validity of Jewish law to regulate the legal lives of Jews. This sort of mutual accommodation represents a convergence of practice across legal orders—a process which blurred the jurisdictional boundaries separating Jewish from Islamic law.[3]

Despite a growing awareness among historians of the Islamic world that Jews at times elected to use sharī'a tribunals, the full implications of jurisdictional boundary crossing on both sides have yet to be appreciated.[4] The voluntary presence of Muslims in Jewish courts has almost entirely escaped the attention of scholars—although there are indications that this was not unique to Morocco.[5] Even more importantly, the convergence

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[3] Jay Berkovitz also uses the term "blurred boundaries": Jay R. Berkovitz, *Protocols of Justice: The Pinkas of teh Metz Rabbinic Court 1771-1789* (Leiden: Brill, 2014), 133.

[4] On the medieval period, see: Shlomo Dov Goitein, *A Mediterranean Society* 5 vols. (Berkeley: University of California Press, 1967-1988), v. 2, 398-401; Moshe Gil, *A History of Palestine, 634-1099* (Cambridge: Cambridge University Press, 1992), 168; Geoffrey Khan, *Arabic Legal and Administrative Documents in the Cambridge Genizah Collections* (Cambridge: Cambridge University Press, 1993); Menahem Ben Sasson, *Tzemiḥat ha-qehilah ha-yehudit be-artzot ha-Islam: Qayrawan, 800-1057* (Jerusalem: Magnes Press, 1996), 309-15; Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period* (Cambridge: Islamic Legal Studies Program, Harvard Law School, 2003), 111. On the early modern Ottoman Empire, see: Ronald C. Jennings, "Zimmis (Non-Muslims) in Early 17th Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri," *Journal of the Economic and Social History of the Orient* 21, no. 3 (1978); Haim Gerber, "Arkhiyon beit-ha-din ha-shara'i shel Bursah ke-meqor histori le-toldot yehudei ha-'ir," *Mi-qedem u-mi-yam* 1 (1981); Amnon Cohen, *Jewish Life under Islam: Jerusalem in the Sixteenth Century* (Cambridge: Harvard University Press, 1984), 115-19; Richard Wittmann, "Before Qadi and Vizier: Intra-Communal Dispute Resolution and Legal Transactions among Christians and Jews in the Plural Society of Seventeenth Century Istanbul" (Ph.D. Dissertation, Harvard University, 2008), Chapter 1. On the modern Middle East, see: Najwa Al-Qattan, "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination," *International Journal of Middle Eastern Studies* 31, no. 3 (1999).

[5] J. Goulven, *Traité d'économie et de législation marocaines* (Paris: Librairie des sciences économiques et sociales, 1921), 15, fn 1; Abraham Marcus, *The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century* (New York: Columbia University Press, 1989), 109; Mark S. Wagner, *Jews and Islamic Law in Early 20th-Century Yemen* (Bloomington: Indiana University Press, 2015), 25. Similarly, there is evidence that Christians went to batei din both for matters involving Jews and for intra-Christian cases, although historians have yet to discuss this in detail, though: see, e.g., Simḥa Assaf, *Batei ha-din ve-sidreihem aḥarei ḥatimat ha-Talmud* (Jerusalem: Defus ha-po'alim, 1924), 16-17; Yom Tov Assis, "Yehudei Sefarad be-'arkka'ot ha-

among legal orders only comes into view if one observes the ways in which various types of legal institutions co-existed. Most legal historians focus on the functioning of one legal order at a time. Only a study that encompasses multiple types of courts can pick up on the ways in which these institutions sought mutual cooperation and accommodation.

The movement of Jews and Muslims across jurisdictional boundaries belies both integration from below—at the level of the individual—and from above—at the level of the institution. Jews' and Muslims' willingness to use one another's courts indicates a degree of comfort with the other that accompanied the economic and, to a lesser degree, social integration of Jews. While Jews did not necessarily have to be friendly with the Muslim judicial officials whose services they sought out, they did need to feel that Islamic law was both accessible and attractive enough to merit going outside the more intimate space of Jewish legal institutions. Similarly, Muslims needed to be familiar not only with Jewish law, but with Jewish communal norms in order to avail themselves of the services of Jewish judges and notaries. At the institutional level, Jews and Muslims were able to move easily among Jewish and Islamic courts in part because both legal orders adapted to the reality of legal pluralism. As Jay Berkovitz observes for early modern France, "the Jewish judicial system was inexorably interconnected with French law and judicial procedure."[6] In Morocco, the overlapping spheres of Jewish and Islamic courts were more often characterized by convergence than competition.

Although both Jews and Muslims crossed jurisdictional boundaries, it was more common for Jews to bring their intra-communal matters to Islamic courts. Jews most often sought out the services of ʻudūl for intra-Jewish commercial matters, especially real estate transactions. When it came to notarizing legal documents, many Jews opted for double notarization with both sofrim and ʻudūl. Muslim judicial authorities accommodated Jews' movements back and forth between Jewish and Islamic courts by upholding the validity of Jewish law for Jews, which they viewed as a sort of customary law akin to those adopted by tribes or merchants. While not as common, Muslims did at times reverse the direction of boundary crossing by seeking out the services of Jewish courts. And just as Muslim judicial officials accommodated the presence of Jews in their courts, so were Jewish judicial authorities willing to make concessions in order to enable Muslims to use their courts. The convergence of Jewish and Islamic courts in Morocco was shaped both from below by the legal strategies of Jews and Muslims, and from above by the rulings of jurists.

Choosing Sharīʻa

Despite the attractions of staying within Jewish legal institutions, Jews frequently opted to fulfill their legal needs in sharīʻa courts. Jewish courts and notaries public must have been comfortable places for most Moroccan Jews. When doing business with their

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goyyim," in *Tarbut ve-ḥevrah be-toledot Yisrael be-yemei ha-beinayyim: qovetz ma'amarim le-zikhro shel Ḥayyim Hillel Ben Sasson*, ed. Robert Bonfil (Jerusalem: Shazar, 1989), 428; Elka Klein, *Hebrew Deeds of Catalan Jews, 1117-1316* (Barcelona: Patronat Municipal Call de Girona, 2004), 19.

[6] Berkovitz, *Protocols of Justice*, 116. See also Ch. 3. Moreover, Berkovitz argues that "Conformity with prevailing systems of justice constituted a significant type of attachment to the larger society," (ibid., 81). This is not wholly unrelated to what Michael Gilsenan calls translation from one legal regime to another: see Michael Gilsenan, "Translating Colonial Fortunes: Dilemmas of Inheritance in Muslim and English Laws across a Nineteenth-Century Diaspora," *Comparative Studies of South Asia, Africa, and the Middle East* 31, no. 2 (2011).

coreligionists, Jews like the Assarrafs could have their legal documents notarized by sofrim who lived in the same quarter, spoke the same dialect of Judeo-Arabic, and wrote in a script they could read. Should disputes arise, Jews could seek a settlement with one of the dayyanim whose reputations for learning and piety were widely respected. Moreover, Jews suffered no disabilities due to their religion when they appeared in a Jewish court. The voluntary presence of Jews in the offices of ʿudūl and the tribunals of qāḍīs in some ways is an unsurprising result of the coexistence of distinct, yet overlapping legal orders. Jews sought out sharīʿa courts in order to take advantage of the differences between Islamic and Jewish law. Yet their choice of Islamic law also points us to two important conclusions more specific to Morocco and the Islamic world. First, power and authority were not distributed equally across different kinds of legal institutions. Because sharīʿa courts were more closely tied to the state, and because they applied Islamic law in a Muslim country, they were in a better position ensure that their rulings were enforced. Second, Jews felt enough confidence in, and familiarity with, sharīʿa courts to choose them over Jewish courts—trust and ease that were facilitated by the role these courts played in the daily lives of so many Jews.[7]

Just as Shalom Assarraf most frequently used Islamic legal institutions in order to notarize contracts with Muslims, so notarization proved the most common motive for Jews to bring intra-communal affairs to Muslim judicial officials. Jews brought all kinds of intra-Jewish contracts to ʿudūl; most documented commercial transactions, such as leases, loans, and business partnerships.[8] More than any other transaction, however, Jews opted to notarize their acquisitions of real estate with ʿudūl, even when these sales took place among Jews. More infrequently—though in some ways more consequentially—Jews brought matters of family law (marriage, divorce, and inheritance) to Muslim notaries public. Such cases at times brought Jewish women to Islamic legal institutions, places they otherwise had little occasion to seek out due to the dominance of men in the commercial sphere.

Perhaps the most eloquent testimony to the ease with which Jews moved between Jewish and Islamic legal institutions—and to the at times unwitting cooperation among their respective judicial officials—is the fact that Jews did not have to choose one set of notaries over another. Instead, many opted to have contracts notarized by *both* sofrim and ʿudūl.[9] The result was a piece of paper with a contract written in Hebrew on one side and signed by sofrim. On the other side was a contract recording the same transaction, but written in Arabic and signed by ʿudūl. For instance, on February 18, 1864, Avraham Miran

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[7] For an exploration of similar issues in France, see: Berkovitz, *Protocols of Justice*, Ch. 4.

[8] On real estate, see below. For other types of sales, see DAR, Yahūd, 18197, 9 Rajab 1311; DAR, Marrakesh, 23 Muḥarram 1314. For a lease contract, see TC, File #4, 2 Jumādā II 1330. For bills of debt, see YBZ, 280, 26 Ṣafar 1298 and UL, Or26.543 (1), 9 Jumādā I 1270. For a business partnership, see TC, File #5, 28 Ramaḍān 1312.

[9] See Jessica M. Marglin, "Cooperation and Competition among Jewish and Islamic Courts: Double Notarization in Nineteenth-Century Morocco," in *Studies in the History and Culture of North African Jewry, Volume III*, ed. Moshe Bar-Asher and Steven Fraade (New Haven and Jerusalem: Yale Program in Judaic Studies and the Hebrew University Center for Jewish Languages and Literatures, Forthcoming). There is some evidence that Jews adopted similar practices in medieval Cairo and in the early modern Ottoman Empire: Goitein, *A Mediterranean Society*, v. 2, 400; Khan, *Arabic Legal Documents*, 1; Uriel I. Simonsohn, *A Common Justice: The Legal Allegiances of Christians and Jews under Early Islam* (Philadelphia: University of Pennsylvania Press, 2011), 178; Wittmann, "Before Qadi and Vizier," 112-13.

went to the sofrim of Marrakesh to register the fact that he had bought two spice stores from his coreligionist Avraham Ḥazan for 550 mithqāls.[10] Four days later, the two Avrahams went to ʻudūl and registered the same sale, on the same piece of paper.[11] The document they ended up with is visually striking in its juxtaposition of Hebrew and Arabic on the same page; the very optics of these sorts of doubly-notarized contracts are a silent testimony to the intertwining of Jewish and Islamic law in Morocco. Moreover, double notarization was even more prominent than these half Hebrew, half Arabic documents indicate; many Jews had the second version of the contract written out on a separate sheet of paper, making it nearly impossible to trace every instance of double notarization.[12]

Although Jewish women rarely did business with Muslims that brought them to sharīʻa courts, they did, at times, use Islamic legal institutions for a range of intra-Jewish transactions. As with Jewish men, women most commonly had ʻudūl notarize property transactions.[13] Even Jewish women of relatively modest means often owned real estate, which they generally acquired through inheritance or as part of their dowry.[14] In the summer of 1860, a Jewess named Yael bat Meir Pinto notarized the gift of a small house in the millāḥ of Essaouira to her three children Masʻūd, Jawhara, and Ajnina in a sharīʻa court.[15] More frequently, women owned a fraction of a piece of property—which was quite typical since houses, apartments, and even rooms were often subdivided into multiple shares. Thus on June 16, 1859, Shalom bought a room in a house near the entrance to the millāḥ from Mardūkh b. Hārūn b. Dūkh b. Salīn, his full brother Ḥayim, and their mother Manānū bint Ṣadūq b. Zāzūn for the sum of 375 mithqāls.[16] The dearth of Jewish women in the Muslim-majority marketplace did not mean that they were absent from Islamic legal institutions; just like Jewish men, Jewish women at times opted to notarize their intra-Jewish contracts with ʻudūl.

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[10] UL, Or.26.543 (2), 11 Adar 5624 and 14 Ramaḍān 1280. Jews sought out double notarization to document real estate transactions in particular.

[11] For more such examples, see UL, Or.26.543 (2), 4 Iyar 5597 and 11 Ṣafar 1253; 6 Tevet 5655 and 10 Rajab 1312; UL, Or.26.544, 16 Iyar 5642 and 18 Jumādā II 1299; PD, 11 Elul 5573 and 23 Rabīʻ II 1229; 6 Rabīʻ II 1317 (the other side has a Hebrew document but since the document is pasted into a record book it is impossible to see it); 19 Kislev 5569 and 2 Shaʻbān 1229; DAR, Yahūd, 2 Jumādā II 1298 (back in Hebrew) and 17 Jumādā I 1306 (back also in Hebrew); Yale, Ms.1825.0048, 13 Ḥeshvan 5636 and 11 Shawwāl 1292. This is similar (though not entirely identical) to what Jay Berkovitz observed in the Jewish courts in Metz, France, namely the practice of having Jewish legal documents "translated from Hebrew and formally produced in French so they could be filed at the appropriate government office" (Berkovitz, *Protocols of Justice*, 92).

[12] I found some documents which clearly indicate that another version of the contract at hand existed, written according to the other legal order but on a separate piece of paper: UL, Or.26.544, 19 Ṣafar 1318 and PD, Shvat 5556. Given the lack of systematic archives, it is quite likely that many such documents were lost, are in private hands, or simply remain unidentified as corresponding to another Arabic or Hebrew version of the same transaction.

[13] See, e.g., PD, 16 Ramaḍān 1267: YBZ, 13 Jumādā I 1268.

[14] Eliezer Bashan, *Nashim yehudiot be-Maroko : Demutan be-re'i mikhtavim min ha-shanim 1733-1905* (Ramat-Gan: Universitat Bar Ilan, 2005), 42-60.

[15] PD, 20 Muḥarram 1277. See also the subsequent entry on this document in which one son mortgages his third of the house to another Jew for 500 mithqāls, also registered in a sharīʻa court (on 25 Rajab 1287).

[16] TC, File #1, 15 Dhū al-Qaʻda 1275. Five other documents in the Assarraf collection concern the sale of a room or a house.

In other instances, Jewish women sought to take advantage of disparities in the law applied by the two distinct yet overlapping spheres of jurisdiction. This strategy was of particular interest to women who wanted a divorce but could not obtain one in a beit din. For instance, in the summer of 1840, a Jewess named Miriam, the daughter of Natan Marsiano, opted to seek a divorce according to Islamic law rather than Jewish law.[17] The resulting legal document, notarized by ʻudūl, confirmed that the two were divorced, that Miriam renounced all her financial claims on her husband, and that she agreed to pay for care of their daughter until her marriage. In Islamic law, most kinds of divorce were initiated by men (who had the right to divorce their wives unilaterally). But Islamic law also granted women the option to initiate divorce (called *khulʻ*); in exchange for renouncing money and/or property, a woman could facilitate a divorce before a qāḍī court. Jewish law, however, only recognized divorce initiated by the husband who was required to give his wife a writ of divorce (called a *get*). Since the early Islamic period, Jewish women like Miriam, who desperately wanted to leave their marriages but found they could not within the system of Jewish courts, sought out the services of a qāḍī instead.[18] Although Miriam's Islamic divorce would not have permitted her to remarry according to Jewish law, women sometimes used their *khulʻ* divorce to help convince their husbands to give them a *get*.[19]

Yet in the majority of instances, when disparities between the two sets of legal institutions were minimal or irrelevant, Jews brought their intra-communal matters to Muslim judges and notaries because of the hierarchical nature of Moroccan legal pluralism. According to Islamic law, sharīʻa tribunals could not recognize evidence drawn up in a Jewish court. Any time that a matter was contested before a qāḍī, it was advantageous to ensure that all the relevant evidence met the standards of Islamic law. Had Islamic and Jewish law carved out entirely separate and entirely equal spheres of jurisdiction which were perfectly respected by all Moroccans, both Jewish and Muslim, then crossing jurisdictional boundaries would have been unnecessary. However, the coexistence of multiple legal orders was never quite so neat. In the Islamic world, all laws were not created equal; Islamic law was officially sanctioned by the state and sharīʻa courts had jurisdiction over both Muslims and Jews, while Jewish courts were invested with limited

[17] YBZ, 280, 6 Rabīʻ II 1256. Although I found only one instance of this sort of wife-initiated divorce in Morocco, I suspect there were many more that simply did not leave behind a written record.

[18] On the medieval period, see: Gil, *A History of Palestine*, 164; Gideon Libson, "Otonomiyah shippuṭit u-feniyah le-ʻarkaot mi-tzad bnei he-ḥasut ʻal pi meqorot muslimiyim be-tequfat ha-geʼonim," in *Ha-Islam ve-ʻolamot ha-shezurim bo; qovetz maʼmarim le-zekharah shel Ḥavah Laẓarus-Yafeh* (Jerusalem: Makhon Ben Ẓvi, 2002), 336; idem, *Jewish and Islamic Law*, 111; Yehezkel David, "Girushin be-yozmat ha-ishah: ʻAl pi teʻudot min ha-genizah ha-qahirit u-meqorot aḥerim," *Sinai* 143 (2011): 37-9; Simonsohn, *A Common Justice*, 178-80. On the Ottoman period see: Al-Qattan, "Dhimmis in the Muslim Court," 434-5; Sophia Laiou, "Christian Women in an Ottoman World: Interpersonal and Family Cases Brought Before the Shariʻa Courts During the Seventeenth and Eighteenth Centuries (Cases Involving the Greek Community)," in *Women in the Ottoman Balkans: Gender, Culture, and History*, ed. Amila Buturovic and Irvin C. Schick (London: I. B. Tauris, 2007), 248-50; Wittmann, "Before Qadi and Vizier," 80-4. It is not clear why I did not find more such documents recording wife-initiated divorces in Moroccan Islamic courts; it is possible this was not as widespread as in other parts of the Islamic world, though I suspect that the reason has more to do with the partial nature of Moroccan archives.

[19] Matt Goldish, *Jewish Questions: Responsa on Sephardic Life in the Early Modern Period* (Princeton: Princeton University Press, 2008), 150-2; MORE CITATIONS

authority over Jews alone. This meant that Islamic law had a certain finality which could not be obtained in a Jewish court.

This is not to say that Jewish courts had no means to enforce their decisions; nonetheless, they were not in as strong a position to do so as were Islamic courts. Jewish judicial officials throughout history threatened those who violated Jewish law with fines and even excommunication (*ḥerem*).[20] But in nineteenth-century Morocco, neither dayyanim nor qāḍīs had the authority to use physical punishment to enforce their own rulings. Rather, local Makhzan authorities generally carried out whatever decision was reached in sharīʿa courts and batei din. Because qāḍīs had far denser ties to the state—formally, at least, they were appointed by the sultan himself—the Makhzan had a greater stake in shoring up the authority of sharīʿa courts. Islamic courts were thus more effective at wielding the threat of physical coercion to back up their decisions.

Matters were somewhat different in Fez and Marrakesh, where Jews ran their own prisons; in these cities, dayyanim could hand transgressors over to the *nagid*, the secular head of the Jewish community who administered the prison.[21] Nonetheless, even in these cities the state often used its authority to override Jewish judges. In a case reported in a responsum (published in 1869), a Jew referred to as Reuven (neither the real names of the people nor the city are given) accused Shimʿon—who was married to Reuven's ex-wife—of breaking into his house and stealing from him.[22] Although the *nagid* initially imprisoned Shimʿon in the Jewish jail, the local rabbis insisted that Shimʿon be released as there was no compelling evidence he was guilty. Nonetheless, the sultan got wind of the crime and sent men to imprison Shimʿon in the municipal jail until he paid a fine of 1,000 *mithqāls*. Even after Shimʿon and the sultan reached a compromise, agreeing that Shimʿon would pay 130 *mithqāls*, the sultan handed Shimʿon over to the governor who again imprisoned him pending a trial (this time in the governor's house). Shimʿon's case demonstrates that Jewish judicial authorities could rather easily be overruled by the Makhzan; even the relatively robust autonomy granted Jews in Morocco never amounted to the authority of the state and its judicial officials.

Finally, Jews feared that without legal documentation from both sets of institutions, unscrupulous individuals would attempt to capitalize on the plurality of legal orders to usurp their lawful rights. Real estate was particularly in danger of being compromised this way, either by Jews or by Muslims. For instance, some Jews would notarize a sale of real estate with sofrim and then sell the same property to a Muslim, this time with a bill of sale notarized by ʿudūl.[23] Since ultimately Islamic law was the law of the land, Jewish courts were unable to enforce the contracts drawn up by sofrim. When these unfortunate Jewish buyers went to a sharīʿa court with bills of sale drawn up in Hebrew, qāḍīs refused to recognize the documents as valid proof and relied instead on the documents drawn up by ʿudūl. Similarly, some Muslims discovered that they could claim real estate belonging to

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[20] Wittmann, "Before Qadi and Vizier," 73; Simonsohn, *A Common Justice*, 141-2; CITATIONS (Hacker).
[21] Shlomo A. Deshen, *The Mellah Society: Jewish Community Life in Sherifian Morocco* (Chicago: University of Chicago Press, 1989), 55.
[22] Avraham ben Mordekhai Ankawa, ed. *Kerem Ḥemer, v. 1* (Livorno: Elijah Benamozegh, 1869), Ḥoshen ha-Mishpat, #142, pp. 97a-98a. Reuven and Shimʿon are standard names given to anonymous actors in Jewish responsa.
[23] idem, ed. *Kerem Ḥemer: Takkanot Ḥakhmei Kasṭilyah ve-Ṭuliṭulah*, vol. 2 (Jerusalem: Ha-Sifriyah ha-Sefaradit Benei Yisakhar, 2000), Numbers 52-55.

Jews by having a bill of sale forged by ʻudūl; if the Jewish owner only had a document in Hebrew to back up his claim, his case was lost.[24] Little wonder that Jews took particular care to have their transactions concerning real estate notarized by ʻudūl—or by both sofrim and ʻudūl.[25] Indeed, the threat of having one's property usurped in a sharīʻa court by either a Jew or a Muslim was so great that in the late sixteenth century the rabbis of Fez passed a series of communal ordinances (*takkanot*, s. *takkanah*) requiring Jews to notarize their contracts concerning the sale, lease, or mortgage of real estate with both sofrim and ʻudūl. They were particularly concerned that bills of sale be double-notarized; a Jew who failed to notarize such deeds with ʻudūl would be "put in prison and remain there day and night, not leaving either on the Sabbath or on holidays" until he submitted to the takkanah.[26] As the many double-notarized bills of sale of real estate attest, the logic of this takkanah was still relevant in the nineteenth century, whether or not it was still in force.[27]

Given the advantages of obtaining contracts that held up in an Islamic court of law, the more pressing question is not why Jews chose to frequent ʻudūl, but rather why they bothered to have their documents notarized by sofrim at all. This is particularly puzzling because Jewish law recognizes the validity of most notarial documents drawn up in non-Jewish courts as long as they do not concern ritual matters (*issur ve-ḥeter*).[28] This meant that real estate transactions, bills of debt, and indeed almost any contract falling under the categories of civil and criminal law could be notarized in non-Jewish courts and still hold up as valid evidence before a dayyan. Nonetheless, Jews continued to engage Jewish notaries to draw up the vast majority of their intra-Jewish contracts, including many that they also had notarized by ʻudūl. One can imagine that for many Jews, especially those who were in less frequent commercial relations with Muslims and thus less knowledgeable about sharīʻa courts, having documents notarized by sofrim was simply easier, more familiar, and less intimidating. For others, to be truly pious meant documenting one's commercial activities according to halakhah; they preferred to notarize contracts with sofrim because doing so ensured that one was adhering to the principles of Jewish law.[29]

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[24] See, e.g., NLI, B861 (8-5165-6), Teshuvah pp. 11b-12b (no date or signature), concerning what to do when a Jew inherits land which is then also claimed by a Muslim. The teshuvah further discusses the fact that the Muslims of Debdou made a practice of stealing land from Jews by forging legal documents in sharīʻa courts saying that they owned the land.

[25] Real estate transactions constituted about 20% of the intra-Jewish documents in the Assarraf collection, that is, 8 out of 39. Among the other collections I consulted, real estate transactions made up over two-thirds of the intra-Jewish contracts notarized by ʻudūl (20 out of 29). In medieval Egypt, Jews similarly registered real estate transactions in sharīʻa courts more often than other types of contract. Scholars have posited that this was because the Fātimid state required subjects to pay a special tax on transfers of real estate, such that notarizing the bill of sale in a sharīʻa court would also ensure that a record was kept of the tax having been paid (Gil, *A History of Palestine*, 165: Khan, *Arabic Legal Documents*, 1), but no such tax existed in Morocco.

[26] Ankawa, *Kerem Ḥemer v2*, # 52-55, pp. 9a-b. The quote is from # 53 (p. 9b), dated Shvat 5345 (January 1585).

[27] Manuscript copies of earlier taqqanot continued to be produced in the nineteenth-century, although it is unclear to what extent these requirements were enforced. See in particular NLI, Ms. B 195 (356=8), pp. 63b-64a, which contains copies of taqqanot numbers 53, 54, and 55. Though undated, the manuscript is clearly from the nineteenth century. Rabbis in early modern France were similarly aware that recourse to non-Jewish courts could, at times, be warranted: Berkovitz, *Protocols of Justice*, 110-11.

[28] This is originally laid out in the Babylonian Talmud, Gittin 10b. See Michael Walzer et al., eds., *The Jewish Political Tradition: Volume 1, Authority* (New Haven: Yale University Press, 2000), 434.

[29] See, e.g., MAE Nantes, 1MA/300/106A, Watin to Directeur des Affaires Chérifiennes, 27 July 1921.

Perhaps most importantly, it is not at all clear whether Moroccan dayyanim consistently upheld the validity of legal documents notarized by ʻudūl, despite their halakhic permissibility. Jews' reliance on sofrim for the majority of their intra-Jewish contracts speaks to the non-pecuniary considerations that weighed in their legal strategies, and the impossibility of reducing forum shopping to the pursuit of financial gain alone.[30]

While bringing intra-Jewish contracts to ʻudūl was relatively common, it was rare for Jews to sue their coreligionists in sharīʻa courts. Jewish law clearly forbids suing another Jew in a non-Jewish court, though jurists made exceptions for those cases in which the local beit din permitted this sort of adjudication (usually when a Jew refused to acknowledge the authority of Jewish courts).[31] Yet we cannot assume that Jews automatically obeyed this injunction, and indeed, despite the infrequency with which Jews sued their coreligionists in Islamic courts, this was not entirely unheard of in the nineteenth century. Intra-Jewish disputes were brought before both qāḍīs and governors.[32] Some Jews had personal ties with Muslim judicial officials and could use these connections to their advantage in a court case.[33] Others knew that certain qāḍīs or pashas were susceptible to bribes and hoped to pay their way to a more favorable ruling.[34] Nonetheless, the scarcity of intra-Jewish lawsuits in Islamic courts undoubtedly reflects Muslim judicial officials' accommodattion of a vibrant Jewish legal order alongside their own. Indeed, one of the reasons that most Jews did not take advantage of the opportunity to sue their coreligionists in sharīʻa courts is the convergence which often ended up aligning Jewish and Islamic law in cooperation rather than competition. In many instances, Jewish and Islamic courts worked together in order to avoid the very discrepancies which made litigation across jurisdictional borders attractive.

Legal convergence I: Accommodating Jewish law in sharīʻa courts

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[30] Ido Shahar, "Forum Shopping Between Civil and Religious Courts: Maintenance Suits in Contemporary Jerusalem," in *Religion in Disputes*, ed. F. Benda Beckmann and et al (New York: Palgrave Macmillan, 2013). On the ambiguity regarding legal documents from non-Jewish courts, see Berkovitz, *Protocols of Justice*, 112.

[31] See especially the Babylonian Talmud, Gittin 98b (as well as Rashi's (Rabbi Shlomo Yitzḥaki, d. 1105) commentary on Exodus 21:1, which paraphrases the Talmud) and Moses Maimonides' *Mishneh Torah*, Hilkhot Sanhedrin 26:7. In medieval Egypt, there was a special court (called the "Jewish court for informers") which determined which cases should be sent to non-Jewish courts: on this, see Mark R. Cohen, "Correspondence and Social Control in the Jewish Communities of the Islamic World: A Letter of the Nagid Joshua Maimonides," *Jewish History* 1, no. 2 (1986): 45-6. See also Jacob Katz, *Exclusiveness and Tolerance: Studies in Jewish-Gentile Relations in Medieval and Modern Times* (Springfield, NJ: Behrman House, Inc., 1961), 53; Moshe Rosman, "The Role of Non-Jewish Authorities in Resolving Conflicts within Jewish Communities in the Early Modern Period," *Jewish Political Studies Review* 12, no. 3/4 (2000): 54.

[32] See, e.g., YBZ, 287:37, 19 Rabīʻ II 1217; Ankawa, *Kerem Ḥemer, v. 1*, #92, p. 85a; PD, 1 Dhū al-Ḥijja 1319; Bension Collection, Ms. 156, summarized in Saul I. Aranov, *A Descriptive Catalogue of the Bension Collection of Sephardic Manuscripts and Texts* (Edmonton: The University of Alberta Press, 1979), 98.

[33] See, e.g., a taqqanah passed by the rabbis in Fez in 1603 prohibited Jews from bringing a coreligionist before an Islamic court without the express permission of a beit din Ankawa, *Kerem Ḥemer v2*, Number 77. The taqqanah discusses a case in which a Jew with a patron forces his coreligionist to go to the non-Jewish court. The word used for patron is the Arabic *ʻināya* (see Shalom Bar-Asher, *Sefer ha-Taqqanot: Yehudei Sefarad ve-Portugal be-Maroko (1492-1753)* (Jerusalem: Akademon, 1990), 131), implying that the patron in question is a Muslim and is somehow involved in the Jew's ability to force a decision in an Islamic court.

[34] See, e.g., DAR, Yahūd, 32977, Rabbi Abnīr and the Jews of Fez to Muḥammad b. al-ʻArabī al-Mukhtār, 2 Dhū al-Qaʻda 1297.

Distinctions between both the laws applied by Jewish and Islamic legal institutions and their ability to enforce those laws were real. Yet the differences between Jewish and Islamic courts were tempered by the efforts of Muslim judicial officials not only to recognize the existence of a Jewish legal order alongside their own, but also to uphold its authority over Jews.[35] The tacit acknowledgement of Jewish law by Muslim jurists in Morocco confirms recent scholarship suggesting that Muslim scholars and judicial practitioners viewed Jewish (and, in relevant areas, Christian) law as forming part of the broader Islamic legal system.[36] Moreover, by actively upholding the validity of Jewish courts, sharīʿa courts and Makhzan courts facilitated the convergence of Islamic and Jewish law. Needless to say, this convergence was only partial; in no way did Muslim judicial officials change sharīʿa such that it came to resemble halakhah. Nonetheless, Muslim judges and notaries were not only aware of the existence of Jewish courts but did their best not to tread on their toes.

Often, qāḍīs made their cooperation with Jewish courts explicit, such as by upholding previous rulings of dayyanim. Indeed, as an inheritance dispute from Fez shows, some Jews sought out sharīʿa courts precisely in order to confirm an earlier ruling handed down by a Jewish judge. In 1802, Natan b. Ḥayim Marsiano (the father of Miriam whose divorce in a sharīʿa court was discussed above) sued his cousin in a sharīʿa court with the express intent of upholding the earlier decision of a beit din.[37] Natan and his cousin Eliyahu shared a grandfather who had recently died. Both were heirs to their grandfather's estate, but Eliyahu tried to claim more than his share. They reached a compromise that Natan would inherit a fourth of a jointly-owned synagogue and a fifth of the rest of his grandfather's property, and a beit din confirmed their settlement.[38] But Eliyahu had second thoughts and wanted to break the agreement. Natan decided that his best bet was to have the settlement confirmed in a sharīʿa court and sued his cousin before a qāḍī. Eliyahu did not dispute Natan's version of events, but claimed that he had been coerced into a settlement and had only agreed to it out of fear. This would have made the settlement invalid, had Eliyahu been able to prove his claim. The case was exceptional enough—or the Marsianos were well-connected enough—that it went all the way to the sultan, Mawlāy Sulaymān (r. 1792-1822). In his position as Commander of the Faithful and

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[35] Similar observations have been made concerning sharīʿa courts in the Ottoman Empire, though more research remains to be done on this question. Amnon Cohen notes that most of the Jewish documents accepted as evidence in sharīʿa courts were marriage contracts, but that at times bills of debt and other commercial contracts were also accepted (Cohen, *Jewish Life under Islam*, 124). For an example of a Jewish document from Ottoman Egypt that was essentially translated and confirmed by a qāḍī and six ʿudūl, see Shimon Shtuber, "Mi-beit ha-din ha-yehudi el beit ha-din ha-sharaʿi " in *Meḥkarim be-ʿaravit u-ve-tarbut ha-islam*, ed. Binyamin Abrahamov (Ramat Gan: Universitat Bar Ilan, 2000).

[36] Libson, *Jewish and Islamic Law*, 103; Christian Müller, "Non-Muslims as Part of Islamic Law: Juridical Casuistry in a Fifth/Eleventh-century Law Manual," in *The Legal Status of Dhimmis in the Islamic West*, ed. Maribel Fierro and John Toaln (Turnhout: Brepols, 2013), esp. 21, 38-41; David Wasserstein, "Families, Forgery and Falsehood: Two Jewish Legal Cases from Medieval Islamic North Africa," in *The Legal Status of Dhimmis in the Islamic West*, ed. Maribel Fierro and John Toaln (Turnhout: Brepols, 2013), 335.

[37] YBZ, 287:37, 19 Rabīʿ II 1217.

[38] The word used for compromise is *ṣulḥ*. The document explains that "the dhimmīs wrote [a document saying] that [Eliyahu] does not have any [grounds for a] claim against [Natan] (*fa-kataba lahu ahlu al-dhimmati bi-annahu lā rujūʿa lahu ʿalayhi*), and all this is in the [Hebrew] script of the dhimmīs (*kullu dhālika bi-khuṭūṭi ahli al-dhimmati*)."

thus ultimate judicial arbiter, Mawlāy Sulaymān ruled that Eliyahu had to respect the settlement he had reached with Natan in the beit din. And although the sultan affirmed a Jewish court's decision, he supported his decision by citing the Islamic legal principle that one should not break a settlement.[39] Had Natan expected a different ruling from a sharī'a court, he probably would have stuck to Jewish institutions; instead, he rightly felt he could trust a qāḍī—or in this case, the sultan—to affirm the authority of the beit din that had already ruled in his favor.

Whereas sharī'a courts had to apply Islamic law regardless of the religion of the plaintiffs, the flexibility inherent in Makhzan courts meant that pashas and qā'ids could explicitly rely on Jewish law when adjudicating intra-Jewish matters. Indeed, when Makhzan officials were faced with an intra-Jewish lawsuit, it was common to consult a dayyan to determine how a Jewish court would rule in the matter and then to adjudicate accordingly.[40] In a similar vein, governors were willing to accept Jewish legal documents as evidence, despite the fact that Islamic law technically required the signatures of Muslim witnesses for contracts to be valid.[41] Since Makhzan courts did not follow the procedural and evidential requirements of Islamic law as carefully as did sharī'a courts, it was possible for Makhzan judicial authorities to draw on evidence that would not have held up in a sharī'a court. Even Makhzan officials' inability to read Hebrew or Judeo-Arabic did not prevent them from considering evidence notarized in Jewish courts as valid. When relying on legal documents in Hebrew, Makhzan courts engaged Jews to read and translate them *viva voce*.[42]

While it was not unheard of for Muslim judges to uphold Jewish law in their rulings, it was even more common for 'udūl to produce written affirmations of halakhah. At times 'udūl consulted with Jewish authorities to ensure that a particular transaction did not actively contravene Jewish law, thus avoiding conflicts between the Jewish and Islamic legal orders. In the summer of 1909, a group of Jews chose to draw up a bill of sale for real estate in Fez with 'udūl.[43] Shmuel b. Moshe Būṭbūl and his nephews Maymon and Shlomoh sold part of a house in the millāḥ to Benjamin b. Moshe b. Samḥūn. As part of the

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[39] In his ruling, the sultan quoted the Mālikī jurist Muḥammad b. Muḥammad Ibn 'Āsim (d. 1426/829 AH), who was the author of *Tuḥfat al-ḥukkām fī nukat al-'uqūd wa-'l-aḥkām,* simply referred to as "al-Tuḥfa" in our document.

[40] MAE Nantes, 1MA/300/106A, Watin to Directeur des Affaires Chérifiennes, 22 March 1920 and Commissaire du Gouvernement près le tribunal de pacha (Meknes) to Chef des Services Municipaux (Meknes), 3 June 1919.

[41] DAR, Rabat/Salé, 19147, umanā' of Rabat/Salé to Muḥammad b. Idrīs, 15 Rabī' II 1263; DAR, Demnat, al-Ṭayyib al-Mayānī to Muḥammad Bargāsh, 30 Muḥarram 1281; DAR, Marrakesh, 5605, Aḥmad Amālik to Mawlāy Ḥasan, 13 Jumādā II 1298; DAR, Demnat, Aḥmad b. Muḥammad al-Murābī to Muḥammad b. al-'Arabī (possibly al-Tūrīs), 22 Shawwāl 1302; DAR, Marrakesh, 24807, Muḥammad al-Hādī b. 'Abd al-Nabī al-Fāsī to Mawlāy Ḥasan, 20 Ṣafar 1309; DAR, Yahūd, al-Ḥājj Muḥammad b. al-Jīlālī to Aḥmad b. Muḥammad b. al-'Arabī Tūrīs, 13 Rajab 1323; DAR, Yahūd, 10 Iyar 5671. There is even some evidence Mawlāy Ḥasan ordered pashas and qā'ids to accept Jewish legal documents as equivalent to those drawn up by 'udūl in all commercial cases: see MAE Nantes, 1MA/300/101B, "NOTE ON JEWS OF MEKNES" (no date or author). For a similar practice in the royal courts of medieval Spain see Assis, "Yehudei Sefarad be-'arkka'ot ha-goyyim," 428.

[42] This system seems to have been relatively informal, probably because the relative rarity of Hebrew documents in Makhzan courts precluded the need for professional translators: see DAR, Demnat, al-Ṭayyib al-Mayānī to Muḥammad Bargāsh, 30 Muḥarram 1281, which discusses the need to find someone to read the Hebrew documents in question.

[43] PD, 12 Jumādā II 1327.

proceedings, "al-ḥazzān Shlomoh b. al-ḥazzān Moshe Ibn Danan[44] came and confirmed that the sellers owned the property in question, and that [their ownership] was established in their [law] through what establishes ownership for the dhimmīs in their religion and according to their custom."[45] The ʻudūl drew on the expertise of one of Fez's leading dayyanim to confirm that Shmuel, Maymūn and Shlomoh were in fact the owners of the property in question according to Jewish law, and thus that they had the right to sell it to Benjamin. These ʻudūl could easily have demanded Islamic legal documentation establishing the Būṭbūls' ownership of the house—something many Jews would undoubtedly have been able to provide. Perhaps the Būṭbūls volunteered Shlomoh Ibn Danan knowing that they were unable to offer proof according to Islamic legal standards, or perhaps these ʻudūl were particularly eager to avoid drawing up a legal document that would usurp someone's rights established in another court. Either way, it is remarkable that the ʻudūl not only bothered to check that the Būṭbūls truly owned the house in question, but asked an expert on Jewish law to weigh in on the matter. Through their signatures, these ʻudūl ensured that the rights of property owners as established in a Jewish court would be respected in Islamic legal institutions.

ʻUdūl also explicitly acknowledged the existence of Jewish legal tenets which were totally absent from Islamic law. In so doing, they ratified the applicability of Jewish law in the Islamic legal documents they produced. The recognition of Jewish law was particularly salient when it came to *ḥazakot* (s. *ḥazakah*). A ḥazakah gave its owner the usufruct rights for a property—that is, the right to inhabit the room, house, or store in question.[46] This right was owned separately from the actual property itself; thus tenants often paid rent both to the owner of the property and the owner of the ḥazakah. And although Islamic law had equivalents to the ḥazakah, such as the *zīna* and the *jalsa*, they were not direct translations of each other and Islamic law did not formally recognize ḥazakot.[47] Nonetheless, Muslim legal authorities not only knew about the existence of ḥazakot on certain properties, in some instances they actively affirmed the rights of the owner of the ḥazakah. A document notarized by ʻudūl in the spring of 1856 recorded a sale of part of a house in Tetuan by a Jew, Shūʻa (Yeshūʻa) b. Yūdhā (Yehudah) Lībī (Levi) to a Muslim, Aḥmad b. Aḥmad al-Razīnī.[48] The sale included the following clause:

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[44] Shlomoh b. Moshe Ibn Danan (b. 1848, d. 1928) belonged to a famous family of scholars in Fez. In 1919 he was appointed to the Haut Tribunal Rabbinique in Rabat: see Yosef Ben Naim, *Malkhei Rabanan* (Jerusalem: Defus ha-Ma'arav, 1930), 114b.

[45] *Ḥaḍara al-ḥazān Shlūmū b. al-ḥazān Mūshī b. Danān wa-iʻtarafa li-l-mālikīna al-bāʼiʻīni bi-ʼl-mulki al-madhkūri wa-annahu thābitun ladayhim bi-mā yuthbitu al-mulka li-ahli al-dhimmati fī millatihim wa-ʻalā ḥasabi al-ʻurfi al-jārī ladayhim.*

[46] Meir Benayahu, "Haskamot ʻḥazaqot he-ḥatzerot, ha-batim ve-he-ḥanuyot' be-Saloniki u-pisqeihem shel rabi Yosef Ṭaiṭatzaq ve-ḥakhmei doro," *Mikhael* 9 (1985); Haim Zafrani, "Judaïsme d'occident musulman. Les relations judéo-musulmanes dans la littérature juridique. Le cas particulier du recours des tributaires juifs à la justice musulmane et aux autorités représentatives de l'état souverain," *Studia Islamica*, no. 64 (1986): 138-41.

[47] J. Abribat, "Essai sur les contrats de quasi-aliénation et de location perpétuelle auxquels l'institution du hobous à donné naissance," *Revue Algérienne et Tunisienne de Législation et de Jurisprudence* 17 (1901): esp. 145-6; Louis Milliot, *Démembrements du Habous : menfaʻā, gzā, guelsā, zīnā, istighrāq* (Paris: Editions Ernest Leroux, 1918), esp. Chapters 1-2.

[48] PD, 2 Rajab 1272. On the al-Razīnī family, see Muḥammad Ḥajjī, *Maʻlamāt al-Maghrib* 23 vols. (Salé: Maṭābiʻ Salā, 1989-2005), 13: 4326-8. On Aḥmad al-Razīnī, see ibid., 13: 4328.

> The seller, the aforementioned Yeshūʿa, exempted the buyer from the ḥazakah practiced by the dhimmīs, such that the aforementioned sale does not include [the ḥazakah] for [the buyer], and does not apply to him; rather, it remains [the seller's] property, which he rightfully owns, part of his property, according to the custom of the dhimmīs, as a complete exemption.[49]

In other words, although Yeshūʿa sold Aḥmad part of a house in Tetuan, he retained the ḥazakah as his own property. According to Islamic law there was no such thing as a ḥazakah, which makes it surprising in and of itself to find it mentioned in this notarized document. In recognizing Yeshūʿa's continued claim on the ḥāzakah, these ʿudūl lent the authority of the sharīʿa to a uniquely Jewish law. Admittedly this sort of bill of sale is unusual; most such documents make no mention of a ḥāzakah even though most properties in Jewish quarters had ḥazakot associated with them.[50] Nonetheless, it attests a broader pattern in which ʿudūl acknowledged and even upheld the authority of Jewish courts.

In other instances, ʿudūl went even farther than simply acknowledging the existence of some facet of Jewish law; they explicitly attested the ruling of Jewish law in a particular case. In so doing, they drew on the knowledge of dayyanim, much as they would on that of an expert witness.[51] The resulting documents were a strange hybrid. Outwardly they conformed to the tenets of Islamic law in that they were written in Arabic and signed by two ʿudūl. But their contents made no mention of Islamic law, instead describing how Jewish law ruled in a given situation. This chapter began with the legal actions taken around Shalom Assarraf's death. The document which Shalom's heirs had notarized by ʿudūl is worth quoting at some length:

> When the dhimmī merchant Shalom b. Yehudah Assarraf died, it was necessary to specify his inheritance. So at that time al-ḥazzān Vidāl b. al-ḥazzān Abnīr al-Tzarfātī, [52] who is among the religious experts of the Jews who knows which Jews inherit and which do not according to their religion,[53] came before two witnesses [i.e. ʿudūl], may God protect them. And [Vidal al-Tzarfātī] knows that the aforementioned Shalom died, and that his heirs are his three sons, the full brothers Yaʿakov, Yehudah, and the bachelor Moshe—[and that Shalom] has no other heir according to their religion. And he knows the aforementioned heirs and their aforementioned inheritance.[54]

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[49] *Wa-istathnā al-bāʿi Shūʿa [sic] al-madhkūru min mabīʿihi al-madhkūri al-ḥazāqa al-maʿrūfata ʿinda ahli al-dhimmati bi-ḥaythu lā yashmaluhā al-bayʿu al-madhkūru li-man dhukira wa-lā yansaḥibu ʿalayhā bal lā zālat [sic] fī mulkihi mālan min mālihi wa-mulkan ṣaḥīḥan khāliṭan min jumlati amlākihi ʿalā ʿurfi ahli al-dhimmati istithnāʾan tāmman.*

[50] The fact that a qāḍī countersigned the document in the presence of the Muslim buyer further suggests the exceptional nature of this bill of sale.

[51] On expert witnesses in Islamic law, see Ron Shaham, *The Expert Witness in Islamic Courts: Medecine and Crafts in the Service of Law* (Chicago: University of Chicago Press, 2010), 27-98.

[52] On Tzarfati, see David Ovadyah, *Fas ve-ḥakhameha* 2 vols. (Jerusalem: Hotza'at Bayt Oved, 1979), v. 1, 359. Tzarfati (lived 1862-1921) came from a long lineage of rabbis originally from Spain (see ibid., 358-9); he became a dayyan in 1891 and was nominated as the head of the beit din in 1919.

[53] *Huwa min asāqifati* (literally, "bishops"; the language here is taken from a Christian context).*al-yahūdi al-ʿārifīna bi-man yarithu min al-yahūdi mimman lā yarithu minhum fī millatihim*.

[54] TC, File #3, 5 Ṣafar 1336.

Shalom's heirs had already divided up their inheritance according to Jewish law; they might even have had this agreement notarized by sofrim. Yet they wanted to make sure that their agreement could not be challenged in a sharīʿa court. The best way to do so was to have an Islamic legal document drawn up which confirmed that the division of inheritance had been made in accordance with Jewish law and with the approval of the relevant rabbinic authorities. Indeed, they summoned one of Fez's dayyanim, Vidal ha-Tzarfati, as an expert witness, one versed in Jewish law ("knows which Jews inherit and which do not according to their religion"), who could confirm the legality of the succession according to halakhah.[55]

It was particularly easy for heirs to fall prey to the existence of multiple legal orders, since the disparities between Jewish and Islamic law was often great when it came to allocating inheritance. Indeed, it was often the case that someone who stood to inherit in one law was given nothing (or much less) in another.[56] For instance, Shalom's daughters might have decided to sue their brothers in a sharīʿa court for a share of the estate, since Islamic law allocated daughters one-half the portion given to male descendants. Jewish women in the medieval period pursued exactly this strategy to try and obtain inheritance they were denied by Jewish law.[57] As we have seen in the case of Natan Marsiano, sharīʿa courts could refuse to allow the usurpation of Jewish inheritance law. Nonetheless, seeking an Islamic deed that ratified the division of an estate according to Jewish law gave Jewish families in Morocco an extra layer of protection, for a qāḍī was bound to recognize a document notarized by ʿudūl.[58] By having ʿudūl notarize a record of how Jewish law carved up their father's estate, the Assarraf brothers avoided the possibility that someone could usurp their inheritance by challenging the division of inheritance in a sharīʿa court. These ʿudūl helped the brothers protect their rights by aligning the two legal orders despite differences in legal doctrine.

How did Muslim judicial officials justify their accommodation of a sacred law other than that of Islam? In some cases they did not have to; the sultan Mawlāy Sulaymān cited an Islamic legal authority in his ruling that Eliyahu had to abide by the settlement he had reached with his cousin Natan in a Jewish court. But for the ʿudūl who signed notarized documents upholding the validity of Jewish law in the division of Shalom Assarraf's inheritance, what Islamic legal principle could they use to justify their actions? This is a difficult question to answer definitively because the level on which this sort of legal convergence occurred was that of notaries and judges, who rarely recorded their legal reasoning. Nonetheless, the terminology they used offers a hint at how they understood their decisions.

In a number of notarized documents, ʿudūl referred to Jewish law as *ʿurf*, or custom.[59] Custom was not formally considered one of the sources of jurisprudence (*uṣūl al-fiqh*) during the formative years of Islam. Nonetheless, custom played an important role in Islamic law and by the early-modern period was often recognized as a *de facto* source of

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[55] On using a dayyan as an authority in Islamic law, see Jaʿfar b. Idrīs al-Kattānī, *Aḥkām Ahl al-Dhimma* (Amman: Dār al-Bayāriq, 2001), 61.

[56] See, e.g., Jessica M. Marglin, "Jews in Sharīʿa Courts: A Family Dispute from the Cairo Geniza," in *Under Crescent and Cross: Essays in Honor of Mark Cohen*, ed. Arnold Franklin, et al. (Leiden: Brill, 2014).

[57] Ibid., 214-15.

[58] For similar cases, see: DAR, Safi, 6, 11, and 30 Jumādā II 1294; TC, File #4, 4 Dhū al-Qaʿda 1326; JTS, box 2, folder #7, 24 Dhū al-Ḥijja 1330.

[59] PD, 2 Rajab 1272; PD, 12 Jumādā II 1327; JTS, box 2, folder #7, 24 Dhū al-Ḥijja 1330.

law.[60] In early modern Morocco, custom and judicial practice (*ʻamal*) were especially central to the development of Mālikī jurisprudence.[61] Particularly salient for our purposes is the fact that custom could be particular to communities, such as the customary laws of guilds or merchants.[62] It seems that in these cases—and presumably many more—Muslim judicial officials treated Jewish law as a form of customary law particular to Jews. In so doing, they incorporated halakhah into the fold of sharīʻa.

The existence of multiple legal orders did not mean that each type of court was isolated from the others, nor that judicial officials were unaware of their counterparts' existence. Indeed, not only did Muslim judicial authorities acknowledge the presence of Jewish courts, they actively worked to ensure that the two legal orders functioned in cooperation with each other. By voluntarily crossing the thresholds of qāḍī courts and ʻudūl's storefronts, Jews stepped outside the familiarity of their own courts and into another religion's legal institutions. These Jews asserted their participation in the broader society in which they lived from below, and their choices were met with the tacit approval of Islamic courts. The Muslim judicial authorities who facilitated the convergence of Jewish and Islamic law brought Jews' integration into Moroccan society from the social level to the legal one. Not only were Jews present in Islamic courts, but their law was present in the documents and decisions of Muslim judicial authorities.

Choosing Halakhah

While Jews' voluntary presence in Islamic courts is not entirely surprising—as a subordinate population living under Islamic rule—the fact that Muslims sought out Jewish legal institutions is far more unexpected. Not only were Muslims the numerical majority, but their own courts had the full backing of the state. Moreover, whereas Jewish law formally recognized the validity of gentile legal institutions in a number of areas, Islamic law allowed no room for a Muslim to voluntarily subject himself to a law other than the sharīʻa. Yet we find that Muslims chose Jewish courts for many of the same reasons that brought Jews into Islamic courts. Like their Muslim counterparts, Jewish judicial officials found themselves accommodating the presence of Muslims in their courts by ruling in ways that aligned Jewish and Islamic legal practice. Legal convergence worked both ways in Morocco; as we have seen, Jews' use of sharīʻa courts for intra-Jewish matters spurred qāḍīs and ʻudūl to recognize the authority of Jewish law over Jews. On the other, Muslims'

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[60] Gideon Libson, "On the Development of Custom as a Source of Law in Islamic Law: Al-rujūʿu ilā al-ʿurfi aḥadu al-qawāʿidi al-khamsi allatī yatabannā ʿalayhā al-fiqhu," *Islamic Law and Society* 4, no. 2 (1997): esp. 133-42. See also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), Chapter 11; Haim Gerber, *Islamic Law and Culture, 1600-1840* (Leiden: Brill, 1999), Chapter 6.

[61] On custom and law in Morocco, see Jacques Berque, *Essai sur la méthode juridique maghrébine* (Rabat1944); Schacht, *An Introduction to Islamic Law*, 61-2; ʻUmar b. ʻAbd al-Karīm Jīdī, *al-ʻUrf wa-ʾl-ʻamal fī al-madhab al-Mālikī wa-mafhūmuhumā ladā ʻulamāʾ al-Maghrib* (Rabat: Ṣundūq Iḥyāʾ al-Turāth al-Islāmī al-Mushtarak bayna al-Mamlaka al-Maghribīya wa-al-Imārāt al-ʻArabīya al-Muttaḥida, 1984).

[62] See, e.g., idem, *al-ʻUrf wa-ʾl-ʻamal*, 99; Marcus, *The Middle East on the Eve of Modernity*, 104-5; Frank H. Stewart, "ʻUrf," in *Encyclopedia of Islam*, ed. P. Bearman, et al. (Leiden: Brill, 2003), 888. This is derived from the legal maxim *al-maʻrūfu ʻurfan kaʾl-mashrūṭi sharṭan* ("what is known as customary is as binding as a condition in a contract," on which see, e.g., ʻAbd al-Wahhāb Khallāf, *Maṣādir al-tashrīʻ al-Islāmī fīmā lā naṣṣa fīhi* (Kuwait: Dār al-qalam, 1972), 146-7). I am grateful to Professor Hossein Modarressi for his help on this subject.

presence in Jewish courts caused dayyanim and ʻudūl to adjust their practice of Jewish law to accommodate their Muslim clients.

On occasion, Muslims chose to resolve their legal disputes before a dayyan rather than a qāḍī. Very little evidence of this practice has survived, probably because it was both relatively rare and because we have access to very few legal documents which remained in the hands of Muslims.[63] In some instances, it seems Muslims chose to adjudicate before a particular dayyan because they respected his reputation for integrity.[64] In others, they opted for a beit din because the trials were speedier and cheaper than those in a qāḍī court.[65] Undoubtedly, much of the adjudication that took place among Muslims in Jewish courts was informal and left no paper trail whatsoever.

Yet there is much evidence that Muslims brought their contracts involving Jews to be notarized by sofrim. (I did not find any evidence of Muslims notarizing intra-Muslim contracts with sofrim.) Although bills of debt in which Jews extended credit to Muslims were almost always notarized by ʻudūl (as discussed in the previous chapter), sofrim also wrote up these kinds of contracts. For instance, on July 10, 1908, Sulṭana bat David b. David u-Yosef b. Sulaymān lent eight *douros Ḥasanī* to the Muslim Ḥamad Zarīgī al-Falālī, which Ḥamad agreed to pay back at the rate of 2 pesetas per week.[66] As a Jewish woman who almost certainly had little or no experience in an Islamic court, Sulṭana might have felt more comfortable bringing Ḥamad before sofrim to notarize their agreement.[67] Yet some Jews who were thoroughly familiar with the workings of sharīʻa courts nonetheless ended up notarizing their inter-religious contracts in Jewish courts. Yeshūʻa Corcos was an immensely powerful leader of the Jewish community of Marrakesh and had extensive commercial dealings with Muslims, most of which he had notarized by ʻudūl.[68] However, in 1904 Yeshūʻa rented rooms in the millāḥ from a Muslim (Muḥammad b. Ḥamu) and had the lease drawn up by sofrim.[69] Jews similarly rented property to Muslims and chose to notarize their leases with sofrim rather than ʻudūl.[70] Of particular interest in these leases is that even though they involved Muslims, they followed the practice of starting a lease from

[63] See the discussion on sources in the Introduction.
[64] 1MA/300/101B, "Note sur les juifs de Meknes » (no date or author); Ankawa, *Kerem Ḥemer v2*, 14.
[65] 1MA/300/101B, "Note sur les juifs de Meknes » (no date or author).
[66] JTS, Box 3, Folder 3, 11 Tammuz 5668.
[67] Jewish men also brought such contracts with Muslims to be notarized by sofrim: see, e.g., UL, Or.26.544, 6 Shvat 5658 and YBZ, 280, 6 Muḥarram 1234. This last document concerns a dispute between Shlomoh b. Menaḥem b. Walīd, from Rabat, and the Muslim ʻAbdallāh ʻAmmār al-Mamnūn. Shlomoh claimed that ʻAbdallāh owed him money on outstanding debts; as part of the settlement, ʻAbdallāh "also allowed [Shlomoh] to collect some debts he [presumably ʻAbdallah] was owed by Jews, some recorded in documents written in Hebrew and others not recorded in documents (*kamā adhinahu an yaqbiḍa lahu* [sic] *duyūnan kānat lahu ʻalā aqwāmi minhā mā huwa bi-rusūmi bi-khaṭṭi ahli al-dhimmati wa-minhā mā huwa bi-ghayri rusūmin*)." Although the pronouns are somewhat ambiguous in the Arabic text, I believe the only sensible interpretation is one in which ʻAbdallāh was owed money by Jews—debts which were recorded in Jewish legal documents—and allowed Shlomoh to collect these debts on his behalf as part of the payment of the outstanding debt.
[68] Part of Yeshūʻa Corcos' personal archive is preserved at the University of Leiden, including numerous Islamic legal documents.
[69] UL, Or.26.544, 10 Iyar 5664 (the same document is also found, in the original, at Yale). See also UL, Or.26.543 (2), 4 Iyar 5656
[70] JTS, Box 2, Folder 3, 8 Nisan 5672 and 17 Kislev 5673.

the Jewish month of Iyar (which falls in the spring).[71] By notarizing their lease contracts with sofrim, Muslims were not only entering into the world of Jewish law, but also that of Jewish custom.

More than any other type of contract, the sale of real estate most often brought Muslims before sofrim. One Muslim in particular, named Abū Bakr al-Ghanjāwī, went to the sofrim of Fez on a number of occasions to notarize his acquisitions of real estate in the millāḥ. On January 16, 1889, al-Ghanjāwī bought a building in the millāḥ from Avraham Nahmiash, his wife Ḥavivah, Avraham's brother David, and David's wife Esther—and had sofrim notarize the bill of sale.[72] On April 9 of the same year, al-Ghanjāwī bought another building from Jews, again with a bill of sale in Hebrew.[73] He returned to sofrim to notarize at least three more bills of sale between 1889 and 1908.[74] Al-Ghanjāwī acquired these properties as investments, planning to rent them out to Jewish tenants (since it was unthinkable for a Muslim to live in the millāḥ).[75] It is possible—perhaps even likely—that al-Ghanjāwī was also having these contracts drawn up simultaneously in sharī'a courts; we know that on other occasions he had 'udūl notarize his real estate transactions with Jews.[76] Al-Ghanjāwī was an unusual character whose trajectory may provide some clue as to why he was such a keen customer of the services of Fez's sofrim. He began life as a lowly camel driver working the routes between Marrakesh and the ports of Essaouira, Safi, and al-Jadida; by the 1870's, he had started working for a British merchant and in 1873 gained British protection.[77] He was later commissioned by Mawlāy Ḥasan to transmit confidential correspondence between the British ambassador and the Makhzan. He was even accused of running a string of "houses of ill repute" in the millāḥ of Marrakesh.[78] In other words, al-Ghanjāwī was far from the ideal of a pious Muslim devoted to protecting and upholding the faith. Nonetheless, al-Ghanjāwī was not by any means the only Muslim to notarize his real

[71] Three of the four documents of Jewish-Muslim lease contracts notarized by sofrim started in Iyar: JTS, Box 2, Folder 3, 8 Nisan 5672 and 17 Kislev 5673; UL, Or.26.543 (2), 4 Iyar 5656. One started in Sivan, the following month: UL, Or.26.544, 10 Iyar 5664. For the custom among Jews of renting properties starting from the month of Iyar, see, e.g, the record book in which Shalom Assarraf recorded the contracts of lease to Jews for his properties in the millāḥ of Fez, drawn up from the summer of 1903 to the winter of 1904 (in PD). The vast majority (if not all) of the lease contracts start in the month of Iyar.

[72] DAR, Yahūd, 14 Shvat 5649.

[73] DAR, Yahūd, 8 Nisan 5649. It is possible that a document in Arabic from April 18 in which the same Jews (Massan (?) b. David and his wife Zohra) sold al-Ghanjāwī a courtyard is simply a reiteration of this earlier sale but in an Islamic court. However, the first sale was for 600 duoros while the second sale was for 300 riyāls: see DAR, Yahūd, 17 Sha'bān 1306.

[74] DAR, Yahūd, 10 Ḥeshvan 5653; 1 Iyar 5668; and one document with no date.

[75] After 1912, when the French decreed that Jews could own property and live outside of the millāḥs, there were instances in which Muslims moved into formerly Jewish quarters; however, as far as I know this was unheard of in the pre-colonial period.

[76] For instance, on November 1, 1892, he sent his representative (*nā'ib*), a Jew named Dasān (?) b. al-Qara', to buy four rooms in a house in the millāḥ of Fez from a Jewish woman and her two children, and had this sale notarized by 'udūl: DAR, Yahūd, 10 Rabī' II 1310.

[77] On al-Ghanjāwī, see Khalid Ben-Srhir, "The Life of El-Ghanjaoui: from a Cameleer to a Wealthy Notable in Pre-colonial Morocco, 1870-1905," (Unpublished paper2013); idem, *Britain and Morocco during the Embassy of John Drummond Hay, 1845-1886* (London: RoutledgeCurzon, 2005), 171-5.

[78] Emily Gottreich, *The Mellah of Marrakesh: Jewish and Muslim Space in Morocco's Red City* (Bloomington: Indiana University Press, 2007), 82.

estate transactions with sofrim, and we have to assume that most others who did so were not such flamboyant characters.[79]

Some Muslims chose to notarize legal documents with sofrim in order to take advantage of disparities between Jewish and Islamic law. Indeed, the ḥazakah—the right to occupancy that exists only in Jewish law, discussed above—proved attractive enough to Muslim entrepreneurs to prompt notarization in Jewish legal institutions. Although ḥazakot functioned much like their Islamic equivalents, a ḥazakah did not replace a *zīna* or a *jalsa*; on the contrary, a single building could have both a ḥazakah and a *zīna* simultaneously, each owned by a different person.[80] Buying a ḥazakah was an investment, much like buying property. Because ḥazakot do not exist in Islamic law, Muslims who wanted to invest in a ḥazakah had to acquire it through a bill of sale drawn up by Jewish notaries. For instance, al-Ghanjāwī bought the ḥazakah on at least one of his properties in the millāḥ of Fez—which clearly accounts for his use of sofrim to draw up this bill of sale.[81] Owning property in the Jewish quarter meant not only interacting with Jews (as buyers, sellers, or tenants) but also with Jewish law.[82] Whether a Muslim bought the ḥazakah on a property or not, ḥāzakot were attached to the vast majority of real estate in the Jewish quarter, and even Muslim landlords would have to contend with them. For instance, one Muslim landlord who did not own the ḥāzakah on his property took precautions to prevent it from falling into the wrong hands.[83]

But the desire to take advantage of disparities between Jewish and Islamic law cannot explain all instances in which Muslim turned to sofrim. Muslims also notarized bills of sale with sofrim for properties that did not include the purchase of a ḥazakah, and thus could just as well have been notarized with ʻudūl. One Jewish observer from the early colonial period believed that Muslims chose sofrim because they were considered "more conscientious in drawing up legal documents" than ʻudūl.[84] It also seems likely that some Muslims worried about the possibility of their property rights being contested in a Jewish court, much as Jews who notarized intra-Jewish contracts in Islamic courts worried that

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[79] Of the nineteen documents concerning Muslims' appearance in Jewish courts which I found, fourteen of these concerned the buying or leasing of real estate. See also 1MA/300/101B, "Note sur les juifs de Meknes » (no date or author); University of Alberta, Bension Collection, Ms. 14 (described in Aranov, *Catalogue of the Bension Collection*, 44), Nisan 5517; UL, Or.26.543 (2), 15 Av 5624; Or.26.544, 27 Shvat 5645, 5 Nisan 5664, and 18 Adar 5670; CAHJP, MA/P/12, Shvat 5517; PD, Shvat 5556.

[80] Abribat, "Les contrats de quasi-aliénation," 143. The article discusses Tunisia in particular, but it seems unlikely that the same situation did not also exist in Morocco.

[81] DAR, Yahūd, no date. (This document, in Hebrew and signed by sofrim, attests to the fact that David al-Falatz sold a ḥazakah on a courtyard to al-Ghanjāwī; the portion preserved in the DAR is clearly part of a longer document, as the date given is "the above date," but unfortunately the first part of the document is not preserved.) See also UL, Or.26.544, 10 Iyar 5664: Here, Muḥammad b. Ḥamū bought the ḥazakot on three upper rooms (*ʻaliyot*) in the millāḥ of Marrakesh. It seems that Muḥammad's purchase was challenged; ten days later the previous owner of the rooms, Yaḥya b. Eliyahu al-Zaraʻ, testified that he had sold the ḥazakot on the properties to Yitzḥaq, who had sold them to Muḥammad, and that Muḥammad was indeed the owner of the ḥazakot (20 Iyar 5664).

[82] Writing on Tunisia in the 1880s, David Cazès observed: "La plus extraordinaire…est que les musulmans propriétaires finirent par reconnaitre le droit de *Hazzaka* et par s'y conformer" (David Cazès, *Essai sur l'histoire des Israélites de Tunis ; depuis les temps les plus reculés jusqu'à l'établissement du protectorat de la France en Tunisie* (Paris: A. Durlacher, 1888), 112).

[83] UL, Or.26.543 (2), ?? to Corcos, 15 Rabīʻ I 1320.

[84] MAE Nantes, 1MA/300/101B, "Note sur les juifs de Meknes » (no date or author).

someone could contest their ownership before a qāḍī unless they had the proper documentation. In this scenario, Muslims sought out Jewish bills of sale as a sort of insurance policy that their property rights would be respected no matter what. The problem with this explanation is that theoretically, at least, Jewish law acknowledged the legitimacy of bills of sale that were drawn up in a non-Jewish court. Even had a Muslim's rights to a particular property been challenged in a beit din, his bill of sale notarized by ʻudūl should have been sufficient to prove his ownership. The fact that Muslims notarized their real estate transactions with sofrim offers further indication that perhaps Jewish courts in Morocco did not, in fact, accept non-Jewish legal documents—or at least not systematically.

As a gate connecting Jews and Muslims, jurisdictional border crossing swung both ways. Most of the time, Jews used the services of Islamic legal institutions as a way out of their own community and into the broader society in which they lived. But Muslims also sought out the legal services of Jewish courts, despite Jews' status as a protected and restricted minority. Through their use of sofrim and their appearances before dayyanim, Muslims entered a legal culture that not only applied different laws but drew its authority from different sacred sources. Just as Jews' regular use of sharīʻa courts forces us to see these mono-religious institutions as serving a multi-religious clientele, so does Muslims' presence in Jewish courts force us to rethink what is often assumed to be the homogenous nature of Jewish legal institutions.

Legal convergence II: Accommodating Muslims in Jewish courts

Scholars have long recognized Jewish jurists' need to accommodate the existence of other, more powerful legal orders; nonetheless, little attention has been paid to the question of accommodating the presence of non-Jews in Jewish courts. Even in those places that afforded Jews' considerable latitude to adjudicate their own legal disputes, their status as a minority group meant that Jewish jurists consistently had to contend with the existence of another, usually more powerful legal order. An important Jewish legal maxim, *dina de-malkhuta dina*, or "the law of the state is the law," summed up the necessity of accommodating the existence of the state and its laws.[85] Naturally, this principle did not mean that Jewish jurists always accepted non-Jewish law as valid; such an approach would have accommodated non-Jewish law to the point of erasing Jewish law. Yet this maxim allowed jurists to ensure that Jewish legal institutions continued to function in the shadow of competing courts. Indeed, Moroccan jurists recognized the need to work in cooperation with Islamic legal institutions in order to retain their authority over Jews, such as in the requirement to double notarize certain intra-Jewish real estate transactions with both sofrim and ʻudūl.[86]

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[85] On this maxim, see especially: Shmuel Shilo, *Dina de-malkhuta dina* (Jerusalem: Hotzaʻat defus akademi be-Yerushalayim, 1974); Menachem Elon, "Dina de-Malkhuta Dina," in *Encyclopaedia Judaica*, ed. Fred Skolnik and Michael Berenbaum (Detroit: Macmillan Reference, 2007).

[86] See also, e.g., Ankawa, *Kerem Ḥemer, v. 1*, #92, p. 85a. A full analysis of Jewish jurists' approach towards accommodating Islamic law is beyond the scope of this book, though would make a fascinating subject of analysis. On the medieval period, see: Libson, *Jewish and Islamic Law*, ; on eighteenth-century France, see Berkovitz, *Protocols of Justice*, Ch. 4. Additionally, see Phillip Ackerman-Lieberman's discussion of Jewish deeds that were written with the intention that they would be valid in an Islamic court: Phillip I. Ackerman-Lieberman, "Legal Writing in Medieval Cairo: 'Copy' or 'Likeness' in Jewish Documentary Formulae," in *From*

The imbalance in power between Jewish and Islamic courts shaped Jewish jurists' attitude to accommodating non-Jews in their courts. Because Jewish law developed in Diaspora—rather than in a context in which Jews ruled over gentiles—mainstream Jewish law is aimed almost exclusively at Jews. Moroccan jurists thus had to make adjustments when Muslims also wanted to take advantage of Jewish legal institutions. The fact that the majority of those living in Morocco were Muslim and that the state considered itself responsible for upholding Islamic law meant that Jews had far more incentive to adapt their legal order to the presence of Muslims than the other way around. Although Jewish law does not treat non-Jews the same as Jews, it was politically unwise for jurists to allow discrimination against Muslims in Jewish courts.

Some of the changes that Jewish jurists made to accommodate Muslims in Jewish courts were quite minor. For instance, a problem arose with a standard formula for drawing up bills of sale involving a Muslim.[87] In bills of sale which were among Jews, sofrim often acquired property on behalf of the buyer (in order to fulfill halakhic requirements concerning contracts). However, since Jewish law prohibits a Jew from acting as a Muslim's agent, this practice became invalid when a Muslim was involved.[88] Instead of writing that the sofrim had acquired the property on his behalf (*ve-qanina minei*), the solution was to write that the non-Jew acquired the property himself (*ve-qanah ha-goy*).[89]

But not all conflicts of law were so easily resolved. Although Muslims in Morocco seemed to have bought and sold ḥazakot relatively freely, their participation in the ḥazakah economy was problematic from the point of view of Jewish law. Theoretically, at least, only Jews were allowed to acquire a ḥazakah; this was largely because the original premise of this legal instrument was to keep property in Jewish hands (even though it had ceased to function this way in nineteenth-century Morocco).[90] But jurists recognized the political difficulties they would face in preventing Muslims from buying ḥazakot. Avraham Koriat (d. 1806), a dayyan in Essaouira and later in Gibraltar and Livorno, discussed the problem posed by the sale of a ḥazakah to a non-Jew.[91] Although Koriat admitted that, strictly speaking, it was illegal to sell a ḥazakah to a Muslim, he ultimately ruled that Jews must uphold such sales:

> But when there is [a question of] defaming God's name we let the matter drop, so that one would not say that if a Jew came with a Muslim to be judged it would be said to the Muslim that in your law one does not buy a ḥazakah, and thus the ḥazakah is still in the hands of [the] Jew, and he has usufruct rights, [such that] it is found, God forbid, that Jewish courts deceive Muslims by writing them false bills of sale that do not have any legal value…. God forbid that Jewish judges should elicit

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a Sacred Source: Genizah Studies in Honour of Professor Stefan C. Reif, ed. Siam Bhayro and Benjamin Outhwaite (Leiden: Brill, 2010), 13-14.

[87] See the discussion of a text by Ḥayim Moda'i (b. 1720 in Istanbul, d. 1793 in Tzfat) in *'Et Sofer*, in Ankawa, *Kerem Ḥemer v2*, 52b, #30.

[88] See Moses Maimonides, *Mishneh Torah*, Sefer Qinyan, Hilkhot Sheluḥin ve-Shotafin, Ch. 2, Law 1.

[89] The bills of sale I examined do not seem to follow this practice, thus the solution is not necessary. However, the fact that Ankawa included this text in *'Et Sofer* suggests that at least some sofrim did follow this custom.

[90] Benayahu, "Haskamot ḥazaqot,".

[91] Rafael Avraham Koriaṭ, *Zekhut Avot* (Piza1812), #80, pp. 47a-48a. On Koriat, see Sidney Corcos, "Coriat Family," in *Encyclopedia of Jews in the Islamic World*, ed. Norman Stillman (Leiden: Brill, 2010).

> such words from their mouths. Rather, on the contrary, we are obligated to uphold the claim of the Muslim [literally, strengthen his hand] who bought [the ḥazakah] and to uphold his transaction in order to strengthen the great religion [Judaism] and exalt it, such that all the nations will know that "the Remnant of Israel do not commit any wrong,"[92] and this is not out of [fear of] the Muslims' violence but rather so that, God forbid, the Holy Name will not be defamed.[93]

Koriat ultimately ruled that batei din must recognize sales of ḥazakot to Muslims. Even though according to Jewish law sofrim should not be writing such bills of sale in the first place, he expected Muslims to continue buying ḥazakot nonetheless. The question, then, was how to deal with the resulting claims. Koriat argued that a failure to recognize the Jewish bills of sale in Muslims' possession would establish a negative image of Jewish courts as institutions that wrote "false bills of sale." In order to avoid this—which would both embarrass and endanger Jews—Koriat declared these bills of sale valid. His assurance that this ruling has nothing to do with fear of "Muslims' violence" seems implausible, at least in the sense that Jewish jurists' decisions were always made in the context of their relative weakness as members of a religious minority. Even if Koriat did not believe that refusing to accept a Muslims' purchase of a ḥazakah would lead directly to a pogrom, he undoubtedly did consider the possibility that the reputation of Jewish courts was connected to the well-being of Jews more generally.

The jurisdictional boundary crossing that brought Jews into Islamic courts moved in the opposite direction as well, bringing Muslims to the offices of sofrim and the tribunals of dayyanim. Muslims' presence in Jewish courts helped shape the nature of Jewish law as it was applied in Morocco, just as Jews' presence in sharī'a courts helped shape the nature of Islamic law. The mutual accommodations of Jewish and Muslim jurists did not diminish the distinctiveness of either legal order, but it did move each towards more cooperation with the other. The resulting legal convergence stood in constant and productive tension with the competition that encouraged individuals to cross jurisdictional boundaries in the first place.

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When Shalom Assarraf's sons went to the sharī'a court to notarize the division of their father's estate—a division according to the principles of Jewish law—they were in some ways making an unusual choice. The jurisdictions assigned to Jews and Muslims gave the Assarraf brothers the right to adjudicate matters such as inheritance strictly within the Jewish legal system. A sharī'a court had no place in resolving how Jews inherited from one another. Yet when understood in the broader context of Jews' and Muslims' jurisdictional boundary crossing, the fact that the Assarraf brothers had their division of inheritance notarized by 'udūl was not all that unusual. Indeed, the Assarrafs' choice to notarize their inheritance agreement in an Islamic court fits into broader patterns of how Jews used Islamic legal institutions.

The jurisdictional boundaries laid out by Islamic law were not totally fictional. Yet even in the most centralized legal systems, individuals manage to maneuver among legal orders in ways that contravene the strict letter of the law. Morocco was by no means a

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[92] *She'erit Yisrael lo ya'asu 'avlah* (Zephaniah 3:13).
[93] Koriaṭ, *Zekhut Avot*, 48a.

highly centralized legal system, and the presence of multiple legal fora at the local level made forum shopping relatively easy. While many Jews—especially merchants—sought out the services of ʿudūl and qāḍīs regularly because of their commercial relations with Muslims, many returned to these same Muslim judicial officials for their dealings with other Jews. Their election of sharīʿa courts makes it even more imperative to understand these institutions as multi-religious. Moreover, Muslims similarly crossed legal lines to take to notarize their contracts or adjudicate their disputes in the millāḥ. Just as Islamic courts served non-Muslims, so did Jewish courts serve non-Jews. Finally, Moroccan jurists of both faiths recognized the reality of jurisdictional boundary crossing and for the most part attempted to accommodate it. The resulting legal convergence allowed Jewish and Islamic courts to coexist without necessarily posing a threat to each other. In other words, the forum shopping engaged in from below produced legal convergence from above. The voluntary presence of each religious group in the other's courts and the resulting legal convergence between Jewish and Islamic courts suggests that not only commerce, but law in and of itself linked Jews and Muslims.